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VOL. 90.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA.

FEBRUARY TERM, 1884.

REPORTED BY

THOMAS S. KENAN.

(VOL. 15.)

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1884.

JUSTICES OF THE SUPREME COURT,

February Term, 1884.

CHIEF JUSTICE:

WILLIAM N. H. SMITH.

ASSOCIATE JUSTICES:

THOMAS S. ASHE, AUGUSTUS S. MERRIMON.

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,

February Term, 1884.

THOMAS M. ARRINGTON,
BOSWORTH C. BECKWITH,
MICHAEL BRADSHAW,
CHARLES H. BROWN,
WILLIAM P. BYNUM,
THOMAS W. CANNADY,
EDWARD H. DAVIS,
WILLIS B. DOWD,
G. M. T. FOUNTAIN,
JEFFERY S. GROGAN,
THOMAS J. HACKLER,
ALVIN R. JOHNSON,
LORENZO D. LOWE,
THOMAS L. LOWE,
EDWARD K. PROCTOR, JR.,
WILLIAM H. QUICK,
WILLIAM C. THORNE,
THOMAS M. VANCE.

CASES REPORTED.

CASES OVERRULED.

Capehart v. Biggs, 77 N. C., 261, in *Bridges* v. *Morris*, 32.
McBee *Ex-parte*, 63 N. C., 332, in *Smith* v. *Brisson*, 284.
Ross v. Henderson, 77 N. C., 170, in *Allen* v. *Grissom*, 90.
University v. Johnson, 1 Hay., 373, in *University* v. *Harrison*, 385.

Mr. Justice ASHE was detained at home for four weeks of this term by indisposition caused by a severe sprain and fracture of the foot.

In *Buie* v. *Simmons*, 9, Mr. Hinsdale should have been reported as appearing for plaintiff, and Mr. Guthrie for defendant.

Page 185, line 6, for "defendant" read "plaintiff."
" 224, " 3 from bottom, for "perpetuate" read "perpetrate."
" 251, " 7 of opinion, for "evidence" read "avoidance."
" 254, " 4 of opinion, for "evidence" read "avoidance."
" 255, " 6, for "vesting" read "resting."
" 267, " 12, for "were" read "mere."
" 274, " 1, for "are" read "is."
" 283, " 9 from bottom, for "they" read "that."
" 288, " 2 from bottom, read "then to B," &c.
" 354, " 20, for "exception" read "execution."
" 457, " 5, for "criminal" read "civil."
" 504, " 15, for "conceded" read "contended."
" 565, " 3 from bottom, for "some" read "sum."
" 599, " 22, for "father" read "brother."
" 645, " 7 from bottom, for "valid" read "void."

CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA,

AT RALEIGH.

FEBRUARY TERM, 1884.

JOHN L. MARKHAM v. W. H. HICKS & CO.

Appeal.

An appeal will not be entertained where the transcript does not show that the action was properly constituted in the court below.
(*Bradley* v. *Jones*, 76 N. C., 204, cited and approved).

APPEAL by plaintiff from a judgment rendered at Spring Term, 1884, of DURHAM Superior Court, by *McKoy, J.*

Mr. W. W. Fuller, for plaintiff.
Messrs. Graham & Ruffin, for defendants.

ASHE, J. This appeal cannot be entertained by this court. It purports to be a case brought up by appeal from a justice's court to the superior court. But there is no record to show that the case was ever constituted in either court. In fact, there is not the semblance of any kind of record.

The case, as presented here, is constituted entirely of two statements of the case on appeal, one signed by counsel, and the

other by the judge, and a copy of the open account upon which the action is alleged to have been brought. That is all.

The cases on appeal state that the statute of limitations was relied on by the defendants, and a jury trial was waived, and by consent His Honor tried the facts. He decided that the plaintiff's action was barred by the statute. That is a question of law. But he failed to find the important fact, when the action was commenced; and without that fact being found, or made to appear by the record, it is impossible for this court to decide whether His Honor's conclusion of law was correct or not.

The case is remanded that the parties may make such disposition of it as they may be advised. *Bradley* v. *Jones*, 76 N. C., 204. The costs must be paid by the appellant.

PER CURIAM. Remanded.

R. A. TORRENCE and others v. E. C. DAVIDSON and others.

Appeal—Reference.

No appeal lies from an order recommitting the report of a referee. (*Lutz* v. *Cline*, 89 N. C., 186; *Jones* v. *Call*, *Ib.*, 188, approved).

APPEAL from an order made at Spring Term, 1883, of MECKLENBURG Superior Court, by *MacRae, J.*

Messrs. Wilson & Son and *Burwell & Walker*, for plaintiffs.
Mr. W. P. Bynum, for defendants.

MERRIMON, J. There has been some irregularity and confusion in the conduct of this action, but it is not properly before us now, and we are not at liberty to suggest how the irregulari-

ties are to be corrected, or pass upon the merits of the important questions presented by the record and eventually to be settled. The appeal was prematurely taken.

The court below heard the case upon the report of the clerk and exceptions thereto, and having found the facts of the case and the law arising thereon, and settled the rights of the parties, ordered a recommittal of the report, with instructions to the clerk to so correct the same as to make it conform to the findings and rulings of the court. From this order of recommittal the defendants appealed to this court.

It is manifest that this order is only incidental and interlocutory; and to execute it preparatory to a final judgment, cannot prejudice the party appealing. He can have every advantage by appeal after final judgment, when all exceptions are brought up and considered together, that he could have by an appeal at the present stage of the action.

It is well settled that an appeal does not lie from an order such as that appealed from in this case. So that the case is not before us. *Lutz* v. *Cline*, 89 N. C., 186; *Jones* v. *Call*, *Ib.*, 188.

The case must be remanded to the end that the superior court may proceed according to law.

Remanded.

JAS. W. GRANT, Adm'r, v. W. A. REESE and others.

Appeal—Reference and Referee.

An appeal does not lie from an order recommitting the report of a referee with instructions to correct the same in conformity to the ruling of the court. (*Lutz* v. *Cline*, 89 N. C., 186; *Jones* v. *Call*, *Ib.*, 188, cited and approved).

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

Mr. R. B. Peebles, for plaintiff.

Messrs. Gilliam & Gatling, *W. C. Bowen* and *W. Bagley*, for defendants.

MERRIMON, J. The record in this case is very voluminous, and the exceptions numerous, indefinite, imperfectly stated and complicated. The court, from time to time, has given them much consideration. At last, at the end of them, we find that the appeal was improvidently taken, and the case is not properly before us.

The trial of the action involved long and intricate accounts. The court ordered a reference; the referee took much testimony, stated the accounts and made report of the same. To this report the plaintiff and the defendants filed numerous exceptions, and the case was heard upon the report and the exceptions thereto. The court sustained some of the exceptions, overruled others, and sustained others in part and overruled them in part, and made an order recommitting the report to the referee, with instructions to correct the same and make it conform to the ruling of the court. From this order and the rulings of the court in respect to the exceptions complained of by the plaintiff, he appealed to this court.

It is manifest that an appeal did not lie at the present stage of the action. There was no order or judgment from which an appeal might be taken until the final judgment should be entered. The exceptions, both of the plaintiff and the defendants, should have been carefully and definitely made and noted in the record at the time they were taken, and upon the coming in of the amended report, the court might have corrected its own errors, if such were brought to its attention, and then have given a final judgment, from which an appeal might be taken, bringing up all the exceptions and assignments of error for review and correction here. This is the orderly course, and that contemplated by the statute providing for appeals to this court.

Although we have considered the case and could promptly decide the questions presented in the record for our decision, if the case were properly before us, we are not at liberty to do so. We have no authority to decide cases and questions not properly constituted before us, and it is the duty of the court to see that cases come before it according to law. It is essential to the integrity and authority of judicial decisions that the court shall have jurisdiction of the cases in which they are made, accordingly as the law directs. Just jurisdiction is indispensable—the life and vigor of judicial decisions depend on it.

The court has repeatedly construed the statute (THE CODE, §548) allowing appeals, and the practice in cases like this is well settled. Slight attention to the decisions of the court would prevent miscarriages like the present, and facilitate the administration of justice. *Lutz* v. *Cline*, 89 N. C., 186, and the cases there cited; *Jones* v. *Call*, *Ib.*, 188.

The case must be remanded, to the end, the superior court may proceed therein according to law as if no appeal had been taken, and it is accordingly so ordered.

Error. Remanded.

OFFICERS OF COURT v. THEOPHILLUS BLAND.

Appeals.

Appeals must be brought up to the term of this court next after they are taken.

MOTION of plaintiff to dismiss the defendant's appeal, heard at February Term, 1884, of THE SUPREME COURT.

Messrs. Haywood & Haywood, for plaintiff.
Messrs. Strong & Smedes and *H. F. Murray*, for defendant.

MERRIMON, J. The appellee moved to dismiss the appeal upon the ground that it was taken to the last October term of this court, and was not brought up to that term at all, nor docketed in this court until the present term.

It appears that the appeal was taken at spring term, 1883, of the superior court of Pitt county, to the last October term of this court. It was not, however, brought up to the October term, nor were any steps taken at that term to bring it up. It was docketed at the present term.

It is well settled that appeals must be brought up to the term of this court next after they are taken, and if they are not brought up to that term, and no effort is made before the court to do so, the appeal will be lost.

This case is in all material respects like that of *Suiter* v. *Brittle, post*, 19, and it must be governed by it.

The motion to dismiss the appeal is allowed.

Appeal dismissed.

GEORGE W. LOGAN v. J. C. L. HARRIS.

Appeal—Judgment of Record.

An appeal will be dismissed where the transcript fails to show a judgment of record from which the same was taken.

(*Davis* v. *Shaver*, Phil., 18; *Jones* v. *Call*, 89 N. C., 188, cited and approved).

CIVIL ACTION tried at Spring Term, 1882, of RUTHERFORD Superior Court, before *Gudger, J.*

The defendant appealed.

Messrs. Hoke & Hoke, for plaintiff.

Mr. W. S. Mason and *Hinsdale & Devereux*, for defendant.

MERRIMON, J. The original process and the pleadings appear in the record. It likewise appears that sundry issues were submitted to a jury, and a verdict was duly rendered upon them; that thereupon the defendant moved for a new trial, which motion was denied by the court, and he then moved in arrest of judgment, which motion was also denied; and the defendant took an appeal to this court. No judgment, nor any minute or memorandum of a judgment, appears in the record.

An appeal can be taken in a case like the present one only from a judgment, in the cases allowed by THE CODE, §548, *entered of record*. The entry of a judgment on the record is essential to its completeness and efficiency. It is this that gives it life and certainty, and perpetuates it as an established memorial. It is not sufficient that the court had taken its resolution as to what judgment it would enter—this is only in the mind of the judge. To make his purpose a judgment, it must be entered of record, and until this shall be done, there is nothing to appeal from.

This court has gone very far in supporting imperfect entries of judgment, but it has always held that there must, at least, be some memorandum or minute from which it can be seen what was intended by the court. If there is an entry implying, with reasonable certainty, enough from which the judgment can be drawn out in proper form, this will be upheld as sufficient. *Davis* v. *Shaver*, Phil., 18. But this court cannot infer or conjecture that a judgment was given by the court below. It acts upon the record, and what is in and of it—not what the court making it intended to put upon it, but through inadvertence or neglect, failed to do so.

It is probable that, in this case, the court intended to enter a judgment, and the parties and their counsel so understood, but what judgment, does not appear; nor is there any minute from which we can ascertain what it was intended to be. It is said in the case upon appeal there was "judgment," but none appears in the record proper.

This is only another illustration of the loose and careless practice too generally tolerated, and if the plaintiff suffers from it, he can justly complain only at himself and his counsel.

The appeal was improvidently taken. There was no judgment to appeal from. It will be sufficient for the defendant to appeal when a judgment shall be entered of record, if he shall be so advised.

This court must see that cases come to it according to law, in order that it may get jurisdiction, and as well with the view to uphold a wholesome practice. *Jones* v. *Call*, 89 N. C., 188.

The appeal must be dismissed, and it is accordingly so ordered.

Appeal dismissed.

JOHN BUIE v. GEORGE D. SIMMONS.

Appeal—Defective Record.

Where an appeal is taken and the record fails to disclose the grounds upon which the party seeks relief (here against an execution), the court will remand the case, that the record may be perfected.

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

MOTION to set aside an execution heard at Spring Term, 1883, of CUMBERLAND Superior Court, before *Shipp, J.*

The motion was refused and the defendant appealed.

Messrs. N. W. Ray and *W. A. Guthrie*, for plaintiff.

Messrs. R. S. Huske and *J. W. Hinsdale*, for defendant.

MERRIMON, J. The record in this case is very imperfect, so much so that we are unable to decide the questions intended to be presented by it, until it shall be perfected.

The names of the persons asking to be made parties as the widow and heirs at law, the grounds and scope of the motion to set aside the execution, which they proposed to make, do not sufficiently appear. The summary statement of the case upon appeal shows that there may have been sufficient grounds for the motion. We are not prepared to say that the appellants are not entitled, in any view of the matter, to make the motion they asked the court to be allowed to make.

In such a case, with a view to the ends of justice, the court will remand the case, to the end that the record may be perfected. *Bradley* v. *Jones*, 76 N. C., 204.

Remanded.

R. D. MOORE v. JULIUS VANDERBURG and others.

Appeal.

1. An appeal must be entered of record in the court below, and the transcript of the record must show the same, in order to give this court jurisdiction.
2. But as it appears that an appeal bond was given, the case is remanded, that the record may be amended to show the appeal was taken, if such be the fact.

SPECIAL PROCEEDING heard at Fall Term, 1883, of IREDELL Superior Court, before *Gudger, J.*

The defendants appealed.

Mr. D. M. Furches, for plaintiff.

Messrs. E. C. Smith and *Fuller & Snow,* for defendants.

MERRIMON, J. It appears from the record sent to this court, that, at August term, 1883, of the superior court of Iredell county, that court affirmed the judgment of the clerk confirming the sale of the land mentioned in the pleadings. It does not, however, appear that any appeal has been taken from the judgment to this court, or that any notice of appeal was given or waived.

It is therefore manifest that the case is not properly in this court. The appeal is the essential means by which this court gets jurisdiction of an action, and it must certainly appear in the record that it was taken from a proper judgment, authorizing it. It is the appeal that puts this court in relation with the case in the court below, and with that court in respect to the judgment appealed from; and this court must be able to see, from the record, the relation thus established. The court will always be careful to see that it has jurisdiction; this is essential to enable it to take any action whatsoever, and to give any effect to its judgment. Indeed, there can be no judgment without jurisdiction, and there can be no jurisdiction without an appeal or some proceeding, or writ, in substitution therefor. This is so upon

principle, but it is, as well, required by the statute. THE CODE, §550, requires that "within the time prescribed in the preceding section (in reference to appeals) the appellant shall cause his appeal to be *entered by the clerk on the judgment docket*, and notice thereof to be given to the adverse party." The entry of appeal thus required is indispensable, and, although according to the loose practice that too generally prevails, a mere memorandum that an appeal was taken is all that is entered, strictly and properly it ought to be set out formally in apt words, that the appellant, at the time specified, took an appeal from the judgment in the record; and such entry, however informally expressed, becomes a part of the record to be sent into this court. Section 551 requires that "the clerk, on receiving a copy of the case settled, as required in the preceding section, shall make a copy of the judgment-roll and of the case, and within twenty days transmit the same duly certified to the clerk of the supreme court." The judgment-roll embraces the entry of the appeal taken, and the latter must be sent up as part of it.

The provisions of the statute have not been complied with, and the case is not here for any purpose; but as it appears that an undertaking upon appeal was given, we remand the case, to the end that the record may be so amended as to show that an appeal was taken, *if such be the fact.*

It is so ordered. Remanded.

A. B. McMILLAN v. NANCY NYE, Adm'x.

Appeal—Justification of Bond—Waiver must be in writing or noted on record.

Where an unjustified undertaking on appeal was filed with and approved by the clerk, as shown by his memorandum, but no note made on the record that the same was accepted by the appellee without objection; *Held*, that the subsequent signing by the counsel of the appellee of the case settled for this court, does not constitute a waiver in writing of the legal requirements

in perfecting appeals; and hence the motion to dismiss the appeal for want of justification of bond was allowed.

(*Harshaw* v. *McDowell*, 89 N. C., 181; *Howerton* v. *Henderson*, 86 N. C., 718, cited and approved).

MOTION to dismiss an appeal from ASHE Superior Court, heard at February Term, 1884, of THE SUPREME COURT.

Mr. J. W. Todd, for plaintiff appellee.
Messrs. D. M. Furches and *G. N. Folk*, for defendant.

MERRIMON, J. The appellee moved to dismiss the appeal in this case upon the ground that the undertaking upon appeal had not been justified as required by the statute.

The appellant admitted the ground assigned, but insisted that the appellee's counsel had, *after the undertaking had been filed*, signed and assented to the case settled upon appeal for this court, and had thus *waived* all objection to it.

This cannot be construed to be a waiver of the requirements of the statute in respect to perfecting appeals. In providing that an undertaking upon appeal shall be given, or a deposit of money in lieu thereof shall be made, THE CODE, §552, among other things, provides "that such undertaking or deposit may be *waived by a written consent* on the part of the respondent." And section 560 provides 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 court in construing these provisions of the statute in *Harshaw* v. *McDowell*, 89 N. C., 181, said: "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."

Now, in this case it does not appear that the undertaking was offered and accepted without objection and the fact noted in the record. Indeed, it does not appear that the attention of the court was called to it at all.

The single fact tending to show that it was brought to the notice of the court, and that the counsel of the appellee saw or knew of it, is the memorandum made by the clerk, whether on or off the undertaking does not appear, in these words: "The same (referring to the undertaking) filed and approved May 21st, 1883. J. M. Dickson, C. S. C." The undertaking and this entry are copied into the transcript of the record next before the case settled upon appeal.

This is a slight fact, raising not more than ground for conjecture that the court had any knowledge of the undertaking, especially in the absence of any order respecting it. The clerk had authority to receive and file it, but he had no authority to make any entry in the record touching it, and in order to create the *waiver* of the undertaking and the requisites in perfecting it, it must have been offered and accepted by consent of the appellee in terms, or implied by his failure to make objection in court, and a note of this fact made in the record. This would have been a sufficient waiver in writing. It is essential that the waiver should be *in writing*, and so made of purpose, and with the assent of the appellee. A slip or inadvertence cannot be treated as a waiver. The statute has expressly made the undertaking and the justification thereof a substantial and necessary incident to appeals, except in the case provided otherwise, and it can be dispensed with only in the way prescribed by law. It is the plain duty of the court to effectuate the legislative purpose. We cannot impair its force by strained constructions in aid of negligent appellants.

The counsel for the appellant insisted on the argument that it sufficiently appears that the counsel for the appellee signed the case settled upon appeal *after* the undertaking was filed, and thus waived all objection to it, and relied upon the case of *Howerton* v. *Henderson*, 86 N. C., 718. He clearly misapprehends the meaning of the court in that case. Mr. Justice RUFFIN, in delivering the opinion, assigned, as a reason why the writ of *certiorari*, in lieu of an appeal, should be allowed, the fact, that

the appellees had waived any objection to the appeal bond by signing the case settled upon appeal after the bond was filed, but he did not mean a waiver in the sense of the statute—that he had "waived by a written consent on the part of the respondent" all legal objection to the appeal bond. This could not be so, unless there had been a note of such waiver in the case settled, and there was none, either in terms or words that could be so construed. At the term next before the opinion was delivered the appeal in that case had been dismissed upon the ground that the undertaking had not been waived and had not been properly justified.

The undertaking upon appeal in this case has not been perfected as the law requires, nor has it been waived by a written consent, in or out of the record. The motion to dismiss must therefore be allowed. Motion allowed.

Appeal dismissed.

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*F. B. HEMPHILL and others v. L. C. BLACKWELDER.

Appeal dismissed for want of justification of bond.

The court express astonishment that appeals should be taken without perfecting them according to law, and say, that if they were disposed to grant relief against such negligence, they have no authority to do so.

MOTION by defendant to dismiss an appeal from McDOWELL Superior Court, heard at February Term, 1884, of THE SUPREME COURT.

Messrs. W. H. Malone and *Robbins & Long*, for plaintiffs.
Mr. G. N. Folk, for defendant.

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*The case of *Fleming* v. *Burgin*, from McDowell, was also dismissed for the reason assigned in this case. *Mr. W. W. Fleming*, for the plaintiff, appellant and *Mr. G. N. Folk*, for the defendant appellee.

MERRIMON, J. The undertaking upon appeal in this case, we find attached to the transcript of the record, but it is not *justified.* No "written consent on the part of the respondent," the appellee, waiving the undertaking properly justified appears on file or in the record.

For this cause, the appellee moves to dismiss the appeal, and it is manifest that he is entitled to have his motion allowed. *McMillan* v. *Nye,* decided at this term, *ante,* 11.

It is not improper to say here, that it is a matter of astonishment to the court, that intelligent gentlemen engaged in the practice of the law persist in sending appeals to this court without perfecting them as required by the plain, peremptory requirements of the statute. If the court were disposed to grant relief against such negligence, it has no authority to do so. Motion allowed.

Appeal dismissed.

J. M. CROSS v. G. W. CROSS and wife.

Appeal—Certiorari—Mandamus.

1. A petition for a *certiorari* as a substitute for an appeal, must be filed at the term of this court next succeeding the rendition of judgment against the petitioner.
2. A *mandamus* requiring a judge to settle a case on appeal, upon exceptions filed by the appellee, will not be granted where the party himself is guilty of laches.

(*Brown* v. *Williams,* 84 N. C., 116, cited and approved).

PETITION for certiorari heard at February Term, 1884, of THE SUPREME COURT.

Mr. J. M. McCorkle, for plaintiff petitioner.

No counsel *contra.*

ASHE, J. The petition states that at fall term, 1882, of Davidson superior court, judgment was rendered in behalf of the defendants in an action pending in said court, wherein the petitioner, J. M. Cross, was plaintiff, and G. W. Cross and wife defendants; that the petitioner appealed to the supreme court, filed his bond in due time, and his counsel, during the term, made out a case on appeal, which was duly served on the appellees; that they, through their counsel, returned the "case," with their objections, to the counsel of the petitioner, who the next day handed the same to His Honor, Judge Avery, who presided at said court, for settlement; that neither he nor his counsel, as he is informed and believes, were ever notified by His Honor of the time and place of settling the case on appeal. The petitioner therefore prays that a writ of *mandamus* or *certiorari*, or other proper process, be issued to His Honor, Judge Avery, requiring him to settle the "case," and forward the same to the clerk of Davidson superior court, that it may be filed, and a transcript of the record and the case sent to this court.

The petitioner is not entitled to the remedies he seeks by his petition to secure an appeal. He has lost his right of appeal by his laches. The law requires that he should make his application for a *certiorari* at the term of the appellate court next succeeding the rendition of the judgment against him. *Brown* v. *Williams*, 84 N. C., 116. There, the petitioner allowed twelve months to elapse before filing his petition, and it was held he had lost his appeal by his laches. But, in this case, he has delayed making his application more than two years after the rendition of the judgment against him. He has been guilty of gross laches, and has thereby lost his appeal. The writ is refused, and the petition dismissed.

Writ refused.

JAMES L. CURRIE v. J. B. CLARK and others.

Appeal—Certiorari.

A *certiorari* will not be granted for an alleged omission on the part of the presiding judge to state exceptions taken on the trial, where the record shows that he settled the case on appeal, upon consideration, after his attention was called to the matters of complaint. It is only where it plainly appears that, by mistake or inadvertence, the judge failed to state something which ought to appear in the case, that a motion for the writ will be allowed.

(*McDaniel* v. *King*, 89 N. C., 29, cited and approved).

MOTION of plaintiff for writ of *certiorari* heard at February Term, 1884, of THE SUPREME COURT.

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

Messrs. John Manning, R. P. Buxton and *M. S. Robbins*, for defendants.

MERRIMON, J. The appellant files his petition in the cause, in which he alleges that the case settled upon appeal for this court does not set forth all the exceptions taken by him to the rulings of the judge in the court below, and that others taken are not correctly stated, and he prays for the writ of *certiorari*, to be directed to the clerk of the superior court, from which the appeal comes, commanding him to certify a full and complete transcript of the record to this court, after the judge who presided at the trial in that court has had opportunity to revise and correct the case settled upon appeal, as he may see fit to do.

We have examined the record and are satisfied that the judge who presided at the trial had his attention called to the several grounds of complaint mentioned in the petition, and that the case was settled by him upon consideration. It is not suggested, either in the petition or the affidavit of counsel to support the motion, that the judge inadvertently, by mistake or misappre-

hension, failed to note the exceptions mentioned, and, indeed, the case shows that he did not.

In such a case the court will not grant the writ of *certiorari*. It is only where it plainly appears that by inadvertence, mistake or accidental misapprehension the presiding judge misstated, or failed to state something that ought to appear in the case settled upon appeal, that the writ will be granted; and it ought to appear that the court would probably make the correction. The purpose of granting the writ is simply to afford opportunity to correct an oversight, and not to *require* the judge to do anything. *McDaniel* v. *King*, 89 N. C., 29.

This court has no authority to suggest to, or direct, a judge of the superior court in settling a case upon appeal, as to what particular exceptions he shall specify, or what facts he shall state. The law charges him with that duty, because he has the record before him, is cognizant of all that was done on the trial, and is presumed to be impartial and just. He is charged with the whole responsibility when it becomes his duty to settle a case upon appeal, and this court must accept it as importing absolute verity, and as it comes from him.

There need be little difficulty about the exceptions in any case, if the courts would note them promptly in the minutes of the record at the time when they are made, and if counsel would put in writing the prayer for instructions. The trouble encountered in settling the case upon appeal grows out of a loose and irregular practice. Two of the ten exceptions are not taken in apt time, oftener it is not noted in writing, and generally, the counsel do not ask for instructions in writing. Hence confusion arises, and sometimes unseemly controversy. A due observance of the law would effectually prevent this, and greatly tend to the proper conduct of trials, and promote the just determination of actions. This court can easily reach what is in and of the record. It is difficult to reach that which is not in it, but it is alleged ought to be.

Motion denied.

J. L. SUITER v. E. W. BRITTLE and others.

Appeal—Attorney and Client—Appearance for special purpose.

1. Appeals must be docketed in this court at the term next after they are taken.
2. Where counsel appear specially, the entry should state the special purpose; but a failure to so state it from inadvertence cannot be construed to be a waiver of the right of his client.

(*Smith* v. *Lyon*, 82 N. C., 2; *Brown* v. *Williams*,, 83 N. C., 684, and 84 N. C. 116; *Wiley* v. *Lineberry*, 88 N. C., 68; *State* v. *O'Kelly*, *Ib.*, 609; *State* v. *Randall*, *Ib.*, 611, cited and approved.)

MOTION to dismiss an appeal heard at February Term, 1884, of THE SUPREME COURT.

Messrs. T. W. Mason and *R. B. Peebles*, for plaintiff appellant.
Mr. Thomas N. Hill, for defendant appellee.

MERRIMON, J. The appellee moved at the present term to dismiss the appeal in this case, upon the ground that it was taken at the spring term, 1883, of the superior court of Northampton county, and was not brought up and docketed at the last October term of this court, nor until the second day of February of the present year, and no steps were taken at the October term to bring it up.

At this term, the counsel for the appellee entered his appearance without specifying that he appeared only for the purpose of making the motion to dismiss the appeal. The appellant insisted that the appearance of the counsel was general, and operated as a *waiver* of the ground of the motion.

The counsel for the appellee declared and insisted that he intended to appear only for the purposes of the motion. The motion was entered in writing several days before it came up for argument, and it is very manifest to the court, that it was the counsel's purpose to appear as he insisted, and he must be so

treated. His course of action sufficiently indicates his purpose. A mere or slight inadvertence of counsel in failing to enter specially, that he entered his appearance only for the purpose of making a motion, cannot be construed to be the *waiver* of the right of his client. Regularly, however, the entry of the appearance should specify the special purpose, if there be any.

This case does not require that we shall pass upon the question how far a general appearance of counsel might operate as a waiver of the grounds of motion like the present.

The appeal having been taken at the spring term, 1883, of the superior court, the law required the clerk of that court to transmit to the clerk of this court, within twenty days after receiving a copy of the case settled for this court upon appeal, a copy of the judgment roll and of the case settled. Granting all the time allowed by law for taking the appeal and settling the case upon appeal, in any possible view of the matter, the transcript ought to have reached the clerk of this court more than a month before the beginning of the last October term, and the appeal ought to have been docketed on the first day of that term. The rule of practice required that it should be docketed within the first eight days of the term; if docketed afterwards, it stood continued under the rule.

It was the plain duty of the appellant to see that his appeal was duly docketed at the term of this court to which it was taken. He might have moved on the first day of the term to compel the clerk to send it up. As he did not, and did not at any time during the October term, he lost the appeal. It is well settlled that the appeal must be brought up to the term of this court next after it was taken. And in cases where no case was settled upon appeal for this court, it is the duty of the appellant to docket the appeal and place himself in position to take such further steps as he may be advised, to perfect his appeal. The appeal is not now properly in this court, and the appellee has rights in regard thereto that he may assert in the way he seeks to do by his motion. *Smith* v. *Lyon*, 82 N. C., 2; *Brown* v. *Williams*, 83

N. C., 684; *Brown* v. *Williams*, 84 N. C., 116; *Wiley* v. *Lineberry*, 88 N. C., 68; *State* v. *O'Kelly*, 88 N. C., 609; *State* v. *Randall*, 88 N. C., 611.

It is suggested by affidavit, that the clerk of the superior court sent a transcript of the record more than once, and in due time, that failed to reach this court. That may be, but that fact did not prevent the appellant from taking the proper measures at the October term to bring his appeal up; indeed, it afforded the strongest reason why proper and prompt action should have been taken. There could scarcely be more manifest neglect.

The appellee is entitled to have his motion allowed, and the appeal must be dismissed. It is so ordered.

Appeal dismissed.

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*W. A. SMITH, Adm'r. v. M. A. ABRAMS and others.

Appeal will be Dismissed where Surety does not Justify—Certiorari.

An appeal was dismissed, upon motion, for the reason that the surety to the bond had not justified; and the appellant then applied for the writ of *certiorari*, stating as an excuse for non-compliance with the statute that it was not the practice in that court for sureties to justify, and that he was not aware of the recent decisions enforcing the statutory obligation; *Held*, that upon his own showing he is not entitled to the writ. The court will require a strict compliance with the statute regulating appeals.

(*Wade* v. *Newbern*, 73 N. C., 318; *Elliott* v. *Holliday*, 3 Dev., 377; *Harshaw* v. *McDowell*, 89 N. C., 181, cited and approved).

PETITION by defendant for *certiorari* heard at February Term, 1884, of THE SUPREME COURT.

*Mr. Justice ASHE did not sit on the hearing of this case.

Mr. James A. Lockhart, for plaintiff.
Messrs. Battle & Mordecai and *J. D. Shaw,* for defendants.

SMITH, C. J. The application is for an order to bring up the record of the cause determined at fall term, 1881, of the superior court of Anson, the transcript of which, upon the petitioner's appeal, was filed in this court at February term, 1883, and the appeal dismissed for insufficiency in the appellants' undertaking, in that the surety thereto had not justified.

The only reasons now assigned for the granting of the writ, and in excuse for non-compliance with the requirements of the statute, are, that it was not a uniform practice in that court for the surety to make oath to his ability to meet his obligation, and that where the bond was produced before the clerk it was accepted by him as sufficient, and that appellants were not then aware of the recent ruling of this court in enforcing this statutory obligation.

In opposition to these averments it is shown in the affidavits of the plaintiff, William A. Smith, that both the intervening creditor and appellant, James B. Lindsey, who executed the bond, and the surety, Jesse M. Smith, were insolvent, sustaining this charge against the latter by extracts from the list of taxables for the years 1881 and 1882. Their affidavits are accompanied with that of the clerk, whose recollection is that when the said Lindsey and his counsel came into his office and inquired of him if the proposed surety would do, his answer was he supposed he would; that the bond was a few days later brought into the office and handed to affiant, who, on examination, discovered the omission of any verification and called it to the attention of the counsel; that thereupon some unremembered conversation took place, and affiant said: "I suppose that Jesse M. Smith would justify if present, and I suppose it will do anyhow."

He further states that he has been in office since September, 1874, and does not recollect, except in the present and one other case, ever to have seen an unjustified appeal bond taken and

sent up, and the general practice has been to have such justification.

If the petitioner's own statements furnished any satisfactory grounds for the omission to pursue the plain directions of the statute, and we think they do not, for the interference of the court in relieving the appellants, they are removed by the uncontradicted affidavits offered in opposition.

The granting of the present application would be to declare, in substance, that any disregard of the law in prescribing the conditions of an effectual appeal might be disregarded, and a remedy found in this writ. Ever since the decision in *Wade* v. *Newbern*, 73 N. C., 318, the purpose has been manifest to enforce the indispensable requisites of the law in perfecting an appeal, when the appellee sought to avail himself of them, and such has been the unvarying current of subsequent rulings. The cases are collected in the note to section 560 of Clark's Code. Some relaxation perhaps was necessary at first, as inattention to the act had induced a practice of not insisting on its provisions to an extent that seemed to warrant the awarding of the writ upon the ground of surprise. But it does not follow that where the appeal is lost this remedy is open to the appellant, unless there be sufficient reason for the failure. The writ of *certiorari* now issues, "as heretofore in use" by the act of 1874–75, ch. 100, and we must look to the former practice for the rules governing its issue.

Among the many cases before this court we do not deem it necessary to advert to but one, and in this the facts are not very unlike those set out in the application before us. *Elliott* v. *Holliday*, 3 Dev., 377. The defendant filed an affidavit stating that he was ignorant of the rule requiring the appeal bond to be executed during the term of the county court; that he thought it sufficient if the appeal was allowed by the court, and that the bond could be executed at any time; that he had brought his sureties to the clerk, but finding him busy, he had, under an erroneous impression, requested them to attend after its expiration. There

was also an averment of merits. The *certiorari* was awarded in the superior court, and, upon the plaintiff's appeal, declared to be erroneous, and DANIEL, J., said:

"The defendant does not come within any of the cases decided in this state. *Chambers* v. *Smith*, 1 Hay., 366; *Collins* v. *Noll*, *Ib.*, 224. There does not appear to be any misconduct either in the court or the clerk; no management, fraud or contrivance by the adverse party, nor any inability in the applicant to give sureties during the term. The only reasons offered are that the defendant was ignorant of the law, and that the clerk was very busy and he did not wish to disturb him. It is a rule that ignorance of the law excuses no man."

Assuming all that the applicant states to be true, no legal excuse is furnished for the omission of the prescribed verification of the bond, without which it is of no effect. C. C. P., §310; *Harshaw* v. *McDowell*, 89 N. C., 181.

The application must be denied and it is so adjudged.

Motion denied.

T. S. ROYSTER, Adm'r, v. H. H. BURWELL and others.

Appeal.

An appeal will be dismissed where there is no statement of the case and no bond with proper justification filed within the time allowed by law.

(*Adams* v. *Reeves*, 74 N. C., 106; *Bryson* v. *Lucas*, 85 N. C., 397; *Sever* v. *McLauchlin*, 82 N. C., 332, cited and approved).

CIVIL ACTION tried at Fall Term, 1883, of GRANVILLE Superior Court before *MacRae, J.*

The defendants appealed from the judgment of the court below, and the plaintiff moved in this court to dismiss the appeal.

Mr. T. B. Venable, for plaintiff.
No counsel for defendants.

ASHE, J. There was judgment in behalf of the plaintiff. "From which judgment defendants appealed to the supreme court; notice waived; bond in the sum of $25 adjudged sufficient; by consent, defendants allowed till Vance superior court to file bond and make up case." This entry on the record is signed by the judge presiding.

No statement of the case on appeal accompanies the record. The bond sent up is without justification and was not filed until after Vance court. Upon these grounds the plaintiff's counsel moved in this court to dismiss the appeal, and the motion is sustained. *Adams* v. *Reeves*, 74 N. C., 106; *Smith* v. *Abrams*, at this term; *Bryson* v. *Lucas*, 85 N. C., 397; *Sever* v. *McLaughlin*, 82 N. C., 332., THE CODE, §560, and the numerous cases there cited.

Appeal dismissed.

M. F. BRANTLEY v. B. F. JORDAN.

Appeal, notice of.

Where, under the Code of Civil Procedure, §80 (not brought forward in THE CODE of '83), the plaintiff, at the time of filing his complaint, failed to name some person upon whom service of pleadings and notices may be made, *it was held* that a notice of appeal filed by the defendant in the clerk's office was sufficient under the statute to charge the plaintiff with notice thereof.

(*Campbell* v. *Allison*, 63 N. C., 568; *Bryan* v. *Hubbs*, 69 N. C., 423, cited and approved).

MOTION to dismiss an appeal heard at February Term, 1884, of THE SUPREME COURT.

Tha defendant appealed from the judgment of the court below, and the plaintiff now moves to dismiss the appeal.

Mr. R. B. Peebles, for plaintiff.
No counsel for defendant.

MERRIMON, J. The appellee moved at the present term to dismiss the appeal in this case, upon the ground that it does not appear in the record or otherwise, that any notice of appeal was given to him.

A notice of appeal appears in the transcript, but it does not appear that it was ever served otherwise than by simply filing it among the papers of the case in the clerk's office.

The appeal was taken to the last October term of this court, and docketed at that term. Counsel then entered his appearance for the appellee, and consented in writing to a continuance of the case to the present term. At this term, no motion was made to dismiss the appeal until the case was called for argument.

Appeals are taken, not granted by the court, by the appellant from the order or judgment of the superior court in the cases allowed by law. They must be taken within ten days after notice of judgment rendered out of term, and within ten days after the rendition of the judgment in term; and within that time, the appellant shall cause his appeal to be entered by the clerk on the judgment docket, and *notice* thereof to be given to the adverse party. THE CODE, §§549, 550.

This court has held repeatedly that a failure to give notice of appeal is a good ground for a motion to dismiss it. *Campbell* v. *Allison*, 63 N. C., 568; *Bryan* v. *Hubbs*, 69 N. C., 423.

It is not necessary that we shall decide the question, whether or not notice of appeal may be *waived* by entering a general appearance by counsel in this court, as was done in this case, because the motion to dismiss must be denied upon another and distinct ground.

The Code of Civil Procedure, §80, provides that, "At the time of filing his complaint, the plaintiff, and at the time of filing his answer, the defendant, shall name some place and person in the county town in which the court to which the action

is brought is held, where and upon whom service of pleadings and notices in the action may be served; and if either shall fail to do so, *the filing of all such pleadings and notices in the office of the clerk of the court shall be deemed sufficient service* on the day of such filing, unless the parties shall, in writing on the copy of his complaint or answer, or by other written notice served on the adverse party, require personal service thereof, at a place named by him in the county, and shall deposit with the clerk a sum sufficient to pay the expense of such personal service, in which case, the personal service shall be made at his expense."

This statute was in force at the time the appeal was taken in this case, and continued until THE CODE went into effect. It was not brought forward in THE CODE and is not now operative.

It does not appear that the appellee named "some place and person in the county town in which the court to which the action is brought is held, where and upon whom service of pleadings and notices in the action might be made, or required in writing personal service, and it must be taken that he did not. It does appear in the record that the appellant filed a notice to the appellee of the appeal "in the office of the clerk of the court," as required by the statute. It is plain that the defendant intended to avail himself of the statutory provision as he had the right to do, although it may not have been the usual course of practice to give notice in that way. In the ordinary course of procedure, the plaintiff should have taken actual notice of the notice filed, but it being filed, the statute charged him with notice. It was competent at the time it was given to give it in the way adopted. It was sufficient, and so the appellee had due notice.

The motion to dismiss the appeal is therefore denied.

Motion denied.

R. McMILLAN v. COMMISSIONERS OF ROBESON COUNTY.

Appeal—Counties and County Commissioners.

The statute does not provide for an appeal from the refusal of the county commissioners to allow credits claimed by a sheriff in his settlement with the county. His remedy to test the validity of his claim is by a civil action.

(*Jones* v. *Commissioners*, 88 N. C., 56, cited and approved).

MOTION to dismiss an appeal heard at Spring Term, 1883, of ROBESON Superior Court, before *MacRae, J.*

This was an appeal to the superior court from the action of the defendant board of commissioners in refusing to allow the plaintiff, late sheriff, certain credits on his accounts with the county. The defendants moved to dismiss the appeal. His Honor granted the motion, and the plaintiff appealed.

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

Messrs. J. D. Shaw, T. A. McNeill, and *Frank McNeill*, for defendants.

MERRIMON, J. The county commissioners of Robeson county declined to allow the appellant, as the late sheriff of that county, credit in his settlement with the county for certain taxes due and uncollected from insolvents, as directed by the statute (Acts 1881, ch. 183), and from their refusal to allow such credit he undertook to appeal to the superior court. That court, upon motion of the appellees, made an order dismissing the appeal, and the plaintiff appealed to this court.

It is manifest that the order of the court dismissing the supposed appeal was a proper one. The county commissioners, in the respect mentioned, possessed no judicial functions; their duties and powers were purely ministerial; and their decision, one way or another, was not conclusive upon the sheriff. He could bring his action in the superior court, and obtain any

redress to which he may be entitled; or, it may be, if he is entitled as he contends, he can properly have redress in the action which the case upon appeal states has been brought against him by the commissioners. At all events, he cannot bring his cause of action into court in the way he has undertaken to do. There is no statute that allows an appeal in this or similar cases. This case is not unlike that of *Jones* v. *Commissioners*, 88 N. C., 56.

No error. Affirmed.

J. J. MOTT v. J. A. RAMSAY.

Practice—Affirmation of Judgment.

The judgment of the court below will be affirmed, where there is no case on appeal, and nothing in the record to show an exception taken.

CIVIL ACTION tried at Spring Term, 1883, of ROWAN Superior Court, before *Graves, J.*

The plaintiff, as revenue collector of the United States, brought this action against the defendant for money collected by him as the deputy collector of the plaintiff, and not paid over.

The defendant sets up a counterclaim as a defense to the action, alleging that by reason of a contract with the plaintiff for additional compensation, made subsequently to his appointment as deputy, the plaintiff became indebted to him in a much larger amount than that claimed by the plaintiff in his complaint.

The matter was referred to a referee to take the account between the parties. The referee reported that in the absence of such a contract as that set up by the defendant, he was indebted to the plaintiff in the amount mentioned in his report; but if, on the other hand, there was such a contract, then the plaintiff was indebted to the defendant in a larger amount than was claimed by the plaintiff against him.

The referee suggested to the court, that whether there was such a contract between the parties as that alleged by the defendant but denied by the plaintiff, was a proper question for a jury. The court being of that opinion, accordingly, at the spring term, 1883, of Rowan superior court, the following issue was submitted to the jury:

"Did the plaintiff and the defendant on or about the 27th day of April, 1872, make a new contract, whereby the plaintiff J. J. Mott agreed to pay the defendant John A. Ramsay, as compensation for his services after that date, the sum of one hundred and fifty dollars per month?" To which the jury responded: "They did not."

There being no exception taken to the report of the referee, judgment was rendered on behalf of the plaintiff for the sum of §162.11, with interest from the 18th of February, 1874, as reported by the referee. From this judgment the defendant appealed to this court.

Messrs. McCorkle, Armfield and *Kerr Craige*, for plaintiff.
No counsel for defendant.

ASHE, J. The case comes before us on appeal of the defendant without any statement of the "case on appeal," and nothing in the record to point us to any exception to the judgment of the court below. In all such cases it has been the uniform practice of this court to affirm the judgment of the superior court. *Swepson* v. *Summey*, 74 N. C., 551; *Utley* v. *Foy*, 70 N. C., 303; *Turner* v. *Foard*, 83 N. C., 683; *State* v. *Orrell*, Busb., 217; *Fleming* v. *Halcomb*, 4 Ired., 268.

No error. Affirmed.

JESSE B. GRANT v. EDWARDS & DELOATCH.

Injunction.

An injunction granted before the issuing of a summons in the action is premature.

(*Kincaid* v. *Conly*, Phil. Eq., 270, and 64 N. C., 387; *Trexler* v. *Newsom*, 88 N. C., 13, and cases cited, approved).

APPEAL from an order made at Chambers, on the 27th of November, 1882, by *McKoy, J.*

The plaintiff appealed.

Mr. R. B. Peebles, for plaintiff.

No counsel for defendant.

SMITH, C. J. Upon the rendition of final judgment in this cause, at February term, 1882 (86 N. C., 513), defendant, James J. Deloatch, without instituting a new action by the issuing of a summons to impeach the judgment for fraud practiced by the plaintiff, applied to the judge holding the superior court at Northampton, and obtained from him a restraining order, to operate until his motion for an injunction could be heard, of the time and place for which due notice was given. This order was made upon an affidavit offered and acted upon at chambers, wherein there are numerous allegations intended to show unfairness and fraud in the plaintiff, whereby the defendant was misled and deceived, and making no resistance himself to the action, committed the defense to the principal defendant, Edwards.

The notice of the application for an injunction having been served, the motion was allowed and the order granted to continue until the hearing of the cause, then supposed to be depending in an impeaching suit at the instance of the complaining defendant.

Such a suit for such alleged cause could have been brought in the superior court of Northampton, under the authority of the

case of *Kincaid* v. *Conly*, Phil. Eq., 270, and 64 N. C., 387, and it is manifest from the form of the interlocutory judgment, and in the absence of any direct opposition to its being made, that the judge acted under the impression that a new and original action for relief had been begun, to which the restraining order was merely auxiliary. The plaintiff appealed, and this unusual proceeding is before us, which is in substance an intervention in a cause, finally disposed of in this court, to prevent the plaintiff from reaping the fruits of his judgment.

The interlocutory judgment, as preliminary to a suit contemplated, but not begun, is wholly unwarranted, and directly repugnant to previous rulings. *Patrick* v. *Joyner*, 63 N. C., 573; *McArthur* v. *McEachin*, 64 N. C., 72; *Hirsh* v. *Whitehead*, 65 N. C., 516; *Trexler* v. *Newsom*, 88 N. C., 13. There is error, and the judgment must be reversed.

Error. Reversed.

J. B. BRIDGERS and wife v. W. H. MORRIS & SONS.

Injunction—Foreclosure Sale—Mortgage.

1. An injunction will be granted to postpone a sale of land by a mortgagee under the power contained in the deed, until the hearing of the case, where the affidavits show there is a controversy as to the amount due, arising out of numerous business transactions between the parties; and in such case it was proper in the court to make the restraining order conditional upon the mortgagor's executing a bond with justification to indemnify the mortgagee.

2. It is not necessary to insert, in a mortgage deed, a provision for giving notice to a mortgagor of an intended sale under a power contained in the deed, in advance of the advertisement. (*Capehart* v. *Biggs*, 77 N. C., 261, overruled as to this point).

(*Mosby* v. *Hodge*, 76 N. C., 387; *Kornegay* v. *Spicer*, *Ib.*, 95; *McCorkle* v. *Brem*, *Ib.*, 407, cited and approved).

BRIDGERS *v.* MORRIS.

MOTION by plaintiff for injunction in a suit pending in NORTHAMPTON Superior Court, heard at Chambers in Tarboro on August 3d, 1883, before *Philips, J.*

The court granted the motion and the defendants appealed.

Mr. R. B. Peebles, for plaintiffs.
Mr. W. C. Bowen, for defendants.

SMITH, C. J. The plaintiffs, J. B. Bridgers and wife, on December 15th, 1880, conveyed by mortgage deed to the defendants, in their partnership name of W. H. Morris & Sons, a tract of land, described as containing one hundred acres, with condition to be void on payment at maturity of a bond for six hundred dollars, executed to said firm on the same day, and payable on January 10th, 1883, with interest from date at the rate of eight per cent. per annum, and vesting a power in the mortgagees of making sale in case of default.

In January, 1882, the plaintiffs executed a second mortgage deed to the defendants for a lot, with store-house thereon and the goods in it, and two tracts of land, designating them by name, on condition to become void if the mortgagors should at maturity discharge a debt due by them on their bond given to the defendants at the same date for fourteen hundred dollars, due on January 1st, 1883, with similar provisions for a sale in default of payment.

The defendants rendered an account of their dealings with the plaintiff J. B. Bridgers to him, showing to be due them on December 30th, 1882, a balance of $2,321.13, and, the latter failing to provide for the payment, they proceeded under the provisions of the mortgages, to advertise a sale of said property on the first Monday in August following, to satisfy the mortgage debts. Thereupon the plaintiffs commenced the present suit on June 26th, 1883, and, using their sworn complaint as an affidavit, applied for and obtained from the judge a temporary restraining order to operate until an application after notice could be

heard for an interlocutory injunction to be in force until an account could be taken, the true indebtedness of plaintiffs ascertained, and the cause finally heard and determined.

The application was heard upon the complaint answer and accompanying exhibits, full and voluminous, at chambers, before the judge, on August 3d, 1883, both parties being represented by counsel, when the following order was made:

"Upon the reading of the complaint, answer and exhibits, it is considered by the court: That upon the filing of a bond in the penal sum of one thousand dollars payable to defendants, with two or more sureties, to be justified before the clerk of the superior court, to indemnify the defendants in the premises, the restraining order in the cause is continued to the hearing—this to be given within ten days; in default thereof, the defendants, after advertising for thirty days, have leave to sell according to the provisions of the mortgages."

The plaintiffs allege the omission of divers credits to which they are entitled, and which are not entered in the account rendered, which would greatly reduce the amount claimed, while the defendants deny their imputations, and, with elaborate explanations, supported by numerous letters from the plaintiff, insist that every proper credit has been allowed, and the full amount claimed is due them.

Without going into a minute examination of the proofs offered, it is sufficient to say that there have been many business transactions between the parties, and it is a proper case to interpose and suspend the proposed sale by the creditor mortgagees, until the account can be investigated and the sum still due be ascertained, before a sale is made to discharge it. The delay cannot, so far as we see, operate to the injury of the mortgagees; and if it could, an ample indemnity is provided in the order itself before the injunction shall issue.

The ruling of the court is in accordance with several recent adjudications, and furnishes no just ground of complaint to the appellants, guarded as it is by the requirement of adequate secur-

ity for the protection of the defendants against loss or damage from the delay. To some of these cases we shall refer in passing upon the appeal.

In *Mosby* v. *Hodge*, 76 N. C., 387, the motion was to dissolve an injunction issued to restrain a sale by the mortgagee, to pay the secured debt, which was allowed in the superior court, and on appeal the ruling reversed. The Chief-Justice who delivered the opinion, after stating that the exercise of such powers by the mortgagee acting for his own benefit was looked upon "with extreme jealousy," proceeds to say: "The exercise of the power is only allowed in plain cases where there is *no complication and no controversy* as to the amount due upon the mortgage debt, and the power is given merely to avoid the expense of foreclosing the mortgage by action: but that where there is such complication and controversy, the court will interfere and require the foreclosure to be made under the direction of the court after all the controverted matters have been adjusted and the balance due is fixed, so that," &c.

In *Kornegay* v. *Spicer*, decided at the same term upon a similar motion, the Chief-Justice uses this language: "The idea of allowing the mortgagee to foreclose the equity of redemption, by a sale made by himself, instead of a decree for foreclosure and a sale made under the order of the court, was yielded to, after great hesitation, on the ground that in a plain case, when the mortgage debt was agreed on and nothing was to be done except to sell the land, it would be a useless expense to force the parties to come into equity, when *there were no equities to be adjusted*, and the mortgagor might be reasonably assumed to have agreed to let a sale be made after he should be in default."

The same rule was affirmed and enforced in *Capehart* v. *Biggs*, 77 N. C., 261, upon the like state of facts, and the mortgagees were forbidden to make sale until the disputed account could be investigated and the indebtedness determined.

We are unable to find in the present case any features essentially distinguishing it from those cited, and exempting it from

the general proposition there established. Here is a controversy as to what is due, and though the evidence may predominate, when examined, in favor of the indebtedness claimed, as argued for the defendant, it cannot be expected that the court, upon a preliminary order, such as this, shall go into a full investigation and decide upon the amount of the indebtedness, instead of leaving this to be settled upon the final hearing and disposition of the cause—more especially where provision is made against any injurious consequences that may arise from the suspension of the sale. *McCorkle* v. *Brem*, 76 N. C., 407.

In our reference to *Capehart* v. *Biggs*, *supra*, for another purpose, we do not wish our silence to be misconstrued as giving sanction to the suggestion of the Chief-Justice in reference to an insertion in a mortgage deed that vests a power of sale in the mortgagee, of a provision for giving notice to the mortgagor of an intended sale in advance of the advertisement. The default authorizes the exercise of the power, and we see no reason for imposing restraints or conditions which the parties themselves did not see fit to introduce into the instrument, and thus impair the value of these securities for the creditor, whose merit chiefly consists in the promptness and small expense with which they are rendered available in enforcing payment.

There is no error and this will be certified.

No error. Affirmed.

J. W. SMALLWOOD and others v. CITY OF NEWBERN.

Graded School Law—Election and Decision of Canvassers—Taxation—Injunction—Act of Assembly.

1. An election was held in the city of Newbern under the rules and regulations governing the city elections, in pursuance of the act of 1883, ch. 117 (to establish graded schools in Newbern), and the proposition submitted to the qualified voters whether a tax should be levied to establish

the graded schools; *Held*, that the declaration of the result of the same by the mayor and city council, under the authority conferred by the act, that a majority of the qualified voters approved the proposition, is conclusive until reversed by a direct proceeding.

2. The injunction to restrain the collection of the tax complained of in this case was properly refused.

3. The validity of an act of assembly will not be determined upon a mere suggestion in an affidavit in injunction proceedings that the same is not valid, but only where the question is raised by proper pleadings and for the purpose of testing its constitutionality.

(*Cain* v. *Commissioners* and cases cited, 86 N. C., 8, cited and approved).

MOTION for injunction heard at Fall Term, 1883, of CRAVEN Superior Court before *Shepherd, J.*

The complaint states, in substance, that the defendant is a municipal corporation, the powers of which being vested in a mayor and city council, as provided by the private acts of 1879, ch. 42, amended by the act of 1883, ch. 117, entitled "An act to establish graded schools in Newbern"; that the plaintiffs are citizens and tax payers of the defendant city, and a tax of twenty cents has been assessed upon every one hundred worth of their property to establish graded schools in the city, which the defendant threatens to collect; that defendant's powers of taxation are restricted by its charter, and that assessed, as aforesaid, is in excess of its powers of taxation; that said tax was not authorized by a vote of a majority of the qualified voters in the city, and the same is wrongfully assessed and cannot be legally collected. Wherefore, the plaintiffs ask for an injunction restraining its collection, &c.

The defendant, admitting some of the plaintiffs' allegations and denying others, relies mainly upon the said act of 1883, and states that an election was held on the 7th of May, 1883, to determine whether the said assessment should be made in aid of the said schools, and that according to the returns of the same, the result was declared according to law that a majority of the qualified voters of the city voted "for schools," and in favor of the assessment of said tax. Wherefore, the defendant asks that the action be dismissed.

In affidavits of plaintiffs, it is denied that a majority of the qualified voters, registered at and for said election, voted in favor of the tax; and that the same was never so declared as a fact by the authorities of the city; and it was also stated that there were many irregularities at said election—one affiant presenting himself at the polls and being refused the privilege of voting, and the poll-holders saying that the registration books had not been revised, &c.

The cause coming on to be heard on the pleadings and affidavits of both parties, it was adjudged that the motion for injunction be refused. From this judgment the plaintiffs appealed.

Mr. W. W. Clark, for plaintiffs.

Messrs. H. R. Bryan and *Nixon, Simmons & Manly*, for defendant.

MERRIMON, J. In view of the verified complaint, answer, affidavits and the case settled upon appeal for this court, we think the court below properly refused to grant the injunction prayed for.

The principal ground of the application for an injunction restraining the defendant from collecting the taxes mentioned in the complaint is, that the result of the vote required to be taken by the statute (Acts 1883, ch. 117, §1) was not fairly and truly ascertained and declared by the proper authorities, and that, in fact, a majority of the qualified voters of the city of Newbern did not vote "for schools."

We have carefully examined and considered the statute cited, the verified pleadings and the affidavits both for the plaintiffs and for the defendant, and are satisfied that the vote was taken substantially as the statute directs, and that the mayor and council of the city of Newbern ascertained and declared the result of the same, and entered a declaration of such result upon the minutes or records of their proceedings, wherein they declared that a majority of the qualified voters voted "for schools," and

that the result of the election was in favor of the assessment of taxes for the purpose of supporting graded schools as allowed by the statute.

It is admitted by the plaintiff that the mayor and council *held* an election as directed by the statute, but he insists that they had no authority to ascertain and declare the result; and, further, that if they had such authority, they did not ascertain the result fairly and truly. He does not point out in the complaint, nor does he suggest in his affidavit, how and by whom the result of the vote should have been ascertained; but we infer he means to insist that the inspectors of the regular city election, required to be appointed under THE CODE, §§3788, 3789, ought to have ascertained, declared and certified the result. This is the strongest view of the matter for the plaintiff, and accepting it as his, we do not think it correct.

The mayor and council are charged specially with the duty of *submitting* the proposition mentioned in the act to the qualified voters. The statute provides that, "The mayor and council of the city of Newbern are authorized and required to *submit* to the qualified voters of said city at the next regular election of councilmen, and under the rules and regulations governing said election, whether an annual assessment shall be levied therein for the support of one or more graded schools in said city."

Now, why are the mayor and council charged to *submit* the propositions? Why was it not provided that the vote should be taken by the ordinary election officers, and deposited in a ballot box set apart by them for the purpose? Why were the inspectors not required to ascertain the result and certify the same to the mayor and council? The legislature might have easily so provided. As it did not, it would seem it did not so intend. It seems to us there was a different purpose in the provision made. It was fit and appropriate to charge the mayor and council with the special duty of submitting this proposition, out of the ordinary course of election. They had to act upon the

result, if a majority of the votes should be cast in the affirmative. They were disinterested—had no personal interest to subserve, not common to every other citizen. They might well and reasonably be charged with a service germane to their official relations to the city. They were required to *submit* the proposition. How, and to what extent? When was the submission to be complete? And how was it to be completed? Certainly not until the vote should be completely taken by them, "under the rules and regulations governing said (the ordinary city) election." This latter clause cannot be construed to mean literally "under the rules and regulations governing" the city election. It means, and must mean, in the nature of the matter, only that such rules and regulations as apply, and as far as they needfully apply, in taking the vote. The mayor and council were to *submit* the proposition—that is, superintend, direct, supervise the vote upon it from the beginning to the end of taking and ascertaining the result of it, employing the ordinary machinery of the regular election as far as the same might be applicable.

The proper authorities having ascertained that a majority of the qualified voters voted "for schools," their finding and decision in that respect, for the purposes of this action, is final and conclusive. Their decision cannot be assailed collaterally. If it could be done in this case, it could be done in another, and in every case, and indefinitely. It would lead to gross absurdity and endless confusion.

The legislature confided to the mayor and council the important duty of submitting the proposition mentioned to the voters of the city of Newbern, and when they discharged that duty, their action in that respect was conclusive upon everybody as to the result of the vote, so long as it shall stand unreversed by a proper judgment or decree in an action brought for the purpose. *Simpson* v. *Commissioners*, 84 N. C., 158; *Norment* v. *Charlotte*, 85 N. C., 387; *Cain* v. *Commissioners*, 86 N. C., 8; *Black* v. *Commissioners*, 99 U. S. Rep., 686.

If the plaintiff was dissatisfied with the action of the defendant in ascertaining the result of the vote in the respect mentioned, he ought, at the proper time, to have brought his action to question the truth and justice of their decision of the matter, and had the same reversed, declared irregular and void, or properly modified. There was a remedy, but that remedy cannot be had in an action like this.

No question is made in the complaint as to the validity of the statute we have just construed. It is hinted in the plaintiffs' affidavit that the act is not valid, but so grave a question ought to be raised by proper pleadings, and generally with the avowed purpose. And such a question ought always to be argued by counsel. It is a matter of the most serious moment to declare an act of the legislature unconstitutional and void. This court cannot assume that the act is invalid, or go beyond the case presented by the record to express any opinion in regard thereto.

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

No error. Affirmed.

E. P. WALTERS v. JAMES I. MOORE and others.

Executions—Sheriff cannot contradict his return thereon, but if erroneous may apply to court to have it corrected.

1. An execution returned into court with an entry of satisfaction endorsed, in whole or in part, extinguishes so much of the debt and becomes a part of the record in the case. The officer cannot be heard to deny or contradict his return: as to him it is conclusive, and he and the sureties upon his bond are liable to the plaintiff in the execution for the sums so endorsed.

2. If the return in such case be erroneous, the officer may have the same corrected upon a direct application to the court for that purpose

(*Bank* v. *Twitty*, 2 Hawks, 5; *Governor* v. *Twitty*, 1 Dev., 153; *McKellar* v. *Bowell*, 4 Hawks, 34; *Snead* v. *Rhodes*, 2 Dev. & Bat., 386; *Piggott* v. *Davis*, 3 Hawks, 25; *Poor* v. *Deaver*, 1 Ired., 391; *Edwards* v. *Tipton*, 77 N. C.,

222; *Smith* v. *Low*, 5 Ired., 197; *Patterson* v. *Britt*, 11 Ired., 383; *Bland* v. *Whitfield*, 1 Jones, 122; *Simpson* v. *Hiatt*, 13 Ired., 470; *Hardin* v. *Cheek*, 3 Jones, 135, cited and commented on).

CIVIL ACTION heard upon exceptions to a referee's report at Fall Term, 1883, of GRANVILLE Superior Court, before *MacRae, J.*

The defendant James I. Moore, who had held the office of sheriff of Granville county for several successive terms, was re-elected at the election held in 1874, and on the 7th day of September following, with the other defendants, his sureties, executed the official bond described in the complaint and now in suit, in the penal sum of ten thousand dollars.

At spring term, 1873, the relator recovered judgment against one N. G. Whitfield for the sum of $1,271.95, with interest thereafter on $995.00, the principal money part thereof besides costs, in the superior court of said county, and on July 8th thereafter caused execution to be issued and delivered to said Moore, as sheriff.

On October 8th the said Whitfield paid to him in money $600, and it was agreed that the sum of $150, then due from Moore to Whitfield, upon the sale of a horse, should be added thereto, and accordingly the former gave his receipt for the sum of $150, as paid on the execution. The writ was, however, returned with a credit endorsed of $600 as paid and applied thereto, the said Moore, in disregard of his promise, applying the additional sum to a larger debt due from Whitfield to him on personal transactions between them. Upon the writ was also endorsed a levy upon certain lands of the debtor.

From fall term, 1873, a writ of *venditioni exponas*, with a *fieri facias* clause, bearing the endorsement of the sum of $600 previously paid and appropriated, issued to the said sheriff, returnable to spring term, 1874, under which he received and paid over to the relator's attorney the further sum of $200. A second similar writ bearing credits for the two payments

endorsed thereon, returnable to fall term, 1874, issued and came into the hands of one John G. Jones, a regular deputy of the sheriff, who called on the debtor for payment.

Thereupon, Whitfield informed the deputy of his sale of the horse to the sheriff for $150, which was to have been entered as a part payment of the debt, and the latter being personally cognizant of the sale and at the price stated, entered this credit also in this form, under those endorsed by the clerk, omitting so much as was applied to the costs:

CR.

By $550.80 paid John W. Hays, attorney, 27th Oct., 1873.
By $200.00 paid John W. Hays, attorney, 27th Apl., 1874.
By $150.00 paid sheriff.

This last credit was made, and was intended by the deputy to remain until he could confer with his principal, and when he did see him, he received a statement of the transaction and agreement with Whitfield already explained.

The writ was returned with these credits, and others followed, upon all of which the same were entered and came into the sheriff's hands, until, by reason of his failure to renew his official bond, the office became vacant, and his successor was qualified on September 14, 1875.

Such are the material facts found and reported by the referee, and sufficient to a proper understanding of his deduced conclusions of law.

The plaintiff insisted that the endorsed payment of $150 operated, as long as it remained, as a reduction of the debt, in favor of Whitfield, and that no evidence was competent to impair its effect or explain it away.

The referee ruled otherwise, and, admitting evidence of the facts offered in explanation, held that the entry of the credit was but *prima facie* evidence that payment was made, and this was

repelled; and further, that the bond in suit was not chargeable with the default, if there be such, in not paying over that sum to the relator.

To this the plaintiff excepts, and the report being confirmed, appeals to this court.

Messrs. John W. Hays, D. G. Fowle and *John Devereux*, for plaintiff.

Mr. Thomas B. Venable, for defendants.

SMITH, C. J., after stating the case. The agreement that the sum due from the sheriff to the debtor should be added to the money paid and the aggregate amount applied to the execution, was not carried into effect; and hence it was not a payment in fact for which the bond then in force was chargeable. But the appropriation was afterwards made and endorsed as a credit by the deputy, and imposes the obligation, if any was incurred, upon the bond executed by the defendants, and upon which the action is brought.

The only inquiry then is as to the legal effect of the entry made by the deputy and continued on the subsequent successive writs issued to the sheriff and returned by him, without an application to the court for leave to strike out or amend the return in any particular, and by which writs he was authorized, regarding these credits as for actual payments, to collect only their residue of the relator's judgment.

With this acquiescence and sanction given to the endorsement of the payment embodied in the return of the execution to fall term, 1874, the question is presented in the overruled exception as to the competency of the evidence in disproof of the payment, in examination of the defendants—the evidence furnished in the return being admissible against the sureties as well as against the officer, their principal, under the act of 1844. THE CODE, §1375.

The question is not free from difficulty, and the authorities in this state seem not to be in harmony, and it becomes necessary

to examine them, and, if practicable, extract some general rule consistent with the adjudications upon the subject.

In *State Bank* v. *Twitty*, 2 Hawks, 5, a motion was made for judgment against the sureties to the sheriff's bond given in 1820, for default in not paying over a sum of money collected under an execution returnable to fall term, 1820, of the superior court of Burke, and upon which was endorsed the following entry: "Received of the within execution eight hundred dollars. F. F. Ally."

The defendant offered to prove that the money was paid to the sheriff Ally in the year preceding, when the *capias ad respondendum* was executed, to be applied to the execution when it should issue after the rendition of judgment.

HALL, J., speaking for the court, held such evidence competent, declaring, that "the return of the sheriff is only *prima facie* evidence against his sureties. It is not conclusive."

The judgment having been arrested, a new action was brought, and the same question came before the court in *Governor* v. *Twitty*, 1 Dev., 153, in which the same judge thus expresses himself in reference to the previous ruling: "Speaking for myself, I was too much influenced by the reasoning on behalf of the sureties, which has since been adopted in *McKellar* v. *Bowell*, 4 Hawks, 34, without observing its total inapplicability to the case. There, the decree was not permitted to be received as evidence against the sureties because they were not parties to it, and because the evidence on which it rested might again be brought before the court, when they became parties in any other suit, and so, in this case, it was said the sheriff's return was not conclusive evidence—that the question still was open, had the sheriff in fact received the money, although his return stated that he had. But I think the *sheriff's return conclusive of the question*, because, as long as that return stands, the plaintiff has no remedy against the defendant for the amount which the sheriff's return states to be received."

Again in *Snead* v. *Rhodes*, 2 Dev. & Bat., 386, the coroner, to whom an execution was delivered, made return thereon that

he had made the moneys, and that the debt and costs were satisfied, annexing to his return as a part thereof a receipt from the plaintiff to him in full of all the money due on the execution.

The plaintiff, to sustain the issue on his part, was permitted to show by the coroner that no money was paid by the debtor to the plaintiff or to himself, nor any paid by him to the plaintiff, but that an arrangement was entered into whereby Blackman, the debtor sheriff, having in his hands an execution against plaintiff's agent, agreed with the plaintiff to pay for him a sum equal to that due on the plaintiff's execution against him, Blackman; and thereupon receipts were exchanged and the plaintiff directed the coroner to return his execution satisfied, and this was done.

The court held the judgment sought to be revived by the *scire facias* to be in law satisfied, and RUFFIN, C. J., says:

"If the plaintiff had acknowledged satisfaction of record, the judgment would be thereby discharged. This is the same thing. Writs of execution, when returned are, *together with the returns, part of the record in this state. Piggott* v. *Davis*, 3 Hawks, 25. The return of satisfaction by the sheriff, it was said in *Governor* v. *Twitty*, 1 Dev., 153, *is conclusive*, and while it stands the plaintiff has no remedy against the defendant. The agreement of a sheriff to return an execution satisfied, without receiving the money, does not bind the plaintiff, but his return that he has levied the moneys does; for after that, no other execution can issue until there is further adjudication by the court."

After saying that the return is conclusive and cannot be collaterally impeached, he adds: "The only manner in which the plaintiff could get clear of it, is by a motion to amend the return of the coroner, which would be heard like a motion to vacate an acknowledgment of satisfaction of record by the party."

The rule is reiterated by GASTON, J., in *Poor* v. *Deaver*, 1 Ired., 391, and he says that, "after the return of satisfaction upon the first execution the judgment theretofore rendered was *extinguished*, and until that return was set aside or corrected,

and a further judgment, or order of the court in nature of a further judgment was rendered, there was nothing of record to warrant further proceedings against the debtor or his property."

In *Edwards* v. *Tipton*, 77 N. C., 222, RODMAN, J., draws a distinction between the evidence furnished in the recitals of a sheriff's deed for land and his return upon the writ, and says: "The latter rests on the officer's personal knowledge and is done in performance of a sworn duty," adding, "for these reasons a return is *prima facie* evidence of what it states, and *cannot be collaterally* impeached, although it may be corrected, so as to speak the truth, on application to the court in which it is."

It is declared again in *Piggot* v. *Davis*, 3 Hawks, 25, cited in *Snead* v. *Rhodes*, *supra*, that *where an execution is returned, it becomes part of the record of the suit.*"

On the other hand, it was declared by DANIEL, J., in *Smith* v. *Low*, 5 Ired., 197, that "the records of a court, professing to state the judicial transactions of the court itself, cannot be contradicted by parol evidence, or any other proof, for they import verity in themselves. But the acts and doings out of court of a ministerial officer, as the clerk issuing writs, constables and sheriffs in making returns on warrants, writs, &c., although required by law to be returned into a court of record, are only *prima facie* to be taken as true, and are not conclusive evidence of the things they write. They may be contradicted by any evidence, and shown to be false, antedated, &c.

This was said in reference to the introduction of evidence by the defendant, in an action for the recovery of land, who claimed under the deed of the person whose land had been sold under execution to the lessor of the plaintiff, the object of which evidence was to prove that the levy had been antedated in order to overreach the conveyance to the defendant. The defendant was a stranger to that proceeding and asserted a title, which but for the false dating would be the *superior title.*

In *Patterson* v. *Britt*, 11 Ired., 383, where the preceding language of DANIEL, J., was recited and approved by PEARSON,

J., the controversy was as to the day on which the attachment was levied on the plaintiff's goods, and whether the officer Exum acted in his capacity of constable or deputy of the sheriff in making the seizure. The officer in his return stated the seizure to have been made on July 29th, when he had valid process, while witnesses stated, some of them, that it was on that day, others, that it was on the day previous.

The original return was made by the defendant Exum, as constable, and he obtained leave to amend and make his return in the name of the sheriff by himself as deputy, in order to give validity to his act, and also to involve the sheriff in a responsibility incurred. Until the amendment to the return, he was a stranger to the proceeding, and ought not to be estopped from showing the fact by means of the conclusive effect ascribed to an official return.

In the case of *Bland* v. *Whitfield*, 1 Jones, 122, the defendant exposed for sale, and struck off to the highest bidder, shingles and timber belonging to the plaintiff, but never disturbed the possession, and produced a writ of execution from a justice conferring authority to take the property, on which was endorsed a levy. It was decided that the "*levy*" did not *per se* imply the commission of an actionable trespass, and was *prima facie* evidence in the proceeding of which it forms a part.

These are the most direct and appropriate adjudications upon the matter in controversy, to which we have been directed, and it is somewhat remarkable that no incongruity is noticed among them by the judges who deliver the later opinions. The inference to be drawn from this silence is that the later were not intended to overrule or modify the earlier adjudications, and that they are capable of being reconciled upon some common basis.

The principle so emphatically declared in the former is that the return of satisfaction, in whole or in part, of the execution in direct response to the mandate, and so entered of record, operates directly upon the debt itself; and as it deprives the

plaintiff of making the sums, so returned as paid, out of the debtor, it imposes an obligation on the officer to account therefor, which he cannot remove by showing his return to be untrue. While it stands the return cannot be contradicted; and if erroneous, his relief must be found in having a correction made, and the return stricken out or amended so as to conform to the facts.

On the other hand, the recitals in the return of what was done by the officer in order to raise the money—matters *in pais*—incidental to his action, but not of the essence of his answer to the mandate of the writ, were open to explanation or to disproof—perhaps from the parties to the action, and certainly so from strangers.

This distinction seems to be recognized in the cases cited, and also in *Simpson* v. *Hiatt*, 13 Ired., 470, and *Hardin* v. *Cheek*, 3 Jones, 135, where in both cases it is held that a party claiming title under an independent conveyance, and not privy to the action in which the return was made, may impeach the recitals of these outside acts of the officer. But we find none which permit contradiction of the return, which appropriates money in payment, by the parties to the suit—and still less by the officer who makes it. As to him it is conclusive and imposes an obligation which the sureties also assume.

It would be a singular result that the return of money collected should be allowed to extinguish the debt recovered, *pro tanto*, and debar the collection of so much of it from the debtor, and yet the sheriff escape responsibility by showing the falsity of his own return, when redress is sought from him.

We must, therefore, adhere to the rule, for its own intrinsic reasonableness, as well as upon the authority of the eminent judges who prescribed it, that the return of money collected on the writ, or so returned by the officer, while it remains, acts upon and reduces the debt, and the officer cannot be heard to deny or contradict it.

For these reasons we must sustain the plaintiff's exception, and reverse the ruling of the court below, and the plaintiff will have judgment here.

Error. Reversed.

W. H. McLAURIN v. M. CRONLY.

Practice—Allegation and Proof.

1. Proof without allegation is as ineffective as allegation without proof, and the court will take no notice of proof unless there be a corresponding allegation.
2. In this case, an equitable defence was set up in the answer, but abandoned on the trial for the want of evidence to sustain it; and it was held error to receive evidence to support a new equitable defence, not suggested in the pleadings, but set up *ore tenus*.

(*McKee* v. *Lineberger*, 69 N. C., 217; *Shelton* v. *Davis*, *Ib.*, 324; *Rand* v. *Bank*, 77 N. C., 152; *Carpenter* v. *Huffsteller*, 87 N. C., 273; *Grant* v. *Burgwyn*, 88 N. C., 95, cited and approved).

EJECTMENT tried at January Special Term, 1883, of RICHMOND Superior Court, before *Graves, J.*

Judgment for defendant; appeal by plaintiff.

Messrs. J. D. Shaw, T. A. McNeill and *Frank McNeill*, for plaintiff.

Messrs. Burwell, Walker & Tillett, for defendant.

MERRIMON, J. The plaintiff alleges that he is the owner in fee of the land specified in the complaint, and entitled to the possession thereof; that the defendant unlawfully withholds the possession of the same, and he is thereby endamaged, and demands judgment for the possession of the land, for damages and costs.

The defendant denies all the allegations in the complaint.

Both the plaintiff and defendant claimed title to the land under John C. McLaurin; the plaintiff, by his deed of bargain and sale, executed the 22d day of January, 1867; the defendant, by his like deed, executed on the 23d day of August 1873.

The defendant alleges in his answer, that on the 16th day of August, 1862, the said John C. McLaurin executed to him a deed, conveying the fee simple interest in the land; that said deed was accidentally lost or destroyed, without having been registered; that the said deed of the 23d day of August, 1873, was executed to him in *substitution* for the lost deed, and it has been duly registered; and he further avers, that the plaintiff had knowledge at the time he took his deed, that the defendant had purchased the land and received a conveyance for the same in August, 1862, and demanded judgment, that he be declared to be the owner of the land; that the plaintiff be decreed to hold any title he might have to the land in trust for defendant; and required to convey such title to him, and for general relief.

On the trial, a proper issue was submitted to the jury, involving the defense thus set up, but there was no evidence to support the affirmative of the same, and the court so instructed the jury; and indeed, this defense was abandoned.

On the trial, however, evidence was admitted by the court, tending to prove that sometime in 1862, John C. McLaurin contracted by parol for the price of $860, in Confederate money paid to him, to convey the land to defendant, and that the plaintiff had notice of this parol contract; that no deed was ever made in pursuance of such contract until the execution of the deed of 1873, and it purported to be in *substitution* for a supposed lost deed. The court received the evidence, and submitted the same to the jury. The jury found a verdict for defendant, the court gave judgment for him, and the plaintiff excepted.

There was no defense, such as that developed by the evidence, set up by the defendant in his answer, nor was the same hinted at in the pleadings.

In every action brought in the superior court, the cause of

action and the various defenses thereto, must be set forth in the record by proper pleadings. Pleading is essential, and cannot be dispensed with, certainly in litigated matters. Reason and common justice, as well as THE CODE, require that the plaintiff shall state in a plain, strong, intelligible manner his grounds of action, and that the defendant shall in like manner state the grounds of his defense, and any counter-claims or demands he may have and desires to set up. This is not mere matter of form. It is of the essential substance of the litigation. It is necessary to the end the contending parties may understand and prepare to meet, each the other's contention, and prepare himself for the trial of issues of law or fact presented, that the court may have a proper, just and thorough apprehension of the controversy, and that the same may go into the record and stand as a perpetual memorial of the litigation, and all that it embraces. Any other course of procedure would lead to endless confusion and litigation. If this were not done, it would be difficult to show what any litigation embraced or that it had been settled and ended, and when and how. It is not sufficient that the plaintiff has a cause of action and can prove it: he must first plead it, then prove it. Likewise, it is not sufficient that the defendant has a good and meritorious defense: he, too, must first plead it, and then prove it.

Hence, in *McKee* v. *Lineberger*, 69 N. C., 217, the late Chief-Justice PEARSON said: There must be *allegata et probata;* and under the new system as under the old, the court cannot take notice of any proof, unless there be a corresponding allegation. Proof without allegation is as ineffective as allegation without proof. The record, either as originally framed or as made by amendment, must set out the case as well on the part of the defendant as on the part of the plaintiff."

The same learned judge, in *Shelton* v. *Davis*, 69 N. C., 324, said: "For the idea of giving the plaintiff judgment upon a state of facts not alleged in the complaint and entirely inconsistent with it, whatever may be said in regard to the progress of

the age, and the liberal and enlarged views of C. C. P. is a proposition which no member of this court can for a moment entertain." To the like effect is *Rand* v. *State Nat. Bank*, 77 N. C., 152.

And in *Carpenter* v. *Huffsteller*, 87 N. C., 273, Mr. Justice RUFFIN said: "The rule that the *allegata et probata* must correspond, obtains under the Code the same as under the old system, and it is as much incumbent upon a plaintiff to prove his case as alleged, as it ever was. The only observable difference between the old and the new system is, that the latter has introduced a new rule for determining what a variance is, and its consequences. A variance, so slight and unimportant that the adverse party cannot have been misled by it, is deemed immaterial, and the court will either order an amendment without terms, or will consider the pleading as if amended, and permit evidence to be given under it. And even in a case of material variance, so substantial that the adverse party may have been misled by the averments, still if the proofs have an apparent relation to and connection with the allegations, the court will allow of an amendment, though upon terms. But where the proof establishes a case wholly different from the one alleged and inconsistent therewith, then no amendment is permitted, but the cause of action must fail." See also *Grant* v. *Burgwyn*, 88 N. C., 95.

In the case before us, the defendant, having denied the allegations in the complaint, set up in his answer an equitable defense. This, however, in the total absence of proof to sustain it, was abandoned on the trial; and thereupon a new equitable defense, not suggested or hinted at in the pleadings, was set up *ore tenus*, and evidence was received to support it. This was not only irregular, but in the face of the plain provisions of THE CODE, §§ 243, 244, 245, which point out how defenses must be pleaded in the various aspects of the defendant's grounds of defense. The whole of the evidence offered to support the defense thus set up was incompetent; nor was it pertinent to support any defense properly before the court, and it ought to have been rejected.

We do not mean to say that the defense thus relied upon was in itself without merit; as to this, we express no opinion. But it ought to have been pleaded properly and in apt time. Possibly the court could have allowed an amendment pending the trial, on terms, but if this could not have been done, then, if the defendant on the trial learned for the first time of such defense, he might have applied to the court to direct a mistrial. At all events, it was error to allow this defense to be thus set up and to receive evidence to establish it.

Surely the code-system of pleading ought to be regarded as liberal and comprehensive enough to meet the convenience of the most latitudinarian pleader; still, their seems to be a growing disposition to extend, go beyond, and sometimes abandon even that. This is, in our judgment, unwise and subversive of the integrity of all judicial procedure, and ought not to be tolerated, much less encouraged by the courts. Pleading is essential in civil procedure, and *procedure* is a necessary branch of legal science, as much so as the great principles underlying and defining human rights. Indeed, the latter would be of little value without efficient methods of carrying them into practical effect. Legal science is really, in very large degree, the embodiment of principles and procedure, and one great principle of law is, that both shall be alike upheld, and the former enforced through the latter. Principles without procedure would be inert, and *vice versa*.

An important part of every code of laws is that settling and defining the methods of legal procedure. In this rest the life, vigor and efficiency of the law. It is, therefore, unwise to underrate its importance. It is of the highest moment to observe and uphold it with consideration and care. It is dangerous to allow and tolerate careless practice under procedure law. Such practice never fails to impair the due administration of justice, and sometimes results in defeating the ends of the law.

The interesting questions ably argued by counsel before this court in this case are not properly before us, and we cannot, therefore, decide them.

There is error, for which a new trial must be awarded. Judgment accordingly. Let this be certified.

Error. *Venire de novo.*

ELISHA PORTER v. D. T. DURHAM.

Processioning Land—The Code, §1924.

1. The purpose of the act concerning the processioning of land is to establish the boundaries thereof, and a complete survey, with plat, certificate, &c., is indispensable to the fulfillment of the statutory requirements.
2. Where a surveyor was prevented by an adjoining proprietor from running the disputed lines, and made report thereof to the clerk of the court, who appointed five freeholders to establish the same and they failed to agree, and thereupon others were appointed whose report showed the claims of the respective parties, but failed to comply with the statute in making a plat and certificate, &c.; *Held*, that the proceeding must be quashed. The surveyor should have resumed the work, adopted the lines settled upon by the co-operating freeholders, and completed the survey.

(*Carpenter* v. *Whitworth*, 3 Ired., 204; *Miller* v. *Heart*, 4 Ired., 23; *Matthews* v. *Matthews*, *Ib.*, 155; *Hoyle* v. *Wilson*, 7 Ired., 466; *Wilson* v. *Shufford*, 3 Mur., 504, cited and approved).

APPEAL from an order made at Fall Term, 1883, of PENDER Superior Court, by *Philips*, *J.*

This was a proceeding under the act for "Processioning Land," in which the plaintiff gave ten days' notice to persons owning lands adjoining his own. The surveyor made a report to the clerk of the court, in which he stated, among other things, that in running one of the disputed lines between the plaintiff and the defendant, he was proceeding to establish a corner at a certain place, when the defendant objected, saying that the surveyor should run the line further on to another point, which the surveyor declined to do, upon the ground that he was running by the calls in a deed. The report sets out in detail the claims of

the respective parties, but the same is not necessary to an understanding of the points decided upon this appeal.

The clerk thereupon issued an order appointing five freeholders to meet said surveyor and complete the survey of the disputed lines, and make report of same. They met in pursuance of the order and proceeded to establish the lines, and subsequently reported to the clerk that they were unable to agree, and asked to be discharged from the further consideration of the matter.

The clerk then declared the proceedings null and void by reason of the failure of the jury to agree, and issued another order directing the sheriff to summon another jury to view the premises and to establish the lines. They met and proceeded to discharge the duty assigned, and made a report thereof to the clerk, which was confirmed, no exceptions being made.

Subsequently the defendant applied for a writ of *certiorari*, which was granted, and the proceeding brought to the superior court, when, at fall term, 1879, the death of the defendant was suggested, and his heirs-at-law made parties.

The cause coming on to be heard, the defendant filed exceptions, insisting there is error in the record and proceedings:

1. Because the report of the first jury does not show that the surveyor was present when the lines were run or passed upon by the freeholders.

2. The surveyor's report contains no plat of the land processioned, nor certificate as required by law.

3. Nor does it set out all the facts in reference to the objections made by the defendant, so as to show the nature of the dispute; nor are the descriptions of the land given, as contained in the deeds of parties.

4. That plaintiff's tract is a small part of a large body of land owned by defendant, which was cut off therefrom and conveyed by the defendant to one Hines (giving in detail the courses, &c.).

5. After the first jury filed their report stating they could not agree (October 4th, 1875), more than twelve months elapsed

before any further action was taken, and there is no evidence of the appointment of a second jury by the clerk, and no authority in law to appoint one—the original proceedings having been declared null and void and the jury discharged; the next proceeding should therefore have been begun *de novo*, and the map, &c., used in the former proceeding were inapplicable to the second.

Judgment was rendered for the plaintiff, affirming the judgment of the clerk and the report of the jury of freeholders establishing the lines, and the defendant appealed.

Mr. Bruce Williams, for plaintiff.
Mr. DuBrutz Cutlar, for defendant.

SMITH, C. J. It was remarked by GASTON J., delivering the opinion of the court in *Carpenter* v. *Whitworth*, 3 Ired., 204, that the "practice of processioning lands, though recognized in our statute for more than a century, has for many years been so generally disused, that few of the profession or of the bench can claim to be familiar with the law respecting it." The same observation will bear repetition after the lapse of forty years, since but little aid can be derived from the few subsequent cases to be found in the reports in the interpretation of its provisions. Inasmuch as great strictness is required in following its directions in order to obtain practical and effectual results, the procedure prescribed by the statute has almost become obsolete.

The proceeding before us, commenced in 1875, terminated in a report made to the clerk of the superior court, by whom it was confirmed the following year. It was removed by *certiorari* in 1879 to the superior court, and heard by the judge upon exceptions taken by the defendant, and from the decision overruling them and affirming the action of the clerk, the case is brought to this court.

The processioner's report of his effort to run the boundaries of the plaintiff's land and the obstruction offered by the defend-

ant to his survey of lines dividing their respective tracts, is, in our opinion, a substantial compliance with the requirements of the act, and is not obnoxious to the defendant's objections. He could only prosecute his work up to the disputed line, and when arrested, make report of what he has done, stating all the circumstances of the case, in order to the further steps prescribed for an authoritative location, and the settlement of the controversy between the contiguous proprietors.

The clerk, substituted for the county commissioners, the immediate successors of the former county court, by the act of 1874–'75, ch. 40, and invested with the same powers, thereupon proceeded to appoint five freeholders pursuant to the directions of the act (Rev. Code, ch. 88, §6), who, after an ineffectual effort to agree upon a line, made return to the clerk and were discharged and others appointed in their place. These, with the processioner, met at the disputed boundary, as a jury of view, inspected the locality and the natural objects called for in the deed, heard evidence, ascertained and established the line between the contestants, and made return thereof, setting out all the material facts in reference to the dispute, the claims of each, and the grounds of their own conclusion. This report seems to us to be sufficient to show the matter in controversy and the claims of the respective parties as to the proper mode of running the line, according to cases in our reports. *Miller* v. *Heart*, 4 Ired., 23; *Matthews* v. *Matthews*, *Ib.*, 155; *Hoyle* v. *Wilson*, 7 Ired., 166.

The cases heretofore in this court have been deemed defective by reason of the omission to set out the facts explanatory of the controversy and of the conflicting claims of the proprietors, "which," says Judge HENDERSON in *Wilson* v. *Shufford*, 3 Mur., 504, "we consider as the declaration or rather the pleadings of the parties, setting forth their respective claims," since it is by comparing the report of the processioner, with the report of the freeholders that the court can see which party prevailed in the claim, and thereby the finding may be reviewed.

In these aspects of the case, the proceeding seems to have been conducted conformably to the act, but it falls short of its full

requirements. The purpose is to assure and fix the boundaries of the land of the plaintiff, and if, after notice, no interruption had come from any adjoining proprietor, the survey would have been around the entire tract. The processioner or surveyor (for now all surveyors of the county are made processioners by statute, acts 1872–'73, ch. 57) is required "*to make a plat of each tract of land processioned, and also a certificate of the same, which certificate shall contain the claimant's name, the quantity of acres, the corners, length and course of each line*" (section 6), and these should be embodied in his report. A complete survey is indispensable to the fulfillment of these conditions, and is essential to secure the practical benefits of the law.

In section seven it is declared that after two processionings the person whose lands are thus run "*shall be deemed and adjudged to be the sole owner,*" and the evidence is preserved by being recorded "*by the clerk in a well-bound book kept for that purpose.*" Section 5.

The statute makes provision for an interrupted survey; directing how disputed lines shall be ascertained; and subjecting the action of the freeholders to a review for the correction of errors. But when the lines are established, the mandate operates on the processioner to go on with his survey and complete it, as if there had been no obstacle in his way. This is, in our opinion, the plain meaning of the law, and this construction is necessary to the production of any useful, practical result.

The processioner's report stopping at the interruption of his survey, and that of the freeholder's conforming to it, give no complete enclosing boundary, but running away in a succession of lines and ending at the termination of the last in dispute, never returns to the starting point, ascertaining no definite area or location for the plaintiff's land, so that the record, thus incomplete, is useless to him.

To be effective, the processioner should have resumed his survey, adopting the lines established for his guidance by the cooperating freeholders, and continued on until the whole boundary,

the undisputed as well as the disputed parts, was run so that his plat and certificate would embrace all the requisites of the act in like manner as if he had not been obstructed in his work.

This is a fatal defect in the proceeding, and it should have been quashed. There is error in the ruling of the court, and it is reversed and judgment will be here entered quashing it.

Error. Reversed.

WILLIAM McKEE v. A. P. ANGEL.

Process—Justice of the Peace—Judgment.

1. A justice of the peace has no authority to depute a special officer to serve process in a civil action.
2. A judgment rendered by a justice of the peace without notice to the defendant may be set aside by a direct application to the justice; and where he refuses to do so, the proper course on appeal is to give judgment reversing his ruling, and not to direct the justice to enter judgment vacating the original judgment.
3. Erroneous, irregular and void judgments defined, and effect of discussed.

(*Marsh* v. *Williams*, 63 N. C., 371; *Garlick* v. *Jones*, 3 Jones, 404; *State* v. *Barefoot*, 89 N. C., 565; *Stallings* v. *Gully*, 3 Jones, 344; *Armstrong* v. *Harshaw*, 1 Dev., 187; *Jennings* v. *Stafford*, 1 Ired., 404; *Morgan* v. *Allen*, 5 Ired., 156; *Hooks* v. *Moses*, 8 Ired., 88, cited and approved).

CIVIL ACTION tried at Spring Term, 1883, of MACON Superior Court, before *Avery, J.*

This was an appeal from the judgment of a justice of the peace, and the facts collected from the transcript of the proceedings had before the justice sent to the superior court, and the judgment rendered by him against the defendant and others on the 30th of December, 1878, are substantially as follows:

On the 16th day of April, 1883, upon the application of the defendant Angel, the said judgment was set aside, upon the ground that the defendant had never been served with a sum-

mons, and had no notice of the judgment, and if the summons had been served, it was not served by a constable or other officer, but by a citizen deputed by the justice for that purpose; and that the judgment rendered by the justice upon such service of process was a nullity. The plaintiff had no notice of this application.

Afterwards the plaintiff moved the justice to set aside the judgment vacating the first judgment of December, 1878, both parties being present. The plaintiff offered affidavits tending to show that the defendant Angel did have notice of the judgment of 1878, and the defendant resisted the motion upon the ground that the judgment was void because the summons was served by a person who was deputed by the justice to make the service, and that he was not present at the trial, and he renewed his motion to have the original judgment vacated.

Thereupon the justice, having taken an *advisari* for two weeks upon the difficulties of the case, being of the opinion that he had the power to depute a constable in a civil action, when it was an extraordinary case, this being a case of that nature, for two of the defendants were about to remove from the state, decided to strike out the judgment of 1883, and refused to vacate the original judgment; from which the defendant appealed.

Upon this state of facts, His Honor in the superior court ordered and adjudged, "that the said E. T. Long, justice of the peace, proceed to enter a judgment vacating and setting aside the original judgment rendered in the above entitled action as to the defendant A. P. Angel, and also the *judgment upon the motion to set aside the said original judgment.*" From this judgment the plaintiff appealed to this court.

Messrs. Jones & Siler, for plaintiff.
Messrs. Reade, Busbee & Busbee, for defendant.

Ashe, J., after stating the case. The first judgment rendered by the justice in December, 1878, was clearly void as to

this defendant. The summons in a civil action before a justice of the peace must be directed to "any constable or other lawful officer." Bat. Rev., ch. 63, §12. "But in criminal actions the warrant must be directed to the sheriff, coroner or any constable, and if no sheriff, coroner or constable can be found, the warrant may be directed to any person whatever who shall have power to execute the same within the county in which it is issued." Bat. Rev., ch. 33, §97. This is the only *extraordinary* case in which a justice of the peace is authorized to depute one, who is not an officer, to execute process. *Marsh* v. *Williams*, 63 N. C., 371; *Garlick* v. *Jones*, 3 Jones, 404. See also *State* v. *Barefoot*, 89 N. C., 565.

Judgments are either irregular, erroneous or void. Irregular judgments are such as are entered contrary to the course and practice of the court. An erroneous judgment is one that is rendered contrary to law.

A void judgment is one which has only the semblance of a judgment, as if rendered by a court having no jurisdiction, or against a person who has had no notice to defend his rights. *Stallings* v. *Gully*, 3 Jones, 344; *Armstrong* v. *Harshaw*, 1 Dev., 187; *Jennings* v. *Stafford*, 1 Ired., 404.

Erroneous and irregular judgments cannot be collaterally impeached, but stand until they are reversed or set aside. *Jennings* v. *Stafford*, *supra*. But a void judgment is no judgment, and may always be treated as a nullity (*Stallings* v. *Gully*, *supra*), and unlike irregular and erroneous judgments, affords no protection to officers or others acting under it, so that if an execution had been issued upon the judgments rendered against the defendant in 1878, and had been levied upon his property, it would have given no protection to either the plaintiff or the officer, and in an action upon such a judgment the fact of its nullity is open to the defense of the defendant, *that he owed nothing*. "*Nil debet*," under the former practice.

The justice seems to have laid some stress upon the fact that the defendant had notice of the judgment, but even if he had

that was not sufficient to make him a party so as to conclude him by the judgment. He had the right to require that he should be made a party to the action by the legal service of process, and where the summons was served by one who had no authority to serve it, it was as if no service had been made, and he had the legal right to disregard it.

But the question here arises, how is the defendant to avoid the judgment? There is no doubt that as soon as he discovered that such a judgment had been rendered against him, he might have availed himself of the remedy of a *recordari* in nature of a writ of false judgment. *Morgan* v. *Allen*, 5 Ired., 156. But he has failed to resort to that remedy, and has had recourse to a motion before the justice who made the judgment to vacate it. Was it in the power of the justice to do that? If it was, it was clearly his duty to do so.

In the case of *Hooks* v. *Moses*, 8 Ired., 88, where an action was brought before a justice of the peace upon a former judgment rendered by a justice, the defense set up by the defendant was, that he was not summoned to appear at any particular time or place, when the judgment was rendered against him. Chief-Justice RUFFIN, speaking for the court, said: "Doubtless those are proper grounds for impeaching the judgment, but that must be done directly upon an application to the magistrate, or to a higher tribunal, to set it aside or to reverse it for that cause." That was done in this case. As the first application in April, 1883, was made and acted upon by the justice without notice to the plaintiff, the justice very properly treated his judgment at that time as a nullity; but the motion was renewed by the defendant in May following, and the justice refused to set aside the judgment from which the appeal was taken, and His Honor in the superior court adjudged that the justice proceed to enter judgment vacating the original judgment as to the defendant Angel, and also the judgment upon the motion to set aside original judgment. While we do not think His Honor had the power to adjudge that the justice should enter the judg-

ment as directed, we must consider his judgment as substantially reversing the judgment of the justice, and to that extent it is sustained. With this modification, the judgment of the superior court is affirmed.

Modified and affirmed.

ALEXANDER JACKSON v. McLEAN & LEACH.

Amendment of Process—Discretionary Power.

A summons or other process may be amended at the discretion of the court, where the defect is of a formal character which would be waived by a general appearance or answer upon the merits of the case, provided the rights of third persons are not affected and no protection is withdrawn from the officer who served it.

(*Henderson* v. *Graham*, 84 N. C. 496, cited and approved).

MOTION by defendants to dismiss the action heard at Spring Term, 1883, of ROBESON Superior Court, before *MacRae, J.*

This was an action of claim and delivery, and the defendants' counsel, who made a special appearance for the purpose, moved to dismiss the action upon the ground of a defect in the summons, namely, that the summons issued on the 26th day of October, 1882, requiring the defendants to "appear before the judge of our superior court, to be held for the county of Robeson, at the court-house in Lumberton, on the 10th Monday ——3rd——, and answer the complaint which will be deposited in the office of the clerk of the superior court of said county, within the first three days of the said term, &c."

The next regular term of the superior court after the date of the summons, was held on the 10th Monday after the 3rd Monday in August, 1882. The motion of defendants was refused.

Messrs. Frank McNeill and *T. A. McNeill*, for plaintiff.

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

ASHE, J. His Honor refused the motion to dismiss, and the record shows that the defendants excepted and appealed; but the record also shows that His Honor allowed the summons to be amended by inserting after the word "Monday," the words "after the," and after the word "third," the words "Monday in August, 1882," so as to make the summons conform to the usual and proper form.

The ruling of His Honor upon the two points appear from the record to have been contemporaneous, and it can make no difference in what order they were made. The real question presented is, whether His Honor had the right, upon his refusal to dismiss, to allow the amendment of the record, and we think it is well settled that he had.

By section 132 C. C. P., it is provided that "the court may, before, and the judge may, after judgment, in furtherance of justice and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party; or by correcting the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defence, by conforming the pleading or proceeding to the facts proved."

This gives the judge in the court below very broad discretion over the subject of amendment, and this section has been construed by this court, in reference to the amendment of process like that under consideration; and it was held that whether a summons should be amended was a discretionary matter and not reviewable (*Henderson* v. *Graham*, 84 N. C., 496); from which is to be deduced the rule, in regard to the amendment of process, that any defect or omission of a formal character, which would be waived or remedied by a general appearance or answer upon the merits, may be treated as a matter which can be remedied by amendment at the discretion of the court, when the rights of other persons are not affected and no protection withdrawn from the officer.

The case falls under that rule, for here, if the defendants had appeared and answered upon the merits, the defect would have been waived; and the amendment can in no way, that we can see, affect the rights of other persons, or withdraw any protection from the officer who served the summons.

There is no error, and as the amendment was a matter within the discretion of the court below, the appeal is dismissed, with costs against the appellants.

No error. Affirmed and appeal dismissed.

HENRY WINSTON v. RALEIGH & GASTON RAILROAD COMPANY.

Railroads—Negligence in killing stock—Judge's Charge.

The plaintiff's cow was killed by defendant's freight train, and in a suit for damages for the injury, the engineer testified that the train was running fifteen miles an hour, at night, and by means of the head-light a cow could be seen seventy-five yards in advance; that he discovered the animal at that distance, blew on brakes, but could not possibly stop the train and avoid the accident. The judge charged the jury that the company should provide such appliances as would enable the engineer to stop the train within the distance mentioned; and if not furnished, then it was the defendant's duty to so slacken the speed that the train could be stopped within that distance; *Held*, error. The company cannot be held to so rigid a rule of accountability where, as here, every reasonable precaution was taken.

(*Doggett* v. *Railroad*, 81 N. C., 459, and cases cited; *Proctor* v. *Railroad*, 72 N. C., 579; *Montgomery* v. *Railroad*, 6 Jones, 464; *Forbes* v. *Railroad*, 76 N. C., 454, cited and approved).

CIVIL ACTION tried at January Special Term, 1883, of FRANKLIN Superior Court, before *Philips, J.*

Verdict and judgment for plaintiff; appeal by defendant.

No counsel for plaintiff.

Messrs. Hinsdale & Devereux, for defendant.

SMITH, C.-J. In the early part of the night in June, 1882, the defendant's train consisting of two coaches and several box-cars, running upon its track on a down grade, came in contact with two cattle belonging to the plaintiff, and killed them. The plaintiff's action, commenced in September following before a justice of the peace, and removed to the superior court by appeal, is for the recovery of their value, as damages resulting from the alleged negligence of the officers and employees of the defendant in running and managing the train.

The testimony of the engineer in charge, though in conflict with that of the other witnesses for the plaintiff, was in substance: "that the train was then moving at the speed of fifteen miles an hour, while eighteen was schedule-time; that the head-light on the engine illuminated the track so that an object could be seen seventy-five yards in advance; that he discovered the cattle at that distance in front of him and immediately blew the whistle rapidly in quick succession to alarm the cattle, shut off steam and gave the signal to put on brakes; that there were two brakemen on the train, and it was impossible to arrest its progress before striking the cattle." The charge complained of relates to this aspect of the case, and is as follows:

It was the duty of the company to provide the train with such appliances as would enable the engineer to stop the train within the distance at which an object, as large as a cow, could be discovered by means of the head-light, or if such appliances were not furnished, then it was the defendant's duty to so slacken the speed of the train that it could be made to come to a halt within that distance.

The instruction is in substance that the company cannot run their trains in the night-time faster than at a speed which will admit by the use of brakes of being checked, and the train brought to a stop before it has traversed the space illuminated by its head-light, without incurring liability for injury to stock straying on its road-bed. In this statement of the law we do not concur, and if it prevailed it would seriously impair the

usefulness of railroad transportation, which depends largely upon the regularity and rapidity of its runnings by night as well as by day. The occasional and unavoidable injury sometimes done to property, in the language of the court in *Doggett* v. *Railroad*, 81 N. C., 459, "is greatly outweighed by the benefits conferred upon the whole country by railroad transportation, and it would be an unwise policy to hamper the latter and diminish its usefulness by needless restraints."

The cases reviewed in that case and those cited in the brief of defendant's counsel, *Montgomery* v. *Railroad*, 6 Jones, 464; *Proctor* v. *Railroad*, 72 N. C., 579; *Forbes* v. *Railroad*, 76 N. C., 454, leave little for us to say upon the general subject. It is true the law presumes negligence, but this is subject to rebuttal upon proof of facts which show there was none.

We are of opinion that the railroad cannot be held to the rigid rule of accountability laid down by the court, that unless a train can be stopped before reaching an object brought to view by a head-light, it must slacken its speed so that it can be brought to a stand-still. It appears from the engineer's evidence that everything was done which could be done, after the discovery of the cow, to avoid the collision. If accepted by the jury, it was a full defense; for we cannot impute culpability in the mere fact that the train was moving as described by him. Every reasonable precaution is required to avoid doing injury to the property of others, but trains are not expected to be run so slowly as to deprive the public of great advantages of rapid intercourse and quick exchange of products. There is error, and must be a new trial, and it is so ordered.

Error. *Venire de novo.*

W. L. WILSON v. NORFOLK & SOUTHERN RAILROAD COMPANY.

Railroads—Negligence in killing stock—Animals frightened by approaching train—Duty of engineer.

1. Where an action against a railroad company for damages in killing plaintiff's mule, is brought within six months after the accident, the fact of such killing (nothing further appearing) is *prima facie* evidence of defendant's negligence; and the burden of repelling the presumption is upon the company.

2. The court charged the jury upon the evidence in this case: (1) If the engineer saw, or could have seen by vigilance, the plaintiff's mule upon the track a quarter or half mile ahead, and could have stopped the train in time to avoid the accident, the company is guilty of negligence: (2) If after thus discovering the mule, and it left the track a quarter of a mile ahead of the train, and the engineer had reason to believe that it was no longer in danger, and afterwards the mule ran upon the track a second time and was killed, then the company is not guilty of negligence, unless the engineer could, by the use of the appliances at his command, have stopped the train in time to prevent the injury; *Held*, no error.

3. The duty of engineers in the careful running of trains, when cattle or other stock are on the track and become frightened by an approaching train and run off and on or near the track, pointed out by MERRIMON, J.

(*Pippen* v. *Railroad*, 75 N. C., 54; *Clark* v. *Railroad*, 1 Winst., 109; *Jones* v. *Railroad*, 70 N. C., 626; *Farmer* v. *Railroad*, 88 N. C., 564, cited and approved).

CIVIL ACTION tried at Fall Term, 1883, of CURRITUCK Superior Court, before *Avery, J.*

The plaintiff claims damages alleged to have been occasioned by the running over and killing his mule by defendant's train. The issues submitted were, first, did defendant negligently kil the mule? and secondly, what was its value? The jury responded in the affirmative to the first issue, and fixed the value of the mule at one hundred and seventy-five dollars.

On the trial, the plaintiff testified in his own behalf that on the first of January, 1883, about 12 or 1 o'clock in the day, his mule got upon the defendant's railroad track and was killed by a train. A mule could be seen three quarters of a mile at the

place where his mule was killed, the track being straight and the country open. Soon after the accident the witness went on the road and saw fresh tracks where the mule got on the road and where it ran down the road, about three hundred yards, to a culvert, and then turned and ran seventy-five or a hundred yards towards the train, and then back about forty feet. One of its legs was crushed, and there were indications that it had been dragged thirty or forty feet. On cross-examination, the witness stated among other things, that he did not see the accident—no curve in the road for three hundred yards—mule ran the length of twenty-eight rails, each thirty feet long, and ran off twenty yards from the track and back, where he was hemmed in—a train had passed, and the witness heard two sharp alarm whistles. On re-direct examination the witness stated the relative position of a fence, a ditch, and the railroad culvert. The testimony of the other witnesses for the plaintiff does not materially differ from that of the plaintiff himself.

The defendant introduced the engineer, who testified that on the day mentioned he was running the locomotive of a freight train, and discovered a mule standing on the crossing in plaintiff's field, near a culvert, about half a mile off. He shut off steam, blew on brakes, and rolled down to within a quarter of a mile of the mule, and then sounded "the cattle alarm," when the mule walked off the track. The train then moved on at the rate of about fifteen miles an hour, when the engineer discovered another mule in the field, near the road, on the opposite side from the first mule, which was likewise driven off. The mule that was killed came suddenly and unexpectedly on the track about five steps ahead of the engine, and did not run along ahead of the train. When witness first gave the "cattle alarm," the mule walked off the track into the field, and when it jumped back on the track the train could not have been stopped in time to prevent the accident. He was running at the usual speed, fifteen miles an hour, blew down brakes, and did all in his power to

stop the train. Witness was vigilant, but did not suppose the mule would run back on the track after it had gone off.

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

1. If the jury believe from the evidence that the mule went off the track, then the engineer was not required to anticipate its sudden return to the track, and was justified in proceeding with the train.

2. If they believe that, after leaving the track, it suddenly came back so near the front of the locomotive as to make it impossible to stop the train in time to avoid striking the mule, the company is not responsible for the injury.

3. If the mule had left the track the engineer had a right to proceed on his journey as upon a clear track.

4. It is not negligence in the railroad company or its agents merely because the engineer did not stop to see whether an animal near the track is coming on the track and may be killed.

5. If plaintiff fails to show negligence on the part of defendant or its agents, the company is not liable.

6. If the mule sprang upon the track only a few feet in front of the moving train, the company is not responsible for the accident, unless the train was being carelessly run.

7. If defendant could not have prevented the killing the mule after it was discovered on the track, then the defendant is not guilty of negligence.

8. A railroad company is not guilty of negligence because it does not stop its trains when persons are on the ground near the track; nor is there any greater deference due to live stock than to human beings.

The court declined to give these instructions, and charged the jury as follows:

This action having been brought within six months after the killing, if nothing further appeared but the fact that the plaintiff's mule was killed by the defendant company on its track, it would be *prima facie* evidence of negligence on the part of de-

fendant, and the plaintiff would be entitled to recover the value of the mule. But there being testimony as to the circumstances attending the killing, the jury must determine, under the instructions of the court, whether the defendant is guilty of any negligence—whether the defendant has rebutted the presumption of negligence. If the engineer saw the mule upon the track a quarter of a mile ahead, or could have seen it by proper watchfulness, running on the track, and could have stopped the train before reaching the point where the mule was killed, then the defendant is guilty of negligence, and the plaintiff is entitled to recover the value of the mule. If the engineer saw the mule that was killed a quarter or half mile ahead, and the mule left the track when the train was a quarter of a mile off, and the engineer had reason to believe that the mule was no longer in danger, and afterwards it ran upon the track in front of the locomotive, then the defendant is not guilty of negligence, unless the engineer could, by using the appliances at his command, have stopped the train after the mule jumped upon the track the second time, so as to prevent the killing.

The defendant excepted to the refusal of the court to give the instructions asked, and to those given; and appealed from the judgment rendered.

Messrs. Pruden & Bunch and *W. B. Shaw*, for plaintiff.
Messrs. Starke & Martin, for defendant.

MERRIMON, J. Although the court declined to give the instructions as prayed for, we think it gave the substance of so much thereof as the defendant was entitled to. They were numerous, and some of them consisted simply of statements of legal propositions without regard to the facts of the case, or giving them point and applicability, and some of them were not sound as legal propositions.

It is sufficient, if the court give the substance of instructions prayed for to which a party is entitled, without impairing their

force; but when the instruction contains only a legal proposition, it is the duty of the court to apply it to the facts of the case bearing upon the issue submitted to the jury. It is not the province of the court to simply state abstract propositions of law—it must apply the law to the case and the facts therein. Especially is this necessary in giving instructions to juries. Such instruction should bear upon the various material aspects of the facts, and thus guide the jury in passing upon issues submitted to them; and as well, such instructions ought always to be as simple and pointed as practicable. Jurors are not presumed to be learned in the law, and it is their duty to take it from the court and be governed by it.

The evidence, particularly that as to the immediate circumstances relating to the killing of the mule, was conflicting. The case turned largely upon the facts. Two material aspects of them were presented; one contended for by the plaintiff, the other by the defendant. The court properly submitted the issues to the jury with instructions, first, as to the law applicable, if the facts as contended for by the plaintiff were true, and secondly, as to the law applicable, if the facts contended for by the defendant were true.

The mule was killed by the defendant's "engine running upon its railroad." This the statute makes "*prima facie* evidence of negligence on the part of the company" in killing the mule, the action having been brought within six months next after the cause of action accrued. THE CODE, §2326.

The burden of repelling the presumption of fact thus raised, is upon the defendant, and it could only be rebutted by showing that by the exercise of due diligence, the killing of the mule could not have been avoided. *Pippen* v. *Railroad*, 75 N. C., 54, and the cases there cited.

The evidence, including that of the engineer, went to show that the railroad was straight, passing through an open field for a long distance in the neighborhood where the mule was killed. It was about one o'clock in the day, and the engineer could, by

reasonable diligence, easily have seen the mule on the road one half or three quarters of a mile ahead of the engine; he saw it on the road half a mile ahead and gave the alarm. The evidence is conflicting as to whether or not the speed of the train was slackened; it was moving at about the rate of fifteen miles per hour; the mule ran off, then on the road, and was killed by the engine.

Now, if these facts were true, or substantially true, and nothing else appeared, the presumption of negligence was not repelled. Indeed, there was manifest negligence. It was the plain duty of the engineer to slacken the speed, and if need be, stop the train. In this aspect of the case, the court instructed the jury that, "if the engineer saw the mule upon the track a quarter or half a mile ahead, or could have seen it running on the track, by proper watchfulness, and could have stopped the train before reaching the point where it was killed, then the defendant was guilty of negligence, and the plaintiff was entitled to recover the value of the mule."

There was evidence tending to prove the case as supposed in this charge, and the plaintiff contended that the evidence proved it. The charge in that view was correct, and is fully sustained by repeated decisions of this court. *Clark* v. *Railroad*, 1 Winst., 109; *Jones* v. *Railroad*, 70 N. C., 626; *Pippen* v. *Railroad*, *supra*; *Farmer* v. *Railroad*, 88 N. C., 564.

The defendant contended, however, that when the whistle was blown, the mule ran off the road, and it was not the duty of the engineer to anticipate that the mule would run back on the road, and slacken the speed of the train; that it did suddenly run back, and so short a distance ahead of the engine, that it was impossible to stop the train before the mischief was done.

We cannot accept this proposition as true, without qualification. If the mule ran off the road quietly and manifested by its acts no great alarm, but a disposition to get away from the road, or if at first it stood still, off the road, until the near approach of the train, then it suddenly ran back on the road a

short distance ahead of the engine and was killed, the engineer being unable to stop the train; in such case there would not be negligence, and the defendant would not be liable.

But in another view, if the mule was greatly frightened at the whistle and the train—was panic-stricken—ran about wildly and recklessly in the immediate neighborhood of the road, and would as likely, in its fright, run on, as from it, and the engineer failed to slacken the speed of the train, and the mule suddenly dashed back on the road and was killed by the engine, this would be negligence, and the defendant would be liable for damages.

It may be conceded that where cattle are quietly grazing, resting or moving near the road—not on it—and manifesting no disposition to go on it, the speed of the train need not be checked, but the rule is different, where the cow or mule is on the road and runs on, then off, along, near to, and back upon it. In such a case, reasonable diligence and care require that the engineer shall slacken the speed, keep the engine steadily and firmly under his control, and if need be, stop it until the danger shall be out of the way.

Every intelligent mind grants the importance and usefulness of railroads as instrumentalities in the advancement of civilization, prosperity and happiness of society; but necessary as they are, essential as it may be to business and travel to have the highest rate of speed consistent with safety, it does not follow that these must be had at the reckless and unnecessary sacrifice of the property of individuals. The law implies and requires that in all employments and businesses, however useful or necessary, there shall be observed reasonable care and diligence in respect to the rights of individuals and the safety of property.

It seems to us that every just mind must conclude that, in a case like that last above supposed, the defendant, to say nothing of the safety of human life and its own property, has not the right to rush on and destroy the mule, cow, or horse, as the case may be, that happens to stray upon its road in a country where

cattle and other live stock are, and have always been allowed to run at large in the fields and forests.

To meet the aspect of the facts as contended for by the defendant, the court charged the jury that, "if the engineer saw the mule that was killed a quarter or half a mile ahead of the train, and the mule left the track when the train was a quarter of a mile away, and the engineer had reason to believe that the mule was no longer in danger, and afterwards, the mule ran upon the track in front of the engine, then the defendant was not guilty of negligence, unless the engineer could, by using the appliances at his command, have stopped the train after the mule had jumped upon the track the second time, so as to prevent the killing."

The instruction is substantially correct. The court fairly submitted the evidence to the jury in the views of it contended for by the parties respectively. The testimony of the engineer tended strongly to support the view contended for by the defendant. The evidence for the plaintiff tended to show negligence as contended by him. It was for the jury to pass upon the weight of the evidence and find a verdict upon the issues thus fairly submitted to them.

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

No error. Affirmed.

C. M. WOOD, Executor, v. BURTIS BARBER and others.

Partnership—Statute of Limitations, when bar removed by Partial Payment by one of several Obligors.

1. In an action against a firm upon a draft accepted by the cashier of a bank who was also a member of the firm, and who made a partial payment upon the same, *it was held* that, to remove the statutory bar set up by the defendant firm, the burden is on the plaintiff to show in what capacity

the acceptor acted in making such payment—whether as cashier or as a member of the firm. THE CODE, §§171, 172.

2. Where a payment is made upon a claim, before it is barred by the lapse of time, by one of several obligors of the same class, it becomes the legal act of all, and arrests the operation of the statute as to them, but does not revive the liability of others of a different class.

3. The rule that payment by one of several debtors, in such case, is evidence against them all, is founded upon the community of interest among the debtors.

(*McIntyre* v. *Oliver*, 2 Hawks, 209; *Willis* v. *Hill*, 2 Dev. & Bat., 231; *Walton* v. *Robinson*, 5 Ired., 341; *Davis* v. *Coleman*, 7 Ired., 424; *Green* v. *Greensboro*, 83 N. C., 449; *Brown* v. *Teague*, 7 Jones, 573, cited and approved).

CIVIL ACTION tried at Fall Term, 1883, of PASQUOTANK Superior Court, before *Avery, J.*

This action was commenced on the 1st day of February, 1883, and is prosecuted for the recovery of the amount due on an accepted draft against the defendants D. C. Lippincott and D. G. Bush (surviving members), and Burtis Barber, executor of Thornton Conrow, a deceased member of the partnership firm of Conrow, Bush & Lippincott, the drawers. The bill was drawn at Elizabeth City, on November 28th, 1873, in the sum of four thousand dollars, and payable at four months on the North Carolina Manufacturing Loan and Trust Company, and presented and accepted on the same day. There are several entries of payments endorsed on the instrument, the last of which, appearing to have been made before suit, is in these words:

"Paid on this note 16th December, 1881, two hundred and forty dollars."

The living partners in their answer admit the endorsed payment to have been made by their firm, while the executor, disclaiming any knowledge of his own or information sufficient to form a belief of the truth of the plaintiff's allegations in respect to the payments, among other defenses, relies upon the bar of the statute of limitation, and the only issue submitted

to the jury was whether the cause of action did accrue to the plaintiff within three years before the bringing of the action.

To rebut the defense, the plaintiff introduced as a witness William Martin, of the law firm of Pool & Martin, who testified that they held the draft for collection, and that he presented it to the defendant Lippincott, who was the managing member of his firm, and also acting cashier of the Albemarle Bank, the same corporation as the acceptor with a change of name, and demanded payment on February 17th, 1880, when Lippincott paid him sixteen hundred dollars, and the same was at once credited on the bill by the endorsed acknowledgment written thereon. The several other payments bear no signature, nor does it appear in evidence by whom they were made, nor in whose handwriting the entries are. The partnership terminated by the death of Conrow in March, 1882.

The defendant Barber contended that the primary liability resting upon the acceptor, and Lippincott being its cashier, as well as managing partner of the drawers, and it not appearing in what capacity he acted in making the payment, nor whose funds were used, the presumption was that it was as cashier and with the moneys of the bank; or,

That the burden of showing that the payment was made on behalf of his firm or out of moneys belonging to it devolved upon the plaintiff, in order to the removal of the bar.

The court refused to give these requested instructions and charged the jury that "if the said payment of sixteen hundred dollars was made by the said bank, or by Lippincott, as its cashier, or by the firm of Conrow, Bush & Lippincott, or either of them, within the three years before the bringing of the action, then they should find the issue against the defendant Barber."

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

Messrs. Pruden & Bunch, for plaintiff.
Mr. B. B. Winborne, for defendant.

SMITH, C.-J., after stating the case. In *McIntyre* v. *Oliver*, 2 Hawks, 209, it was held that the acknowledgment of a subsisting partnership debt by one partner, even after the dissolution of the firm, was binding on all the constituent members and prevented the operation of the statute of limitation. The same doctrine is announced in *Willis* v. *Hill*, 2 Dev. & Bat., 231, and *Walton* v. *Robinson*, 5 Ired., 341. In the latter case, the same reviving effect is ascribed to a payment as involving a reassumption of the residue of the debt.

In consequence of these rulings was passed the act of 1852, now embodied in section 171 of THE CODE, wherein it is enacted:

That no act, admission or acknowledgment by any partner, after the dissolution of the copartnership, or by any of the makers of a promissory note or bond, after the statute of limitation shall have barred the same, shall be received as evidence to repel the statute except against the partner or maker of the promissory note or bond, doing the act or making the admission or acknowledgment.

The new promise or acknowledgment, now required to be in writing (THE CODE, §172), or act, in partial payment, to which the same efficacy is given by the statute, to bind the testator, must have been made or done during the continuance of the partnership by one of its members acting for all and in the exercise of the agency which springs out of their joint relations. It is by virtue of the implied power of each to bind all that the act of one, within the scope of the business for which the association is formed, is deemed to be the act of all the partners. To give to the payment made by Lippincott the effect of a payment by the firm, he must have acted as a partner or used the common fund in making it, and this must appear if the others are to be bound.

The charge of the court ascribes the same effect to a payment coming from the acceptor or its cashier, as if it came from the partnership through one of its members, and seems to proceed

upon the idea that a recognition of continuing liability by any of the parties to the instrument imposes upon all the others the same liability, whatever may be their separate obligations under it. The rule does not go to this extent, nor have we found any case supporting this view. To give this effect to the act of one, there must be a community of interest and a common obligation among them. They must be obligors in a bond, makers of a promissory note, drawers or acceptors of a bill, or joint endorsers of either. An admission, direct or involved in the act of payment by one of either class, under the same measure of responsibility, becomes the legal act of all that class, but does not revive the liability of others of a different class. Thus if one of several joint acceptors promises to pay as directed in the statute, or makes a payment, his associate acceptors are bound by what he does; but the drawers are not, because there is no such common interest and responsibility as gives legal force to the act. And so of the other classes who may be bound in like manner. This is the import of the statute, which confines the act, admission or acknowledgment, as the case may be, as evidence to repel the statute, to the *associated partners, obligors, and makers* of a note. The rule prescribed in the statute, restrictive of that previously laid down in our adjudications as already shown, is in accord with the current of decisions in this state and elsewhere upon the point now considered, and none in conflict has been called to our notice. It is laid down by an excellent writer on the law of Evidence, whose work is among our best, that "if such payment be made by *one of several debtors*, who is not otherwise discharged from the obligation, it is evidence against them all," and he adds, "the rule is founded on the community of interest *among the debtors*." 2 Greenl. Evi., §444.

"The payment by one of the makers of the promissory note," in the language of DANIEL, J., "according to numerous decisions, took the case out of the act of limitation *as to all the makers* of the note." *Davis* v. *Coleman*, 7 Ired., 424.

So it is declared in a recent case, "that the payment of interest on the note (in suit) before it was barred by lapse of time,

arrested the operation of the statute as to *all the makers*, sureties as well as principal." *Green* v. *Greensboro College*, 83 N. C., 449.

Now, there was no common obligation associating the acceptor with the drawers, and while a partial payment by one drawer would affect the other drawers, or by one of several acceptors would extend to all, and so, as to all who are jointly bound, the act of a person of one class cannot extend to and create or renew a liability resting upon another class.

The contracts of the drawers and of the acceptors of a bill are wholly unlike, and the liability of the latter is in front of the liability of the former.

The drawer undertakes that his bill shall be accepted and paid from funds upon which he has a right to thus appropriate.

The drawer's liability, in the language of MANLY, J., "is a conditional liability, dependent upon presentation to the drawee and notice of his failure to the drawer. Such a precedent action is indispensable to fix a liability upon the latter." *Brown* v. *Teague*, 7 Jones, 573.

We think the defendant was entitled to the instruction that the burden rested upon the plaintiff to show affirmatively that the payment was on behalf of the firm, in order to repel the statute, and that there is error in the instruction that the same result follows, whether the payment was made by the bank or by one of the drawing firm on its behalf.

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

Error. *Venire de novo.*

GILBERT PATTERSON, Ex'r, v. ROBERT LILLY and others.

Partnership—Agency—Demand and Refusal—Statute of Limitations—Trusts and Trustees—Issues.

1. Where one of the members of a firm was constituted its general managing agent by the articles of partnership, and upon the death of one partner his executor consented to a continuance of the business, *it was held* that the manager became the agent of the executor as well as of the other surviving member.
2. *Held further:* A demand and refusal to account are necessary to terminate the agency and put the statute of limitations in operation.
3. Application of the statute of limitations to trusts, constructive and direct, discussed by ASHE, J.
4. The ruling of the court below upon submission of the issues and order of reference affirmed.

(*McNair* v. *Ragland*, 3 Mur., 139; *Northcott* v. *Casper*, 6 Ired. Eq., 303; *Commissioners* v. *Lash*, 89 N. C., 159, cited and approved).

CIVIL ACTION tried at January Special Term, 1883, of RICHMOND Superior Court, before *Graves, J.*

The plaintiff, as executor of Hugh L. Patterson, deceased, brought this action against the defendants Robert Lilly and John Patterson, as surviving partners of Robert Lilly & Co., and the said Lilly and Patterson and Edmund Lilly, as surviving partners of Lilly & Patterson, for an account and settlement of the partnership dealings.

In 1866 a mercantile partnership was entered into by articles of agreement between the plaintiff's testator (Hugh L. Patterson) and the defendants Robert Lilly and John Patterson, in which it was agreed that the same should continue for two years from the 29th of March, 1866; that John and Hugh L. Patterson should furnish the capital; the expenses and losses to be defrayed out of the profits; the balance, if any, to be divided as follows: one-half to Lilly and the other half to the Pattersons in proportion to the capital contributed by each; that Robert

Lilly shall have full charge and management of the business, keep the books, and an account of all the transactions of the firm, which shall at all times be open to the inspection of the partners, have power to employ clerks, &c., and receive as compensation for his services one-half of the net profits.

The business of this firm was carried on until the time limited for its expiration, and was then continued in the name of Lilly & Patterson, without any further written agreement, but upon substantially the same terms, except that Hugh L. Patterson was to have a salary of five hundred dollars a year for services to be rendered by him.

The business was conducted in the name of Lilly & Patterson until the death of the said Hugh in 1870, and continued until 1871 for the purpose of winding up the affairs of the partnership.

In 1873 the plaintiff demanded a settlement of the partnership dealings of the said two firms, of Robert Lilly, one of the surviving partners and the managing member of them. The defendants did not refuse, but went into a settlement and divided the assets on hand, except two tracts of land, one of which was afterwards sold and the proceeds divided in 1875, leaving the other tract (which was worth about six or seven hundred dollars) unsold at the time this suit was bronght.

At the time of that settlement there remained due out of the assets of the firms a balance of five hundred and seventy-five dollars to the plaintiff's testator for his salary, which had not been paid at the commencement of this action; and the defendant Robert Lilly admits the right of the plaintiff to have an account in respect to the land.

It also appears from the pleadings and admissions of the defendant, that the indebtedness of the defendant partners and others to the firms was entirely omitted in the partial settlement of 1873. In the replication of the plaintiff it is alleged, and not denied, that there were large amounts due to the partnership from the partners Robert Lilly, Hugh L. and John Patter-

son, and from Edmund Lilly and Gilbert Patterson, which are specifically set forth, none of which were included in any statement or settlement of the accounts of the firms.

The plaintiff contended there never had been any final settlement, and sought to have the account taken of the dealings of the firms of Robert Lilly & Co. and Lilly & Patterson.

The defendant Robert insisted that the account and settlement of 1873, except as to the two tracts of land and the salary due to plaintiff's testator, was a final stated account, and that the plaintiff's action was barred by the statute of limitations, and relied upon THE CODE §§155, 158, and also upon the presumption arising from the lapse of time; and he and Edmund Lilly both denied that the latter had ever been a partner of the firm of Lilly & Pattesson.

The following issues were submitted to the jury:

1. Has there been any final settlement of the partnership of Robert Lilly & Co., or of Lilly & Patterson, except as to the land and salary as alleged in the answer? No.

2. Was Edmund Lilly a partner in the firm of Lilly & Patterson? No.

3. Were the amounts set forth in the replication omitted from the settlement, if any has been made; and if so omitted, was it done by mistake or inadvertence? Omitted by mistake.

4. Is the plaintiff's cause of action barred by the statute of limitations? No.

During the progress of the trial, the defendants' counsel asked the judge to submit an additional issue, viz.: Was there a settlement of all partnership matters of R. Lilly & Co. and of Lilly & Patterson, excepting the four accounts set out in the plaintiff's replication before the commencement of this action? This was refused by His Honor upon the ground (1) because not submitted in proper time; and (2) because not presented by the pleadings. Defendants excepted.

John Patterson, one of the partners, testified that the partners never met and took into consideration all the affairs of the

firms, nor did he think the old accounts on outside parties were included in the settlement of the accounts of the partnership.

One McLean testified that after some dispute, the book-keeper (Morrison) and the witness were asked to look over a statement made by Morrison and handed to the plaintiff, and it seemed the individual accounts of the partners with the firms were not included; and Morrison said the accounts were not included; and when Lilly's attention was called to it, he said it must have been an oversight.

The plaintiff offered to prove that the amounts of these accounts as set out in his replication was correct, but this being admitted by defendants' counsel, His Honor held that it was unnecessary.

The defendants' counsel asked the court to charge the jury that, if they believed the testimony, the plaintiff's cause and causes of action were barred by the statute of limitations. This was refused, and the court told the jury that the relation one partner sustained to another was a fiduciary one, and the statute did not bar the action.

The jury responded to the issues as indicated above, and the defendant Robert Lilly moved for a new trial, for error in the court: (1) In submitting to the jury the first issue; (2) in refusing to submit the issue proposed by the defendant; (3) for misdirection to the jury in respect to the statute of limitations. The motion was overruled, and the defendant excepted.

It was then ordered by the court that the matter be referred to the clerk to state an account of the said partnership firms, and report to the next term of the court. The defendant Robert Lilly excepted, for that the inquiry should have been confined to the items set out in plaintiff's replication, and as there was no dispute as to the amount of those accounts, nor as to the manner of distribution, it was error to refer. The defendant appealed.

Messrs. J. D. Shaw and *Burwell, Walker & Tillett*, for plaintiff.
Messrs. T. A. McNeill and *Frank McNeill*, for defendants.

ASHE, J. The exceptions taken by the defendant are, first, to the first issue submitted; secondly, to the refusal of His Honor to submit the issue proposed by the defendant; and lastly, the alleged misdirection in regard to the statute of limitations.

The first issue was one directly raised by the pleadings. The plaintiff alleged that there never had been a final account and settlement of the partnership dealings, and the defendant insisted that there had been a full and final account and settlement of all partnership matters, except as to the land and salary of the plaintiff's testator.

The issue proposed by the defendant, aside from not being offered in proper time, which was a matter of discretion with His Honor, was not raised by the pleadings, as properly held by the court. The individual indebtedness of the respective partners to the firms had not been mentioned in the complaint or answer. But, in what is called the replication, which must be regarded as an amended complaint of the plaintiff, the indebtedness is specially set forth with the averment that it had been omitted in the partial settlement had in 1873; and the defendant, in his second amended answer, allowed by the court, to the amended complaint of the plaintiff, does not deny the allegations of the plaintiff with regard to this indebtedness; and therefore, they are to be taken as true, and leave nothing upon which to frame an issue. If this were not so, the issue proposed is not a proper one, for it only embraces in the exception the four accounts set out in the amended complaint, and omits the land and the salary—though the defendant insisted that he had settled everything but these two items.

The exception to the instruction upon the statute of limitations was properly overruled. Certainly, fiduciary relations subsist between copartners. Collyer on Partnership, lays it down that the same rules and tests are applied to the conduct of partners as are ordinarily applied to that of trustees. Indeed the functions, rights and duties of partners in a great measure, comprehend those both of trustees and agents. *McNair* v. *Ragland*, 3 Mur., 139.

But the application of the statute of limitations to trusts depends upon the character of the trust, and the distinction is this: Where the trust is constructive, such as is raised by operation of law, *e. g.*, where one takes possession of property in his own name and is afterwards by matter of evidence or construction of law changed into a trustee, lapse of time may be pleaded in bar even when his conduct was originally fraudulent, and his purchase would have been repudiated for fraud. Angel on Lim., §471. But where the trust is direct, it is a well established rule, belonging exclusively to the jurisdiction of courts of equity, that, so long as the trust subsists, the right of the *cestui que trust* cannot be barred or excluded by the trustee, by virtue of the length of time during which the latter has held possession. *Ib.*, §468. Yet it is a rule quite as well settled, that where the fiduciary character of the trustee has ceased or been put an end to by his repudiating the rights of the *cestui que trust*, as by assuming absolute ownership over the property, or by refusing to account for the same, then the statute does apply, and the *cestui que trust* must bring his action within the time prescribed or be barred. *Ib.*, §174.

But the defendant contends there was a "cesser" of the privity in this case; that the fiduciary relation between him and the plaintiff, as the representative of the deceased partner, was put an end to by the settlement which took place in 1873, and his action was barred after three years from that time. But did that work a "cesser"? "Although the representative of a deceased partner cannot, strictly speaking, be deemed a partner with the survivors, still a community of interest subsists between them. The executor is a tenant in common with them in all the partnership property and effects in possession (*e. g.*, the two tracts of land mentioned in the pleadings); and though the choses in action go to the survivors, and the law vests in them the sole and exclusive right to reduce them into possession, yet, when recovered, the survivors are regarded as *trustees* thereof for the benefit of the partnership, and the executor of the deceased

partner possesses, in equity, the same right of sharing and participating in them which his testator would have had, if he had been still living." Story on Part., 493. So that, the representative of the deceased partner is still, to some extent, a partner with the survivors until the business of the partnership is wound up. For it is held that the statute of limitations does not commence to run in favor of one partner against another, even after a dissolution of partnership, as long as there are debts due from the partnership to be paid, or debts due to be collected. *Hammond* v. *Hammond*, 20 Georgia, 556; Wood on Lim., §210.

But conceding, as contended by the defendant, that the relation of trustee and *cestui que trust* terminated in the dissolution of the partnership by the death of Hugh L. Patterson, yet there is another fiduciary relation subsisting between the parties which opposed an obstruction to the running of the statute against the plaintiff. The defendant Lilly, by the terms of the original articles of copartnership, was constituted the general agent of the partnership. He was to keep the books, hire clerks and servants, and have the entire management of the business. And the business was continued upon the same terms under the firm of Lilly & Patterson, with the exception that the plaintiff's testator was to be paid a salary of five hundred dollars a year for certain services to be rendered by him; and after the dissolution by the death of Hugh Patterson, the business was continued in the same manner with the *consent* of the plaintiff, as he alleges—and it is not denied. This made Lilly the agent of the plaintiff as well as of the other surviving partner, and his agency continued up to the commencement of the action. He sold one tract of land in 1875 and divided the proceeds, and holds another tract subject to division. His agency had never ceased before this action. It is true a demand was made by the plaintiff in 1873, but there was no refusal; and a demand and refusal were necessary to terminate his agency. In *Northcott* v. *Casper*, 6 Ired., Eq., 303, Chief-Justice RUFFIN said: "If there be an express understanding by one to manage an estate for

another, for an indefinite period, a right to an account arises between them from time to time, but the statute of limitations does not operate to bar an account for any part of the time while the relation of principal and bailiff subsists between them, that is, while the agency of the management of the estate is kept up. While the relation continues, there is a privity between the parties, and there is nothing to set the statute in operation": and it was held in that case that a demand and refusal were necessary to put the statute in motion. And in *Commissioners* v. *Lash*, 89 N. C., 159, it was held that where the relation of principal and agent subsists, the demand for an account necessary to put the statute of limitations in operation, must be such as to put an end to the agency. Nothing less than a *demand and refusal*, or the coming to a final account and settlement, or the death of one of the parties, will put an end to an agency. Here, there was no refusal, and the jury have found there was no final account and settlement, and the parties are still living.

As to the order of reference, we think there is no error, for upon the winding up of the affairs of the partnership, each partner has a right in equity, a *quasi* lien upon the partnership property to have it applied to the debts and liabilities of the firm; and to have a similar lien on the surplus assets for the purpose of having them applied in payment of what may be due to the partners respectively, *after deducting what may be due from them, as partners to the firm*. Lindley on Part., 471.

There is no error. Let this be certified that the case may be proceeded with in conformity to this opinion and the law.

No error. Affirmed.

ALLEN & CO. v. L. D. GRISSOM and others.

Partnership, creditors of, have no equitable lien on partnership effects.

1. Partnership creditors have no lien in equity upon, and cannot follow, the effects of a firm in the hands of an assignee under a trust deed, to give their claims a preference over the trusts contained in the deed.
2. The change in the individuals composing the firm here does not affect the rule; but the plaintiff creditors are entitled to an account of the assigned fund.

(*Hassell* v. *Griffin*, 2 Jones' Eq., 117; *Rankin* v. *Jones*, Ib., 169; *Clement* v. *Foster*, 3 Ired. Eq., 213; *Potts* v. *Blackwell*, 4 Jones' Eq., 58; *White* v. *Griffin*, 2 Jones, 3; *Phillips* v. *Trezevant*, 67 N. C., 370; *Burns* v. *Harris*, Ib., 140, approved; and *Ross* v. *Henderson*, 77 N. C., 170, doubted).

CIVIL ACTION tried at Spring Term, 1884, of DURHAM Superior Court, before *McKoy, J.*

The defendants appealed.

Messrs. Graham & Ruffin, for plaintiffs.

No counsel for defendants.

SMITH, C. J. The firm of Grissom & Henry, consisting of the defendants L. D. Grissom and Robert Henry, and the latter being under age, while engaged in carrying on a mercantile business in the town of Durham, contracted in the purchase of goods for their store the two debts specified in the complaint, whereof that of the plaintiffs W. & T. Allen & Co. fell due on January 15th, 1882, and that of the other plaintiffs, Wolfsheimer & Co., on February 1st of the same year.

On November 18, 1881, the defendant Henry retired from his firm, and by an instrument under seal executed by himself and the defendant Robert Holloway, for the recited consideration of seven hundred and ninety dollars, assigned his undivided interest, being a moiety, in the property and effects of

every kind belonging to the partnership to the latter, who also covenanted to pay off the partnership debts outstanding and exonerate the said Henry from liability therefor.

Thereupon the partnership of Grissom & Holloway was formed, the latter taking the place of the withdrawing partner, and a similar business was conducted by them. Finding themselves unable to meet their liabilities, the said firm of Grissom & Holloway made a general assignment of the partnership property and resources to the defendant, John M. Moring, in trust to provide for the payment out of the fund of his own charge for services, professional and as trustee, and then to pay a debt declared to be due the defendant Pattie, wife of said Holloway, in about the sum of nineteen hundred dollars, which she in her answer states was for money loaned the firm from her own separate estate in which her husband had no interest.

The trustee, Moring, has collected from the assets seven hundred and thirteen dollars, of which he has paid the said Pattie four hundred and fifty dollars, and holds the residue subject to such disposition as the court may direct. The residue of the assigned estate, as the trustee represents, will be insufficient to discharge the secured debts. The members of both firms, as well as the firms, are insolvent.

In this action the plaintiffs suing for themselves and all other creditors of Grissom & Henry, assert and seek to enforce a lien, which they allege a court of equity will recognize as subsisting in favor of the firm creditors upon the effects and property of the firm, and to follow the fund into the hands of the assignee for the purpose of giving it a preference over the trusts contained in the deed, and they insist that the assignment by Henry of his moiety is subordinate to their claim to be satisfied out of the partnership effects. They also assail the debt alleged to be due the *feme* defendant as false and fraudulent.

The court was of opinion, and so ruled, that the joint property of Grissom & Henry was primarily chargeable with the joint debts, and that this liability adhered to it, notwithstanding

the conveyance of the partner Henry, followed by the assignment of the successor firm of Grissom & Holloway to the trustee, and that the partnership property must be first applied to the partnership debts, and ordered a reference for an account to be stated upon the basis of this ruling.

The appeal presents the question of the correctness of the ruling in reference to the equity of the partnership creditors to be paid in preference to those mentioned in the trusts of the assignment of Grissom & Holloway, and this is the only point we propose to consider.

It is well settled that each member of a partnership has a right to require the application of the joint effects to the joint debts, before any portion of them can be diverted to the individual debts of the separate partners, and this is a means of personal exoneration. It is an equity possessed by each and grows out of their relations as partners, and the implied limitation upon the power of each to dispose of the common property in furtherance of the object of their association. But this equity does not extend to the creditors, as such, so as to create a lien, but they receive the benefits of the exercise of the right of the separate partners to require the appropriation, and the exoneration is worked out in the payment of their debts. With the assent of the partners any one of them is free to dispose of the company's effects for his individual use, and a creditor cannot intervene to prevent the application. This is the doctrine established by repeated recognitions in this court, from which, whatever may have been the decisions elsewhere, we are not at liberty to depart, and it commends itself to our approval. It is true that where a fund comes under the control of a court of equity, without any previous liens or priorities resulting from positive contract, the distribution has been made among creditors by appropriating the joint effects to the joint debts, and, as some writers lay down the rule, the same preference should be accorded to the separate creditors of satisfaction out of the separate property, the surplus in each case

only being exposed to the other class of debts. 4 Kent. Com. 65; 1 Story Eq., §676.

But this rule is questioned by this court in *Hassell* v. *Griffin*, 2 Jones' Eq., 117, and *Rankin* v. *Jones*, *Ib*, 169, under the effect of our statute which makes contracts joint and several, and gives an action against the representative of a deceased joint debtor equally as against the survivor, and it is only applicable when joint and separate estates are to be administered, untrammelled with conflicting equities arising out of contract.

A few references only are needed to vindicate the principle enunciated in this court.

In *Clement* v. *Foster*, 3 Ired. Eq., 213, Chief-Justice RUFFIN, the eminent equity jurist, whose long judicial life is so intimately identified with the unfolding and application of its principles as shown in the reports, speaks in this manner:

"The principal question in the cause is whether the plaintiff had a right, in this court, to have the management of the partnership effects taken out of the hands of the partners themselves, Foster and Gilbert, or their assignees, and the effects applied to the payment of the plaintiff's debt upon the ground that the partners are not able to pay their debts, and that they are, or one of them is, *appropriating those effects to their or his separate uses*. We own that we know of no such equity in a general creditor of a partnership. At the instance of one partner the court will, in such a case, interfere against the other partner, because they are joint owners of the property, and one has no right to apply it to his separate use, thereby leaving the other liable to the partnership debts out of his own estate, or at all events, depriving him of property that belongs to him."

"The creditors of a firm," in the words of PEARSON, J., in *Rankin* v. *Jones*, *supra*, "*have no lien upon the effects of a firm.* If one of the partners, as in our case, transfers all his interest in the firm effects to the other, and is content with his personal undertaking to pay the firm debts, the retiring partner has no longer any lien in equity in regard to the effects of the late

firm, and the effects, supposing the transfer to be *bona fide*, become the property of the other, subject to be sold by such of his creditors, without discrimination, as issue executions, and *subject to be sold and transferred by him in trust for the payment of his debts, according to the preference he may prescribe,* in the same way as any other property he owns."

In *Potts* v. *Blackwell*, 4 Jones' Eq., 58, the same principle is reiterated by BATTLE, J., who, in his comments in answer to the question whether the creditors have such a lien upon the partnership effects at the dissolution, as to prevent one partner from assigning them in payment of his individual debts, says:

"The case of *Rankin* v. *Jones*, 2 Jones' Eq., 169, decides expressly that the creditors of a partnership have no such lien," and that in that case it was held "that the *partnership creditors could not follow these effects*, to subject them to the payment of the firm debts.

In *White* v. *Griffin*, 2 Jones, 3, it was decided that an administrator could retain the proceeds of the separate estate of an intestate for a partnership debt, against the claim of an individual creditor, in a course of legal administration, and that a court of equity will not restrain the exercise of the right. *Hassell* v. *Griffin*, *supra*.

Again, READE, J., delivering the opinion in *Phillips* v. *Trezevant*, 67 N. C., 370, says: "Where one partner, who is insolvent or in failing circumstances, without the consent and against the will of the other partner, is disposing of the effects of the partnership, and appropriating them to his own use, the *other partner* has the right to an injunction and to have a receiver appointed."

So it has been decided that each member of an insolvent firm may have his personal property exemption taken out of the joint effects with the consent of the other, but not without, the court declaring "that the creditors of the firm cannot object, because *they no more have a lien upon the partnership effects*," &c. *Burns* v. *Harris*, Ib., 140.

The only intimation to the contrary is expressed by RODMAN, J., in *Ross* v. *Henderson*, 77 N. C., 170, where he declares that a partner undertaking to sell his interest in the whole or part of the joint property, commits a breach of the partnership agreement, "for which the other partner, and as subrogated to his rights the partnership creditors, may have a remedy." We do not suppose he means to assert an equity to reside in the creditors independently of that which the creditors possess, *inter sese*, but that their interest *results from the exercise* of the right of restraint against misapplication, which rests with the other members. If more is meant, it is wholly at variance with the current of previous adjudications, and we are not at liberty to concur in the proposition.

"It is thus through the operation of administering the equities *between the parties* themselves," is the conclusion of Mr. Justice STORY, "that the creditors have the opportunity of enforcing their *quasi lien*." Story Part., §360.

In this view of the law governing the relations between partnership creditors and debtors in respect to the property of the latter, what claim upon the facts of this case have the plaintiffs to intercept the fund and frustrate the purposes of the assignment of the partners Grissom & Holloway to the trustee?

The former partner, Henry, is asking no relief; the continuing partner, Grissom, makes no objection to the assignment and accepts the assignee, Holloway, as a partner under it in place of Henry. These latter, Grissom & Holloway, convey to Moring. These are all willing to abide by what has been done, and the action places them in the attitude of resisting defendants, to be coerced by the power of the court.

Thus the relief is demanded upon the single ground that the firm creditors have a lien upon the firm property, which the members individually or collectively cannot evade by applying it to any other than partnership purposes, and in discharge of partnership liabilities. The cases cited show no support for the proposition.

We but repeat what has been so often said before, that the

plaintiffs have no such lien to be enforced by themselves, against the will of the partners, in whom the equity resides.

But the plaintiffs have a right to an account of the assigned fund, and if fraudulent, to have the claim of the *feme* defendant disallowed.

We therefore declare there is error in the judgment which attempts to establish a lien in favor of the plaintiffs, and so much of it is reversed. Let this be certified.

Reversed.

W. D. E. CLANTON v. THOMAS B. PRICE, Adm'r.

Partnership—Arbitration and Award—Witness—Statute of Limitations—Executors and Administrators.

1. Partnership matters and others not connected with the joint business, and unsettled during the life-time of one of the partners, were referred by his administrator and the surviving partner to arbitrators for settlement, whose award, among other things, was, that the partnership assets belong to J, the deceased partner, who is liable for the firm debts; and after allowing all credits he owes to W, the other partner, a certain sum, which was paid; *Held*, in an action by plaintiff W (who was forced to pay firm debts) against the defendant administrator of J, for damages sustained by the defendant's failure to execute the award: (1) That the act of 1879, ch. 183, making a party to a suit upon a judgment rendered or a bond executed previous to [August 1, 1868, an incompetent witness, does not apply, as this action is not founded on a judgment or bond. (This act is now superseded by the act of 1883, ch. 310). (2) The payment of the sum found due to the plaintiff was not a full execution of the award, and does not relieve the defendant from paying the firm debts. (3) It requires no judicial investigation to determine the character of these debts by reason of the fact that the notes bore the individual signatures of the partners, since the defendant was informed by his intestate that they were firm debts.

2. *Held further:* The seven year statute of limitations barring suits against a decedent's estate does not apply here. The action is not on an indebtedness of the defendant's intestate, but arises out of the defendant's failure to pay certain common liabilities, and the court below properly rendered a personal judgment.

(*Morgan* v. *Bunting*, 86 N. C., 66; *Brown* v. *Cooper*, 89 N. C., 237; *Blossom* v. *Van Amringe*, 63 N. C., 65; *King* v. *Mfg. Co.*, 79 N. C., 360; *Pickens* v. *Miller*, 83 N. C., 543, cited and approved).

CIVIL ACTION tried at Fall Term, 1882, of MECKLENBURG Superior Court, before *Graves, J.*

The defendant appealed from the judgment of the court below.

Messrs. Bynum & Grier, for plaintiff.
Messrs. Wilson & Son, for defendant.

SMITH, C. J. The copartnership which had subsisted for several years between the plaintiff and the defendant's intestate, not having been settled during the life-time of the latter, and there being other matters in dispute between the parties to the action not connected with the joint business, for an adjustment thereof they agreed upon a reference to three designated persons and to abide by their award. The arbitrators, on March 13th, 1864, rendered their award as follows:

"That as to the partnership between said parties from all that is now made to appear, the existing partnership assets of every kind belong to John B. Clanton and that he is liable for the payment of all the debts which said firm may still owe; that after allowing all the credits claimed, John B. Clanton owes W. D. E. Clanton the sum of one thousand six hundred and sixteen dollars and four cents, due on the 13th of March, 1864."

Subsequently is annexed: "We further award that W. D. E. Clanton make, execute and deliver to John B. Clanton, a quit claim deed to his interest in a tract of land on the Catawba river at the Tuckasegee Ford, which was sold and conveyed by John B. Clanton."

Accompanying the award is an account stated between the partners of their individual transactions outside of the joint business, from which appears to be due the sum of $1,616.04, as set out in the award.

The plaintiff was afterwards sued upon two of the firm notes and his property sold under execution issued to enforce payment, for which sum, as well as for the moneys paid to two other creditors of the partnership, as damages sustained by reason of the defendant's failure to execute the award, the present action is prosecuted. Several issues raised by the answer were prepared and submitted to the jury, which, with their findings thereon, are these:

1. Was there any arbitrament and award, and, if so, was the defendant to pay all the debts of the firm of which plaintiff and defendant's intestate were partners? Answer—Yes.

2. Were the debts alleged by the plaintiff to be debts of the firm, copartnership debts? Answer—Yes.

3. Has the plaintiff paid the debts as alleged? Answer—Yes.

4. Has the defendant performed the award? Answer—No.

5. Is the plaintiff's right of action barred by the statute of limitations or any part thereof? Answer—The thirty and fifty dollar notes are barred.

Upon the trial of these issues the plaintiff introduced the record of the court showing the rendition of judgments in favor of one Brown and wife against himself upon two notes executed in 1857, and for the payment of money only, and then offered himself as a witness to prove declarations of the defendant that the notes were given for debts of the firm. This testimony was objected to as incompetent under the act of March 11, 1879 (Acts 1879, ch. 183), but admitted by the court, and the witness proceeded to state, that after judgment had been recovered in the suit of Brown and wife, the defendant told him that the debt was one of the partnership, and his intestate had directed him to pay it.

This is the first exception required to be considered, and is, in our opinion, without force. The act to which reference is made, superseded and repealed since by the act of 1883, ch. 310, but then in operation and applicable to the evidence, does not embrace the present case. This is not an action "*founded* on any

judgment rendered" or "on any *bond* under seal for the payment of money or conditioned to pay money, executed previous to the first day of August, 1868," nor indeed upon any *bond* or *judgment*, but upon the *obligation* imposed by the award, and the judgment is used as evidence and the measure of the damages to which the plaintiff is entitled for violating it. *Morgan* v. *Bunting*, 86 N. C., 66; *Brown* v. *Cooper*, 89 N. C., 237.

The sum found to be due, and specified in the award, it was conceded had been paid by the defendant.

The court was requested by the defendant's counsel to charge the jury in substance:

1. That the payment of the sum of $1,616.04 was a full execution of the award and an exoneration from further liability thereon.

2. That if the plaintiff failed to assert his claim to the defendant within seven years after the intestate's death, it was barred and he could not recover.

3. That the notes not appearing upon their face to be partnership obligations, but bearing the individual signatures of the partners, there must be an adjudication to establish their true character before the non-payment of them could operate as a breach of the award.

The court refusing to give these instructions, charged the jury that the award is, that the defendant shall have the effects of the firm and pay off its debts; that the account is but a statement of the personal dealings between the parties and does not affect the copartnership; that the jury must determine from the evidence whether the notes were for debts of the firm, and proof of this must come from the plaintiff; that it does not appear that defendant has paid any of the firm liabilities, and he must show that he has paid all such as were brought to his knowledge; that he is not held to the same measure of responsibility as an administrator, and is only required to pay such as he has notice of; and that the statute of limitations has no application to the case.

The defendant excepts to the refusal of the court to give the directions asked, and also to those which were given in their stead.

We are unable to see any just grounds for complaint on the part of the appellant.

The plain and manifest intent of the arbitrators, as disclosed in the award, is to charge the defendant with the payment of all outstanding debts of the firm, while the account ascertains alone the result of their personal transactions with each other.

An award is not unlike a verdict, and the duty of the arbitrators is best discharged in the words of the late Chief-Justice "by a simple announcement of the result of their investigations." *Blossom* v. *Van Amringe*, 63 N. C., 65; and repeated in *King* v. *Manfg. Co.*, 79 N. C., 360; see also, *Pickens* v. *Miller*, 83 N. C., 543.

Assuming the account as part of the award, it contains nothing to qualify the force of the words used in placing upon the defendant the responsibility of providing for the joint debts and protecting the plaintiff therefrom.

2. Equally untenable is the contention that a judicial investigation and determination of the character of the notes was necessary to impose on the defendant the duty of taking them up. He himself knew from his intestate that they were of that kind, and, possessing this information, he is in default in not pursuing his intestate's directions and performing his own undertaking to discharge them.

3. We concur with the court that the statute does not obstruct the plaintiff's recovery. The agreement to refer is personal to the defendant, and so in terms in the award. In effect it charges the defendant with, and protects the plaintiff from, the firm liabilities. The action is not on an indebtedness of the intestate, subsisting at his death and putting the statute in motion, but springs out of the defendant's omission to pay certain common liabilities, which the award requires him to pay. This exception of the defendant must be overruled.

4. The remaining exception is to the form of the judgment rendered. The assets in the defendant's hands, whether sufficient or not, are not involved, and the judgment must be personal. We have treated the action as one against the defendant in his individual capacity and not as representing the intestate, although he is called administrator, for the structure of the complaint and the cause of action set out therein, as arising out of an undertaking to abide by the award, show the action to be personal.

But the parties seem to have considered the award as not imposing a personal obligation upon the defendant, and the agreement to submit as a means of ascertaining a disputed indebtedness of the intestate, and not the creation of an individual responsibility, we deem it proper to remand the case in order that such direction may be given to it as will enable the parties to carry out their intent in the matter after this adjudication of the questions presented by the appeal to this court for its determination.

Remanded.

GEORGE W. HUNTLEY v. H. MATHIAS and others.

Agency—Principal liable for tort of agent—Evidence—Judge's Charge.

1. In a suit for damages against the principal for the tort of an agent, the plaintiff alleged, and testified, that he hired a horse to the agent who was traveling about the country selling steam engines, in the interest of his principal (a manufacturing company), and that the horse was injured by misuse and overdriving. The defendant admitted the agency, but asked the court to instruct the jury that there was no evidence the agent had authority from the principal to hire horses, which was refused; *Held*, no error.
2. Such an agency includes the incidental powers necessary to carry out its purpose, and the evidence tended to show that the agent hired the horse in the course of his business, and for the benefit of his principal.

(*Gilbraith* v. *Lineberger*, 69 N. C., 145; *Katzenstein* v. *Railroad*, 84 N. C., 688; *Bank* v. *Bank*, 75 N. C., 534; *Williams* v. *Windley*, 86 N. C., 107; *Jones* v. *Glass*, 13 Ired., 305; *Cox* v. *Hoffman*, 4 Dev. & Bat., 180, cited and approved).

HUNTLEY *v.* MATHIAS.

CIVIL ACTION for damages for injury to a horse, tried at Spring Term, 1883, of ANSON Superior Court, before *MacRae, J.*

It is alleged in the complaint that the defendant Mathias was the agent, and in the employ of, and doing business for, the defendant corporation (The Taylor Manufacturing Company), and that while he was so employed, on or about the 1st day of October, 1881, he, as such agent, hired from the plaintiff a horse, and did "neglect, abuse, overdrive, overload, and greatly damage" said horse. It is further alleged that the defendant corporation so hired the horse, and injured him by such neglect and misuse, that the plaintiff is endamaged to the amount of $75.00.

The defendants admit that the defendant Mathias hired the horse from plaintiff, and that he was in the employ of the defendant corporation, and deny all the other allegations in the complaint.

On the trial, "the plaintiff testified that he hired a horse to defendant H. Mathias on the 1st of October, and that said Mathias was traveling about through the country selling steam engines for the defendant company. He further testified to the hard driving of and consequent injury to the said hired horse by said defendant Mathias, and as to the amount of the damage. There was also other testimony to the injury and damage."

Upon this state of the facts, the defendants prayed the court to instruct the jury that there was no evidence that Mathias had authority from the defendant corporation to hire horses or a horse, and that there was no evidence that the corporation had hired the horse or authorized its hire. The court declined to give this instruction, and the defendants excepted.

The court charged the jury in substance that the liability of the defendant corporation depended upon the character of the agency, and whether the hiring of the horse was under its direction; that plaintiff must satisfy them that by the contract of

agency the agent had authority from his principal to hire horses, and the horse, in the prosecution of the business of the agency, and that if the corporation did so authorize the hiring of the horse, and the agent negligently treated, overdrove, and abused the horse, and he was injured by such treatment, in the course of the business, the defendant corporation would be liable for damages so sustained by the plaintiff. The defendants excepted.

The jury rendered a verdict for the plaintiff and there was judgment accordingly, and the defendants appealed.

Messrs. Little & Parsons, and *Haywood & Haywood*, for plaintiff.

Messrs. J. A. Lockhart and *S. T. Ashe*, for defendants.

MERRIMON, J. In the absence of any written instrument, agencies in many cases arise from verbal authorizations, from implications, from the nature of the business to be done, or from the general usages of trade and commerce.

It is a general principle, applicable in all such cases, whether the agency be general or special, unless the inference is expressly negatived by some fact or circumstance, that it includes the authority to employ all the usual modes and means of accomplishing the purposes and ends of the agency, and a slight deviation by the agent from the course of his duty will not vitiate his act, if this be immaterial or circumstantial only, and does not, in substance, exceed his power and duty. Such an agency carries with and includes in it, as an incident, all the powers which are necessary, proper, usual and reasonable, as means to effectuate the purposes for which it was created, and it makes no difference, whether the authority is general or special, expressed or implied, it embraces all the appropriate means to accomplish the end to be attained.

The nature and extent of the incidental authority, in such cases, turn often times, upon very nice considerations of actual usage, or implications of law, and it is sometimes difficult to ap-

ply the true rule. Incidental powers are generally derived from the nature and purposes of the particular agency, or from the particular business or employment, or from the character of the agent himself. Sometimes the powers are determined by mere inference of law; in other cases by matters of fact; in others by inference of fact; and in others still, to determine them becomes a question of mixed law and fact. Story, on Agency; §§85, 97, 100; *Gilbraith* v. *Lineberger*, 69 N. C., 145; *Katzenstein* v. *Railroad*, 84 N. C., 688; *Bank* v. *Bank*, 75 N. C., 534; *Williams* v. *Windley*, 86 N. C., 107; 1 Wait Act. & Def., 221, 230.

In the case before us the allegations of the complaint are very general and the evidence is meagre, but applying the rules of law above stated to the whole case, we think the court properly held that there was evidence to go to the jury in respect to the authority of the agent to hire the horse.

It is alleged in the complaint that Mathias was the agent of the defendant corporation, and this is admitted in the answer, and the evidence went to show that the object of the agency was, that the agent should travel about the country from place to place, and sell steam engines for his principal. Now, common experience and observation show, that generally, a man, whether as principal or agent, going about the country from place to place, and in various directions, to sell steam engines, or merchandise of any kind that people generally purchase, does not go on foot, but on railroads when he can, on horseback, or in light, convenient vehicles. This is done almost uniformly, with a view to expedition as well as the reasonable comfort of the person traveling. In the general order of things, this is done, and it is reasonable and proper that it should be. And ordinarily, where an agent is sent out on such service, his principal furnishes the means of transportation. This is not perhaps uniformly, but it is genenerally so, and if there is not a legal presumption of authority in the agent to hire a horse or vehicle for the purpose of getting from place to place, the fact certainly

raises the ground for an inference of fact to that effect, to be drawn by the jury. The nature of the agency in this case rendered it necessary that the agent should from time to time, have a horse to enable him to get from one place to another, and this gives rise to the inference that his employer gave him authority to hire one.

The corporation defendant sent its agent out to travel from place to place to sell its goods, and it gave him credit as a trustworthy man in and about the business of the agency. In view of the habits of men, the customary course of business, especially the custom in such agencies as that under consideration, there arose the ground for an inference that the jury might properly draw, not conclusive in itself, but to be made and weighed by the jury, to the effect that the agent Mathias had authority to hire the horse for the purpose of his agency. *Katzenstein* v. *Railroad, supra; Bank* v. *Bank, supra; Bentley* v. *Doggett*, 51 Wis., 224; (37 Am. Rep., 827).

That the principal is liable to third persons for torts, deceits, frauds, malfeasance and non-feasance, and omissions of duty of his agent in the course of his employment, cannot be questioned, even though the principal did not authorize, justify, or participate in, or know of such misconduct. Story on Agency, 452, *et seq.*; *Jones* v. *Glass*, 13 Ired., 305; *Cox* v. *Hoffman*, 4 Dev. & Bat., 180.

The evidence in this case tended to show, and the jury found, that the agent hired the horse in the course of the business of his agency, and for the benefit of his principal, and while he had possession of, and used the horse, in the course of his business, he negligently and carelessly drove him too rapidly, or otherwise maltreated him, whereby he was seriously injured, to the damage of the plaintiff. The court fairly left the question of authority in the agent to hire the horse, and the character and extent of the injury to him, to the jury, and we cannot see that the defendant has any just ground of complaint.

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

No error. Affirmed.

A. J. KIVETT and wife v. A. A. McKEITHAN.

Parol license relating to land may be revoked upon notice—Mills, condemnation of land for use of—Costs of needless matter in transcript.

1. The plaintiff built a mill, and, with tho verbal consent of the defendant, constructed a dam across a stream upon land of the latter; and after the mill had been in operation for several years, the defendant withdrew his consent to the further use of the land for this purpose, and notified the plaintiff to level the dam, which he failed to do; and thereupon the defendant caused the obstruction to be removed; *Held*, in an action by plaintiff for damages: (1) That a parol license relating to land, either voluntary or supported by a valuable consideration, may be revoked by the owner without incurring liability in damages, where notice is given and reasonable opportunity afforded to remove improvements put up thereunder. (2) The plaintiff should have taken a conveyance of the easement, or pursued the remedy pointed out for the condemnation of land for mill purposes. THE CODE, §1849.
2. The appellant, though awarded a new trial, must be taxed with the costs of unnecessary matter sent up with the transcript.

(*McCracken* v. *McCracken*, 88 N. C., 272, cited and approved).

CIVIL ACTION tried at Fall Term, 1883, of HARNETT Superior Court, *McKoy, J.*

Verdict and judgment for plaintiff; appeal by defendant.

Messrs. R. P. Buxton and *W. E. Murchison*, for plaintiff.
Messrs. W. A. Guthrie ard *J. W. Hinsdale*, for defendant.

SMITH, C. J. In the year 1877, the plaintiff, at an expenditure of several thousand dollars, caused a valuable mill for grinding and sawing to be built on the waters of Little river, in Harnett county, and a dam across the stream extending to the opposite shore, and upon land belonging to the defendant. The latter gave his verbal consent to the construction of an embankment

upon his land not to be more than one foot in height; but this not being sufficient to raise the requisite head of water, it was in fact made one foot and a half higher than the limit, and in this condition, without complaint, the mill was operated for several years. Some six or more months before February, 1882, the defendant withdrew his consent to the further use of his land in this manner, and gave notice to the plaintiff thereof, requiring him to level the dam and remove the obstruction. This was not done, and, accordingly, in that month the defendant proceeded to demolish so much of the structure as projected over and upon his premises. For the injury to the property consequent upon this act of the defendant, the present suit was soon afterwards instituted.

It is needless to consider the series of rulings of the court to which the defendant excepted during the progress of the trial, and which appear in the record, since most if not all of them depend upon the result of an inquiry into the lawfulness of the defendant's conduct in destroying, after notice of revocation of the license, the structure resting upon his own land. If he had the right to do this, the action cannot be maintained; if he had not, he is answerable in damages.

The instructions imparted to the jury proceed upon the legal proposition that the defendant had authority to remove so much of the dam as exceeded in height the limits of the license, but no portion that was within these limits, and the jury were accordingly directed to ascertain to what extent the embankment had been disturbed, and to render a verdict as they should find the fact to be. In other words, the law is declared to be that, after the plaintiff's large outlay in putting up the mill upon the faith of the defendant's consent and its continuance, the defendant could not, at his own will, terminate the license and entail large consequent loss upon the plaintiff without being exposed to the latter's claim for compensatory damages.

We do not concur in this general proposition that a parol license, even when supported by a valuable consideration, and

still less when voluntary, relating to land, cannot be recalled by the owner without incurring liability to the party to whom it is given, where notice of the withdrawal is given and a reasonable opportunity is afforded for the removal of any structures, fixtures or improvements which may have been put there by him. The acquirement of any interest in land by consent or contract not in writing, is directly within the prohibition of the statute of frauds, as interpreted and enforced in this state in numerous adjudications.

We do not recognize the doctrine which prevails in many of the states, that a part or even a full performance of the stipulation of an unwritten agreement for the disposition of an interest in lands, other than a lease not enduring more than three years (THE CODE, §1743), exempts such agreement from the operation of a statute which declares it "shall be void and of no effect" (§1554), while in such case we compel the restoration of moneys paid under it, and perhaps allow compensation for what has been expended and cannot be restored to the extent of the value of the benefit which the other party receives and appropriates to his own use.

The cases in which it has been held that a license acted on and expenditures made upon the faith of its continuance, when founded on a valuable consideration, vests an interest beyond the power of revocation at the will of the owner who gives it, proceed upon the same considerations and reasoning which support the doctrine of part performance, and these are, that the statute will not countenance an attempted fraud and render it successful. Many of them will be found collected in the notes of the learned and discriminating editor of the American Decisions appended to *Ricker* v. *Kelly*, vol. 10, page 40; *Rinch* v. *Kern*, vol. 16, page 501, and *Mumford* v. *Whitney*, vol. 30, page 71.

But the subject of a parol contract, under which improvements in good faith have been put upon land and the relative resultant interests and rights to and between the parties to it, has been so fully considered in the recent case of *McCracken* v. *Mc-*

Cracken, 88 N. C., 272, that little remains but to announce the conclusion there arrived at.

The court there use this language: "If we consider the contract as a license between the parties, as a license given to the plaintiff to enter upon the land and erect and enjoy the improvements, we cannot perceive that it in the least serves to help his case. If purely a license, it excused, it is true, his entry upon the land which otherwise would have been a trespass. But it was still revocable, and its continuance entirely dependent upon the will of the owner. If intended to pass a more permanent and continuing right in the land, whereby the authority or estate of the owner could be in the least impaired, it was then not only necessary to be evidenced by writing, but could only be made effectual by deed."

In that case the defendant disclaimed any purpose to appropriate to his own use the building put on his land, and the court say "the plaintiff must be content with getting that back without further compensation for loss."

In answer to a suggestion of bad faith in the defendant in inviting the expenditure and then depriving the plaintiff of its fruits, we may say, all this is done with full knowledge of the law, that the permission may be recalled; and it is the plaintiff's folly and the result of misplaced confidence in its continuance, for which the law makes no provision. The plaintiff could have guarded against the loss by purchasing and taking a conveyance of the easement from the defendant; or, if this could not be done, by pursuing the remedy pointed out in the statute (THE CODE, §1849, *et seq.*) for the condemnation and appropriation of lands of a recusant proprietor on the other side of the stream for the necessary uses of the mill; and this remedy for the inconveniences suffered from the defendant's conduct, which, if resorted to in the first instance, would have prevented them, is still open for his relief.

It is then immaterial how much of the dam was removed by the defendant, for he had the right to level it to the ground as

well that excess as that within the limits of his license; and for the error of the ruling in this respect the verdict must be set aside and a new trial awarded.

The testimony as appearing in the notes of the judge is needlessly attached to the transcript and must not be taxed against appellee, but must be paid as costs of the appellant. Let this be certified.

Error. *Venire de novo.*

WESTERN NORTH CAROLINA RAILROAD v. M. S. DEAL.

Fixtures—Railroad Depots.

1. A tenant may remove a building erected by him, for the better enjoyment of his trade, while he remains in possession of the land. But if he neglects to avail himself of this right during the term, the nature of the property, and the uses to which it was devoted, as shown in this case, will serve to rebut the presumption of abandonment.
2. The strict rule that a building becomes part of the land is relaxed, where it appears that the same is put up purely for the exercise of a trade, or for the mixed purpose of trade and agriculture, or manufacturing.
3. Where the owner of land verbally consented that the plaintiff company might erect a depot thereon for railroad business, *it was held* that the structure did not become a part of the freehold and the plaintiff had the right to remove it.

(*Pemberton* v. *King*, 2 Dev., 376; *Moore* v. *Valentine*, 77 N. C., 188; cited and approved).

CIVIL ACTION tried at Spring Term, 1884, of CATAWBA Superior Court, before *Shipp, J.*

The defendant railroad company brought this suit to test its right to remove a house built for a depot, the defendant refusing to allow the same, and setting up a claim thereto upon the ground that it was a fixture.

The facts were agreed upon, and are in substance as follows: The defendant company constructed its railroad to the town of

Newton, in the county of Catawba, about the year 1860, and erected near the track at Newton a brick depot, which it continued to use in its business operations until the fall of 1881.

The company took possession of the land where the depot was located, both under its charter and the verbal license of the defendant's ancestor, and continued in possession of the same, until, by an act of assembly directing it, the line of the road was changed so as to approach the town of Newton by a different route. Accordingly, the company moved its iron rails and cross-ties to the new line, about the fall of 1881, and abandoned the use of the former line.

The land on which the depot was erected had in the meantime come into the possession of the defendant—one-half by descent and the other half by purchase; and two years after the abandonment of the old line the defendant entered and took possession of the depot, without plaintiff's permission.

The company claims that the depot is not a fixture, and demanded of the defendant, before this suit was brought, that it be allowed to remove the same a few hundred yards to the side of its track upon the new line, and the defendant refused.

Thereupon the court below adjudged that the plaintiff company have the right to remove the depot, and the defendant appealed.

Messrs. D. Schenck and *M. L. McCorkle*, for plaintiff.
Messrs. Armfield & Armfield and *G. N. Folk*, for defendant.

MERRIMON, J. The general rule of law is, that buildings and other structures erected on land for the better enjoyment of it, become identified with, part of, and go with the land, and the tenant has no right at any time to remove them. Anciently the law was more strict in respect to making things erected upon, and attached to the land, directly or indirectly, a part of the freehold, than in more modern times. As civilization has advanced, and trade, the mechanic arts, and other industries

have multiplied and increased in development, and correspondingly, in their necessities and wants of reasonable convenience, there has been a growing relaxation of the strict rule of law mentioned in their favor.

It is the policy of the law to encourage trade, manufactures, and transportation, by affording them all reasonable facilities. Buildings, fixtures, machinery, and such things, certainly intended and calculated to promote them, are treated, not as part of the land, but distinct from it, belonging to the tenant, to be disposed of or removed at his will and pleasure. Hence if a house, or other structure, is erected upon land only for the exercise of trade or the mixed purpose of trade and agriculture, no matter how it may be attached to it, it belongs to the tenant, and may be removed by him during his term, and in some classes of cases, after it is ended; though the tenant, after his term is over, would, in going back upon the land to get his property, be guilty of a trespass in going on the land, and only in that respect, the property would remain his.

The exceptions to the general rule pointed out above are well settled, and the practical difficulty in any case arises in pointing out when the general rule, or the exception, applies. The exception does not depend upon the character of the structure or thing erected, or whether it is built of one material or another, or whether it be set in the earth or upon it, but whether it is for the purposes of trade or manufacture, and not intended to become identified with and part of the land; this is the test. *Pemberton* v. *King*, 2 Dev., 376; *Moore* v. *Valentine*, 77 N. C., 188; *Clives* v. *Mowe*, 2 Smith's, L. C., 99, and notes; *Van Ness* v. *Packard*, 2 Pet., 137; Taylor on L. and T., §§544, 545, 546; Arch. L. and T., 366.

The defendant's counsel insisted in the argument, that if the plaintiff might have removed the building in controversy while it was in its possession, it certainly would not have the right to do so after it had gone out of possession of the land, and after the lapse of two years.

If the property is to be treated as personalty, and distinct from, and not a part of the land, we see no reason why the plaintiff may not remove it, although it had gone out of possession of the land. The plaintiff might return and get any article of personal property confessedly such. It may do the same as to the house in question, if it be settled that it is not of the land, unless it appears that the plaintiff relinquished its right.

In *Pemberton* v. *King, supra*, the court say "the general rule is, that any erection, even by the tenant, for the better enjoyment of the land, becomes a part of the land, but if it be purely for the exercise of a trade or for the mixed purpose of trade and agriculture, it belongs to the tenant, and may be removed during the term or after its expiration, though in the latter case the tenant will be guilty of a trespass in entering upon the land for that purpose, and in that respect only." The erection may be removed, because it is not in contemplation of law a part of the land, but personalty, and belongs to the tenant, and he may therefore remove it at any time.

There are authorities which decide that the tenant may remove the buildings while he remains in possession of the land, but not after he has yielded possession thereof. These go upon the ground that if the tenant neglects to avail himself of his right within the period of his term, the law presumes that he voluntarily relinquished or abandoned his claim in favor of the landlord, but such presumption cannot arise, where the facts and circumstances, and the nature of the property, and the uses to which it is devoted, combine to rebut such a presumption. If the tenant yields possession and leaves the structure standing, this fact may be evidence that it was not used or intended only for the purpose of trade or manufacture, or of abandonment of it, but it could not change the established character of the property.

The character of the structure, its purpose and the circumstances under which it was erected, the understanding and agreement of the parties at the time the erection was made, must all

be considered in determining whether it became a part of the freehold or not.

In this case, the ancestor of the defendant understood that the plaintiff desired to use the land solely for the purposes of a railroad and the erection of structures incident and necessary to it, and to be used in connection with it, only for storing freights and carrying on its business at the station at Newton. He consented to the use of the land and the erection of the building for that purpose. It was plain to him, as it must have been to everybody acquainted with the facts, that the building was to be used for that and no other purpose, and that it was not intended to aid in the enjoyment of freehold, or to be in any way or manner advantageous to the person entitled to the reversion or the inheritance. The nature of the business of the plaintiff, and the uses to which the structure in question was to be devoted, go to show that at the time the road and depot building were constructed, it was not intended or contemplated by the owner of the land or the plaintiff that they should become part of and merged in the freehold, but that it was to be used solely for the purposes of the business and trade of the plaintiff, and to remain or be removed as the interests and fortune of that trade might require.

We think, also, that the presumption did not arise in this case that the plaintiff relinquished or abandoned the house in question to the defendant. The legislature authorized and required the change of the line of the road, and to do this, in the order of things, required an indefinite period of time, dependent upon the extent of the work to be done and many contingent circumstances. It appears that the new depot, rendered necessary by the change, was to be built near by the old one; that the house in question would be useful to the plaintiff in making the required changes; and there was no apparent motive of any kind for an abandonment of the property. There is nothing in the nature or circumstances of the change that can be reasonably construed to create the legal presumption of relinquishment of the right of the plaintiff to remove the building to the defend-

ant; but, on the contrary, the nature of the change of the road, the time required and the manifest usefulness of the building to the plaintiff, operate to prevent the presumption in favor of the defendant. The presumption relied upon does not arise or apply in all cases, and it certainly does not where the nature of the property, the uses to which it is devoted and may be devoted by removal, the indefinite period of time to be occupied in the removal of that and other property devoted to kindred uses, naturally and reasonably point to a different conclusion.

The plaintiff's counsel, on the argument, cited the cases of *Wagner* v. *Railroad*, 22 Ohio State Rep., 563, and *Railroad* v. *Canton Co.*, 30 Md., 347, as bearing directly upon this case. We find them very much in point and cite them with approval.

The house in question was not intended at the time it was built to become part of, or for the benefit of the land on which it was erected. It was erected by the plaintiff with a knowledge and assent of the ancestor of defendant, for the sole purpose of carrying on its business or trade. It is, therefore, personal property. No legal presumption of relinquishment or abandonment of the right to remove it, to the defendant, arises. The plaintiff is, therefore, entitled to have and remove it as it may see fit to do.

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

No error. Affirmed.

JAMES E. SHEPHERD v. COMMISSIONERS OF WAKE.

Judge of Superior Court—Compensation for holding special terms.

1. A judge of the superior court is entitled to one hundred dollars per week for holding special or additional terms, to be paid by the county in which they are held.

2. The January and June terms of Wake superior court are additional terms, created by the act of 1872–'73, ch. 1, for the holding of which the judge is entitled to one hundred dollars per week, by virtue of section four, which, being of a local nature, is saved from repeal by THE CODE, §3873.

CONTROVERSY without action under THE CODE, §567, heard at Spring Term, 1884, of WAKE Superior Court, before *Avery, J.*

The facts upon which this controversy is submitted are as follows:

The plaintiff, a duly elected and qualified judge of the superior court, held the January term, 1884, of said court, beginning on the 7th day of January, 1884, and continuing for three weeks. In pursuance of the act of 1872–'73, ch. 1, the plaintiff claims that he is entitled to one hundred dollars a week for holding said term, and has demanded payment of the same from the defendant commissioners. The validity of the claim being denied and payment refused, this case is presented by agreement of the parties to the end that the question may be passed upon and their rights and liabilities determined.

The court below held that the plaintiff was entitled to compensation as claimed, and rendered judgment in his favor for three hundred dollars, and the defendants appealed.

Messrs. Walter Clark, W. S. Mason and *Gatling & Whitaker*, for plaintiff.

Messrs. E. C. Smith and *Fuller & Snow*, for defendants.

ASHE, J. The constitution provides that the state shall be divided into nine judicial districts, for each of which a judge shall be chosen; and there shall be held a superior court in each county, at least twice in each year, to continue for such time in each county as may be prescribed by law. But the general assembly may reduce or increase the number of the districts. Art. IV, §10.

By section 910 of THE CODE, two superior courts a year have been assigned to each county of the state, except the counties of

Wake, Cumberland and Robeson; to Wake, two additional terms are given, and to Cumberland and Robeson, one additional term to each.

By section 3734 of THE CODE, it is provided that "the judges of the superior court shall each have an annual salary of twenty-five hundred dollars in full compensation for all judicial duties assigned them by the general assembly; and for the holding of a special or additional term of the superior court, the judge presiding shall receive one hundred dollars for each week, to be paid by the county in which the special term is held, on the production of the certificate of the clerk of the court aforesaid."

In order to ascertain which of the four terms of the superior court of Wake are to be regarded as additional terms, it is necessary to refer to the law as it existed before THE CODE went into operation. And we find on reference to the act of 1872–'73, that the January and June terms of the court were created as additional terms for that county. The judges are therefore entitled, by virtue of section 3734, to one hundred dollars per week for holding the January and June terms of the superior court for said county, to be paid by the commissioners of said county.

It will be noticed that there is in section 910 a special provision that the expense of holding the *additional* terms in Cumberland and Robeson shall be defrayed by the commissioners of those counties respectively, but no such provision is made with respect to the county of Wake, for the reason, we presume, that the legislature supposed that the expense of holding the additional terms in that county had already been provided for in the fourth section of the act of 1872–'73, which, being of a local nature, was saved from repeal by section 3873 of THE CODE.

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

No error. Affirmed.

G. H. BROWN, Ex'r, v. B. C. CALLOWAY and others.

Judge's Charge.

The failure of a judge to charge the jury specially upon a particular point, where there are more than one presented by the evidence, cannot be assigned for error in this court. The party complaining should have submitted a prayer for special instructions upon the trial.

(*Simpson* v. *Blount*, 3 Dev., 34; *Arey* v. *Stephenson*, 12 Ired., 34; *Hice* v. *Woodard*, *Ib.*, 293; *Morgan* v. *Smith*, 77 N. C., 37, cited and approved).

CIVIL ACTION tried at Fall Term, 1883; of WILKES Superior Court, before *Shipp, J.*

This action was commenced before a justice of the peace and brought by appeal to the superior court, to recover a balance alleged to be due on a note. The execution of the note was admitted and the defendant relied upon the plea of payment. The case is stated in the opinion. Judgment for plaintiff; appeal by defendant.

Messrs. Armfield & Armfield and *D. M. Furches*, for plaintiff.
Mr. R. Z. Linney, for defendant.

MERRIMON, J. The record does not disclose any particular exception taken by the appellant in the court below, and we are unable to discover any error therein that entitles him to a new trial.

His counsel insisted on the argument that the court, in its charge to the jury, made the case turn altogether upon the question of the genuineness of the receipt from the testator of the plaintiff to the defendant, put in evidence by the latter, whereas he insisted that there was evidence of the payment of the debt, apart from the receipt in question.

The defendant pleaded payment of the debt specified in the complaint, and the receipt put in evidence is very broad in its

terms, and if genuine, in view of the evidence introduced, went very strongly to prove the payment of the debt. The plaintiff contended that the date of the receipt had been changed from the date of 1844 to 1866, and it appears that the question of the genuineness of this receipt was the main one raised on the trial, and the whole contest turned very largely, if not exclusively, on that. Nearly the whole of the testimony bore upon that question.

It is true, two witnesses testified that the testator of the plaintiff said in 1866 to them, that the defendant "had about paid him up," and another witness said that she saw the defendant pay plaintiff's testator some money in "June, after the war," and some paper was written, and the testator said he would "fix the papers right" when he got home. The main purpose of this evidence was, as is apparent, to aid in proving the genuineness of the receipt, to show that there was probably a reason why it should have been given in 1866, as it purported to be. This, as evidence of a full payment of the balance due, was by itself slight, certainly not very convincing.

If the defendant intended to rely upon this evidence of payment, apart from the receipt, he should have so insisted, and if need be he ought to have prayed the court to instruct the jury specially that there was some evidence of payment apart from the receipt. This it seems he did not do.

If the court fails to charge the jury specially upon a point, when there are more than one presented by the evidence, this is not error, unless it was requested to give the charge; and when, upon a trial, a principal question was in issue, and the result turned mainly upon it, and there were other possible views submitted to the jury, and the court failed to call them specially to the jury's attention, this cannot be assigned for error, unless the party complaining prays the court so to do. *Simpson* v. *Blount*, 3 Dev., 34; *Arey* v. *Stephenson*, 12 Ired., 34; *Hice* v. *Woodard*, *Ib.*, 293; *Morgan* v. *Smith*, 77 N. C., 37.

But in this case the court, after charging the jury with considerable particularity as to the main question (the genuineness of

the receipt), went further, and charged them "that in forming their conclusions as to the question of payment, they should take into consideration all the facts and circumstances, the endorsed payments and the other evidence in the case."

There was no prayer for special instructions, and the exception taken was to the charge of the court generally. The only error assigned in this court was that mentioned above. The charge was intelligent and fair, and free from any substantial error, and the judgment must be affirmed.

No error. Affirmed.

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*MAY MURRILL and others v. A. J. MURRILL and others.

Superior Court has no power to modify decree of this court.

The superior court has no power to modify or change a judgment or decree of this court certified to the court below. Its powers are confined to incidental matters of detail necessary to carry the decree into effect, not inconsistent therewith. The rule that the superior courts have authority to vacate or modify decrees made in a cause, at any time before final judgment, does not apply here.

(*Calvert* v. *Peebles*, 82 N. C., 334; *State* v. *Lane*, 4 Ired., 434; *Grissett* v. *Smith*, Phil., 297; *Perry* v. *Tupper*, 71 N. C., 380; *Rush* v. *Steamboat*, 68 N. C., 72; *Ray* v. *Ray*, 12 Ired., 24; *Ashe* v. *Moore*, 2 Mur., 383; *Welch* v. *Kingsland*, 89 N. C., 179, cited and approved).

PETITION for partition heard at Fall Term, 1883, of ONSLOW Superior Court, before *Philips, J.*

This suit was brought to the spring term, 1851, of the late court of equity in and for Onslow county, to sell the lands mentioned in the pleadings for partition. The lands were sold and notes taken from the purchaser for the purchase money, in pursuance to the decree of the court. These notes were never paid,

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

the makers thereof having become insolvent, and there was never any order directing the title to the land to be conveyed to the purchaser. Nevertheless, the commissioner who sold the land executed a deed therefor, to the purchaser, the defendant A. J. Murrill, and he executed a deed therefor to the defendant D. A. Humphrey.

At the spring term of 1882 of the superior court, it was decreed that there was due to the infant plaintiffs, as part of the proceeds of the sale of the lands, the sum of $1,883.33, with interest on the same from the 1st day of January, 1852, until paid, and that the money so due was a lien upon the land mentioned in the pleadings. The decree directed a sale of the land to be made on the first Monday in December of 1882, unless on or before that day the defendant should pay into court the said sum of $1,883.33, and the interest thereon. The decree further directed that the deed executed by the commissioner to the defendant Murrill, and that executed by the latter to the defendant Humphrey, be brought into court and cancelled, and declared the same to be void. From that decree the defendants appealed, and this court, upon the hearing of that appeal, affirmed the decree.

The decree and opinion of this court were duly certified to the court below, with directions to proceed accordingly.

Afterwards, at the fall term of 1883 of the court below, that court, at the instance of the defendants, undertook to modify and change the decree affirmed by this court, and decreed that the defendants, as tenants in common, were entitled to one-third of the lands mentioned in the pleadings, or one-third of the proceeds of the sale thereof; that, as it appears to the court that the lands would not sell for a sum sufficient to pay the plaintiff's debt and interest, the defendant Humphrey should have one-third of the proceeds of the sale thereof. This is the substance of the modification and change of the decree affirmed by this court, made by the last decree of the court below. From this decree the plaintiffs appealed.

Messrs. H. R. Bryan and *Strong & Smedes*, for plaintiffs.
Messrs. Nixon, Simmons & Manly, for defendants.

MERRIMON, J., after stating the above. It is very clear that it was the duty of the superior court to proceed in the case in that court, in strict accordance with the decree of affirmance in this court. Indeed, it had no authority to modify or change in any material respect the decree affirmed. The latter decree is conclusive as to the matters embraced by it, and the court below had no power to review, correct or modify it. Any further action taken in the case must be in pursuance of and consistent with it.

Upon the plainest principle, the courts, whose judgments and decrees are reviewed by an appellate court of errors, must be bound by and observe the judgments, decrees and orders of the latter court, within its jurisdiction. Otherwise, the court of errors would be nugatory and a sheer mockery. There would be no judicial subordination, no correction of errors of inferior judicial tribunals, and every court would be a law unto itself.

Appellate courts of errors are founded upon the fundamental principle and theory, and to the end that the errors of subordinate judicial tribunals shall be corrected by them in the orderly course of judicial procedure; the law applicable to the cases before them is unalterably settled and applied by their judgments and decrees, until and unless these be altered by themselves in a proper proceeding for the purpose, or by some proper action attacking them for fraud, mistake, or other like consideration as may be allowed by law. This view is in accordance with that of this court in *Calvert* v. *Peebles*, 82 N. C., 334. In that case the court, Mr. Justice ASHE delivering the opinion, said, "when this court announced by its decision that there was no error in the judgment of the court below, that court had no right or power to modify that judgment in any respect. It could only be done by direct proceeding alleging fraud, mistake, imposition,

&c." To the like effect are the cases of *State* v. *Lane*, 4 Ired., 434; *Grissett* v. *Smith*, Phil., 297; *Perry* v. *Tupper*, 71 N. C., 380.

This court is a court of errors in the broadest sense, and its judgments have all the force and effect of judgments of such courts, whether reference be had to the general principles of law applicable to them, or to the constitution and laws of this state. It is established as such a court; its jurisdiction and authority prescribed; and power to enforce its judgments conferred by the constitution. Art. IV, §§2, 6, 8, 12; THE CODE, §§957 and 962, prescribe how its judgments shall be entered, and the duties of the superior courts in respect to them. *Rush* v. *Steamboat Co.*, 68 N. C., 72.

The decree appealed from is manifestly in conflict with that affirmed by this court, and is intended to modify and change it. The latter established that a sum of money is due to the infant plaintiffs, and that this sum is a lien upon the land, in their favor, to the extent of the whole sum due: the former gives them but two-thirds of the proceeds of the land when sold, assuming that the land will not sell for a sum sufficient to pay the sum due them, and directs that the defendant Humphrey shall have one-third thereof.

It is unnecessary to enquire what were the grounds of this action of the court, for it is plain that it had no authority to make the decree; it was unauthorized and irregular. The court ought to have directed the sale of the land as provided by the decree affirmed by this court, only changing the same in such incidental respects as might be necessary to carry it into effect. The court had complete power to make all orders and decrees necessary for this purpose, not inconsistent with the decree affirmed.

We cannot suppose that the court below had any purpose to set at naught and disregard the decree of this court, but we take it that that court misapprehended the scope and effect of its decree affirmed by this court, and the extent of its powers over its own records. Strictly, an appeal was not the proper remedy for

the appellants, because there was not strictly error, and, therefore, no question raised for this court to decide. The object of the appellants was to have the decree in their favor recognized and enforced by the court, and this could be accomplished by a *mandamus*. *Ray* v. *Ray*, 12 Ired., 24. This, however, is unnecessary, for we do not doubt that the superior court will do its office according to law.

The counsel for the appellees, in the argument before us, insisted that the superior court had power to vacate and modify orders and decrees made in a cause before it at any time before final judgment, and he relied upon *Ashe* v. *Moore*, 2 Murp., 383, and *Welsh* v. *Kingsland*, 89 N. C., 179. The counsel clearly misapprehends the cases cited. Those cases and many others like them decide that the superior court may, before final judgment, look into the whole record, correct and modify its previous interlocutory orders and proceedings, properly ascertained to be erroneous, but this does not imply, or intend, that the superior court shall have power to revoke or modify a judgment of this court, affirming a final judgment, or its opinion in respect to interlocutory judgments, orders and decrees of that court in any case. The judgment of this court in respect to any question in the case reviewed by it must be treated as final and conclusive in the whole course of the action, and not subject to review or correction by the court below. The decision of this court settles definitely all questions reviewed by it. The chief object of this court is to settle finally questions of law as applicable to the cases properly brought before it.

The superior court improperly undertook to modify and change its decree affirmed by this court, and its action in that respect must be set aside, and the court proceed in the case according to law. Let this be certified to the superior court of Onslow county.

Error. Reversed.

*MARK YOUNG v. W. W. ROLLINS and others.

Jurisdiction—Contempt Proceeding—Injunction and Receiver.

1. The jurisdiction of this court over "issues of fact," under article four, section eight of the constitution, is restricted to interlocutory and final judgments which are exclusively equitable in their nature, and which a court of equity as a distinct and separate tribunal could alone render, under the former system.
2. In a proceeding for contempt, the facts found by the judge are conclusive, and this court can only pass upon their sufficiency to warrant his judgment.
3. An order appointing a receiver of a defunct corporation with power to receive into his possession all the effects of the company, and also investing him with the usual rights and powers of receivers, involves the correlative duty of delivering the same to him by the late officers of the company in whose hands the funds are, although not expressly required in the decretal order.
4. The three year limitation in reference to the appointment of receivers under Rev. Code, ch. 26, §6, does not apply here.
5. A receivership continues as long as the court may think it necessary to the performance of the duties pertaining thereto.
6. The validity of an injunction is not affected by a failure to require an indemnity bond to accompany it; nor is a party for that reason justified in disobeying the mandate, but if aggrieved, his remedy is in a motion to dissolve.
7. Upon the facts found, it was held that this is a case of manifest disregard of the directions of the court, and in law, a contempt of its authority.

(*Jones* v. *Boyd*, 80 N. C., 258; *Pain* v. *Pain*, *Ib.*, 322; *Biggs Ex-parte*, 64 N. C., 202; *Cromartie* v. *Commissioners*, 85 N. C., 211; *Von Glahn* v. *DeRosset*, 81 N. C., 467; *Sledge* v. *Blum*, 63 N. C., 374; *Richards* v. *Baurman*, 65 N. C., 162; *Miller* v. *Parker*, 73 N. C., 58, cited and approved).

CONTEMPT PROCEEDING heard at chambers in Morganton on the 12th of September, 1883, before *Graves, J.*

This was a motion to attach the defendants W. W. Rollins and C. M. McLoud for contempt, and to require them to make a sworn statement and inventory of their receipts and disbursements of

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

the funds, and their entire transactions in reference to the affairs of the railroad company, as set out in the opinion of this court, and to require them to pay over to the receiver, B. F. Long, the sum of $23,250, alleged to be in their hands. The motion was based upon the affidavit of the receiver and others.

From the judgment finding the respondents guilty of contempt and imposing a fine, and directing payment to the receiver, the respondents appealed.

Messrs. W. M. Robbins and *Hinsdale & Devereux*, for plaintiff.
Messrs. D. Schenck and *J. H. Merrimon*, for defendants.

SMITH, C. J. After due notice of an intended motion and the issue of an intermediate temporary restraining order, before obtaining which the plaintiff was required to execute and did execute a bond with sureties in the sum of one thousand dollars for the indemnity of the defendants, the following interlocutory judgment was rendered in the cause at chambers, on June 15th, 1880, by the judge then presiding at the several superior courts of the eighth district.

On reading the affidavits filed in this action on the part of the plaintiff and defendants, and being debated by the counsel respectively for the plaintiff and defendants, it is considered by the court that Benjamin F. Long be appointed a receiver, to take into his possession all the choses in action and effects of every kind, belonging to the late corporation, known as The Western Division of the Western North Carolina Railroad Company, upon his entering into an undertaking in the sum of twenty thousand dollars payable to the state of North Carolina, with two or more sufficient sureties, to be approved by the clerk of the superior court of McDowell county.

That upon the filing of such undertaking and its approval by the said superior court clerk, the said Benjamin F. Long, as such receiver, shall be vested with the usual rights and powers of receivers under this court, and shall have power to receive

into his possession all the effects and choses in action belonging to the late corporation (The Western Division), and to sue for and recover all such effects and choses in action lately belonging to said corporation, and to do all other things proper as such receiver.

That the defendant W. W. Rollins and the other defendants named in the plaintiff's affidavit as directors of the said Western Division, be enjoined and restrained from disposing of, in any manner, the effects and choses in action belonging to the said late Western Division until the final hearing of this action.

The bond required of the receiver was executed, as appears from its date, on July 1st, 1880, and is justified by several sureties at different times afterwards, the last justification being on March 25th, 1882, four days after which it was filed in the office of the superior court clerk of McDowell and by him examined and approved.

It was for an alleged violation of this mandate that a rule was granted the plaintiff upon affidavit against the defendants W. W. Rollins and C. M. McLoud, returnable on September 12th, 1883, at Morganton, before *Graves, J.*, requiring them to "answer and show cause why they should not be attached for contempt of court, for disobedience to, and refusal to comply with the orders of the court," and why they should not pay over to the receiver the sum of $23,250, alleged to be in their hands, and such other effects of the company, with the books and papers relating thereto, of which they have possession or control.

The rule was answered in an elaborate explanatory statement, upon consideration of which and of affidavits produced in support and opposition, the judge rendered judgment, finding the facts and declaring the law as follows:

This motion was made at Newton, in the county of Catawba, on the 29th day of August, 1883, the plaintiff and defendants being present and represented by counsel, and was continued to be heard at Morganton this day, and the motion being now renewed, and being heard upon affidavits and answers and argument of counsel;

It is considered and declared to be the facts that the restraining orders heretofore made by Judge Avery were duly served upon the respondents, and that the said respondents had notice of the restraining order and injunction made in this case by Judge Gilmer.

It is further found and declared to be the facts that in November, 1881, the said respondents did dispose of a number of bonds of the said property and effects of the said Western Division of the Western North Carolina Railroad Company for the sum of $23,250, and that they applied of the said sum so by them received, the sum of $12,372 to discharge the debts for which said bonds were pledged, and they received in cash $10,878.

It is, therefore, adjudged and decreed to be a fact that the said respondents have wilfully disobeyed the orders of the court heretofore made, enjoining and restraining them from transferring or disposing of the effects belonging to the Western Division of the Western North Carolina Railroad Company.

It is further declared to be the facts that the said receiver of the said Western Division of the Western North Carolina Railroad Company, Benjamin F. Long, appointed by order of Judge Gilmer, gave bond and sureties duly approved, and that afterwards, on May 12th, 1883, he demanded of the said respondents to account for and pay over to him, as receiver as aforesaid, all sums of money due and owing to the said Western Division of the Western North Carolina Railroad Company.

And it is further declared to be the fact that the said respondents, W. W. Rollins and C. M. McLoud, have failed and refused to pay over the money in their hands due and belonging to the said Western Division of the Western North Carolina Railroad Company to the said receiver.

It is, therefore, adjudged and declared that the said respondents have wilfully disobeyed the restraining orders heretofore made in the cause, and it is ordered and adjudged that the said respondents, W. W. Rollins and C. M. McLoud, be each fined one hundred dollars for such disobedience.

It is further ordered and adjudged that the said respondents, W. W. Rollins and C. M. McLoud, pay into the office of the clerk of the superior court of McDowell county, on or before the Monday of the second week of fall term, 1883, of said court, the sum of $10,378, with interest thereon from the 12th day of May, 1883; and it is further ordered that upon the paying into office of the said sum, the clerk of the said court shall pay the same over to the said B. F. Long, receiver as aforesaid. It is further ordered that the said respondents pay the costs of this proceeding, to be taxed by the clerk of the said superior court of McDowell.

It is further considered that the findings herein made are for the purposes of this motion, and that the several findings and orders herein made shall not in any way prejudice the said receiver, B. F. Long, or the said respondents, C. M. McLoud and W. W. Rollins, in any subsequent motions or proceedings for further accounting between the parties, but as to all subsequent proceedings each party shall proceed as advised.

From this judgment the respondents appeal to the supreme court.

It is adjudged that the respondents' appeal bond for costs of the appeal be fixed at the sum of $25.

It is further ordered that the respondents give bond in the sum of $11,000, with sufficient sureties, to be approved by the clerk of the superior court of McDowell county, to abide by and perform the judgments rendered in this cause.

The first inquiry to be met is as to the character of and effect of the finding of facts by the court, and whether upon the appeal we can examine and pass upon the evidence in their support. It is contended in argument that this is an interlocutory order made in a case cognizable in a court of equity under our former system, and the appeal requires us to determine the facts as well as the law, as is held in *Jones* v. *Boyd*, 80 N. C., 258. Taking this view, the respondents' counsel has discussed very

fully the affidavits which were before the judge in the court below.

We recognize the interpretation put upon the amendments introduced into the constitution by the convention of 1875 by the ruling in that case, but we do not consider the present appeal within the principle. This is not one of those interlocutory orders in furtherance of the objects of the suit which we review in full under the enlarged jurisdiction conferred.

A proceeding for contempt, to vindicate the rightful authority of the court and to compel obedience to its lawful commands, is incidental to a course of judicial proceedings, but opens a new issue with those against whom it is directed. It is a function not confined to a court of equity, but possessed also by a court of law, and is essential to the full exercise of jurisdiction by both. *Pain* v. *Pain*, 80 N. C., 322.

If the appeal from the ruling was in a case before a court of law, it is plain we should be bound by the facts found and could only review matters of law arising out of them: why should a different practice prevail where the cause is pending before a court of equity? While we have but one form of action, we are compelled to recognize the former distinction to some extent, in order to give practical operation to the constitution, while it is equally necessary, as far as practicable, to preserve uniformity in actions instituted and prosecuted under the present system.

There should be one and the same rule observed in exercising jurisdiction over appeals from orders, which a court of law was a scompetent to make as a court of equity, in a suit before it, and hence, to avoid confusion and conflict, we are constrained to restrict the jurisdiction, as enlarged, to judgments final as well as interlocutory, which are exclusively equitable in their nature, and which a court of equity as a distinct and separate tribunal could alone formerly render, and upon appeals in such cases we must look into the evidence, written and embraced in the transcript, and therefrom determine the facts as well as the law arising from them.

In case of a fine or commitment for a contempt in the presence of the court, and punitory in its effect, no appeal is allowed; yet the particulars of the offence—in other words, the facts upon which the judge acts—must be set out in the record in order to a review of the exercise of judicial power by this court, when the record is brought up, as it may be by a writ of *certiorari*. THE CODE, §650; *Biggs, Ex-parte*, 64 N. C., 202.

Where the fine or commitment is not punitory merely, but coercive and to enforce obedience to the orders of the court, made in the progress of the action, an appeal lies at once, but there is the same necessity that the facts should be found to enable the appellate tribunal to revise the exercise of the power and determine its lawfulness. *Cromartie* v. *Commissioners*, 85 N. C., 211, and cases cited.

In the absence of any adjudication, and we have found none to the contrary, our conclusion is that the facts found by the judge upon evidence are binding upon the appeal and we can only inquire if they are sufficient to warrant his judgment.

The validity and force of the order restraining the respondents from making any disposition of the bonds of the defunct corporation in their possession and directing their transfer to the receiver, are assailed on various grounds, as well as the present proceeding consequent upon the alleged violation of the mandate.

1. The refusal to account with and pay over the effects of the company to the receiver is justified on the ground that this is not expressly required in the decretal order.

It is true those words are not contained in the mandate, but the receiver is invested "with the usual rights and powers of receivers" and specially with power "to receive into his possession all the effects and choses in action" of the dissolved company, and this involves the correlative duty of delivery by the respondents, one its late president, the other a director; for how can the receiver get possession when the respondents to whom the command applies withholds it? Not only is the delivery

directed (for a suit was not contemplated when full redress could be afforded between the parties already before the court), but any other disposition of them is restrained.

2. It is urged that the order was operative only upon the execution of the prescribed bond, and this being completed and delivered only on March 29th, 1882, the lapse of three years after the corporation ceased to exist, the appointment became a nullity under the statute. Rev. Code, ch. 26, §6, as explained in *Von Glahn* v. *De Rosset*, 81 N. C., 467.

But the receiver's appointment was made more than two years previous, and his office does not cease until he shall have performed all the duties devolving upon him, for the statute expressly provides for its remaining "as long as the court shall think necessary for the purposes aforesaid," that is, until the resources of the corporation are called in and recovered.

If it were otherwise, a defendant sued need only prolong and put off the trial of an action until the time had elapsed, to escape altogether from liability for a debt. The demand was made after the bond was given, and consequently when the receiver was vested with all the rights and powers conferred by the order. But a sufficient answer to the objection is found in the fact that the act annulling the Western Division company appoints the Western North Carolina company its trustee and receiver, and upon its ceasing to exist, the appointment is of necessity and but a substitution of another in place of a corporation receiver, which had ceased to exist under the provisions of the act of March 29th, 1880, as held in the former appeal, reported in 85 N. C., 485.

3. It is next objected that an indemnifying undertaking is an indispensable prerequisite to the issuing of an injunction, C. C. P., §192, and none being required in the order, it was ineffectual and void.

Without passing upon the question whether the bond given upon the issue of the previous preliminary order extends to that which continued the restraint, as argued for the appellees, it is

a sufficient answer to the objection that respondents were before the judge when it was made, and while they appealed from it, it was not upon the ground that it was defective in this respect, and the validity of the order was upheld in this court.

But the absence of the requirement for an indemnity does not render the order void so that its commands may be violated with impunity. While it remains it must be obeyed, and, if irregular, vacated or corrected by an application to the authority that made it.

In reference to such an order, it must be obeyed as long as it exists, and the remedy of an aggrieved party must be found in a motion to dissolve and not in setting it at defiance. His only safe course is to obey until the order is set aside. 1 Whit. Prac., §104.

In *Sledge* v. *Blum*, 63 N. C., 374, PEARSON, C. J., expressed the opinion that an injunction issued without bond is not void, though irregular, and that a bond may be filed *nunc pro tunc*, and the irregularity cured.

In *Richards* v. *Baurman*, 65 N. C., 162, the bond was given before the motion was passed on to vacate, and it was held to remove the grounds for the motion in this respect.

In *Miller* v. *Parker*, 73 N. C., 58, the order was vacated upon the peremptory demands of the statute, because no such bond of indemnity had been given.

But none of the cases which we have been able to find in our own reports sustain the proposition that the order for an injunction is a nullity unless preceded or accompanied with such bond; nor has any, except that of *Pell* v. *Lander*, 8 B. Monc. (Ky.), 554, decided elsewhere, been called to our attention. This case is in its features exceptional, as it was an attempt to arrest a sale under execution, and the officer chose to obey the mandate in the writ. It cannot be regarded as establishing a general principle.

We prefer to adhere to the rule which disallows a violation of a judicial order while it remains, and compels a party affected by its operation to make a direct application for its reformation or vacation.

4. Assuming the facts as found to be true, it is a case of manifest disregard of the directions of the court, and in law a contempt of its authority which fully warrants the action of the judge.

We cannot listen to considerations of policy and the motives which promoted the effort to obtain supposed advantages to those interested in the funds in this known disregard of the orders. The court, for reasons adjudged sufficient, commanded this fund to be retained and paid over to the receiver, and this the respondents should have done and then asked for an allowance of any claim they may have against it. It is the most imperative duty of a court, when it makes a lawful order, to compel obedience; and a judicial tribunal would be useless, if it failed to exercise its power, for most practical purposes.

Upon a review of the case we find no error, and this will be certified to the court below.

No error. Affirmed.

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* M. YOUNG v. W. W. ROLLINS and *others*.

Parties—Summons—Amendment.

1. The refusal of the court below to grant plaintiff's motion to make an additional party at chambers, in this case, where notice was served upon such party, but without giving notice of the intended motion to those already defendants, is affirmed.
2. The additional defendant could have been brought in by summons regularly issued.
3. Whether the judge had the power to allow such amendment out of term time.—*Quære.*

MOTION heard at Chambers on August 29, 1883, in an action pending in MCDOWELL Superior Court, before *Graves, J.*

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

The plaintiff moved to make the Western North Carolina railroad company a party defendant. The motion was refused on the ground that the court had not the power to grant it, and the plaintiff appealed.

Messrs. Hinsdale & Devereux and *W. M. Robbins*, for plaintiff.

Messrs. D. Schenck and *Reade, Busbee & Busbee*, for defendants.

SMITH, C. J. This action was begun on February 10th, 1880, and the Western North Carolina railroad company, as now organized, formed on May 27th thereafter, upon the extinction of the preceding corporation of the same name. On August 17th, 1883, notice signed by counsel of the plaintiff was issued and two days later served upon the said company, of a motion to be made before the judge holding the courts of the district of which McDowell county is part, at Newton, in Catawba county, on the 29th day of that month, "to make the Western North Carolina railroad company a party defendant in the action," and to admit other plaintiffs.

At the time and place mentioned the company appeared and affidavits were submitted and read on its behalf, and in support of the motion to make the company a party defendant, when the following ruling was made:

The court doth adjudge that it has not power in this case to make the W. N. C. R. R. Co. a party defendant, and upon this ground the motion to make the W. N. C. R. R. Co. a party is refused.

From this judgment the plaintiff appeals.

We do not understand, as the appellant's counsel do, the application to be for *leave to issue a summons* and thus bring in the company, which is present before the judge upon notice, as an additional defendant, but to render the application *effectual at once by a judicial order operating upon the company.* Thus interpreted, and the repetition in very words contained twice in

the denying judgment indicates that the ruling was predicated upon the form of the motion, we concur in the refusal. That such was the view of His Honor in the peremptory and unexplained responsive action to the proposition, derives support from the fact that no notice was given to the defendants who were entitled to the information of the intended motion, while the company, which really had no interest in the matter until served with summons, did have such notice. Then the opinion of the court that it had no such power as was invoked, "*in this case*," does not seem to imply a total abnegation of a right to authorize the addition of new defendants by process sued out for them, unless the application be during the term of a court, since there is no suggestion that the refusal was upon that ground.

We do not decide upon the general question of the exercise of the right of allowing such amendment out of term time, the inconvenience of which will readily occur to any one, nor to the sufficiency of the reasons assigned for that now proposed, after such long delay, and when the only object seems to be to reach other assets which can as well be pursued in a separate action, the consideration of which belongs to the judge whose discretion is addressed and whose decision is not reviewable.

Our conclusion is that His Honor was right in denying the motion in the form assumed, as beyond his authority to grant it. If we misconstrue the ruling, the words used to express which are in such guarded and precise language, no harm can come to the plaintiffs, since they can renew the application in an unobjectionable form, and, indeed, if never allowed, a remedy is open to the receiver in a new and distinct suit against the company, charged with having obtained some of the assets of the defunct corporation which it succeeds. There is no error.

No error. Affirmed.

*E. F. ASHE v. J. T. GRAY.

Jurisdiction—Action for deceit and false warranty.

1. The former ruling in this case (88 N. C., 190), to the effect that an action for deceit and false warranty in the sale of a horse, is cognizable in the superior court, though the damages claimed amount only to fifty dollars, is affirmed.

2. *Held further:* Although some of the articles in the complaint show that the plaintiff's claim rests in contract, yet taken in connection with the others and considering the complaint as an entirety, it sets out a cause of action *ex delicto.*

3. Where a complaint contains a cause of action of which the court has not, and others of which it has jurisdiction, the court will disregard the former and proceed to try the latter.

(*Watson* v. *Dodd*, 72 N. C., 240; *Hicks* v. *Skinner*, *Ib.*, 1; *Haywood* v. *Daves*, 81 N. C., 8; *Lewis* v. *Rountree*, *Ib.*, 20; *Devereux* v. *Devereux*, *Ib.*, 12; *Mizell* v. *Simmons*, 82 N. C., 1; *Lassiter* v. *Ward*, 11 Ired., 443; *Blanton* v. *Wall*, 4 Jones, 532; *Chamberlain* v. *Robertson*, 7 Jones, 12; *Street* v. *Tuck*, 84 N. C., 605; *Finch* v. *Baskerville*, 85 N. C., 205, cited and approved).

PETITION to rehear filed by defendant and heard at February Term, 1884, of THE SUPREME COURT.

The decision in this case, as reported in 88 N. C., 190, was that an action for deceit and false warranty in the sale of a horse, is cognizable in the superior court, though the damages claimed amount only to fifty dollars. The defendant asks that the ruling be reversed, and states in his petition to rehear:

1. The complaint and answer show that plaintiff did not sue for deceit and fraudulent representations, associated with a cause of action for a false warranty, but that the first and second articles of the complaint are allegations of a contract of warranty, for the breach of which damages are laid at fifty dollars; and the third and fifth articles of the complaint set out a cause

*Mr. Justice ASHE being a relation of the plaintiff, did not sit on the hearing of this case.

of action for deceit and false warranty. The plaintiff, in his prayer for judgment, treats these articles as separate causes of action.

2. The court erred in holding that the deceit practiced, in connection with the sale and inseparable from it, was the gist of the action. The only issues asked by plaintiff were as to the contract of warranty and damages, notwithstanding all the allegations in the complaint as to deceit and false warranty were expressly denied in the answer, and they must therefore be deemed to have been abandoned (*Tayloe* v. *Steamship Co.*, 88 N. C., on page 17), leaving the cause of action on the contract—damages fifty dollars—and ousting the jurisdiction of the superior court.

3. The court erred in holding that the averments in the complaint determined the jurisdiction. If it be true that the "sum demanded" and not the "amount in dispute" controls the jurisdiction, it does not follow that, because a plaintiff joins a tort with contract (which is less than $200) the superior court necessarily has jurisdiction.

Messrs. J. A. Lockhart and *Hinsdale & Devereux*, for plaintiff.
Mr. J. D. Shaw, for defendant.

SMITH, C. J. "The weightiest considerations make it the duty of the court to adhere to its decisions. No case ought to be heard upon petition to rehear unless it was decided hastily, and some material point was overlooked, or some direct authority not called to the attention of the court."

This language of the late Chief-Justice, found in the opinion in *Watson* v. *Dodd*, 72 N. C., 240, is almost in the very words reiterated by different members of the court in *Hicks* v. *Skinner*, at the same term; *Lewis* v. *Rountree*, 81 N. C., 20; *Haywood* v. *Daves*, *Ib.*, 8; *Devereux* v. *Devereux*, *Ib.*, 12; and *Mizell* v. *Simmons*, 82 N. C., 1. The rule is a safe and salutary rule, sufficient to

admit of the prompt correction of errors in law, and securing consistency and uniformity in its established principles.

We have not had our attention directed upon this rehearing to any overlooked adjudication or authority upon the point wherein lies the alleged erroneous ruling in law, but the argument invites us to reconsider the complaint and put upon it and the results of the verdict a different construction from that before given.

Upon a re-examination of the complaint, we adhere to the opinion, that while the first three articles, separated from what follows, will admit of an interpretation that the claim rests in contract, yet, considered in connection with the context and the complaint as an entirety, it is manifestly intended to set forth a cause or causes of action *ex delicto*, combining a cause of action *upon a false warrant*, which dispenses with a *scienter*, with one upon false and fraudulent representations in which a *scienter* must be alleged and shown.

The gist of the complaint upon the false warranty being in the *inducement* which led to the making of the contract and not in the violation of the contract itself, the fifth article concludes with the averment that "by the said false, fraudulent, and deceitful representation, *and by the false warranty of the defendant*, the plaintiff was induced to exchange horses with the defendant."

The vicious propensities of the horse seem to have been conceded, as no issue upon this matter was submitted; and the sole controversy was as to the making the warranty, the alleged mismanagement of the horse by the plaintiff in the development of the vicious traits, and in contributing to his damages, and their measure.

These responses are as appropriate to the cause of action based upon a *false warranty*, as to a cause of action founded on a contract broken.

We add to the cases cited in the former opinion, and in corroboration, the following: *Lassiter* v. *Ward*, 11 Ired., 443;

Blanton v. *Wall*, 4 Jones, 532; *Chamberlain* v. *Robertson*, 7 Jones, 12; *Williamson* v. *Allison*, 2 East, 446.

The presence in the complaint of a cause of action whereof the court has not, with those whereof the court can take cognizance, cannot defeat the exercise of jurisdiction over the latter, and may be disregarded. Indeed, on demurrer, the effect of misjoinder is to separate the causes of action, not to put an end to the suit. *Street* v. *Tuck*, 84 N. C., 605; *Finch* v. *Baskerville*, 85 N. C., 205; C. C. P., §131.

The complaint being for a tort, sustains the jurisdiction, though the charge of a *guilty knowledge* of the falsity of the representations which influenced the plaintiff in making the contract of exchange, may not have been proved, and for the want of which no issue was asked to be made up.

We therefore affirm the judgment and deny the application of the defendant at his costs.

No error. Affirmed.

ELIZA WISEMAN v. THOMAS WITHEROW.

Jurisdiction—Running Account—Sum demanded must be in good faith as to amount due.

The superior court has no jurisdiction of an action to recover upon a running account of $312 where it is shown that from time to time the defendant had reduced the amount by sundry payments, to a sum under $200 at the time the action was brought. While the sum demanded ordinarily determines the jurisdiction, yet the plaintiff must make his demand in good faith and not for the purpose of giving the court jurisdiction.

(*Froelich* v. *Express Co.*, 67 N. C., 1, cited and approved).

CIVIL ACTION tried at Spring Term, 1883, of MCDOWELL Superior Court, before *Gudger*, *J.*

Upon the call of this case, the defendant's counsel moved to dismiss the action upon the ground of a want of jurisdiction,

and "it appearing to the court that it has not jurisdiction of the subject matter of the action, it is adjudged that the same be dismissed at plaintiff's costs," and from this ruling the plaintiff appealed. The facts necessary to an understanding of the point decided in this court are sufficiently stated in its opinion.

Messrs. Sinclair & Sinclair and *J. B. Batchelor*, for plaintiff.
Mr. M. H. Justice, for defendant.

MERRIMON, J. It is the sum of money *demanded* in the action upon the contract, express or implied, that determines the question of jurisdiction, in a case like the present one, but the law contemplates that the plaintiff will make his demand in good faith and with reasonable certainty, as to the amount in dispute, and with no purpose to evade or give the jurisdiction improperly.

If it *manifestly* appears to the court that the sum demanded is greater than was really due, and was so alleged for the purpose of giving the court jurisdiction, when in truth and law it could not attach, then, in the language of the late Chief-Justice PEARSON, in *Froelich* v. *Express Co.*, 67 N. C., 1, "it is the duty of the court, '*ex mero motu*,' to interfere and prevent an evasion of the constitution."

In this case, the court below does not specify the particular ground upon which the judgment dismissing the action for want of jurisdiction was founded, but we must presume, in view of the facts appearing in the record, that it rested upon the ground that there was obviously a purpose to give the court jurisdiction, when the facts and the law arising upon them would not allow the same.

It seems to us that there were facts that warranted the action of the court. The plaintiff sued for $312, for feeding and lodging the defendant's servant, at regular intervals, for a period embracing several years. Pending that time, the defendant from time to time paid on account of such running indebtedness sun-

dry sums of money, thus discharging the same *pro tanto*, until, at the time the action was brought, he owed her only the sum of $58.75. This appears from the plaintiff's own showing.

Her daughter, under her direction, kept the account, and she knew or could have known what sum was due her. It was not fair or proper to allege that so large a sum was due, when in fact, within her knowledge, so small a one was due.

We think the court was warranted in giving the judgment appealed from. There is no error and the judgment must be affirmed.

No error. Affirmed.

H. R. BROOKS and others v. Z. T. BROOKS and others.

Amendment of Pleadings—Ejectment—Right to open and conclude.

1. An amendment of pleading is ordinarily left to the discretion of the presiding judge; but where it is of such nature as renders a corresponding amendment necessary on the part of the adverse party, a refusal to allow the latter is appealable.
2. Where a motion to amend an answer is disallowed, the defendant cannot avoid the binding effect of the answer by a disclaimer *ore tenus* of the defence set up; and the facts therein stated are legal evidence against him.
3. The parties admitted on the trial of this case that there was no controversy as to the location of the land in dispute, and they are bound by the admission.
4. The practice in reference to opening and concluding the argument before the jury, is regulated by a rule of the superior court (89 N. C., 609, rule 6), and the decision of the judge is not reviewable on appeal.

(*Dobson* v. *Chambers*, 78 N. C., 334; *Henry* v. *Cannon*, 86 N. C., 24; *Wiggins* v. *McCoy*, 87 N. C., 499; *Gill* v. *Young*, 88 N. C., 58; *Adams* v. *Utley*, 87 N. C., 356; *Guy* v. *Manuel*, 89 N. C., 83; *Churchill* v. *Lee*, 77 N. C., 341, cited and approved).

EJECTMENT tried at Fall Term, 1883, of PERSON Superior Court, before *MacRae, J.*

Both the plaintiffs and defendants claim to derive title from Larkin Brooks, deceased. The plaintiffs are the heirs-at-law of David Brooks, and the defendants are the heirs-at-law of the said Larkin Brooks.

On the trial the plaintiffs put in evidence a deed from Larkin Brooks and his wife to David Brooks, dated July 22d, 1873.

The defendants denied the validity of this deed upon the ground that their ancestor Larkin Brooks was insane, and had not sufficient mental capacity at the time he signed this deed to execute such an instrument. Numerous witnesses were examined before the jury in respect to his mental capacity, and this was the principal question at issue.

The defendants Z. T. Brooks and Larkin Brooks, Jr., set up in their answer, as a matter of special defense, that David Brooks, the ancestor of the plaintiffs, had in his life-time contracted in writing to sell to each of them a part of the land in dispute.

The plaintiffs read the answer of these defendants in reference to such special defence, as an estoppel upon them. They then moved the court for leave to amend their answer by striking out so much thereof as referred to such contract of purchase and as embraced such special defense. The court refused to allow the motion to amend and the defendants excepted. No testimony was introduced by the defendants in support of said special defense.

The last named defendants then moved the court to allow them to enter a *disclaimer* of all title and claim to the land in controversy derived from David Brooks. This motion was also denied by the court. They then prayed the court to charge the jury that they disclaimed and abandoned all claim under David Brooks. The court declined to grant the prayer, and they again excepted. They then requested the court to instruct the jury that the plaintiffs had introduced no evidence as to the location of the land mentioned in the complaint. The court declined to grant the prayer, because it was admitted by counsel on both sides at the beginning of the trial, that both plaintiffs and de-

fendants claimed under Larkin Brooks, and that there was no controversy as to the location of the land, and that as the defendants' counsel had stated that they would introduce no testimony in support of the third defense of the answer, the only questions for the jury were, the mental condition of Larkin Brooks at the time he executed the deed to David Brooks, and the rental value of the land on the question of damages; and further, because one Ruffin R. Woody, the first witness introduced by plaintiffs, had testified "that he was well acquainted with the lands described in the deed from Larkin Brooks to David Brooks, and as to the value of the same; that they were known as the home place and the Mayo tract; that Larkin Brooks was in possession at the execution of the deed; that he remained in possession up to his death, and his heirs have been in possession ever since his death." The defendants excepted.

The counsel for the defendants insisted upon his right to close the argument to the jury. The court held otherwise, and the defendants again excepted, and appealed from the judgment.

Messrs. Graham & Ruffin, for plaintiffs.
Mr. L. C. Edwards, for defendants.

MERRIMON, J. It is within the discretion of the court to allow or disallow a proposed amendment of the pleadings, either before or on the trial of an action, and the exercise of such discretion is not reviewable in this court. *Dobson* v. *Chambers*, 78 N. C., 334; *Henry* v. *Cannon*, 86 N. C., 24; *Wiggins* v. *McCoy*, 87 N. C., 499; *Gill* v. *Young*, 88 N. C., 58.

There are cases, however, where the amendment allowed may create a right in the adverse party to be allowed to make corresponding amendments or put in additional pleadings rendered necessary by the amendments first allowed. In such cases, if the court should disallow a proper application to amend, the action of the court would be reviewable here. *Gill* v. *Young*, *supra*.

Parties are bound by their pleadings, and declarations of fact made therein are evidence against them in any proper case. The court having refused to allow Z. T. Brooks and Larkin Brooks, defendants, to amend their answer by withdrawing so much thereof as raised the special defense, it remained as though they had not made the motion to amend, and they were bound by it for all the purposes of such a pleading, and the facts therein stated were competent as evidence against them, like declarations made by them on any occasion. As evidence, they were to be taken for what they were worth, subject to any proper explanation the parties making them could give. Nor could the defendants avoid the binding effect of their answers by an attempt to disclaim *ore tenus* that they claimed under David Brooks. They were bound by their answer as it appeared in the record according to its legal effect, and, besides, it was legal evidence against them. It was their folly to plead inconsistent defenses. The court, therefore, properly refused to instruct the jury that the defendants had disclaimed and abandoned all claims under David Brooks. *Adams* v. *Utley*, 87 N. C., 356; *Guy* v. *Manuel*, 89 N. C., 83.

It very plainly appears that the principal question in contest on the trial was as to the mental capacity of Larkin Brooks, the elder. It was admitted by the counsel on both sides, in the presence of the court, that both the plaintiffs and defendants claimed the land described in the complaint, and there was no controversy as to its location. Such admissions are binding upon the parties and their counsel, and when distinctly made, the court may justly enforce them in the progress of the trial. Besides, a witness testified that he knew and was well acquainted with the land mentiond; that part of it was called the "home place" and the other part the "Mayo tract." Two of the defendants allege in their answer that they respectively purchased the land so designated from the ancestor of the plaintiffs. The court properly and justly refused to instruct the jury that there was no evidence as to the location of the land. There was evidence pointing out

the location, and besides, it appears from the conduct of the trial, the admissions and declarations of counsel, that there was no real contest about its location. If the defendants intended to make a contest as to that, they ought in common fairness to have said so; at all events, they should not have so demeaned themselves as to mislead the plaintiffs. The utmost fairness ought to be observed in all judicial proceedings, and especially in the conduct of trials.

Apart from this case, it is a sad mistake to suppose that the practice of the law is a game of hazard, to be won by shift, subterfuge, deception and dissembling. On the contrary, the law requires of those who practice in its courts the strictest and most delicate observanee of candor, truth, integrity, justice and fair dealing in the conduct of all legal proceedings, in and out of court. There could scarcely be a greater reproach to a well-bred lawyer, than to say of him truly that he had gained his case by trick and circumvention!

The plaintiffs alleged in their complaint that they had title to the land in question, and the defendants having broadly denied this leading and material allegation, the burden of proving it rested on the plaintiffs. Both parties having introduced evidence, the rule of practice, settled by many decisions, gave the plaintiffs the right to close the argument to the jury. *Churchill* v. *Lee*, 77 N. C., 341; Clark's Code, 210.

How the argument of causes shall be conducted and the order of argument is a matter of practice, and is now regulated by a rule of practice in the superior courts, and rests in the discretion of the court. Its exercise of discretion is not reviewable in this court. See rule 6, 89 N. C., 609.

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

No error. Affirmed.

H. ATKINSON and wife v. D. McINTYRE and others.

Pleading—Answer—Tenants in Common—Boundaries of land.

An answer to a petition for division of land, which alleges that the boundaries of the land described in a deed set out in the complaint are not sufficient to locate any land, and that therefore no title passed by the deed to the petitioners as tenants in common, is frivolous and will be disregarded.

SPECIAL PROCEEDING for partition of land commenced before the clerk and heard at Spring Term, 1883, of ROBESON Superior Court, before *MacRae, J.*

The petition alleged that in 1851 one John O. Daniels conveyed the land in question to Demaris Thompson, Oliver Thompson, Absla Thompson, James Thompson and Charity Thompson; that Oliver died without issue; that Absla intermarried with the other plaintiff, Hybert Atkinson, and Demaris intermarried with Dugald C. McIntyre, who died, leaving the defendant in this case his heir-at-law; that James Thompson sold his interest in the land to said Dugald C. McIntyre; and Charity, who married W. J. Smith, sold her interest also to the said Dugald C. McIntyre, her husband joining in the deed. The land so conveyed, of which a partition was sought, was bounded as follows, to-wit:

Beginning at a stake in Charles Thompson's line, upper one hundred acre tract, and runs with that line No. 80 east 27 chains to a small pine: then along his other line, No. 12 west, 25 chains, to a stake by three pines, then So. 61 east 1 chain to a stake, two pines and a sweet gum, then So. 40 west 24 chains to a stake in said Thompson's line of a one hundred acre tract, then No. 30 west 17 chains to the other corner, then So. 65 west 44 chains and 75 links to his other corner, and then No. 30 west 27 chains to the beginning.

The defendants, in their answer, admit that John O. Daniels conveyed the land as described in the petition to Demaris

Thompson, Oliver Thompson, James Thompson, Absla Thompson and Charity Thompson; that Oliver died without issue, and that James Thompson and William J. Smith and wife, Charity, sold and conveyed their interest in the land to Dugald C. McIntyre, and that he is dead, leaving the defendants his heirs-at-law; and that the parties intermarried as alleged.

But they say "that it is impossible to ascertain or find the corners or boundaries mentioned in said deed, or to locate any land by the description therein, as the defendants are informed and believe, and that *therefore* the said deed did not operate to convey any title to any lands to the grantees therein named as tenants in common or otherwise," and for the same reason they are not tenants in common with the plaintiffs.

The clerk of the superior court granted the prayer of the petition, and ordered that a writ of partition issue, from which judgment the defendants appealed to the superior court in term.

At the spring term, 1883, of said court, the case coming on to be heard before His Honor, it was adjudged that the appeal be dismissed, that the judgment of the clerk be affirmed, with costs against the defendants, and that the case be remanded to the clerk of the superior court to be proceeded with in accordance with law. From this judgment the defendants appealed to this court.

Messrs. Rowland & McLean, for plaintiffs.
Messrs. Frank McNeill and *T. A. McNeill*, for defendants.

ASHE, J. The answer of the defendants does not set up any substantial defense to the petition. It is evasive and disingenuous. While they admit that land, such as that described in the petition, was conveyed to the grantees mentioned therein, and that their father purchased two-fifths of said land, yet they insist that no title passed by any of these conveyances in consequence of an uncertainty in the location of the land. From the character of the answer, we are strongly impressed with the suspicion

that the defendants, or some of them, are in possession of the very land under a title derived from their father, Dugald C. McIntyre, and his wife Demaris, and in order to keep out the plaintiffs from the rightful enjoyment of their interest in common with them, they have been driven to the flimsy, elusive and frivolous defense set up in their answer.

There is no error. The judgment of the superior court must be affirmed. Let this be certified to the superior court of Robeson county, that the case may be remanded to the clerk of that court, that the frivolous answer of the defendants may be disregarded, and the case proceeded with according to law. The plaintiffs are entitled to their costs in this court.

No error. Affirmed.

ROWLAND GOSS and others v. JAMES WALLER, Ex'r.

Pleading—Demurrer.

A demurrer "that the complaint states no cause of action whatever" against the defendant, will be disregarded. It must distinctly specify the grounds of objection to the complaint. THE CODE, §240.

(*Love* v. *Commissioners*, 64 N. C., 706; *Bank* v. *Bogle*, 85 N. C., 203, cited and approved).

SPECIAL PROCEEDING against the defendant executor of Nancy Waller, for an account and the payment of legacies bequeathed to the plaintiffs, commenced before the clerk and heard on appeal at Fall Term, 1883, of GRANVILLE Superior Court, before *MacRae, J.*

The defendant demurred to the petition as follows: "That the petition or complaint states no cause of action whatever against him. Wherefore he demands judgment that he go without day and recover of the petitioners his costs of action."

On the first day of March, 1873, the clerk gave judgment

overruling the demurrer, from which judgment the defendant appealed to the judge of the fith judicial district, and at fall term, 1883, the case was heard before His Honor, who sustained the ruling of the clerk, and adjudged that plaintiffs recover of defendant and his sureties the costs of appeal, and directed the ruling and his opinion to be certified, &c. From this judgment the defendant appealed to this court.

Mr. T. B. Venable, for plaintiffs.
Messrs. J. B. Batchelor and *L. C. Edwards*, for defendant.

ASHE, J. There is no error in the ruling of His Honor. The statute provides that the demurrer shall distinctly specify the grounds of objection to the complaint, and unless it does so, it may be disregarded. THE CODE, §240—same as C. C. P., §96. This section has received judicial construction.

In *Love* v. *Commissioners*, 64 N. C., 706, where the court held "that a demurrer under the C. C. P. differs from the former demurrer *at law* in this: Every demurrer, whether for substance or form, must distinctly specify the ground of objection to the complaint, or be disregarded. It differs from the former demurrer in equity, in that the judgment overruling it is final and decides the case, unless the pleadings are amended." Chief-Justice PEARSON, who delivered the opinion, said, "it is so easy to specify the ground of objection that the court is not disposed to relax the rule. *There is no use in having a scribe unless you cut up to it.*" This decision was cited with approval in the more recent case of *Bank* v. *Bogle*, 85 N. C., 203.

The judgment of the judge of the superior court must be affirmed, and this opinion certified to the superior court of Granville county, that the same may be certified to the clerk of the superior court with directions to proceed according to law. The appellant must pay the costs of the appeal.

No error. Affirmed.

MARY A. ALFORD v. E. L. McCORMAC.

Pleading, verification of—Signature of Affiant not necessary to Affidavit.

1. Where a pleading is verified, every subsequent pleading except a demurrer must be verified also; *Hence,* if the plaintiff verify his complaint and the defendant fail to verify his answer, the plaintiff is entitled to judgment.
2. An affiant is not required by our statute to subscribe the affidavit. It is sufficient if the oath be administered by one authorized to administer oaths.

(*Harkey* v. *Houston,* 65 N. C., 137; *Alspaugh* v. *Winstead,* 79 N. C., 526; *Wynne* v. *Prairie,* 86 N. C., 73; *Rogers* v. *Moore, Ib.,* 85, cited and approved).

CIVIL ACTION tried at January Term, 1884, of ROBESON Superior Court, before *MacRae, J.*

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

Messrs. Rowland & McLean, for plaintiff.

Messrs. J. D. Shaw, T. A. McNeill and *Frank McNeill,* for defendant.

MERRIMON, J. This action is founded upon a promissory note properly pleaded. The plaintiff made the usual affidavit of verification of the complaint, except that she failed to subscribe her name to it. She did, however, subscribe the complaint.

The defendant filed his answer without verification. Thereupon, at the appearance term the plaintiff moved for judgment as in case no answer had been filed. The court allowed this motion, and gave judgment in favor of the plaintiff for the amount of her debt and costs. The defendant excepted, upon the ground that as the plaintiff failed to subscribe her name to the affidavit of the verification, the complaint was not verified as required by law, and he could not, therefore, be required to verify his answer.

It is required by THE CODE, §257, that "every pleading in a court of record must be subscribed by the party or his attorney;

and when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also."

This court has repeatedly held in construing this section that if a pleading be verified, and the subsequent one shall not be, the latter may be set aside and diregarded; and in case the plaintiff verifies his complaint, and the defendant fails to verify his answer, the plaintiff may take judgment as if no answer had been filed. THE CODE, §385; *Harkey* v. *Houston*, 65 N. C., 137; *Alspaugh* v. *Winstead*, 79 N. C., 526; *Wynne* v. *Prairie*, 86 N. C., 73; *Rogers* v. *Moore*, *Ib.*, 85.

So that the judgment was regular and proper, unless, as the defendant contends, the complaint was not duly verified, because the plaintiff failed to subscribe the affidavit of verification.

The verification of pleadings must be by affidavit. THE CODE, §258. But the statute does not in terms or specifically require that it shall be *subscribed* by the affiant, and it need not be, unless an affidavit is incomplete and inoperative without it.

An affidavit is defined to be "an oath or affirmation reduced to writing, sworn or affirmed to before some officer who has authority to administer it." Another author defines it to be "an oath in writing, sworn before some judge or officer of a court, or other person legally authorized to administer it; a sworn statement in writing; a statement in writing of one or more matters of fact, signed by the party making it, and sworn to before an authorized officer." Burrill Law Dict. and Bouvier Law Dict.—*Affidavit.*

The essential requisites are, apart from the title in some cases, that there shall be an oath administered by an officer authorized by law to administer it, and that what the affiant states under such oath shall be reduced to writing before such officer. The signing or subscribing of the name of the affiant to the writing is not generally essential to its validity; it is not, unless some statutory regulation requires it, as is sometimes the case. It must be certified by the officer before whom the oath was taken before it can be used for legal purposes; indeed, it is not complete or

operative until this is done. The certificate, usually called the *jurat*, is essential, not as part of the affidavit, but as official evidence that the oath was taken before a proper officer. The object of such an instrument is to obtain the sworn statement of facts in writing of the affiant in such official and authoritative shape, as that it may be used for any lawful purpose, either in or out of courts of justice. The signature of the affiant can in no sense add to or give force to what is sworn, and what is sworn is made to appear authoritatively by the certificate of the officer.

This seems to us to be a reasonable view of the principal requisites of an affidavit, and although there is some contrariety of judicial decision upon the subject, the weight of authority sustains it. *Jackson* v. *Vogel*, 3 Johns, 540; *Hoff* v. *Spicer*, 3 Cains, 190; *Melins* v. *Shaffer*, 3 Denio, 60; *Burkit* v. *Gerrard*, 1 Harr. (N. J.), 124; *Shelton* v. *Berry*, 19 Texas, 154; *Watts* v. *Womack*, 44 Ala., 605; *Noble* v. *United States*, Dev. (Ct. Cl.), 83.

While the law is as we have expounded it, the general practice in this state has been to require the affiants to subscribe their names to the affidavits made by them. This is a wholesome practice, and we commend it. It ought to be observed by all officers who take affidavits for any purpose, not because it is essential, but because it serves to supply strong additional evidence that the affiant swore what is set down in the writing, in case it should at any time be brought in question. The certificate of the officer taking it is official, but not conclusive evidence of what appears to have been sworn.

As we have said, it is sometimes required by statute that affidavits shall be subscribed by the parties making them. Of course, in such cases, they would be incomplete and inoperative without the signature of the affiant subscribed by him.

There is no error and the judgment must be affirmed.

No error. Affirmed.

N. G. PENNIMAN v. JOHN H. DANIEL.

Attachment, affidavit in, and order of publication.

1. An affidavit for an attachment, stating that the defendant is a non-resident and has property in this state, or has removed, or is about to remove some of his property from this state with intent to defraud creditors, is sufficient. The statute puts the modes in the alternative, and the plaintiff succeeds if he establishes either.
2. But where the plaintiff makes oath that he believes or apprehends the property will be removed, he must also state the grounds of his apprehension.
3. Where the application to vacate is to the clerk before the sitting of the court to which the summons is made returnable, a further order of publication to cure a defective service may be obtained upon affidavit to the court, without discharging the attachment.

(*Palmer* v. *Bosher*, 71 N. C., 291; *Brown* v. *Hawkins*, 65 N. C., 645; *Hughes* v. *Person*, 63 N. C., 548; *Gashine* v. *Baer*, 64 N. C., 108; *Clark* v. *Clark*, *Ib.*, 150; *Branch* v. *Frank*, 81 N. C., 180; *Price* v. *Cox*, 83 N. C., 261, cited and approved).

MOTION by defendant to vacate an attachment heard at Fall Term, 1883, of CATAWBA Superior Court, before *Graves, J.*

The court allowed the motion to vacate, but refused to dismiss the action. Plaintiff appealed.

Messrs. M. L. McCorkle and *W. G. Burkhead*, for plaintiff.

Messrs. J. F. Morphew, L. L. Witherspoon and *G. N. Folk*, for defendant.

SMITH, C. J. On the 14th day of March, 1883, the plaintiff sued out of the clerk's office a summons and warrant of attachment against the defendant's estate, returnable to fall term, held on the last Monday in August, of the superior court of Catawba.

The affidavit upon which the attachment issued states as follows:

1. That during the year 1879 the defendant "became indebted to him in the sum of $9,200, with interest on the same till paid,

two years after date," and that by various payments the amount due on the note has been reduced to the sum of $6,993.50.

2. That the plaintiff is about to commence an action in this court against the defendant John H. Daniel, and has issued a summons therein.

3. That the defendant "has left the state, and is now, as he is informed, a resident of the state of Maryland, and has property in this state," or has removed or is about to remove some of his property from the state with intent to defraud his creditors.

On the same day the sheriff executed the warrant by levying upon certain real and personal estate of the debtor, specifically mentioned in his endorsed return thereon.

On the 23d day of the same month the plaintiff obtained an order of publication of notice to the defendant of the sum demanded in the action, and of the issue and levying of the attachment, and requiring him to appear at the next ensuing term of the court and answer the plaintiff's complaint, or judgment will be taken in case of his default, and the property taken condemned to satisfy the plaintiff's debt and costs of suit.

Publication was made for six successive weeks in the newspaper designated in the order in conformity with its terms.

On June 22d, 1883, after notice, wherein the grounds of the intended motion are set out in detail, counsel for the defendant appeared before the court, producing a letter of authority from the defendant duly executed, and a copy whereof is made part of the transcript, and moved for the discharge of the attachment and vacating the order for its issue.

In response to the motion and "upon the face of the pleadings" the court declared "that there are irregularities in the proceedings," and "ordered that the attachment be vacated and set aside." From this ruling of the clerk the plaintiff appealed; and at the fall term of the court to which the processes were returnable, the sheriff having endorsed on the summons his return, "Due search made—the defendant not to be found in my county," the appeal came on to be heard before the presiding

judge, with a superadded motion "to dismiss the action," and he rendered the following judgment:

This case coming on to be heard, it is considered by the court that the attachment heretofore issued and levied on a certain brick store-house in the town of Hickory, and other property, be and the same is hereby vacated and dismissed; and further, that the said property be and the same is discharged and free from all liens created by said alleged attachment.

And it is further considered that there has not been as yet any service of process upon the defendant John H. Daniel, and consequently he is not a party to the action, save by special appearance entered by his attorney for the purpose of the motions aforesaid, and those only. The motion to dismiss the action is refused.

From this ruling the plaintiff brings the case up to this court and assigns error in the judgment discharging the attachment.

The case on appeal is but a repetition of the facts contained in the record, and a statement of the general ground of the ruling to be that the averments of non-residence and of removal, or the defendant's being about to remove his property with fraudulent intent, are in the alternative and not distinct and positive as required by the statute; and further, for that no facts are set out to warrant the latter charge that the defendant is about to fraudulently withdraw his property and place it beyond the jurisdiction of the state.

The correctness of this ruling is alone before us, and this depends upon the sufficiency of the averments in the affidavit, as a compliance with the statutory requirements.

The statute authorizes the issue of the attachment at or after the issue of the summons, "when it shall appear by affidavit or otherwise that a cause of action exists against such defendant, specifying the amount of the claim and the grounds thereof, and that the defendant is either a foreign corporation or *not a resident of this state*, or has departed therefrom with intent to defraud his creditors or to avoid the service of a summons, or

keeps himself concealed therein with like intent, or that such corporation or person has removed, or is about to remove, any of his or its property from this state with intent to defraud creditors, or has assigned, disposed of or secreted, or is about to assign, dispose of or secrete any of his or its property with the like intent, whether such defendant be a resident of this state or not. C. C. P., §201.

The obvious meaning of the statute is to make these several disjoined and specified acts each a distinct ground for the awarding the attachment, whichever may be shown by affidavit to exist. The court, taking this view, seems to have considered the affidavit as assigning three of these specifications, to-wit: that the defendant is a non-resident; that he has removed some of his property out of the state with a fraudulent purpose; that he is about to remove such property with a similar purpose, and that the latter was an imperfect allegation in not stating the facts from which the intent to remove the property is inferred, so that the court may judge of their sufficiency to warrant the inference.

But we do not place this strict and rigorous meaning upon the language used in the affidavit. The concluding clause contains a single averment with a twofold aspect, and is intended to meet the case of an actual removal accomplished, as well as the initiatory step in that direction at a different stage.

This was the form of allegation passed upon, when a similar objection was taken, in *Palmer* v. *Bosher*, 71 N. C., 291, wherein RODMAN, J., uses these words: "But we think it (the affidavit) was not defective, because it stated that the defendants were removing, or were about to remove their property in the alternative. A plaintiff may not know with such certainty as to enable him to swear to it, whether a defendant is only about to remove his property or has actually begun removing it," to which we may add, or has completed the removal.

And so in *Brown* v. *Hawkins*, 65 N. C., 645, PEARSON, C. J., commenting on the averment "that the defendant is about to assign, dispose of or secrete certain property," describing it, says:

"The criticism on the affidavit that it is vague and uncertain, in that it avers that the defendant was about to assign, dispose of or secrete the property, whereas it ought to have specified distinctly *one* of these three modes by which the alleged fraudulent intent was to be accomplished, is not tenable. The statute puts the three modes in the alternative, and, in this respect, the affidavit is sufficiently definite by following the words of the statute; for it may be out of the power of the party to designate the precise mode."

It was said in *Hughes* v. *Person*, 63 N. C., 548, "that when the plaintiff, in his affidavit for the attachment or arrest, relies upon his apprehension of what the defendant is about to do, as if he declares that he has reason to *believe and does believe* that the defendant is about to dispose of his property, &c., he must state *why he thinks so*, in order that the court may judge of the reasonableness of his fears."

The same distinction is taken in *Gashine* v. *Baer*, 64 N. C., 108, and in *Clark* v. *Clark*, *Ib.*, 150, in the latter of which it is suggested that the words "about to dispose of his property" would not be sufficient unless accompanied with a statement of the grounds for the assertion.

In our view, the words used in the present case, in connection with what precedes, constitutes an averment which takes in the initial and successive steps towards and the actual placing of the goods beyond the limits of the state. The defendant may be said to be about to remove until he has removed them, and consequently, if he was in the very act of removing or transporting, and had not reached the state line, it would be embraced in the terms of the affidavit. The plaintiff makes oath, not to his *belief* or *apprehension* that the goods will be removed, but to the fact that they are about to be removed, or have been already removed from the state, as an act executed or in process of execution with the injurious intent.

The case presented, then, is that of two distinct and independent grounds assigned for suing out the attachment, either of which alone is sufficient—put in an alternative form—and the

question is, does this mode of averment meet the demands of the statute? It is certainly a form not to be commended, but it is in substance the same as if both were asserted to be true, for in either case the failure of one authorizes the plaintiff to fall back on the other, and he succeeds if one be established. So, too, an indictment for perjury would lie, though in this case proof would be necessary of the falsehood of both allegations, as is said in the opinion in *Palmer* v. *Bosher, supra,* that is, that no removal had been made, or was about to be made by the defendant.

It will be noticed that the proceeding before the clerk, upon the application to discharge the attachment, was before the sitting of the court to which the summons was to be returned, and when a further order of publication upon a corrected affidavit might have been obtained, and this without discharging the attachment. *Branch* v. *Frank,* 81 N. C., 180; *Price* v. *Cox,* 83 N. C., 261. The motion to dismiss, if proper at all, was refused, and there is no appeal therefrom on the part of the defendant.

The ruling of the court must be reversed, and this will be certified.

Error. Reversed.

E. PASOUR, Guardian, v. C. J. LINEBERGER.

Practice—Attachment—Res Adjudicata—Trial.

1. Where an appeal is taken from a refusal to discharge an attachment, the court below cannot in the meantime allow a motion "to dismiss" the same to be entered, for the appeal takes the case out of its jurisdiction. The motion to dismiss is in effect a motion to discharge; and upon the dismissal by this court of the motion to discharge, the judgment appealed from remained undisturbed and conclusive, and the matter embraced therein is *res adjudicata.*

2. In attachment and other ancillary proceedings it is competent for the court to find the facts from the affidavits and other proper evidence; and a party consenting to this mode of trial cannot afterwards demand a jury trial. Const., Art. iv, §13.

(*Roulhac* v. *Brown*, 87 N. C., 1; *Halcombe* v. *Com'rs*, 89 N. C., 346; *McRae* v. *Com'rs*, 74 N. C., 415; *Bledsoe* v. *Nixon*, 69 N. C., 81; *Bank* v. *Twitty*, 2 Dev., 386; *Burke* v. *Turner*, 85 N. C., 500; *Sanderson* v. *Daily*, 83 N. C., 67; *Mabry* v. *Henry*, *Ib.*, 298; *Wilson* v. *Lineberger*, 82 N. C., 412; *Isler* v. *Murphy*, 71 N. C., 436; *Baker* v. *Cordon*, 85 N. C., 116; *Leggett* v. *Leggett*, 88 N. C., 108; *Wessell* v. *Rathjohn*, 89 N. C., 377; *Armfield* v. *Brown*, 70 N. C., 27; *Keener* v. *Finger*, *Ib.*, 35; *Moye* v. *Cogdell*, 66 N. C., 403; *Heilig* v. *Stokes*, 63 N. C., 612; *Foushee* v. *Pattershall*, 67 N, C., 453, cited and approved).

MOTION by defendant to vacate an order of attachment heard at Fall Term, 1883, of GASTON Superior Court, before *Gilmer*, *J.*

Judgment for plaintiff; appeal by defendant.

Messrs. R. W. Sandifer and *Reade, Busbee & Busbee*, for plaintiff.

Messrs. G. F. Bason and *Jones & Jonnston*, for defendant.

MERRIMON, J. This action was brought on the 26th day of July, 1882. On the same day the plaintiff applied for and obtained a warrant of attachment, which was levied upon the lands of the defendant. On the 31st day of August, 1882, the defendant moved, for causes assigned, to discharge this attachment. Upon the hearing of this motion the court declined to grant it, and thereupon the defendant appealed to this court. Pending the appeal the defendant, by leave of the court, entered a motion to "dismiss" the attachment, and assigned causes in that respect.

The appeal to this court was dismissed at February term, 1883, because the undertaking upon appeal was not properly perfected.

At fall term, 1883, of the superior court, the motion to "dismiss" the attachment was heard and denied, and thereupon the defendant appealed to this court. Upon the hearing of the motion to "dismiss" the attachment, the court, in passing upon the facts, found that the facts and causes assigned had been heard and acted upon by the court upon the hearing of the motion to discharge the attachment.

It is very clear that the appellant's exceptions cannot be sustained:

1. The motion to "dismiss" the attachment was in effect a motion to discharge it, for the causes assigned, and the defendant could not avoid the effect of the first motion by simply changing the name of the motion. The law determines the quality and effect of the motion, by whatever name it may be called. The causes assigned were such as, if sustained, tended to support a motion to discharge the attachment.

2. When the appeal from the order of the court denying the motion to discharge the attachment was dismissed by this court, the judgment in the superior court remained undisturbed and in full force and effect, and was conclusive upon the defendant, just as though no appeal had been taken; at all events, until it should, for sufficient cause, be set aside or modified by the court making it. The whole matter embraced by the judgment appealed from was *res adjudicata*. *Roulhac* v. *Brown*, 87 N. C., 1; *Halcombe* v. *Commissioners*, 89 N. C., 346.

3. Pending the appeal to this court, it was not competent or proper in the court below to entertain any motion or make any order in respect to the matter embraced by the judgment appealed from, because that court had no jurisdiction of that matter while it was in this court. The appeal brought the motion to discharge the attachment, and everything incident to it, into this court, and here it remained, not to be affected by anything the superior court could do, until the appeal should be disposed of in some proper way. *McRae* v. *Commissioners*, 74 N. C., 415; *Bledsoe* v. *Nixon*, 69 N. C., 81; *Bank* v. *Twitty*, 2 Dev., 386.

4. It appears from the findings of fact by the court, that the several facts and grounds upon which the second motion to discharge the attachment was based, were before and considered by the court upon the first motion to discharge it. If it were competent or proper to hear a second motion to discharge the attachment at all, it certainly was not allowable to base such a motion upon grounds that had already been passed upon. When a

matter is once litigated and settled by the court in the legal course of procedure, that must be conclusive of it. Any other course would contravene a well settled principle of law, and would be trifling with the administration of justice. There must be an end of controversy, and as well in respect to ancillary proceedings, such as warrants of attachment, warrants of arrest, and the like, as in the disposition of the whole action. *Burke* v. *Turner*, 85 N. C., 500; *Roulhac* v. *Brown*, *supra*; *Sanderson* v. *Daily*, 83 N. C., 67; *Mabry* v. *Henry*, Ib., 298; *Wilson* v. *Lineberger*, 82 N. C., 412.

5. After the appellant had made his second motion to discharge the attachment and the same had been heard by the court, the facts of the matter having been found by the court with the consent of the defendant, the latter demanded that a jury be empaneled to try the question of fact raised.

If the appellant were entitled to have an issue of fact growing out of the motion to discharge the attachment tried by a jury in any case, his demand certainly came too late in this case. He had made his motion before the court, submitted the affidavits and other evidence, and consented that the judge might find the facts according to the ordinary method of procedure in that respect. By this he was concluded. After a party has accepted one method of trial, and by it has tried his case and failed, he cannot insist upon another. *Isler* v. *Murphy*, 71 N. C., 436; *Baker* v. *Cordon*, 86 N. C., 116; *Leggett* v. *Leggett*, 88 N. C., 108; *Wessell* v. *Rathjohn*, 89 N. C., 377; *Armfield* v. *Brown*, 70 N. C., 27; *Keener* v. *Finger*, Ib., 35.

The several provisions of THE CODE, in respect to granting warrants of attachment, and like applications for ancillary remedies, and motions to dismiss or vacate the same, allow that the same be granted, discharged or vacated, upon affidavits and other proper evidence, and that the facts be found by the court. It is not contemplated that questions of fact arising in such matters shall be tried by a jury. In such proceedings, however, the court may, for its better information and satisfaction, frame

and submit proper issues to a jury, and perhaps there are cases in which it ought to do so; but in ordinary cases it is not bound to do so, if indeed, it is in any. *Moye* v. *Codgell*, 66 N. C., 403; *Isler* v. *Murphy*, *supra*; *Baker* v. *Cordon*, *supra*.

It is a mistaken view of the constitution (Art. IV, §13) to insist that by virtue of it a party to an action has a right to have every question of fact arising in it submitted to a jury. Such a view of it is not only utterly impracticable, but the legislation and practice in the courts of this and other states having a like constitutional provision, practically contravene and deny such a construction. Neither the language nor the spirit of the constitution requires so absurd a thing. The clause cited has reference to "*issues of fact*" raised by a proper pleading, or in some proceeding where a substantial right comes directly and finally in question. This case does not require that we point out with precision the cases, or class of cases, in which a party has a right to have issues of fact submitted to a jury, and it is not proper that we shall here do so. *Heilig* v. *Stokes*, 63 N. C., 612; *Foushee* v. *Pattershall*, 67 N. C., 453.

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

No error. Affirmed.

D. T. MOORE, Trustee, v. WILLIAM HINNANT.

Judgment of Court cannot be modified at subsequent term—Exceptions to the rule—Controversy without action—Practice.

1. A court has no power to set aside or modify a final judgment at a subsequent term, except upon petition to rehear; or upon the ground of mistake or excusable negligence; or to correct the record so as to make it speak the truth.

2. The statute allowing controversies without action to be submitted to the judge upon a "case agreed" does not contemplate a trial by jury; and

whether this court can remand such a case and direct an issue of fact to be tried by a jury in the court below upon motion made in apt time (?).

(*Davis* v. *Shaver*, Phil., 18; *Sharpe* v. *Rintels*, *Ib.*, 34; *Bender* v. *Askew*, 3 Dev., 141; *State* v. *Alphin*, 81 N. C., 566; *Winslow* v. *Anderson*, 3 Dev. & Bat., 9; *Dunns* v. *Batchelor*, *Ib.*, 52, cited and approved).

PETITION by defendant for modification of judgment, heard at February Term, 1884, of THE SUPREME COURT.

Messrs. MacRae & Strange, for petitioner.
No counsel *contra*.

MERRIMON, J. This was a controversy submitted without action in the superior court of Johnston county, wherein judgment was rendered for the plaintiff sustaining the validity of the deed in trust in question, and upon appeal to this court, the judgment of the court below was affirmed. See 89 N. C., 455.

At the present term the defendant filed his petition praying the court to *amend and modify* its judgment entered at the last term, and to direct that the case be remanded to the superior court to the end that "an *issue* may be framed and submitted to a jury, as to the *intent* with which the deed of assignment was executed."

This is not an application to be relieved from a judgment against the defendant entered by "mistake, inadvertence, surprise, or excusable neglect"; nor can it be treated as an application to rehear the case for alleged errors of law; nor can it be treated as a motion to correct and amend the judgment entered at the last term, because, through some mistake, error or inadvertence, it is not what the court intended it to be. It is simply an application to the court to alter the judgment entered and intended upon mature consideration to be entered, so as to permit and direct the case to be tried again in an aspect of it not heretofore, as is alleged, fully presented and considered.

The application is an unusual one. Indeed, it is without precedent, so far as we know, in this state. We have not been favored with an argument in support of it, and we have not, after

diligent search, been able to find any decision or other authority that warrants it.

There can be no question that this court has the power to correct any mistake in its records and judgments, so as to make them conform to what the court intended they should be, but which, through accident, mistake or inadvertence, they fail to show, because there is no entry, or a false or incorrect one. The court has power at all times to make its records speak the truth, having due regard for the rights of parties and third persons. This power, however, ought to be exercised with scrutinizing care and caution.

But the court has not the power at a subsequent term to revoke, set aside, alter or amend a final judgment entered at a former term, except upon application to rehear, or because of "mistake, inadvertence, surprise or excusable neglect," as allowed by law. The exercise of such a power is forbidden by principle and the overwhelming weight of authority, if indeed there can be any well considered case found that sustains it.

The courts of justice afford large and reasonable opportunity to litigants to have their rights and controversies cognizable in them, settled according to law. But it is a wise, just and essential principle of the law, that there must be an end to every litigation. It would give rise to universal distrust, endless strife, confusion and corruption, if the records and judgments were at all times, and indefinitely, under the control of the courts to the extent that they might, for one cause or another, or in their arbitrary discretion, modify or change them. With such a power in the courts, a litigant would never be sure that his right was settled. Indeed, that lawsuits shall be ended in the order of judicial procedure, is essential to the stability of government and the good order and well-being of society.

It is a fundamental principle of the common law, as the authorities ancient and modern show, that the court cannot change and modify its final judgments at a term subsequent to the term at which they were entered. During the term the

record, including the judgment, is *in fieri*, and may be amended or set aside, as to the court may seem proper; but after the term, the power to interfere with it no longer exists.

LORD COKE, in his treatise upon Littleton, says that "during the terme wherein any judicial act is done, the record remaineth in the breast of the judges of the court and in their remembrance, and therefore the roll is alterable during that terme, as the judges shall direct; but when the terme is past, then the record is in the roll, and admitteth no alteration, averment or proof to the contrarie." Co. Litt., 260*a*.

At a much later day, Mr. Justice BLACKSTONE said: "But when once the record is made up, it was formerly held, that by the common law no amendment could be permitted, unless within the very term in which the judicial act so recorded was done; for, during the term, the record is within the breast of the court, but afterwards it admitted of no alteration. But now the courts have become more liberal, and, when justice requires it, will allow of amendments at any time while the suit is *depending*, notwithstanding the record be made up and the term be past. For they at present consider the proceedings as *in fieri* till judgment is given; and, therefore, till then, they have power to permit amendments by the common law; but when judgment is once given and enrolled, no amendment is permitted at any subsequent term." 3 Blk. Com., 407. This is good law at this day and prevails in this state, and in most, if not in all the states of the Union, except that after the term at which judgment is given is past the court may correct it so as to make it conform to what it was intended by the court to be.

This court has seldom had occasion to refer to the subject of the power of a court of record to change its judgments after the term at which they were entered, but it has repeatedly, incidentally, recognized the doctrine that such power does not exist. *Bender* v. *Askew*, 3 Dev., 149; *Dunns* v. *Batchelor*, 3 Dev. & Bat., 52; *Winslow* v. *Anderson*, *Ib.*, 9; *Davis* v. *Shaver*, Phil., 18; *Sharpe* v. *Rintels*, *Ib.*, 34; *State* v. *Alphin*, 81 N. C., 556.

In the last named case, Mr. Justice ASHE said: "It has been well settled that a judgment regularly entered at one term of the court cannot be set aside at a subsequent term."

In other states frequent decisions have been made on this subject, and they generally, if not uniformly, deny the power of the courts to change their judgments at a term subsequently to that at which they were made. If there are exceptional cases that seem to hold to the contrary, it will be found in most of them that they only decide that the court has power to correct errors and make the records speak the truth. *Allen* v. *Whitney*, 1 Story Rep., 310; *Bush* v. *Robbins*, 3 McLean, 486; *Gibson* v. *Wilson*, 18 Ala., 63; *Harris* v. *Bellingsly*, *Ib.*, 438; *Harrison* v. *State*, 10 Mo., 686; *Holly* v. *Bond*, 1 Hum. & Mar. (Va.), 25; Freeman on Judg., §96.

The case in which the application before us is made was heard and decided by this court upon its merits, as presented by the facts agreed upon and submitted to the superior court, as allowed by the statute. THE CODE, §567. This court might perhaps, upon application in apt time, have directed an issue of fact to be tried by a jury, but it is too late now to entertain such application. The judgment is beyond the control of the court. We say this court might perhaps have power in such an action to direct an issue of fact to be tried by a jury, but the nature and form of the proceeding does not contemplate a trial by jury in the superior court. By the statute allowing the case to be submitted, the facts must be agreed upon and submitted to the judge. He passed upon the whole case and gave judgment for the plaintiff, and this court affirmed his judgment.

This court has no power to grant the relief prayed for, and the application must be denied. It is so ordered.

Motion denied.

A. McA. COUNCIL and others v. WILLIAM H. AVERETT.

Judgment in Claim and Delivery.

1. The judgment in claim and delivery should be in the alternative; that is, for delivery of the specific property if to be had, and if not, then its value as assessed by the jury.
2. Where the parties in such case compromised the matter and agreed upon a judgment that plaintiff should pay defendant a certain sum and costs of suit, dispensing with an order for restitution, such judgment is binding on the sureties to the plaintiff's undertaking.
3. A summary judgment may be entered up against the sureties.

(*Ins. Co.* v. *Davis*, 74 N. C., 78; *Harker* v. *Arendell, Ib.*, 85; *Manix* v. *Howard*, 82 N. C., 125, cited and approved).

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

This was an action of claim and delivery brought by the plaintiff to recover certain personal property (cotton, corn, &c.) alleged to be wrongfully detained by the defendant. The case is stated in the opinion. There was judgment against the plaintiff and sureties on his undertaking for the sum of six hundred dollars and costs. The sureties complain of this, and say that judgment could not be rendered against them unless in the event of a failure on the part of their principal to comply with the conditions of said undertaking, and then only by action against them upon the same.

Messrs. W. A. Guthrie and *J. W. Hinsdale*, for sureties.
No counsel for defendant.

SMITH, C. J. Upon the institution of this action, on December 4, 1882, under the provisions of THE CODE relating to claim and delivery (C. C. P., ch. 2), certain personal goods described in the plaintiff's affidavit were seized by the sheriff and delivered to the plaintiff, he at the time, with John T. Council and

Mary Council, sureties, executing an undertaking "in the sum of $1,200 that the plaintiff shall prosecute the action, return the property to the defendant, if such return be adjudged, and pay to him such sum as may for any cause be recovered against the plaintiff in this action." At spring term, 1883, the following judgment was entered:

"This action having been called for trial, and a compromise having been made between plaintiff and defendant, upon the terms that plaintiff pay to defendant the sum of six hundred dollars in sixty days after the adjournment of the court, and further, that plaintiff pay all the costs of this action, it is now, on motion of defendant's counsel, adjudged that the defendant do recover from plaintiff and the sureties, Mary Council and John T. Council, the sum of six hundred dollars and all costs of the action, and the same to be paid within sixty days after the adjournment of the court, or execution to issue for the same."

From this judgment the appeal is taken, the sureties complaining thereof, and assigning as error in the rendition:

That the judgment should have been entered against the principal alone for the restoration of the property to the defendant, no evidence being offered of its loss or destruction, and upon his default in returning the goods the sureties can only be reached and made liable by an action on the undertaking, according to its terms.

The course of procedure suggested to charge the sureties is that pursued in the state of New York, and the appellants have been misled by not adverting to the cases of *Boylston Ins. Co.* v. *Davis*, 74 N. C., 78, and *Harker* v. *Arendell*, *Ib.*, 85, where it is decided that a summary judgment may be taken against the sureties to such an undertaking, and the objection is not pressed in the argument for appellants.

The proper mode of entering up judgment is pointed out by DILLARD, J., in *Manix* v. *Howard*, 82 N. C., 125, whose words we repeat, as meeting our approval, and being in accord with the statute and the terms of the obligation assumed: "A judg-

ment for restitution merely would not and might not be effectual, for if the sheriff should be unable on execution to find the goods, or if the plaintiff has disabled himself to surrender the property, then the order of restitution becomes fruitless. The only judgment to meet such a possible state of things, it seems to us, would be a judgment to have *the specific articles returned, if to be had, and, if not, the assessed value thereof.*"

Now, the parties dispense, by agreement, with the judgment of restitution, and consent to a judgment for the value of the goods in money, the other branch of the alternative stipulation. The contract of the sureties, conforming to the directions of the statute, is, that the plaintiff shall prosecute his action, "return the property to the defendant, *if such return be adjudged, and pay to him such sum as may for any cause be recovered* against the plaintiff in this action."

The stipulation is twofold, and is explicit to pay whatever sum *for any cause may be adjudged,* and the plaintiff assents to the recovery of what is accepted as the value of the goods. The plaintiff prosecutes his own action, and the sureties assume responsibility for whatever may be legitimately and *bona fide* adjudged against their principal, who alone is the manager of his action, and by whose conduct of it they must abide. His right to compromise in preference to hazarding the results of an inquiry into the value of the goods before a jury cannot be questioned, nor is a judgment thus rendered any less binding on the sureties. This the sureties agree to pay, and the summary judgment against them also was entirely correct and proper.

No error. Affirmed.

G. H. LEE v. R. B. KNAPP and others.

Judgment by default and inquiry—Evidence—Goods sold and delivered.

Upon an inquiry of damages, in a suit for goods sold and delivered, where judgment was taken by default for want of an answer, evidence in bar of the action is not competent. The judgment by default admits the cause of action, and the plaintiff is only required, upon the inquiry, to make proof of the delivery of the goods and their value.

(*Garrard* v. *Dollar*, 4 Jones, 175; *Swepson* v. *Summey*, 64 N. C., 293; *Parker* v. *House*, 66 N. C., 374, cited and approved).

CIVIL ACTION tried at Spring Term, 1882, of DAVIDSON Superior Court, before *Avery, J.*

The plaintiff in his complaint alleged that the defendants R. B. Knapp, William Overaker and J. W. Lingenfelter were indebted to the plaintiff in the sum of eleven hundred and sixty-four dollars and fifteen cents, due by account, and promised to pay the same, and that said account is for goods sold and delivered to the defendants during the years 1879 and 1880, and that no part thereof had been paid, and demanded judgment for the amount alleged to be due and for costs, &c.

Summons was served upon the defendants by publication, and at the return term, no answer having been filed, judgment by default and inquiry was rendered against the defendants for the want of an answer, and at the spring term, 1882, a jury was empaneled to inquire of the damages.

The plaintiff introduced one Overaker, who testified that he bought the articles set out in the complaint as agent of the defendants, and they were worth the amount charged.

The defendants, upon cross-examination of this witness, proposed to show by him "that the defendants organized as the Thomasville Gold and Silver Mining Company, and afterwards bought the articles as an incorporated company, and stated that they offered to prove this with a view of showing that the plain-

tiff was only entitled to recover nominal damages. The plaintiff objected to the evidence, the objection was sustained, and defendants excepted.

The defendants proposed to show further, by the same witness, that the defendant Lingenfelter was president of the company incorporated in the state of Pennsylvania, and that the defendant Knapp was treasurer and secretary, and that they as officers on behalf of said company gave instructions to the witness to buy the goods, with the view of taking the position (if true) that the defendants were only liable for nominal damages. Objection by the plaintiff was sustained, and the defendants excepted.

The plaintiff then introduced as a witness his clerk, who had made out the account sued on, and who testified that it was correct, and the defendant Knapp, with the defendant Overaker, came into the store and told witness to let said Overaker have whatever he called for. Defendants' counsel then proposed to ask this witness "if he did not charge the articles in the books to the Eureka Mining Company, and if he did not understand that the articles were sold to the Eureka Mining Company when they were delivered—stating that the evidence was offered with the view (if true) of insisting that the plaintiff was only entitled to nominal damages." Objection by the plaintiff was sustained by the court, and the defendants excepted.

There was a verdict for the plaintiff for the amount claimed in the complaint. Judgment; appeal by defendants.

Messrs. M. H. Pinnix and *J. M. McCorkle*, for plaintiff.
Mr. W. H. Bailey, for defendants.

ASHE, J. The exceptions taken by the defendants to the ruling of His Honor in excluding the evidence offered by them were properly overruled by the court. The defendants proposed to prove that the articles alleged to have been purchased by them were not bought by them, but by one or the other of the two

corporations, in one of which they held official positions. The evidence was of such a character that, if the facts proposed to be proved had been set up in an answer filed by them and sustained by proof, it would undoubtedly have defeated the plaintiff's action.

And it is settled that on an inquiry of damages upon a judgment by default, nothing that would have amounted to a plea in bar to the cause of action can be given in evidence to reduce the damages (*Garrard* v. *Dollar*, 4 Jones, 175), and the reason given for the rule is, that to allow such evidence after a judgment by default on an inquiry of damages, would take the plaintiff by surprise and prevent him from meeting the defendant upon equal terms with respect to the evidence, whereas when such defense is set up in the answer, the plaintiff has notice of the defense and may prepare to meet it.

The plaintiff alleged in his complaint that the goods mentioned therein were bought by the defendants, and the judgment by default admits all the material allegations properly set forth in the complaint, and of course everything essential to establish the right of the plaintiff to recover. Any testimony therefore tending to prove that no right of action existed against the defendants, or denying the cause of action, is irrelevant and inadmissible on the inquiry of damages. *Garrard* v. *Dollar*, *supra*.

In this case the action was in nature of assumpsit for goods sold and delivered, and the specific articles were not set forth in the complaint. The judgment by default admitted the plaintiff had cause of action against the defendants and would have been entitled to nominal damages without any proof; but in seeking substantial damages, he was required to make proof of the delivery of the articles and their value. This the plaintiff did, and there was no competent evidence offered by the defendants to reduce the damages. The evidence offered by them only went to the cause of action, which being admitted by the judgment by default, the plaintiff was entitled to recover the value of the

amount of goods proved to have been delivered. *Swepson* v. *Summey*, 64 N. C., 293; *Parker* v. *House*, 66 N. C., 374.

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

No error. Affirmed.

ANNA K. ROULHAC, Executrix, v. JOHN MILLER and others.

Judgment by default and inquiry in suit on bail bond—Measure of damages.

1. A judgment by default final for want of an answer in a suit upon a bail bond cannot be sustained. It should have been interlocutory and the damages inquired of by the jury.
2. That the measure of damages for a breach of such bond is the amount of the debt recovered, is but the rule to guide the jury in assessing damages. (*Parker* v. *House*, 66 N. C., 374; *Parker* v. *Smith*, 64 N. C., 291; *Rogers* v. *Moore*, 86 N. C., 85; *Wynne* v. *Prairie*, *Ib.*, 73, cited and approved).

CIVIL ACTION tried at Spring Term, 1883, of ORANGE Superior Court, before *Gilmer*, *J.*

The defendants appealed.

Messrs. Graham & Ruffin, for plaintiff.
Messrs. Gatling & Whitaker, for defendants.

SMITH, C. J. The present suit is upon a written undertaking executed by the defendants, as sureties upon the discharge from arrest of the principal, William Garl Browne, against whom the plaintiff was then prosecuting her action for the recovery of a money demand. The undertaking is as follows:

ANNA K. ROULHAC, Executrix,
v.
WM. GARL BROWNE.

Whereas, the above-named Wm. Garl Browne has been arrested in this action, now, therefore, we, Wm. Garl Browne,

John Miller and John Gatling undertake in the sum of eight hundred dollars, that if the defendant is discharged from arrest, he shall at all times render himself amenable to the process of the court during the pendency of this action, and to such as may be issued to enforce the judgment therein. Witness our hands and seals this 7th April, 1882. (Signed and sealed by Browne, Miller and Gatling).

The plaintiff's complaint alleges the rendition of judgment for her in the action, in which the order of arrest was obtained, for the sum of $504, with interest from September 1st, 1875, and costs, the issue of a fruitless execution against the property of the debtor, the issue of process against his person and the inability of the officer to find him, and the breach of the defendants' obligation, for which she demanded judgment against them for $800, to be discharged by the payment of the judgment recovered.

No answer, deemed sufficient, having been put in, judgment by default, without an inquiry as to damages, was entered up at spring term, 1883, for the sum of $733.32, principal and interest computed to that date, with interest on $504 from April 2d and costs.

The defendants having failed to bring up the case by appeal, have applied for and obtained a writ of *certiorari*, under which the record has been transmitted and is now under review. (See same case, 89 N. C., 190).

There is error in entering up a final instead of an interlocutory judgment upon the complaint. The obligation assumed by the defendants was that their principal, the debtor, should "at all times render himself amenable to the process of the court during the pendency of the suit," and the breach consists in his failure to respond to the process which issued against his person. The recovery of damages therefor, whatever may be the rule for measuring them, is the relief to which the plaintiff is entitled, and they must be ascertained by a jury.

In *Parker* v. *House*, 66 N. C., 374, which was a suit upon a constable bond, and the complaint specified the different claims and their amounts alleged to have been lost by negligence, an interlocutory judgment was rendered for want of an answer, and in assessing damages it was insisted they were ascertained by the undenied specifications in the complaint, and other evidence before the jury was not required. But the court say that "the defendant by failing to answer admits this allegation" (the want of due diligence in making the collection), but does not admit the amount of damages, for this is the question to be determined upon proofs." *Parker* v. *Smith*, 64 N. C., 291.

The subject and the practice as affected by legislation are so fully considered in the recent cases of *Rogers* v. *Moore*, 86 N. C., 85, and *Wynne* v. *Prairie*, Ib., 73, as to dispense with any renewed examination. The rule we deduced and laid down is clearly recognized and embodied in the amended form in which section 217 C. C. P. appears in section 385 of THE CODE.

Final judgments are now allowed upon a default when a verified complaint "sets forth one or more causes of action, each consisting of an *express or implied contract to pay absolutely or upon a contingency a sum or sums of money fixed by the terms of the contract, or capable of being ascertained therefrom by computation.*

The authorities cited in the argument at last term, upon hearing the application for the writ of *certiorari*, seem to fix the measure of damages for a breach of the bail bond at the amount of the debt recovered, but if so, it is a rule to guide the jury in determining the damages in an inquiry before them, to be acted on by them, but not in the summary way pursued in the present case.

There is error in the judgment and it must be modified and made interlocutory, and the damages inquired of by the jury.

This will be certified that the cause may proceed to a judgment final in conformity to this opinion.

Error. Reversed.

M. A. McEACHERN and others v. F. W. KERCHNER, Adm'r.

Consent Judgment, relief against.

1. A judgment by consent cannot be corrected by the court without the consent of all the parties to it. It is not the judgment of the court except in the sense that it is recorded and has the effect of a judgment. In such case the court can only correct its own errors in making the entries, as for instance, the misprision of its clerk.
2. A party complaining of such judgment upon the ground of fraud or mistake, can seek redress by instituting a new action.
3. An interlocutory consent order may be corrected upon motion in the cause.

(*Edney* v. *Edney*, 81 N. C., 1; *Stump* v. *Long*, 84 N. C., 616, cited and approved).

SPECIAL PROCEEDING for account and settlement, commenced before the clerk, and heard at January Special Term, 1883, of RICHMOND Superior Court, before *Graves, J.*

This was a motion to amend the record in said proceeding, and upon consideration of the same, after argument of counsel, the judge ordered that the judgment of the clerk be reversed, and remanded the proceeding to the probate court to be disposed of according to law, and from this judgment the plaintiff, Margaret A. McEachern, appealed.

Messrs. Frank McNeill and *T. A. McNeill*, for plaintiff.
Messrs. Burwell, Walker & Tillett, for defendant.

MERRIMON, J. In a proceeding duly instituted and pending in the court of probate of the county of Richmond between the devisees and legatees under the will of John Fairley, deceased, and F. W. Kerchner, administrator with the will annexed of the said John Fairley, to settle and wind up the estate in the defendant's hands, a judgment by "*consent of all the parties*" was entered, on the 8th day of August, 1877, with the consent and sanction of the court.

The defendant, afterwards, in the same proceeding, on the 21st day of May, 1881, and after the said proceeding had been ended, filed his petition, wherein he prays, "that the said terms of compromise be filed and entered in this cause, and the said decree so reformed and amended as to conform to the true intention and agreement of the parties." The notice given in connection with this petition, was of a motion "to be allowed to file the terms of agreement and compromise made by the parties in said cause, and upon which the consent and compromise decree was entered, and to make such amendments or modifications of said decree as may be necessary to declare and give effect to said agreement."

The judgment complained of makes no reference to any terms of compromise or settlement, other than is set out therein, nor does it make any reference to papers of any nature connected therewith.

The clerk of the superior court, after hearing the said motion, on the 10th day of April, 1882, denied the same, on the ground "that the decree appearing upon its face to be a decree *by consent*, can only be amended and reformed by consent." From this judgment the defendant appealed to the superior court of that county. The superior court reversed the judgment of the clerk, and remanded the case with directions to proceed according to law. Thereupon the plaintiff, Margaret A. McEachern, appealed to this court.

The facts found by the court of probate are not before this court. Indeed it does not appear that the facts were found by that court at all.

We think that the superior court erred in reversing the judgment of the clerk.

A judgment by "consent of parties," is a judgment, the provisions and terms of which are settled and agreed to by the parties to the action to be affected by it, and it is placed upon, and becomes of record, by the consent and sanction of the court. The court does not settle the grounds or the terms of it; it is not

the judgment of the court, except in the sense that the court allows it to go upon the record and have the force and effect of a judgment; and, therefore, the court cannot amend, modify or correct it, except by the consent of all the parties to it. It is essentially, in its provisions, the agreement of the parties, and if the court should change it in any respect without consent, it would cease at once to be the judgment agreed upon by the parties; and such exercise of judicial power would be a practical denial of the right of the party prejudiced, or supposing himself prejudiced, to be heard according to law.

If a party to such a judgment complains of it because of inadvertence, mistake, accident or fraud in the agreement to have it entered of record, he can have redress only by consent of all the parties, or by an action instituted for that purpose, making all proper parties independent of the action in which such judgment was entered. In such independent action he can allege and set forth such grounds of complaint against such judgment as he may have, and the court can grant such relief as he may be entitled to.

In case of an *interlocutory consent* order complained of for like causes, it might be corrected upon petition and motion, pending the action, but not after the action has been ended. This is allowed because the action could not be determined until any contest about such interlocutory order should be determined. After the action is determined, the judgment cannot be assailed for any of the causes mentioned, except through a new action.

The subject of judgments by consent is ably discussed by Mr. Justice Dillard in *Edney* v. *Edney*, 81 N. C., 1. This case is fully approved in *Stump* v. *Long*, 84 N. C., 616. These cases are, in material respects, like that before us, and it must be governed by them.

The court in case of a consent judgment could only correct some error of its own in respect to the entry of the judgment, as for example, if only a part of the consent judgment had been entered on the record, or the clerk had by inadvertence miscopied a word or phrase of the agreement settling the terms of

the judgment filed with the court. In such and like cases the court could correct its own errors, but it could not add to, modify or correct the agreement. Nothing of this sort is suggested in the present case.

The judgment in question was a final one; the action was terminated; the defendant prays in his petition to file papers not filed with the court at the time the judgment was entered; nor is any reference made to them in the judgment, and he prays to correct and amend the judgment in accordance with the papers referred to in the petition. The appellant does not consent to the filing of the papers, or the correction prayed for; on the contrary, she refuses to do so, and assigns sundry grounds specified in her answer to the petition why she will not.

It is very clear that the court cannot amend the judgment. We do not intend to intimate that the defendant could not have redress by a proper action, notwithstanding this decision.

This in no way involves the power of the court to amend its records at all times, so as to make them speak the truth.

There is error. The judgment of the superior court must be reversed. Let this be certified to the superior court, to the end that the judgment there may be reversed, and judgment affirming the judgment of the clerk of the superior court may be entered according to law. It is so ordered.

Error. Reversed.

J. H. WILSON, Jr., and wife v. C. J. LINEBERGER.

Rehearing.

Applications for a rehearing under Rule 12, 89 N. C., 606, are based only upon alleged errors in law and newly discovered evidence, and, therefore, such proceeding is not the proper mode of asserting a claim to uncollected assets not included in the former account of the party to be charged.

PETITION by plaintiffs to rehear filed November 12th, 1883, and heard at February Term, 1884, of THE SUPREME COURT.

Messrs. Wilson & Son, for plaintiffs.
Messrs. Jones & Johnston and *N. Dumont*, for defendant.

SMITH, C. J. The error assigned consists in our overlooking the evidence of the solvency of L. A. Mason, a debtor to the partnership, against whom judgments had been recovered, furnished in his returns of taxable property, when passing upon the defendant's responsibility for the entire indebtedness, which, if well founded, cannot be corrected in this method of proceeding. Applications for a rehearing are confined to alleged errors in law, or are sustained on the ground of newly discovered evidence. Rule 12, 89 N. C., 606.

In the former opinion (88 N. C., 416), the defendant was to be held liable for so much only of the judgments against this debtor as had been collected by the defendant, and of course exonerating him from personal accountability for the residue, since it did not appear that any detriment had come to the firm from the omission to collect that. The fund did not thereby become his, but continued to belong to the firm as before, and future collections made would inure to the common benefit of all the partners. We merely determined that the defendant should not *then* and in that account be charged with uncollected sums still due, having reference to the time of the rendering the account by the commissioner.

The judgment disposes of the defendant's administration of copartnership matters and his personal accountability for the results of acts and omissions entailing loss or harm to the associate members, but leaves the uncollected assets, from which moneys might thereafter be realized, to be distributed among them. Our ruling is that which ought to have been made by the judge and originally by the commissioner, upon the facts then existing and the evidence before him.

There is no obstacle to a further accounting for moneys of the firm subsequently collected by the defendant and for which he has not been already made responsible, but the present is not the appropriate mode of reaching them.

The decree heretofore made will, if necessary, be so modified as not to conclude the plaintiffs from asserting their claims to such further moneys derived from the partnership resources and not included in the account, as may have come or may come into the hands of the defendant. In all other respects the judgment must be affirmed.

Modified.

MARTHA DRAPER v. J. A. BUXTON & CO.

Sheriff—Execution—Allegation and Proof—Pauper not entitled to recover costs.

1. Where, in an action for conversion, it was alleged that the sheriff sold property belonging to the party complaining and not to the defendant in the execution; *Held*, that no recovery can be had against the plaintiff in the execution (the defendant here) where there is no proof that he instructed the sheriff to sell; or that he was present at the sale or ratified it; or that he received any portion of the proceeds.
2. Every material allegation in the complaint must be supported by proper evidence, to enable a plaintiff to maintain his action.
3. One suing *in forma pauperis* is not entitled to recover costs of his witnesses. THE CODE, §212.

(*Lentz* v. *Chambers*, 5 Ired., 587; *Hall* v. *Younts*, 87 N. C., 285; *Booshee* v. *Surles*, 85 N. C., 90, cited and approved).

CIVIL ACTION tried at Spring Term, 1882, of NORTHAMPTON Superior Court, before *Bennett, J.*

This is an action of trover for the conversion of a lot of cotton, corn and fodder. The jury found the issues in favor of the plaintiff; judgment accordingly; appeal by defendants. The facts are stated in the opinion of this court.

No counsel for plaintiff.

Mr. R. B. Peebles, for defendants.

MERRIMON, J. The plaintiff sued *in forma pauperis*, and brought the action to recover the value of certain corn, cotton

and fodder, which she alleges belongs to her, and the defendants unlawfully converted it to their own use. The answer of the defendants specifically denies all the allegations in the complaint.

On the trial the court submitted, along with two other appropriate issues, the following: "Did the defendants, by themselves, their agents and officers, wrongfully convert the same (the property in question) to their own use?" The jury responded "yes."

The evidence tended to show that the sheriff of Northampton county, by his deputy, had process in his hands (the exact character of which does not appear, but we must take it to have been a *fieri facias*), in favor of the defendants, and against Benjamin F. Draper, and by virtue of such process sold the property in question.

It appears that the defendants were not at the sale, and it does not appear that they gave the deputy sheriff, or the sheriff, instructions to sell the property, or that they received the money, the proceeds of the sale, or that they in any way ratified the sale thereof, or had anything to do with it. Indeed, the deputy sheriff testified that the defendants did not instruct him to sell the plaintiff's property. The case, settled upon appeal for this court, purports in terms to set forth *all the evidence* produced on the trial.

The defendants prayed the court to instruct the jury that upon the evidence the plaintiff was not entitled to recover. The court declined so to do, and the defendants excepted.

We think the defendants were entitled to the instructions prayed for. Indeed, we are at a loss to conjecture why the court denied the same, in view of the case as it appears to us in the record.

Every issue of fact must be supported by proper evidence, and such in degree of weight as reasonably warrants the jury in finding the same in favor of the party on whom the burden of proving it rests. And in a case like the present, where more than one issue is raised by the pleadings, each one material and

essential to establish the plaintiff's right to recover, must be sustained by such evidence; else, the issue not so sustained must be found against him, and the action fail. The plaintiff must prove every material allegation in his complaint, not admitted by the defendant in his answer, to enable him to recover. It sometimes happens that the same evidence in its scope goes to support all of the issues, and there can be no objection to this; nor does it matter, that the evidence comes from the opposite party; it is sufficient that proper evidence is before the jury. But in such case the evidence must be pertinent to support each issue. There must be evidence, however the same may appear, going to support each issue, and when this is not so, the court ought to instruct the jury that the plaintiff cannot recover.

The jury must not be left to mere conjecture, or remote inference, or inference drawn from improper sources. There must be evidence—proper evidence—pertinent evidence; from what quarter soever it comes, it must be *evidence*.

Now, in this case it was necessary that the plaintiff should introduce evidence, or that there should be evidence, to warrant the jury in finding the issue above set forth in her favor. So far as appears from the record, there was no evidence pertinent to it. The defendants were the plaintiffs in the execution under which the sheriff sold the plaintiff's property mentioned in her complaint. The process did not command the sheriff to sell her property. So far as appears, the defendants did not, by word or act, direct him to sell her property, nor does it appear that they received from the sheriff any part of the proceeds of the sale thereof. If it appeared that they received the proceeds of the sale, then it might be that this would be treated as a ratification of the sheriff's act. In the absence of such evidence, it was in evidence coming from the deputy sheriff that the defendants were not at the sale, and that they did not instruct him to sell the plaintiff's property.

The mere fact that the sheriff sold the property under an execution in favor of the defendants was not evidence, nor was

it a fact from which the jury could infer that the defendants had anything to do with the sale of the plaintiff's property. It was the duty of the sheriff in collecting the money specified in the execution, to sell, if need be, the property of the defendant therein—not that of some other person. That he sold the property of the defendant raises no presumption of fact that the defendant instructed him to do so, or ratified his act. Cooley, on Torts, 127, 128, 129; *Lentz* v. *Chambers*, 5 Ired., 587.

As the plaintiff failed to introduce proper evidence to support the issue, she cannot recover in this action, and the defendants were entitled to the instructions prayed for, and denied by the court.

2. The court gave judgment, that the defendants be taxed with the costs allowed to plaintiff's witnesses, amounting to $14.60. In this there is error. THE CODE, §212, provides that, "whenever any person shall sue as a pauper, no officer shall require of him any fee, *and he shall recover no costs.*"

This provision of the statute, in terms, deprives all officers of costs, and the last clause of it is very sweeping, and manifestly embraces the costs of witnesses. Compensation to witnesses is a part of the cost of an action, as much so as any other statutory charges in and about the same. *Hall* v. *Younts*, 87 N. C., 285; *Boushee* v. *Surles*, 85 N. C., 90.

The case states that the court, in allowing the plaintiff the witness-costs, relied upon *Boushee* v. *Surles, supra*. This was a clear misapprehension of what that case decides, for the Chief-Justice, in that case, after discussing the state of the law prior to the act of 1868–'69, ch. 96, §3, says: "The change in phraseology, we think, was intended to declare that as he (the pauper plaintiff) paid none of the defendant's costs if he failed, so if successful in his action, the defendant should be taxed with none of his costs." In that case, the witness-costs were expressly disallowed.

There is error, and the judgment must be reversed and a new trial awarded. Let this be certified.

Error. *Venire de novo.*

K. S. DELOATCH v. W. H. COMAN.

Landlord and Tenant—Jurisdiction.

An action by a landlord against a tenant for the recovery of rent, the sum demanded not exceeding two hundred dollars, is an action upon the contract of lease and cognizable in the court of a justice of the peace. The jurisdiction cannot be ousted because further relief is asked which such court has no power to grant.

(*Belcher* v. *Grimsley*, 88 N. C., 88; *Ashe* v. *Gray*, *Ib.*, 190; *Montague* v. *Mial*, 89 N. C., 137; *Livingston* v. *Farrish*, *Ib.*, 140; *Wilson* v. *Respass*, 86 N. C., 112, cited and approved).

CIVIL ACTION tried at Fall Term, 1882, of HERTFORD Superior Court, before *Gilliam*, *J.*

The action was commenced in the court of a justice of the peace, and the affidavit of the plaintiff, treated as his complaint, is in substance as follows:

The plaintiff leased to defendant a certain tract of land for cultivation during the year 1881, and the defendant agreed to pay and deliver to plaintiff nine hundred pounds of lint-cotton as rent for the same; and also, another tract for which the defendant agreed to pay one-fourth of the crop of cotton as rent. The defendant removed from the premises about twenty-seven hundred pounds of seed-cotton, and delivered the same at the gin of Cooke & Harrell, in Murfreesboro, without the plaintiff's consent, and now refuses to pay more than one average bale of cotton towards the rent alleged to be about $103.25. The plaintiff further alleges that the rent-lien attaches to the said seed-cotton in possession of the defendant at said gin, and that he is entitled to the same to satisfy his claim for rent; that the defendant wrongfully detains the property, nor has it been taken for taxes, assessment, or fine, in pursuance of any statute, or seized under execution or attachment against the property of the plaintiff, and that the actual value of the same is $94.50.

The defendant resisted the claim on the ground that the jus-

tice of the peace had no jurisdiction of the action—the value of the property being alleged to be over fifty dollars.

The justice overruled this demurrer and from the judgment the defendant appealed to the superior court. His Honor affirmed the judgment, with leave to the defendant to answer the complaint, and from this ruling the defendant appealed to this court.

Messrs. D. A. Barnes and *J. B. Batchelor*, for plaintiff.
Mr. B. B. Winborne, for defendant.

SMITH, C. J. If the action were solely to recover possession of the removed cotton, raised upon the rented land and subject to the statutory lien, in the use of the remedy given in the first section of the act of 1877, THE CODE, §1750, and not "founded on contract," the value of the goods claimed being in excess of fifty dollars, the cognizance of the cause would not be vested in a justice of the peace. Although the lien to be enforced by possession results from the contract of lease, the cause of action consists in the unlawful removal or withholding of the crops from the lessor before the satisfaction of his claim, and its end, the restoration of the possession; and hence the suit is for a tort, the jurisdiction of which, when the property demanded and in controversy exceeds the sum mentioned, is confided exclusively to the superior court. This is the principle established by past adjudications. *Belcher* v. *Grimsley*, 88 N. C., 88; *Montague* v. *Mial*, 89 N. C., 137; *Livingston* v. *Farrish*, Ib., 140.

This is not, however, the case presented in the record: The summons is, in form and effect, "in a civil action," and for the recovery of rent "due of nine hundred pounds of lint-cotton" grown upon the leased premises, to the amount of ninety-four dollars and fifty cents; while it also demands the possession of all the removed cotton under the lien.

The affidavit, which the parties accept as the complaint, filed as the initiatory step in the collateral proceeding for claim and

delivery, also sets out the contract and asserts the plaintiff's right thereunder to the rent-cotton, and the defendant's resistance to the amount alleged to be due, as the supposed ground of the defendant's withholding; so that the suit is both to enforce the contract and to get possession of the crop in order thereto.

It is obvious that the action, whatever may be sought in its prosecution, is founded upon contract, and the sum demanded not being above two hundred dollars, no other than the court of a justice of the peace can exercise jurisdiction in the premises. Nor can this jurisdiction be ousted because further relief is asked which it is not in his power to grant. *Ashe* v. *Gray*, 88 N. C., 190.

Whether the action be for the recovery of a money demand measuring the value of the rent-cotton stipulated to be paid, or proceeds under the sanction of the third section of the statute (THE CODE, §1756), it had a rightful origin in the justice's court. But in neither case is restitution ordered, while in the latter the crop is secured to await the result of the dispute as to the amount due. This act has been carefully examined and its provisions construed in a recent case (*Wilson* v. *Respass*, 86 N. C., 112), rendering a repetition needless. It is there said that "this section contemplates an action to determine a dispute growing out of the agreement and the relative rights and obligations created by its stipulations, without disturbing the possession of the lessee, cropper or assignee of either."

Its purpose is to provide a summary mode for ascertaining a disputed liability, and, in case of delay, to secure the fruits of the judgment by requiring of the lessee, as a condition of his remaining in possession of the property, an adequate undertaking for the payment of what may be recovered.

The action is, however, in no proper sense for the redress of a tort within the meaning of the law, though accompanied with these collateral advantages to render the recovery effectual, and they do not change the nature of the proceeding, nor affect the authority of the tribunal in which the essential controversy is to be tried.

The simple point presented in the appeal is the question of jurisdiction, and the ruling of the court must be sustained. The irregular and unwarranted order for seizure, with its consequences, will be corrected in the court below. There is no error. This will be certified to the end that the cause proceed in said court.

No error. Affirmed.

ISABELLA BARNES v. ROBINSON RAPER.

Dower—Possession does not supply Seizin.

1. In a proceeding for dower, it was admitted that the husband did not have seizin of the land during the coverture; *Held*, that an issue whether he was in possession at the time of his death, claiming the land as his own, and the finding thereon, could in no way effect the result; since possession does not supply the seizin necessary to support a claim for dower.
2. The act of assembly requiring "seizin *and* possession" of an inheritable estate by the deceased husband to entitle his widow to dower, commented on by SMITH, C. J. The word "and" substituted for "or" in the original act of 1784, does not change the sense of the enactment.

(*Houston* v. *Smith*, 88 N. C., 312; *Littleton* v. *Littleton*, 1 Dev. & Bat., 327; *Tate* v. *Tate*, 1 Dev & Bat., Eq., 22; *Weir* v. *Humphries*, 4 Ired. Eq., 264, cited and approved).

SPECIAL PROCEEDING for dower, commenced before the clerk and tried at Spring Term, 1883, of WILSON Superior Court, before *McKoy, J.*

The plaintiff is the widow of Henry Barnes, and states in her petition that the defendants Wiley Lamm and Robinson Raper claim possession and title to the two tracts of land therein described, and asks to have her dower in the same allotted to her. The petitioner afterwards compromised her claim upon the tract in possession of said Lamm.

The substance of the defendant's answer is set out in the

opinion. The court below adjudged that the plaintiff is not entitled to dower, and she appealed.

Messrs. Strong & Smedes, for plaintiff.
Messrs. Connor & Woodard, for defendant.

SMITH, C. J. In answer to the petitioner's application for an assignment of dower in the two tracts of land described in the petition, alleged to be claimed by the defendants respectively, they deny to be true the allegation of seizin in the intestate husband, at any time during their marriage, in either tract. For the trial of the matters drawn in controversy by the pleadings, the cause was removed to the superior court, and, it being admitted by the plaintiff that the intestate Henry Barnes, husband of the petitioner, did not at any time during the coverture have legal seizin of the lands, an issue was submitted to the jury in this form: Did Henry Barnes remain in possession of the land to the time of his death, claiming it as his own? To this inquiry the jury answered, he did not.

Thereupon the court adjudged that the petitioner is not entitled to dower, and she appeals to this court.

The statute in force at the time of the intestate's death, in 1872, and restoring the common law right of dower, gives to a married woman, whose husband dies without or with a will from which she dissents, an estate for life in one-third in value of the lands, rights of redemption, legal and equitable, and other equitable estates whereof her husband was "seized and possessed at any time during the coverture." Acts 1869–'70, ch. 176, (THE CODE, §2103).

The seizin, as required at common law, to render the estate dowable, must be of an estate of inheritance, with the freehold vested in the deceased husband, as is fully explained in the recent case of *Houston* v. *Smith*, 88 N. C., 312.

The intestate Henry Barnes, who did once own the land, the subject of controversy, conveyed it by deed to his daughter and

only child Mary, wife of Ruffin Raper, previous to his marriage with the petitioner, and it was conceded that he had no seizin during the period of their marriage.

This admission put an end to the claim, unless the petitioner was able successfully to impeach the deed as made in contemplation of marriage and with intent to defraud her of her right to dower. *Littleton* v. *Littleton*, 1 Dev. & Bat., 327; *Tate* v. *Tate*, 1 Dev. & Bat. Eq., 22.

This, it does not appear that she proposed to do, and consequently her asserted claim, being groundless, must be denied.

We are unable to understand why an issue was submitted to the jury in reference to the possession, since possession cannot supply the seizin of an inheritable estate, necessary to support the right of dower, and the responding verdict, if favorable to the petitioner, would not affect the result. The act, it is true, speaks of an estate whereof the husband is *seized and possessed*, substituting the copulative "*and*" in place of the disjunctive "or" in the original act of 1784. A similar change was made in the Revised Code, ch. 118, §1, and yet these alterations in the phraseology do not affect the sense and meaning of the enactment, as held in *Weir* v. *Tate*, 4 Ired. Eq., 264.

In the elaborate opinion of the Chief-Justice, he remarks that "it was never understood by the profession why the term 'possessed' was introduced into that statute, as it certainly was not intended that there should be dower of terms for years, or that the rule of the common law should be abrogated which makes a legal seizin in the husband sufficient to support a title to dower." This was said in passing upon the force of the disjunctive "or" between the words "seized" and "possessed"; and it is added that, "in point of law, however, the owner of the inheritance is not only *seized*, but is said to be possessed, for the purposes of dower and courtesy, when the reversion or remainder is not after a freehold, but after a term for years only. The possession of the tenant for years is the possession of the reversioner."

These suggestions in reference to the possession are made to prevent any inference from our silence that the issue was at all material in determining the validity of the petitioner's claim, or that a different response would have given it any efficacy.

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

No error. Affirmed.

J. A. WORTHY v. H. B. SHIELDS, Guardian.

Jurisdiction—Issues of Fact—Right of trial by jury—Witness, deposition of.

1. The jurisdiction of the supreme court over issues of fact, under article four, section eight of the constitution, will be assumed upon two conditions: 1. If the matter be of such an equitable nature as a court of equity under the former system took exclusive cognizance of. 2. If the proofs are written and documentary, and in all respects the same as they were when the judge of the court below passed upon them.
2. A party under the present system has a right to a jury trial of an issue of fact, as well when it involves an equitable as a legal element entering into the merits of the controversy.
3. Depositions of witnesses are never taken by a court while engaged in the trial of a cause.

(*Goldsborough* v. *Turner*, 67 N. C., 403, commented on; *Lee* v. *Pearce*, 68 N. C., 76; *Heilig* v. *Stokes*, 63 N. C., 612; *Jones* v. *Boyd*, 80 N. C. 258; *Shields* v. *Whitaker*, 82 N. C., 516; *Leggett* v. *Leggett*, 88 N. C., 108; *Wessell* v. *Rathjohn*, 89 N. C., 377, cited and approved).

EJECTMENT tried at December Special Term, 1883, of MOORE Superior Court, before *MacRae, J.*

The defendant appealed.

Messrs. J. W. Hinsdale, McIver & Black and *W. A. Guthrie*, for plaintiff.

Messrs. M. S. Robins and *W. E. Murchison*, for defendant.

SMITH, C. J. The plaintiff asserts title to the land described in the complaint, and demands the recovery of possession and damages for the wrongful withholding by the defendants. He also alleges that the defendants claim under a deed, in form and effect a mortgage (of which he annexes a copy), made by the former owner, D. R. McDonald, to the defendant A. R. McDonald, who, being a lunatic, is represented by his guardian, the defendant H. B. Shields, on February 11th, 1870, by virtue of which the mortgagee entered upon the premises, and from the value of the use and occupation as rents has received a larger sum than the secured debt and interest. He therefore asks for an account, and proffers to pay any deficiency found after applying the rents to the debt. The answer of the lunatic and guardian controverts the allegation of ownership, declares the deed to be and intended to be a conveyance of the land for the sum recited to be the consideration, with a condition by which the bargainor might, if he chose, within the period of one year thereafter, redeem, on restoring the purchase money and interest, but meanwhile was under no obligation to do so, or to pay the money. The others, tenants under their associate defendant, disclaim any independent title in themselves.

When the cause came on for trial, the defendant proposed to prepare and submit to the jury issues arising out of the controverted allegations contained in the pleadings, which the judge refused to allow, assigning as his reasons therefor that the claims mentioned in one of the articles in the answer in general terms, with the explanatory statements of counsel, grow out of the execution of a deed from the sheriff of Moore county to the said A. R. McDonald, pursuant to a sale under execution against said D. R. McDonald, of the estate and interest remaining in the latter in the disputed land, after his deed to the former, and are, as is the action in its scope, wholly *equitable in their nature* and proper to be tried and determined by the court without a jury.

To this ruling the defendant's exception taken *in limine* presents the only question we find it necessary to consider.

In *Goldsborough* v. *Turner*, 67 N. C., 403, where the purpose of the action was to set aside a deed for fraud practiced in inducing its execution, and a series of inquiries had been put to the jury and answered, RODMAN J. says in terms that "the judge may himself decide the issues of fact made in a case like this," under sections 224 and 225 of the Code of Civil Procedure, and that while he may seek the aid of a jury in determining matters of fact for his own guidance, he is not bound by the findings, but may arrive at and act upon different conclusions of his own—pursuing the former practice in courts of equity; yet this view of the relative administrative functions of the judge and jury, under the constitution and superseding system, was disavowed by the court in the opinion of the Chief-Justice delivered at the succeeding term in *Lee* v. *Pearce*, 68 N. C., 76.

Referring to the preceding case, he says: "In that case issues were found by the jury fixing the allegations of fraud, and no consideration of the remarks of Justice RODMAN is admissible which would impose on this court the province of trying issues of fact as distinguished from questions of fact (*Heilig* v. *Stokes*, 63 N. C., 612), for such a construction is opposed by the constitution. Art. IV, §10, 'No issue of fact shall be tried before this court.' Nor is a construction admissible which would impose on the judge of the superior court the duty of trying issues of fact, except when by consent of parties the judge is substituted for a jury, for such a construction is opposed by the constitution." §18.

The words which are quoted by the Chief-Justice from section 10 are omitted from the correspondent section 9 contained in the amended constitution, and in place is substituted this sentence: "And the jurisdiction of said court over 'issues of fact' and 'questions of fact' shall be the same exercised by it before the adoption of the constitution of one thousand eight hundred and sixty-eight."

The result upon the judicial power of this court produced by this change in the organic law came up for examination in *Jones*

v. *Boyd*, 80 N. C., 258, and the distinction in the appellate jurisdiction over causes brought up for review on rulings in the courts of law and courts of equity, is plainly marked. It is there said that under the former system "this court was invested with authority to review the decrees, final or interlocutory, of the *courts of equity*, and the evidence upon which they were rendered, and, in case of reversal, to exercise original jurisdiction itself. The case, whether upon appeal or removal, was heard upon written and documentary proofs only, according to the well established practice in courts of equity, and consequently this court had before it the same means of arriving at a correct decision which the court below had."

Conforming to this view of appellate authority, we have since confined our examination of the evidence, with the purpose of deducing facts from it in cases brought up by appeal, to such only as were, before, of exclusive equitable cognizance; and then only when the accompanying evidence was in writing in the form of affidavits or depositions and exhibits which could be seen and weighed by us, in the plight in which they appeared before the judge of the superior court. The former equity court acted upon testimony coming from the lips of witnesses, reduced to writing as it was uttered before the examiner, and the subject matter in all its aspects was thus presented to the revising tribunal.

We have not proceeded beyond these assigned limits, nor can we do so without assuming and exercising a jurisdiction larger than was possessed before the adoption of the constitution of 1868, and seriously affecting the character of the court as intended in the instrument which confers its authority, as one for the correction of errors in law.

There are thus two underlying conditions essential to our assumption of jurisdiction to pass upon issues of fact:

1. The matter must be exclusively of equitable cognizance in the former division of administrative judicial power; and

2. The proofs must be in all respects the same before us as they were before the judge of the superior court, written and

documentary—not a narrative of what was delivered, but the words which were spoken—so that as an appellate tribunal, the court shall stand in the same relation to it that was occupied by the judge who made the ruling in the superior court.

It was only under such circumstances that the revisory jurisdiction was possessed and exercised previous to the constitution framed in 1868. As that court then examined and deduced conclusions of fact from the evidence in causes coming up from the court of equity on appeal (or by removal which is now not authorized), so this court, in the exercise of the restored jurisdiction, can only act when we have the cause before us in the same plight and similar surroundings as it was presented to the judge of the superior court. A fair construction of the amendatory provisions of the constitution do not require, nor do we think they permit our overstepping these limits and invading the province, while we usurp the functions of the jury.

It is clear that a jury verdict cannot be disregarded (*Shields* v. *Whitaker*, 82 N. C., 516; *Leggett* v. *Leggett*, 88 N. C., 108; *Wessell* v. *Rathjohn*, 89 N. C., 377), and we take but a step further in declaring that parties have a right to submit an issue of *fact* as well when it involves an equitable as a legal element entering into the merits of a controversy made in the pleadings; and this is the legitimate consequence of a reduction of all remedial proceedings into one single action.

The necessity of restriction is made apparent, in that the appellant, when denied a jury, at once demanded that the testimony be taken in the form of a deposition, so that the court could see and interpret it from the words of the witness, and not have it in a narrative form according to what he was understood to mean, rather than what he said.

This also was denied and properly denied, for under no system were depositions taken by the court while engaged in the trial of the cause.

The transcript presents another difficulty in the plaintiff's way upon the assumption that the case is to be tried as one in

equity. The allegation of title is denied in the answer, thus devolving on the plaintiff the burden of proving it, and all the necessary proof must be contained in the statement of the case, since nothing appears to have been conceded. Looking then at the attachment papers annexed, there is not seen to have been any publication required to bring the non-resident debtor before the justice and warrant his rendering judgment of condemnation. In equity trials, without regard to the rulings below, the inquiry was whether upon the pleadings and evidence the plaintiff was entitled to relief, and if so, it was accorded to him. No errors were required to be assigned, and the trial was *de novo*. This course is so foreign to that prescribed in the Code of Civil Procedure that we are not disposed by construction to extend our appellate power beyond reasonable limits intended by the framers of the constitution.

There is error in the judgment of the court refusing a jury trial, and this will be certified.

Error. Reversed.

J. G. L. ENGLAND and others v. EDMUND GARNER and others.

Judgment—Judicial Sale—Attorney and Client—Non-residents.

1. The judgment of a court having jurisdiction of the parties and the subject matter, though irregular, is valid until reversed; and if reversed, a purchaser in good faith at a sale made in pursuance of such judgment will be protected.
2. An appearance by counsel, even without authority, is regular upon its face, and upon the facts here, binds the party for whom the appearance was made.
3. A judgment against an infant is not absolutely void, but *irregular*; and if set aside, the interest of a *bona fide* purchaser under the judgment without notice will not be affected.
4. The courts, being open to non-residents in asserting their right to property here, will go no farther in protecting them than residents from the consequences of unreasonable delay.

(*Jennings* v. *Stafford*, 1 Ired., 404; *Williams* v. *Harrington*, 11 Ired., 616; *University* v. *Lassiter*, 83 N. C., 38; *Ivey* v. *McKinnon*, 84 N. C., 616; *Sutton* v. *Schonwald*, 86 N. C., 198; *Gilbert* v. *James*, *Ib.*, 244; *Morris* v. *Gentry*, 89 N. C., 248; *Rogers* v. *McKenzie*, 81 N. C., 164; *Weaver* v. *Jones*, 82 N. C., 440; *White* v. *Albertson*, 3 Dev., 241; *Marshall* v. *Fisher*, 1 Jones, 111; *Doyle* v. *Brown*, 72 N. C., 393, cited and approved).

CIVIL ACTION tried at December Special Term, 1883, of MOORE Superior Court, before *MacRae, J.*

The plaintiffs instituted this action on August 7, 1880, and ask that the orders and decrees in an *ex-parte* proceeding, in the late court of equity of Moore county, for the sale of land for partition, be set aside and declared void, and that they be decreed owners of the land and entitled to the possession thereof.

The facts alleged in the complaint and material to the case are, that in the year 1835, J. W. England removed with his family to the state of Alabama, and died in 1849 seized of certain lands in Moore county in this state, and the plaintiffs are his heirs-at-law, and residents of Alabama.

At spring term, 1860, an *ex-parte* petition was filed by A. R. Kelly, attorney at law, on behalf of the heirs of said England (the plaintiffs in this action), to sell the land for partition. Order of sale was granted, and a sale made on September 27, 1860, and confirmed at fall term, 1861. But the plaintiffs allege they knew nothing of this proceeding until 1874, when they were informed that the land was sold for partition among them as tenants in common, and that they have received none of the proceeds of said sale. They were also informed that their attorney instituted proceedings in August, 1878, to set aside the decree. See 84 N. C., 212, and 86 N. C., 366.

In 1867, A. R. McDonald, attorney at law, appeared for the petitioners, and rules were served upon the defendants in this action, who were the purchasers at said sale or their grantees, to show cause why the purchase money should not be paid, which rules were discharged. These proceedings were also had without the knowledge of the plaintiffs, one of whom (J. G. L. England) was a minor when the said *ex-parte* petition was filed.

The defendants demurred to the complaint upon the grounds:

1. It does not allege that the purchasers had any knowledge of any fraud or irregularity in the proceedings, or want of anything in the attorneys.

2. It does not state that the purchasers had notice that the plaintiff J. G. L. England was a minor.

3. It is not stated that said Kelly was insolvent or ever had been, or that said McDonald was insolvent until 1878.

His Honor sustained the demurrer and the plaintiffs appealed.

Messrs. John Manning and *R. P. Buxton*, for plaintiffs.

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

MERRIMON, J. It is well settled upon principle and authority, that where it appears by the record that the court had jurisdiction of the parties and the subject matter of an action, the judgment therein is valid, however irregular it may be, until it shall be reversed by competent authority; and although it be reversed, a purchaser of the real estate or other property at a sale made under and in pursuance of such judgment while it was in force, and which it authorized, will be protected. All that the purchaser in such case is required to know, is, that the court had jurisdiction, and made the judgment upon the faith of which he purchased, and that such judgment authorized the sale. If this were not so, courts of justice would be worse than mockeries—their judgments and decrees would be snares and pitfalls for honest people—respect for and confidence in them would justly to a great extent be destroyed, and the effect upon society would be ruinous in a high degree. No one, whether he purchased immediately or mediately at such a sale, could be sure that he had purchased anything, much less a good title to the property sold, as against parties to the record.

It is a rule of law founded in sound policy as well as justice, that persons who purchase at judicial sales in good faith, shall

be protected against the errors and irregularities of the court, and the laches of parties which they cannot see, and about which they have no opportunity to inform themselves. *Jennings* v. *Stafford*, 1 Ired., 404; *Williams* v. *Harrington*, 11 Ired., 616; *University* v. *Lassiter*, 83 N. C., 38; *Ivey* v. *McKinnon*, 84 N. C., 651; *Sutton* v. *Schonwald*, 86 N. C., 198; *Gilbert* v. *James*, *Ib.*, 244; *Morris* v. *Gentry*, 89 N. C., 248; *Gray* v. *Brignardello*, 1 Wall., 627; Freeman on Judgments, §§509, 510.

According to the allegations in the complaint, the defendants, or those under whom they claim, purchased the land in controversy, at a judicial sale, under an apparently regular decree of the court of equity of Moore county authorizing it, granted in a suit wherein it *appears by the record* that the court had jurisdiction of the parties and the subject matter, and the parties to that suit are the present plaintiffs, or parties under whom they claim. It thus appears that the defendants, in respect to the purchase of the land mentioned in the complaint, are within the rule of law above stated, and they are therefore entitled to the protection of the court.

It is urged with much earnestness by the counsel for the plaintiffs, that the plaintiffs did not in fact personally appear in the court of equity in the suit mentioned, nor did they authorize counsel to bring the suit in their names, or represent them in that or any suit. The record, however, shows that they did institute the proceeding to sell the land in the court of equity, and that they were represented by counsel, and the court took jurisdiction of them and the subject matter of the proceeding. The presumption is, that they brought the suit, that counsel appeared therein by their authority, that the court had actual knowledge of their appearance, took jurisdiction of them and the subject matter, and granted the decree of sale in the orderly course of procedure.

There is no allegation that the defendants, or those under whom they claim, purchased with notice of any fraudulent prac-

tice in procuring the sale to be made, or irregularities in the record. It appeared to them, that the court had jurisdiction of the parties, the subject matter, and complete authority to make the decree. It must be taken that the counsel had authority to represent the parties in bringing and prosecuting the suit to its termination. An appearance by counsel, even without authority, is regular upon its face and is a good appearance in court. *University* v. *Lassiter, supra*; *Rogers* v. *McKenzie*, 81 N. C., 164; *Weaver* v. *Jones*, 82 N. C., 440.

It is alleged in the complaint that one of the plaintiffs was an infant at the time the proceedings in equity were instituted. It seems, however, he came of age pending the proceedings of the court. Be that fact as it may, the court recognized and took jurisdiction of him in the proceeding as a party of age, and represented by counsel. If he were an infant, this fact did not render the judgment as to him absolutely void; it was irregular, and might, upon proper application, have been set aside, not, however, to the prejudice of *bona fide* purchasers without notice. *White* v. *Albertson*, 3 Dev., 241; *Williams* v. *Harrington, supra*; *Marshall* v. *Fisher*, 1 Jones, 111; Freeman on Judgments, §513.

It was insisted that the plaintiffs were non-residents long before, at, and after the time the proceedings in equity were instituted, and this fact ought to serve as a protection to them. We cannot appreciate the force of this suggestion. The courts were open to non-residents as well as residents—both stood on the same footing, and there was no barrier to prevent the plaintiffs from coming to this state and at all times to care for their property and interests here. They certainly, according to their own showing, greatly neglected their property in this state, and there is a strange and unexplained delay in looking after the matters of which they complain. They may, however, have suffered, and this is to be regretted, more particularly if it happened through irregular proceedings in court, but their misfortune cannot be ground for overturning an important and well settled principle of law, and a great number of our own decisions.

It was contended on the argument that *Doyle* v. *Brown*, 72 N. C., 393, sustained the plaintiffs' contention. We have examined that case and do not think that a proper interpretation of it is in conflict with what we have here said.

We are of the opinion that, as against the defendants, the plaintiffs have not stated in their complaint facts constituting a cause of action.

The judgment of the court below must therefore be affirmed.

No error. Affirmed.

D. L. SAYLOR and others v. B. F. POWELL and others.

Homestead.

1. A widow is not entitled to homestead in lands of her husband if he die leaving children—minors or adults.
2. An heir twenty-one years old is not entitled to homestead in the lands of his ancestor.

(*Wharton* v. *Taylor*, 88 N. C., 230; *Wharton* v. *Leggett*, 80 N. C., 169, cited and approved).

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

This is a creditors' bill filed by the plaintiffs against the defendants, who are the widow and son of Henry Powell, deceased, who died intestate, and seized and possessed of the house and lot, in the town of Wadesboro, described in the complaint. The son and only heir was more than twenty-one years of age, and was the administrator of the intestate's estate. The plaintiffs are creditors of the intestate, and had obtained judgments against him which were regularly docketed in the superior court.

The defendants' intestate was possessed of very little personal estate—not more than sufficient to pay his funeral expenses, and the charges incident to the administration, and the taxes due upon his real property, which is the only resource for the payment of

the plaintiffs' debts. They have demanded payment of the administrator, but he has taken no steps for the satisfaction of their claims; and they therefore ask that the house and lot be sold and the proceeds made assets to pay the decedent's debts.

The defendants deny the plaintiffs' right to have the land sold, for the reason that B. F. Powell, the son and only heir of the deceased, is entitled to his homestead in the same, and the defendant Harriet, the widow, is entitled to her dower and homestead therein.

His Honor adjudged that the house and lot be sold subject to the dower of the widow, and from this judgment defendants appealed.

Messrs. J. A. Lockhart and *Little & Parsons*, for plaintiffs.
Mr. J. D. Pemberton, for defendants.

ASHE, J. The only question presented for the determination of this court is, whether the defendants, or either of them, are entitled to a homestead in the house and lot.

The claim set up by the widow for a homestead is decided in the case of *Wharton* v. *Leggett*, 80 N. C., 169, where it is held that, under article ten, section five of the constitution, a widow is not entitled to a homestead in the lands of her husband, if he die leaving children—minors or adults.

And the defendant B. F. Powell is not entitled to a homestead, either under the constitution or under the act of 1877, ch. 253. It is alleged in the complaint that he was twenty-one years old, which is not denied. So that even if he was a minor when his father died, and he was then entitled to a homestead, the right ceased as soon as he attained his majority. Const., Art. X, §3. Nor is he entitled to it by virtue of the act of 1877, for that act has been declared to be in violation of the constitution of the state. *Wharton* v. *Taylor*, 88 N. C., 230.

There is no error. Let this be certified, that the case may be proceeded with in accordance with this opinion and the law.

No error. Affirmed.

JOHN L. MARKHAM v. W. H. HICKS & CO.

Homestead—Reversionary Interest.

1. The debtor's estate, in its entirety, in the homestead, is protected from sale under execution until the expiration of the period of exemption. THE CODE, §501, and following. The law prohibiting the sale of the "reversionary interest" has not been changed by the fact that the act of 1870 (Bat. Rev., ch. 55, §26) is not incorporated into THE CODE.
2. The legal effect of the homestead laws is to protect the occupant in the enjoyment of the land set apart as a homestead, unmolested by his creditors.
3. No judgment lien attaches to the homestead where the debt was contracted since May 1, 1877 (ch. 253).

(*Poe* v. *Hardie*, 65 N. C., 447; *Littlejohn* v. *Egerton*, 77 N. C., 379; *Bank* v. *Green*, 78 N. C., 247; *Keener* v. *Goodson*, 89 N. C., 273; *Mebane* v. *Layton*, *Ib.*, 396, cited and commented on).

MOTION by defendant for injunction heard at Spring Term, 1884, of DURHAM Superior Court, before *McKoy, J.*

The motion was granted and the plaintiff appealed.

Mr. W. W. Fuller, for plaintiff.

Messrs. Graham & Ruffin, for defendant.

SMITH, C. J. The plaintiff having recovered judgment before a justice of the peace on August 31st, 1883, and caused it to be docketed in the superior court of Durham, sued out execution and delivered the same to the sheriff of Orange, directing him to sell in satisfaction a tract of land therein, which in this action had been allotted to the defendant Stanly as his homestead. The sheriff being about to sell this land, there being no other property of the debtors liable to seizure, the said defendant applied for and obtained a restraining order, the issuing of which is the subject of the plaintiff's present appeal. For him it is insisted that the act of 1870, Bat. Rev., ch. 55, §§26 and 27, being omitted from THE CODE, has ceased to have operation, and

the land, subject to the exemption, may now be sold for the satisfaction of the plaintiff's debt.

The argument in support of this contention proceeds upon the misconception that there is a divided estate in the debtor, produced by the separation and setting apart of the exempt from the remaining land, one, enduring for his own life and prolonged for the benefit of his wife and minor children, the other, the residue of his previous estate. The former, or homestead proper, is called in *Poe* v. *Hardie*, 65 N. C., 447, "a determinable fee," and in *Littlejohn* v. *Egerton*, 77 N. C., 379, by the late Chief-Justice, "a quality annexed to land whereby the estate is exempted from sale under execution." The other is designated alike by the court and the act referred to, as "a reversionary interest" left unprotected by the constitution.

These inadvertent expressions, as to the effect produced upon the debtor's estate in the exempt land, have led to serious and embarrassing difficulties in interpreting the beneficient provision of the constitution in securing a home to the debtor and his family, without trenching needlessly upon the rights of creditors. The force of the constitution, and of the statute to give it effect, is spent in repelling the creditor from the property which is thus placed beyond the reach of final process, and leaving the debtor in its full and undisturbed enjoyment for the prescribed period. They place the property, when ascertained and set apart, outside of that which the creditor may seize and appropriate to his judgment, as if for the time being the debtor did not own it.

The correct view of the constitution and the subsidiary statutes is taken and expressed by BYNUM, J., in *Bank* v. *Green*, 78 N. C., 247: "Their legal effect is simply to protect the occupant in the enjoyment of the *land, set apart as a homestead, unmolested by his creditors.*"

Again: "The homestead has been called a determinable fee, but as we have seen that no new estate has been conferred upon the owner, and no limitation upon his old estate imposed, it is obvious that it would be more correct to say that there is con-

ferred *upon him* a determinable exemption from the payment of his debts in respect to the particular property allotted to him."

The subject is similarly considered in the cases of *Keener* v. *Goodson*, 89 N. C., 273, and *Mebane* v. *Layton*, *Ib.*, 396.

In the former the court say: "The assignment of a homestead is in no sense a conveyance of land, nor does it profess to pass any title." * * * It has no other effect than simply to attach to his existing estate a quality of exemption from sale under execution.

In the latter it is said, that the assignment of the homestead "only serves to indicate where it is and whether there be any excess subject to levy and sale to pay judgment creditors."

The estate of the debtor remains after the allotment, as before, the same, whether it be in fee, for life, or for years. It is *this estate in its entirety* in the exempt land which the creditor is not allowed to sell under final process by the mandate of the constitution, and to which no judgment lien now attaches, when the debt was contracted or the cause of action accrued since May 1st, 1877. THE CODE, §501, part 4.

It is to be remembered that when the constitution was formed and adopted, no lien upon land was created by the rendition of a judgment, and it attached only when execution issued, running back to its teste for a commencement, and therefore the prohibition was a full and ample protection, not only against a sale, but against any lien upon the exempt property, for there could be no lien unless the officer having the final process could sell.

The general assembly in the enactment of THE CODE seems to have interpreted the constitution as putting an interdict upon a sale of the *land set apart*, that is, of the *debtor's estate therein*, whatever it might be, until the expiration of the period of exemption, thus rendering unnecessary the incorporation into THE CODE of the act of 1870. A glance at some of its sections will make this manifest.

Section 501 exempts "*such property* as the judgment debtor may have set apart," &c. Specification 3 in this section pro-

vides for the exemption of "the *property, real and personal,* as set forth in article ten of the constitution," &c. Specification 4 declares to be exempt in certain cases "the property, real and personal," and the homestead, &c.

These terms are not of doubtful meaning, since they are themselves defined in section 3765, part 6, where it is enacted that "*property*" shall include "all property both real and personal;" "*real property*" shall embrace "lands, tenements and hereditaments," and "*personal property*" shall take in "all things capable of ownership not descendible to the heirs-at-law."

In the form of the appraisers' return, given in section 524, it is declared that "the entire tract" bounded by the circumscribing lines "is therefore exempted from sale under execution according to law."

This language strongly implies a legislative construction of the constitution in consonance with the judicial, which forbids the sale of the land covered by the exemption, and which itself constitutes the homestead and the debtor's estate therein, leaving to him and his family the uninterrupted possession and enjoyment for the limited space, free from the claims of the creditors.

This interpretation of the constitution relieves the subject from many perplexing difficulties, incident to the idea of a change of the debtor's estate; and we adopt it as calculated to protect the insolvent in the use of the privileges conferred upon him by law, and his exempted homestead from interruption by creditors. When it expires, this, as any other property, becomes subject to their demands, but not sooner. The personalty is exempt: why should not the land of specified value within the limits be equally so? We see no reason for distinguishing between them, except that in one case the exoneration is for a term of years which may extend beyond life and does operate during life, while the other is for the debtor's life only. Such we hold to be the law.

There is no error in the issue of the restraining order. Let this be certified.

No error. Affirmed.

C. C. SHEPHERD and others v. E. MURRILL, Sheriff.

Homestead and Personal Property Exemption.

A debtor has the right at any time before sale under execution to demand that his personal property exemption be laid off. A failure to make such demand at the time of the levy does not operate a waiver of such right.

APPEAL from a judgment of a justice of the peace heard at Fall Term, 1883, of JONES Superior Court, before *Philips, J.*

The action is to recover the value of one bale of cotton sold by the defendant, sheriff of Onslow county, under an execution issued to enforce the payment of a debt contracted in 1880, without having allotted to the plaintiff his personal property exemption.

The plaintiff testified that on the day of the levy of the execution the defendant came to his house and informed him of the execution and inquired if he would pay it, which he refused to do. The defendant then asked if he did not have a bale of cotton at a certain gin, and the plaintiff said he did, and the defendant said he would have to levy upon and sell it; to which the plaintiff replied, "if you levy upon my bale of cotton, I'll sue you." The defendant left, and soon afterwards, on the same day, went to the gin and levied upon the cotton. On the next day the plaintiff saw the defendant and asked him by what authority he took the cotton, and the defendant said, "by authority of this execution." The plaintiff then said, "if you sell my bale of cotton, I'll sue you."

The plaintiff did not then demand that his personal property exemption be laid off, but sought the advice of an attorney, and on the day of sale, but before the sale took place, he handed to the defendant a written demand, drawn by his attorney, for an allotment of his personal property exemption, and was told by the defendant that "it was too late." The defendant sold the cotton for $42. The plaintiff did not own $500 worth of personal property.

The defendant testified that the judgment against the plaintiff was to enforce a claim for labor done in repairing a certain boat upon which it was declared to be lien, and in pursuance of the terms of a prior execution he had levied on and taken possession of the boat, but before the sale thereof it was stolen; that when he received the execution under which the cotton was sold, he went to plaintiff's house and said to plaintiff, among other things, that he had a bale of cotton at the gin. The further testimony of the witness, in reference to the demand and sale, does not materially differ from that of the plaintiff.

The defendant insisted that plaintiff should have demanded his exemption at the time of levy or within a reasonable time thereafter, before the day of sale; that plaintiff had waived his right to the same, and asked the court so to instruct the jury, which was refused—the court telling the jury there was no evidence of a waiver. Defendant excepted. Verdict and judgment for plaintiff; appeal by defendant.

Mr. S. W. Isler, for plaintiff.
Messrs. Nixon, Simmons & Manly, for defendant.

MERRIMON, J. The defendant insisted that the plaintiff ought to have demanded that his personal property exempt from execution should be appraised and laid off to him at the time of the levy upon his property, or within a reasonable time thereafter, before the day of sale; and that inasmuch as he did not make such demand until the day of sale, he had waived his right to make it.

The court held that there was no such waiver, and we concur in its judgment.

The constitution provides that, "the personal property of any resident of this state, to the value of five hundred dollars, to be selected by such resident, shall be, and is hereby exempted from sale under execution, or other final process of any court, issued for the collection of any debt." Art. X, §1.

The statute giving practical effect to this provision of the constitution provides that, "whenever the personal property of any resident of this state shall be levied upon by virtue of any execution or other final process, issued for the collection of any debt, and the owner, or any agent or attorney in his behalf, shall demand that the same, or any part thereof, shall be exempt from sale under such execution, the sheriff or other officer making such levy shall summon three appraisers," &c., to appraise and lay off the exempted property. THE CODE, §507.

There is here no provision in terms or effect, that makes it imperative on the execution debtor to demand the appraisement and laying off of the exempted property; nor is there anything in the nature of the demand or the duty of the officers charged with the execution in relation thereto, that renders it necessary that it shall be made before the day of sale.

The complete capacity to make the allotment would always remain until the day of sale, and we can see no reason, certainly no substantial reason, why it might not be done on the day of the levy, or on any day before the sale, or on that day. It might happen that the execution debtor could not make the demand earlier than the day of sale. He might be absent at the time of the levy, and a variety of circumstances might exist that would reasonably delay the demand. The language of the statute is "*whenever* the personal property of any resident of this state shall be *levied upon*," &c., that is, *at any time*, while it is levied upon, and the levy continues to the day of sale.

The law favors the homestead and the personal property exemption, and gives all reasonable opportunity for the assertion of the right thereto; and statutes must be liberally construed to this end. These exemptions are not intended simply to serve the noble purpose of beneficence toward the needy and unfortunate, but as well the greater purpose of government in identifying every family, every citizen, as much as practicable, with the soil of the state, thus giving greater strength, permanency and dignity to citizenship, and enhancing the power and greatness of the state.

It is wise policy in government to identify its people with its soil and establish permanent homes for families and individuals. This is essential to a steady, orderly and reliable population, and the accumulation of wealth, power and respectability.

These exemptions have been deemed so important as to be made a feature in the government of the state.

They are established and protected by constitutional provisions, and the statutes in execution of these provisions are thorough and strict in their details, imposing heavy penalties and liabilities upon such officers as neglect or refuse to discharge their official duties in regard to them.

We cannot doubt that a just construction of the statute gives the execution debtor the right, at any time, after the levy upon his property and before the sale thereof, to demand that his personal property exemption shall be ascertained.

In this case, it is very apparent that the plaintiff did not intend to waive his right. He repeatedly notified the sheriff, that if he sold his cotton he would sue him, and at last consulted legal counsel as to his rights, and under advice, gave the sheriff written notice of his demand.

The court properly refused to give the jury the instructions prayed for. In this there is no error, and the judgment must be affirmed.

No error. Affirmed.

JAMES F. NORMAN v. JOHN S. CRAFT.

Personal Property Exemption—Mortgage.

Where a mortgagor conveyed his personal property, more than $500 in value, with a clause in the deed reserving his "personal property exemption allowed by law and to be selected by him"; *Held*, that the title to the whole of it passed to the mortgagee and remained in him, until the exempted articles were legally set apart; and the simple act of executing a second mort-

gage conveying a part of said property, is not a selection of such part, nor a separation of the same from the bulk. The second mortgagee in such case holds in subordination to the prior conveyance.

(*Massey* v. *Warren*, 7 Jones, 143; *Brannon* v. *Hardie*, 88 N. C. 243, cited and approved).

CIVIL ACTION, tried on exceptions to the report of a referee, at Spring Term, 1883, of WASHINGTON Superior Court, before *Shepherd, J.*

The court overruled the exceptions to the report of W. D. Pruden, referee, confirmed the report and gave judgment in favor of the defendant, from which the plaintiff appealed.

No counsel for plaintiff.

Messrs. W. A. Moore and *James E. Moore*, for defendant.

SMITH, C. J. On January 2, 1873, Jeremiah Robertson, to secure certain debts due to the plaintiff by notes, executed to him a mortgage deed conveying enumerated articles of personal property, including the mule in dispute, more than five hundred dollars in value, with the following reservation: "Saving and excepting my personal property exemption allowed by law, to be selected out of the above mentioned property by me or any member of my family entitled to such exemption."

On the same day and shortly thereafter the said Robertson made a similar deed to the firm of Hornthal & Bro., to secure his indebtedness to them of the mule and a horse, only without such or any reservation. The deeds were proved and registered according to the priority of execution.

No claim was ever made by the mortgagor or any member of his family, nor any proceeding instituted, to have set apart and designated the exempted part of the articles enumerated in the first mortgage, and while some part of the debt therein secured has been discharged out of crops made in 1878, a larger amount still remains due.

Early in January of the next year, Robertson removed to an adjoining county, carrying the mule with him, and was pursued and possession recovered, under a claim and delivery proceeding, by Hornthal & Bro., who, under their mortgage, sold and delivered to the defendant. The mortgagor died on the day of the seizure, a few hours later.

The referee, who reports the foregoing facts, finds as his deduction therefrom that the execution of the second mortgage was an election to take and hold the mule as a part of the exempted articles, and the exercise of a reserved right, which enabled him to pass the title thereunder to Hornthal & Bro., and the plaintiff could not recover.

The plaintiff excepted to this conclusion of the referee, but it was not sustained by the court, and judgment being rendered for the defendant, the plaintiff appeals.

The sole question before us is as to the plaintiff's title and the effect upon it of the subsequent mortgage.

We cannot give our assent to the view and ruling of the court. The title to all property mentioned in the prior mortgage passed to the plaintiff and there remained, until in some legal way the exempted articles were separated, set apart and valued at the instance of the debtor. There is no specific article included in the reserving clause, but the exemption is of parts of the whole to be selected therefrom of an aggregate limited value, and to be ascertained in some mode thereafter. The mode of procedure by which this is to be done is pointed out in section 511 of THE CODE, and is intended to be prompt and summary in its execution.

Until this separation and valuation are made, the title to each and every article enumerated in the deed, in undistinguished bulk, is vested in the mortgagee, and he alone can sue for the conversion of any part.

The selection is not effected by the simple act of executing a subsequent mortgage with or without a similar qualifying clause, and the second mortgagee holds in subordination to the prior conveyance. Robertson could have had his exemption laid

off after executing both deeds, and had a right to select the articles which were to constitute it, omitting or including the mule in the list. If he had excluded the mule, the parties would have stood towards each other in the simple relation of prior and posterior mortgagees as to their part of the property. If the mule had been embraced in the selection, the result would have been a divesting of the plaintiff's right for the benefit of the second mortgagee, against whom no exemption could operate; and the present action could not have been maintained.

This conclusion is sustained by an adjudication in this court, to which our attention was not called in the argument, so essentially like the present case in this feature, that we reproduce parts of the opinion in place of comments of our own.

In *Massey* v. *Warren*, 7 Jones, 143, the insolvent debtor had conveyed to the plaintiff by deed executed in September, 1855, when the exemptions contained in the Revised Code, ch. 45, §§7 and 8, were in force, various articles mentioned in detail, adding to the enumeration the qualifying words, "*excepting only such part as the law allows poor debtors.*" These goods were seized and sold under executions, by the defendant's direction, which were issued on judgments rendered after the making and registration of the deed, and this suit was to recover damages for the conversion.

The defence was that part of the property was exempted from the deed, as being that which the grantor was entitled to hold by virtue of section eight aforesaid.

The ninth section provides a method for ascertaining and setting apart the exemptions which the debtor may have under the preceding section, as does section 511 of THE CODE in ascertaining and determining the personal exemptions allowed under the present law.

MANLY, J., delivering the opinion, uses this language: "We concur with the court below in the opinion that the whole of the debtor's property passed under the deed of September 7th, 1855, except the articles enumerated in 7th section of the Revised Code,

ch. 45. Articles which may be allowed under the 8th section, until they are set apart according to the provisions of the 9th, are in every respect undistinguishable from the rest of the debtor's property."

Again he proceeds: "Other articles than the excepted ones of the 7th section are only conditionally exempt, and do not belong to the charity list until certain legal proceedings are had by which the property is impressed with a new character—a character which it does not intrinsically possess."

In accordance with this reasoning, and in regard to a reservation not dissimilar, after referring to a case in Kentucky, we recently said: "This case seems to establish the proposition that all the goods are transferred and *the property remains in the assignee, until the reserved part is separated and allotted* to the debtor, as exempt." *Brannon* v. *Hardie*, 88 N. C., 243.

We are therefore of opinion that the property in the mule was in the plaintiff and he is entitled to recover.

The referee finds the value of the mule to be $75, but does not ascertain the damages beyond that sum. If the plaintiff so elect, he may have judgment for that sum in this court; otherwise the cause must be remanded in order to an inquiry into the damages.

There is error, and the judgment is reversed, and unless the plaintiff is content to have judgment as above, the cause must be remanded.

Error. Reversed.

MARY McGLENNERY v. REID MILLER and others.

Husband and Wife, probate of deed of—Tenant by the Courtesy—Parties.

1. A deed made in 1852 by husband and wife, conveying the wife's land, was required to be first acknowledged by the husband and wife, and then her privy examination taken; and unless this order of acknowledgment and

probate, under the Revised Statutes, ch. 37, §§10, 11, was observed, the deed is ineffectual to pass title either to the interest of the wife or that of the husband as tenant by the courtesy initiate.

2. A husband tenant by the courtesy initiate has an interest in the land, and is a necessary party to a suit respecting it; and if he refuse to become a co-plaintiff in an action by the wife to assert her right to the property, he should be made a party defendant.

3. But where the action concerns her separate property, or is between herself and her husband, she may sue alone. THE CODE, §178.

(*Burgess* v. *Wilson*, 2 Dev., 306; *Pierce* v. *Wanett*, 10 Ired., 446; *Malloy* v. *Bruden*, 88 N. C., 305; *Williams* v. *Lanier*, Busb., 30; *Houston* v. *Brown*, 7 Jones, 161; *Wilson* v. *Arentz*, 70 N. C., 670, cited and approved).

EJECTMENT tried at Spring Term, 1883, of ASHE Superior Court, before *Gudger, J.*

The plaintiff is a married woman. She intermarried with her present husband, Martin McGlennery, in the year 1850. There were children of the marriage born alive, and at the time of the marriage she was seized in fee of the lands described in the complaint.

On the 7th day of February, 1852, the plaintiff and her husband executed a deed purporting to convey the land in fee to John Hartzog and Eliza Hartzog. The execution of this deed was witnessed by C. R. Phillips.

The husband never acknowledged the execution of the deed, but on the 15th day of June, 1857, the execution thereof by him was proved before the clerk of the county court of Ashe county by the subscribing witness.

The county court of that county, at the February term thereof in 1852, made an order in these words: "It appearing to the satisfaction of the court that Mary McGlennery is a citizen of Wilkes county, it is ordered that C. R. Phillips, one of the court, and B. C. Calloway, be appointed commissioners to take the privy examination of the said Mary McGlennery, and that a commission issue to them touching the execution of the said deed by her."

There appears on the record an entry in these words: "February 7th, 1852. We, the undersigned, being appointed by the court to take the acknowledgment of Mary McGlennery to the above deed, examined her separate and apart from her husband, and she says that it is her deed and act of her own free will." (Signed by Phillips and Calloway).

It appears that a commission issued to the persons who signed this certificate, directing them to take the acknowledgment of the execution of the said deed by the plaintiff, and her privy examination in relation thereto, but it does not appear that the commission was ever returned to the court, or that the court ever made any order directing the registration of the deed and the certificate thereon.

It further appears that another entry was made on the deed in the following words: "North Carolina, Ashe county: June 15th, 1857. The within deed was duly proved before me by the oath of C. R. Phillips, one of the subscribing witnesses to said deed, and ordered to be registered, together with the certificate annexed. Test, B. Gambill, C. C. C."

The husband of the plaintiff is not joined as a party to the action, because he refused to be made a party.

The defendants claim title to the land in question by virtue of the deed above referred to.

The plaintiff insists that the deed was inoperative and void, because the privy examination of the plaintiff was insufficient; and further, that it was likewise inoperative and void as to the husband of the plaintiff. The court so held, and the defendants excepted and appealed from the judgment.

Messrs. Linney, Witherspoon and *Folk*, for plaintiff.
Mr. J. W. Todd, for defendants.

MERRIMON, J., after stating the facts. The principal question raised by the exceptions was as to the validity and sufficiency of the probate of the deed executed by the plaintiff and her husband on the 7th day of February, 1852.

In our judgment the privy examination of the wife is fatally defective, and therefore no title passed to the bargainees by the deed.

The execution of the deed in question purports to have been proved under and in pursuance of the Revised Statutes, ch. 37, §§10, 11. These sections provide in substance that a deed executed by husband and wife must be acknowledged before a judge of the supreme or superior courts, or before the county court of the county where the land lies, and that then the privy examination of the wife shall be taken by the judge, or by some member of the county court appointed by the court for that purpose. If the deed shall be acknowledged by the husband, or proved as to him by the oath of one or more witnesses before a judge, or before the county court of the county where the land lies, and it shall be represented to the judge or county court that the wife is a resident of another county, or is so aged and infirm that she cannot travel to the judge or county court to make acknowledgment of the deed and let her privy examination be taken, then, and not until then, the judge or the county court may, by his or their order, direct the clerk of the county court of the county where the land lies to issue a commission to two or more commissioners, authorizing them to take the acknowledgment of such deed of the *feme covert*, and likewise to examine her privily and apart from her husband, touching her free consent in the execution of the deed; and when they shall have taken such acknowledgment and privy examination, to certify the same to the county court, and this court shall then order the same, with the commission and certificate, to be registered.

It is contemplated and required by the statute that the deed shall be first acknowledged by the husband and wife, and that her privy examination shall be taken afterwards; or, if for any of the causes specified in the statute this cannot be done, then, first, the husband must acknowledge the execution of the deed, or it must be proved as to him by witnesses before a judge or the county court, and then, upon suggestion to the judge or

county court, as directed by the statute, the commission may go out to take the acknowledgment and privy examination of the wife.

This is the order of acknowledgment of the execution of a deed by husband and wife provided by the terms of the statute, and this order is regarded as material, and of the substance of the execution of such a deed. The leading purpose of the statute, it is true, was to facilitate alienations by married women, but it was likewise intended to protect them against the undue influence of their husbands. Hence, the privy examination: this was to take place after the acknowledgment of the signing of the deed, apart from the husband, in the presence of the examining officers where the wife was supposed to feel free to express herself under the examination as to her will and desire in respect to the deed. It was intended also that the husband should first acknowledge the execution of the deed, to the end it might appear that the wife signed the same with his knowledge and consent. She is to be protected by him as well as by the law. This view of the statute is fully warranted by its terms and purpose, and it has been so repeatedly and uniformly construed. *Burgess* v. *Wilson*, 2 Dev., 306; *Pierce* v. *Wanett*, 10 Ired., 446; *Malloy* v. *Bruden*, 88 N. C., 305.

It does not appear that the deed in question was ever before the county court, or that the husband ever acknowledged it, or that it had been proved as to him by witnesses before the supposed privy examination of the wife. Indeed, it appears negatively that he never acknowledged it, and affirmatively that it was proved as to him by witnesses several years afterwards.

The order of the court appointing the commissioners is indefinite in its terms and very defective in its provisions. It does not mention that any particular deed had been acknowledged, or proved by any person, nor does it appear what deed the plaintiff was to be examined about.

The report of the commissioners is quite as defective. It does not appear that it was ever certified to the court, or that the

court ever saw it, or made any order respecting it; nor does it appear that the court ever ordered the deed, the entries thereon, or the commission, or any return of it, to be registered. There could scarcely be a lamer attempt at a compliance with the essential requisites of the statute. We cannot hesitate to hold that the statute was not complied with, and the deed is inoperative.

The marriage took place in 1850; the wife was seized in fee of the lands at the time of the marriage, and there were children of the marriage born alive. Hence the husband has a life estate in the lands as tenant by the courtesy *initiate*. He could not, however, sell or lease it for the term of his life, or for any less term of years, without the consent of his wife, to be made effectual by deed executed in the same manner as deeds are required to be executed by married women to pass title to their real estate. Nor could any such interest of his be subject to sale to satisfy any execution obtained against him. Rev. Code., ch. 56, §1; *Williams* v. *Lanier*, Busb., 30; *Houston* v. *Brown*, 7 Jones, 161; *Wilson* v. *Arentz*, 70 N. C., 670.

While the husband is thus tenant by the courtesy, he had no power to convey his life estate as tenant by the courtesy *initiate*, and therefore, the deed as to him is inoperative, as well as to the wife.

It thus appears that the husband has an interest in the land in question, and he ought, therefore, to be joined as party plaintiff with his wife in this action. It seems that the counsel for the plaintiff so thought, for it is stated in the complaint that the "husband, for reasons personal to himself, refused to join as plaintiff in this cause." Nevertheless, he is a necessary party and must be made such before there can be a judgment upon the merits of the action. Where it appears in an action that a person not a party to it had a direct interest in the subject matter of litigation, the court will not proceed to judgment until such person be made a party. And where the husband ought to join the wife in an action and refuses to do so, and likewise, where it appears that he has an interest in the subject matter of litigation, and is on that account a necessary party, he must be

made such before the court will give judgment upon the merits of the action. This is upon the principle that the court will make all necessary parties, and do whatever else that may be proper and essential to perfect its jurisdiction of the action and make its judgment effectual as to the subject matter in dispute.

Ordinarily, when a married woman brings an action, her husband must be joined with her, except "when the action concerns her separate property," or "when the action is between herself and her husband." THE CODE, §178. But if for any cause he will not join his wife in the assertion of her rights by action, and give that aid and protection that he ought to do as husband, or, if he is a necessary party to a complete determination or settlement of the questions involved in the action, and his refusal to join in the action appears, as it must do by proper averment, then he may be made a party defendant. If this were not so, the husband might by his refusal to join the wife in a proper action deprive her of all legal remedies. This the law will not tolerate. The husband ought to be the protector and helper of the wife, and if he will not be voluntarily, the law will compel him in all proper cases to do his duty, by bringing him into the action as a defendant. This is so upon general principles, as well as by statute. The statute provides in the broadest and most comprehensive terms for making parties to actions, and embraces cases like the present. THE CODE, §§184, 185. Here, the husband is "a necessary party to a complete determination or settlement of the questions involved in the action." He ought, as husband, to join as party plaintiff, but he will not. In such a case, he may be made a defendant. The provisions of the two last cited sections are general, and embrace and apply to all cases touching which special provision as to parties has been made by THE CODE.

There is no reason founded in principle or policy, why a husband should be allowed, by reason of his relation as husband, for one cause or another, to deprive the wife of the remedies allowed by law. It would be singular indeed, if a wife, entitled

to the possession and enjoyment of valuable real estate, in which the husband has some interest, could not assert her right by action, because her husband refused to join her in it. Such is not the law, and if he will not join her, she may bring him in as defendant for all legitimate purposes.

We do not undertake to decide, at this time, what are the rights of the wife in respect to the lands in dispute. It will be proper to do so only when the husband is before the court.

As the husband was not made a party, and is necessary as a party, the judgment must be set aside, and a new trial awarded, to the end the husband may be made a party if the plaintiff shall so determine, and the action may be disposed of according to law. Judgment accordingly. Let this be certified.

Error. *Venire de novo.*

E. & A. J. BURNS v. HUGH McGREGOR and wife.

Married Women, contract of—Equitable lien on land to secure purchase money.

A married woman, her husband joining in the deed, conveyed land she owned and received a deed for a tract of greater value, in pursuance of an arrangement to exchange the tracts; she agreed to execute note and mortgage to plaintiff on the latter tract to secure the difference in the price, which was accordingly done, jointly with her husband; but she refused to acknowledge that the mortgage was executed of her own free will; *Held*, that while she cannot be compelled to make the acknowledgment, the contract is binding, and the land conveyed to her subject to the payment of the price, by reason of an equitable lien in favor of the plaintiff; if she keeps the property she must pay the debt. But the land is not chargeable with the debt due by the husband to the plaintiff, and included in the note. (*Atkinson* v. *Richardson*, 74 N. C., 455; *Pippen* v. *Wesson*, *Ib.*, 437; *Bunting* v. *Jones*, 78 N. C., 242; *Newhart* v. *Peters*, 80 N. C., 166; *Hall* v. *Short*, 81 N. C., 273; *Johnson* v. *Cochrane*, 84 N. C., 446; *Scot* v. *Battle*, 85 N. C., 184, cited and approved).

BURNS *v.* MCGREGOR.

CIVIL ACTION tried upon demurrer to complaint at Spring Term, 1883, of ROBESON Superior Court, before *MacRae, J.*

The court overruled the demurrer and gave judgment for plaintiffs and the defendants appealed.

Messrs. French & Norment, for plaintiffs.
Messrs. Rowland & McLean, for defendants.

MERRIMON, J. The demurrer admits the averments of the complaint, and the facts therein stated must be accepted as substantially true. So that the question is, does the complaint state a cause of action?

It appears that the *feme covert* defendant was the owner in her own right of a tract of land and desired to exchange it for another tract of greater value that the plaintiffs had purchased from D. M. Currie, but for which they had not taken title to themselves.

It was accordingly agreed between the plaintiffs and the *feme* defendant, that she should convey her tract of land to the said Currie at the price of $1,000; that the latter, at the instance of the plaintiffs, should convey to her the title in fee for the tract he had sold them, at the price of $1,300; that she should join her husband in the execution of two promissory notes to plaintiffs due at different times, and also execute a mortgage of the land (so to be conveyed to her) to secure the payment of these notes.

In pursuance of such agreement, the wife and her husband joined in a conveyance of her land to Currie, and the latter and his wife joined in a proper deed conveying the fee simple title, in the land sold by Currie to the plaintiffs, to the *feme* defendant.

The *feme* defendant and her husband joined in the execution of two notes, each for $237.50, and a mortgage of the land so conveyed to her, to secure the payment of these notes, but upon her privy examination before a justice of the peace, touching

her free consent in the execution of the mortgage, she persistently refused to acknowledge the execution thereof by her of her own free will and consent, and thus refused to give the mortgage efficiency.

In the two notes was embraced a debt of $175.00 of the husband due to the plaintiffs.

The contract between the plaintiffs and the *feme* defendant was intended to be one transaction. The deeds, the notes and the mortgage were to be executed simultaneously. It was manifestly not the intention of the plaintiffs to relinquish their right to have the title to the land they had purchased from Currie, until the difference in value between this land and that of the *feme* defendant should be paid. The wife and the husband so understood, and the latter approved of the contract in writing, by joining his wife in the execution of the deed to Currie, and the notes and the mortgage to the plaintiffs. Indeed, it was of the substance of the agreement, that the plaintiffs should have a lien upon the land to secure their debt of $300, the difference in value between the two tracts.

The wife having obtained the title to the land she desired to own, availing herself of her disabilities as a married woman, refused to pay the difference in price of the two tracts, or to execute the mortgage to secure it, as she agreed to do. Having gotten the title, she seeks to avoid paying a part of what she justly owes and agreed to pay for it! She repudiates her contract, and desires to obtain the fruit of so much of it as is beneficial to herself!

This the law will not tolerate. The constitution and the statute wisely extend large and careful protection and safeguards to married women in respect to their rights and property, but it is no part of their purpose to permit, much less help one of them to perpetuate a fraud, if by possibility, under some sinister influence, she should attempt to do so. It would be a reproach upon the law if such a thing could happen.

In this case the wife cannot be compelled to execute the mortgage, as she agreed to, or to reconvey the land she has the legal title for, to Currie or the plaintiffs, upon the payment to her of $1,000, the price of the land she conveyed to Currie; but she took the land conveyed to her by him, charged in her hands, with an equitable lien in favor of the plaintiffs, arising out of the contract to secure the money she agreed to pay them as the difference in value between her land and theirs. There was no agreement that the title to the land should pass to the wife absolutely; on the contrary, it was in effect stipulated that it should not. In such a case, the creditor may, in an action like the present one, reach the property for which the debt was contracted, and sell so much of it as may be necessary to discharge the debt. The wife may, under an engagement not legally binding upon her, refuse to pay her debt, but if she does so, she cannot keep the property for which the debt was contracted. It would contravene the plainest principles of justice to allow a married woman to get possession of property under an engagement not binding upon her, and let her repudiate her contract and keep the property! She must observe and keep her engagement, or else return the property; if she will not, the creditor may pursue and recover it by proper action in her hands. *Atkinson* v. *Richardson*, 74 N. C., 455: *Bunting* v. *Jones*, 78 N. C., 242; *Newhart* v. *Peters*, 80 N. C., 166; *Hall* v. *Short*, 81 N. C., 273; *Johnson* v. *Cochrane*, 84 N. C., 446; *Scott* v. *Battle*, 85 N. C., 184.

If, however, one under a contract not binding on her sell property to a married woman, that shall be consumed or disposed of in some way, so that he cannot reach it, if she chooses to disaffirm her contract, and not pay the purchase money, in that case, the creditor must pay the penalty of his folly in the loss of his debt. *Scott* v. *Battle, supra.*

The notes mentioned include a debt of $175.00, that the defendant husband owed the plaintiffs. This the wife is not bound to pay; it is not a part of the price of the land, nor is

the land chargeable with it. *Pippen* v. *Wesson*, 74 N. C., 437.

The court properly overruled the demurrer. There is no error, and the judgment must be affirmed. Let this be certified.

No error. Affirmed.

JOHN CARSON v. WILLIAM DELLINGER.

New Trial—Discretionary Power—Newly-discovered Evidence.

1. An application for a new trial, except for error of law in its conduct, is addressed solely to the discretion of the presiding judge, whose decision is not reviewable on appeal; *Therefore*, where a party moved for a new trial upon the ground that he had found a witness whose testimony was material to his case, and stating in his affidavit how he came into possession of the name of the witness, &c.; *Held*, that the judge's refusal of the motion was conclusive.

2. *Held further:* The granting a new trial for newly-discovered evidence and for matter occurring since the trial, where the application is made to this court, is a matter of sound discretion, in the exercise of which the court will be governed by the peculiar circumstances of the case.

(*Moore* v. *Edmiston*, 70 N. C., 471; *Thomas* v. *Myers*, 87 N. C., 31; *Pain* v. *Pain*, 80 N. C., 322; *Dalton* v. *Webster*, 82 N. C., 279; *Vest* v. *Cooper*, 68 N. C., 131; *Bledsoe* v. *Nixon*, 69 N. C., 81; *Henry* v. *Smith*, 78 N. C., 27; *Horne* v. *Horne*, 75 N. C., 101; *Powell* v. *Watson*, 6 Ired. Eq., 94; *Houston* v. *Smith*, *Ib.*, 264; *Dyche* v. *Patton*, 8 Ired. Eq., 295, and 3 Jones Eq., 332; *Holmes* v. *Godwin*, 69 N. C., 467; *Bank* v. *Tiddy*, 67 N. C., 169; *Moore* v. *Dickson*, 74 N. C., 423; *State* v. *Lindsey*, 78 N. C., 499, cited, commented on and approved).

EJECTMENT tried at Fall Term, 1882, of MCDOWELL Superior Court, before *Avery, J.*

The defendant appealed.

Messrs. Reade, Busbee & Busbee, for plaintiff.

Messrs. Sinclair & Sinclair and *J. B. Batchelor*, for defendant.

SMITH, C. J. The controversy in this action, upon the only issue submitted to and passed on by the jury, was to the proper position of the boundary lines of the one hundred acre grant issued to one Lewis Clark, of which the defendant is in possession of the part claimed by the plaintiff under a grant of earlier date to John Carson and subsequent conveyances reaching to himself. The defendant claimed the interference by virtue of an adversary continuous occupation for over forty years by those who preceded, and himself under color of title by deeds whose lines were dependent on and fixed by the location of those called for in the grant to Clark. These boundaries the defendant was unable to establish in consequence of the clearings by which all natural objects had been removed, and a verdict was found for the plaintiff, declaring him to be the owner in fee simple of the land described in the complaint.

Afterwards and during the term the defendant moved for a new trial, upon the ground that he had since found a witness whom he had seen at his residence in another county some seventy miles distant and conversed with on the subject, by whose testimony he would be able to locate the corners and lines of the Clark grant at the places contended for on the trial. In support of the application, his own affidavit, set out in full in the transcript, was read, explaining how he came into possession of the name of the witness; his repeated and unsuccessful previous efforts to obtain the needed evidence; the opportunities and means of knowledge possessed by the witness, and other matters in excuse which it is not necessary to further recite.

The court declined to interfere with the verdict and entered up judgment for the plaintiff, from which the defendant appeals.

The only question presented is whether the refusal of his application is a ruling erroneous in law and reviewable in this court.

However strongly the recitals in the affidavit, assuming them to be true, may appeal to the presiding judge for his interposition in the exercise of the power confided to him in administer-

ing the law, and to give to the defendant an opportunity to make use of the testimony of the newly found witness before another jury, it is a matter of discretion reposed in him which we have neither the right nor disposition to supervise or control. Considerations of the kind are addressed to his judgment, founded upon full knowledge of all that transpired at the hearing before the jury; and his decision granting or refusing the application is, and ought to be, final and conclusive.

The defendant's counsel attempts to withdraw the present application from the admitted general rule and distinguish it, as governed by fixed and well established principles of law, and insists that when the required conditions are met, the denial is of a legal right in the applicant and constitutes an error in law which may be revised and remedied by appeal.

In our examination of the authorities we do not find this distinction recognized, nor a motion on the ground of testimony recently found put upon a different footing with a motion to set aside a verdict and grant a new trial for any other assigned reason, not involving an error of law committed during its progress, the sufficiency of which the judge himself determines.

The jurisdiction conferred upon this court by the constitution, article four, section eight, aside from the enlargement made in the late amendment which has no application to the case, is "to review upon appeal every decision of the courts below upon every matter of law or legal inference," and we can revise and correct erroneous rulings in matters of law arising out of ascertained facts, and not the exercise of a discretionary power. There are no facts found before us upon which the action of the judge, the subject of complaint, is predicated, so that, if it were the subject matter of appeal, we could decide upon its correctness. The affidavits which furnish the evidence of the assumed facts and which may be sufficient to warrant a finding, do not authorize this court to proceed upon them *as established*, in order to review the ruling. This alone is an adequate reason for refusing to entertain the appeal.

We propose, in illustration of this principle, to refer to some of our own adjudications, from which it will be seen that, upon whatever grounds based, the application for a new trial, except for error of law in its conduct, is addressed solely to the discretion of the trying judge and must abide the result of his opinion.

"By C. C. P., §299," remarks BYNUM, J., "an appeal is allowed as well from an order granting as refusing a new trial, but in either case the matter appealed from must be of law or legal reference. * * * To give parties the benefit of the above section of the Code, the courts should, and no doubt will, on exceptions taken by the party aggrieved, put upon the record the matters inducing the order granting as well as refusing a new trial. The appellate court can thus see whether the order presents a matter of law which is the subject of review, or matter of discretion which is not. In this way only, it is conceived, can the full benefit of that provision of the Code be secured to suitors. *Moore* v. *Edmiston*, 70 N. C., 471; *Thomas* v. *Myers*, 87 N. C., 31.

In *Pain* v. *Pain*, 80 N. C., 322, in answer to an exception to the refusal of the judge to re-open the case and hear further testimony, the court declare: "We cannot review the exercise of this discretion. The point was for him and not for us to determine, and his action is conclusive."

So where the judge overruled a motion to set aside the judgment and grant a new trial, ASHE, J., says: "It is a pure matter of discretion with His Honor from which no appeal lies. *Dalton* v. *Webster*, 82 N. C., 279."

The principle enunciated in the opinion of READE, J., in *Vest* v. *Cooper*, 68 N. C., 131, in its application to the facts in the present case, is decisive of it. Upon the report of a referee coming in, the defendant moved to refer the matter back with instructions to re-open the account and hear *newly discovered evidence*, and the motion was allowed. The court say in reply to an objection to this ruling, that "it is as well settled as anything in the practice that the judge who tries the cause may set aside a verdict

and grant a new trial for *newly discovered evidence*, or because the verdict is against the weight of the evidence, or because the damages are excessive, &c. And the same is true in regard to a report which is in the nature of a verdict. And this is done in the exercise of his *discretion*, from which no appeal lies. * * * There seems to be an impression that there may be an appeal from every motion for a new trial, and the fact is overlooked that it must 'involve a matter of law or legal inference,' and not a mere matter of discretion. This will illustrate: 'plaintiff recovers of the defendant $1,000. Defendant files an affidavit that since the trial he has discovered that he can prove the debt has been paid. His Honor says: I believe your affidavit and grant a new trial; or, I do not believe it, and I refuse a new trial. This is a matter of discretion, and no appeal lies.'"

The same view is taken as to the character of an application made originally to this court for its exercise of the same power, which was entertained in *Bledsoe* v. *Nixon*, 69 N. C., 81; *Henry* v. *Smith*, 78 N. C., 27; *Horne* v. *Horne*, 75 N. C., 181. In the last case the court declare that "the allowance of the motion to vacate the judgment and grant a new trial for *newly discovered evidence* and for matter occurring since the trial, under the supervisory power and equitable jurisdiction of this court, is a *matter of sound discretion, in the exercise of which the court will be governed by the peculiar circumstances of each case.*"

When the interposition of a court of equity was invoked under our former system, after the control of a court of law over its judgments was lost by the expiration of the term, and to provide for which, under restrictions, that power was prolonged for a year by section 133 of the Code of Civil Procedure, it was afforded with reluctance and in a narrow range of cases, as in case of fraud (*Powell* v. *Watson*, 6 Ired. Eq., 94), or where the new evidence is such as in effect to destroy the adversary proof (*Houston* v. *Smith*, *Ib.*, 264), or where a false witness, known to be such by the party for whom he testifies, without means of contradiction at the trial, and the witness has been

prosecuted for perjury or has escaped beyond the process of law. *Dyche* v. *Patton*, 8 Ired. Eq., 295, and S. C., 3 Jones Eq., 332.

The rulings indicate the great reluctance with which the courts of equity interposed to take from a successful litigant the fruits of his recovery at law, and to exercise its coercive power over his person, and that it was only done in cases of manifest injustice and wrong, and where there was no other relief attainable.

The appellant, however, relies in his brief upon what is said by RODMAN, J., in *Holmes* v. *Godwin*, 69 N. C., 467, upon an application made on similar grounds and denied by the court: "We are of opinion that the granting of a new trial for such a cause necessarily, always, or nearly always, must be within the discretion of the presiding judge, and that his *decision can never, or very rarely*, in such a case, be on a naked matter of law or legal inference, *so as to authorize an appeal.*"

Then, after pointing out the several conditions requisite to sustain the motion, to-wit: 1. That the witness will give the newly discovered evidence. 2. That it is probably true. 3. That it is material. 4. That due diligence was used in securing it, he adds: "It is perhaps *possible* to imagine a case in which all these considerations might be conceded for the party, and the refusal of a judge in *such* case (the italics are his) would make a question of law. But it is scarcely possible to conceive of a refusal by a judge in exactly such a case."

In this case a counter-affidavit was offered, and as of course the judge was required to consider the opposing proofs and determine the facts established. Clearly this was not reviewable on appeal. The general proposition is in full accord with the rule that commits to the discretion of the judge the solution of the question as to the award of another trial, and the intimation that the discretion may be so grossly abused as to be subject to correction is but another instance of the extreme caution with which the judge lays down a general rule. In a similar manner he expresses himself in reference to an appellate revision of an order of continuance, saying, "if in any case we had the right

to revise his discretion, it must certainly be one of plain and palpable error to justify us in undertaking to do so." *Bank* v. *Tiddy*, 67 N. C., 169. Similar intimations find expression in *Moore* v. *Dickson*, 74 N. C., 423, and *State* v. *Lindsey*, 78 N. C., 499.

It is enough to say that no such case has yet occurred, and until it does, and the hand of a corrective court is applied, we prefer to abide by the general rule, which leaves all such matters to the disposal of the presiding judge, who is much more competent to administer justice between the parties, possessed as he is, and we are not, of all the facts and circumstances upon which he is to act.

For the reasons stated we must affirm the judgment.

No error. Affirmed.

GUGGENHEIMER & ADELSDORF v. JOHN BROOKFIELD.

Fraud and Fraudulent Conveyances—Attachment.

1. A debtor unable to pay his indebtedness in full, has the right to prefer creditors, if he make no reservation for his own benefit to the injury of creditors unprovided for.

2. An attachment issued upon an affidavit alleging a fraudulent disposition of property, and it appeared that the defendant executed a deed to a trustee to secure debts to certain preferred creditors, which was placed in the hands of an attorney to be delivered when it became necessary to give priority to them; and upon being informed of the attachment proceedings, the trustee executed the deed and placed it in the register's hands for registration on the same day the attachment issued. The court found as a fact, and adjudged that the defendant had not assigned his property to defraud creditors; *Held*, no error.

(*Rencher* v. *Wynne*, 86 N. C., 268; *Hale* v. *Richardson*, 89 N. C., 62; *Moore* v. *Hinnant*, *Ib.*, 455, cited and approved).

NOTE.—SMITH, C. J. The case of Claflin & Co. against Brookfield is similar to this case, and must be disposed of in the same way. There is no error. This will be certified.

GUGGENHEIMER *v.* BROOKFIELD.

MOTION to vacate an attachment, in an action pending in MECKLENBURG Superior Court, heard at Charlotte on March 16th, 1883, before *MacRae, J.*

From the judgment vacating the attachment the plaintiffs appealed.

Messrs. Burwell & Walker, for plaintiffs.
Messrs. Jones & Johnston, for defendant.

SMITH, C. J. The plaintiffs commenced their action on March 2d, 1883, and at the same time sued out a warrant of attachment which was at once levied upon goods of the defendant. The order for its issue was based upon an affidavit stating that the defendant "has assigned and disposed of some of his property with intent to defraud his creditors, as affiant is informed and believes."

After giving notice to the plaintiff of the intended application, the defendants' counsel on March 16th moved before *MacRae, J.*, to vacate the order and discharge the attachment, which being heard upon affidavits, was allowed, and the plaintiffs appealed.

The evidence has been unnecessarily sent up, since the facts are found by the court, and there being no suggestion that there is no evidence to support any of the several findings, they are conclusive in an appellate review.

The fact relied on principally, if not wholly, to sustain the allegation of fraudulent assignment, was a deed in trust executed by the defendant to one J. M. Avery, conveying the defendant's stock of goods in Charlotte, and his choses in action to the trustee to secure debts due to The Traders' National Bank in that city and the copartnership firm of Latta & Bro. The circumstances attending the assignment are as follows:

On the 20th day of January preceding, the defendant caused the deed to be prepared by his attorneys, giving the said preference, and signed and sealed the same in the presence of the president of the bank, who became an attesting witness, and

placed the deed in the hands of his attorneys to be held by them, and delivered only when it became necessary to give priority to them over other creditors of the debtor. It was the bargainor's intention that the deed should not take effect by delivery, unless he failed to obtain indulgence on his maturing debts, or could make such arrangements with his creditors as would enable him to continue in the prosecution of his business.

The president of the secured bank, hearing of the issue and levy of the plaintiffs' attachment, gave information to the attorneys in custody of the deed, to carry out the purposes of the bargainor; and thereupon the trustee Avery, also executed it in presence of the same subscribing witness by whose oath it was proved and placed in the hands of the register for registration, between the hours of one and two o'clock P. M. of the same day on which the attachment issued.

Upon these facts, and many more relating to other transfers of property, not insisted on before us and not therefore necessary to be restated, the court declares in general terms, "that the defendant has not assigned or disposed of any of his property with intent to defraud his creditors," and adjudged "that the order of attachment heretofore made in this action be vacated."

There may be an intent apparent upon the face of a deed, and, if not, shown by proofs *aliunde*, as to secure a benefit to the debtor, or to others for whom he wishes to provide, which will equally avoid the deed as if its direct purpose was to hinder and delay creditors, and such an instrument made with such intent would be fraudulent and inoperative against creditors. But a debtor unable to pay his indebtedness in full, has an undoubted right, in the absence of a bankrupt law, to make preferences in the distribution of his property among the creditors, when the appropriation is absolute and with no reservation for his own benefit to the injury of creditors unprovided for.

Under such circumstances the intent is itself a substantive fact, to be found as such, and a material element in the

assignment. In this case the fraudulent intent is negatived by the finding of the court, and we must act upon the assumption of its non-existence. *Rencher* v. *Wynne*, 86 N. C., 268; *Hale* v. *Richardson*, 89 N. C., 62.

The subject is so recently examined in *Moore* v. *Hinnant*, 89 N. C., 455, that we do not consider it needful to pursue it further.

There is no error in the ruling of the court in discharging the attachment and vacating the order for its issue. Let this be certified.

No error. Affirmed.

ANDREW LINK and others v. CALEB LINK and others.

Trusts and Trustees—Execution of parol trust—Fraud—Pleading.

1. In an action to enforce a parol trust, it appeared that in pursuance of an agreement a purchaser at execution sale was to hold the land until his bid and other debts of the defendant in the execution were paid, and that, then, the purchaser was to convey to a son of the said defendant in trust for the father and his family. This was accordingly done, but the deed to the son was absolute upon its face; *Held*, that the court will enforce the trust.

2. *Held further:* The question of fraud not being suggested by the answer or raised by the pleadings, it was error in the court below to refuse judgment upon the ground that the arrangement was for the purpose of defrauding creditors of the defendant in the execution.

3. *Held also:* The action being to engraft upon the legal estate an equity created by parol, and not for reforming the deed, no allegation that the conditions were omitted by mistake or fraud in drafting the deed is necessary.

(*Kelly* v. *Bryan*, 6 Ired. Eq., 283; *Clement* v. *Clement*, 1 Jones' Eq., 184; *Briggs* v. *Morris*, *Ib.*, 193; *Brown* v. *Carson*, Busb. Eq., 272; *Briant* v. *Corpening*, Phil. Eq., 325; *Bonham* v. *Craig*, 80 N. C., 224; *Mulholland* v. *York*, 82 N. C., 510; *Shields* v. *Whitaker*, *Ib.*, 516; *Cheek* v. *Watson*, 85 N. C., 195; *Gidney* v. *Moore*, 86 N. C., 484, cited and approved).

LINK *v.* LINK.

CIVIL ACTION tried at Fall Term, 1883, of CATAWBA Superior Court, before *Graves, J.*

The plaintiffs appealed.

Messrs. Hoke & Hoke and *Battle & Mordecai,* for plaintiffs.
Messrs. R. Z. Linney and *Armfield & Armfield,* for defendants.

SMITH, C. J. The plaintiffs, the widow and heirs-at-law of the intestate, Jacob Link, with their husbands in this action against Caleb Link and Catherine, wife of John Campbell, the other heirs-at-law, seek to charge the estate in the tract of land described in the complaint, and vesting in said Caleb, with a trust in favor of the widow and heirs-at-law, and to enforce its execution.

The complaint alleges that during the life-time of the intestate, the said land then belonging to him was sold under execution by the sheriff and conveyed to the plaintiff, Alexander Goodson, under an agreement previously entered into, that the latter should hold the title until reimbursed the purchase money, and the other debts of the intestate were paid, and then, at the majority of said Caleb, to convey the said land to the latter in trust for the intestate and his heirs.

That in April, 1848, a year after the execution sale, the said Alexander disposed of some gold mining privileges in working the land for the sum of $500, from which he retained the amount of his advances, and soon afterwards executed a deed for the premises to the said Caleb, and also paid over to him the residue of the purchase money under an express agreement that the land should be held upon the same trusts which attached to it when held by the said Alexander.

That the said Caleb and his father, Jacob, resided on the land after the sheriff's sale, as before, enjoying with other of the intestate's children its use and occupation, from which and the fund received from said Alexander, the said Caleb has discharged all the debts of the said Jacob.

And this arrangement was made in regard to the land in consequence of the intemperate habits of the intestate, to prevent the waste and improvident disposal of the property and to preserve it in the family for the common support of its members.

The defendant, Caleb, who alone answers, denies the allegations of fact upon which the trust is raised, and avers that he paid for the land and it was conveyed to him absolutely and as his own.

The action was instituted on February 6th, 1880, and after many continuances was brought to trial at fall term, 1883, of Catawba superior court, upon issues then framed and submitted to the jury, which, with the responses, are as follows:

1. Did Alexander Goodson become the purchaser at sheriff's sale and acquire the legal title to the land described in the complaint, under a parol trust that he would hold the land, until he was refunded his purchase money, and until other debts were paid, and until Caleb Link, the defendant, became (of age omitted), and that he would then convey the same to the said Caleb Link to hold as trustee for the benefit of Jacob Link and his heirs?

2. Did the said Alexander Goodson execute and deliver to said Caleb Link a deed in fee simple, absolute on its face, for the said land, but in faith upon the condition that the said Caleb Link should hold the said land for the benefit of the said Jacob and his heirs?

To both these enquiries upon the evidence introduced without objection, and, as we must infer, sufficient to warrant the findings, the jury responded in the affirmative.

The court refused the plaintiffs' motion for judgment, and being of opinion that if a parol trust was declared, it was in pursuance of an arrangement to defraud creditors, which the court would not enforce; and further, that the complaint was fatally defective in not alleging "that the terms or conditions were omitted from the deed by surprise or ignorance, or mistake

or fraud," rendered judgment for the defendants and the plaintiffs appealed.

There was no issue raised by the pleadings to be submitted to the jury, in reference to the fraudulent purpose imputed by the court to the original arrangement between the debtor and Goodson, his son-in-law, in reference to the latter's becoming the purchaser; nor do we find any evidence of such purpose in the testimony delivered. No such defense is set up in the answer, and while the plaintiffs' averment that the object was to guard against the consequences of the disposal of the property by an intemperate man, to the injury of those who looked up to him for support, and preserve it for their common benefit, is denied, the defendant has not relied on his denial so far as to propose an issue as to the intent. The transaction is not disclosed as belonging to that class which a court of equity will not lend its aid to enforce, because illegal or in contravention of public policy.

On the contrary, the complaint in direct terms alleges (article 4), that the purchaser at the execution sale was to "hold the land until he was repaid his said bid and *until other debts of the said Jacob Link were paid*," making the discharge of both conditions precedent to the conveyance to the said Caleb.

The second ground assigned for refusing the plaintiffs' motion for judgment is the absence of any allegation that the terms of the several deeds were left out from surprise, ignorance, mistake or fraud, and that this was necessary to warrant the interference of the court in reforming them in accordance with the intention of the parties to each.

The cases cited for the appellee abundantly show that such averments must be made and supported by facts dehors the agreement and in corroboration of it, in order to the reformation of the deed so as to carry out the common intent not expressed upon its face. *Kelly* v. *Bryan*, 6 Ired. Eq., 283; *Clement* v. *Clement*, 1 Jones' Eq., 184; *Briggs* v. *Morris*, *Ib.*, 193; *Brown* v. *Carsons, Executor*, Busb. Eq., 272; *Briant* v. *Corpening*, Phil. Eq., 325; *Bonham* v. *Craig*, 80 N. C., 224.

But the object of the present action is not to correct and reform the deeds, for they are just such as they were intended to be; but to engraft upon the legal estate an equity created by parol, and to compel the performance of the duties assumed and involved in the trust as incident to the legal estate.

The validity of such a trust, as is averred in the complaint and found by the verdict of the jury, is in our opinion fully supported by the case of *Mulholland* v. *York*, 82 N. C., 510, where the authorities are collected and examined, and in the reasoning by which it is sustained.

It would be a result greatly to be regretted, if the defendant Caleb, without advancing any money in payment and accepting a conveyance of the title upon a positive undertaking to hold land for the use of his father and the family, of which he was himself a member, could not be compelled to execute the trust. It would be to enable him to consummate a positive fraud and enjoy, unrestrained, its ill-gotten fruits. The prevention of the fraud invites the exercise of the equitable jurisdiction of the court, and it is accomplished by recognizing and compelling the discharge of the trusts upon whose assumption he was enabled to secure the title to the property.

In addition to *Mulholland* v. *York, supra,* we refer to *Shields* v. *Whitaker*, 82 N. C., 516; *Cheek* v. *Watson*, 85 N. C., 195; *Gidney* v. *Moore*, 86 N. C., 484.

There is error and the plaintiffs are entitled to judgment upon the verdict.

Error. Reversed.

H. A. BOND, Ex'r, and others *v.* W. A. MOORE and others.

Trusts and Trustees—Resulting Trust, when raised—University—Escheat.

1. A husband conveys land to a trustee "for the use of the party of the third part (his wife) and upon the trusts hereinafter declared," to wit: that

the trustee shall convey the same to such person as the trustor's wife may direct in writing, or by will or other appointment; or, upon the trustor's death, to the surviving wife; or, upon the wife's death without a will, to the party entitled by the law of the state; and the wife died intestate without heirs and without making any disposition of the estate as prescribed in the trust deed; *Held*,

(1). That, by a proper construction of the deed, a life estate only was intended to be secured to the wife, with a power of disposition of the whole estate.

(2). Upon her death without executing the power, the husband became the equitable owner in fee of the remainder, and entitled to a conveyance of the legal estate from the trustee.

(3). In such case there arises a resulting trust to the party creating the trust or to his heirs.

2. The rule which raises a trust in favor of one whose money was used in payment of land bought, has no application to the facts of this case.

3. The deed does not point to any particular person to take the inheritance, but leaves it to pass under the law as undisposed of property; and hence, under the rule above announced, the defendant's position that it passed to the heirs of the wife, and there being none, then to the University by the law of escheat, cannot be sustained.

(*Levy* v. *Griffis*, 65 N. C., 236; *Holmes* v. *Holmes*, 86 N. C., 205; *Mosely* v. *Mosely*, 87 N. C., 69; *Robinson* v. *McDiarmid*, *Ib.*, 455; *King* v. *Weeks*, 70 N. C., 372; *Cunningham* v. *Bell*, 83 N. C., 328, cited and and approved).

CIVIL ACTION tried at Fall Term, 1883, of CHOWAN Superior Court, before *Avery*, *J.*

John M. Jones, owning the lot of land in the town of Edenton described in the complaint, and the recovery of possession of which is the object of this action, on February 9th, 1866, conveyed the same by deed executed by himself of the first part, Thomas W. Hudgins of the second, and Martha A. Jones, his wife, of the third part, to the said Thomas W. Hudgins in fee upon the following declared trusts:

1. That the said trustee shall at any time convey the said lot and improvements to such person as the said party of the third part shall direct in writing attested by one witness.

2. That he will convey said lot and improvements to such person as the said party of the third part shall give or devise the same

to, by last will and testament, or by an appointment in the nature of one, which power to make a will or appointment in the nature of one is expressly conferred upon the said party of the third part, notwithstanding her coverture.

3. Upon the death of the party of the first part, he will convey the said lot and improvements to the said party of the third part.

4. Upon the death of the party of the third part without having made a last will and testament or appointment in the nature of one, he will convey the said lot and improvements to the party or parties entitled by the laws of North Carolina.

5. The party of the first part shall occupy or rent out the lot and improvements for his own use during the joint lives of himself and the party of the third part, unless the same shall be sooner sold by her order.

These declarations of the trusts upon which the trustee was to hold are preceded by recitals in the deed, which in substance state that the said Martha A. had heretofore united with her said husband in the sale and conveyance of certain lots owned by her previous to her marriage, the purchase money whereof he had received, under an arrangement by which he agreed to convey the lot herein described "to a trustee for the use of the party of the third part and upon the trusts hereinafter declared."

The said Martha died before her husband, without heirs, having made no disposition of the estate under the forms conferred in the deed, by deed, will or other writing.

John M. Jones, her survivor, died in 1879, leaving a will, wherein the plaintiff Bond is named executor and the other plaintiffs are the devisees.

The trustee died in 1872, intestate, and the defendants, other than the defendant Moore, who is in possesion of the lot, are his heirs-at-law.

The defendant Moore claims the lot by virtue of a judgment against the University, an execution issued thereon, a sale and a sheriff's deed to him.

The relief demanded is a recovery of the possession and damages for detention against Moore, and a judgment against the other defendants requiring a conveyance of the legal title.

The defendants demur to the complaint, and the demurrer being overruled and judgment rendered for the plaintiffs, they appeal.

Messrs. Pruden & Bunch, for plaintiffs.
Mr. W. A. Moore, for defendants.

SMITH, C. J., after stating the case. The question to be decided arises from the construction of the deed, and is, whether an equitable estate in remainder vests in the plaintiffs, entitling them to demand a conveyance of the legal estate from the heirs-at-law of the trustee and possession from the defendant Moore.

It is not important to consider the force and effect of the terms used in the declaration of the trust in favor of the wife, and the necessity of words of inheritance to enlarge an estate for life into a fee. This trust is, as are the others, *executory,* and not an *executed trust*—created by a direction to the trustee to convey—not itself a conveyance; and the same technical rules of construction do not prevail in interpreting both. When the trustee is required to act in execution of the trust, in order to effectuate the expressed purpose of the instrument, that purpose is ascertained by employing the ordinary rules of interpretation; and a direction to convey the lot, in the absence of restriction or qualifying words, when applied to instructions given to the trustee, is a direction to convey the full estate vested in him, and the trust consists in the right to have it performed. In the latter case the intent is ascertained by giving a fair and reasonable meaning to the language in which it is expressed, and in this sense the trust is enforced. This is the distinction taken in *Levy* v. *Griffis,* 65 N. C., 236, and is warranted in *Holmes* v. *Holmes,* 86 N. C., 206.

But it is a settled rule in the interpretation of written instruments to look to other provisions for light to guide in arriving

at the meaning of any doubtful clause. In applying the rule, we think it plainly appears that a life estate only was intended to be secured to the wife, associated with a power of disposition of the whole estate, by a written instrument in the form prescribed. The recitals in the deed show that it is drawn in pursuance of the agreement between Jones and his wife, and in precise fulfillment of its terms; for it declares the promise to have been to convey the lot to a trustee for her use "upon the trusts hereinafter declared."

Among the trusts enumerated, the third undertakes to provide for the contingency of the death of the wife without having exercised the power conferred, clearly contemplating a remainder and limiting her estate under a preceding clause for the term of her life. Nor is it material whether this final limitation of the trust estate is effectual or inoperative by reason of an insufficient description of the party to take under it. In either case the clause subserves the same purpose in showing the character and extent of the estate secured to the wife.

Her death, then, without her having exercised the dispositive power, her husband still being alive, and his estate also becoming extinct, which endured only during their joint lives, presents the very contingency upon whose happening the trustee is required to convey "to the party or parties entitled by the laws of North Carolina." Who is the party meant? The plaintiffs appropriate this designation to the grantor, the defendants to the heirs of the wife, and there being none, to the University substituted in their place under the law of escheat.

In our opinion, the words do not and were not intended to point out any particular persons to take the inheritance remaining, but to leave it to pass under the law as undisposed of property. They show such estate, depending on a contingency, to have been in the mind of the grantor as capable of subsisting beyond the life of the wife and of his own, and to place it under the control of the law.

This being the proper construction of the clause upon well

established principles, the undisposed of remainder was freed from the intervening life estate in the wife, became united with the then expiring life estate of the husband, and he became the equitable owner of the entire inheritance.

"Another form in which a resulting trust may appear," says Mr. Justice STORY, "is where there are certain trusts, created either by deed or will, which fail in whole or in part, or which are of such an indefinite nature that courts of equity will not carry them into effect, or which are illegal in their nature or character, or which are fully executed and yet leave an unexhausted residuum. In all such cases there will arise a *resulting trust to the party creating the trust*, or to his heirs or legal representatives, as the case may require." 2 Story Eq. Jur., §1106*a*; Lewin on Trusts, 175; *Mosely* v. *Mosely*, 87 N. C., 69; *Robinson* v. *McDiarmid*, *Ib.*, 455.

But the defendants contend that inasmuch as the husband was permitted to receive the purchase money of the wife's land, under his agreement to convey his lot in trust for her, this money constitutes the consideration of his deed and the trust arises to her. The rule which raises a trust in favor of one whose money was used in payment for land bought, has no application to the facts of the present case. The deed to which she consents in becoming a party contains all the trusts, and, in the very form he agreed to make and secure to her, the full fruits of his contract. He stipulates to make precisely such a conveyance, and with such declaration of trusts as are found in the present deed. This exhausts her equity in the premises. Her money is the consideration of, and given for, the interests and benefits secured to her in its provisions, and for no other portion of the trust estate. The land was her husband's, not her's; and whatever estate remains after all the trusts in her behalf have been executed, must be vested in him. This does not belong to the class of cases in which the purchase money of one party has been used and the title to the land conveyed to another.

"The doctrine," remarks the same author, "is strictly limited to cases in which the purchase has been made in the name of

one person and the purchase money has been paid by another." 2 Story Eq. Jur., §1201*a*. The authorities cited in the argument sustain this view of the law. Unless the constructive trust was raised in such case, a successful fraud would be perpetrated by the grantee. *King* v. *Weeks*, 70 N. C., 372; *Cunningham* v. *Bell*, 83 N. C., 328; *Kisler* v. *Kisler*, 27 Am. Dec., 308.

We, therefore, affirm the judgment overruling the demurrer, and remand the cause to be proceeded with in the court below.

No error. Affirmed.

W. K. WILCOXON v. R. H. DONELLY, Adm'r, and others.

Rents—Distributee's liabilities to refund overdrawn share of estate.

1. Rents are incident to the reversion, and when the estate is transferred go to the bargainee, unless they are overdue or are secured by note.
2. Where a distributee of an estate has received more than was due him, the amount does not constitute a charge upon his share of the land, and its repayment can only be enforced as a personal obligation.

(*Mixon* v. *Coffield*, 2 Ired., 301, approved).

CIVIL ACTION tried at Spring Term, 1883, of ASHE Superior Court, before *Gudger, J.*

The defendant administrator appealed.

Messrs. Q. F. Neal and *J. W. Todd*, for plaintiff.
Mr. D. M. Furches, for defendants.

SMITH, C. J. The case comes up from a decree making a final disposition of the controversy in a cause which originated in the year 1860, in the court of equity of Ashe county, for the settlement of the estate of Matthias Poe, and its apportionment among his heirs-at-law—of whom there were two sons and three daughters, one of whom had made an assignment of her share

to one E. L. Dugger—and was prosecuted until spring term, 1883, of the superior court, its successor.

At fall term, 1875, under an order of reference before made, the commissioners, J. W. Todd and Q. F. Neal, made a report in which they state:

1. That the rights of the heirs and children of Sally Bowers, a deceased daughter, and of Isaac Little and wife, Elizabeth, another daughter, have been settled.

2. That Isaac Ingram and wife, Esther and Ransom Poe, another daughter and son, have assigned their share in the lands embraced in the reference to the intestate E. L. Dugger, and that the latter has conveyed the interest vested in him in the home and Harper tracts to William Wilcoxon and thereby transferred to him the rents and profits incident thereto.

3. That John Poe, another son, had conveyed his share to one Allen Perkins, and the latter again to said Wilcoxon.

The commissioners then state an account distributing the proceeds arising from the sale of the tracts, parcel of the intestate's lands, made by order of the court, and ascertaining the relations of the several tenants towards the fund, inclusive of rents for which they are chargeable.

In this account, John Poe seems to have overdrawn, and is found indebted to the fund in a large sum.

To this report two exceptions are filed by the administrator, Donelly, in substance these:

1. For error in allowing to said Wilcoxon the charges for rents of the lands conveyed to him; and

2. In not making the indebtedness of John Poe, an insolvent non-resident, a lien attaching to his share of the fund, and declaring it to be a personal liability only.

To ascertain the facts implied in these exceptions, another reference was made to the same commissioners, to ascertain and report:

1. When Allen Perkins went into possession and how long he remained in possession.

2. How long Wilcoxon held possession and when it commenced.

3. Whether the rents and profits accruing passed to Wilcoxon by Dugger's deed to him; and to report,

4. The evidence taken upon these inquiries.

At spring term, 1880, in response, the commissioners report that Perkins entered into possession on January 1st, 1860, and Wilcoxon entered upon the tract covered by the widow's dower about December, 1869.

The exceptions were therefore overruled, the report confirmed and the court proceeded as follows:

It further appearing to the court that the whole matter has been settled, except certain costs in certain orders heretofore made, it is ordered and adjudged that when the commissioner, W. H. Gentry (appointed in place of the deceased commissioner who had sold the land), shall have paid off the balance of the costs due, then to make title to the purchasers or their assigns of the land sold by his predecessor, G. H. Hamilton, and that the said W. H. Gentry be allowed for his services the sum of ten dollars, and the further sum of $3.50 for each deed executed by him.

From this judgment and preceding overrulings of his exceptions, the said Donelly appeals.

We have no hesitancy in expressing our assent to the action of the court in regard to both exceptions.

Rents accruing under a contract of lease are incident to and connected with the estate in reversion, and, when the estate is transferred, follow the assignment to the bargainee, unless they are at the time overdue or are secured by bond or note, which breaks the connection and separates the obligation from the estate. So it was held in *Mixon* v. *Coffield*, 2 Ired., 301—where a guardian rented out the ward's lands for a year, taking no note, bond or covenant for payment, and the ward arriving at age in July, conveyed the land to the tenant—that the rent was extinguished by merger in the reversion, and could not, nor any part of it, be recovered.

But there is here no contract of rent, but a mere estimate of the value and use of land, as if rent, during its occupation. We are utterly unable to find any reason in support of the claim of the *bargainor* (whose administrator is the appellant) to charge his bargainee for the use or rent of that which belongs to the latter under the deed of the former.

Nor do we find any error in the character given to the indebtedness by the tenant by reason of his receiving more than his share of the fund. It has no resemblance to an assessment charged upon a more valuable in favor of a less valuable dividend for equality in the partition of lands held by tenants in common. This money-charge is a part of the share of inferior value. Here, the party is liable because he has received too much and may be required to refund, but it must be enforced as a personal obligation. Indeed, it arises out of the nature of the use of the "home and Harper tracts," for a series of years, which constitute three-fourths of what he is charged with as received, and nearly double the excess that he owes.

There is no error, and this closes a controversy which has been protracted for nearly a quarter of a century. *Finis sit litium.* The judgment is affirmed.

No error. Affirmed.

W. H. HUGHES, EX'R., v. V. S. MCNIDER.

Purchaser of Land—Defect of title as defence in action for purchase money.

1. A vendee, who has received a deed for land and is in undisturbed possession, has no equity to relief upon the mere ground of an alleged defect of title in the vendor (where there is no fraud in the transaction), but must rely upon his covenants.

2. In an action for the purchase money, the vendor may complete his title, pending the same and at any time before the trial.

3. And an allegation on the part of the vendee that there are incumbrances on the land, must be supported by proof of their existence at the time of trial, in order that the defence of defect of title may avail him.

(*Bell* v. *Cunningham*, 81 N. C., 83; *Clanton* v. *Burgess*, 2 Dev. Eq., 13; *Crawley* v. *Timberlake*, 2 Ired. Eq., 460; *Love* v. *Camp*, 6 Ired. Eq., 209, cited and approved).

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

The suit was brought by Samuel Calvert, and after his death his executor, Hughes, was made party plaintiff.

1. The plaintiff alleged that the defendant, on the first of February, 1876, executed a bond in words and figures following: "For value received I promise to pay Samuel Calvert, on or before the first day of January, 1879, the sum of four hundred dollars, with interest at eight per cent.

V. S. MCNIDER (Seal)."

2. That no part of the same has been paid except the sum of eighty dollars, credited on the bond as follows: "Received February 4th, 1878, the sum of eighty dollars, in part payment of the within bond. S. CALVERT."

3. That there still remains due and unpaid the sum of $376.26, with interest. Wherefore the plaintiff demands judgment for the same.

The defendant filed answer, as follows:

1. That the allegations in section one and two of complaint are admitted to be true.

2. That he is advised and believes that section three contains no statement of fact, but a mere inference of law.

3. That by way of plea in avoidance, the defendant alleges that the consideration of the bond was the purchase of a certain lot of land situate in the town of Jackson, containing two acres more or less, and bounded as follows (describing it in full).

4. That on the first of February, 1876, the plaintiff executed and delivered to defendant a deed for said lot, having assured him that his title to the same was good and clear. Trusting in

the plaintiff's representations as to the title, the defendant executed said bond and accepted a deed for the land.

5. That afterwards, and before the bond became due, the defendant was informed, and believes the same to be true, and so alleges, that plaintiff's title to the land was not good and clear, and that the deed did not convey to the defendanta clear fee simple title thereto.

6. That he is informed, and so alleges, that plaintiff cannot now give to defendant a clear fee simple title to the land.

7. That, upon ascertaining he did not have a good title, the defendant abandoned possession of the land.

Wherefore the defendant asks judgment that the bond be surrendered and canceled, &c.

The plaintiff, in reply to defendant's answer, after admitting section three thereof, states:

1. That the facts set forth in section four are not true, but that plaintiff executed a deed for the premises described in section three, and that said deed (herewith filed) contains all the warranties, assurances, &c., and was read over to the defendant who is and was a man of intelligence, and resides in the town of Jackson, and could have easily examined the records as to plaintiff's title.

2. The plaintiff admits that, at the time said deed was executed, there were judgments amounting to several thousand dollars against him in the superior court of Northampton, but that they did not amount to as much as the marketable value of plaintiff's unencumbered real estate in the county; and that early in the year 1878 and before the said bond fell due, he paid off the said judgments, which left the plaintiff's title to the said lot entirely clear. The plaintiff therefore denies the statement contained in section five.

3. In reply to section six, the plaintiff says that upon the satisfaction of the said judgments the defendant's title became an absolute unencumbered fee simple, except defendant's mortgage to plaintiff to secure the purchase money.

4. In reply to section seven, the plaintiff says that notwithstanding the existence of said judgments, the defendant continued in the possession of the premises for several years, when as plaintiff is informed, and so alleges, the defendant not only had constructive notice, but actually knew of said judgments.

Wherefore the plaintiff demands judgment as prayed for in the complaint.

Both parties declining to submit any issues to be tried by the jury, it was agreed by the parties that the court should hear argument upon the facts presented in the pleadings, and after the same was heard, it was adjudged that the plaintiff recover the sum demanded, and the defendant appealed.

Mr. Thomas W. Mason, for plaintiff.
Mr. R. B. Peebles, for defendant.

SMITH, C. J. The case was by consent left to the court to be determined upon the facts presented in the pleadings, both parties declining to frame issues or introduce evidence, and each claiming that the burden of proof upon the defence relied on in the answer rested upon the other. The defendant contended that the replication was an admission of his equity with an allegation of matter in evidence which the plaintiff is required to show. The court being of opinion that the replication must be taken in entirety and not in part, gave judgment for plaintiff, and the defendant appealed.

We are not required to determine the sufficiency of the reasons assigned for the rendition of the judgment, but the correctness of the ruling itself. There cannot be error if the judgment be right, and this only is the proper subject of our review. *Bell* v. *Cunningham*, 81 N. C., 83.

We do not mean to intimate, however, that the judge did not put a proper construction upon the submission as a direction to pass upon all the undisputed facts averred in the pleadings, and determine their legal effect; and, if so, he was clearly right.

But assuming that he was to decide upon the pleadings as such, and declare from whom the initiatory movement must come in furnishing affirmative proof, the result is the same. The defendant's asserted equity to restrain the collection of the purchase money due for the lot and secured in the bond in suit, consists in the alleged false assurances of the vendor's title at the time when the deed was made, and the existence of the liens of the docketed judgments, several thousand dollars in amount, unknown to the defendant, encumbering the lot; and in the alleged continuance of the liens up to the filing of the answer which disabled the plaintiff's testator from perfecting the title.

The false representations charged are directly denied in the replication, and are therefore to be put aside and the case considered as if the answer were silent in this respect. Assuming it to be true that these judgments against the vendor were in force, and further, that the vendee has not constructive notice of them (a proposition by no means intended to be conceded except for the purpose of considering another aspect of the defence), has the defendant an equity to resist the payment of the obligation incurred in his purchase, when, at the time, he accepts the deed of the vendor with a covenant of warranty *in execution* by the latter of his part of the agreement? and must not the defendant be deemed to have surrendered any right under the contract to convey and to rely alone upon the security and protection afforded by the deed?

A similar inquiry was presented to the court in the case of *Clanton* v. *Burgess*, 2 Dev. Eq., 13, upon facts almost identical, when the plaintiff, against whom judgment at law had been recovered for the purchase money of the land, sought to restrain its enforcement under execution. Delivering the opinion, RUFFIN, J., uses this language: "The case cited at the bar (*Abbot* v. *Allen*, 2 John. Ch. Rep., 519), lays it down that a purchaser, who has received a conveyance and is in possession and not disturbed, will not be relieved on the mere ground of defect of title when there was no fraud nor eviction, but must rely on his

covenants." * * "The contrary would amount to this, that no obligatory contract can be made unless the vendor's title is perfect, and that any defect, secret or notorious, so notorious as to effect the price agreed on, should put it in the vendee's power to rescind after receiving a conveyance with covenants against those defects."

This would be decisive, if accepted as a correct statement of the law, of the defendant's appeal. But the equity to be enforced is to be allowed from payment, while the defects exist, and ceases when they are removed. The defence, to be available, must be in the continuance of an imperfect title or encumbered estate, at the time when the purchase money is sought to be compelled. It was, therefore, necessary for the defendant to aver, as he does in his answer, the encumbrance to be still subsisting, so that the vendor could not then give a clear fee simple title to the property; and this the replication meets with a direct denial, declaring that the judgments were all paid, and their liens discharged early in the year 1878. It then devolved on the defendant to sustain his allegation by proof, and in its absence we must assume the fact to be that there was no such lien when the defense was made, an essential element in the alleged equity.

We again quote from the same opinion upon this point: "It is undoubtedly the law of this court that the vendor may complete his title pending the suit and at any time before the hearing. He is allowed to make good his contract and buy his peace." To the same effect are *Crawley* v. *Timberlake*, 2 Ired. Eq., 460, and *Love* v. *Camp*, 6 Ired. Eq., 209.

For these reasons we sustain the ruling of the court below and affirm the judgment.

No error. Affirmed.

D. F. WILKIE v. WOMBLE & JENKINS.

Parol contract to convey land, when repudiated, vendee can get back what he has paid under it.

1. Where a vendor elects to repudiate a parol contract to convey land, the vendee, under his general prayer for relief, is entitled to recover the amount he has paid under the contract.
2. Evidence of a parol transfer of the vendee's interest under the avoided contract was properly excluded; for in such case there is no equitable interest to transfer, and if there were, the assignment should be in writing.

(*Green* v. *Railroad*, 77 N. C., 95; *Davis* v. *Inscoe*, 84 N. C., 396; *Parker* v. *Allen*, *Ib.*, 466; *Love* v. *Neilson*, 1 Jones Eq., 339; *Whitfield* v. *Cates*, 6 Jones Eq., 136; *Murdock* v. *Anderson*, 4 Jones Eq., 77; *Ellis* v. *Ellis*, 1 Dev., 398; *Capps* v. *Holt*, 5 Jones Eq., 153; *McCracken* v. *McCracken*, 88 N. C., 272; *Beaman* v. *Simmons*, 76 N. C., 43, cited and approved).

CIVIL ACTION for specific performance of a contract, to convey land, tried at Fall Term, 1883, of CHATHAM Superior Court, before *MacRae, J.*

The defendant appealed.

Mr. John Manning, for plaintiff.

No counsel for defendants.

SMITH, C. J. The complaint is for the specific performance of a contract for the sale of land, of which most of the purchase money has been paid, and the answer, admitting the making of an unwritten contract, set up the statute of frauds in evidence. Thereupon the plaintiff, under his prayer for general relief, demands the return of the moneys paid, and was allowed to recover under the rulings of the court.

The defendant Jenkins is joined with the vendor, Womble, because the land has been conveyed to him by the latter, as alleged, with full knowledge of the prior right and equity of the plaintiff.

The answer also relies upon an alleged assignment by plaintiff,

of his interest in the premises to one J. H. Wilkie, against whom the defendant Jenkins has a claim for moneys paid as his surety, as a bar to the action by the plaintiff.

1. The agreement of Womble to convey when the price was paid, was void only at the *election of himself, and, if he chose to abide by it, though vesting in parol,* is the measure of the plaintiff's rights, and affords his only means of redress. He can only maintain an action in such case upon the agreement and according to its terms. *Green* v. *Railroad,* 77 N. C., 95; *Davis* v. *Inscoe,* 84 N. C., 396; *Parker* v. *Allen, Ib.,* 466.

As the plaintiff is obliged to proceed upon the contract, if the defendant assents to its performance, and must put the defendant to his election, the suit, in its present form, is obviously the proper one; and when the contract is repudiated he is remitted to his right to get back what he has paid under it. In the former practice, where such a bill was filed and such a defence set up, the plaintiff was allowed compensation for the value of his improvements in the same suit under his general prayer. *Love* v. *Neilson,* 1 Jones' Eq., 339.

"Although a plaintiff may fail as to the principal equity which he seeks to establish," is the remark of PEARSON, C. J., at the conclusion of the opinion in *Whitfield* v. *Cates,* 6 Jones' Eq., 136, he may fall back on a secondary equity, provided it is not inconsistent with the principal equity and the allegations in the bill are sufficient to sustain it."

In *Murdock* v. *Anderson,* 4 Jones' Eq., 77, the court refused to assume jurisdiction to decree payment of the money, because "the contract being void, the money can be recovered at law in an action for money had and received, and there is no peculiar equitable ingredient" in the case.

But if from peculiar circumstances the remedy at law would be inadequate, the court will interpose and give redress. *Ellis* v. *Ellis,* 1 Dev. Eq., 398.

And so also when the defendant is willing to come to an account upon the basis of the nullity of the contract. *Capps* v. *Holt,* 5 Jones' Eq., 153.

The united jurisdictions in law and equity and the administration of the rules appropriate to each in a single judicial tribunal now, admits of the full redress to which a suitor may be entitled in a single action as is suggested in the dissenting opinion in *McCracken* v. *McCracken*, 88 N. C., 272.

The obligation to restore what has been received results from the annulling of an executory agreement for the sale of land, and will be enforced against the party so avoiding it. *Beaman* v. *Simmons*, 76 N. C., 43.

2. The second exception to the refusal of the court to hear evidence of a parol transfer of the plantiff's interest in the land under an avoided contract, is untenable.

There is no equitable interest to transfer; and if there were, the assignment must be in writing to be effectual, and it is not suggested that the rights of the plaintiff under the contract generally have been assigned.

There is no error in excluding the evidence, nor in the other rulings of the court, and the judgment must be affirmed.

No error. Affirmed.

W. F. & D. D. GIBSON v. W. H. McLAURIN.

Mortgage, foreclosure proceeding.

In foreclosure proceedings, it appeared that several sales of the mortgaged premises were made under the orders of court, and that the mortgagor forbade the same and repeatedly delayed the mortgagee in collecting the debt, by disparaging his own title and offering to raise the bid, by which means he succeeded in setting aside the sales, and on motion of the mortgagee the last sale was confirmed by the court—the report thereof showing it was properly conducted and the land brought a fair price; *Held*, no error. Upon the facts of this case the mortgagor has forfeited all right to the consideration of the court.

CIVIL ACTION tried at January Special Term, 1883, of RICHMOND Superior Court, before *Graves, J.*

This action was to foreclose a mortgage, and the plaintiffs moved to confirm a sale of the mortgaged lands described in the complaint, which was had in pursuance of a decree theretofore rendered in favor of the plaintiffs as mortgagees against the defendant as mortgagor. Affidavits in support of and against the motion were offered by both parties, from which His Honor found the following facts:

That several sales had heretofore been made under orders of the court, and that at all of them including the last, the defendant in person or through his agents forbade the sales, alleging that the purchaser would not get a good title; that he has disparaged his own title and thereby obstructed and delayed the plaintiffs in obtaining the benefit of their recovery and realizing their money under the decrees; that the defendant, pretending to act as agent for and in the name of one Everett, heretofore made a proposition to increase the bid made at one of the sales ten per cent., representing said proposition as coming from said Everett; that he filed a bond signed by him as the agent of Everett, and by others as sureties, and said proposition was accepted and a resale ordered by the court; that the defendant was not authorized to act for Everett in the matter, nor did Everett know, at the time, that the proposition had been made; that defendant, in his own name, has offered in writing to increase the bid made at the last sale ten per cent., and has filed a bond to make good his offer or proposition, and the sureties on the same are solvent and the bond sufficient; that the plaintiffs have agreed in open court to credit defendant's debt with $2,000, the amount of a former bid of plaintiffs, or that the sale be confirmed at that amount, the defendant being insolvent, but the defendant declined this proposition; that the sale which plaintiffs now move to confirm was in all respects fairly conducted, and made after due advertisement, and that at said sale the land brought a fair price.

Upon consideration of these facts and the pleadings and proceedings in the cause, and after argument of counsel for the parties, the court adjudged that plaintiffs' motion be granted, and that

the sale last made and report thereof by the commissioner be in all respects confirmed, and that the commissioner make title to the purchasers, upon their crediting their judgment with the amount of their bid. From this judgment the defendant appealed.

Messrs. J. D. Shaw and *Burwell, Walker & Tillett*, for plaintiffs.
Messrs. Frank McNeill and *T. A. McNeill*, for defendant.

ASHE, J. The defendant, in 1877, borrowed from the plaintiffs the sum of five or six thousand dollars, gave his bond for the amount, and a mortgage on his lands as described in the complaint to secure the payment thereof. After indulging the defendant for several years, the plaintiffs brought an action to foreclose the mortgage, and obtained a decree for the sale of the land. Three several sales were had. At the first, the land brought at the bid of the plaintiffs two thousand dollars; at the second, one thousand dollars; and at the third and last sale, sixteen hundred and sixty-five dollars.

The defendant in person or through his agent forbade each of these sales, discouraged bidding by disparaging his title in alleging that the title was defective. After each sale, he moved to set aside the sale, and succeeded in setting aside the first two sales; and finally came before the court after the last sale had been made, for a price considerably in advance of the preceding one, and in his affidavit offered to raise the bid to eighteen hundred and fifty dollars. But when the plaintiffs offered in open court to give him credit on the judgment against him for $2,000, or to have the report confirmed for that amount, he declined the offer, which we suppose satisfied His Honor that the defendant was not acting in good faith, but was only making the offer to throw additional obstacles in the way of the plaintiffs in their efforts to collect what was due them, and he refused to entertain the proposition, and confirmed the sale.

We think His Honor did right. The defendant, by his shuf-

fling conduct, had forfeited all right to the consideration of the court. From the first to last, with unremitted pertinacity, he has apparently resorted to every practical means of which he could avail himself to thwart the efforts of the plaintiffs to recover a just debt.

That the defendant now gets for his land only $1,665, when he might have realized on its sale $2,000, is the result of his own folly and his trifling with the court and its proceedings. He has no one to blame but himself.

The judgment of the superior court is affirmed. Let this be certified.

No error. Affirmed.

JAMES WALKER v. C. P. MEBANE and others.

Mortgage—Foreclosure Proceeding—Issues.

1. Where a mortgage of land is made to one to secure a debt, and a third party, by an arrangement with the mortgagor (who executes to him a second mortgage on same land), pays the debt in his notes which are accepted by the mortgagee, which notes are afterwards assigned to the plaintiff; *Held*, in an action to foreclose the mortgage and subject the land to the payment of said notes, the plaintiff is not entitled to recover. The mortgage debt being thus discharged, the mortgage deed, though not satisfied upon the register's books in pursuance of THE CODE, §1271, is in equity no longer operative; and if the parties intended to hold the land as security for the said notes, a new mortgage should have been executed for that purpose.
2. *Held further:* The circumstance that there was a difference between the exact amount of the notes used in payment of the debt and those originally secured by the first mortgage is of no force, since the mortgagee accepted the former in discharge of the debt.
3. Where, upon the issues submitted in such case, the jury find the debt was paid, but that the mortgage was not satisfied, *it was held* that the issue to which the latter part of the verdict was responsive, and the finding upon

it, are immaterial. The fact of payment being found, the law determines the status of the mortgage deed.

4. Nor can the withdrawal of the answer of the defendant mortgagor, allowing judgment to be entered for the plaintiff, have the effect of defeating the rights of the third party to whom the second mortgage had been executed under the said arrangement.

(*Wall* v. *White*, 3 Dev., 105; *Powell* v. *Brinkley*, Busb., 154; *Elliott* v. *Wyatt*, 73 N. C., 55, cited and approved).

CIVIL ACTION to foreclose a mortgage tried at June Term, 1883, of NEW HANOVER Superior Court, before *McKoy, J.*

On the 8th day of January, 1871, Maria A. Mebane was indebted to the Mechanics' Building and Loan Association in the sum of $3,403. This debt was created with the assent of her husband, James A. Mebane, and to secure the payment thereof the said Maria A., with the like assent of her husband, executed to this corporation a mortgage of a lot or parcel of land situate in the city of Wilmington. This mortgage contained a power of sale, authorizing the mortgagee to sell the land in the contingencies therein specified.

In the month of January, 1874, the defendant, Charles P. Mebane, assumed the payment of all such sums of money as should thereafter be due from Maria A. Mebane to the said corporation, on account of the indebtedness and liabilities embraced by the said mortgage; and he executed to her a bond to indemnify and save her harmless as to any further payments of money on her part to the said corporation on account of the indebtedness secured by the mortgage. The corporation was not a party to this agreement between Maria and Charles Mebane, and had nothing to do with it.

At the same time the said James A. Mebane and Maria A., his wife, executed to the said Charles P. Mebane two promisory notes, one for $4,000 and the other for $3,521.37. The note for $4,000 was the supposed amount that would be due by Maria on account of the said mortgage debt, and it was given to indemnify Charles P. Mebane against whatever payments he might

make to the corporation on account of its claims against the said Maria, and to secure these two notes Maria A. Mebane and her husband executed to Charles P. Mebane *a second* mortgage upon the land embraced by the mortgage above mentioned.

Thereupon Charles P. began and continued to pay the monthly sums of money due to the said corporation, that under its mortgage were to be paid by Maria A. Mebane, until about July, 1875, when he ceased to pay, as he had agreed with Maria A. Mebane to do.

In February, 1876, however, Charles P. Mebane proposed to the corporation a "compromise" of the debt due to it from Maria A. Mebane. This proposition resulted in an adjustment and settlement of the debt, by which Charles P. agreed to give and did give to the company his three promissory notes, each for $416.67, dated March 1st, 1876, payable to the order of said corporation, one due in two months, one in four months and one in six months, with interest from date at the rate of eight per cent. per annum, and these notes were so executed and accepted by the corporation "as an adjustment and settlement of the amount claimed to be due from Maria A. Mebane."

James A. Mebane died intestate on the 17th of August, 1874, and the defendant, Edward Cantwell, became his administrator.

Charles P. Mebane assigned the notes given him, one for $4,000 and the other for $3,521.37, by Maria A. Mebane, to his wife, Martha C., in October, 1874.

The plaintiff purchased from the corporation for value and before maturity two of the notes given to it by Charles P. Mebane, and he seeks by this action to subject the land mortgaged by Maria A. Mebane and her husband to the said corporation to the payment of these notes.

The defendant, Charles P. Mebane, and his wife, Martha C., insist that the said mortgage executed by Maria A. and her husband to the corporation was paid and discharged by the said Charles P. Mebane at the instance of the said Maria A.; that the land mortgaged to him to secure the notes executed to him

by the said Maria A., with the assent of her husband, and which he assigned to his wife, was duly sold to pay said debts.

Maria A. Mebane at first pleaded in this action, insisting in her answer that the mortgage she executed was paid and discharged. She afterwards, however, withdrew her answer and allowed judgment to go against her.

On the trial the following issues were submitted to the jury at the instance of the plaintiff:

1. "Did C. P. Mebane execute the three notes mentioned in the complaint?" To this issue the jury responded "Yes."

2. Did the Building Association assign and transfer two of the notes to the plaintiff for value received?" To this issue the jury responded "Yes."

3. "Was there any agreement that the notes executed by C. P. Mebane were to be in payment and satisfaction of the debt due by Maria A. Mebane to the Building Association, and of the mortgage securing the same?" To this issue the jury responded, "Yes, as to the debt; no, as to the mortgage."

The following issues were submitted to the jury at the instance of the defendant:

1. "What amount, if any, did Maria A. Mebane owe the Building Association on the first of March, 1876?" To this issue the jury responded "Nothing."

2. "Did Maria A. Mebane authorize C. P. Mebane to execute the three promissory notes executed by C. P. Mebane to the Building Association, and to bind her real estate under the mortgage executed by her to the Building Association for the payment of the same?" The jury answer "No."

3. "Did Maria A. Mebane at the time said notes were executed by C. P. Mebane to the Building Association, to-wit, 1st March, 1876, know that C. P. Mebane had executed the same?" The jury answered "No."

4. Did Maria A. Mebane execute to C. P. Mebane a mortgage dated January, 1874, to secure the amount of money C. P. Mebane might pay to the Building Association for her, on

account of her indebtedness to the association, and did she execute two promissory notes payable to C. P. Mebane, one for $4,000 and the other for $3,251.39, one of which, to-wit, the one for $4,000, was the supposed amount that would be due by Maria A. Mebane to the Building Association, and did C. P. Mebane assign the said notes to Martha C. Mebane in October, 1874? The jury answer "Yes."

5. "Did Martha C. Mebane have any knowledge of the execution of those promissory notes for $416.67, each executed by C. P. Mebane to the Building Association?" The jury answer "No."

6. "Would the three notes for $416.67 each, executed by C. P. Mebane to the Building Association, have been paid if presented for payment at maturity, and was C. P. Mebane at maturity of said notes able to pay the same?" The jury answer "Yes."

7. "Was all the interest of Maria A. Mebane in the tract of land mentioned in the complaint sold since the pending of this suit under a decree of the superior court of New Hanover county for a foreclosure of a mortgage executed by M. A. Mebane and J. A. Mebane to C. P. Mebane, dated 1st January, 1874?" The jury answer "Yes."

There was evidence introduced by both the plaintiff and the contesting defendants tending to support the affirmative and negative of these issues.

Upon the verdict of the jury upon the issues the court gave judgment for the contesting defendant, whereupon the plaintiff having excepted to sundry rulings of the court and the judgment thus given by it, appealed to this court.

Mr. George Davis, for plaintiff.
Mr. C. M. Stedman, for defendant.

MERRIMON, J., after stating the case. The decision of a single one of the numerous questions discussed before us, must

in our judgment be conclusive of this case, and we need not decide the others.

Passing by all questions as to the validity of the mortgage debt, and the mortgage executed by Maria A. Mebane to the defendant corporation, and any like question as to the validity of the notes which the plaintiff seeks to have paid by a sale of the real property embraced by that mortgage, we think the defendant Charles P. Mebane paid, and was fully authorized to pay and discharge, the mortgage debt mentioned, due to the defendant corporation, by executing to it his own three promissory notes, two of which the plaintiff now owns; and that the mortgage debt being discharged, the mortgage itself was in equity discharged, and has no operative effect for any purpose.

It appears to us very clearly, that in January, 1874, Charles P. Mebane agreed with Maria A. Mebane, for a valuable consideration, that he would pay and discharge her indebtedness, secured by the mortgage to the defendant corporation. He "assumed," obliged himself to her, to pay this indebtedness and executed to her a bond of indemnity to that effect. This engagement was between the two last mentioned parties. The corporation was in no way a party to it; it continued to hold its debt and the mortgage to secure it, just as if the agreement had not been made.

Charles P. Mebane was thus fully authorized to pay and discharge the mortgage debt due to the corporation in such way, and for such valuable consideration as might be acceptable to the latter. He was not bound to pay it in a particular way, or pay the whole of it, if he could discharge it by paying a less sum. His obligation was to discharge it, and he had no further or other power or authority from Maria A. Mebane to do anything more about it.

At first, he paid portions—installments—of the debt he thus assumed to pay, as required by its terms, and as provided in the mortgage. At length, however, he failed to do so, and finally the corporation agreed with him to accept his three

promissory notes in discharge of the whole indebtedness of Maria A. Mebane secured by the mortgage the plaintiff alleges still to exist and seeks to foreclose. It appears that the notes were given and accepted as an adjustment and settlement of the whole, not simply a part, of the debt. All the evidence goes to prove this, and the jury expressly found that the notes were given and accepted in "payment and satisfaction" of the mortgage debt mentioned. There is nothing going to show that there was any reservation of right or advantage to the corporation, or Charles P. Mebane under the mortgage, as to the mortgage debt. It was absolutely discharged. He had authority, as we have seen, to discharge it, and he did so in a competent way, and in a way the corporation deemed advantageous to it.

It is suggested that the notes were not equal in amount to the full amount of the indebtedness of Maria A. Mebane, and that there was a balance. There seems to have been some question as to how much she really owed, growing out of the payments she had made, and the circumstances under which she made them. It was insisted that if she were allowed certain credits growing out of usury exacted from her by the corporation, the notes given by C. P. Mebane would be in amount equal to, if not greater than the balance she owed. But this is not at all material; because, no matter what was the exact amount of her debt, the corporation accepted, for causes and considerations satisfactory to it, the three notes of Charles P. Mebane in discharge of the balance of it.

The evidence, as well as the finding of the jury, leaves no doubt upon our minds that the debt to the corporation was, and was intended to be, absolutely discharged.

An essential effect and consequence of the discharge of the mortgage debt was the discharge of the mortgage itself. The debt alone gave it life, vigor and efficacy. The mortgage was incident to the debt, rested upon it, and when the purpose for which it was created was accomplished, it ceased to have effect. *Wall* v. *White*, 3 Dev., 105; *Powell* v. *Brinkley*, Busb., 154; *Elliott* v. *Wyatt*, 74 N. C., 55; 2 Jones on Mort., §§956, 972; 1 Pow.

on Mort., 145; Coot on Mort., 559; *Costin, Ex-parte,* 2 Johns' Eq., 505; *Knox* v. *Johnston,* 26 Wis., 41; *Merrill* v. *Chase,* 3 Allen, 339.

It appears in this case, that the legal right of redemption under the mortgage was lost, but the equitable right of redemption continued until the debt was paid. Regularly, the mortgagee ought to have acknowledged the satisfaction and discharge of the mortgage in the presence of the register of deeds, and he ought to have entered satisfaction on the margin of the record of the mortgage, and this entry ought to have been signed by the mortgagee; and this done as required by the statute, would operate as a deed of release, or reconveyance of the land embraced by the mortgage. THE CODE, §1271. Otherwise the mortgagee should have reconveyed the land by proper deed. It does not appear that there was such reconveyance in this case, but nevertheless, the discharge of the mortgage debt was a complete discharge in equity of the mortgage, and the mortgagor is entitled to have the legal title. 2 Jones on Mort., §§886, 972, 943, 946; 1 Pow. on Mort., 119*a*; *Marriott* v. *Handy,* 8 Gill., 31; 1 Jones on Mort., §355; *McNair* v. *Picotte,* 33 Mo., 55; *Perkins* v. *Stern,* 23 Tex., 561.

The case states that there was no evidence of any agreement on the part of the corporation to *release* the mortgage, on receiving the notes in discharge of the mortgage debt. Such agreement was wholly unnecessary: it followed as a legal, certainly as an equitable consequence, that the payment of the debt discharged the mortgage.

One of the directors of the corporation testified that it did not release or agree to release the mortgage, but retained it as a security for the notes given by Charles P. Mebane. He does not state that there was an affirmative or express agreement to this effect, nor does he state that the notes were not given and received in discharge of the debt. And the jury, while they found that the mortgage debt was paid, found also that the mortgage itself was not paid and satisfied.

The learned counsel for the plaintiff insisted on the argument

that the finding of the jury in respect to the payment of the debt and mortgage was contradictory and absurd, and must be rejected; that the court cannot take part of the finding and reject part, and it is said "how can it distinguish the proper from the improper finding"? He further insisted, that the findings of the jury in response to the issues submitted at the instance of the defendants strengthened this objection.

There is only a seeming absurdity. The material finding was as to the payment of the mortgage debt. So much of the third issue submitted at the request of the plaintiff as applied to the mortgage, separate and apart from the debt it secured, was immaterial and were surplusage, and ought not to have been incorporated into the issue submitted. Whether the mortgage was discharged or not was a question of law, with which the finding of the jury had nothing to do. The material and the only material inquiry was, was the debt paid? and whether it was or not, the law fixed the status of the mortgage. If the debt was paid, it was discharged; if the debt was not paid, it remained operative until it should be paid. As we have said, the debt was the life of the mortgage, and gave it vigor and efficacy.

And in the view we have taken of the case, the issues submitted to the jury at the instance of the defendant were unnecessary and immaterial, and did not reach the spirit and substance of the real matter at issue. Having reference to these issues, it was not material to inquire what sum of money Maria A. Mebane owed the corporation on the first of March, 1876, because, whether she owed much or little on that day, Charles P. Mebane had paid the debt, and that question was settled by the finding of the jury upon the plaintiff's third issue. Nor was it material to inquire whether or not she had authorized Charles P. Mebane to execute the *promissory notes* and continue the mortgage to secure them. The substantial question was, had she authorized him to pay her mortgaged debts without regard to whether he paid and discharged it in his own notes, or cash, or property, real or personal. Nor was it material that she should know on the first of March, 1876, that Charles P. Mebane had paid

her debt by giving his own notes. The material question was, had he paid the debt? Nor was it material to inquire whether or not she had executed to C. P. Mebane notes and a mortgage to secure him for his outlays in paying her debt to the corporation. It was of no concern to the plaintiff or to the defendants in this controversy whether she had not paid him or promised to pay him on that account—that was a matter exclusively between them. Nor was it material to inquire whether she knew of the execution of the three notes to the corporation by Charles P. Mebane—that was a matter between the corporation and him with which she had no concern. Nor was it material to inquire whether Charles P. Mebane paid the corporation the full amount of her debt. He engaged to discharge the debt and did so, and this only was material to her. Nor was it material to inquire whether the notes of C. P. Mebane referred to, would have been paid if presented at maturity, and if he was able to pay them at that time—that concerned the corporation. Nor was it material to inquire whether the interest of Maria A. Mebane in the tract of land, mentioned in the complaint, had been sold since the bringing of this action to pay her mortgage debt to Charles P. Mebane—this was a matter material only to themselves. These issues were all beside the case.

If the agents of the corporation supposed at the time they accepted the notes of Charles P. Mebane in discharge of the mortgage debt, that the mortgage, as separate from the debt, could be continued and substituted to secure the notes given by him to the corporation, they were mistaken as to the legal effect of the payment of the mortgage debt. The payment of the latter discharged the mortgage, and the corporation and Charles P. Mebane could not by arrangement and mere parol agreement infuse into it renewed life and efficacy, so as to make it secure the debt of Charles P. Mebane.

It does not certainly appear that he undertook to enter into such agreement; but if he did so, he had no authority from Maria A. Mebane, the mortgagor, to that effect. Indeed, any such agreement was not feasible. If it was intended to hold the

land as a security for the notes given by Charles P. Mebane to the company, a new mortgage ought to have been executed, and Maria A. Mebane should have joined in it, or some other method to create a lien should have been adopted.

There is no suggestion that the corporation assigned the mortgage debt to Charles P. Mebane, or that the mortgage debt was to remain undischarged until his notes should be paid. There is no intimation of any such agreement; on the contrary, as we have seen, the mortgage debt was absolutely discharged, and hence, also, the mortgage.

The debt and the mortgage having been discharged, Maria A. Mebane could not give renewed life and effect to them by withdrawing her answer in this action and allowing judgment to go against her in favor of the plaintiff. She could not thus change the legal status of the land and give advantage to the plaintiff. By allowing judgment to go against her, if the land remained hers, the docketing of the judgment would create a lien on it in favor of the plaintiff. If, however, she executed a second mortgage in favor of Charles P. Mebane, as alleged and admitted, she could not defeat his right by withdrawing her defense.

Whatever may be the rights of Maria A. Mebane and Charles P. Mebane and his wife Martha C., as among themselves, to the land, it is very clear that the plaintiff has no lien upon it, by virtue of the supposed mortgage he seeks by this action to foreclose; and therefore, while we do not pass upon the correctness of the particular rulings of the court below, we are satisfied that the court reached a correct conclusion, and therefore affirm its judgment.

No error. Affirmed.

F. M. RAWLINGS v. HENDERSON HUNT and others.

Mortgage of thing not in esse, valid—Agricultural lien and mortgage included in one deed—Practice.

1. A crop to be planted on one's own land, or on land let to him, as well as a crop planted and in process of cultivation, is the subject of a valid mortgage.
2. An instrument may be so framed as to operate in one part as a mortgage, and in another as an agricultural lien; but to create the latter, it must conform to the requirements of the statute allowing agricultural liens.
3. The plaintiff is legally entitled to the property sued for, by virtue of the first mortgage.

No equitable rights of the defendant are passed upon.

The judgment here is confined to this case, and the court takes no notice of the fact stated in the record, as to other cases turning upon the principles applicable to this.

(*Cotton* v. *Willoughby*, 83 N. C., 75; *Harris* v. *Jones*, *Ib.*, 317; *Clark* v. *Farrar*, 74 N. C., 686; *Patapsco* v. *Magee*, 86 N. C., 350, cited and approved).

CIVIL ACTION in the nature of claim and delivery, tried at Fall Term, 1883, of NASH Superior Court, before *Philips, J.*

On the 25th day of January, 1882, Jacob Arrington executed to the plaintiff a deed which was thereafter duly recorded. It is set forth in the preamble therein that Arrington was about to engage in the cultivation of various crops upon a tract of land situate in Nash county, known as the "Hines place," during the year 1882; that he desired to secure to the plaintiff an "agricultural lien," as allowed by the statute providing for such liens; that the plaintiff was to furnish him with advances of cash and supplies to enable him to make his proposed crops, to an amount not exceeding one hundred dollars; and that before the execution of the deed of that sum the plaintiff had advanced to him $70.10 for the purpose mentioned.

This deed, in terms, conveys to the plaintiff a bay horse, and adds: "Also, a lien upon each and every of said crops to be

cultivated and made during the said year, with full power to take possession of any portion, or all of said crops at any time after their maturity, as may be sufficient upon the sale thereof to satisfy said debt, and such advances as shall have been made, and all expenses that may be incurred by the party of the second part (the plaintiff) in executing, probating, recording and enforcing this lien; and if by the first day of December, 1882, the aforesaid indebtedness has not been discharged by the proceeds of sale of said crops, or otherwise, then the party of the second part is authorized to take possession of said property and sell the same, or so much thereof as will satisfy the amount remaining due and all costs and expenses in any way incurred by said seizure and sale."

Between the date of the deed and the first day of July, 1882, the plaintiff advanced to said Arrington the further sum of $29.90, the balance to be advanced as provided by the deed.

After that time, the plaintiff advanced to Arrington the further sum of $24.29, and he promised to repay this sum with the first bale of cotton he might gather from the crops, and accordingly he afterwards delivered to the plaintiff a bale of cotton, to pay the last mentioned sum, of the value of $35.00, and with this exception, the plaintiff received no part of the crops. The money advanced by the plaintiff was used in the production of the crops.

On the 25th of May, 1882, the said Arrington executed to the defendants, Battle, Bunn & Co., another deed, creating an "agricultural lien on the same crops in consideration of not exceeding $500, to be supplied by them in cash or other things necessary to make the crops; and of this sum they advanced from time to time the sum of $416.33. Arrington also owed them the sum of $331.06, a debt due prior to and having no connection with the "agricultural lien." In addition to the lien upon the crops, this deed conveyed to Battle, Bunn & Co. three mules and farming utensils, to secure the advancements of money, &c., and contained a power of sale.

Of the crops produced, Battle, Bunn & Co. received eight bales of cotton—the same sold for $369.75—and this sum was applied by them upon their debt due before and not embraced by the "agricultural lien."

In February, 1883, they took possession of the residue of the crops and sold the same for $180.00. At this sale, the defendant Hunt purchased eleven barrels of corn and fifteen hundred pounds of fodder for $48.00; and the plaintiff brought this action against him before a justice of the peace in Nash county to recover the property so purchased by him. The justice of the peace gave judgment in favor of the plaintiff, and the defendant appealed to the superior court. Battle, Bunn & Co. then intervened, and became also parties defendant in the action.

The parties agreed upon the facts and submitted the whole case to the judgment of the court. The court gave judgment for the defendants and the plaintiff appealed.

Mr. W. S. Mason, for plaintiff.

Messrs. Battle & Bunn and *Reade, Busbee & Busbee*, for defendants.

MERRIMON, J. It is settled that a contemplated unplanted crop to be made by the mortgagor on his own land or land let to him, as well as one planted and in process of cultivation, may be the subject of a valid mortgage. *Cotton* v. *Willoughby*, 83 N. C., 75; *Harris* v. *Jones*, *Ib.*, 317.

The deed from Jacob Arrington to the plaintiff operated as a mortgage with power of sale in favor of the latter, upon the horse and the lien upon the crop to be made conveyed by it, notwithstanding the purpose therein mentioned to create an "agricultural lien."

The defendant insisted that the operative conveying words in the deed do not embrace the crops to be produced. We cannot accept this interpretation of its provisions.

The operative words are, "the party of the first part *sell and convey* to the party of the second part" * * * "one bay

horse: to have and to hold to the use of the party of the second part, his heirs and assigns forever; *also*, a lien upon each and every of said crops to be cultivated and made during the said year," &c. It then proceeds to give the mortgagee the right to take possession of the crops and sell them in the contingencies specified.

At the end of the word "forever" is a semicolon, denoting a succeeding clause upon the same subject, then comes the word "also." This latter word, as here employed, is a copulative conjunction connecting the two clauses, and it implies likewise, in like manner, in addition to, besides—noting addition or conjunction. See Webster, Worcester and Burrill's Law Dictionary; *Pain* v. *Snelling*, 5 Ea., 87; 4 M. & S., 58; 1 Salk., 239. The word is significant and important; it cannot be treated as meaningless or mere surplusage; it must be treated as doing its complete office in connecting two important clauses of the instrument, and having effect in that way. Besides, if it were treated as the beginning of a separate paragraph or sentence, or of an independent subject, or if it should be rejected altogether, it would leave the provision of the deed as to the liens and the crops in an exceedingly awkward if not meaningless condition.

This case is in all material respects like the cases of *Cotton* v. *Willoughby* and *Harris* v. *Jones*, *supra*, and must be governed by them.

It was contended on the argument for the appellees that if the deed could operate at all, and as a mortgage of the horse, it could not so operate as to the crops; that as to the crops it was inoperative, or if operative at all in that respect, it constituted only an "agricultural lien" to secure the sum of $29.90 advanced by the plaintiff *after* the execution of the deed.

We think the deed might be treated as creating an "agricultural lien" on the crops to secure the advancement of $29.90. It has all the necessary requisites for that purpose, but it goes further in this case; it has all the essential elements of and it creates a mortgage on the crops as well as the horse. No par-

ticular formula of words are essential to create a mortgage of personal property. Any words that express the purpose to create a lien and give the mortgagee power over and control of the property, with power of sale, or to have it sold to pay the mortgage debt, are sufficient. As we have seen in this case, the mortgagor used apt words of conveyance as to personal property, and provided in terms that the plaintiff should have the right to take possession of the property, including the crops, and sell the same to pay his debt.

It is not true, as contended, that an instrument intended as an "agricultural lien" must effectuate that purpose and none other, or be treated as necessarily inoperative for all purposes. A written instrument, whether deed or otherwise, to create such a lien must indeed conform to the statutory requirements, else it cannot operate to create such lien; but if the instrument will bear such a construction as will effectuate the purpose of the parties, it must be so construed and treated. As, for example, if it would not operate to create the "agricultural lien," but has all the requisites of a mortgage of personal property, it would be so treated and upheld. If a written instrument, as a deed, fails to effectuate one purpose specified in it, yet it will effectuate another purpose plainly agreed upon in it, it must be upheld for the latter purpose. We can see no reason why it should not be, and in such case every reason why it should be, as completely as if provided for in a separate instrument. Nor can we see any good reason why the same instrument may not be so framed as to operate in one part of it as a mortgage and in another as an "agricultural lien."

It was suggested on the argument that this court had decided otherwise in *Clark* v. *Farrar*, 74 N. C., 685. A slight examination of that case will show the contrary. It decides the instrument there in question was fatally defective, and *did* not create an "agricultural lien"; but Mr. Justice BYNUM, delivering the opinion, expressly passed by the question whether or not it could operate as a mortgage. He said, "without stopping to

enquire whether the only operative words in the defendant's deed, to-wit: "the said O. C. Farrar *shall have a lien* on all crops," &c., can be construed into a conveyance of the crops to the defendant, we pass to that view of this part of the case which is decisive." He then properly proceeds to show that the instrument was false upon its face and fraudulent as to creditors, and could not, under the guise of an "agricultural lien," deceive and mislead them to their prejudice.

And it was also insisted that this court had decided otherwise in *Patapsco* v. *Magee*, 86 N. C., 350. That case does not justly bear the construction the defendant's counsel give it. It cites *Clark* v. *Farrar, supra*, as in point for a purpose, and so it was. The learned judge then added, *obiter*, that, "according to the same authority, an instrument, which, as intended by the parties to operate as an agricultural lien, and which purports to be one, must take effect *as such*, or not at all, and will not be permitted to prevail as a mortgage." We have seen that the case referred to does not sustain the view of it thus expressed. Besides, the court then adverts to the fact, that the instrument there under consideration did not convey or purport to convey the title of the property, which was the subject of agreement.

The plaintiff, in our judgment, is entitled by virtue of the mortgage in his favor, to have the possession of the property, including all the crops therein mentioned, to sell the same and pay his mortgage debt, or so much thereof as has not been discharged; and the surplus, if any, will belong to the defendants according to their respective rights, taking it that Arrington owes them, as they allege, for advancements.

This is an action at law; no equitable rights are set up in the pleadings; and we are not called upon, indeed, we cannot undertake, to adjust any possible equities in favor of the defendants. We are not at liberty to express an opinion as to whether or not the plaintiff is chargeable in equity with the horse mentioned in the deed, or how he must apply the proceeds of the bale of cotton he received as part of the crops. We pass only upon the legal rights of the plaintiff as they appear in the record.

The court ought to have given judgment for the plaintiff upon the case submitted to it, and as it did not, there is error, for which the judgment must be reversed, and judgment entered here for the plaintiff.

This judgment does not extend to any other case. This court cannot take notice of and act upon a stipulation as to other cases turning upon the principles applicable to this case.

Judgment reversed, and judgment for the plaintiff.

Error. Reversed.

H. S. LEDBETTER v. STEPHEN QUICK.

Landlord and Tenant—Agricultural Supplies.

1. A landlord is entitled to the first lien upon the crop for rents due and advancements made. THE CODE, §1754.
2. Supplies necessary to make and save a crop, are such articles as are in good faith furnished to and received by the tenant for that purpose. And it was proper in the court to leave it to the jury to find, whether upon the evidence a mule and wagon, &c., were treated as andvancements.
3. *Held further*: Where landlord and tenant undertake by collusion and fraud to create an indebtedness to the former, under color of "advancements," to the prejudice of creditors of the tenant, such transaction will not be sustained.

(*Montague* v. *Mial*, 89 N. C., 137; *Livingston* v. *Farish*, *Ib.*, 140; *Womble* v. *Leach*, 83 N. C., 84, cited and approved).

CIVIL ACTION tried at Fall Term, 1883, of RICHMOND Superior Court, before *McKoy, J.*

This action is for the conversion of five bales of cotton, the plaintiff claiming the same as landlord of one Hiram Leviner, to whom the plaintiff had leased certain lands. There was a written contract of lease for agricultural purposes, containing a stipulation for payment of rent, the term being three years, beginning on January 1, 1882, and continuing until December 31, 1884.

The rent money was paid; and the controversy here is as to which of the parties to this suit is entitled to have his account for advancements of agricultural supplies and expenses in making and saving the crop paid out of the crop.

The plaintiff testified that, independently of the said lease, there was an agreement between him and Leviner that his account for supplies for the year 1882 should be paid out of the crop, to an amount not exceeding six hundred dollars, and that the same should be a lien on the crop. The plaintiff then offered to prove his account against Leviner, and the defendant objected, unless plaintiff could show that the articles sold were received by Leviner as advancements for making the crop. The court admitted the evidence, stating that the plaintiff could only recover for articles furnished to make and save the crop, and whether the same were furnished, and for what purposes used, would be a question for the jury. The defendant also objected to certain specific items in the account, upon the ground that the amounts charged were paid, not to Leviner, but to other persons, and there was no evidence that they were advancements made to Leviner for crop purposes. Objection overruled.

The defendant further objected to item 17 of the account, and in regard to this, the plaintiff testified that he sold Leviner a mule for $154 and took a note for the price, and a mortgage on the mule to secure it. And in reference to item 33, to which objection was also made, the plaintiff testified that he sold him a wagon for $55, and secured payment of the same in like manner, but that he took the wagon back under a power contained in the mortgage, and sold it for $36.

The plaintiff further testified that the defendant told him that he (the defendant) had gotten five bales of cotton from Leviner, and witness told the defendant that Leviner was his tenant, and that said cotton belonged to the plaintiff.

One Brantley Brown was then introduced by the plaintiff and testified, after objection by defendant, that he saw the defendant's wagons hauling off cotton from the plaintiff's place. This was

admitted in corroboration of the plaintiff's testimony, to-wit: that defendant told him to get five bales.

The defendant excepted to the overruling his objections, and introduced two liens or mortgages executed to him by Leviner to secure advancements for agricultural supplies—one dated February 16, 1882, and the other June 5, 1882, but did not introduce any evidence to show that anything was due on them.

Under the instructions of the court, the jury found the issues in favor of the plaintiff, and the defendant appealed from the judgment rendered.

Mr. J. D. Shaw, for plaintiff.

Messrs. Strong & Smedes, *Frank McNeill* and *Burwell, Walker & Tillett*, for defendant.

MERRIMON, J. The landlord or his assigns can maintain an action against his tenant, or cropper, or the assignee of either, or any person, unless otherwise agreed upon between the parties to the lease, in case such tenant, cropper, or the assignee of either, or any person, shall remove the crop or any part of it from the land leased, or convert it, before the rents shall be paid, or before the conditions of the lease shall be performed or damages in lieu thereof paid; or before the "advancements" made by the landlord or his assigns to make and save the crop shall be paid; if such removal or conversion shall be made without the consent of the landlord or his assigns, as the case may be. The statute in express terms vests the possession of the crop in, and creates a lien in favor of, the landlord or his assigns for the purposes mentioned, until the lien shall be discharged as indicated. The landlord, or his assigns, has a lien upon his whole crop, and a special property in it to the extent of his lien, and is entitled to possession. He has such a property interest as enables him to maintain his action for the recovery of the same. THE CODE, §1754; *Montague* v. *Mial*, 89 N. C., 137; *Livingston* v. *Farish*, *Ib.*, 140, and the cases there cited; *Rawlings* v. *Hunt*, *ante*, 270.

In the case before us there was no question made as to the lease, which was executed on the 2d day of December, 1881, and it appears that the rents had been paid. The landlord alleged, however, that by agreement, contemporary with the lease, he as the landlord was to supply his tenant with "advances of provisions and supplies" during the year 1882, to make and save the crops to an amount not exceeding $600; that he made such "advancements" from time to time as required by the tenant, and there is still due to him on that account several hundred dollars, and that the defendant removed a part of the crop made during that year without his assent.

On the trial, the plaintiff produced his itemized account for advancements made to his tenant, and the defendant objected to the whole of it, unless the plaintiff could show that the things so supplied were really necessary to make and save the crop, or were expenses necessary and incident to this purpose, and the tenant so accepted and used the same. He likewise objected to sundry items in it, particularly to one for a mule and another for a wagon, because, as he insisted, they were not such things as were in their nature advancements.

The court left it to the jury to find from the evidence whether or not the things supplied were received and treated by the tenant as advancements, and instructed them that the rents having been paid, the plaintiff could only recover for advancements to make and save the crop; and as to the mule, he left it to the jury to find whether or not the mule was treated as an advancement.

It might be difficult, in many cases that might arise, to say what would or would not be advancements to make and save the crop, in the sense of the statute; but we think that a mule or a wagon may, generally, be regarded as such advancement, if supplied in good faith for that purpose. The tenant, acting in good faith, must be the judge of what is necessary and proper to aid him in making and saving the crop, and when the landlord has in good faith furnished supplies as required by the tenant,

this will be sufficient on his part, without regard to the particular things supplied. There is a great variety of ways in which things not *per se* necessary to make and save a crop, may incidentally serve that purpose, and the tenant alone can be the better judge in such respects. He may employ laborers, and to pay them he may use goods that would seem to have no reference to a crop at all, and yet it very plainly appears to the reasonable mind that such goods would be supplies not inappropriate to pay for labor.

In the account, we notice several small items of charge for shoes, snuff, calico, and the like, not to a large amount, and for orders in favor of sundry persons who may have been, and probably were, laborers. It may be, and probably was, that the tenant found it convenient to pay his laborers in this way. If the laborer should find it convenient to take an order for goods to suit his taste and wants, or to accept goods from the tenant directly, we can see no just reason why he may not do so, and the expenditure on the part of the tenant in such way would not destroy the character of the supplies as advancements. Indeed, goods supplied, and almost anything of value, would, in this view, be treated as supplies in the sense of the statute. Much the larger part of the account is made up of items for such things as were manifestly advancements, such as flour, meal, corn, and like articles.

Leaving out the particular items objected to, except those for the mule and wagon, and there would still be a very considerable balance in favor of the plaintiff. The plaintiff was a witness on the trial in his own behalf. He was a competent witness, and it appears that the jury believed his testimony. He alone testified to the account. In any view of the account, there was a considerable balance due him, and he could, therefore, maintain his action. He was entitled to have possession of the whole crop, until his debt against the tenant for advancements was fully paid.

If the landlord and tenant should collusively and fraudulently

undertake to create an indebtedness under color of advancements, no matter what might be the character of the supplies, in order to favor themselves, or either one of them, to the prejudice of the creditors, with or without liens on the crop, subsequent to the just lien of the landlord, such transaction could not be sustained. The debt for "advancements" must be such as is created in good faith on the part of the landlord. It must not be made collusively, nor can he be allowed to supply such things as advancements as are manifestly not such, and he has good reason to believe are not so intended. The "advancements," whether they be money or merchandise, must be such as go directly or indirectly to make or save the crop, and the tenant must be the judge of what best serves his purpose. *Womble* v. *Leach*, 83 N. C., 84.

The objection to the testimony of the witness Brown cannot be sustained. It was clearly competent. It tended to prove the removal of a part of the crop, and to sustain what the plaintiff had sworn.

The defendant introduced two "agricultural liens" upon the crop of the tenant—one executed on the 16th day of February, 1882, and the other on the 5th of June, 1882, but he did not offer to show that he had made any advancements, as contemplated by them. It was his folly or his misfortune, that he did not inform himself as to the claims and demands of the landlord before he supplied the tenant with the advancements. The statute, of which he was bound to take notice, gave the landlord a first lien for the rents due to and advancements made by him.

This is an action at law. The defendant does not rely upon, or pray for, equitable relief, as he might have done, if the crop were in excess of the debt due to the landlord.

There is no error, and the judgment must be affirmed. *Rawlings* v. *Hunt*, *supra*.

No error. Affirmed.

J. T. PICKENS v. T. B. RYMER.

Deed—Seal of one may be adopted by another signer of an instrument.

Two persons may adopt the same seal to an instrument, and it then becomes the deed of both; otherwise it is the deed of one and the simple contract of the other; and whether the party signing intended to adopt the seal of another signer is a question of fact for the jury, the burden being on the plaintiff to show that the defendant adopted the seal or scroll. It is, therefore, error in the court, upon inspection of the instrument, to decide the matter as a question of law.

(*Yarborough* v. *Monday*, 3 Dev., 420, cited and approved).

CIVIL ACTION tried on appeal from a judgment of a justice of the peace, at Spring Term, 1883, of BUNCOMBE Superior Court, before *Avery, J.*

This action was brought to recover the amount due on a note of which the following is a copy: "Twelve months after date we or either of us promise to pay to J. T. Pickens ninety dollars for value received of him, as witness our hands and seals, with interest from date. October 22, 1861."

(Signed) F. M. BALLEW. [*Seal.*]
T. B. RYMER.

On this note two credits were endorsed—the one on November 1, 1869, and the other on January 3, 1871.

The defendant pleaded payment and the statute of limitations, and the plaintiff proved the execution of the note by D. Wilfong, the subscribing witness.

The plaintiff's counsel submitted the note to the inspection of the court and admitted, that if it was not a note under seal, the defendant's plea of the statute of limitations would be a bar, and upon an intimation from the court that the jury would be instructed that it was not a note under seal as to the defendant Rymer, the plaintiff submitted to a judgment of nonsuit and appealed.

Messrs. M. E. Carter and *Reade, Busbee & Busbee,* for plaintiff.

No counsel for defendant.

ASHE, J. The only question presented for the consideration of this court is whether there was error in the instruction which His Honor intimated he would give the jury.

Such an instruction would have been manifestly erroneous. A seal is an essential requisite of a deed, and no writing without a seal can be a deed. Shep. Touch., 56. Blackstone also lays it down as an indispensable requisite of a good deed (Vol. 2, 304); and there is no question that two or more persons may adopt the same seal. There is abundant authority on this point. It was so held in *Yarborough* v. *Monday,* 3 Dev., 420, where this court said: "Two parties may adopt the same seal, and in that event it is the deed of both, otherwise it is the deed of one and the simple contract of the other." To the same effect are *Hollis* v. *Pond,* 7 Hump., 222; *Pequaket Bridge* v. *Mathis,* 7 N. H., 232; *Bonham* v. *Lewis,* 3 Monroe (Ky.), 376; 4 Term Rep., 313, and 3 Ves., 578.

These authorities not only establish the principle that two or more persons may adopt one seal, but they establish the further principle that, whether the party subscribing a deed, opposite whose name there is no seal, intended to adopt the seal of another signer who has made his seal, is a question of fact for the jury, and the judge cannot upon inspection instruct the jury that it is or is not a deed of one of the parties, as they would be deciding both the law and the fact, and in this consisted the error committed by His Honor in the court below. He said he should instruct the jury that it was not the deed of the defendant. That was deciding both the law and the fact and leaving nothing for the jury to decide; whereas he should have told the jury that two persons may adopt the same seal, but whether it was the sealed or unsealed instrument of the defendant was a question of intention which was a fact to be determined by the jury, and

the *onus* lay on the plaintiff to prove that the defendant adopted the seal or scroll. *Hollis* v. *Pond, supra.* And in the case of *Yarborough* v. *Monday, supra,* the court held that the question whether both parties adopted the same seal was one for the jury and not for the judge. And in the Kentucky case *Bonham* v. *Lewis, supra,* which was an action upon a note signed by two parties with only one seal opposite the name of the first signer, there was a demurrer to the declaration, and the court in their opinion say: "Where an instrument with one seal and two or more signers is alleged to be sealed by all, the court is not authorized to infer, from there being but one seal and two or more signers, that but one in fact sealed the instrument; and the party who contends that it is not his seal must reach the fact by way of plea, and as one seal may be the seal of many signers, the court from *bare inspection* of the paper and declaration cannot decide that it is the seal of one only."

The judgment of nonsuit must be set aside and this opinion certified to the superior court of Buncombe county, that a *venire de novo* may be awarded.

Error. *Venire de novo.*

JOSEPH SMITH and wife v. FRANK BRISSON and wife and others.

Deed, a fee may be limited after a fee under the Statute of Uses.

1. A fee-simple may be limited after a fee-simple either by deed or will, by operation of the statute of uses; if by deed, it is a conditional limitation; if by will, it is an executory devise.

2. An estate to A and the heirs of his body, but if he die without such heirs living at the time of his death, then to the heirs of B; *Held,* that the limitation over is good. (The case is governed by the act of 1827 and 1856, in reference to contingent limitations and construing "heirs" to mean "children"; and the act of 1784, changing an estate tail into a fee).

3. Springing and shifting uses and conditional limitations discussed by ASHE, J.

(*McBee, ex parte,* 63 N. C., 332, overruled; *Folk* v. *Whitley,* 8 Ired., 133, approved).

SMITH *v.* BRISSON.

EJECTMENT tried at Spring Term, 1883, of ROBESON Superior Court, before *MacRae, J.*

The action was tried by the court upon a case agreed and a jury trial waived, except as to the amount of damages.

It was agreed that both the plaintiffs and defendants claim under a deed executed by Rowland Mercer, Sr., to Rowland Mercer, Jr., dated the 30th of August, 1859, the important part of which is as follows: "For and in consideration of the natural love and affection I have for my son, Rowland Mercer, and the further sum of one dollar to him in hand paid, the receipt of which is hereby acknowledged, has given, granted, bargained, sold and conveyed, and do hereby give, grant, bargain, sell and convey to the said Rowland Mercer and the heirs of his body, and if the said Rowland Mercer should have no heirs, the said land shall go to the heirs of my son James A. Mercer, all that tract of land," described as in the complaint.

It was admitted that Rowland Mercer, Jr., died on the 10th day of November, 1871, without ever having had any children, and that James A. Mercer was living at the date of the said deed executed on the 30th of August, 1859, and had living children at that time, the defendant, Orren Mercer, being one of them. The land in controversy was devised by Rowland Mercer, Jr., to the *feme* plaintiff, who was then his wife, but has since intermarried with the other plaintiff, Joseph Smith. It was agreed if upon the above state of facts the plaintiffs are entitled to recover, judgment is to be rendered for them; if not, for the defendants.

His Honor being of opinion with the plaintiffs, upon the jury's returning a verdict assessing the plaintiffs' damages, adjudged that they recover the damages so assessed and that a writ of possession issue. From which judgment the defendants appealed.

Messrs. French & Norment, for plaintiffs.

Messrs. Frank McNeill, T. A. McNeill and *J. D. Shaw,* for defendants.

ASHE, J. Both parties to this action claim title to the land described in the complaint under the deed executed by Rowland Mercer, Sr., to Rowland Mercer, Jr., on the 30th day of August, 1859.

The plaintiffs contend that the deed conveyed an absolute estate in fee simple in the land to Rowland Mercer, Jr., and by his will the fee simple title to the same was devised to the *feme* plaintiff.

The defendants, on the other hand, insist that the deed conveyed only a determinable fee to Rowland Mercer, Jr., which terminated by his death without children, and vested an absolute fee simple, by the limitation in said deed, in the children of James A. Mercer.

The deed in question is to be construed as if it read, to the said Rowland Mercer and the heirs of his body, and if the said Rowland Mercer should die not having such heirs living at the time of his death, the said land shall go to the children of my son James A. Mercer.

By the act of 1827, ch. 7 (Bat. Rev., ch. 42, §3), it is provided, "that every contingent limitation in any deed or will made to depend upon the dying of any person without heir or heirs of his body, shall be interpreted a limitation to take effect when such person shall die not having such heir or issue living at the time of his death." And by the act of 1856 (Bat. Rev., ch. 43, §5), "any limitation by deed, will or other writing to the heirs of a living person, shall be construed to be the children of such person, unless a contrary intention appear by the deed or will."

The defendants especially relied upon the case of *McBee, Ex-parte*, 63 N. C., 332, which was a conveyance to W. J. Stowe, "to have and to hold the said land to his heirs, executors and administrators for and during the period of his natural life; at his death to go to the heirs of his body, to them, their heirs and assigns forever. And in default of heirs of his body living at his death, said property to go to L. J. P. and the heirs of her

body." It was held this vested in W. J. Stowe an estate tail, and by the act of 1784 it was changed into a fee simple, and that the limitation over, "and in default of heirs of his body living at his death, to go to L. J. P. and the heirs of her body, was void."

The only authority relied upon for this decision was *Folk* v. *Whitley*, 8 Ired., 133. The decision in that case was made upon the construction of a will in which the testator devised as follows: "I lend to Benjamin Whitley, son of Elizabeth Nobles, all the lands I own in Conehoe Island," &c., (being the premises in controversy) "during his natural life, and after his death I give the above mentioned land to his heirs, lawfully begotton, to them and their heirs forever; and in case he (the said Benjamin) should die without lawful issue of his body, then I lend the above mentioned land to his brother, Henry Whitley, in manner as aforesaid."

This will was made in 1791, and it was held, Chief-Justice RUFFIN speaking for the court, that the words used in the will, "heirs lawfully begotten," were words of limitation and not of purchase, and that Benjamin Whitley took an estate tail by the application of the rule in *Shelly's* case, which was converted into a fee simple under the act of 1784, and that the limitation over was void."

It is always with great reluctance we find ourselves constrained to differ with our brethren who preceded us on the bench, but in the case of *McBee* we are forced to the conclusion that they overlooked the true ground upon which the case of *Folk* v. *Whitley* was decided. It was not because a fee simple was given to Benjamin Whitley and therefore the limitation over was void, but because the will having been made before our act of 1827 the limitation over was too remote. The court say on page 138: "It is clear, therefore, that Benjamin, the son, took an estate tail by the words of the devise to him, and, consequently, that the limitation over to Henry was after *an indefinite failure of the issue of Benjamin.* The effect then is that

the fee into which the act of 1784 turns the estate tail became absolute in Benjamin, and Henry and his heirs take nothing." But in *McBee's* case the limitation over was not too remote. So the authority relied on did not sustain the conclusoin of the court in that case.

At common law a fee simple could not be limited after a fee simple. There was no way known to that law by which a vested fee simple could be put an end to and another estate put in its place; and the reason is, because no freehold could pass without *livery of seizin*, which must operate immediately or not at all.

But after the Statute of Uses, 27 HENRY VIII., when the possession of the legal estate was transferred to the use, vesting the legal estate in the *cestui que use* in the same quality, manner, form and condition that he held the use, and the courts of law assumed jurisdiction of uses, it was held that an estate created by a deed operating under the statute might be made to commence *in futuro* without any immediate transmutation of possession; as by a bargain and sale, or a covenant to stand seized to uses. "*Cessante ratione cessat et lex.*" And consequently it was held that, by such conveyances, inheritances might be made to shift from one to another upon a supervening contingency, which to avoid perpetuities was required to be such as must happen within a life or lives in being, and the period of gestation and twenty-one years thereafter.

Thence arose the doctrine of springing and shifting uses, or conditional limitations. A springing use is one which arises from the seizin of the grantor, and where there is no estate going before it; but a conditional limitation, or shifting use, is always in derogation of a preceding estate. 2 Minor's Inst., 816. An example of this is where an estate is conveyed by bargain and sale or by covenant to stand seized to A and his heirs, but if B shall pay to A one hundred dollars within thirty days, then B and his heirs.

It was under this doctrine of a shifting use that it has been

held since very early after the statute of uses, that a fee-simple may be limited after a fee-simple, either by deed or will; if by deed, it is a conditional limitation; if by will, it is an executory devise. "And in both these cases a fee may be limited after a fee." 2 Blk. Com., 235.

Mr. Hargrave, in Note A, 2 Coke, 271*b*, which is an elaborate treatise on the subject of uses, says: "It is a maxim of the common law that no estate can be limited upon a fee-simple; or in other words, an estate in fee-simple cannot be made to cease as to one, and take effect, by way of limitation, upon a contingent event, in another person." But he adds: "It is clearly settled that limitations of that kind may take effect by way of use."

And Mr. FEARNE, in his work on Remainders, treating of conditional limitations, says: "If before the statute of uses, land had been conveyed to A and his heirs, with a proviso, that if A should not leave any child of his body living at the time of his decease, the land should go over and belong to B and his heirs, it it obvious that the limitation to B must be legally void. It cannot be a grant of the reversion, as the whole fee was previously granted; or the grant of a remainder, as it was preceded by no particular estate. It would not confer a title on B to enter for a condition broken, as such a title of entry could only belong to the grantor or his heirs." And he proceeds to say, "that they so far partake of the nature of a remainder, that when the event happens upon which they are to take effect, the estate created by them passes to a stranger; and they so far partake of the nature of a title to enter for the breach of the condition, that when the event takes place they operate to defeat the preceding estate." The same doctrine is maintained in 2 Minor's Inst., 265; 1 Saunders on Uses and Trusts, 150.

Conditional limitations had no existence at common law, and only arose out of conveyances having operation under the statute of uses, the effect of which was to dispense with livery of seizin; 2 Minor's Inst., 264. For the purpose of limiting over estates,

they are generally treated as synonymous with shifting uses. They seem to have been so considered by Mr. FEARNE, in the extract above, taken from his work on Remainders.

It is said that a seizin is necessary to serve the use, and some of the ablest jurists of England have taxed their ingenuity to find where the seizin lies to support a limitation over, after the seizin of the feoffor or feoffee has been extinguished by the operation of the statute. Some have said there was a "scintilla juris" remaining in the feoffor or feoffee, and others contended that the doctrine is a mere utopian idea, but wherever the seizin may be, the courts have never, so far as we have observed, permitted a conditional limitation to fail for the want of a seizin to serve the use by which it was raised.

The statute of uses is in force in this state. THE CODE, §1330. And the deed, under which both parties to the action claim title to the land in controversy, has its operation under the statute, and as the consideration mentioned in it is both pecuniary and natural affection, it may operate either as a bargain and sale, or as a covenant to stand seized as to both the parties, for they are all the blood relations of the grantor.

Our conclusion is that the limitation over to the children of James A. Mercer was good, and that there was error in the court below in not rendering judgment in their behalf upon the case agreed.

The judgment, therefore, of the superior court is reversed, and judgment must be rendered on behalf of the defendants.

Let this be certified, etc.

Error. Reversed.

W. A. PRICE v. N. S. DEAL.

Deed—Action for Breach of Covenants—Measure of Damages.

1. In an action for damages for breach of covenants in a deed, the court, under the "prayer for general relief," will give such relief as the justice of the case demands.

2. If the action be for breach of covenant for quiet enjoyment, an eviction must be alleged and proved; but if for that of seizin, it is sufficient to negative the words of the covenant and to allege and prove the grantor had no title. In either case the measure of damages is the price paid for the land, with interest.

3. Where the title of the grantor fails as to a part of the land conveyed, as here, and the grantee pays a hundred dollars to extinguish the outstanding title, the measure of damages is the sum so paid, provided it does not exceed the value of that part as assessed by the jury; but if it exceed such value, the rule for the guidance of the jury is not the quantity, but the value that such part proportionately bears to the value of the whole tract, estimated by the consideration in the deed.

(*Williams* v. *Beeman*, 2 Dev., 483; *Wilson* v. *Forbes*, *Ib.*, 30; *Bank* v. *Glenn*, 68 N. C., 35, cited and approved).

CIVIL ACTION tried at Spring Term, 1883, of ALEXANDER Superior Court, before *Gudger, J.*

This action was brought to recover damages for the breach of covenants contained in a deed from the defendant to the plaintiff.

The plaintiff alleged that he purchased the land described in his complaint, containing about sixty acres, for the price of three hundred dollars, which was paid by him, and was a full and fair price for the land embraced within the boundaries of the deed which the defendant executed to the plaintiff at the time of the purchase.

That the deed contained two covenants—the one a covenant for quiet enjoyment, and the other a covenant of seizin.

That the plaintiff took possession of said tract of land, and his possession as to sixteen acres thereof had been disturbed by one Wilson Price, who claimed the same by a paramount title, and took possession under said title, and the said parcel of land is still held in possession by one Lafayette Little, who purchased from the said Wilson Price.

And that one Isaac Price had taken possession of another parcel of said land, consisting of twenty-four acres, under a title paramount to that of the defendant, and ousted the plaintiff therefrom, and the plaintiff had purchased the interest of the

said Isaac Price and paid him the sum of one hundred dollars to procure his title.

The plaintiff demanded judgment for the damages he had sustained by the breach of warranty, and for such other relief as the justice of the case might require.

The defendant denied all the allegations of the complaint, except that plaintiff did take possession of the land described in the complaint, and that he purchased from Isaac Price an outstanding incumbrance on the land, but if he did so, it was of his own accord, and he had no cause of action against the defendant on that account.

An order of survey was made to ascertain the boundaries of the portions of the land claimed by paramount title as alleged in the complaint. And it was agreed that after the survey the plaintiff might have leave to amend his complaint, so as to set out the exact boundaries of the parcels of land in dispute, and the defendant has leave to answer the complaint as amended. A survey was made and reported, but the record fails to disclose its purport or that there was any amendment of the pleadings.

On the trial it was admitted by the defendant that there was a title paramount as to the twenty-four acres, and also as to nine acres of the land contained in the defendant's deed of conveyance to plaintiff.

It was in evidence that there had been an action brought as to the twenty-four acres, and that the plaintiff had bought in the incumbrance thereon, and as to the nine acres, it was woodland, and that there had been no ouster of the plaintiff from that parcel and no other claim than by a processioning proceeding.

The defendant asked His Honor to charge the jury, "that if the plaintiff, supposing Isaac Price had a better title to the twenty-four acres than he had, bought in the incumbrance voluntarily and of his own accord, he could not recover the value of the land so incumbered in this action; and that if he had a right to recover at all for this incumbrance of the twenty-four acres, he could only recover the one hundred dollars and inter-

est on the same from the time he paid it; and that in order to recover in this action there must be such a disturbance of the plaintiff's title as would subject the disturber to an action of trespass."

These instructions were refused, and His Honor charged the jury, "that as the defendant admitted he had no title to the twenty-four acres and the nine acres at the time he executed his deed, the covenants contained in his deed were broken, and the plaintiff was entitled to recover for the twenty-four acres, that proportion of the cash price of the land that his portion bore to the whole amount of the land proposed to be conveyed, with interest thereon from the time he purchased the incumbrance upon this parcel; and as to the nine acres, notwithstanding there had been no disturbance amounting to an eviction or trespass, the plaintiff was entitled to recover such a proportion of the purchase money as this parcel bore to the whole amount conveyed."

The defendant excepted. There was a verdict and judgment in behalf of the plaintiff, and the defendant appealed.

Messrs. R. Z. Linney, and *G. N. Folk,* for plaintiff.
Mr. M. L. McCorkle, for defendant.

ASHE, J. The defendant's counsel insisted that, as the demand for judgment in the complaint was for damages for a breach of the covenant of quiet enjoyment, the plaintiff could not recover, because no eviction under a paramount title had been shown, and the plaintiff was not entitled to recover the amount paid by him to remove the incumbrance, because it was a voluntary act on his part.

But the plaintiff alleged breaches of the covenant of seizin as well as that of quiet enjoyment, and prayed for general relief. In such a case the courts will look to the allegations and proofs and give the plaintiff such relief as the justice of his case demands, consistently with the facts set out in the complaint and not disputed.

The plaintiff alleged that two parcels of the sixty acres purchased by him from the defendant, the one consisting of twenty-four acres, and the other of nine acres, had been claimed by persons having paramount titles, and that he had had to pay one hundred dollars to remove the incumbrance from the twenty-four-acre tract.

The defendant admitted he had no title to either of these parcels of land.

As a general rule a plaintiff cannot recover in an action for a breach of covenant for quiet enjoyment, without showing an eviction from the possession under a paramount title, and the measure of damages in such cases is the price paid for the land, with interest. *Williams* v. *Beeman*, 2 Dev., 483.

But in an action upon a covenant of seizin, all the plaintiff need show is that defendant had no title or no right to convey. *Wilson* v. *Forbes*, 2 Dev., 30; Rawle on Covenants for Title, 66; *Brant* v. *Foster*, 5 Iowa Rep., 287.

The reason of the distinction is that a covenant for quiet enjoyment is a covenant for possession, and that of seizin is a covenant for title, the word being used as synonymous with *right*. In an action upon the former covenant, an eviction must be alleged in the complaint or declaration, but on the latter, it is only necessary to negative the words of the covenant and to allege that the grantor had no seizin or title to the land. 4 Kent. Com. 479; *Richest* v. *Snyder*, 9 Wend., 416. And, as a general rule, the measure of damages is the same for a breach of covenant of seizin as for a breach of covenant of quiet enjoyment. *Wilson* v. *Forbes, supra*. This rule of damages is applicable to those cases where there is an eviction from the whole of the land conveyed, or a want of title to the same. But where there is an eviction from a want of title to only part of the land conveyed, and the plaintiff has been put to the necessity, as in this case, to advance money to remove an incumbrance, the measure of damages is more difficult to be fixed.

We think His Honor very properly refused to give the instruc-

tions asked for by the defendant, upon the question of damages, but we are also of the opinion that there was misdirection in the instruction which he did give to the jury.

It is well settled that a party who purchases land with covenants for seizin or quiet enjoyment may protect himself by buying in the outstanding title. *Faucett* v. *Woods*, 5 Iowa, 400.

When that is done the measure of damages, according to the best lights we have been able to obtain on the point is, that the damages in such a case would be limited to, or measured by, not the value of the land, but by the amount reasonably paid for that purpose, provided it did not exceed the purchase money. *Faucett* v. *Woods, supra; Brant* v. *Foster*, 5 Iowa, 287; Wood's Mayne on Damages, §255; *Bank* v. *Glenn*, 68 N. C., 35. It will be seen from the rule laid down by these authorities that the price paid to extinguish the outstanding title must not exceed the purchase money, and to determine whether it exceeded that amount it becomes necessary for a jury to ascertain the relative value of that parcel, and in doing so the rule for their guidance is not the proportion in quantity, as held by His Honor in the court below, but such proportion as the *value* of the land covered by the title paramount bears to the value of the whole land, estimated by the consideration. *Cornell* v. *Jackson*, 3 Cush., 506; *Morris* v. *Phillips*, 5 Johnson, 49. But if the amount paid to extinguish the outstanding title to the twenty-four acres shall be found to be more than the assessed value of that part, then the amount so assessed shall be the measure of damages, and this latter measure applies as well to the nine acres.

Being of the opinion that the justice of the case was not reached by the jury, in consequence of the misdirection of His Honor, the case must be remanded to the superior court of Alexander county, that proper issues may be submitted to the jury upon the question of damages only, with instructions as to the measure of damages in accordance with the principle announced in this opinion.

Error. Remanded.

GEORGE and JAMES FOX v. LAFAYETTE STAFFORD.

Tax Titles—Sale by Revenue Collector—Recitals in Deed—Burden of Proof—Tenants in Common.

1. One who claims under a deed for land sold to pay taxes, must show that the law regulating such sales has been complied with, in order that the deed may operate to pass title.
2. Ordinarily, the recitals in such deed are not evidence against the delinquent tax-payer, but the essential prerequisites must be proved *aliunde* the deed—the burden being on the purchaser, or those claiming under him, in the absence of any legislative provision to the contrary.
3. *Held further:* Where such sale is made by a collector of internal revenue and a deed executed to the purchaser, reciting the land purchased, for what taxes it was sold, the name of the purchaser, and the price bid, as authorized by act of Congress (U. S. Rev. Stat., §§ 3198, 3199), such deed is *prima facie* evidence only of the facts *required by the act to be stated*, and the burden of rebutting the presumption is on the party claiming adversely to the purchaser.
4. *Held also:* Where there are other recitals in the deed, it is incumbent on the purchaser to establish them by evidence *dehors* the deed; as to them, the act of Congress does not change the burden of proof.
5. The case of *Overcash* v. *Kitchie*, 89 N. C., 384, to the effect that one of several tenants in common may sue in ejectment, approved.

(*Avery* v. *Rose*, 4 Dev., 549; *Love* v. *Gates*, 4 Dev. & Bat., 363; *Pentland* v. *Stewart*, *Ib.*, 386; *Garrett* v. *White*, 3 Ired. Eq., 131; *Jordan* v. *Rouse*, 1 Jones, 119; *Taylor* v. *Allen*, 67 N. C., 346; *Hays* v. *Hunt*, 85 N. C., 303; *Overcash* v. *Kitchie*, 89 N. C., 384, cited and approved).

EJECTMENT tried at Spring Term, 1883, of ALEXANDER Superior Court, before *Gudger, J.*

Verdict and judgment for defendant; appeal by plaintiffs.

Mr. R. Z. Linney, for plaintiffs.
Mr. D. M. Furches, for defendant.

MERRIMON, J. The plaintiffs and defendant claim to derive title to the land described in the complaint from Hugh Fox,

deceased. The plaintiffs show title *prima facie* as two of his heirs-at-law.

The defendant alleged that in the life-time of the said Hugh Fox, he owed the United States taxes, duly assessed against him under the internal revenue laws, to the amount of $171.67; that he failed to pay the same as he was bound to do; that the collector of internal revenue in the sixth collection district in North Carolina sold the land in question on the 4th day of July, 1868, according to law, to pay the taxes so due; that one Michael Rufty became the purchaser thereof and paid the purchase money therefor, and in pursuance of such sale the collector executed to him a proper deed for the land on the 4th day of July, 1869, and that afterwards Rufty, by proper deed, conveyed the land to the defendant, and under the same he is in and holds possession thereof.

These deeds were proved and registered according to law, and were put in evidence by the defendant on the trial. He offered no other evidence as to title, and insisted that the collector's deed was *prima facie* evidence that all the requirements of the law necessary to a sale of the land to pay the taxes due from Hugh Fox had been complied with; that the recitals in the deed were *prima facie* true, and that by the deed he had a perfect title as against the plaintiffs.

The plaintiffs insisted that the deed of the collector did not operate to pass the title to Rufty, unless the collector had in all things strictly complied with the requirements of the law authorizing the sale of real estate to pay taxes due from delinquent tax-payers under the internal revenue laws of the United States; that the deed did not operate *per se* to pass the title, and that the recitals therein were not *prima facie* true. The court held that the collector's deed was *prima facie* evidence of all the recitals therein and operated *per se* and without any evidence *dehors* the deed to pass the title. The plaintiffs excepted to this ruling of the court.

Generally, a deed executed by the officer selling lands to pay

taxes, to the purchaser thereof, does not *ipso facto* operate to pass the title of the owner from whom taxes are due, to the purchaser. The operative force of such deed depends upon whether the material preliminary requirements of the law necessary to the sale have been complied with. The things to be done preliminary to the sale are just as essential in passing the title as the deed itself; indeed, the latter is inoperative for any purpose unaided by them. Upon the plainest principles of justice, the land of the delinquent from whom taxes are due, shall not be seized and sold without legal warrant, and the warrant must appear and be made to appear by him who claims under it.

Where, however, it is made to appear that the requirements of the law have been complied with by its officers, as to the duties devolved upon them—when every essential act to be done appears to have been done; and the conditions preliminary have been performed, then the deed becomes conclusive evidence of the title in the purchaser.

And also, ordinarily, the recitals in a deed for land sold to pay taxes, are not evidence against the owner of the property. The things necessary and preliminary to and in aid of it, must be established by proof *aliunde* the deed. The deed itself is not *prima facie* evidence that the prerequisites of the law have been complied with by the ministerial officers conducting the proceedings leading to the sale. The fact of their regularity must be established by proper poof, and the *onus probandi* rests on the purchaser, or those claiming under him. It must appear that the taxes were due according to law, and that every other material requirement has been complied with. *Avery* v. *Rose*, 4 Dev., 549; *Love* v. *Gates*, 4 Dev. & Bat., 363; *Pentland* v. *Stewart*, *Ib.*, 386; *Garrett* v. *White*, 3 Ired. Eq., 131; *Jordan* v. *Rouse*, 1 Jones, 119; *Taylor* v. *Allen*, 67 N. C., 346; *Hays* v. *Hunt*, 85 N. C., 303.

While this is the general and reasonable rule of law in respect to tax deeds, it is nevertheless within the power of the legislature to change it so as to shift the *onus probandi* (as to the gen-

eral prerequisites to support the deed and render it effective) from the purchaser to the person whose land has been sold for taxes, and such power has been frequently exercised, sometimes to one extent and sometimes to another and different extent. Blackwell on Tax Titles, 79, 80; Cooley on Taxation, 354.

In the case before us, it is insisted that the act of Congress makes the recitals in the collector's deed *prima facie* evidence of all the recitals therein, and of every material fact necessary to support and render the deed effective to pass the title to the purchaser.

A brief examination of the statute will show that it does not so provide in terms, nor can it be reasonably so construed as to give it such effect. The Revised Statutes of the United States provide as follows:

"Sec. 3198. Upon any sale of real estate, as provided in the preceding section, and the payment of the purchase money, the officer making the seizure and sale shall give to the purchaser a certificate of purchase, which shall set forth the real estate purchased, for whose taxes the same was sold, the name of the purchaser, and the price paid therefor; and if the said real estate be not redeemed in the manner and within the time hereinafter provided, the said collector or deputy collector shall execute to the said purchaser, upon his surrender of said certificate, a deed of the real estate purchased by him as aforesaid, reciting the facts set forth in said certificate, and in accordance with the laws of the state in which such real estate is situate, upon the subject of sales of real estate under execution."

"Sec. 3199. The deed of sale given in pursuance of the preceding section shall be *prima facie* evidence of the facts therein stated, and, if the proceedings of the officers, as set forth, have been substantially in accordance with the provision of law, shall be considered and operate as a conveyance of all the right, title and interest the party delinquent had in and to the real estate, thus sold at the time the lien of the United States attached thereto."

It will be observed that the first of the sections recited requires that the certificate of purchase shall set forth four facts: 1. The real estate purchased. 2. For what taxes the same was sold. 3. The name of the purchaser. 4. The price paid therefor. And it requires that the deed when it is executed shall recite these facts. There is no provision that it shall recite any other facts, and it is only required, in other respects, to conform to the laws of the state where the sale was made.

The next recited section provides that the deed shall be *prima facie* evidence of the facts therein stated, that is, of the facts *required by the statute to be stated.* Cooley on Taxation, 354, 355; *March* v. *City of Brooklyn,* 59 N. Y., 280.

This provision of the statute is in derogation of the general rule of evidence, and it cannot be extended beyond its plain, reasonable meaning. It cannot be construed to mean that the deed is to be received as evidence of any and every fact, beyond the recitals required by the statute to be made in it. Other recitals of facts in it, if there be such, must be proved as required by the general laws of evidence. There are no words in the statute that warrant such a latitudinous construction of it, as that contended for. The words certainly do not imply such meaning as that attributed to them. On the contrary, it is provided that "if the proceedings of the officers have been substantially in accordance with the provisions of law," then the deed shall operate as a conveyance of the right and title of the delinquent. The meaning of this is, that if the proceedings, that underlie and give rise to the facts required to be recited in the deed, are "substantially in accordance with the provisions of law," then the title shall pass.

Now what are the material things to be done to the end that the sale may be made and the deed duly executed? It is made the duty of the collector to require and, if need be, compel persons liable to pay taxes, to make returns; thereupon, the Commissioner of Internal Revenue is required to make proper assessments, and certify the same to the collector, and the collector

must then give ten days' notice to the person assessed to pay the taxes so assessed against him, stating the amount and demanding payment. It is not until this shall be done and there has been neglect or refusal to pay the taxes due, that the amount of it becomes a lien in favor of the United States, which the collector may enforce by distraint and sale, nor can there be a seizure and sale of the real estate to pay taxes, until there shall appear to be a failure to find goods, chattels, or effects to satisfy the sum due, and there must be given to the delinquent a notice of the property to be sold and the time and place of sale. Rev. Statutes U. S., §§3172, 3199.

All these things are required to be done and are prerequisites to a sale of the land, but the statute does not require that the fact that they have been done shall be set forth and recited in the deed, nor does it provide that the deed shall be *prima facie* evidence of such facts. They must be proved by evidence *dehors* the deed, and as to them the statute does not change the burden of proof, and it therefore rests on the purchaser.

That these prerequisites were complied with was not made to appear on the trial, although they were essential to the operative effect of the deed. The *onus* of proving them rested on the defendant. He might have proved them. They were, or ought to have been, within his reach.

This construction of the statute is fully sustained by the case of *Brown* v. *Goodson*, 56 How. Prac. Rep. (N. Y.), 301, where the very questions raised in this case were decided. See also *Williams* v. *Peyton*, 4 Wheat., 77; *Martin* v. *Davis*, 4 McLean, 211; *Jackson* v. *Sheppard*, 7 Cow., 88.

The defendant's counsel, upon the argument, relied upon the cases of *DeTreville* v. *Smalls*, 98 U. S. Rep., 517; *Keely* v. *Saunders*, 99 U. S. Rep., 441. These cases do not apply to the one before us. They construe a statute very different in its provisions from the one we have construed, and we need not comment upon them.

The exception taken that the plaintiffs cannot maintain this

action without joining the other tenants in common cannot be sustained. The point was met and decided in the case of *Overcash* v. *Kitchie*, 89 N. C., 384, and we are content to refer to what we there said as applicable here.

There is error, for which a new trial must be awarded. Judgment accordingly. Let this be certified.

Error. *Venire de novo.*

JAMES M. CHEEK v. J. H. WATSON and another.

Certiorari—Ejectment, issue of damages in—Right to open and conclude—Evidence.

1. A *certiorari* will not be granted where it appears that the judge settled the case on appeal upon due consideration, and omitted nothing by mistake or inadvertence. *Currie* v. *Clark, ante*, 17.
2. In ejectment, the issue as to damages ought to be submitted along with the issues upon the main question (here a parol trust), with instructions to the jury that if they find the latter in favor of the plaintiff, then to assess his damages; but if for the defendant, then they need not consider the issue as to damages.
3. The order of argument of counsel is regulated by a rule of the superior court. *Brooks* v. *Brooks, ante*, 142.
4. While there should be no departure from the settled rule in reference to the admissibility of evidence, yet, when one party is allowed to get the benefit of evidence not strictly competent, the opposite party should be allowed the same latitude in combatting it. But if it appear that the court admitted improper testimony to an unwarranted extent and to the prejudice of a party, a new trial will be granted.

(*Sudderth* v. *McCombs*, 67 N. C., 353; *McDaniel* v. *King*, 89 N. C., 29; *Miller* v. *Miller, Ib.*, 209; *Johnson* v. *Sedberry*, 65 N. C., 1; *Perry* v. *Morris, Ib.*, 221, cited and approved).

PETITION by plaintiff for *certiorari*, heard at February Term, 1884, of THE SUPREME COURT.

Mr. John Manning, for plaintiff.

Messrs. Graham & Ruffin, and *Reade, Busbee & Busbee*, for defendants.

MERRIMON, J. The plaintiff suggests a diminution of the record, in that it "does not set forth the entries appearing on the summons and civil issue dockets of Durham superior court, and a copy of the written issues on file in the papers of the said action."

It is not indicated how such entries and issues are material to a proper understanding and decision of the questions presented by the appeal, and upon an examination of the record, we do not find that they are.

It is only essential to send to this court so much of the record as is necessary to enable it to see that the court below had jurisdiction, and to properly understand and decide the questions presented by the exceptions; all besides this only tends to increase the costs and encumber the appeal, while it serves no useful purpose. *Sudderth* v. *McCombs*, 67 N. C., 353.

The petition shows upon its face that the court, in settling the case upon appeal, had before it and considered the several matters assigned as grounds for this application for the writ of *certiorari*. It does not appear that the judge, by inadvertence, mistake, or misapprehension, failed to settle the case upon appeal, as he intended to do, nor does it appear that he would probably alter or correct it, as suggested, if he had opportunity to do so. On the contrary, the strong probability is that he would not.

The affidavit of the counsel for defendants shows that the court, in the presence of counsel on both sides, occupied much time in settling the case, and did so upon full consideration.

In cases like this, the court will grant the writ only where it is probable that the judge below would correct some mistake in the case settled by him. *McDaniel* v. *King*, 89 N. C., 29; *Currie* v. *Clark*, decided at this term, *ante*, 17.

Motion denied.

The petition for the *certiorari* being disallowed, the cause was heard and determined upon the record as filed. The action was brought by the plaintiff to recover possession of land, and tried at Spring Term, 1884, of DURHAM Superior Court, before *McKoy, J.*

After the pleadings were read, the plaintiff's counsel moved to be allowed to amend the complaint by inserting a statement of his damages for use and occupation of the land, so as to entitle him to open and conclude the argument. His Honor refused the motion, except upon payment of costs, and stated that if the jury should find against the defendants upon the question as to the alleged parol trust, he would then direct an inquiry into plaintiff's damages, and in that event would allow the amendment without costs. The plaintiff excepted to this ruling.

The plaintiff bought the land on December 10, 1869, at the sale of the assignee in bankruptcy of the defendant Watson, and the issue raised as to the parol trust was submitted to the jury in the following form:

"Did the plaintiff purchase the land described in the complaint at the bankrupt sale of the defendant's property upon a parol agreement that the defendant should have the right to redeem the same upon the payment of the purchase money and interest? Answer—Yes."

The plaintiff was introduced as a witness in his own behalf, and his counsel proposed to ask whether, at the time of the sale, the plaintiff and defendant Watson were not co-sureties upon a bond given by H. B. Guthrie as sheriff of Orange county for the years 1866 and 1867; and whether their principal had not been guilty of a default in office, whereby a liability had fallen on them in the sum of about $6,000, from which the defendant Watson was getting relief by going into bankruptcy; and whether, at the time of said sale, the plaintiff's property was not actually under execution for this their joint liability; and, also, whether the defendant Watson did not owe the plaintiff an individual debt of about $200. The defendant objected to this

evidence on the ground of irrelevancy, and the plaintiff insisted that the object in introducing it was to show the improbability of the plaintiff's consenting to buy the land for the defendant's benefit and allow him to redeem it under such circumstances. His Honor said that with this view the evidence would be admitted, and the plaintiff then testified as to these particulars.

On cross-examination the plaintiff was asked whether he and one Mason, who was also a surety on the sheriff's bond as aforesaid, did not agree with their principal that the latter should take the money arising from the taxes of 1867 and place it in plaintiff's hands to buy his property when sold for the default of the year 1866, and thus have the property to meet the default of 1867, and whether this arrangement was not carried out; all of which the plaintiff denied; but he admitted he had purchased certain land at that time when sold by the sheriff, and that he still owned the same. The witness also admitted he had purchased other real estate with money furnished him by a son of the said sheriff, to whom he gave his note for $1,100, but the same was returned to him without the payment of any money. He also stated that he had suffered a loss, as surety to the said sheriff, of about $2,000.

The defendant, in reply, introduced said Mason, who testified that there was such an arrangement made between himself and the plaintiff and H. B. Guthrie, whereby the latter was to furnish the money to buy his property when sold, and accordingly the money was placed in plaintiff's hands, with which he bought Guthrie's property, professing to do so for the benefit of all the sureties upon said official bond for the year 1867, and that he afterwards refused so to apply the property thus purchased, claiming that he had bought it for himself and with his own means. This witness further stated that, instead of losing anything by reason of his surety for Guthrie, the plaintiff actually made clear a valuable plantation containing about three hundred acres.

The plaintiff objected to this testimony on the ground that

the matters were collateral, and that the defendant was bound by the plaintiff's answer thereto upon his cross-examination. Objection overruled, and plaintiff excepted.

His Honor instructed the jury, among other things, to find the issue in favor of plaintiff, unless they believed, not only that there was a parol promise made by plaintiff to defendant to buy the land for defendant's benefit, but that the effect of such promise was to enable the plaintiff to purchase it at an undervalue, and thus make it inequitable for him to hold the land.

The jury found the issue in favor of the defendant, and the plaintiff appealed from the judgment rendered thereon.

Mr. John Manning, for plaintiff.

Messrs. Graham & Ruffin and *Reade, Busbee & Busbee*, for defendants.

MERRIMON, J. If the amendment prayed for was necessary, to grant it and prescribe the terms upon which, and the juncture in the progress of the action at which it should be allowed, lay in the discretion of the court, and the exercise of such discretion is not reviewable here. It may be said, however, that the court ought always, having a due regard for the rights of the parties to the action, in furtherance of justice, to allow such amendments when necessary.

The court suggested that the main question to be tried was as to the *parol trust* alleged by the defendant in his answer, and assured the plaintiff that if the verdict of the jury in this respect should be in his favor, the amendment should be allowed without costs, and a proper issue submitted as to the *quantum* of damages.

As it turned out, such an issue was not material in this case, but we think the course suggested by the court does not conform to the usual practice, and that it ought not to be adopted as a precedent in such cases. Regularly, the issue as to damages ought to have been submitted along with the other issues, with

instructions to the jury that if they found the issue as to the parol trust in favor of the defendant, they need not consider the issue as to damages, otherwise they would award such damages as they might find the plaintiff entitled to, and like appropriate instructions should be given in all such cases. Thus, the action should be tried without multiplying juries, and unnecessary expenditure of costs and consumption of time; besides, this is the orderly course of procedure.

It is stated in the record that the purpose of the plaintiff in asking for the amendment before the trial, was to put the *onus* on himself to prove the damages in excess of the sum admitted by the defendant, if he were liable at all, and thus give the plaintiff the right to make the closing argument to the jury. The order of argument is now regulated by rules of procedure in the superior court. The decision of the court as to who shall be allowed to open and conclude the argument in an action, is not reviewable in this court. It is presumed that the court will always regulate the argument in each particular case, with an eye single to fairness, and with strict justice to the parties litigant. It seems to us, that the court in this case did so, for it is plain that the burden of proving the affirmative of the main issue submitted to the jury, rested upon the defendant.

The power of courts to regulate matters of practice, and of this court to prescribe rules in respect thereto for the superior courts, cannot be questioned. The power is conferred by the constitution and as well by THE CODE, §561. The power to regulate practice is exercised to a greater or less extent by all courts. *Johnson* v. *Sedberry*, 65 N. C., 1; *Perry* v. *Morris*, *Ib.*, 221; *Brooks* v. *Brooks*, decided at this term, *ante*, 142; *Day* v. *Wordsworth*, 13 How. (U. S. Rep.), 363.

The exception to the admission of evidence cannot be sustained. The testimony of the plaintiff objected to by the defendant ought not in strictness to have been admitted, but the court having allowed the plaintiff such great latitude, properly allowed the defendant opportunity to combat, as well as he could, the

ground laid by the plaintiff for an inference in his favor, and to the prejudice of the defendant, by evidence bearing directly upon the matters testified to by the plaintiff.

We do not mean to be understood as saying that the court should encourage any departure from the settled rules of evidence, when the admission of improper testimony is objected to. We only say that where one party first gets the benefit of evidence not strictly admissible, the opposite party should be allowed like latitude in combatting the same under the direction of the court. It is the duty of the court to see that equal justice is done to both sides on the trial in the admission of testimony. The safe rule is to adhere strictly to the settled rules of law. If it appears that the court has admitted improper testimony to an unwarranted extent in a case like that mentioned, to the prejudice of the opposing party, this would be ground for a new trial. In *Miller* v. *Miller*, 89 N. C., 209, cited by both parties in the argument, no more was meant than what is here said. In that case the evidence objected to was admitted on the ground of the latitude allowed to the defendant in calling out particular facts.

We think the plaintiff has no just grounds of complaint at the admission of the testimony offered by the defendant, and the judgment must be affirmed.

No error. Affirmed.

A. D. COWLES and others v. JOEL T. FERGUSON.

Ejectment—Pleading.

1. The plaintiff alleges he is the owner of a tract of land, describing it by well-defined boundaries, and that defendant is in possession of part of the same; and the defendant claims title in himself and admits he is "in possession of said tract." The plaintiff introduced in evidence a grant covering the whole tract, and the defendant proved he had been in pos-

session of a small part, included within the boundaries, for thirty years before suit brought; *Held*—

(1) The admission in the defendant's answer must be understood to be confined to the part of which he is alleged to be in possession.

(2) The failure to disclaim title to the part outside of that admitted to be in his possession, will not affect the defendant's right to remain in possession of so much as he shows title to.

2. *Held further:* The plaintiff may recover and the defendant will retain so much of the land as each shows himself entitled to upon the evidence, unaffected by the fact that both set up a claim to the whole tract.

3. Distinction between the former practice in ejectment where possession was recovered without affecting the right of property, and the conclusive effect of a judgment as to title under THE CODE, pointed out by SMITH, C. J.

(*McKay* v. *Glover*, 7 Jones, 41; *Hipp* v. *Forester*, *Ib.*, 599; *Carson* v. *Burnett* 1 Dev. & Bat., 546; *Atwell* v. *McLure*, 4 Jones, 371, cited and approved).

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

The plaintiff in the first article of his complaint, alleges himself to be the owner and entitled to the possession of a tract of land described by well-defined boundaries and containing one hundred acres.

In the second article he alleges "that the defendant is in the possession of a part of said tract," and unlawfully withholds the same, without further and more particular description.

The defendant denies the plaintiff's asserted ownership, or that he has any interest therein, and claims title in himself.

In the second article of the answer, he "admits that he is in possession of said tract," and avers it to be "lawful and rightful."

Pending the action the plaintiff died, and his heirs-at-law were admitted as parties to prosecute the action.

No specific issues were framed upon the controverted facts, but the cause was submitted to the jury, after numerous continuances, for a general verdict, in the rendition of which they say they "find all issues raised by the plaintiff in his favor."

Thereupon the court rendered judgment declaring the plaintiffs to be the owners in fee of the tract described, and that, upon the possession alleged and admitted in the pleadings, and in the absence of any disclaimer of title or possession as to any part, the plaintiffs recover possession of the portion in the defendant's occupation, with costs, and have their writ of possession. From this judgment the defendant appeals.

Mr. R. Z. Linney, for plaintiffs.
Messrs. Armfield & Armfield, for defendant.

SMITH, C. J., after stating the case. The plaintiffs on the trial showed in evidence a grant from the state to the original plaintiff, their ancestor, his death and the descent to them as his heirs of the tract of land described in the complaint.

The defendant introduced no paper title, but proved by two witnesses facts which tended to show that the defendant and those under whom he claimed had been in possession of a small part included in the boundaries of the grant, consisting of three or four acres, for thirty years next before the commencement of the action.

The court intimated an opinion that upon the state of the pleadings, the defendant not having specified the part occupied by him nor disclaimed as to the residue, the plaintiffs would be entitled to the verdict of the jury if the evidence introduced by them was believed, and directed defendant's counsel to proceed. This he declined, stating that upon the view of the law entertained by the court, he supposed the cause was terminated. The jury returned a verdict for the plaintiffs.

The defendant's answer may bear the construction put upon it by the court as not only denying the plaintiffs' and asserting his own title to all the land comprised in the grant, and admitting a possession commensurate with those limits, but an equally consistent interpretation may confine the admission of occupation to the undefined part of it. The plaintiffs do not allege the

defendant's possession to be commensurate with the territory covered by the grant and set out in the complaint, but to be *only of a part*, without describing that part. The answer *admits*, that is, *does not deny*, the plaintiffs' averment that the defendant "is in possession of said land," and the *admission* should have the same restriction as the averment to which it is a response. Beyond this it would not be an *admission*, but the statement of an independent fact. If this comprehensive import be given to the answer, it is met by the plaintiffs' allegation restricting the possession to a part only, and as a general rule the plaintiff recovers according to his own allegations and the case made in the complaint.

But we do not attach the same significance to the form of the answer, however interpreted, as the court has in its bearing upon the rights of the defendant. Assuming that the defendant claims title and possession as following it to the whole tract, and upon the proof is unable to make good his claim, shall he for this reason be denied the right to retain the part to which he does show title and possession? Conceding as we must, in reviewing the ruling of the court, that by a long adverse possession the defendant has acquired title to the part so occupied, and it is the same if his evidence would warrant the jury in so finding, the plaintiffs will not fail in their action, because they do not show themselves entitled to the whole area claimed in the complaint They will recover so much as they show title to, though less than the whole; and this, because the claim to all is a claim to all the parts which make the whole, the greater including the less.

The same principle applies to the defence with equal if not greater force. The defendant cannot be denied the right to retain so much of the land in dispute as he proves himself to be the owner of, because his assertion of title and possession to all could not be sustained. He is not to be deprived of what is his own because he claimed more than belongs to him. Indeed his case is stronger, for he retains all to which the plaintiffs cannot show title in themselves, because, though the defendant's posses-

sion may be wrongful as to the true owners, it is not wrongful to the plaintiffs whose recovery is confined to what is proved to belong to them.

The true and governing rule applicable to conflicting claims set up to the same land by the parties to the action is, and must be, that they recover and retain respectively what each shows himself entitled to upon the evidence, unaffected by the fact that both set up claims to the whole, with this qualification, that so much as does not belong to either remains undisturbed with the one in possession. This rule, just in itself, seems to have been subordinated to some technical principle of pleading which refused to the defendant his right to hold what was his own, because he did not disclaim as to the residue of the tract; in other words, he claimed too much, and therefore cannot keep what is his own.

The court was perhaps misled by what is said by PEARSON, C. J., in *McKay* v. *Glover*, 7 Jones, 41, that "if a plaintiff succeeds in showing title to any part of the land contained in the demise, *of which the defendant is in possession*, the jury may return a general verdict; although, as to the other part, the plaintiff failed to show title." But, he adds: "The court may, in its discretion, direct the jury to find specially, *so as to run the line* between the plaintiff and the defendant; but the usual course is not to complicate the enquiry, and to allow a general verdict, if the plaintiff makes out his case as to any part of the land held by the defendant, and the plaintiff then takes out a writ of possession at his peril." This is said about the old form of the action of ejectment, whose object is to get possession for the lessor of the plaintiff, and the determination affects no right of property in either. Its results are unlike the result of the action under the Code of Civil Procedure, which may, as in other actions, conclude and settle the title when that is put in issue, and such is the effect of the judgment rendered in this case, if allowed to stand.

But we think the question is disposed of by former adjudica-

tions under the old system of practice, to some of which we will advert.

In *Carson* v. *Burnett*, 1 Dev. & Bat., 546, the declaration covered several tracts, and the defendant proved title in himself to those which were in his tenant's possession. The lessor insisted upon a verdict for that to which he had shown title, and it was held that he was not entitled to a verdict, although the defence was general.

In *Atwell* v. *McLure*, 4 Jones, 371, PEARSON, J., in the opinion, for the purpose of illustration, puts this case: Suppose the declaration is for a tract of land, setting out the metes and boundaries; the party upon whom the declaration is served makes himself defendant; on the trial it turns out that the defendant has title to so much of this tract as he is in possession of; the plaintiff has title to the remainder, but the defendant never was in possession of that part. The defendant is entitled to judgment because the plaintiff has failed to prove that he (the defendant was in possession of any land to which he (the plaintiff) had title.

But the very question now before us was considered and answered by the court, BATTLE, J., delivering the opinion in *Hipp* v. *Forester*, 7 Jones, 599.

"It has been suggested," say the court, "that the declaration included the whole tract granted to Franks, and as the defendant did not disclaim for the part of which he was not in possession, the lessor was entitled, at least, to a verdict for that part. That proposition cannot be sustained; because, as to such part he was already in possession, and could not, therefore, maintain ejectment against another person for it. According to a rule well established in this state, he could not recover without showing a better title than the defendant to the land of which he had shown the defendant to be in possession."

If this was the prevailing practice under the former system when no right was concluded by the result beyond the present possession, much more must it be recognized under the new prac-

tice, when the consequences of a determination may be permanently to settle the title to the property in dispute. In the face of a direct denial of the plaintiffs' property in the entire tract and of proof of title to part, of which the defendant may have only been in possession, the judgment fixes title in the plaintiffs to the entire tract, inclusive of that which belongs to the defendant. The ruling which leads to this result must be erroneous. There must be a new trial, and it is so ordered. Let this be certified.

Error. *Venire de novo.*

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*JOHN TYSON, Jr. v. G. J. SHEPHERD and others.

Ejectment, pleading in.

1. In ejectment, the plaintiff alleged that he was the "owner in fee of the land," and that defendant "unlawfully withholds possession thereof from the plaintiff"; and the defendant denied the first allegation, but made no answer to the second; *Held*, that an issue as to the plaintiff's seizin in fee was immaterial, inasmuch as the failure to answer the second allegation was an admission of the wrongful withholding the possession from the plaintiff.

2. The averment in the complaint of the "unlawful withholding" is sufficient under THE CODE.

(*Garrett* v. *Trotter*, 65 N. C., 430; *Johnston* v. *Pate*, 83 N. C., 110, cited and approved).

EJECTMENT tried at Spring Term, 1883, of ANSON Superior Court, before *MacRae, J.*

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

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*Mr. Justice ASHE did not sit on the hearing of this case.

Messrs. S. T. Ashe, J. A. Lockhart and *T. P. Devereux*, for plaintiff.

Messrs. J. D. Shaw, Strong & Smedes, and *J. D. Pemberton*, for defendants.

SMITH, C. J. The complaint alleges in the first article that the plaintiff is the "owner in fee-simple of the land described," and in the second:

"That the defendants unlawfully withhold the possession thereof from the plaintiff," and demand judgment for possession and damages.

The defendants deny the allegation that the plaintiff is "owner in fee-simple of the land described in the complaint or any part thereof," and make no answer to the allegation contained in the second article of the complaint.

At the trial the defendants proposed an issue as to the plaintiff's seizin in fee, which was refused by the court as immaterial, inasmuch as the failure to answer the second allegation of the complaint was an admission that they were in possession and withholding it from the plaintiff wrongfully, and possession and damages were only claimed in the action.

The jury assessed the damages, the only enquiry submitted to them, and from the judgment thereon the defendants appeal.

While the title of the plaintiff, as owner in fee of the land, when asserted, may be put in issue by the defendants' denial and require proof in its support in order to a recovery, the right of possession may have been separated from the inheritance, so that the seizin may be in one and the right of possession in another, the latter may successfully prosecute his action to get or regain possession from a wrong-doer.

The defendants' answer seems to recognize this distinction, and while they controvert the allegation of full ownership in the plaintiff, they concede his right to possession and their wrongful withholding from him. How could their occupation be a wrong to him unless it was inconsistent with his right to occupy

the premises? And if so, the state of the title is not drawn in controversy, nor the plaintiff called on to show that it is vested in him. His right to a judgment for what he demands is as complete as if he had title in fee.

Some comments have been made upon the form of the allegation in characterizing the defendants' withholding as *wrongful*, as blending a fact with matter of law and not in accordance with the rules of pleading introduced by the Code of Civil Procedure.

The complaint would not be defective in failing to aver "that the defendants *illegally* and *wrongfully* withheld the possession from the plaintiff, yet the absence of those words was a subject of exception in the case in which that ruling was made. *Garrett* v. *Trotter*, 65 N. C., 430.

It is certainly an appropriate form of charging the defendants, and an admission of the fact and law involved in the plaintiff's claim to be put in possession. An occupation may be rightful or wrongful, and a defendant may admit his possession wrongful against one claiming it and dispense with an enquiry as to its lawfulness.

This the defendants do, and thus they submit to the judgment of the court against them.

The policy of the new system is to narrow controversy to such disputed matters as are necessary to be disposed of in order to a final determination, and, when the concessions are sufficient for such purpose, to disregard others which are not essential.

We are not disposed to acquiesce in such refinements as were made by the supreme court in California, where in *Payne* v. *Treadwell*, 5 Morris' Rep., 310, it is held that an allegation of ownership in fee and possession in defendant unlawfully withheld, was insufficient, for the reason "that the defendant may be in possession as tenant or otherwise, and his possession consistent with the plaintiff's title"; nor to the ruling in New York in *Lawrence* v. *Wright*, 2 Duer, 673, where it is declared that an averment of title in the plaintiff is defective, in that it is not a statement of fact but a conclusion of law.

On the other hand, such a complaint as was filed in *Payne* v. *Treadwell* is sustained on demurrer by the supreme court of New York, in *Sanders* v. *Leary*, 16 How. Pr. Rep., 308, while this court has declared a demurrer to a complaint in such form frivolous, in *Johnston* v. *Pate*, 83 N. C., 110.

There is no error and the judgment must be affirmed.

No error. Affirmed.

J. G. YANCEY and wife v. D. W. GREENLEE.

Ejectment—Tenants in Common—Appeal, motion to dismiss.

1. The defendant's defence, resting upon an alleged possession of the land under one of several tenants in common, has no application to the facts of this case.
2. One of several tenants in common may sue for the recovery of possession of the whole tract.
3. A motion to dismiss an appeal for want of an appeal bond will not be entertained after argument. 89 N. C., 597—Rule 2, §5.

(*Godfrey* v. *Cartwright*, 4 Dev., 487; *Bronson* v. *Paynter*, 4 Dev. & Bat., 393; *Holdfast* v. *Shepard*, 6 Ired., 361; *Pierce* v. *Wanett*, 10 Ired., 446; *Hutchison* v. *Rumfelt*, 82 N. C., 425, cited and approved).

EJECTMENT tried at Spring Term, 1879, of MCDOWELL Superior Court, before *Graves, J.*

The complaint is in the usual form for the recovery of land, averring ownership in the plaintiffs and their right to the possession of the tract of land described with definite boundaries, and the wrongful occupation and withholding by the defendant. The defendant's answer denies the plaintiffs' title and their claim to sole and exclusive possession, admits himself to be "in the possession of certain lands immediately adjoining the lands described in the first paragraph of the plaintiffs' complaint, by the consent and authority of one of the owners," and adds as new matter and a further defence to the action:

That the lands mentioned in the complaint, and the lands immediately adjoining, occupied by him, are parts of the real estate of one John H. Greenlee, which at his death and by his intestacy descended to his two children, James H. Greenlee and Hannah A. E. Flemming, and that the moiety of the latter by her death and intestacy descended to her heirs-at-law, to-wit: the plaintiff Mary W., W. W. Flemming and Samuel H. Flemming, and that both tracts are now held by these several parties as tenants in common; and that the defendant is in possession of the said contiguous tract under and by authority of the said James H. Greenlee, the owner of an individual moiety therein.

After many continuances, the case was submitted to the jury at spring term, 1879, and they returned an affirmative response to the following issues:

1. Is the defendant in the adverse possession of the land described in the complaint, or any part of it?

2. If he is in possession of any of the land aforesaid, is said possession wrongful?

3. Is the plaintiff entitled to the possession of the lands described in the complaint?

From the judgment rendered upon these findings the defendant appeals.

Mr. W. W. Flemming, for plaintiffs.
Mr. G. N. Folk, for defendant.

SMITH, C. J., after stating the case. There is no assignment of errors accompanying the record, and from an inspection, we can discover none.

The appellant's counsel suggests that the defence rests upon an alleged tenancy in common of the land, with the assent of one of whom the defendant occupies, and that an issue should have been framed to present that matter to the jury. The answer to this is obvious:

1. The plaintiffs do not sue for the recovery of the adjoining

tract to which the defence applies, according to the defendant's own statements, but land which, though it may be held by them in common with others, he sets up no claim to hold in this suit.

2. The defendant denies the plaintiffs' title to the land described in the complaint, and also his wrongful occupation of it.

3. The defence, if applicable to the land from which the plaintiffs seek to eject him, could have been made available under the second issue as to his wrongful holding, since his possession, under one of several tenants equally entitled to possess, could not be wrongful against another.

4. The findings of the jury negative the matters set up in opposition to the recovery, for by their verdict he is declared to be in the adverse and wrongful possession of land to which the plaintiffs are entitled.

If the land sued for belongs to the *feme* plaintiff and others in common, she has an undoubted right to expel an intruding trespasser and regain or recover the possession, her right being full and complete, although others have the same right. Even in the old form of ejectment, one or more of several tenants in common could make a demise enabling the lessee to recover, as the following cases show, against a usurper: *Godfrey* v. *Cartwright*, 4 Dev., 487; *Bronson* v. *Paynter*, 4 Dev. & Bat., 393; *Holdfast* v. *Shepard*, 6 Ired., 361; *Pierce* v. *Wanett*, 10 Ired., 446.

It must be declared that there is no error, and, according to the well established rule, when none appears the judgment must be affirmed.

The motion to dismiss for want of an appeal undertaking comes too late after argument and cannot at this stage of the case be entertained under the rule, 89 N. C., 597, as construed in *Hutchison* v. *Rumfelt*, 82 N. C., 425.

No error. Affirmed.

JOHN R. SAVAGE and others v. JOHN F. LEE and others.

Deed—Estate of Freehold in futuro—Livery in Seizin abolished.

1. An estate of freehold to commence *in futuro* can be conveyed by a deed of bargain and sale operating under the Statute of Uses, or by executory devise; *Therefore*, an estate to H. for life and at her death to her children in fee, reserving a life estate to the grantor, is good.
2. *Held further*, that, independently of the Statute of Uses, a deed under the act of assembly abolishing livery of seizin and substituting registration therefor, may operate to pass a freehold estate *in futuro*.

(*Hodges* v. *Spicer*, 79 N. C., 223; *Davenport* v. *Wynne*, 6 Ired., 128; *Sasser* v. *Blythe*, 1 Hay., 259; *Jones* v. *Potter*, 89 N. C., 220; *Hogan* v. *Strayhorn*, 69 N. C., 279, cited and approved).

CIVIL ACTION tried at Spring Term, 1883, of CHOWAN Superior Court, before *Shepherd, J.*

The following facts were agreed upon:

1. Reddick Watson died in April, 1881, seized of a house and lot in the town of Edenton, leaving the plaintiffs his only heirs-at-law.

2. On the 2d day of February, 1866, he conveyed the said land by deed to Hannah Watson during her natural life, and at her death to her three children, Reddick, Florence and Nicey Watson, in fee-simple, reserving to himself a life estate therein.

3. He was never married, and the children were the natural children of Reddick by the said Hannah.

4. Hannah died before Reddick Watson, leaving the said children surviving her, and they are now living.

5. The defendant Nicey is one of them and is the wife of the defendant Lee.

6. The defendants are in possession of said land, claiming the same by virtue of said deed, and have refused after demand to deliver the possession to the plaintiffs.

If the court shall be of opinion with the plaintiffs, judgment is to be entered that they recover possession of the premises

described in the complaint, and that a jury assess their damages against the defendants for detention of the same, otherwise judgment is to be entered for defendants.

Judgment was rendered in behalf of the defendants, from which the plaintiffs appealed.

Mr. W. A. Moore, for plaintiffs.
Mr. W. D. Pruden, for defendants.

ASHE, J. The sole question presented by the case agreed is whether the deed in question passed any estate to the defendants. The deed, which is sent up as part of the record, conveys in terms the land in controversy to Hannah Watson for life, and at her death to her three children, Reddick, Florence and Nicey Watson, in consideration of "their kind attention and as faithful servants to the vendor in sickness as well as in health," and for the further consideration of five dollars to the vendor in hand paid by the vendees, reserving to the vendor his life-time right in the premises. The deed was duly admitted to probate and registered, as appears by the certificate of the probate judge and register of deeds for the county of Chowan.

It is contended by the plaintiffs that the deed was void and passed no title to the defendants, because it conveyed an estate of freehold to commence *in futuro*. In other words, that one seized of an estate in fee-simple cannot convey the freehold to another and reserve a life estate in the land conveyed; that the effect of this deed was the same as if the bargainor had simply conveyed the land to the defendants to take effect and be enjoyed after his death; and that it is a rule of the common law that an estate of freehold cannot be created to commence *in futuro* except after an estate for years: it must take effect presently either in possession or remainder, for the reason that at common law no freehold in lands could pass without livery of seizin, which must operate immediately or not at all.

Conceding this to be the proper construction of the deed,

"yet deeds acting under the statute of uses, such as bargain and sale, covenant to stand seized, or a conveyance to uses, or even a devise, may give an estate of freehold to commence *in futuro;* as a bargain and sale to A and his heirs from and after Michaelmas Day now next ensuing, is good, and the use in the meantime results to the bargainor or his heirs." 2 Black., 166, note 2, citing 2 Prest. on Conv., 157, and Saunders on Uses and Trusts, 1 vol., 127, and 2 vol., 98.

At the common law a use might be raised by a deed of feoffment, but it was necessary to make livery of seizin to the feoffee. After the statute of Henry VIII. transferring the possession to the use, a new species of conveyance was introduced to avoid the trouble and inconvenience of going upon the land and making livery of seizin; as for instance, deeds of bargain and sale and covenant to stand seized, among others. By these conveyances, uses which are limited to arise on future events may be raised without any transmutation of the possession, the use resulting to the grantor until the event happens, and then the *statute executes the use.* 2 Washburn on Real Property, 286.

In *Wyman* v. *Brown*, 50 Maine, 139, after an elaborate and exhaustive review of the authorities on this question, in a case which involved the construction of a conveyance like that in this case, where the conveyance was not to take effect during the life-time of the bargainor, the supreme court held that an estate of freehold to commence *in futuro* can be conveyed by a deed of bargain and sale operating under the statute of uses, and to sustain the opinion of the court, the following, among other authorities, were relied upon:

"By executory devise and conveyances operating under the statute of uses, freehold estates may be limited to commence *in futuro.*" 1 Greenl., title 1, §36.

"Deeds operating under the statute of uses, such as bargain and sale, covenant to stand seized, or even a devise, may give an estate of freehold to commence *in futuro.*" 1 Chitty on General Practice, 306; 2 Black., 144, note 6.

"A bargain and sale to the use of D, after the death of S, is good." Gilbert on Uses (Sugden Edition), 163.

"By a bargain and sale or covenant to stand seized, a freehold may be created *in futuro*." Cornish on Uses, 44. To which may be added *Rogers* v. *Eagle Ins. Co.*, 9 Wend., 611; *Bell* v *Scammon*, 15 N. H., 381; 2 Wash. on Real Property, 617, §16; and note to 2 Smith's Leading Cases, 451; and to the same effect is 2 Minor's Inst., top page 425, 1-f.

But we need not go out of our own state for authorities. In *Davenport* v. *Wynne*, 6 Ired., 128, where there was a conveyance of real property upon the consideration of love and affection, reserving a life estate to the donor, it was held by this court that the conveyance was good; that it was a conveyance to stand seized to the use of the vendees on his death. To the same effect is *Hodges* v. *Spicer*, 79 N. C., 223. And in *Sasser* v. *Blythe*, 1 Hay., 259, overruling *Ward* v. *Ward*, 7 Mar. 28, a similar construction was given to an instrument of like import. In the note to that case Judge BATTLE says: "There cannot be the least doubt but that a covenant to stand seized to the use of another, after his own life, is good to pass the estate intended; for the law raises in the grantor an estate for life in the meantime to support the future estate. This has been decided in a vast number of instances. There is no point better established by the authorities." And he cites in support of the position, besides Coke, a number of English authorities.

Jones v. *Potter*, 89 N. C., 220, is another case where a deed with like reservation for the life of the donor was sustained. It is true the point was not raised in that case and not adverted to in the argument before the court, nor considered by us, for the reason, we suppose, it was thought to be a question too well settled to admit of controversy.

Our conclusion from the authorities is, that no matter which construction is placed upon the deed, whether a conveyance to commence *in futuro* or a remainder to take effect after the estate for life in the grantor, the deed is operative as a good bargain

and sale, to pass the legal estate, being founded upon a pecuniary consideration.

But independently of the statute of uses, we can see no reason why a deed in this state may not have the effect of passing a freehold estate *in futuro*. The reason why it could not be done at common law arose from the necessity of livery of seizin; but livery of seizin was abolished by our act of 1715, which declared that all deeds, acknowledged or proved according to law and registered in the county where the land shall lie, "shall be valid and pass estates in land, without livery of seizin, attornment or other ceremony whatever." *Ratione cessante, cessat et lex.*

The object of this statute, says Chief-Justice PEARSON in *Hogan* v. *Strayhorn*, 65 N. C., 279, "manifestly is to dispense with the ceremony of livery of seizin, to substitute registration of the deed in lieu thereof, and to allow title to be passed by the deed, which before had accompanied the livery of seizin, without that expensive and inconvenient ceremony." And it has been decided by this court that no deed is effectual to pass the title to land without registration.

We are of opinion there can be no question but that the title of the land described in the complaint passed to the bargainees by the deed of Reddick Watson. The judgment of the superior court is therefore affirmed.

No error. Affirmed.

A. M. MAXWELL and others v. ALEXANDER JONES.

Ejectment—Trespass—Landlord and Tenant.

Plaintiff leased to a tenant and defendant evicted the tenant, thereupon the plaintiff and his tenant joined in an action against the defendant for the recovery of possession of the land and for damages. After verdict for defendant, the plaintiff moved for a new trial, upon the ground that the action was for a trespass on the possession of the tenant, which motion was refused;

Held, no error—there being no allegation or issue in reference to the tenant's possession, and plaintiffs' resting the whole case upon their title.

(*Smith* v. *Ingram*, 7 Ired., 175; *Gilchrist* v. *McLaughlin*, *Ib.*, 310; *Graham* v. *Houston*, 4 Dev., 232, cited and approved).

EJECTMENT tried at Spring Term, 1883, of ASHE Superior Court, before *Graves*, *J.*

Verdict and judgment in favor of the defendant; appeal by plaintiffs.

Messrs. Q. F. Neal, D. G. Fowle and *G. N. Folk*, for plaintiffs.
Messrs. J. W. Todd and *R. Z. Linney*, for defendant.

SMITH, C. J. The allegations contained in the complaint are that the plaintiff Maxwell is and was seized and entitled to the possession of the tract of land in dispute, described by its boundaries, and had leased it to his co-plaintiff, Upchurch, for a term, not expired, and put him in possession, and that the defendant wrongfully entered and evicted the tenant. The relief demanded is "judgment for the recovery of possession of said land and for two hundred dollars damages."

The answer is a separate and direct denial of each allegation.

The issues submitted to the jury, to each of which was returned an answer in the negative, are:

1. Is the plaintiff the owner in fee-simple of the lands described in the complaint?

2. Was the defendant in the wrongful possession of any portion of said lands when the action was brought?

On the trial the plaintiff exhibited in evidence a grant of the land from the state, issued in the year 1844, from which he deduced title to himself. The defendant claimed under an older grant made to one Roark, but did not connect himself with the estate of the grantee. It was shown that at the time of the defendant's entry the plaintiff Upchurch was in possession under a lease from the other plaintiff for one year, and then in force.

No issue appears to have been asked in reference to the pos-

session of Upchurch and any rights of his incident thereto, nor was it the subject of comment; nor were any instructions relating thereto asked during the trial; but the plaintiffs "rested their whole case upon the title of Maxwell, and upon his right to recover."

Among other matters the court charged the jury "that the plaintiff must recover on the strength of his own title and not on the weakness of that of his adversary's," and to this the plaintiff excepted.

After verdict the plaintiffs moved for a new trial, on the ground that the action is for a trespass upon the possession of Upchurch, and not to determine the title to the land. The motion being refused and judgment rendered for defendant, the plaintiffs appeal.

There can be no objection to the instruction given in the action, if it be deemed to have for its object the restoration of the land to the plaintiffs, and no authority is needed to sustain its correctness as a principle of law.

But the action is manifestly of this kind from the structure of the complaint, the issues eliminated from the pleadings, and the conduct of the cause by both parties up to the close of the trial. The complaint asserts title as well as a right of possession in Maxwell, the wrongful entry and occupation by the defendant, and demands possession, also substantial damages for the withholding.

It is true the tenant is also a plaintiff, and this was a necessity; since he alone, being then entitled to possession under the lease, could sue for its restitution, and the two plaintiffs are associated because the entire estate, according to their averments, resided in them, and one or the other would be entitled to recover whenever the action was determined.

Again, if the action were for the invasion and usurpation of a possession merely, and this is sufficient for a recovery against a wrong doer with no title or right of entry, the damages would be merely nominal *for the entry*, while the demand is for the con-

tinued occupation since the entry. Possession must be regained before damages can be had for occupation held and injuries suffered by the premises subsequent to the original invasion. *Smith* v. *Ingram*, 7 Ired., 175; *Gilchrist* v. *McLaughlin*, *Ib.*, 310; *Graham* v. *Houston*, 4 Dev., 232.

These references show the action to be for the recovery of land and the damages incidental to and resulting from the continued wrongful occupation by the alleged aggressor, and upon this view the issues were prepared and submitted to two successive juries; nor was any objection made until the rendition of the last adverse verdict.

Under such circumstances the court properly refused to entertain a suggestion that the character and purpose of the action had been misunderstood, and that it only sought redress for an unlawful entry upon, and disturbance of, a mere possession of the tenant.

There has been a fair trial upon the merits and the plaintiffs must abide the result.

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

No error. Affirmed.

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*ADELAIDE KRON and another v. FRANK DENNIS and another.

Ejectment—Receiver.

The act of assembly requiring a defendant in ejectment to give bond for costs and damages before putting in a defence to the action (THE CODE, §237), does not abridge the power of the court to appoint a receiver to secure the rents and profits.

(*Rollins* v. *Henry*, 77 N. C., 467; *Vaughan* v. *Vincent*, 88 N. C., 116; *Jones* v. *Boyd*, 80 N. C., 258; *Twitty* v. *Logan*, *Ib.*, 69; *Levenson* v. *Elson*, 88 N. C., 182; *Horton* v. *White*, 84 N. C., 297, cited and approved).

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

MOTION for the appointment of a receiver, heard at Chambers on the 7th day of December, 1882, before *Graves, J.*

This motion was made in an action brought by the plaintiffs to recover possession of land, and pending in the superior court of Montgomery county. The facts are stated in the opinion. The defendants appealed from the judgment allowing the motion.

Mr. W. J. Montgomery, for plaintiffs.
Messrs. Burwell & Walker, for defendants.

SMITH, C. J. The complaint alleges that while the defendant Frank Dennis was in possession of the land described and belonging to them (plaintiffs), as their tenant, he in collusion with his co-defendant, Melissa A. Smith, who also set up a claim thereto, surrendered it to her and immediately resumed occupation, as before, under a pretended contract of lease from her, and both now set up an adversary holding. At fall term, 1882, of the superior court of Montgomery, upon the return of process served, the defendants were allowed sixty days within which to file their answer as of the term, and at the same time the plaintiffs applied to the court for the appointment of a receiver, and their motion, after several continuances, by consent was heard at chambers on December 7th, and upon the evidence a receiver appointed to take charge of the property, on which was a flour and grist-mill in operation, in order to secure the rents and earnings of the rightful owner. It was also provided in the interlocutory order, and the receiver was directed, "that if the defendants shall enter into a bond in the penal sum of six hundred dollars with sufficient sureties, to be justified and approved by the clerk of the superior court of Montgomery county, conditioned that the defendant shall pay over to said receiver, the reasonable rents and profits of the mills and farming lands annually, and shall keep said property in good repair, commit and permit no waste on the said property, except such as may occur without negligence, then in that case the receiver

may allow defendants to keep possession of said property." From this ruling the defendants appeal.

In the argument before us, it is insisted that the provision of the act of 1870 (THE CODE, §237) which requires a defendant, before being allowed to put in any defence to an action brought for the recovery of real property or of possession, to enter into bond with sureties to secure the costs and damages which may be recovered, and as construed in the cases of *Rollins* v. *Henry*, 77 N. C., 467, and *Vaughan* v. *Vincent*, 88 N. C., 116, dispenses with the need of a receiver in such actions, and if it does not deny, does not warrant the exercise of the power of withdrawing the property of the one in possession and committing it to the hands of an appointee of the court

The evidence which we are requested to look into upon a construction of the amendment introduced into the constitution in 1875 (*Jones* v. *Boyd*, 80 N. C., 258, and other cases), contained in the transcript, brings this case within the rule acted on in *Rollins* v. *Henry*, 77 N. C., 467, and *Twitty* v. *Logan*, 80 N. C., 69, and *Levenson* v. *Elson*, 88 N. C., 182, if it be proper to make the appointment in addition to the statutory remedy furnished.

The affidavits filed show that the defendant Melissa brought suit in 1878 against the tenant in possession under the present plaintiff, and instead of prosecuting the same entered upon the premises and reinstated him, her co-defendant, as her own tenant, as is alleged by the fraud of the latter, and in consequence failed in her action; while the defendants aver that the tenant yielded to the superior title of the said Melissa, and the possession thus acquired in October, 1881, has continued ever since. Without going into the details of the evidence in connection with the alleged insolvency of the defendant Melissa and her inability to respond in damages, should the plaintiffs succeed in their suit, we think in the present condition of the controversy the judge was fully warranted in making the order as favorable at least to the defendants as they could reasonably require.

What was said in *Horton* v. *White*, 84 N. C., 297, we repeat as not inappropriate to the facts of the present case: "We should be reluctant to disturb his (the judge's) conclusions of fact deduced from the evidence (and would do so only in case of palpable error), in an order merely interlocutory, and intended only to secure the fruits of a final determination to the successful litigant."

We do not understand the requirements of security for damages and costs before a party can resist a suit to recover possession of land, as in any degree abridging the power of the court to commit property in litigation, under the circumstances pointed out in the cases referred to, to the custody of a receiver for its safety and the security of the rents and profits issuing therefrom, though this additional remedy may less frequently call for its exercise. Indeed this is all that the order undertakes to do, for upon the execution of the bond the defendants are allowed to remain in the possession. *Vaughan* v. *Vincent*, *supra*.

The expediency of this prompt action finds its justification in the fact that the time for filing an answer had been enlarged for two months, and even then it was uncertain if the principal defendant would give the required bond.

The indulgence allowed seems to suggest the propriety of the action of the court to avoid possible injury to the plaintiffs, and it meets our approval. There is no error. Let this be certified.

No error. Affirmed.

A. D. COWLES and others v. RUFUS D. HALL.

Ejectment—Presumption of Grant—Continuity of Possession—Judge's Charge.

1. Where thirty years actual possession of land is relied upon to presume a grant from the state, it is not necessary to show that there was any con-

nection between the successive occupants during the period. Nor will a three year breach in the continuity of possession repel such presumption.

2. An error in the charge of the judge, which is not unfavorable to the party complaining, is not ground for a new trial.

(*Candler* v. *Lunsford*, 4 Dev. & Bat., 407; *Ray* v. *Lipscomb*, 3 Jones, 185; *Reynolds* v. *Magness*, 2 Ired., 26; *Melvin* v. *Waddell*, 75 N. C., 361; *Davis* v. *McArthur*, 78 N. C., 357, cited and approved).

EJECTMENT tried at Spring Term, 1883, of WILKES Superior Court, before *Graves, J.*

The plaintiffs claim to be, but the defendant denies that they are the owners of the land described in the complaint, and admits he is in possession. The following issues were submitted to the jury:

1. Are the plaintiffs the owners, and entitled to the possession of the land described in the complaint?

2. If the plaintiffs have sustained damage, what is the amount thereof?

On the trial the plaintiffs offered in evidence a grant from the state to James D. Cowles, from whom they claimed as heirs, and also offered evidence to show that they were the heirs-at-law of the said Cowles, and that the said grant covered the land in controversy.

The defendant offered evidence tending to show that there had been actual possession adverse to the plaintiffs of a small part of land, embraced in a field which had been cultivated and used as a pasture under an inclosure, by different persons for more than thirty years, but did not show any connection between the possession of the different occupants of the said field other than the bare succession in the occupants thereof. The plaintiffs offered evidence to show that there had not been such occupancy.

"The court instructed the jury that if the plaintiffs had satisfied them that the grant offered in evidence covered the land in controversy, the plaintiffs would be entitled to recover, unless the defendant had established a title to the land, actually occupied by him, by possession. That it was not necessary for the

defendant to show any paper or written evidence of title, if he had satisfied the jury that the land which he claimed had been actually occupied by the parties claiming up to known and visible boundaries for more than thirty years before the issuing the grant to James D. Cowles, although the defendant may not have satisfied them that the parties in the actual occupation had not claimed under their predecessors in the occupation."

The jury, after a short consultation, returned into court and asked His Honor "if three years' abandonment of possession would be such a break in the possession as would destroy its effect?"

The court instructed the jury "that if there had been an abandonment of the possession for three years within the thirty years, it would not be such an interrupted possession as would ripen into title; and added, that the law did not require the same continuity of possession to ripen thirty years' possession into title without evidence in writing of title, as is required to ripen possession under color of title into a good title, but that the uninterrupted possession which the law allowed to ripen into a good title after thirty years, must be such as to show that there was some one in possession, and against whom the state may have taken action to assert its claim."

Upon the first issue the jury found in favor of the plaintiffs as to all the lands in controversy, except the small field under fence; and upon the second, that the plaintiffs recover no damages.

The plaintiffs moved for a new trial. The motion was overruled, and there was judgment on the verdict for the plaintiffs, from which they appealed.

Mr. R. Z. Linney, for plaintiffs.
No counsel for defendant.

ASHE, J. The statement of the case on appeal does not show that there was any evidence offered on the trial to show that there was any interruption of three years in the possession of the

defendant, and those who preceded him in the occupation of the land in controversy, except what may be inferred from the instruction asked of the court upon that point. But taking it for granted that there was such evidence, the instruction given by His Honor in response to the enquiry submitted by the jury is so obscure that it is difficult to surmise what he meant. If, when he told the jury that "an abandonment of the possession for three years within the thirty years would not be such an interrupted possession as would ripen into title," he meant to convey the idea that thirty years' possession with an interruption of three years would not ripen into title, the instruction was erroneous. *Candler* v. *Lunsford*, 4 Dev. & Bat., 407. But although erroneous, there was no ground for complaint on the part of the plaintiffs, for the instruction so understood was favorable to them. And where an error in the charge of the judge is favorable to the party excepting, this court will not order a *venire de novo*. *Ray* v. *Lipscomb*, 3 Jones, 185; *Reynolds* v. *Magness*, 2 Ired., 26.

But viewing that portion of His Honor's instruction to the jury, in connection with the entire charge, we must presume there was a ellipsis in the sentence above quoted, and what he did say was, that an abandonment of the possession for three years would not be such an interrupted possession as would prevent a ripening into title. If this is what he did say, or intended to say, there was no error. For in the case of *Candler* v. *Lunsford*, *supra*, it was held that a longer time than three years would not be such a breach in the continuity of the possession as to rebut the presumption of a grant.

Without any errors in the charge of His Honor being pointed out in the "bill of exceptions" (here the "statement of the case"), we are left entirely to conjecture as to what were the alleged errors to which exception was taken by the plaintiffs.

If there was any other besides that above disposed of, it may possibly have been to that part of the charge where His Honor told the jury, that without any writing or paper title, thirty

years' actual possession by different occupants, before the grant of James D. Cowles, would presume a grant from the state, though the defendant may not have satisfied them that the party in the actual occupation had not claimed under his predecessors in the occupation.

If that be a ground of exception, there was no error in the instruction. It has been too repeatedly decided by this court to admit now of controversy, that when thirty years' actual possession of land is relied upon to presume a grant from the state, it is not necessary to show that there was any connection between the successive occupants of the land during the period. *Melvin* v. *Waddell*, 75 N. C., 361; *Davis* v. *McArthur*, 78 N. C., 357; *Candler* v. *Lunsford*, *supra*.

Finding no error, we affirm the judgment of the superior court.

No error. Affirmed.

R. D. JOHNSON and others v. GEORGE D. PATE.

Ejectment, verdict and judgment conclusive—Pleading—Estoppel—Judgment upon Demurrer.

1. In ejectment, as well as in an action to recover personal property, the verdict and judgment conclusively determine the matter in issue between the parties.
2. Where plaintiff in ejectment claims under a mortgagee's sale, and also by reason of an estoppel arising out of a judgment against the defendant in a former action, involving the title to the same land; *Held*, that a *general* denial of plaintiff's ownership does not controvert the existence of the record of said judgment.
3. A judgment rendered upon demurrer is as conclusive, by way of estoppel, as a verdict finding the facts confessed would have been.

(*Davis* v. *Higgins*, 87 N. C., 298; *Hartley* v. *Houston*, 65 N. C., 137; *Kitchen* v. *Wilson*, 80 N. C., 191, cited and approved).

JOHNSON *v.* PATE.

EJECTMENT tried at Spring Term, 1883, of CRAVEN Superior Court, before *Philips, J.*

The defendant appealed.

Mr. W. W. Clark, for plaintiffs.

Messrs. Walter Clark and *Strong & Smedes*, for defendant.

SMITH, C. J. The plaintiff sets up title to the land, the possession of which he seeks to recover, by virtue of a sale and conveyance from the mortgagee acting under the authority of the deed of a former owner, and also by reason of an estoppel arising out of a judgment recovered by him against the defendant in a former action, involving the title to the same land, a copy of the proceedings in which is annexed to the complaint.

The defendant in general terms denies the plaintiffs' asserted ownership, and avers that he "has no knowledge or information sufficient to form a belief" as to "the allegations of the said first article of the complaint, alleging title and reciting the muniments thereof," but does not deny the record or the accuracy of the copy set out in the complaint. As this is not a specific denial of the material averment of the fact that there is such a record, as required under our present system of pleading (THE CODE, §243), we are disposed to construe the language employed in the answer, as have the counsel of both parties in the argument before us, as not controverting the existence of the record, but the legal consequences deducible from it, and that these only are put in issue by the plaintiffs' demurrer to the answer, sustained in the judgment of the court below.

The only enquiry then, assuming the proceedings to have been had and concluded in the former action, as shown in the record, is, as to their legal effect in determining the plaintiffs' title, there being no suggestion that the defendant has acquired any since, or that the relations of the parties to the land have been in any manner changed.

1. The rule is well settled that a demurrer to the merits of a

complaint or other pleading overruled and followed by a final judgment, is decisive of all the material facts charged and of the rights dependent upon them.

"A judgment upon demurrer," says Mr. FREEMAN in his work on Judgments, section 267, "may be a judgment upon the merits. If so, its effect is as conclusive as though the facts set forth in the complaint were admitted by the parties or established by evidence submitted to the jury. No subsequent action can be maintained by the plaintiff if the judgment be against him on the same facts stated in the former complaint."

"A judgment rendered upon a demurrer," in the language of the court in *Mispel* v. *Laparte*, 74 Ill., 306, "is equally conclusive (by way of estoppel) of the facts confessed by the demurrer as a verdict finding the same facts would have been, since they are established, as well in the former case as in the other; and facts thus established can never afterwards be contested between the same parties or those in privity with them.

A general demurrer confesses all matters of fact well pleaded. Mansel. Demr., 94; 24 Law Lib., 63; Big. Est., 33; Gould on Plead., §§43, 44; *Wilson* v. *Perry*, 24 Ind., 156.

2. Such being the general rule of pleading, we are next to enquire into the effect of the present record upon the title to the land as between the same contesting parties.

We are relieved from the necessity of considering the point by a recent decision, overlooked among the references furnished by the appellant's counsel, and we quote a part of the opinion in *Davis* v. *Higgins*, 87 N. C., 298:

"Although some doubt was expressed upon the point by RODMAN, J., in *Johnson* v. *Nevill*" (an erroneous citation intended for *Harkey* v. *Houston*, 65 N. C., 137), "an early decision made after the introduction of the new system of pleading under the Code (C. C. P.), it has been since settled that a matter put in issue and material to the result, is conclusively determined by the verdict and judgment, *where land is sought to be recovered*, as it would be if the recovery of personal property were the

object. Here, both the pleadings and the issue involve the determination of the title and consequent right of possession in the plaintiff, and this is *distinctly and definitely decided in the verdict.*

The remark made in the opinion in *Kitchen* v. *Wilson*, 80 N. C., 191, assimilating that action to the former superseded action of ejectment, as to the proof required in order to a recovery of possession, had no reference whatever to the effect of a verdict finding affirmative facts in issue as *res adjudicata* between the same parties.

Recurring to the complaint in the former case, it asserts positively a title vesting in the plaintiff in these lands and a consequent right to have possession. These averments the demurrer admits, and the effect is the same as if they had been controverted and found upon issues passed upon by a jury. The judgment could only be for the recovery of possession and damages upon a verdict putting title in the plaintiff.

It must be declared there is no error, and the judgment is affirmed, but the cause may be remanded for an enquiry into the plaintiff's damages if he shall so elect; and if not, final judgment will be entered here.

No error. Affirmed.

BERRY BRYANT v. JOSEPH KINLAW and others.

Parties in Ejectment—Landlord let in to defend possession of Tenant.

1. In ejectment, where a tenant is defendant in the execution under which plaintiff bought, and had a legal estate in the land liable to sale by the sheriff, the plaintiff purchaser can recover possession, and no intervening party can come in and obstruct the action.
2. But if the tenant be a mere *locum tenens*, holding as servant or agent of the owner, then the owner may be let in as a party defendant, notwithstanding the sale of any supposed interest of the debtor tenant.

3. *Held further:* If a stranger to the tenant sue and there is no privity between them, the real owner may come in and assert his own superior title to protect the tenant's possession; and this, even where the tenant has an estate for years in the land.

4. In such cases, an application to be made a party defendant must disclose the character of the tenancy, and show whether the tenant had an estate liable to execution, even although the plaintiff alleges a seizin of an estate in fee in the defendant; for the sheriff's deed conveys no greater estate than that possessed by the debtor.

(*Isler* v. *Foy*, 66 N. C., 547; *Maddrey* v. *Long*, 86 N. C., 383; *Wade* v. *Saunders*, 70 N. C., 277; *Colgrove* v. *Koonce*, 76 N. C., 363; *Rollins* v. *Rollins*, *Ib.*, 264; *Cecil* v. *Smith*, 81 N. C., 285; *Lytle* v. *Burgin*, 82 N. C., 301; *Keathly* v. *Branch*, 84 N. C., 202, cited and commented on).

MOTION to be made a party defendant, in an action of ejectment, heard at Spring Term, 1883, of ROBESON Superior Court, before *MacRae, J.*

The motion was denied and the applicant appealed.

Messrs. T. A. McNeill and *Frank McNeill*, for plaintiff.
Messrs. Rowland & McLean, for appellant.

SMITH, C. J. The plaintiff claims title to the land described in his complaint under an execution against the defendant, in pursuance of which the sheriff, on January 3, 1882, sold and conveyed the same to him, and in this action he demands possession and damages for withholding it.

The defendant denies these allegations or any knowledge or information sufficient to form a belief of their truth, and moreover avers that on May 14th, 1878, he sold and conveyed for a valuable consideration the premises claimed to one Flora Ann Kinlaw, now the wife of Owen Owens, "and since then he has been holding said lands as the tenant of Flora A. Owens."

At spring term, 1883, of the superior court, after due notice to the plaintiff, accompanied with an affidavit of the facts upon which the application rests, the said Owens and wife moved the court to be admitted to defend the action and assert the title of the said Flora to the land.

In support of the motion, her affidavit was introduced and read, wherein she states that the defendant, the former owner, before any lien was acquired by judgment against him under which the sheriff sold, conveyed the land to her in fee-simple for full value, and that his possession has since been as her tenant, and was such when the present suit begun.

No other evidence was adduced. The court refused the motion, and from this ruling the applicants appealed. The cause, however, proceeded to a verdict and final judgment against the defendants, with a stay of execution ordered until the disposal of the appeal.

The sole enquiry before us is as to the right of the appellants, upon the facts stated in the affidavit, to intervene and defend the action against the defendant in the protection of his occupying as tenant under the title vested in the said Flora by virtue of his deed.

There have been many cases before the court requiring a construction to be put on the act (C. C. P., §61) under which the appellants claim a right to intervene, and, independently or in association with the defendant in possession, contest the plaintiff's title to the land in controversy and assert their own.

To ascertain its application to the case made in the affidavit, it becomes necessary to review some of the adjudications.

In *Isler* v. *Foy*, 66 N. C., 547, the plaintiff derived his title under a sale made by the sheriff by virtue of an execution against the defendant Harrison, who had the year before conveyed the land to the defendant Foy, and had thereafter been in possession, as before, up to the bringing of the suit. He disclaimed title, and the other defendant proposed to set up in opposition to the plaintiff's recovery his own title under the deed. It was held that he was not confined to the defences open to the defendant in the execution, but could set up any others peculiar to himself, and avail himself of a defect in the plaintiff's title. Delivering the opinion of the court, RODMAN, J., uses this language:

"Where the tenant had an estate, as a term for years which passed to the purchaser under execution and was unexpired at the trial, the title of the landlord would be no bar to the plaintiff's recovery, and in such case the purchaser, taking possession of the tenant's term, would succeed only to the tenant's rights, as between him and his landlord. But where the tenant has no estate, but a barely permissive possession at the time of action brought, there seems to be no reason for allowing a recovery to have the effect of changing such possession to the injury of the landlord by virtue of any estoppel against the tenant, whether honest or collusive, because in such a case the possession would be in substance that of the landlord, and not that of the tenant, who would be more properly described as the servant or agent of the landlord than as his tenant."

In *Maddrey* v. *Long*, 86 N. C., 383, the same doctrine is reiterated that other parties let in by consent to defend with the tenant, whose estate the plaintiff had bought under execution, were not restricted by the estoppel resting upon him, and could assert their own title.

In *Wade* v. *Saunders*, 70 N. C., 277, the defendant in the execution, whose land had been sold by the sheriff to the plaintiff, was not permitted to show an outstanding superior title in his son to whom he conveyed, and in order to the admission of the evidence at the suggestion of the judge, the son was made a party.

Commenting on this ruling by which the deed was received in evidence, PEARSON, C. J., says, in reference to section 61: "We are of opinion His Honor erred in supposing these words (one who claims an interest in the controversy) to mean any person who claims an interest in the thing which is the subject of controversy." And he adds: "As the action was on the part of the purchaser, at sheriff's sale against the defendant in the execution, to recover possession of the land, the construction of His Honor on section 61, that any outsider may be made a party defendant, and by force of his alleged claim of title, change the

controversy made by the action into another controversy in regard to the *bona fides* of a deed, is a latitude of construction for which we find no warrant in the books."

The manner in which the new defendant was brought into the case, to render competent evidence which the defendant sued could not introduce, may have had some influence in conducting the court to the conclusion announced, and ignoring the difference in the practice in this respect under the former system and under the provision contained in the new, what had before been pointed out by RODMAN, J., in the case cited, which seems hardly reconcilable with this. But the Chief-Justice in declaring that the other clauses of the section are but corollaries of the first seems not to have considered with his usual carefulness the force of the concluding paragraph, "and any person claiming title or right of possession to real estate may be made party plaintiff or defendant, as the case may require, to any such action." Subsequently to this case, several others have given a wider scope to the enactment. See *Colgrove* v. *Koonce*, 76 N. C., 363.

1. Thus, where two parties, each claiming to be landlord of a tenant in possession, and one sues, the other has an interest in the controversy and may be admitted to defeat the action. *Rollins* v. *Rollins*, 76 N. C., 264.

2. Where the plaintiff bought at an execution sale the interest of the husband in land claimed by the wife and whereon both resided, she was held entitled to come in and defend her estate and their possession. *Cecil* v. *Smith*, 81 N. C., 285.

3. The plaintiff bought the interest of one tenant in common with another and sued to recover possession; and the co-tenant was declared to have a right to come in and defend the action. *Lytle* v. *Burgin*, 82 N. C., 301.

4. In *Keathly* v. *Branch*, 84 N. C., 202, the mortgagor was sued, and the purchaser of the land sold under the mortgage was allowed to come in and set up his own title. The principle is laid down in the opinion of the court, as governing such applications, in these words:

"It is very clear that a claimant of land in dispute between other parties to a suit, and not connected with or in that controversy, nor injuriously affected by its result, cannot be allowed to intervene and assert his own independent title. This would be in effect to make a double action and introduce new issues foreign to the original subject of controversy and not within the scope of either section 61 or 65 of C. C. P. But this is not the condition of the applicant in the present case. He has a direct relation to and interest in the retention of the possession by the mortgagor for himself, and in preventing the plaintiff's recovery; and this is *adverse to the plaintiff* and in harmony with the defence. *As the defendant holds permissively under the applicant*, the latter is but protecting his own, while he protects the possession of the occupant."

The deduction from these rulings clearly is, that if the tenant, the defendant in the execution, had any legal estate in the land liable to seizure and sale by the sheriff, the purchaser can sue and recover possession in order to its enjoyment, and no intervening party can come in and obstruct the action. But if the tenant were a mere *locum tenens*, holding for and as servant or agent for the owner, the latter may defend the possession and defeat the recovery, notwithstanding the sale has been made of any supposed interest of the debtor.

And so, if a stranger to the tenant sue and there is no privity between them, the real owner will be admitted to protect the tenant's possession by his own superior title; and this, even where the tenant has an interest of term for years in the property.

In the case before us, the appellant in her affidavit simply alleges that the defendant is her tenant, and has since the conveyance to her "been holding said lands as tenant of affiant." But the character of the tenancy is not disclosed, nor does it appear whether the defendant had or had not an estate or term which could be sold and the title thereto passed to the plaintiff who purchased.

It is true the plaintiff alleges a seizin of an estate in fee in

the defendant when he bought, but the sheriff's deed could only convey such interest as the debtor possessed, and a recovery against him would in no way affect the rights of the appellants.

The case was allowed to proceed to a final judgment instead of being arrested to await the result of the appeal, as suggested in *Keathly* v. *Branch, supra,* but in this case no harm ensues, and the writ of possession was properly suspended until the decision of the appeal.

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

No error. Affirmed.

W. W. TAYLOR and others v. SOLOMON APPLE and others.

Husband and Wife—Ejectment, inability to give bond in—Certificate of Counsel.

1. Where a wife asserts an independent title in herself, she has the right to intervene and defend it in an action of ejectment brought against her husband.
2. The defendant here is allowed to defend without bond, upon affidavit of inability in accordance with the requirement of the act of 1869-'70, ch. 193, which was in force at the time this suit was brought. This act is modified by THE CODE, §237, in reference to the affidavit, that is, in requiring the party to state "that he is not worth the amount of the undertaking in any property whatsoever, and is unable to give the same.
3. Where in such case counsel certify that he has examined the case of the defendant, and that in his opinion the plaintiff is not entitled to recover; *Held,* a substantial compliance with the statute. It is not intended that the enquiry of counsel should extend beyond the information derived from the defendant.

(*Cecil* v. *Smith,* 81 N. C., 285; *Young* v. *Greenlee,* 82 N. C., 356; *Manning* v. *Manning,* 79 N. C., 293; *Jones* v. *Fortune,* 69 N. C., 322, cited and approved).

EJECTMENT tried at Fall Term, 1883, of CASWELL Superior Court, before *MacRae, J.*

The facts relating to the matters passed upon by this court are stated in its opinion. The defendants appealed.

Mr. Thomas Ruffin, for plaintiffs.
Mr. John W. Graham, for defendants.

SMITH, C. J. This action, instituted by the plaintiffs against the defendant Solomon Apple, is for the recovery of possession and damages for the detention of the land mentioned in the complaint, upon the filing of which at the return of the summons, Agnes B. Apple, his wife, on her application, was admitted a party to defend her own title, upon affidavit stating that the land had been bought and paid for out of her moneys, or moneys furnished by her father for her benefit, though her husband had taken a conveyance of the estate to himself. Her answer was put in, stating this matter in defence, and the cause was continued from time to time until spring term, 1883, when the plaintiffs, on an affidavit of the insufficiency in amount of the bond given before the defendant was allowed to answer, and the insolvency of the sureties, moved for further and additional security, and in response an order was entered requiring the defendants to execute, with approved or justified sureties, a bond in the sum of $400, to secure such damages as may be awarded to the plaintiffs, with costs, in the event of their recovery, on or before Tuesday of the next term, and declaring that, in case of failure to give the bond, the plaintiffs shall have judgment for possession of the land. The clerk is directed within thirty days to issue notice of the order, and this was done on the 1st day of June.

At fall term, 1883, the defendants make oath in writing and say, each, that neither of them is able to give the bond of $400 specified in the order; that beside the land in controversy they have but little property; that so much as is owned by the affiant Agnes B. is not under her control, but is managed by a trustee, and that, including it, neither one of them "has property above the homestead and exemption allowed by law."

Accompanying the affidavit is the certificate of her counsel, stating that "we have examined the case of the defendants in this action, and if the facts be as stated by the said Agnes B. in her affidavit, filed as an answer, the plaintiffs ought not to recover against her, though entitled to recover against Solomon Apple."

The defendants asked upon the submission of these papers to be allowed to continue the defence under the act of 1869–'70, ch. 193, §4, the *proviso* to which section is in these words:

Provided that no defendant shall be required to give said bond, if an attorney, practicing in the court where the action is pending, will certify to the court in writing that he has examined the case of the defendant, and that, in his opinion, the plaintiff is not entitled to recover, and said defendant shall further file an affidavit that he is unable to give said bond.

This clause was transferred and became section 237 in THE CODE, and is modified by substituting the word "*undertaking*" in place of "*bond*," and adding after "affidavit," instead of the former concluding clause, the following: "Stating that he is not worth the amount of said undertaking in any property whatsoever, and is unable to give the same.

The court deeming both the affidavit and certificate insufficient under the statute to warrant a dispensing with the undertaking, directed the answer to be stricken from the file, and rendered judgment in favor of the plaintiffs for recovery of the land, and for the issue of a writ of possession, reserving to them the right to have an enquiry of damages. From this judgment the defendants appeal.

We can only consider the appeal of the *feme* defendant, for her husband is excluded from the benefit of the certificate given to her, and consequently there can be no exception to the judgment so far as it affects him alone.

It seems from the affidavits, for the complaint is general and does not indicate the source from which the plaintiffs derive title, that they claim the husband's estate under a sale by execution against him, while the wife asserts a superior and independent

equitable title in herself, and her right to intervene and defend it is sustained by the cases of *Cecil* v. *Smith*, 81 N. C., 285, and *Young* v. *Greenlee*, 82 N. C., 346.

Indeed the wife's right to her separate estate may be asserted against her husband himself. *Manning* v. *Manning*, 79 N. C., 293.

The provisions of the law in force at the time when the order for further security was entered, are substantially met in the present application to dispense with the bond and be allowed to continue the defence, and, if *then* made, ought to have been granted. The inability to give the bond is positively declared, and this is all that the statute demands. *Jones* v. *Fortune*, 69 N. C., 322.

This right, as incidental to the order, follows its enforcement, and we see no reason why it should not be available upon the motion to modify or revoke, after the inability to furnish the bond has been ascertained by effort, and can be declared on oath. The transaction is continuous until the order was executed by the rendition of judgment.

THE CODE, in direct terms, and to avoid such inconveniences (§3868), provides that "the repeal of the statutes mentioned in the preceding section (statutes public and general, with some exceptions and limitations) shall not affect any act done, or *any right accrued* or established, or *any suit or proceeding had or commenced* in any case before the time when such appeal shall take effect."

This clause clearly reserves to the *feme* defendant the exercise of the right conferred by the previous act to ask for liberty to defend without bond, which *right existed* when the order was made and could be asserted before its consummation in arresting it.

2. The next objection is to the incompleteness of the certificate of counsel.

There seemed to be great force in the argument for the appellee in support of the ruling that it ought to state the results of a

full enquiry into the merits of the defence, not only as disclosed in the *defendant's averments* of fact, but as reached upon a full consideration of these and others in connection, ascertained upon examination, which may modify or correct them. But upon a more careful consideration, we think the enquiry is not required to extend beyond the information derived from the defendant, and such as counsel may possess in addition, upon which, as prudent and safe advisers, they would undertake to act.

The statute demands only that counsel shall certify "that he *examined the case of the defendant*," that is, upon the information communicated as a defence, and that in the opinion formed upon these assumed facts, "the plaintiff is not entitled to recover."

Now, the present certificate is based upon the sworn statements of the answer, which, in the opinion of the counsel, if correct, destroy the plaintiff's cause of action against the *feme* defendant. This is not a departure from the substantial statutory requirements.

It will be observed that when one proposes to sue *in forma pauperis*, or to appeal (sections 210 and 553 of THE CODE), he is only required to swear to his inability to give the undertaking; while in order to defend an attack upon his right of possession of land, he must state not only such inability, but further, that "he is not worth the amount of said undertaking in any property whatsoever," apparently, if not in fact, denying the privilege to one who has only sufficient exempt property to equal the amount of the bond. But our case proceeds under the former law which does not make the distinction. There is error in the ruling, which will be reversed, and this will be certified.

Error. Reversed.

R. B. PEEBLES v. JOHN W. PATE.

Execution, return on, evidence—Ejectment—Sheriff's Deed—Agreement between defendant and purchaser—Fraud—Estopped.

1. Returns of an officer endorsed upon an execution are admissible in evidence in all cases where the execution is evidence.
2. The defendant in execution and the purchaser agreed that the latter should buy the land and hold the same under the sheriff's deed until he was repaid the purchase money; *Held*, that the transaction will be upheld in the absence of fraud upon the creditors of the defendant.
3. Execution issued upon a judgment, land was sold thereunder and a deed made to the purchaser; *Held*, not competent to have another execution upon the same judgment and sell the same lands a second time for a balance of the same debt alleged to be unpaid; and the purchaser under the latter gets no title.
4. Such a proceeding can be sustained only when the defendant subsequently acquires a new estate in the land, which is subject to execution, or perpetrates a fraud rendering the sale void.
5. The defendant in ejectment is not estopped to show title in a third person, where the execution under which the plaintiff purchased conferred no power upon the officer to sell the land.
6. The plaintiff can take no advantage of any estoppel that may exist between the parties to the mortgage deed in this case.
7. Every estoppel must be reciprocal; it must bind both parties; a stranger can neither take advantage of it nor be bound by it.

(*Vestal* v. *Sloan*, 76 N. C., 127; *Mulholland* v. *York*, 82 N. C., 510; *Williford* v. *Conner*, 1 Dev., 379; *Grimsley* v. *Hooker*, 3 Jones' Eq., 4; *Smith* v. *Fore*, 10 Ired., 37; *Leach* v. *Jones*, 86 N. C., 404; *Wade* v. *Saunders*, 70 N. C., 277; *Badham* v. *Cox*, 11 Ired., 456; *Moore* v. *Byers*, 65 N. C., 240, cited and approved).

EJECTMENT tried at Spring Term, 1883, of NORTHAMPTON Superior Court, before *Philips, J.*

On the trial the plaintiff, in support of his title, introduced a judgment rendered and docketed in said county on the 10th of February, 1869, in favor of Mary E. Phillips as guardian of the children of John D. Phillips and against John W. Pate and

others for one hundred and fifteen dollars, with compound interest on the same from January 1st, 1881, till paid, and for costs. The said judgment was upon a bond executed in 1860; also an execution on said judgment issued the 8th day of June, 1874, returnable to the fall term of said court; also a sheriff's deed dated November 7th, 1874, reciting a sale of the land (*the locus in quo*) under said execution as the property of John W. Pate, and purporting to convey the same to the plaintiff R. B. Peebles. He also proved that the defendant, John W. Pate, was in possession of the *locus in quo* at the time of and ever since the commencement of this action. The plaintiff here rested his case.

The defendant John W. Pate, by way of impeaching the validity of the execution and sale to the plaintiff, and to show that the plaintiff acquired no title under the execution of the 8th of June, 1873, offered in evidence an execution on the same judgment issued June the 10th, 1873, and the return of the sheriff thereon; also another execution issued June 30th, 1873, upon the same judgment upon which there was the following return by the sheriff: "Not satisfied. August 9th, 1873. This day levied this execution upon a tract of land containing twenty-four acres, more or less, and upon another tract of land containing two hundred and fifty-nine acres, more or less, the property of John W. Pate, to satisfy this execution"; also one other execution which was issued on the same judgment, dated October 17th, 1873, which came to the hands of the sheriff on the 12th of November, 1873, and with the same the defendant introduced the following entries, which were endorsed on the said execution, to-wit: A copy of the levy of August 9th, 1873, as set forth as originally endorsed on the execution of date June 11, 1873; also on said execution this return: "December 6th, 1873. Received two hundred and two dollars from the sale of the above named tracts of lands purchased by Wm. T. Stephenson, of which thirty-three dollars and twenty-two cents is costs and commissions, and one hundred and sixty-eight dollars and seventy-eight cents on debt and interest in part of this execu-

tion." (Signed by the sheriff). Also on said execution is the following entry: "December 22d, 1873. Received of W. Newsom, sheriff, the sum of one hundred and sixty-eight $\frac{78}{100}$ dollars in part of the within execution." (Signed, R. B. Peebles, attorney for J. J. Long).

The other entries were also endorsed on the execution of June 8th, 1874, under which the plaintiff claims title, in the handwriting of the clerk of the court, and also the following endorsment of a return by the sheriff:

"After due and lawful advertisement at the court-house in Northampton county, and four other public places in said county, I did, on the 7th day of November, 1874, expose to sale and sell at public auction to the highest bidder for cash, the two tracts of land mentioned in the levy, where and when R. B. Peebles became the last and highest bidder for the same in the sum of five dollars each, complied with the terms of sale and was declared the purchaser."

The defendant introduced J. D. Boone as a witness, who testified that he was at the time of the above-stated proceedings a deputy sheriff; that the handwriting of the returns and receipts was as recited herein, and that the land sold under execution of date 17th of October, 1873, under which Stephenson purchased, and that of date 10th June, 1874, under which the plaintiff purchased, were the same lands, and it was admitted that the sheriff's deed to each of the purchasers covered the *locus in quo*. The foregoing evidence was offered as a part of the record under which the plaintiff claimed.

The defendant also introduced a deed from the sheriff to W. T. Stephenson, dated December 6th, 1873, reciting a sale to him under execution of 17th October, 1872. All of the evidence introduced by the defendant was objected to by plaintiff and admitted by the court.

The plaintiff then, with a view of showing that the deed from the sheriff to Stephenson of December the 6th, 1873, passed no title as against creditors of John W. Pate, offered evidence to

show that before and at the said sale of December 6th, 1873, said Stephenson agreed with said Pate to lend and did lend him money enough to pay off the execution in the hands of the sheriff, with the understanding that the lands should be sold by the sheriff and an absolute deed made to said Stephenson to secure the repayment of the money loaned and interest; that just before the sale, Stephenson (Pate being present) asked the sheriff how much the execution and costs amounted to, and the sheriff replied that he thought $200 would cover it, and then Stephenson bid $202 for both tracts, and there was no other bid made. But when the plaintiff, as attorney for the plaintiff in the judgment, came to settle with the sheriff, it was ascertained that there was some sixty dollars due on the judgment, which the defendant refused to pay; that at the time of the sale, December 6th, 1873, the sheriff had notice that Stephenson was to lend the defendant the money. All of this evidence was objected to by the defendant and ruled out by the court, and the plaintiff excepted.

With the view of estopping the defendant from saying that Stephenson had title to the land, by virtue of the sheriff's deed to him, the plaintiff then offered in evidence a mortgage deed made by the defendant, December 8, 1873, for the land in controversy, to Stephenson to secure the purchase money for the land. This evidence was objected to by the defendant and ruled out by the court, and the plaintiff excepted.

Upon an intimation from the court that the plaintiff was not entitled to recover, he submitted to a nonsuit and appealed.

Messrs. Thos. N. Hill and *W. C. Bowen*, for plaintiff.
Messrs. R. O. Burton, Jr., and *Willis Bagley*, for defendant.

ASHE, J. The exception taken by the plaintiff to the ruling of His Honor in admitting the endorsements on the executions as evidence on the part of the defendant is untenable. The

executions were unquestionably competent evidence, and "a return when made is a matter of record, and is admissible in all cases where the execution is. The rule allowing the return of officers to be read in evidence is based upon their responsibility for the truth or falsity of such returns, and is sufficient evidence of all the proceedings under the writ." Herman on Executions, §214.

The exception to the ruling of His Honor in admitting in evidence the deed executed by the sheriff to Stephenson, is also untenable. So, likewise, was his exception to the ruling of His Honor including the evidence offered by the plaintiff in regard to the transaction between them as to the redemption of the land.

This evidence was offered to show that the agreement between the defendant and Stephenson, by which the latter was to purchase the defendant's land under execution sale and hold the title until the defendant should repay the money advanced by Stephenson was covinous and intended to hinder and defeat the creditors of the defendant, and that the sheriff's deed under the sale was void and passed no title to Stephenson. But we are unable to discover any of the "ear-marks" of fraud in the transaction. The agreement was perfectly legitimate. Such contracts between the defendants in execution and the purchasers of their land, under execution sale, have been sustained by repeated adjudications of this court. *Vestal* v. *Sloan*, 76 N. C., 127; *Mulholland* v. *York*, 82 N. C., 510.

And we cannot see how this case differs in principle from those cases. The defendant's land was advertised for sale under execution, and Stephenson agreed to advance the money or lend it to the defendant to satisfy the execution, and buy at the sale and take the sheriff's deed for the same and hold the land until he was reimbursed. There was no concealment of any sort attending the transaction—no attempt or purpose to buy the land at a reduced price, but on the other hand, everything was done openly and fairly. Before the sale, Stephenson and the

defendant went to the sheriff and enquired of him what was the amount of the execution, and being informed that $200 would cover the amount it called for, without any dallying, he at once bid the amount which he supposed would satisfy the execution. Could anything have been fairer?

Even if this transaction had not been free from the suspicion of "*mala fides*," the contention of the plaintiff that it was intended to hinder and delay the creditors of the defendant, cannot be sustained.

To avoid a deed or transaction under the statute of frauds, there must be a creditor to be defrauded, and before he can take advantage of the statute at law, it is held he must reduce his debt to a judgment, issue execution upon it and have the defendant's land sold thereunder. *Williford* v. *Conner*, 1 Dev., 379; *Grimsley* v. *Hooker*, 3 Jones' Eq., 4. But here, there was no creditor to be defrauded. There was no creditor except the plaintiff in the judgment under which the land was sold, and she is not such a creditor as could take advantage of the statute, for the reason she had once had the land sold under execution on her judgment, and had no right to have it sold a second time under another execution upon the same judgment. When the land was once sold under execution of October 17th, 1873, the plaintiff had no right to issue another execution on the same judgment and have the same land sold a second time for the same debt.

Under present system, the judgment, like the former levy, creates the lien on land, and the execution upon it is in the nature of a *venditioni exponas;* and "when a *venditioni exponas* under the former practice was issued, and land mentioned in it was sold, another *venditioni exponas* cannot be issued; and if it does, it is invalid, and the purchaser gets no title." *Smith* v. *Fore*, 10 Ired., 37.

It was so expressly held in this very case when it was before this court at the February term, 1882 (86 N. C., 437). The only ground upon which such a proceeding could be sustained

would be where the defendant had subsequently acquired such a new estate in the land as subjected it to execution, or had perpetrated a fraud which made the sale void. But here there was no fraud, and the defendant had acquired no title to the land, which made it the subject of execution.

The plaintiff further insisted he had the right to recover, upon the ground that the defendant in this action was the defendant in the execution, and was in possession when the land was sold and at the commencement of this action, and he could not defeat the plaintiff's recovery by showing title in a third person. It is conceded this is a well established rule. *Leach* v. *Jones*, 86 N. C., 404; *Wade* v. *Saunders*, 70 N. C., 277.

But to operate as an estoppel, the execution under which the plaintiff has purchased must be valid, and sufficient to confer the power to make the sale upon the officer who undertook to sell; otherwise the attempted sale is ineffectual against the debtor, and this he may show in the action of the purchaser to recover. In such cases the estoppel does not apply. *Peebles* v. *Pate*, *supra*; *Smith* v. *Fore*, *supra*. It was there held that this very exception under which the plaintiff claims title was invalid, and the defendant was not estopped to deny the plaintiff's right to recover.

The only other exception taken by the plaintiff was as to the refusal of His Honor to admit evidence of the mortgage executed by the defendant to Stephenson, which was offered with the view of estopping the defendant from saying that he, Stephenson, had title to the land by virtue of the sheriff's deed of December 6th, 1873.

The exception was properly overruled. The plaintiff had no right to take advantage of any estoppel that might have existed between the parties to that deed. "Every estoppel must be reciprocal, that is, it must bind both parties, since a stranger can neither take advantage of any estoppel nor be bound by it." Co. Lit., 352*a*; 1 Taylor on Evi., 586.

The only interest which the defendant acquired by the con-

tract with Stephenson was an equity to have the land conveyed to him when the money advanced for its purchase should be repaid, with interest, and that is such an interest as is not subject to be sold under execution. *Badham* v. *Cox*, 11 Ired., 456; *Moore* v. *Byers*, 65 N. C., 240.

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

No error. Affirmed.

JAMES L. CURRIE v. J. B. CLARK and others.

Execution—Fraud in suppressing bidding—Setting aside Sale—Judge's Charge must be put in writing at request of party.

1. At execution sale the defendant's property was bid off by the plaintiff at an inconsiderable sum, in pursuance of an alleged fraudulent arrangement to suppress competition among bidders; *Held*, in an action to impeach the title acquired by plaintiff, that the sale be set aside and the parties placed *in statu quo*, without prejudice to the plaintiff's remedies from lapse of time since the sale.
2. It is the duty of the judge, at the request of a party to an action, to put his instructions in writing and read them to the jury. THE CODE, §414. But where the court, as here, gave oral instructions not differing from those set out in the written charge, and the appellant makes no suggestion to the contrary, his exception to the oral part of the charge does not constitute ground for a new trial.

(*Crews* v. *Bank*, 77 N. C., 110; *Young* v. *Greenlee*, 82 N. C., 346, and 85 N. C., 593, cited and approved).

EJECTMENT tried at Fall Term, 1883, of MOORE Superior Court, before *McKoy, J.*

The plaintiff appealed.

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

Messrs. John Manning, M. S. Robins and *R. P. Buxton*, for defendants.

SMITH, C. J. The plaintiff's title to the land in dispute is derived from a sale under executions issued against the defendants, made on August 7th, 1879, and the sheriff's deed executed on the next day. The answer, after denying the plaintiff's allegation of ownership and wrongful withholding, while admitting possession, sets up a defence to the action that the sale was brought about and the land bid off and conveyed by the sheriff through the fraudulent procurement and unfair practices of the plaintiff, by means whereof he became the purchaser of the property, worth several hundred dollars, for the inconsiderable sum of twenty-five dollars, and thereby acquired no estate in the premises.

Four issues were submitted to the jury, the first three enquiring as to the plaintiff's title, the defendants' wrongful possession and the damages therefrom, and the fourth involving the essential matters of defence, in these words:

4. Did the plaintiff obtain the title through means of the sheriff's sale by fraudulently suppressing the biddings therefor by means of fraud or fraudulent representations, or fraudulent practices?

The jury found all the issues upon the evidence and under the instruction of the court against the plaintiff, and from the judgment rendered thereon he appeals.

The last and material issue is somewhat vague and confused, and does not present the intended enquiry into the plaintiff's conduct, in connection with the sale and the *mala fides* and fraud imputed to him, in a form calculated to be understood and explicitly answered by the jury, and restrictive of the evidence to be heard. But no exception was taken, and the issue seems to have been framed with a view to the admission of impeaching and sustaining testimony in regard to the plaintiff's action in securing the title through a judicial sale by practices not tolerated by the law, and the fruits of which it will not permit him to retain. The evidence upon this point may be thus summarily stated:

There had been several judgments recovered against the defendants, two of them on debts contracted before the adoption of the constitution in 1868, and entitled to priority of satisfaction, and all docketed in the superior court of Moore county, on which executions had been issued to the sheriff, and were in his hands at August term, 1879, of the court.

The first and earliest docketed judgment was in favor of H. and E. J. Lilly, and had been assigned to the plaintiff, and the next, in favor of E. L. Pemberton, was in charge of his attorney, J. C. Black, for management and collection. The amount due on both, with costs, was about seven hundred dollars, which sum, increased by the other executions, made an aggregate of near one thousand dollars, the value of the land upon the estimate of a witness for the plaintiff.

The sheriff with these writs advertised the sale of the land to take place on August 4th, the first day of the term of the court, and while he sold other property under other executions, postponed the sale of this until the next and again the day following, Wednesday, when amid considerable bidding it was sold to the said attorney for the sum of seven hundred dollars, the defendant N. D. J. Clark being present, the sheriff giving notice that if the bid was not complied with the land would be again put up at 10 A. M. of the ensuing day. On Thursday, as the sheriff was proceeding to resell, during the recess between the morning and evening sessions of the court, he was stopped by the plaintiff, who asked him to wait a few moments, during which the plaintiff and the attorney withdrew for private consultation, at the end of which the plaintiff returned and directed the officer, in his own language, to "go ahead." During this interview the plaintiff proposed to buy the Pemberton debt, and was informed by Black that he had assured Clark the day before that the land, if resold, should bring enough to pay that execution; and thereupon the plaintiff said: "If you will let me have the judgment the sale may go over."

Under these circumstances the assignment was made to him

of the Pemberton debt and the sale proceeded, when the plaintiff became the purchaser at the price of twenty-five dollars. Clark was not present on this occasion, nor was the attorney, who testifies he would have been, had he known of it. The testimony of the plaintiff is in opposition to that of Black in reference to any suggestion of deferring the sale and his assent thereto.

It does not appear how many, if any other, persons were present on the occasion of the last sale, or whether any bid except that of the plaintiff was made.

The appellant's exceptions are now to be considered:

1. The defendant, N. D. J. Clark, to whom the land is understood to belong, and who is referred to when the name is used, was allowed, after objection, to say that his absence on Thursday was in consequence of the assurance received from Black that the land should bring seven hundred dollars.

We do not see why it was not competent in him to explain the cause of his non-attendance and apparent inattention to his own interest, when he was aware of the intended resale, if the first bid was not complied with by payment, or in what respect the answer could be obnoxious to just complaint.

2. The court refused to charge that there was no evidence to sustain the 4th issue and it should be withdrawn, or the jury directed to return a negative answer.

The court properly declined to so charge in the face of the testimony of the circumstances under which the sale was made to the plaintiff. The manifest result of his management, if upheld, is to put in him the title to land worth twenty times the sum paid, and this by practices, if the testimony be accepted, inconsistent with good faith and fair dealing towards the owner whose property has been sacrificed, and fails to meet a proper share of his indebtedness. The difficulty is not obviated by the proffer of the plaintiff's counsel to apply the full amount of the previous bid to the executions, that is, in effect to raise the price to that sum, for the defendant's legal right is to have a fair sale, and that his property shall bring the largest sum that any bidder

may be willing to give, and this sum appropriated to the discharge of his debts. Whatever means are used to obstruct this legal right of the debtor and secure his property to the execution creditor for an unreasonable price, is an abuse of legal process which the law will not recognize and uphold. In our view there was evidence, and its weight and sufficiency it was the province of the jury to determine.

3. The next and most serious objection to the charge is, that it was not all put in writing, after a request from plaintiff's counsel that it should, according to the directions of C. C. P., §238, which provides "That every judge, at the request of any party to an action on trial, made at or before the close of the evidence, before instructing the jury on the law, shall put his instructions in writing, and read them to the jury; he shall then sign and file them with the clerk as a part of the record of the action."

It is stated in the case that when a new trial was asked, after verdict, the plaintiff assigned as error, that, after the request for a written charge, the court said "anything orally to the jury." The statute neither in purpose nor terms goes to this extent, nor does it apply to the requirement in the preceding section (237), that the judge "shall state in a plain and correct manner the evidence given in the case," but it does not embrace the further direction that he shall "declare and explain the law arising thereon." The instructions to be written and read are such as expound the law and are reviewable on appeal. This is the plain meaning and effect of the words that the judge, "before instructing the jury *on the law*, shall put *his instructions* in writing, that is, his instructions as to *what the law* is arising upon the different aspects of the evidence and the admissible hypothetical findings of the jury, in order to a revision and correction when erroneous.

Moreover, the statutory mandate positively forbids any verbal explanatory comments which may affect or modify the written language and tend to mislead the jury as to its purport or

aim. The propositions embodied in the writing must stand in their assumed form, not added to or diminished by any contemporary and extraneous words falling from the lips of the judge. The jury must gather the meaning of the instruction solely from the written words in which it is conveyed, as must the revising court in passing upon its correctness in law.

Similar statutes are in force in many of the states, some of them more stringent in their exactions and making a disregard of them *an error in law*, entitling the party to a new trial.

The numerous citations from the reports of other states contained in the carefully prepared and elaborate brief of appellant's counsel, showing much research and successful labor on his part, fully sustain the views we have taken of the construction and operation of our own enactment.

The most important and pertinent cases we find on examination are the following: *Basworth* v. *Barker*, 65 Ind., 596; *Davis* v. *Foster*, 68 *Ib.*, 238; *Shafer* v. *Stinson*, 76 *Ib.*, 374; *Battorf* v. *Shelton*, 79 *Ib.*, 98; *Ray* v. *Wooters*, 19 Ill., 82; *Pimberthy* v. *Lee*, 2 Wis., 261; *Gile* v. *People*, 1 Col., 60; *Black* v. *State*, 31 Texas, 574; *Hardy* v. *Turner*, 9 Ohio St., 400; *Wilson* v. *Town of Granby*, 47 Conn., 59; *Paris* v. *State*, 2 Iowa, 449; *Dixon* v. *Florida*, 13 Fla., 636; *Payne* v. *Commonwealth*, 31 Grattan (Va.), 858, with many others to the same purport.

In *Ray* v. *Wooters*, *supra*, decided in 1857, SKINNER, J., declared the requirement so imperative that oral instructions, given under a statute which provides for written instructions in all cases, civil or criminal, before the petit jury, and prohibits any oral qualifications, modification or explanation of those committed to writing, even when conceded to be immaterial, were fatal to the verdict and called for a new jury.

The substance of these adjudications conforms to the interpretation which our own enactment bears, in the exclusion of verbal comments.

Now, what are the facts in reference to this exception set out in the case made up on the appeal?

The special instructions requested for the plaintiff, which, however, do not appear to have been signed by counsel, or at least such signature is not annexed, as directed by section 239, were read over to the jury and reasons assigned for refusing them, written on the margin of the paper containing the instructions: "The court moreover did give instructions to the jury orally, but gave no instructions upon legal questions different from those set out in the *written charge.*"

There is no suggestion to the contrary of this; and if there were, we should be disposed to hold that the verbal part should have been also in writing, so as to enable us to see if there was a variance or modification which may have misled the jury in considering both, and not to leave this to the opinion of the judge. The very aim of the statute is that the jury shall hear only what is put in writing, for the judge is directed "to *read them* (the instructions) *to the jury.*"

It is not the policy or purpose of the statute, nor does the language used bear such rigorous construction as to forbid any and all oral expressions from the presiding judge. As what he may tell the jury in matters of law for their information and guidance must be *written and read,* so he is not permitted to add to, take from, modify or explain what he delivers as his charge, for this would be to change perhaps the meaning which would otherwise be ascribed to the writing and produce the very mischief intended to be remedied. But the act, upon any reasonable interpretation of its terms, does not go further and put an interdict upon every oral utterance which is in precise accord with what is written and affects it in none of the suggested particulars, at the peril of a *venire de novo* if he does thus speak. This would be to subordinate substance to form and subserve no useful purpose.

It is expressly stated in the case that nothing was said varying in any respect from the legal propositions submitted in writing, nor does the appellant suggest the contrary. Hence, the written instructions must be understood as correctly and fully embodying

the rules and principles of law communicated to the jury, and be regarded as a compliance with the demands of the law. Yet it is prudent and safe, and this cannot be too strongly impressed upon the minds of those who administer distributive justice at jury trials, when the charge is put in writing it should be simply read over, without outside remark of any kind in the hearing of the jury, and thus controversies, such as have arisen in this case, be avoided.

The charge itself, in so far as it relates to the fourth issue, and the evidence bearing upon it, is not obnoxious, as we have already said, to just complaint.

So much of it as refers to the duration and force of docketed judgments has no material bearing upon the real controversy, and the error in regard to a docketed justice's judgment, subjecting it to a limitation shorter than that which applies to others originally rendered in the superior court, does not enter into our consideration in determining the appeal. The result depends wholly upon the finding upon the last issue, irrespective of the responses to the others.

But there is error in the rendition of final judgment by which the land is restored to the judgment debtor on his return of the price bid and interest.

In *Crews* v. *Bank*, 77 N. C., 110, the defendant derived title to the land under a sheriff's sale made on September 6th, 1869, which the jury found was brought about by a fraudulent combination between the execution debtor and his creditor, the plaintiff purchasing in suppressing competition. The plaintiff bought at a subsequent sheriff's sale under a later docketed judgment.

Delivering the opinion, RODMAN, J., says: "In many cases it would work an obvious injustice to declare the sale void, because the purchaser had stifled competition and obtained the property for less than its value. What he paid has gone to the payment of debts of the defendant in the execution which were a lien upon the land, and if the sale is set aside at all, it should

be set aside altogether, and the purchaser put in the condition in which he was before or be subrogated to the place of the creditors *pro tanto*." He adds:

"If the sale to him (the execution creditor and purchaser) was held void, he could still take out execution, *at least*, for the excess of his judgment over his bid, and sell the land again (*Halyburton* v. *Greenlee*, 72 N. C., 316), and perhaps might for the whole original amount, disregarding the supposed payment. I know of no authority to the contrary."

So in *Young* v. *Greenlee*, 82 N. C., 346, where fraud and combination to stifle bidding between the debtor and purchaser were charged, DILLARD, J., speaking of the effect upon the title, says: "His (the sheriff's) sale and deed passed the legal title to Flemming, and by his deed it was conveyed to and now resides in the *feme* defendant. Against a legal title thus communicated, a purchaser at a subsequent sale under a junior judgment and execution cannot prevail in an action, basing his right of recovery on the legal title alone. The remedy in such case must be by an action impeaching the elder title, and setting forth the special facts calling for the exercise of the equitable powers of the court to put the older title out of the way, in whole or in part." This ruling was affirmed on an application to rehear, 85 N. C., 593.

The defence here is in effect an impeachment in equity of the title acquired by the plaintiff, and the relief cannot go beyond the setting aside the sale and restoring the parties to the *status* they occupied previous thereto, and without prejudice to the plaintiff's remedies, from the lapse of time since. This is the full measure of the defendant's equity, and it affects the plaintiff only by depriving him of an estate which he acquired by unlawful means and under the form of legal process. The sale must therefore be set aside and the land again exposed to sale, the proceeds arising from which will be paid over according to the priorities of the several executions as they existed on the day of the sheriff's sale, which is thus put out of the way.

It must be declared that the judgment below is erroneous, and

this will be certified, to the end that judgment be rendered according to this opinion, and the cause proceed in the court below.

Judgment accordingly.

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*J. G. WILLIAMS, Trustee, v. J. B. BATCHELOR, Administrator.

Account—Reference and Referee—Judgment—Allowance to Attorney.

1. A judgment entered upon confirming a report of a referee settles all matters taken into the account, and is a bar to any claim which ought to have been set up in that reference.
2. But where subsequent collections are made out of a fund remaining in the hands of the party liable to account, and not adjudicated in the judgment, a claim for compensation for his services is a proper one, to be allowed upon evidence and enquiry before a referee.

MOTION in the cause heard at January Term, 1883, of WAKE Superior Court, before *McKoy, J.*

This motion is made in an action tried at fall term, 1875, of Wake superior court, and upon the overruling of exceptions to the commissioner's report the defendant appealed to this court, which affirmed the ruling of the court below. See 74 N. C., 557.

His Honor refused the motion, and the defendant appealed.

Messrs. Reade, Busbee & Busbee, for plaintiff.
Messrs. D. G. Fowle and *E. G. Haywood,* for defendant.

SMITH, C. J. At January term, 1876, of this court, final judgment was entered affirming that entered in the superior

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

court and by appeal brought up for review, among the provisions in which is the following:

It is further ordered, adjudged and decreed, the said Joseph B. Batchelor, as commissioner as aforesaid (for the sale of the lands), after retaining out of said purchase money five per cent. thereof, which is hereby allowed him for his services in making sale and collecting and disbursing the proceeds thereof, and executing title to the purchaser, apply the residue to the satisfaction of the sum of $5,013.16, with the interest on $5,000 thereof from the 4th day of October, 1875, until paid, owing to the plaintiff as trustee of Douglass Bell, the younger; but if the defendant William S. Mason shall hereafter make further collections on account of the notes specified in the pleadings, the amount which the said Mason shall so collect is to be first applied to the satisfaction of said debt due said trustee Williams, and the said Batchelor is to satisfy the residue thereof after the application of the payment made by said Mason; and if said Batchelor shall have paid the whole of said debt before said Mason shall have made any further collections and payment as aforesaid, then the said Mason is to apply such collection to replace *pro tanto* the amount so paid by said Batchelor, *and shall pay the amount so collected to said Batchelor, as administrator de bonis non cum testamento annexo of Louis D. Henry, deceased.* And any residue of said proceeds of sale which may remain in the hands of said Batchelor, he is to retain as administrator *de bonis non cum testamento annexo* of Louis D. Henry, deceased.

There had been before, on a reference in an action between the said Batchelor, as administrator as aforesaid, and the said Mason, an account stated and reported to the superior court of Wake county at June term, 1875, wherein it was ascertained that the latter had in his hands, for which he was accountable as collecting agent and attorney, on April 15, 1875, a balance of $695.23, and there being no exception thereto the same was confirmed. In the account the said Mason is charged with

moneys collected by an attorney employed by him at Wilmington, under a creditor's suit against the estate of a debtor, and is allowed a credit of ten per cent. thereof retained by that attorney for his services, and no further charge by said Mason, in respect to that fund, is made or passed on.

Late in the year 1882, as we infer in the absence of any date, the said Joseph B. Batchelor, as administrator *de bonis non* of the testator Louis D. Henry, caused a notice to be given to said William S. Mason, of which he acknowledges service, to appear at the January term, 1883, of the superior court, and show why the decree aforesaid (which on appeal had been sustained and again affirmed at January term, 1876) should not be enforced, and the said Mason be compelled to pay over to him, as such administrator, whatever further collections had been made on two certain specified debts "since, and over and above the amounts collected" and charged in that decree.

To this notice an answer is returned wherein said Mason admits his having received since the decree and outside of what is therein accounted for, in different sums at various times, $924.86, whereof he had paid out $581.30 and there was remaining in his hands the residue, $345.50. He demands to be paid out of this sum a reasonable fee for the moneys collected at Wilmington, for which no allowance was made in the referee's report, and also asserts a claim for services in making the additional and subsequent collections.

Upon the hearing the said Batchelor moved the court:

1. For a peremptory order for the payment over to him of the moneys conceded to be in the hands of Mason; and, this being refused,

2. That the court, upon the statement before it, and without further evidence, determine what, if any, sum should be retained for the agent's further compensation in these last collections, and direct the balance to be paid over.

This was also refused, and the said Batchelor appeals.

The parties to this appeal are defendants in the original action,

but, upon the subject matter of controversy now before us, assume and occupy adversary relations to each other.

In our construction of the decree, it settles all matters taken into the account previous to its rendition, and is a bar to any claim for services in abatement of the amount declared to be due, which could have been and ought to have been claimed in that reference. It undertakes to adjust and does conclude all demands which could have been then made, and were not made, in reduction of that balance. It puts an end to controversy in this regard.

2. The claim for compensation, in making the subsequent collections out of funds which were allowed to remain in his hands after the order for their transfer, is a proper one, and is not adjudicated in the judgment. The net result of the collections, ascertained by deducting all legitimate expenses incurred and a fair compensation to the agent, is the amount to which the administrator is entitled. The court properly refused the first motion, and properly declined to pass upon the compensation to be retained by the agent, without evidence. A proper course would be to refer the enquiry as to the allowance which should be made to the defendant Mason, to the clerk or some other competent person, to be made upon such evidence as might be adduced before him, and with directions to him to make report. We do not mean to say that this is the only course to be pursued, but that it is a convenient and usual way of bringing the question before the court for its final determination. There is no error. Let this be certified.

No error. Affirmed.

*W. G. B. GARRETT v. W. L. LOVE.

Judgment upon confirmation of report, motion to correct.

A report of a referee made to this court and confirmed, and final judgment entered thereon, is not open to a motion, at a subsequent term, to correct an alleged error in the method of computing interest adopted by the referee. The court held, however, that the result arrived at by the referee in pursuance of the decision rendered in this case (89 N. C., 205 is correct).

MOTION by defendant to correct a judgment heard at February Term, 1884, of THE SUPREME COURT.

No counsel for plaintiff.

Messrs. Battle & Mordecai, for defendant.

SMITH, C. J. At the last term, the clerk to whom a reference had been ordered to compute and ascertain the result of the opposing claims of the parties (89 N. C., 205) made his report, and there being no exceptions thereto, it was confirmed and final judgment rendered in favor of the defendant for the excess of his counter-claim. His counsel now ask us to have revised and corrected the method of computation adopted by the referee in the adjustment, and to direct a calculation that shall at once reduce the note given the plaintiff by applying the amount due on the Parker debt according to its face, but which had at the time been in part discharged by him. The proper time for making the application was upon the coming in of the report and before its confirmation, since we can only rehear, with a view to correct an erroneous judgment, by petition filed in accordance with the rule.

But if it were still open to correction, is the mode of computation itself incorrect?

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

Let us assume that the Parker debt is valid, and all is due which on its face is called for; or let us substitute a note in the like sum given by the plaintiff to the defendant, as this will place the defendant in as favorable a position as he can claim to occupy; the value of his counter-claim would be the principal money with interest added to the time when the adjustment is to be made, and precisely the amount thus ascertained is the sum allowed by the clerk. On the other hand, the plaintiff's demand is estimated by a computation that applies successive payments, each exceeding interest then due, to a reduction of so much of the principal as the sum paid exceeds the interest; and so as to other payments until the residue is ascertained to the same date as the counter-claim, and the difference between them is the sum for which the defendant recovers judgment.

The several part payments by defendant on his debt must go as reducing credits, for such is the understanding and intent of both. If the counter demand is made to reduce the defendant's note, at once, to the difference between them, it is variant from that understanding; and equally so is the early extinction of the plaintiff's debt, so that what are credited payments become, what neither intended, independent loans and advances. The defendant accepted the Parker note as a valid subsisting and separate security; and that the plaintiff should make it good is the full measure of his demand, and he can claim no more. This he has, and with this he should be content. But we think a correction, if proper in itself, cannot be made of the judgment of the court.

Motion denied.

WILLIAM PICKENS v. JAMES FOX and another.

Excusable Negligence, under section 274—*Attorney and Client.*

The court made an order that no civil business would be transacted in consequence of the accumulation of criminal cases which would occupy the

term. The defendants' counsel was called home by illness in his family, but before leaving the court he enquired about the civil causes, and was informed by the judge that it was not probable that anything would be done on the civil docket, and accordingly so advised his client, who also went home. Upon calling over the civil docket on the last day of the term, judgment by default was entered against the defendant, on motion of plaintiff's counsel who, upon examination of the papers, did not find among them the defendants' demurrer which had been previously filed; *Held*, that the court properly set aside the judgment upon the ground of excusable negligence under THE CODE, §274.

(*Deal* v. *Palmer*, 68 N. C., 215; *Francks* v. *Sutton*, 86 N. C., 78; *Ellington* v. *Wicker*, 87 N. C., 14; *English* v. *English*, *Ib.*, 497; *Gear* v. *Reams*, 88 N. C., 197, cited and approved).

MOTION to set aside a judgment in BUNCOMBE Superior Court, heard at Chambers on January 30th, 1884, before *Gudger, J.*

The defendants were served with a summons requiring them to appear at the clerk's office within ten days thereafter, and answer a complaint which would be filed therein, or application for the relief demanded in the complaint would be made. The defendants employed counsel to defend the action and he appeared before the clerk and moved to dismiss the proceedings for want of jurisdiction in him over the subject matter of the action. The clerk refused to act in the premises, for the reason that no case was properly before him of which he could take cognizance.

At the ensuing spring term, 1883, the cause was docketed and a similar motion made before the presiding judge, which was not then entertained in consequence of the absence of the plaintiff's counsel, and the motion was not again renewed. During the term, however, the complaint was filed, the action being to recover land in defendant's possession claimed by the plaintiff, and under an agreement of counsel entered of record in the cause, the pleadings were to be filed during the next fall term, 1883.

At this term, which is held for four weeks, the time and attention of the court were occupied in the trial of criminal

cases, which were protracted until a late hour of Saturday in the last week.

Anticipating that no opportunity would be afforded for the transaction of business on the civil docket, an order was adopted at the instance of a member of the bar in attendance, whereby in substance that was postponed, in the same plight, and without prejudice, to spring term, 1884. This order in full is set out in the transcript, and it is not necessary to specify in detail its provisions.

The demurrer in form, but in effect a written motion to dismiss for want of jurisdiction, was filed on Thursday of the last week, and before leaving the court, called away by illness in his family, the defendants' counsel enquired of the judge in reference to civil causes, and was answered by him that it was not probable that anything whatever would be done on the civil docket, and the attorney accordingly so advised the defendants and that their presence was no longer required, and they could return home, and with this assurance they left.

Late on Saturday afternoon, in calling over cases from the civil docket, when this was reached the plaintiff's attorney moved for judgment, stating that no answer had been filed or other defence put in, an error into which he had fallen by reason of the absence from the papers of that which had been filed, in his examination of them, while the name of the defendants' counsel had been marked as appearing for them, and thereupon judgment final was rendered for the plaintiff.

The present application is to set aside the judgment and recall the writ of possession that had been issued to enforce it, and was heard by the same judge, who presided at the term when most of the facts transpired upon which the motion is based, and from his order relieving the defendants from the judgment under C. C. P., §133, the plaintiff appeals.

Mr. James H. Merrimon, for plaintiff.

Messrs. M. E. Carter and *Johnston & Shuford*, for defendants.

SMITH, C. J., after stating the above. It would be difficult to find a case, the facts in which found by the judge himself personally cognizant of many of them, which more clearly come with the provisions of the statute and warrant the exercise of the power it confers. If there be blame attributable to any, and we do not see that any has been incurred, it falls upon counsel and not upon client, and the judgment is most clearly the result of an inadvertent and erroneous statement, though believed to be true when made, from the counsel of the plaintiff.

The subject has been so often and so fully discussed, and the force and meaning of the statute with its limitations pointed out in cases heretofore before the court, that we are content to say that the ruling of His Honor is fully sustained by the cases of *Deal* v. *Palmer*, 68 N. C., 215; *Francks* v. *Sutton*, 86 N. C., 78; *Ellington* v. *Wicker*, 87 N. C., 14; *Geer* v. *Reams*, 88 N. C., 197; *English* v. *English*, 87 N. C., 497.

There is no error, and this will be certified to the court below.

No error. Affirmed.

MOTT v. RAMSAY.

Excusable Negligence.

The sickness of an attorney is a sufficient excuse for want of diligence in perfecting an appeal.

ASHE, J. Since the opinion was filed in this case, dismissing the appeal [reported *ante*, 29], the defendant has filed affidavits satisfactorily showing that so far from having been guilty of laches in perfecting his appeal, he used all possible diligence in his endeavors to have it perfected, but failed to do so in consequence of the illness of his attorney.

Being of the opinion that his neglect was entirely excusable,

the judgment rendered in the case at this term is set aside, and the case will stand upon the docket as if no judgment had been rendered.

Judgment accordingly.

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*ALANSON CAPEHART v. KADER BIGGS & CO.

Appeal, notice of.

An appeal will not be dismissed upon the ground that no notice of appeal was given, where the record shows that an appeal bond was filed and approved by the court. The filing the bond and its approval in open court is notice to the appellee.

CIVIL ACTION tried at Fall Term, 1883, of NORTHAMPTON Superior Court, before *McKoy, J.*

A motion to dismiss the defendants' appeal was made in this court.

Messrs. R. B. Peebles and *Hinsdale & Devereux*, for plaintiff.

Messrs. W. Bagley, Mullen & Moore, Fuller & Snow, and *E. C. Smith*, for defendants.

ASHE, J. In this court a diminution of the record was suggested, and on motion of the plaintiff's counsel, a writ of *certiorari* was issued to the clerk of the superior court of Northampton county, directing him to make out and transmit to this court a correct transcript of the record in this case.

In return to the *certiorari*, the clerk sends up another transcript, accompanied with his certificate, that the record heretofore sent to this court was, in all respects, correct, except as to the

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

expression, "notice of appeal waived"; said expression was inadvertently put by him in the case. He says it nowhere appears in the case, except in the statement of the case on appeal filed by L. F. Dettrick (one of the defendants), and supposing it was true in fact, he put it in the record sent to the supreme court. He says, "the error occurred in this way: The appellant filed his statement of case, and the appellee filed his exceptions thereto, and the appellant did not ask the court to settle the case, and in sending up the record, I endeavored to consolidate the two."

Upon the return of the writ of *certiorari*, the plaintiff's counsel moved to dismiss the appeal, upon the ground the defendant had given the plaintiff no notice of appeal.

Taking it to be true, as certified by the clerk, that there was no waiver of appeal properly upon the record, yet we do find in the record the entry, "Bond in the sum of $250, filed and approved by the court."

The plaintiff's counsel is supposed to have notice of what is done in open court, especially in a case where he appears as counsel for one of the parties, and the taking the appeal bond in court, and its approval by the judge in open court, was actual notice of the appeal, as effectively so as if the notice had been given in the manner prescribed by law. Although the plaintiff's counsel did not waive the notice, he had notice, and there is no ground upon which to sustain his motion.

The motion to dismiss the appeal is therefore disallowed.

Motion denied.

FLORENCE V. LAWTON and others v. NORWOOD GILES and others.

Judge's Charge, exception deemed to be taken—Negligence—Injury to property from fire.

1. If there be error in the charge of the judge, it is deemed excepted to without filing any formal objection by the party complaining (THE CODE, §412), and may be taken advantage of for the first time in this court.

2. The plaintiffs' house was destroyed by fire, communicated by sparks emitted from the smoke-stack of the defendants' mill (located in the city of Wilmington), and in an action for damages for the injury resulting from the alleged negligence of the defendant; *Held:*

(1). The burden of showing care anddiligence, and the use of improved appliances to avoid accident, rests upon the defendant.

(2). Where, upon the evidence in such case, the judge charged the jury that if sparks were emitted in operating defendants' mill and fell on neighboring houses which could be thereby readily set on fire, it was negligence to run the mill without curing the defect in the appliances; and if the defect could not be remedied and the sparks must necessarily pass out and fall on buildings likely to be thus set on fire, then the defendant had no right to operate the mill at all; *it was held,* that while the latter part of the charge as a separate proposition is error, yet when taken in connection with the whole charge as set out in the case, it is qualified by the direction that the same cannot be operated without the owner's being liable for damages to others from fire thus communicated.

(*State* v. *Dunlop,* 65 N. C., 288; *State* v. *Jones,* 87 N. C., 547; *Ellis* v. *Railroad,* 2 Ired., 138; *Aycock* v. *Railroad,* 89 N. C., 321; *Anderson* v. *Steamboat Co.,* 64 N. C., 399, cited and approved).

CIVIL ACTION tried at January Special Term, 1884, of NEW HANOVER Superior Court, before *Gilmer, J.*

The action is for damages resulting from the alleged negligence of defendants in causing the burning of plaintiffs' house. The case is stated in the opinion of this court. Verdict and judgment for plaintiffs; appeal by defendants.

Messrs. Russell & Ricaud, for plaintiffs.
Mr. George Davis, for defendants.

SMITH, C. J. Late in the afternoon on March 13th, 1881, the plaintiffs' house, constructed of wood and with shingle roof, some hundred yards distant from the rice mill of the defendants, operated by steam power in the city of Wilmington, was set on fire and badly burned, as alleged, from sparks issuing out of the smoke-stack of the mill, attributable to the negligent management of them and their servants, and the want of due precaution in providing against their escape. On the day of the

occurrence the wind was blowing with a velocity of from fourteen to sixteen miles an hour in the direction of the plaintiffs' house.

There was much testimony offered in reference to the emission of sparks of considerable size from the pipe at different times before the fire, of the excellent construction of the furnace and arrangement and working of the engine, to guard against injury to the property of others, and to secure safety to the owners. There had been upon the top of the pipe a spark-arrester, or covering cap with wire gauze or net-work to prevent the passing of large burning cinders, but this, not being deemed necessary and greatly obstructing the draught and the efficient working of the machinery, had been removed and was not in use.

Experts who had examined the mill testified to its being supplied with modern improvements and appliances that greatly contributed to its safety, and that the escaping smoke, when it left the furnace, passed through a flue of twenty-six feet, and then up the smoke-stack some sixty-seven feet more, before being poured out into the open air, and that this arrangement afforded protection against the communication of fire, greater than that derived from spark-arresters placed on short pipes, such as were in use on steamboats and locomotives, and rendered them unnecessary.

The testimony is given in detail, but so far as it relates to the defence, the above general statement will suffice to render intelligible the objections *here made* to the charge, for no exceptions appear in the record to have been taken to any part of it.

The issues submitted to the jury, and the responses to each, were:

1. Was the plaintiff's house burned by the emission of sparks or other inflammable matter from defendants' mill? Yes.

2. Was the injury to the plaintiff's house caused by the negligence of the defendants? Yes.

3. What damages, if any, did the plaintiff sustain? Five hundred dollars.

The testimony was mainly directed to the second issue involving the question of negligence on the part of the defendants.

The entire charge of the court is set out in the case, as well as in the special instructions given at the instance of the plaintiffs, which, under a recent change in the law, are "deemed to be excepted to without any formal objections," and consequently are brought up for consideration by an appeal. THE CODE, §412, par. 3.

The charge, the correctness of several portions of which is denied in the argument for the appellant in this court, is as folllows:

"As a general principle, the plaintiffs, owning a house in the city of Wilmington, were entitled to enjoy it freed from injury caused through another's negligence, and the defendants, owning and operating a rice mill in the same city, had the right to do so, if they so conducted and managed their mill and machinery as not to injure others. The defendants having chosen steam to operate their mill, this being recognized as a dangerous element in itself, are held by the law to a very high degree of care and skill, as railroad and steamboat companies, &c., and if in such business as they were engaged in, there was known and in use any apparatus which, applied to their engine, would enable it to consume its own sparks, and thus prevent their emission to the consequent ignition of combustible matter of others, it was negligence in them if they did not avail themselves of such apparatus."

"But they were not bound to use every possible precaution which the highest scientific skill might have suggested, nor to adopt an untried machine or mode of construction. While the law does not require absolute scientific perfection in the construction of such works as the defendants used, it does require the exercise of a high degree of care and skill to ascertain, as near as may be, the best plan for their structure."

If the defendants, at the time of the fire, had availed themselves of all the discoveries which science and experience had put in their reach, and had constructed their machinery so per-

fect as to prevent the emission of sparks or other inflammable material calculated to ignite adjoining property, then they have done all the law requires, and would not be guilty of negligence. But if you find the machinery of the defendants used on the day of the fire not so perfect as to prevent the emission of sparks or other inflammable matter calculated to ignite adjoining or neighboring property, they would be guilty of negligence; and the fact that they had in use such machinery, &c., as was in common and general use and had been approved by experience, would not relieve them."

In response to the request of the plaintiffs' counsel, the jury were further directed:

1. "If the defendants' mill, situated in the heart of the city, frequently emitted live sparks, which, blown by the wind, fell on neighboring property in a condition likely to ignite, it was negligence in them to operate the mill without curing the defect, and if the mill could not be operated without the emission of sparks likely to ignite, they had no right to operate it at all."

2. "It was their duty to use sufficient appliances, such as spark-arresters, to prevent the emission of sparks, and if, previous to the fire, they had used such precautions and thereby secured safety to adjacent property, and they afterwards removed them, and the fire would not have occurred, but for the removal, this was negligence."

3. "If the plaintiffs' house was covered with old shingles when defendants erected their mill, and the house was endangered thereby, the law did not require the plaintiffs to remove the shingles, and in not removing them they were not chargeable with contributing negligence."

4. "If the plaintiffs' house was burned by the defendants, the burden is on them to exonerate themselves by showing that they exercised diligence to prevent mischief."

5. "If the running of the mill on this occasion was not such as to endanger adjacent property under ordinary circumstances, yet if at the time a gale at the speed of fifteen miles an hour was blowing and had been so blowing during the day, and thus such

property was exposed to greater peril from sparks or other inflammable matter, it was the defendants' duty to use additional, and, as compared with other times, extraordinary precautions, to the extent of stopping their mill for the day, or until the gale was over."

6. "If sparks came from the mill, as insisted by the plaintiffs, before the fire, it was the defendants' duty to know the fact and to use some efficient means to prevent their escape."

The exceptions to the charge, relied on here in argument, and nowhere specified in the record as necessary under the former practice, are to be examined and passed on, and these we now proceed to consider:

1. The first objection is to the general terms in which the principles of law are conveyed in the instructions, instead of declaring and applying the law to the facts in the different aspects in which they are presented in the testimony.

It is the duty of the judge to explain and adapt the law to any authorized findings which the jury may make upon the evidence, and this is the requirement of the statute (THE CODE, §413), which directed him, after stating the evidence, to "declare and explain the law arising thereon," as construed in *State* v. *Dunlop*, 65 N. C., 288, and *State* v. *Jones*, 87 N. C., 547.

But we do not think the charge obnoxious to the objection. The general rules laid down to guide the jury are appropriate to the testimony given in and both the testimony for the defence, consisting largely of the opinions of experts, being of necessity very general. The directions, if a correct exposition of the law upon an assumed state of facts, were such as would enable the jury to understand and apply it in arriving at a proper response to the issue of negligence.

2. Exception is taken to the instruction, number 4, that if the plaintiffs' house was set on fire from combustible material coming from the smoke-pipe of the mill, the burden of proving the use of proper care and diligence in exoneration devolved upon the defendants.

This instruction conforms to the rule laid down in *Ellis* v.

Railroad, 2 Ired., 138, and approved in *Aycock* v. *Railroad*, 89 N. C., 321, in these words: "Where the plaintiff shows damage resulting from the defendant's act (fire communicated from a passing train to property near the track), 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 some extraordinary accident which renders care useless."

The reason for the exception to the general rule that one required to allege must prove negligence, in the case of fire caused by steam engines, is thus stated in a late and valuable treatise: "All information as to the construction and working of its engines is in the possession of the company, as are also the means of rebutting the charge of negligence entirely in its power. An outsider can hardly be expected to prove that in the construction of the engine, or in the use of it, at the time the injury occurred, the company was guilty of negligence. He can only prove that his property was destroyed by one of the company's locomotives; and having done this, it is but proper to call on the defendant to show that he was not negligent, that he employed careful and competent servants, and that he had used the most improved appliances to *prevent the escape of fire from his engines.*" 1 Thomp. Neg., 153, par. 3.

This, says the author, is the ruling of the courts of England, of Missouri, Illinois, Tennessee, Wisconsin, Nebraska, Nevada, and perhaps Minnesota, while in numerous other states (in which this state is erroneously included), some further proof is required of the plaintiff.

3. A third and more serious complaint is made of the terms of the first instruction asked and given, in that, the jury were told that "if the mill could not be operated without this emission of sparks likely to ignite, they (the defendants) had no right to operate it all."

Considered by itself and as a separate proposition, the language would convey a meaning to which we are not ready to assent, that is, as a denial of the right to put up and run a mill

driven by steam, unless absolute safety against fire could be secured. But this is the concluding part of a single instruction, and must be interpreted in connection with what precedes and qualifies its import.

The charge in substance is, that if the mill in the midst of a city frequently sent out sparks which, carried by the wind, fell on neighboring property in condition to be readily set on fire, it was negligent to run the mill without curing the defect which allowed them to escape, and if the defect was irremediable and the combustible material must necessarily pass out and fall on buildings likely to be thus ignited, then the mill should not be run at all, that is, not run without the owners incurring the responsibility for consequences when a fire did occur. Thus understood, the direction is not erroneous, and is the direct result of the principle imparted in the maxim "*sic utere tuo ut alienum non lædas.*"

The jury had been before reminded of the absence of a spark-arrester, as a precautionary measure against accidental fires, in preventing the escape of large and flaming cinders, from which the principal peril comes, and which in the opinion of the experts was needless, while it interfered seriously with the draft required by the furnace; and the jury were told in substance that if the escape of flaming sparks, so imperiling the property of adjoining proprietors, could not be restrained, as seems to have been contended in exoneration of the defendants, they had no right to operate the mill; that is, not to operate it without being liable for the damages to others resulting from the fire thus communicated.

Taking the entire charge into consideration, with the parts to which objections are specially pointed, we think the law was fairly and fully explained, and the legal relations existing between those who may use steam as a motive force in a crowded city and those whose property may be exposed thereby to unusual perils, correctly stated, securing to the former all their just rights, and a reasonable immunity and safe-guard to the property of the

latter near by. The rule of responsibility may be stringent, but protection should be afforded against unusual dangers, by requiring the adoption of all reasonable means to prevent an injury.

We have not wandered over the many and conflicting rulings to be found in the reports of the different states, nor made a vain attempt of reconciling them upon a common basis, but we have preferred to pursue the line of decisions marked out in our own. There may be less use for a spark-arrester where coal is employed as a fuel, as we suppose it is used mostly in the states of the north and west, than in our own, where wood is employed from which larger ignited flakes of unconsumed material are poured out of the mouth of the pipe, but it would seem to be a reasonable requirement here, and so it was held in *Anderson* v. *Steamboat Co.*, 64 N. C., 399.

There is no error, and judgment must be entered for the plaintiffs, with costs.

No error. Affirmed.

JOSEPH J. NORRIS and others v. SAUNDERS EDWARDS.

Evidence—Presumption of death from continued absence, may be rebutted by declarations of deceased members of family.

Where evidence was received of the prevailing belief in one's family and of the general reputation in the neighborhood, from his protracted and continued absence, that he was dead, *it was held* that the declarations of his deceased wife, as to the fact of her receiving a letter from him since he left, are admissible to negative the force of the reputation of the death.

(*Clements* v. *Hunt*, 1 Jones, 400, cited and approved).

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

Verdict and judgment for plaintiffs; appeal by defendant.

Messrs. Strong & Smedes and *A. M. Lewis & Son*, for plaintiffs.

Messrs. Argo & Wilder, for defendant.

SMITH, C. J. The plaintiffs derive title to the land mentioned in their complaint by descent from their father, Joseph Norris, and the latter under a deed from Etheldred Jones, a former admitted owner, from whom the defendant also claims.

Joseph Norris, the ancestor, removed from the county of Wake, in which he was residing, in February, 1870, leaving his wife and the plaintiffs, then very young, the offspring of a previous marriage, who constituted his family, and has never returned.

To show his death, and that it occurred long anterior to the bringing the suit, besides relying on the presumption furnished by his protracted and continuous absence, the plaintiff Joseph was examined on his own behalf, and testified to the death of his step-mother in the year 1875 or 1876, and to the general belief prevailing in the family that the absent husband and father had died. This evidence, though objected to by defendant, was admitted.

A series of questions was then propounded by the defendant as to the wife's receiving in 1873 or 1874, a letter purporting to come, or which she said came, from her absent husband, and as to its contents, none of which designated the letter as genuine or in his handwriting, and they were disallowed.

The plaintiffs having examined another witness and shown a reputation in the neighborhood to the same effect, the defendant addressed to the witness the following interrogatory:

Have you ever heard the step-mother of the plaintiffs, the wife of their father, in her life-time say that she had received a letter from him since he left?

The question on plaintiffs' objection was excluded, and to this ruling the defendant's eighth exception, which we propose to examine, is taken.

Testimony had been received of the prevailing belief, in the family and from the last witness, of a general reputation in the neighborhood to the same effect, and assuming *belief*, if not synonymous with reputation, to be its necessary incident, the evidence rejected is manifestly of the same kind and rests upon the same principle as the evidence received. The declaration offered to be shown proceeds from the lips of the deceased wife, spoken during her life-time, and directly tends to negative or weaken the force of the reputation of the death, since he must have been living at the time when the letter was written; and her declaration, aside from what it contained, was admissible under the rule applicable to this kind of evidence.

The case does not disclose the grounds on which the evidence was refused, and it may have been upon the supposition that general reputation alone was competent, and not any special declaration made even by a deceased member of the family. But such is not the rule. Reputation, at least in matters relating to pedigree, is made and results from repeated personal utterances, and death may be proved by individual declarations of the fact when they come from any of the family who have themselves since died; and this when the relationship is by blood or marriage. The authorities to this effect are uniform. 1 Green. Evi., §103; 1 Tay. Evi., §582; 2 Phil. Evi., 188; Abb. Tr. Evi., 91; 1 Stark. Ev.., 604.

In *Reed* v. *Norman*, 8 C. & P., 65, it was proposed to put in evidence a letter, bearing the same date with the postmark, in the handwriting of the person whose death was in controversy, the daughter testifying that it was in answer to one from herself to her father, written about two months previous to its receipt. It was admitted; Lord DENMAN, C. J., remarking that "the very act of writing this letter shows that he must have been alive."

Thus declarations of deceased members of a family are competent, says NASH, J., "to prove relationship; as who was a particular person's grandfather, or whom he married, how many

children he had, or as to the time of the birth of a child" (*Clements* v. *Hunt*, 1 Jones, 400), and they are equally so as to one's death."

The evidence here proposed and refused was not as to what was contained in the letter, but as establishing the fact that the supposed deceased was and must have been living when the letter was written, and in consequent antagonism to the prevalent family report of his death and to the inferences drawn from his absence.

As this error enters into and invalidates the trial and entitles the defendant to have the issue submitted to another jury, we do not examine into the other exceptions and pass upon their sufficiency.

There is error. The verdict must be set aside and a *venire de novo* awarded, and it is so ordered.

Error. *Venire de novo.*

UNIVERSITY OF NORTH CAROLINA v. J. W. HARRISON and others.

Evidence—Escheat to University—Presumption of death from long Absence—Presumption of heirs.

1. The death of one who has been absent for seven years or more is inferred where it is shown that reasonable enquiry has been made of those most likely to hear from him if he were not dead, and that in the meantime he has not been heard from.
2. There is a presumption of the law that every person dying leaves heirs, however remote; and it is incumbent upon the University claiming land by escheat to rebut this presumption by proof founded upon such enquiry.
3. The testimony of a witness for plaintiff to the effect merely that for a long time he had not heard from the supposed deceased, or that he ever married and had children, is competent to go to the jury, upon an issue as to the death and existence of heirs, but does not raise a presumption that there are no heirs, requiring the defendant to combat it.

(*University* v. *Johnson*, 1 Hay., 373, doubted).

UNIVERSITY *v.* HARRISON.

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

Judgment for plaintiff, appeal by defendants.

Messrs. W. S. Mason, T. P. Devereux and *D. G. Fowle,* for plaintiff.

Messrs. J. H. Flemming, Battle & Mordecai and *Pace & Holding,* for defendants.

SMITH, C. J. The land described in the complaint and sought to be recovered was granted by the state in August, 1779, to Godfrey Hartsfield, who, four years thereafter, conveyed the same to Micajah Mickelroy, under whom the plaintiff claims by the law of escheat

To show the death and intestacy of the last owner, without heirs, one Henry Jett, examined as a witness for the plaintiff, and who had attained the age of ninety-three years, testified that he was raised by William Polk, whose residence was in the city of Raleigh, and while in his service had seen Micajah Mickelroy, then a grown man and thirty-five or forty years old, at his master's house, and that he moved away, since which witness had never heard from him, nor had he heard that Mickelroy ever married or had children or brothers. Another witness introduced in support of the plaintiff's title, one Burke McDade, who stated he was twenty-three years old, and had resided all his life within a mile of the land and six miles from Raleigh, testified that he had heard of Mickelroy; did not know where he lived; never heard of his having heirs, nor of his setting up any claim to the land; that one Dick Smith (for whom witness was overseer for about eleven years) for fifteen or twenty years had cut timber on the land, sold some of it, and that a few acres had been cleared, by whom he did not know, when he first became acquainted with the land.

This was all the evidence adduced to show the death of Mickelroy and that he left no heirs to succeed to the inheritance, beyond the fact that none had appeared to claim it.

The defendants asked the court to charge the jury "that there was no evidence that Micajah Mickelroy died without heirs," which was refused, and, instead, these instructions were given:

1. If Mickelroy has been absent and not heard from since the witness, now ninety-three years old, was a young man, or for more than seven years, he is presumed to be dead.

2. The burden is on the plaintiff to show that Mickelroy was the owner of the identical land in controversy, and that he died without issue or collateral heirs capable of inheriting.

3. If he is dead and the jury believe that no heirs or representatives have appeared to claim the land during this long period of time, this is presumptive evidence sufficiently strong upon which to infer the fact that there are no heirs.

The last charge, numbered 3, is not specifically made the subject of exception, but as it is given as a substitute for, and in response to an instruction asked and refused, it must be considered in association and as embodying a proposition the correctness of which is open to examination on the appeal. The responsive instruction might not be obnoxious to criticism, if intended only to leave the evidence to the jury, to be weighed by them in passing upon the enquiry whether the ancestor and last owner had died without any heirs to whom the inheritance could descend, and in determining its sufficiency to warrant the inference that there were none such; but it was accompanied with the declaration that the preceding facts stated raised presumptive evidence strong enough for the jury so to find the fact, thus devolving upon the defendants the burden of disproof, with this presumption in the scale against them to be met and overcome. Thus understood, the direction was erroneous, and, even if susceptible of another meaning, calculated to mislead the jury in arriving at their verdict.

The death of a person who has removed his domicil, or has been absent from his home for seven or more years, is inferred, where he has not meanwhile been heard from by those who would be expected to hear from him, if living. The mere

absence of evidence or report of his being alive is not alone sufficient to raise the presumption, but the absence of such information or report must appear by enquiring of relations, and if there are none, of those among whom he formerly resided, who would be most likely to hear from him if he were not dead. *Banning* v. *Griffin*, note *a*, 15 East, 293.

In *France* v. *Andrews*, 15 Adolph. & Ellis, 756, a witness thirty-eight years of age stated that he "had never known of the existence of his cousin, and was not aware of having any other relations now alive," and PATTERSON, J., said: "The mere lapse of time does not raise a presumption of death, unless you go further and show that the person has been absent and not heard of by those who would have heard from him if he had returned." In the same case COLERIDGE., J, expressed his opinion thus: "My doubt is whether there was reasonable evidence of enquiry in this case. Either the lessor of the plaintiff might have produced some person who would naturally have heard of the *cestui que vie*, if he was alive, or he might have called those who had made search for such person, and would have found him if he had existed." For the purpose of showing that the absent person has not been heard from, those should be called as witnesses, or a reasonable inquiry made among them without success should be proved. Abb. Trial Evi., 76.

But a more serious difficulty is to be met when it becomes necessary to show, besides the death, that the party left no heirs, lineal or collateral, to succeed to his estate. The presumption is not that an intestate died without, but that he left heirs to take his estate. The rule in such case is so forcibly laid down and explained by Senator VERPLANK, of the former court of errors in New York, in passing upon the case of *The People* v. *Fire Ins. Co.*, 26 Wendell, 218, that we prefer to reprodnce his remarks in place of comments of our own.

"What then," he asks, "is the evidence absolutely necessary to raise a presumption, or mere naked probability of the defect of heirs for the consideration of the jury, in the case of a claim

of escheated lands?" Then after a reference to a statute which directs that a title to real property by escheat shall be established by an action of ejectment, he proceeds:

"Now the great principle of the action of ejectment, as it is expressed by KENYON and ELLENBOROUGH, and adopted in all the text writers, English and American, is, that the party claiming must prevail by the strength of his own title, not by the weakness of that of his adversary. What degree of evidence is necessary then to make out any presumption of probability whatever, sufficient in the absence of opposing testimony to show the state's title by reason of defect of heirs, or to furnish any ground for a verdict in favor of the people? The ordinary rational, as well as legal presumption as to every person is, that he *must have some relations and consequently some heirs*, however remote, and whether known to him or not. From the natural laws of human descent and relationship, this must be so; and the necessary presumption must be that every citizen dying leaves some one entitled to claim as his heir, however remote, unless one or the other of the only two exceptions known to our law (alienage and illegitimacy) should intervene. * * * Proof of the fact of there being no known heirs of the deceased may well raise a presumption that for some unknown reason the inheritable blood had failed, provided such proof be direct and positive, founded upon enquiry, advertisements, personal family knowledge, or the actual declaration of the person last seized, or of those from whom his title descended. But can he with propriety go further than this and permit the natural and general presumption of kindred to be combated at all by proof of mere hearsay reputation?" Abbott Trial Evi., 75, 76.

This statement of the law seems to us to be correct, and the requirement that enquiries be made of those most likely to know whether there are any heirs capable of succeeding to the inheritance, before any presumption can arise that there are none, is eminently reasonable and proper.

Testing the facts given in evidence by this rule, they fall

short of its requirements. One witness who had heard of, but never seen the deceased, yet lived in the same neighborhood, does not appear to have made any enquiry to ascertain if he has any relations living from whom information might have been obtained, and gives testimony merely negative. Another witness residing several miles distant from that locality had seen the deceased at his master's table, and knew of his removal, many years ago. His testimony is that he had never heard of him since, nor whether he had ever married or had children or brothers, and this is equally negative.

The witness is not asked whether he has applied to the proper sources of information, or indeed made any enquiry even of persons who reside near the former residence of the deceased, nor whether there is any of his blood there still remaining.

Besides this, there is the only additional fact that no claimants of the land under the ancestor have made their appearance.

Now while this negative evidence is competent and perhaps sufficient to warrant the finding of the jury, it does not raise such a presumption that there are no persons capable of succeeding to the inheritance, requiring the defendants to combat it; but it was for the jury to consider and estimate its proper force in arriving at a verdict upon the issue before them. Indeed the presumption is the other way, and it rested upon the plaintiff to offer proof in overcoming it.

It is true, language almost identical with that contained in the instruction is used in the opinion in *University* v. *Johnson*, 1 Hay., 373, but it is an unsafe guide to follow, as a general rule, in determining upon an escheat. It was said in regard to a grantee, who, within a year or two after the issue of the grant in 1763, left the country intending to go to Ireland, and of whom nothing had been heard for more than thirty years, during which had occurred events which rendered the people of Ireland aliens and incapable of transmitting lands, owned by them in this state, by descent. Const. 1776, §40.

Such evidence would be much more cogent, under such cir-

cumstances, where it may be supposed those of the blood of the ancestor were residents of the same country with him, and thus excluded, by the disability of alienage, from succeeding to his real estate. The presumption would then be confined to heirs living and citizens of the government where the land was.

But independently of these peculiar incidents to that case, we cannot concur in a ruling so much at variance with the rulings since made and the sound reasoning upon which they rest for support. We think some reasonable effort should be made to ascertain whether there are survivors of the blood of the ancestor, before assuming that there were none such.

For the error pointed out, and without passing upon others assigned, the defendants are entitled to a new trial, and it is so adjudged. Let this be certified.

Error. *Venire de novo.*

HARDY JONES v. T. T. BOBBITT and others.

Evidence to rebut presumption of payment—Judge's Charge—Action for specific performance of contract.

In an action for specific performance of contract for the purchase of land, the plaintiff claimed he had paid the notes given for the price, but the defendant alleged that the plaintiff after paying a part took up the original notes by giving a new note for the balance. The plaintiff replied that the new note was for a consideration other than the purchase money, and put in evidence the original notes marked "settled" and "satisfied in full"; and it further appeared that for eighteen months after such settlement the plaintiff had failed to demand a conveyance of the land, and the defendant introduced no evidence; *Held*,

(1) The defendant was entitled to the instruction asked to the effect that there was some evidence to go to the jury to rebut the presumption of payment of the purchase money arising from the bare possession of the original notes.

(2) Where one party introduces evidence in support of his allegation, the opposite party is also entitled to the benefit of it as tending to support his counter allegation.

(*Boing* v. *Railroad*, 87 N. C., 360; *State* v. *White*, 89 N. C., 462, cited and approved).

CIVIL ACTION for specific performance of a contract tried at Fall Term, 1883, of GRANVILLE Superior Court, before *MacRae, J.*

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

Mr. J. B. Batchelor, for plaintiff.
Messrs. E. C. Smith and *Fuller & Snow*, for defendants.

MERRIMON, J. The action is brought to compel the specific performance of a contract in writing under seal, whereby the ancestor of the defendants agreed and obliged himself to convey to the plaintiff certain lands therein mentioned, upon the payment of the purchase money therefor by the plaintiff.

The plaintiff alleges that the purchase money has been paid, and this the defendants deny, averring that the plaintiff, at the time of the execution of the bond for title, executed three promissory notes for the purchase money; that he paid part thereof, and upon a settlement and ascertaining the balance unpaid, the plaintiff took up these notes and gave his other new one for the balance due; that this balance has not been paid, and remains due.

The plaintiff, in his replication, denies the allegations of the defendants, admits that on or about the day of the settlement of the notes for the purchase money, he executed to the obligor in the bond for title, his note, but not for the balance of the purchase money, and avers that the same was given for consideration other than the purchase money, and that no part of the same remains unpaid.

Upon the trial, the court submitted to the jury an issue involving the question whether or not the purchase money had been

paid. The evidence was meagre and unsatisfactory. We are not satisfied that all the purchase money had been paid.

The plaintiff produced in evidence on the trial the bond for title, and the three original notes given by him for the purchase money on which certain credits were entered. On the face of two of them were written the words, "settled, January 20th, 1880. Rufus Bobbitt, W. A. B." On the face of the third one, the words, "satisfied in full," were written, and this was all the evidence offered on the part of the plaintiff to prove the payment.

The defendant introduced no evidence, but contended that the production of the notes given for the purchase money simply raised a presumption of the payment of them by the plaintiff; that the admission in the verified complaint and replication of the plaintiff contributed to make evidence tending to rebut the presumption of payment; that the entry on the face of one of the notes, "satisfied in full," and on the other two, "settled, January 20th, 1880," the exact date of the note which the defendant alleged was given in settlement of the balance due upon them, and which the plaintiff admits was given on or about that day, but for other considerations; and that the delay to demand the title for eighteen months after the notes for the purchase money were "settled," and the failure to demand title at the date of such settlement, constituted some evidence to go to the jury to rebut the presumption that the purchase money was in fact paid, and prayed the court to so instruct the jury.

This prayer the court declined to give, but told the jury that the possession and production of the three notes for the purchase money by the plaintiff was presumptive evidence of their payment, and that the defendants have offered no evidence to rebut the presumption of payment, and that they should find the issue in favor of the plaintiff. Thereupon the defendants excepted. The jury rendered a verdict for the plaintiff, and the court gave judgment accordingly and the defendants appealed.

It is a plain principle of law, that if one party in an action,

in the introduction of evidence to support his allegations, introduces evidence to support the averments made by his adversary, the latter is entitled to the full benefit of it. Evidence received on the trial must have its legitimate weight and effect upon the matter in question, without regard to the party offering it. The object of the law is to ascertain the truth, and to base its judgments and decrees thereon.

We do not concur with the court in holding that there was no evidence to go to the jury, tending to rebut the presumption of payment arising from the bare possession of the notes given for the purchase money. It may well be that these notes were in fact discharged, or rather taken up, by another note of the plaintiff. This would not be such a payment of the purchase money for the land as would entitle the plaintiff to have title therefor. In order to obtain title, he must have paid the money or other valuable thing in lieu thereof. His renewed promise to pay was not sufficient, and the real enquiry presented by the pleadings in this case was, did the plaintiff pay the cash money, or its equivalent in discharge of the notes for the purchase money he "settled" and took up, or did he give for them his own other note? This issue, it seems to us, was not well tried, and we think there was *some evidence* to go to the jury tending to show that the money was not in fact paid.

The presumption of fact of payment was not a strong one, in view of the ambiguous meaning of the word "*settled*" written on the face of two of the notes, with this uncertainty increased by the words "*satisfied in full*" written on the face of the third one. These facts of themselves are very suggestive, and produced doubt upon our minds as to how the notes for the purchase money were "settled."

The evidence must be taken with the circumstances going to control its weight. The ambiguous word "settled," upon the face of the note, might not of itself be evidence at all to rebut the presumption; but when it is taken in connection with the words "satisfied in full," strength is added to it,

and when to this is added the other fact that the plaintiff delayed demanding title to the land for eighteen months, leaving the facts as to the execution of a new note on the day of the *settlement* of the notes for the purchase money out, because they were not introduced as evidence, we think there was some evidence to go to the jury tending to rebut the presumption.

If the facts and circumstances mentioned, and treated by the court as *no evidence*, had gone to the jury, and, in view of the character and slight weight of all the evidence, and the presumption of fact under the circumstances of the entries on the face of the notes, they had found a verdict for the defendants upon the question of payment, such finding could not be treated as absurd, or altogether unreasonable and not to be allowed by the court. If there was evidence at all, the defendants were entitled to have it go to the jury for what it was worth, and if the facts and circumstances constituted some evidence, however slight, the court ought to have told the jury so, and to give such weight to it as they might deem just. *Boing* v. *Railroad*, 87 N. C., 360; *State* v. *White*, 89 N. C., 462; *State* v. *James*, decided at this term.

We think there was some evidence to rebut the presumption of payment in the sense of the issue submitted, and the court ought to have so instructed the jury.

There is error for which the defendants are entitled to a new trial. Judgment reversed, and a new trial awarded. Let this be certified.

Error. *Venire de novo.*

B. A. BERRY v. A. G. CORPENING, Adm'r.

Statute of Limitations—Executors and Administrators—Motion for leave to issue execution.

1. The statute of limitations may be set up as a defence by an administrator to a motion for leave to issue execution after ten years from the date of

docketing a judgment against his intestate; and this, although executions have regularly been issued within each successive period of three years after the judgment was docketed.

2. The statute of limitations relates only to the remedy, and the defendant is never afforded an opportunity of relying upon it until the plaintiff resorts to his remedy, either by action on the judgment, or motion in the nature of *scire facias* to revive it.

(*McDonald* v. *Dickson*, 85 N. C., 248; *Williams* v. *Mullis*, 87 N. C., 159, cited and approved).

MOTION to make the defendant a party to a judgment against the defendant's intestate, and for leave to issue execution against him, heard at Spring Term, 1883, of BURKE Superior Court, before *Gudger, J.*

The motion was made before the clerk of the superior court, and the judgment upon which leave to issue execution was asked was rendered before a justice of the peace in favor of the plaintiff against J. B. Kincaid, executor of M. W. Kincaid, on the first of February, 1871, and docketed in the superior court on the 8th day of the same month. J. B. Kincaid died without finishing his administration, and the defendant A. G. Corpening was duly appointed administrator *de bonus non* with the will annexed of the said M. W. Kincaid.

Notice of the motion was issued and served on the defendant on the 11th day of May, 1882, more than ten years after the docketing of the judgment.

It was admitted that executions upon the judgment had been regularly issued within each successive period of three years after the judgment had been docketed.

The defendant resisted the motion and filed a written answer in which he relied upon the statute of limitations, alleging that more than ten years had elapsed after the rendition as well as the docketing of the judgment.

The motion was refused by the clerk, and the plaintiff appealed to the superior court, where his ruling was reversed and the execution ordered to issue, and from this judgment the defendant appealed to this court.

Messrs. Reade, Busbee & Busbee, for plaintiff.
No counsel for defendant.

ASHE, J. The motion before the clerk was to make the defendant a party to the judgment, and for leave to issue execution against him.

In *McDonald* v. *Dickson*, 85 N. C., 248, it was held that a motion for leave to issue execution after the lapse of three years, was in lieu of and a substitute for the ancient writ of *scire facias*, and it must be treated as such, and the same protection extended to parties thereunder as was done under the use of that writ.

The *scire facias* was either an original writ, or a writ to repeal letters-patent, or a process to continue an action pending, and for the latter purpose was used to revive a judgment upon which no execution had issued for a year and a day; because, at common law, a presumption arose from a plaintiff's delay, beyond a year, that his judgment had either been satisfied, or for some supervening cause ought not to be allowed to have its effect. And whenever it was sought to fix a party in a judgment given against another, who was not a party to the record, as the heir, executor, or administrator, though it be *within the year*, the plaintiff could not take out execution, but had to resort to a *scire facias*, to show cause why an execution should not issue. "Resort to the *scire facias*," says FOSTER in his work on Scire Facias, page 101, "was only for the specific purpose of making the judgment and execution consistent with each other, since otherwise there would be judgment against A and execution against B, which would render the judgment absurd and inconsistent; but the *scire facias* makes the record technically correct, and the party has the opportunity of *contesting whether he is really liable to the execution or not.*" And to that end he may plead anything which has been done, under the original judgment, which exonerates him from liability, provided it be matter which might not have been set up as a defence to the original action; for example, *nul tiel record*, release, payment,

that the debt and damages were levied on a *fi. fa.;* that his person was taken in execution on a *capias ad satisfaciendum, Ib.*, 305; or, he may plead the statute of limitations, *Ib.*, 30; and *McDonald* v. *Dickson*, *supra*, where it was expressly held by this court, upon the last authority, that the defendant may plead the statute of limitations in a motion for leave to issue execution, in analogy to the practice on writs of *scire facias.*

There is nothing in that decision which militates against the doctrine laid down in *Williams* v. *Mullis*, 87 N. C., 159. There, it is held that an execution may be issued after the lapse of ten years from the date of docketing the judgment, when the judgment has been kept alive by the issuance of executions within each successive period of three years after its rendition. The ground of that decision was that the statute of limitations acts merely upon the remedy, and where there is no remedy resorted to by the plaintiff, either by an action upon the judgment or a motion in nature of a *scire facias* to revive it, the defendant is never afforded the opportunity of relying upon the statute for his protection.

The legislature has prescribed ten years as the limitation to an *action* upon a judgment (THE CODE, §§151, 152), but it has made no provision for a party to avail himself of its protection when there is no action or proceeding in nature of an action taken against him.

This view of the matter, we are aware, presents the anomaly of a case, where, under certain circumstances, executions may be issued upon a judgment against a defendant so long as he lives; but when he dies, his administrator may exonerate his estate from liability thereto by setting up a defence that was not permitted to his intestate; but such a result is the logical sequence from the well established doctrine that the statute of limitations relates only to the remedy. *Sturges* v. *Crowninshield*, 4 Wheat., 122; Wood on Limitations, 26.

There is error, and the judgment of the superior court is reversed.

Error. Reversed.

B. F. MORTON and another v. JOSEPH BARBER and another.

Statute of Limitations—Homestead—Reversionary Interest.

The statute of limitations does not run against a debt owing by a homesteader during the existence of his interest in the homestead, provided the same has been actually laid off; and then only as to debts affected by the allotment, that is, judgments docketed in the county where the land is situate and solely with reference to the lien of such judgments upon the reversionary interest. (This proceeding is governed by Bat. Rev., ch. 55, §26, but that statute is not brought forward in THE CODE of '83; see also, opinion in *Mebane* v. *Layton*, 89 N. C., pp. 400, 401).

(*McDonald* v. *Dickson*, 85 N. C., 248, cited and approved).

MOTION for leave to issue execution, heard at Fall Term, 1883, of ALAMANCE Superior Court, before *MacRae, J.*

This was an appeal from the order of the clerk granting leave to issue execution upon a judgment rendered by a justice of the peace in favor of the plaintiffs for twenty-two dollars and fifteen cents and costs, on the first day of March, 1869, and docketed in the superior court on the 22d day of May, 1869, upon a transcript from the justice.

On the said 22d day of May, executions issued on the judgment from the superior court, together with other executions from the same court, and docketed at the same time.

Under the execution against the defendants Barber and Rippy, the sheriff proceeded to have the homestead and personal property exemption of defendant Barber appraised and set apart, and after allotting homestead and exemption, a schedule of which was a part of his return, there was no property of defendant Barber liable to satisfy said executions.

The plaintiff Iseley assigned his interest in said judgment to one J. R. Ireland, and sometime thereafter died.

On the 22d day of March, 1879, the said J. R. Ireland in his own behalf, and defendant Morton as his authorized agent, made the affidavit required by statute, that said judgment had

not been paid, and more than three years had elapsed since execution issued, and asked leave for execution to issue.

Thereupon notice was issued to the defendants, as required, and they appeared in obedience thereto and filed answer, setting up irregularity in the rendition of the judgment by the justice of the peace. Upon the hearing the clerk granted leave to issue execution, from which the defendants appealed to the superior court in term. In that court the judgment of the clerk was reversed, at fall term, 1880, upon the ground that the judgment rendered by the justice was "void and of no effect."

From that judgment the plaintiffs appealed, and at January term, 1881, of this court the judgment of the superior court was reversed upon the ground of "the want of authority in the superior court to entertain the enquiry into the proceedings had before the justice of the peace for the purpose of vacating his judgment, or annulling the force and effect of the transcript upon which it was docketed, for any of the reasons assigned." *Morton* v. *Rippy*, 84 N. C., 611.

Then at the fall term, 1883, of the superior court the motion was again made, before *MacRae, J.*, for leave to issue execution, and it was refused because of the lapse of time (ten years from the docketing the judgment to the time this motion was made), from which judgment the plaintiffs appealed.

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

ASHE, J. The only exception taken below to the ruling of His Honor was, "that the statute of limitations did not run in favor of Joseph Barber after the allotment of his homestead and personal property exemption by the sheriff in 1869, under execution issued upon this judgment in favor of the plaintiffs."

The decision in *McDonald* v. *Dickson*, 85 N. C., 248, is decisive of this case. There, as here, the plaintiffs contended that the case was saved from the bar of the statute by virtue of the act of 1869–70 (Bat. Rev., ch. 55, §26), which declares it to

be unlawful to levy and sell under execution the reversionary interest in lands included in a homestead, until after the expiration of the homestead interest therein, and provides "that the statute of limitations shall not run against any debt owing by the holder of the homestead affected by this section, during the existence of his interest therein."

This court held that the provisions of that act were only intended to apply where the homestead had been actually allotted, and only as to the debts affected by such allotments, *i. e.*, to judgments docketed in the county where the homestead land is situated and *solely with reference to their liens upon the reversionary interest in such lands.*

For any other purpose than that of allowing a judgment creditor to issue his execution and sell the land allotted for a homestead after the termination of the homestead, the statute is still a bar.

Section 26 of chapter 55 of Battle's Revisal is not brought forward in THE CODE, but this proceeding was commenced before THE CODE went into operation, and is therefore not affected by it (§3868). There is no error. The judgment of the superior court is affirmed.

No error. Affirmed.

POPE & McLEOD v. JAMES ANDREWS.

Statute of Limitations—Letter—Evidence—Written acknowledgment of debt.

1. The plea of the statute of limitations should set out the *facts* upon which the defence is grounded. An averment that a demand is barred, is but stating a conclusion of law.

2. Where a suit had already been commenced to recover an amount alleged to be due upon an account, and the defendant set up the statutory bar as a defence, but wrote a letter to the plaintiff's attorney stating that, if he

would take five hundred dollars in satisfaction, judgment might go against him at court; *Held*, that the letter is an admission and assumption of the debt to the specified amount ($500), and operates to remove the bar to the recovery of the same.

(*Moore* v. *Hobbs*, 79 N. C., 535; *Boyden* v. *Achenbach*, *Ib.*, 539; *Humble* v. *Mebane*, 89 N. C., 410; *Falls* v. *Sherrill*, 2 Dev. & Bat., 371; *McCurry* v. *McKesson*, 4 Jones, 510, cited and approved).

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

Judgment for plaintiffs; appeal by defendant.

Messrs. Rowland & McLean, for plaintiffs.

Messrs. T. A. McNeill and *Frank McNeill*, for defendant.

SMITH, C. J. The plaintiffs sue upon an account made up from a series of items contracted during the period from May 31st, 1877, to April 10th, 1880, and in their complaint demand the lesser sum of five hundred dollars. The answer denies the indebtedness altogether, and the defendant says: "For a further defence the defendant says that plaintiffs' alleged cause of action is barred by the statute of limitations."

Two issues were submitted to the jury, the first in respect to the indebtedness, to which an affirmative response is rendered, and the second interrogatory, in the form in which the answer sets up the defence under the statute, to which a negative response is returned.

Upon the trial, besides evidence to prove the indebtedness and the defendant's liability therefor, the plaintiffs introduced, for the double purpose of showing an admission of the sum demanded and of removing the statutory bar, and read in evidence a letter from the defendant addressed to the plaintiffs' attorneys in whose hands the claim had been placed, and bearing date April 13th, 1882, three days after the action had been instituted, as follows:

APRIL 13th, 1882.

Messrs. ROWLAND & MCLEAN, Dear Sirs: You will please allow my son Nathan the 39 acres I let him have, in addition to

what you have got in the complaint: and in order to settle the Pope & McLeod account against me which you have for collection, if you will take five hundred dollars in satisfaction of it, you can take judgment against me for that amount, and have it entered up court week, so I will not have to come to court.

(Signed) JAMES ANDREWS.

Witness: NATHAN D. ANDREWS."

This letter was carried by the subscribing witness, Nathan D. Andrews, a son of the defendant, to the attorneys, and he further testified that he told his father that he had been informed by the plaintiff McLeod that the firm had brought suit on an account for $662 and some cents, and witness asked if they would accept $500 in settlement, and they had so agreed; that he thereupon asked the defendant if he would sign an agreement to pay $500, and defendant answered he could not pay it at once, it would ruin him; and witness said that McLeod had told him that defendant could have his own time to pay it in. Witness further testified that when he delivered the letter to the plaintiff McLeod the proposition was accepted for the firm.

This testimony, as well as the admission of the letter in evidence was objected to, but the exception is not pressed, and we see no ground upon which the ruling can be impeached. The only exception needful to be considered is to the charge of the court in reference to the second issue. The instruction is:

"If the jury believe that James Andrews agreed in writing on the 13th day of April, 1882, to submit to a judgment for five hundred dollars, which offer was accepted by the plaintiffs, their cause of action is not barred by the statute of limitations, that is, if the defendant was originally indebted on the account to the plaintiffs. If he owed nothing, then his offer to permit judgment for five hundred dollars to be entered against him was without consideration and void."

We have before averted to this insufficient manner of setting up the effect of the lapse of time as an impediment to the suit.

The averment that the demand is barred by the statute is but stating a conclusion of law, and not the facts from which it is deduced. This is neither in conformity to the former nor the present mode of pleading the defence. As the complaint must contain a statement of the facts out of which the action springs, as held in *Moore* v. *Hobbs*, 79 N. C., 535, there would seem to be the same reason for requiring the answer to state those upon which the defence depends. *Boyden* v. *Achenbach*, 79 N. C., 539; *Humble* v. *Mebane*, 89 N. C., 410.

But as no exception is taken and the jury have passed upon the issue, we proceed to examine the exception to the charge upon this point.

The argument here is that the acceptance of the offer contained in the letter is an extinguishment of the pre-existing cause of action, and constitutes itself a new one in its place; and the present suit, preceding it, cannot be maintained. If this were so, there could be no breach until the defendant interposed and prevented the rendition of judgment, for this was the assumed undertaking of the defendant.

But the case does not present this aspect. The proposition is to settle *the claim* in the hands of the attorneys, and then in suit, by submitting to a judgment for the sum mentioned, and is a plain and manifest acknowledgment of liability for it, and *pro tanto* displacing the statutory bar to the claim. The statute, C. C. P., §51, which declares that no acknowledgment or promise shall be received as evidence of a new or continuing contract whereby, &c., is a virtual affirmation of the sufficiency of such acknowledgment or promise when in writing, to repel the statute and *continue in force the preceding obligation of the contract*, and such is the effect ascribed to the defendant's communication and offer. This retroactive operation of a new promise upon the former contract is decided in *Falls* v. *Sherrill*, 2 Dev. & Bat., 371.

The requirement of the rule which restores vitality to a promise and repels the statute, is, that it "must be a promise," in the

words of BATTLE, J., "to pay the debt sued on, either express or implied, and the terms used must be certain in themselves, or must have sufficient certainty to give a distinct cause of action by aid of the maxim "*id certum est quod certum potest reddi.*" *McCurry* v. *McKesson*, 4 Jones, 510. The letter is a distinct admission of the debt and an assumption of it to the specified amount. It was, therefore, operative in removing the statutory bar to so much of the original demand then in action.

The exceptions to the evidence are untenable, and indeed have not been pressed upon the hearing in this court.

We have not considered the effect of a part payment on the account in the delivery of cotton in the fall of 1879, under the last clause of section 51 as a recognition of liability, since in the view we have taken it is unnecessary to do so.

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

No error. Affirmed.

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*G. W. LONG, Adm'r, and others v. BANK OF YANCEYVILLE and others.

Statute of Limitations—Bank, personal liability clause in charter of.

1. The three year statute of limitations begins to run, against an action to enforce the personal liability of stockholders of a bank under a clause in its charter, from the date the bank suspends specie payments; and this, whether the assets of the corporation are exhausted in payment of debts, or not.
2. The liability of the stockholders arises when the bank refuses or ceases to redeem its bills and is notoriously and continuously insolvent.

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

CIVIL ACTION tried at Fall Term, 1883, of ALAMANCE Superior Court, before *MacRae, J.*

Judgment for defendants; appeal by plaintiffs.

Mr. E. S. Parker, for plaintiffs.

Messrs. Graham & Ruffin, for defendants.

SMITH, C. J. In the act incorporating the Bank of Yanceyville and under whose provisions it was formed and put in operation, is contained the following clause:

In case of any insolvency of the bank hereby created, or ultimate inability to pay, the individual stockholders shall be liable to creditors in sums double the amount of stock by them respectively held in said corporation. Acts 1852-'53, ch. 8, §12.

The present suit, instituted on December 30th, 1872, is prosecuted on behalf of the creditors of the bank against the defendants, who are a portion of the stockholders, to enforce this personal statutory obligation and to collect what is due from each, to constitute a fund to be applied to the debts of the insolvent corporation.

It is admitted that the bank suspended specie payments on December 15th, 1860, and has never since resumed, nor been able to redeem its bills and meet its liabilities in coin.

Upon these facts the court ruled that, more than three years having elapsed since the suspension of the bank before the commencement of the suit, eliminating from the count of time the period during which the operation of the statute of limitations ceased, the statutory bar had interposed and the plaintiffs could not recover.

From the judgment rendered in favor of the defendants the plaintiffs appeal, and present the ruling for our review and determination.

When this case was before us on a former appeal, *Long* v. *Bank*, 81 N. C., 41, in reference to this defence we used this language:

"In *Perry* v. *Tubman*, 92 U. S. Rep., 156, the supreme court of the United States held that the statute began to run against the action to enforce the personal liability of the stockholders '*when the bank refuses or ceases to redeem and is notoriously and continuously insolvent, and this* may be before the assets of corporation are applied and exhausted.' This point of time is not fixed in the present case, and it may be very difficult to fix it, unless the rule adopted in *Godfrey* v. *Terry*, 97 U. S. Rep., 171, be applied, which determines the insolvency by the date of suspension of specie payments, a doctrine announced by a majority of the court and opposed by a strong and forcible dissent of others."

In *Perry* v. *Tubman*, *supra*, the clause in the charter of the Bank of Augusta, Georgia, upon which the suit was predicated, is not unlike that before us, in providing "that the individual property of the stockholders in said bank shall be bound for the *ultimate redemption* of the bills issued by said bank, in proportion to the number of shares held by them respectively." In answer to the suggestion that the resources of the corporation should be first exhausted before having recourse to the remedy against the stockholders, the court say: "The case is not so much like that of a guaranty of the *collection* of a debt where the previous proceeding against the principal debtor is implied, as it is like a guaranty of *payment* where resort may be had at once to the guarantor without a previous proceeding against the principal."

In *Carroll* v. *Green*, decided at the same term, the provision in the act incorporating the Exchange Bank of Columbia declares the stockholders liable individually in sums not exceeding three the amount of their several shares "in case of the failure of the bank," and Mr. Justice SWAYNE, delivering the opinion of the court, says: "The liability gave at once the right to sue, and by necessary consequence the period of limitation began at the same time." The court adopted the time specified in the report of the master as the period of failure, instead of the date of

suspension, because, while the result would be the same, the proof was that if the bank "had been put in liquidation on February 1st, 1865, it could then have met all its liabilities and redeemed its outstanding bills in specie or its equivalent," and that was the month in which the report finds the insolvency to have been reached.

In *Godfrey* v. *Terry, supra*, the clause in the Merchants' Bank of South Carolina at Cheraw, where the stockholders were made responsible "in case of the failure of said bank" as in the preceding case, the master fixed the date of failure on March 1st, 1865, while it was agreed that the bank suspended specie payments in November, 1860, and never resumed. Mr. Justice MILLER, speaking for the court, announces as the conclusion arrived at, "that the bank failed, within the meaning of the clause of its charter, in November, 1860," and the statute was a bar protecting those who were the stockholders.

It is also declared that the sanction of the legislature given to the suspension, merely relieved the bank from pains and penalties thereby incurred, but "it could not relieve them from the obligation to pay their debts in specie nor extend the time for such payment."

And again, if the bank had resumed soon after suspension, "and had paid or offered to pay all its indebtedness in specie, there would have been no question of the liability of stockholders, nor any question of failure. But since it never did pay or offer to pay these obligations, *it was ever afterwards insolvent and its failure must bear date of this first* and continued refusal and inability to pay."

The same question again came before the same court in *Terry* v. *McLure*, 103 U. S. Rep., 442, upon the construction of a similar provision in the charter of the Bank of Chester, and Mr. Justice MILLER affirms the former rulings, and says that the allegations of the bill, the answers of the defendants, and the evidence "all show that the suspension of specie payments took place on the 27th day of November, 1860, and that the

statute of limitations of four years of the state of South Carolina, applicable to such cases, bars the complainant's right of recovery."

We cannot distinguish the present case from those adjudications, and we accept their interpretation of the force and effect of such imposed statutory responsibility upon individual shareholders, and its duration.

In our opinion, the suit could have been brought, as soon as the corporation became insolvent, against it and the stockholders jointly, in order to secure the appropriation of its assets to its debts and other corporate liabilities, and then an assessment upon the stockholders within the limits of their obligation, to make up the deficiency to the creditors.

As the suit at law would have been barred, the same claim asserted in equity would be also barred, and as both the bank and its stockholders were alike exposed to the suit, the statute would run in favor of each.

Without entering upon the consideration of any other grounds assigned for the ruling in the court below, we sustain it upon the authority of the cases cited. The judgment is affirmed.

No error. Affirmed.

DAVID WORTH v. COMMISSIONERS OF ASHE COUNTY.

Taxation—Stock in Foreign Corporation.

1. Shares of stock in a foreign corporation are personal property, and when the owner lives in this state, are taxable here.

2. The laws of this state are paramount here, and all of its citizens are subject to them without regard to the laws of any other state; *Hence*, a resident of this state who may have all his money invested in stock of corporations in another state and subject to tax there, is liable to tax under the laws here. The tax is regarded as a tax upon the owner on account of his ownership, rather than upon the shares of stock.

(*Worth* v. *Com'rs*, 82 N. C., 420; *Redmond* v. *Com'rs*, 87 N. C., 122, cited and approved).

CIVIL ACTION tried at Fall Term, 1883, of ASHE Superior Court, before *Graves, J.*

In this case the plaintiff, a resident of this state, asks that the defendant commissioners and their agents be restrained from collecting taxes upon his stock held in the bank of Abingdon, a corporation formed under an act of the legislature of the state of Virginia, and doing business in that state. The plaintiff alleges that the stock of the bank is taxed in Virginia for state and county purposes there, and that the same has been placed on the tax list here, and the sheriff threatens to collect the tax. The defendants demurred to the complaint, the court sustained the demurrer, and the plaintiff appealed.

Messrs. Q. F. Neal and *T. M. Argo*, for plaintiff.
Attorney General, for the state.
Mr. J. W. Todd, for the county.

SMITH, C. J. The case presented by the demurrer to the plaintiff's complaint differs in no essential particular from that before us on the defendants' appeal between the same parties and upon the same subject matter, and decided at January term, 1880 (*Worth* v. *Commissioners of Ashe*, 82 N. C., 420). The conclusion then reached, after a careful and full examination of the authorities, and reflection, that the plaintiff's shares of stock in the Bank of Abingdon, a corporation formed under the laws of Virginia and there doing business, were liable to taxation under the laws of this state, the power to enact which was vested in the general assembly, must control the decision in the present case, for it is of the utmost importance that the law, when declared after deliberate and careful examination, should remain undisturbed, unless a palpable error is seen to have been committed, and it is likely to lead to disastrous results.

Since that decision, our attention has been called to the case of *Dyer* v. *Osborne*, 11 R. I., 321, which is so fully in accord with our ruling that we shall make a brief extract from the

opinion of the Chief-Justice therein delivered as the opinion of the court. The defendant there contested his liability to taxation in Rhode Island, where he resided, on stock which he held in certain corporations formed and operating under the laws of Massachusetts, and in that state, where all the stock was already taxed.

The court declared that in the light of the cases cited and reviewed, the state of Rhode Island has jurisdiction to tax the defendant's stock, "by having jurisdiction over the owner, the tax being in fact a tax upon the owner on account of ownership, rather than upon the shares themselves."

In reference to the tax imposed in Massachusetts the Chief-Justice proceeds: "The laws of Rhode Island are paramount in Rhode Island and all the inhabitants of the state are subject to them without regard to the laws of any other State. * * * It would certainly be going too far to hold that a man of wealth living in Rhode Island cannot be taxed at all, if his property is invested in the stocks of a manufacturing corporation of another state and there subject to taxation."

There is nothing repugnant to this in the ruling in *Redmond* v. *Commissioners*, 87 N. C., 122, where it is held that notes and other securities belonging to a non-resident, but in the hands of an agent here employed to manage them for his principal, and having an office here to perform the functions of his agency, are taxable. The *funds themselves* being here and in the hands of a trustee are declared to be subject to the taxing power, as would be personal property in a different form, belonging to a non-resident owner. The *situs* of the securities, thus detached from the owner, is that of the agent who has and manages them.

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

No error. Affirmed.

WILLIAM NEAVES v. NORTH STATE MINING COMPANY.

Agency—Corporations—Statute of Frauds.

1. A draft signed by an agent is a sufficient memorandum of a contract to fulfill the conditions of the statute of frauds, and binds the principal, though the name of the latter does not appear in the instrument. The authority of the agent may be shown *aliunde*, and such authority need not be in writing.

2 Therefore, where an agent of a corporation agreed to buy land and deliver drafts to the vendor, which were drawn by one of its officers and endorsed by said agent, and a deed was thereupon executed to the company, but the drafts were protested for non-payment; *Held*, in an action by the vendor to recover the purchase money, that the company is bound by the contract.

(*Mizell* v. *Burnett*, 4 Jones, 249; *Green* v. *Railroad*, 77 N. C., 95; *Oliver* v. *Dix*, v. *Hooker*, Phil. Eq., 193, cited and approved).

1 Dev. & Bat. Eq., 158; *Washburn* v. *Washburn*, 4 Ired. Eq., 306; *Phillips*

CIVIL ACTION tried at Fall Term, 1883, of ASHE Superior Court, before *Graves, J.*

On the first day of October, 1881, the plaintiff in person and the defendant corporation, through one R. M. Eames, its duly authorized agent, entered into an agreement for the sale by the former of certain mineral interests in land owned by him to the latter for five hundred dollars, the title to be made and the purchase money to be paid at once in consummation of their respective contracts.

Instead of a payment in money, the said agent delivered to the plaintiff five several drafts, each in the sum of one hundred dollars, drawn by one William Brandreth (an officer of the defendant), upon the East River National Bank of New York, payable to and endorsed by the said agent, with the assurance of their being accepted and paid out of the funds then on deposit, and thereupon the plaintiff executed and delivered a deed (conveying said mineral interests to the company) to the said agent, which was accepted, and has been duly proved and registered.

The several drafts were presented at the bank and protested for non-payment, of which notice was given to the defendant.

The present action was then instituted to recover the purchase money aforesaid, specified in the drafts, and the defendant denies having made a contract with the plaintiff, and offers, upon a surrender of the drafts, to reconvey the premises to the plaintiff.

Upon these facts the court directed judgment to be entered for the plaintiff, and the defendant appeals.

Mr. J. W. Todd, for plaintiff.
Messrs. Q. F. Neal and *D. G. Fowle*, for defendant.

SMITH, C. J., after stating the above. The appellant relies upon the statute of frauds as a defence to the action, and the only question is, whether the drafts, as containing written evidence of the defendant's contract, are a sufficient compliance with its requirements.

The statute in this state not differing in this particular from the English act of 29 Char. II, declares that contracts of the kind specified "shall be void and of no effect, unless such contract or some memorandum or note thereof shall be put in writing, and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized. THE CODE, §1554.

The entire agreement is not required to be put in writing, but only the contract of the party against whom its stipulations are to be enforced, and it is sufficient if there be a written memorial of this, from which its terms can be seen, although the contract itself when made was verbal only. This has been held where the recitals were contained in a letter and proof could be made without resort to parol testimony. *Mizell* v. *Burnett*, 4 Jones, 249; *Green* v. *Railroad*, 77 N. C., 95.

Nor is it necessary that the consideration of the undertaking should be in writing, and when necessary it may be shown by evidence *aliunde*.

It is moreover a compliance with the statutory demand that the contract of the vendee is put in the form of a note or other personal security given for the purchase money.

In *Mizell* v. *Burnett, supra*, PEARSON, J., makes this exposition of the law:

"The statute provides," he remarks, "that the contract shall be signed by the party to be charged therewith. This answers the purpose, which is to exclude perjury in an action to enforce the contract. In reference to the other party the statute is silent, and there is consequently nothing to justify the construction that he is also required to sign. If the purchaser of land pays the price in cash, taking the bond for title, there is no reason why he should put his signature to the contract. So, if he gives *a note for the price, that is sufficient, although the note makes no reference to the contract.*"

The transaction from its inception to the delivery of the drafts was exclusively between the parties to the action, the deed was made to the company and accepted by it, the drafts were a means of payment by the defendant of the price of the property conveyed, and they were put in that form by its agents for its benefit and with its sanction.

Is this a sufficient memorandum of the defendant's contract to bind it within the meaning of the statute? This is the only point raised on the appeal.

It does not admit of question that all the elements of the defendant's contract necessary to be in writing are to be found in the drafts, and the only difficulty arises out of their being in the form of personal securities of the persons who draw and endorse, and which upon their face have no apparent connection with the company for whom they were then acting, and under ample authority. This objection, however, we think, has been removed in the construction put upon the words of the statute by former adjudications.

In *Oliver* v. *Dix*, 1 Dev. & Bat. Eq., 158, Chief-Justice RUFFIN says: "Within the statute, the signature need not be *that of the principal, nor in his name*, but that of the agent is sufficient."

These words are adopted as a correct expression of the law by NASH, J., in *Washburn* v. *Washburn*, 4 Ired. Eq., 306, and again in *Phillips* v. *Hooker*, Phil. Eq., 193, where BATTLE, J., in answer to the objection that the contract was that of the agent only and did not bind the principal, says: "We think otherwise. It is true that the note or memorandum of the contract does not expressly state that Amos Harvey was the agent of the defendant, or that he was acting as her agent, but it does sufficiently appear by implication that he was so acting, for he says: 'I do agree for Mrs. Hooker to make a deed,' which means she shall make a deed. This shows that Harvey was acting as agent, and then a signature in his name satisfies the requirement of the statute of frauds, as was expressly decided in *Oliver* v. *Dix*," and he adds: "Besides, it appears from the answer, that the defendant admitted the agency and ratified the contract of sale made by the agent, a circumstance which is also relied on in *Oliver* v. *Dix*, as having a binding effect upon the principal."

The statute does not require the party's own signature to the memorandum, in the words of a recent author, but allows it to be signed by "some other person thereto by him lawfully authorized."

So it is held that a member of a corporation is a competent agent under this clause to sign for the corporation or a partner for his firm. Browne Stat. Frauds, §367.

As the authority of the agent to act for his principal may be shown *aliunde*, and here the authority to do what was done is conceded in the case, so it is not necessary that the name of the principal or his relation to the transaction shall appear upon the writing itself, or in the form of the signature. It is sufficient, that the act was throughout for the principal, and with his full concurrence to make the memorandum, to fulfill the conditions of the statute and impose a legal obligation.

This proposition rests upon ample authority, as a few references will show.

In *Sanborne* v. *Flogler*, 9 Allen, 474, BIGELOW, C. J., declares

that an agent may write his own name and thereby bind his principal, and that parol evidence is competent to prove that he signed the memorandum in his capacity as agent.

"It is clear," says HOYT, J., "that the authority of the agent in such a case need not be in writing." *Dykes* v. *Townsend*, 24 N. Y., 57. Browne Stat. Frauds, §370*a*.

It is not necessary that the authority should be in writing. *Blood* v. *Hardy*, 15 Maine, 61.

The statute does not exclude parol evidence that a written contract for the sale of goods, purporting to be between the seller and buyer, was in fact made by the *buyer only as agent for another*. *Wilson* v. *Hart*, 7 Taunton, 295.

The agent's signature may be in his own name, no principal's name or fact of agency appearing in the memorandum, and *parol proof* will be admitted to show the agency and hold the principal. Browne Stat. Frauds, §370*b*.

To the same effect are *Johnson* v. *Dodge*, 17 Ill., 433; *Curtis* v. *Blair*, 26 Miss., 309; *McWharter* v. *McMahan*, 10 Paige (N. Y.), 386; *Champlin* v. *Parish*, 11 *Ib.*, 405.

The drafts then being drawn by an officer of the defendant and endorsed by another agent who conducted and undertook to consummate the negotiation, are admitted to be in the exercise of an agency and in legal effect the act of the company, whose operations are conducted by agencies, and as the sum contracted to be paid fully appears therefrom, it is the same as if the instruments were corporate acts in form, as they are in effect, and thus the statute is complied with.

There is no error, and judgment will be here entered in affirmation, with costs.

No error. Affirmed.

G. F. BASON, Trustee, v. KING'S MOUNTAIN MINING COMPANY.

Corporation, deed of, at common law and under the statute.

1. A deed of a corporation, the concluding clause being, In witness whereof the said corporation "has caused this indenture to be signed by its president and attested by its secretary, and its common seal to be affixed," with the signatures and seal, is properly executed as a common law deed.
2. The statute providing that the president and two other members of a corporation shall sign its deed conveying real estate (Rev. Code, ch. 26, §22), is an enabling act, and does not exclude the common law method.

EJECTMENT tried at Fall Term, 1883, of GASTON Superior Court, before *Gilmer, J.*

Defendant appealed.

Messrs. Wilson & Son, Jones & Johnston and *G. F. Bason*, for plaintiff.

Messrs. R. W. Sandifer and *Reade, Busbee & Busbee*, for defendant.

SMITH, C. J. The two tracts of land, the subject of controversy and for the recovery of possession of which the present action was begun on April 10th, 1880, are claimed by the plaintiff under a decree rendered in the superior court of Gaston against the heirs-at-law of one M. A. Moore who purchased the same at a sale made by the sheriff under several executions issued on judgments rendered at spring term, 1876, against the Gaston Mining Company, a corporation formed under the laws of this state. The sheriff's deed to Moore bears date on November 18th, 1876. There were numerous rulings in reference to evidence introduced by the plaintiff on the trial of the issue before the jury, to which exceptions, noted on the record, were taken, but it is not necessary in the view we have taken of the case on appeal to consider and decide them.

The defendant denied the plaintiff's title, and admitting possession asserted ownership in itself.

In order to show that no estate passed to the purchaser at the sheriff's sale, the defendant introduced a deed from Walker, Mackey & Beckwith conveying the premises in dispute to the Gaston Mining Company, and a deed from the latter, dated on December 3d, 1873, to one George Bull in trust to secure a certain indebtedness of the said company and one George J. Richardson to Walker, Mackey & Beckwith, the former owners and grantors. This deed was admitted to registration upon proof of acknowledgment before a commissioner of this state in the city of Philadelphia, exhibited before the clerk of the superior court of Gaston, adjudged by him to be sufficient and ordered to be registered.

This deed in trust was discharged, and the estate restored to the grantor company by an entry of satisfaction upon the margin of the registry thereof, as directed by the statute. Bat. Rev., ch. 35, §29.

The defendant exhibited a second deed from the Gaston Mining Company, made on March 16th, 1874, to B. K. Jamison & Co., in trust to secure coupon bonds to be issued.

The defendant also offered in evidence a third deed for the same lands, dated on February 3d, 1875, conveying them to William M. Stewart, in trust to secure coupon bonds to the amount of one hundred thousand dollars under the authority conferred in the act incorporating the said company. Private acts 1874–75, ch. 9, §3.

The concluding clause of this deed, which is full and minute, and whereof a copy is attached to the transcript, is in these words:

"In witness whereof the said Gaston Mining Company have caused this indenture to be signed by their president and attested by their secretary and their common seal to be affixed hereto, the day and year first above written.

[L. S.] G. C. WALKER, President.

Attest: GEORGE BULL, Secretary.

Signed, sealed and delivered in presence of George Bull, Secretary.

The probate is in this form:

PHILADELPHIA—*ss:*

Be it remembered, that on this 2d day of February, 1875, personally appeared before me, a commissioner of the state of North Carolina, residing in the city of Philadelphia, Gilbert C. Walker, president of the above named corporation, who being duly sworn according to law deposeth and saith that he was personally present at the execution of the above written mortgage, and the common seal of the Gaston Mining Company was duly affixed thereto, that the seal so affixed is the common and corporate seal of the said Gaston Mining Company, and that the above written mortgage was duly sealed and delivered by, as and for the act and deed of the said corporation of the Gaston Mining Company for the uses and purposes therein mentioned, and that the name of this deponent, subscribed to the said mortgage as president of the said corporation in attestation of the due execution and delivery of said mortgage, is of this deponent's proper handwriting.

Witness my hand and seal the day and year
[L. S.] above written.

THEO. D. RAND,
Commissioner for North Carolina in Philadelphia, Pa.

The probate and registration are as follows:

NORTH CAROLINA, } Probate Court.
GASTON COUNTY. } February 16th, 1875.

The foregoing deed and certificate having this day been exhibited before me, E. H. Withers, judge of probate for Gaston county, and it appearing to the satisfaction of the court that the same has been regularly executed and proved before Theo. D. Rand, a commissioner of deeds for North Carolina residing in Philadelphia, Pa., therefore let said deed and this certificate be registered.

Witness my hand and seal this 16th day of
[L. S.] February, 1875.
(Signed by the clerk as probate judge).

Received into office for registration this 16th day of February, 1875, at 4 o'clock P. M., and forthwith registered.

(Signed by the register of deeds).

The admission of these three deeds from the company was opposed by the plaintiff for an alleged imperfection in the execution by the corporation, and insufficiency of proof to warrant their registration, and sustained by the court.

We have not set out the form of execution and manner of proving the two former, for the reason that if the latter be free from the imputed defects, it answers as effectually for the purposes of the defence as if all of them were.

There was no connection or privity shown to exist between the defendant and any of the grantees, nor any title in him.

Upon the only issue submitted to the jury, "Is the plaintiff entitled to the possession of the realty described in his complaint?" they were directed by the court if they believed the evidence, to find for the plaintiff.

While the defendant corporation fails to show any estate in itself or any relation in the trustees in the several conveyances from the Gaston Mining Company, protecting its possession against the claim of the plaintiff, his recovery depends upon his own positive right to have possession, and the proof of such right in another, to whom he is a stranger in interest, as effectually defeats his action as if shown to be in the defendant. Waiving the question whether upon the facts contained in the record he has shown title to the premises directly or by estoppel, not reaching to the defendant, in the absence of evidence of its claiming under those to whom it does not apply, and without enquiring whether the debtor company, under the deeds, if valid, is subject to sale under execution, we proceed to consider what seems to be the essential matter of controversy presented in the appeal, the sufficiency in substance and form of the last deed of the Gaston Mining Company to pass its estate to the grantee named therein.

No reason appearing in the record is assigned by the court for refusing to receive the several deeds in evidence to show the divesting of the estate in the lands out of the Gaston Mining Company previous to the sale under execution, upon which was predicated the instruction to the jury, but from the course of the argument we infer it was because the deeds were not in the form prescribed by the Revised Code, ch. 26, §22, which were deemed to exclude every other mode of conveying land by a corporation. The ruling then involves two enquiries:

1. The legal sufficiency of the deed at common law to pass the estate; and,

2. The meaning of the statutory provision.

I. The deed has in our opinion the legal requisites of the common law to operate as a valid conveyance of land.

The technical mode of executing the deed of a corporation is to conclude the instrument, which should be signed by some officer or agent in the name of the corporation, with: "In testimony whereof the common seal of said corporation is hereunto affixed," and then to affix the seal. Ang. & Ames Corp., §225.

"If a contract purporting to be sealed with the seal of a corporation is offered in evidence, and it is proved to have been signed and executed by the proper agents, the presumption is that the seal was also regularly affixed by the proper authority, and a contract under seal, executed by an agent, within the scope of his apparent powers, will be held valid and binding upon the corporation until evidence to the contrary has been adduced." Morawitz on Corporations, §169.

The common seal of a corporation affixed to the deed is tantamount to a delivery, and suffices, nothing to the contrary appearing, to pass an estate in lands, although there may not have been an actual delivery to the party. Grant on Corporations, 63; 78 Law Library, 74.

In *Hutchins* v. *Bynum*, 9 Gray, 367, the deed was held to be sufficiently authenticated where the clause was: "In witness whereof the said Bristow County Savings Bank, by George

Atwood, their treasurer, duly authorized for this purpose, have hereunto set their name and seal," adding the signature of the treasurer and the corporate seal.

And again, the words, "In testimony whereof the said party of the first part (the corporation) have caused these presents to be signed by their president and their common seal to be affixed," followed by the signature of the president and the corporate seal. *Haven* v. *Adams*, 4 Allen, 8.

In *Blackshire* v. *Iowa Home Co.*, 39 Iowa, the court say that when the corporate seal and the signatures of the officers executing the deed are proved, the court will presume the possession of authority, and the seal itself is *prima facie* evidence that it was affixed by proper authority.

We think it clear from these authorities that the deed from the Gaston Mining Company is properly executed, and it is equally manifest that the proof before the commissioner was amply sufficient to warrant the order of the clerk for registration.

II. The remaining enquiry is as to the interpretation of the statute, and whether the method there prescribed for the conveyance of land by corporations is exclusive of all others and mandatory in its requirements. The enactment is in these words:

"Any corporation may convey land and all other property transferable by deed, by deed of bargain and sale or other proper deed sealed with the common seal and signed by the president, or presiding member or trustee and two other members of the corporation, and attested by a witness. Rev. Code, ch. 26, §22.

In the Revised Statutes, ch. 26, §1, from which this clause was transferred, the language is a little different, declaring "that it shall be lawful for any corporation to convey lands by deed of bargain and sale, sealed with the common seal of said corporation and signed," &c.

In the sections immediately preceding and following that in the Revised Code, the terms are positive and mandatory. No corporation created by letters patent for the purposes herein allowed, *shall*, under any pretence, engage in banking. Sec. 21.

Suits against a corporation when at law *shall* be by process of summons, etc. Sec. 23.

The service of summons, if against any insurance company, &c., *shall* be made by leaving a copy, &c. Sec. 24.

The other antecedent sections show the same differences of phraseology, indicating the use of the word "may" in section 22 as in section 17, where the right to hold real estate is conferred, to be in the sense of permitting end authorizing, without impairing the rights and modes of action incident to a corporate body as such.

In this view we are fully sustained by the ruling of the supreme court of Minnesota, in the construction of a very similar enactment. *Morris* v. *Keil*, 20 Minn., 531. There, the plaintiff claimed the land upon which the trespasses had been committed, under a deed ending in the words:

"In testimony whereof, the said Oxford Female College has caused these presents to be signed by the president of its board of directors and countersigned by the secretary thereof, and its corporate seal to be hereto affixed, this 3rd day of November, 1868. O. H. STODDARD, Pres.

J. H. HUGHES, Sec'y.

The statute in that state declares that "every corporation authorized to hold real estate, may convey the same by an agent appointed by vote for that purpose," and it was insisted in argument that "every other mode of corporate conveyance was excluded."

The court held otherwise, saying: "We think that the purpose of this provision was to point out one way in which a corporation might properly make a conveyance of real estate, but there is no reason for supposing that the intention was to exclude the other and very common practice of a conveyance by a corporation through one or more of its officers; for instance, its president, secretary, treasurer, instead of through an agent appointed by vote for that particular purpose."

We think our statute should bear the same construction, as enabling in its effect, intended to point out a convenient and certain method for the transfer of real estate, but leaving still open that provided by the common law, and which has been pursued in the present case.

For this error the judgment must be reversed, and a *venire de novo* ordered, and it is so adjudged. This will be certified.

Error. *Venire de novo.*

S. A. YOUNG v. B. T. BARDEN and others.

Corporations, suits against—Parties.

A suit against a corporation (here a town) must be brought in its corporate name, and not against its officers or agents.

(*Brittain* v. *Newland*, 2 Dev. & Bat., 363; *Mauney* v. *Mfg. Co.*, 4 Ired. Eq., 195; *Ins. Co.* v. *Hicks*, 3 Jones, 58, cited and approved).

EJECTMENT tried at Spring Term, 1883, of COLUMBUS Superior Court, before *MacRae, J.*

The plaintiff alleges in his complaint that the defendants as mayor and commissioners of the "town of Fair Bluff" are in possession of the lands described therein and unlawfully withhold from him possession thereof. The defendants deny the allegation of the complaint.

On the trial the plaintiff introduced evidence to show title to the land in himself, and that he was in possession thereof on the 29th of June, 1880; that on that day the marshal of the said town, by order of its mayor, put him out of possession, and "since that time it (the land) has been in the possession of the town of Fair Bluff, represented by the defendants."

The defendants demurred to the evidence upon the ground that the possession was proved to be in the "town of Fair Bluff," and not in them, and that as the town was not a party

to the action the plaintiff could not recover. The court being of that opinion, the plaintiff submitted to a judgment of nonsuit and appealed.

Messrs. W. A. Guthrie and *J. W. Hinsdale,* for plaintiff.
No counsel for defendants.

MERRIMON, J. Our opinion is that the plaintiff cannot maintain this action, taking the facts to be as they appear in the case settled upon appeal.

The "town of Fair Bluff" is a municipal corporation, created by an act of the general assembly (private acts of 1872–'73, ch. 84). The defendants are described as the mayor and commissioners of that corporation, and it seems that it was the purpose of the plaintiff in this action to sue it. If so, he should have sued it in its corporate name, and as he did not, he has failed to make it a party. Corporations must sue and be sued by their names, like natural persons. The action is in effect against the defendants in their individual and personal capacity. The designation and descriptive words appended to their names are mere surplusage and go for naught. The action is not against the corporation but against the individuals whose officers and agents they are. Any judgment that might be rendered in it would not be against the corporation, because it has not been sued. *Brittain* v. *Newland,* 2 Dev. & Bat., 363; *Mauney* v. *Mfg. Co.,* 4 Ired. Eq., 195; *Ins. Co.* v. *Hicks,* 3 Jones, 58.

The evidence showed that the possession of the land in question was in the corporation "represented by the defendants," and as it was not a party, there could be no recovery against it; so that, as to it the action must fail.

If the action be treated as against the defendants personally, as it must be, it cannot be maintained, because the evidence did not show that they were in the actual possession of the land for any purpose, or that they claimed any interest in it. If the plaintiff

could have shown that they were in the actual possession, even though they might be in possession under the corporation, the action might be maintained, just as an action might be maintained against the tenant in possession under the landlord, or against any one in actual possession.

If, however, it be taken that the defendants were constructively in possession, as the mayor and commissioners of the "town of Fair Bluff," and in no other way, or if that corporation were in possession, "represented by the defendants," as the case states, the action could not be maintained against them, because they were not claiming in the actual possession.

Corporations, in contemplation of the law, are capable of having actual possession of land, and whatever may have been supposed to the contrary in the distant past, it is now settled that the actions of ejectment and trespass lie against them. Ang. & Ames on Corp., §§186, 240; Malone on Real Property Trials, §§ 88, 89; *Dater* v. *Railroad*, 2 Hill, 629.

There can be no question that when the officers or servants of a corporation have actual possession of its land, an action may be maintained against them to recover possession. But such possession on their part must be actual, and not such as arises or is implied by simply going upon the land occasionally in the exercise of the office of mayor and alderman, or in going upon it temporarily to do some special service or act that requires but a short time to perform it. The possession necessary in such cases, to warrant an action, must have continuity under some claim, colorable or otherwise, and not such as arises from doing service without claim of possession. Hence a mere laborer or servant of the corporation doing service or acts upon the land at the command of its principal officer, has not actual possession in the sense necessary to support an action for possession. *Lucas* v. *Johnston*, 8 Barb., 244; *Chiniquy* v. *Catholic Bishop*, 41 Ill., 148.

The court properly held that the plaintiff could not recover, and the judgment must be affirmed.

No error. Affirmed.

J. T. ROPER and others v. TOWN OF LAURINBURG.

Towns and Cities.

A municipal corporation has the right to provide indemnity for its officers who may incur liability to others in the *bona fide* discharge of their duties; *Therefore* it is competent for a town to appropriate a reasonable amount of its funds to employ counsel to defend its police officers in actions for false imprisonment.

MOTION for injunction heard at Fall Term, 1883, of RICHMOND Superior Court, before *McKoy, J.*

The purpose of this suit is to restrain the defendants, the mayor and commissioners of the town of Laurinburg, a municipal corporation formed by law, from employing and paying counsel for services to be rendered in certain actions, civil and criminal, depending in the superior court, out of the public funds in the treasury derived from taxation. Two of these are prosecutions against separate parties who are charged with violating a town ordinance which forbids drunkenness, the use of profane or indecent language, the exposure of the person, or other disturbance of the public peace; and two others are suits instituted by those so charged against the town constable and his assistant for arrest and false imprisonment. The causes of action in all have one and the same source.

The plaintiffs in the last mentioned suits were arrested in the said town by the defendants therein for alleged public drunkenness, which accusation the plaintiffs deny and the defendants affirm, and the affidavits read before the judge, upon the hearing of the motion for an injunction continuing the temporary restraining order previously made *ex parte*, are in conflict in regard to what occurred when the arrest was made. The testimony of one of the present plaintiffs relates to the evidence given in at the trial, before the mayor, of the parties arrested for a violation of the ordinance by W. B. Hatton, the constable,

in reference to the condition and conduct of the accused. The other testifies to his seeing them at the time; that they were behaving in an orderly and peaceable manner, and neither was drinking to excess or drunk, and that they were subjected to great violence and indignity by the officer and those aiding him and even after being taken into custody.

The statement of the mayor is that he was present when Hatton went up to arrest H. F. Deaton, one of the accused, and that he and his associate, F. M. Deaton, on September 1st, 1883, both of them, were drunk, and this he infers from the fact that they were staggering and acting as drunken men usually act, and so when brought to trial before him he adjudged them guilty of the charge; that when the arrest was attempted with the aid of the deputy Beaseley, the accused made violent resistance to being carried before affiant, and assaulted the officer and his assistant, and that these latter acted throughout in self-defence, the whole disturbance being witnessed by affiant; that the arrested parties were not in a proper condition to be at once arraigned and tried for their conduct; and further that the said Hatton is a most efficient public officer.

Upon the evidence the court refused the application for an injunction, and dissolved the previous *ex parte* order of restraint, and from this judgment the plaintiffs appeal.

Mr. John D. Shaw, for plaintiffs.

Messrs. J. T. Legrand, Burwell, Walker & Tillett and *Strong & Smedes*, for defendant.

SMITH C. J., after stating the above. We do not feel called upon to determine the facts of the transaction, so differently represented in the affidavits, and we recapitulate only so much of the testimony as shows that all the actions originated in an attempted discharge of public duty and the maintenance of good order in the town, and whether there was in fact a breach of the town ordinance committed in presence of the officer and mayor

which warranted the immediate arrest, or whether violence was used in excess of any required to overcome the resistance offered, are, in our view, not material enquiries to be answered in passing upon the ruling brought up for review.

The right of a municipal corporation to provide an indemnity for its officers who may incur a liability to others in the *bona fide* exercise of their functions while engaged in the discharge of their duties, is too well settled by adjudications, and too well founded in considerations of public policy, to admit of controversy. It is so expressly declared in 1 Dill. Mun. Corp., §98, and the references fully support the general proposition asserted in the text.

The consequences might be most serious if such officers were to be left to struggle alone and unaided against every action that persons arrested may *choose* to bring upon an allegation of abused authority, *though honestly exercised*, in the maintenance of the public peace and the preservation of good order, and the results of which, though successfully defended, might prove disastrous to the officer.

Within the range of this conceded power must be embraced the employment of counsel and the payment of a reasonable compensation for their services, and the more necessary is it to a municipal body, such as this is, who have no regular and salaried legal adviser to resort to in case the occasion shall require. Such a right, limited by a just responsibility for its exercise, must abide in the corporation as essential to its own self-protection, and the attainment of the ends for which it is formed.

Adjudicated cases are not wanting in the reports which sustain this view, to some of which we will refer.

In *Bancroft* v. *Lynnfield*, 18 Pick., 566, WILDE, J., declares "that towns have an *authority to defend and indemnify their agents* who may incur a liability by an inadvertent error, or in the performance of the duties imposed on them by law."

So it is said by FLETCHER, J., delivering the opinion in *Bobbitt* v. *Savoy*, 3 Cush., 530, "that it is difficult to see why a town

may not be at expense to take care of their interests involved in a suit, where their servant is made a party, as well as incur expenses to protect their interests in a suit where the town is a party. * * * Where the servants of the town have made mistakes which have rendered them liable at law, it has been held *legal and proper for the town to meet the expense.*"

In the later case of *Hadsell* v. *Hancock*, 3 Gray, 526, the court say: "No question is made as to the power of towns to *indemnify their officers and agents against liabilities in the bona fide discharge of their duties.*"

But a case more directly in point is that of *Sherman* v. *Carr*, 8 Rhode Island, 431, the facts whereof are briefly these: "An action of trespass was brought against the mayor of Newport, and the constable, who acted in his aid, committed the acts complained of in virtue of the powers conferred upon him in his official capacity by an act of the general assembly of Rhode Island. At the first trial, the jury disagreed; at the second, a verdict was rendered for the plaintiff, and set aside; at the third, a similar verdict assessed the damages at $2,500, which were reduced, by plaintiff's consent, to avoid its being also set aside, to $1,500.

The action was brought by certain tax payers to enjoin the payment by the treasurer to the mayor of moneys appropriated by the city council to defray the expenses of the suit.

The injunction was denied, and BRADLEY, C. J., speaking for the court, uses this language:

"Is it then one of the usual and ordinary expenses of a city to protect its officers, who, while exercising in good faith the functions of their office, have been found by the verdict of a jury to have exceeded the lawful powers of that office and to have trespassed upon the rights of a citizen? If the power to indemnify an officer under these circumstances does not rest in that body who appropriate the money for all the legitimate duties of a municipality within its own province, the various executive officers of a city perform their duties at the peril of an individual respon-

sibility for all their mistakes of law and of fact, however honest and intelligent they may be, and also at the peril of the possible mistakes of a jury naturally jealous of the rights of the citizen when brought in conflict with the exercise of official power. If the officer is thus responsible, he will naturally be too cautious, if not timid, in the exercise of his powers which must be frequently exercised for the protection of society, before and not after a thorough investigation of the case in which he is called upon to act. * * * We know of no case in which, while the officer continues to act in behalf of the community, and not in his own behalf, it is held that the community cannot indemnify him."

Concurring in this exposition of the law, and conceding to the corporate authorities of the town the right to apply a reasonable amount of the moneys in their treasury for the purposes contemplated, we cannot undertake to supervise their action and stop them in their effort to vindicate the corporate authority and protect their agent in the enforcement of their ordinances. There is no such abuse shown as warrants the interference of the court. We therefore sustain the rulings of the court in refusing an injunction. Let this be certified.

No error. Affirmed.

FRED BUNCH v. TOWN OF EDENTON.

Towns and Cities—Liability for injury occasioned by defective side-walks—Negligence.

1. A town is liable in damages to one who receives an injury by falling in an excavation near the side-walk (made by the owner of a lot for a cellar), where it appears there was no concurring negligence and the municipal authorities failed to cause to be erected a railing to prevent accidents to passers-by.

2. The court intimate that the owner of the lot may be answerable in damages to the plaintiff, but this is no defence to the defendant town.

(*Hill* v. *Charlotte*, and case cited, 72 N. C., 65; *Lewis* v. *Raleigh*, 77 N. C., 229, cited and approved).

CIVIL ACTION tried at Spring Term, 1883, of CHOWAN Superior Court, before *Shepherd, J.*

The plaintiff brought this action against the board of councilmen of the town of Edenton, to recover damages for an injury occasioned by alleged negligence on the part of the town in failing to keep the streets in proper condition.

The plaintiff was going along the side-walk on Main street, at night, and fell into a pit and received the injury complained of. The facts relating to the accident and those bearing upon the point decided, are sufficiently set out in the opinion of this court.

The following issues were submitted to the jury:

1. Did the defendants erect or cause to be erected around the pit any sufficient guard or barrier for the safety of travelers? Answer—No.

2. Did they provide sufficient light near the excavation to enable travelers to see and avoid the same? Answer—No.

3. Did the excavation include a portion of the side-walk? Answer—No.

4. Did the plaintiff by his negligence contribute to the injury? Answer—No.

5. What amount of damages has the plaintiff sustained? Answer—$250.

It was admitted on the trial that the excavation had been open for several weeks, to the knowledge of the defendants, before the accident occurred.

The defendants resisted the motion for judgment upon the ground that in passing upon the third issue the jury find the excavation did not include any portion of the side-walk or street.

The court gave judgment for the plaintiff and the defendants appealed.

Messrs. W. A. Moore and *Pruden & Bunch*, for plaintiff.
Messrs. A. M. Moore and *W. J. Leary*, for defendants.

MERRIMON, J. It is admitted in the answer that "it was the duty of the defendants * * * to repair the streets of the town of Edenton and make and keep them safe and convenient for persons traveling to and fro on said streets."

It appears in the record that one Lee owned a lot situate along and immediately adjoining Main street in that town, and on the side of the lot next to, adjoining and bordering on the outer side of that street, there was an excavation for the purpose of a cellar, eight feet deep, running immediately along the street the distance of forty feet, and extending back from it about sixty feet.

The defendants had knowledge of this excavation. It was permitted to remain open and unenclosed for a month without any railing, fence or other sufficient barrier to prevent persons passing that way from falling into it, and no light was placed placed at night on the street near this opening.

The plaintiff, passing along that street on the side-walk on a very dark night, was unable to see the pit, missed the side-walk, fell into it and broke his thigh, doing him serious damage. The jury found that he did not by his negligence contribute to the injury to himself.

The defendants contend generally that the plaintiff has no cause of action against them, and that if in any case they could be liable for injuries happening on the streets in said town, they could not be held liable in this case, because the pit that occasioned the injury to the plaintiff was outside of the street and side-walk.

An action does not lie against a municipal corporation for damages for the non-exercise or for the manner in which, in good faith, it exercises discretionary powers of a public or legislative character; as where power is conferred upon it generally in its discretion to make ordinances and regulations for the good government of the town, to erect such public buildings, improve such public parks and walks as it may see fit; in such and like cases no action lies for a failure to exercise such powers, nor

because they were exercised in a particular manner, direction or place rather than some other.

But it is otherwise where the law confers powers and imposes corresponding duties upon such corporation, mandatory in their character. And likewise, if in the exercise of discretionary powers, through neglect or want of proper care and skill on the part of its agents and workmen, injury is done to any individual in his person or property, an action will lie in favor of the party injured against the corporation for damages for such injury.

Such corporations are always liable for acts of misfeasance positively injurious to persons, done by their officers in the course of the exercise of the corporate powers, or in the execution of corporate duties. And likewise, mere neglect or omission to perform an absolute and positive corporate duty, as distinguished from one discretionary in its nature, owing by the corporation to the plaintiff or in which he is especially interested, is ground for an action for damages in his favor. *Meares* v. *Wilmington*, 9 Ired., 73; *Hill* v. *Charlotte*, 72 N. C., 55; *Lewis* v. *Raleigh*, 77 N. C., 229; *State* v. *Haywood*, 3 ——, 99; Dill. on Corp., §764.

It was the positive duty of the corporate authorities of the town of Edenton to keep the streets, including the side-walks, in "proper repair"; that is, in such condition as that the people passing and repassing over them might at all times do so with reasonable ease, speed and safety. And proper repair implies also that all bridges, dangerous pits, embankments, dangerous walls and the like perilous places and things very near and adjoining the streets, shall be guarded against by proper railings and barriers. Positive nuisances on or near the streets should be forbidden under proper penalties, and, when they exist, should be abated.

The defendants were charged with this duty and they were invested with the amplest powers to discharge it. They could raise money, employ labor, abate nuisances and make all needful rules and regulations to make and keep the streets in all respects

safe and convenient, and protect them against perilous places and things alongside of and near to them.

While all persons passing on the streets must do so in an orderly manner, they have a right to expect that the town authorities have properly exercised their powers; that they have done their duty; that the streets are in good repair; that the side-walks are in safe condition, and dangerous places adjoining and near to them are properly guarded. They have the right to rely upon the the corporate authorities to do these things.

The defendants insist that the excavation mentioned was not *in* the street, and therefore they are not liable. This defence is not tenable. It was immediately along the side of the street and rendered it precipitous and dangerous. Persons passing the street on foot go almost exclusively on the side-walk, and there is generally much passing over them in the night time. One walking on the side-walk at any time, much oftener at night, especially in the absence of light, might, by accident, stumble and fall over the steep edge. Not infrequently, crowds of people pass along the side-walk, and on such occasions, a misstep of one might precipitate one, two or more persons into the pit. The side the street is of a material part of it, and must be kept free from danger, however the same may arise, as well as other portions of the street. Pits and other dangerous places immediately adjoining it and near to it make it perilous, and such places are nuisances. When these are permitted to exist and the streets are not properly protected against them, the latter are not in reasonable repair

This view of the matter seems to us to be reasonable and just, and it is sustained by numerous judicial precedents. *Davis* v. *Hill*, 41 N. H., 329; *Adams* v. *North*, 13 Allen, 429; *Chicago* v. *Gallager*, 44 Ill., 295; *Murphy* v. *Glancester*, 130 Mass., 470; *Spurhank* v. *Salem*, 1 Allen, 30; *Adams* v. *Natick*, 13 Allen, 431; *Williams* v. *Clinton*, 28 Conn., 264; *Parker* v. *Mason*, 39 Ga., 725; *Norristown* v. *Mayer*, 67 Penn., St. Rep., 355; Shear. and Red. on Neg, §§386, 391.

In this case, the excavation was manifestly a dangerous one

and a source of peril to everybody passing on the side-walk, especially at night. It was tolerated for a month; no light was placed near it at night to warn the passenger; there was no railing to protect him, and a slight misstep might precipitate him over the perilous edge. It was the obvious duty of the defendants to abate such a nuisance, or, if circumstances required that the place should remain open so long, then to compel the owner to place a railing along the edge of the street, or have it done at his expense.

There was manifest negligence on the part of the defendants in a respect mandatory upon them and in which the public had a direct interest. They failed to keep the street in the place mentioned in good and safe repair; they failed to abate a dangerous nuisance as the law required and furnished them with the power and means to do, and as the public had the right to expect them to do. Through their neglect, and no neglect on his part, as appears from the record, the plaintiff sustained damages, and he is entitled to recover the same in this action.

It may be that the owner of the excavation is answerable to the plaintiff for damages, but this is no defence for the defendants; they are responsible to him, and he chooses to bring his action against them as he has a right to do.

It was suggested in the answer that the owner of the excavation placed some of the earth taken from it on the edge of the side-walk and this served as a protection. It does not so appear to us; on the contrary, it increased the danger, for it made an obstacle on the surface of the side-walk and furnished a means over which one might, in the dark, easily stumble into the pit.

We are of opinion that the exceptions cannot be sustained, and the judgment must be affirmed.

No error. Affirmed.

T. C. WHITE v. COMMISSIONERS OF CHOWAN

Counties and County Commissioners—Roads and Bridges.

A county is not liable in damages for an injury to the plaintiff, occasioned by a defective bridge forming a part of the highway across a stream, in the absence of any statutory provision. Distinction between towns and counties and their corporate powers and liabilities, stated by MERRIMON, J.

(*Mills* v. *Williams*, 11 Ired., 558; *Caldwell* v. *Justices*, 4 Jones' Eq., 323; *Kinsey* v. *Justices*, 8 Jones, 186; *State* v. *Justices*, 4 Hawks, 194; *Meares* v. *Wilmington*, 9 Ired., 73, cited and approved).

CIVIL ACTION tried at Fall Term, 1883, of CHOWAN Superior Court, before *Avery, J.*

The plaintiff brings this action against the defendants to recover damages for injuries to himself, his horse and buggy, occasioned by the falling in of a decayed bridge, forming part of a highway across a swamp in the county of Chowan, which the defendants, as the plaintiff alleges, were bound by law to keep in good and reasonable repair, but which they permitted to become ruinous and dangerous.

The defendants insisted by their answer and on the trial in the court below, that they were not civilly liable for the injury thus sustained by the plaintiff. The court held that they were so liable, gave judgment for the plaintiff, and the defendants appealed.

Messrs. John G. Bunch and *Pace & Holding*, for plaintiff.
Mr. W. D. Pruden, for defendants.

MERRIMON, J. The question presented for our decision in this case is, are county commissioners, in their corporate capacity, liable for damages sustained by a person passing on a highway in their county, occasioned by a failure of the proper county authorities to keep such highway, and the public bridges along and over the same, in good and safe repair?

The counties of this state, like those of most of the states in the Union, are subdivisions of its territory embracing the people who inhabit the same, created by the sovereign authority, and organized for political and civil purposes. They are created at the will of the sovereign without any special regard to the solicitation, consent or desire of the people who reside in them. The leading and principal purpose in establishing them is, to effectuate the political organization and civil administration of the state, in respect to its general purposes and policy which require local direction, supervision and control, such as matters of local finance, education, provisions for the poor, the establishment and maintenance of highways and bridges, and in large measure, the administration of public justice. It is through them, mainly, that the powers of government reach and operate directly upon the people, and the people direct and control the government. They are indeed a necessary part and parcel of the subordinate instrumentalities employed in carrying out the general policy of the state in the administration of government. They constitute a distinguishing feature in our free system of government. It is through them, in large degree, that the people enjoy the benefits arising from local self-government, and foster and perpetuate that spirit of independence and love of liberty that withers and dies under the baneful influence of centralized systems of government. They contribute largely to the life-principle of American liberty, and are, in a very large sense, governmental in their nature and their purposes, and to this end are invested with appropriate corporate functions. These functions are not always the same; they may be enlarged, abridged or modified at the will of the legislature, but, generally, they are intended only to be essential aids and political agencies in the administration of the government of the state, and exercise their powers for that purpose. They are not in the strict legal sense municipal corporations: they are sometimes called *quasi* corporations, and this designation distinguishes them on the one hand from private corporations aggregate, and on the other from municipal corpo-

rations proper, such as cities and towns, organized under charters and special statutes, and invested with more and special powers, and endowed with more of the functions of corporate life. *Mills* v. *Williams*, 11 Ired., 558; *Caldwell* v. *Justices of Burke*, 4 Jones' Eq., 323; Dill. on Corp., §§9, 10; Cooley on Const. Lim., 240.

Such being the general purpose of counties and county government, they are not ordinarily liable to be sued civilly for the manner in which they exercise, or fail to exercise, their corporate powers. They may be sued only in such cases and for such causes as may be provided for and allowed by the statute. And, although a county may have power to establish public roads and bridges, and to levy taxes and raise money to construct and keep them in repair, it is not liable to a party sustaining damage by reason of its failure to exercise such powers, unless such liability be expressly declared by statute, or by implication necessarily arising therefrom. These views are fully sustained by the great weight of authority. Dill. on Corp., §§761, 762, 763, 785; Whar. on Neg.; Cooley on Const. Lim., 247.

In *Kinsey* v. *Magistrates of Jones*, 8 Jones, 186, this court held that the justices of the peace of that county were not liable to the owner of property for injuries to it, occasioned by defects in public bridges under their control. In that case, the late Judge MANLY said: "The justices cannot be held responsible, either in criminal prosecutions or civil actions, for deficiencies in the public highways and bridges. They are charged with certain duties in respect to them, but when these are performed their office ceases, and the overseers and contractors are responsible to the county and to citizens. That they are not criminally responsible, except for the non-performance of the specific duties assigned them by law, is decided by the case of *State* v. *Justices of Lenoir*, 4 Hawks, 194; and that they are not responsible at all in civil actions to the citizens of the country, is also settled by authority and the uniform practice of the state."

This decision and all similar decisions rest upon the ground

that counties are political agencies and organizations intended to aid in the general administration of the state government, in respect to matters local in their nature, and requiring local supervision and control.

There can be no question that it is within the power of the legislature to provide and declare by statute that the several counties shall be liable for damages occasioned by their failure to keep the roads and bridges in proper and safe repair, and in some states such liability has been created, but there is no such statutory provision in this state. While the powers of the county governments have in some respect been greatly enlarged, there is no statute which provides, either expressly or by reasonable implication, that the several counties of the state shall be liable civilly for injuries to persons or property occasioned by the failure of the proper county authorities to keep the highways and bridges in proper repair. No such provision was brought to our attention on the argument, and we have been unable by assiduous search to find any. THE CODE, §2033, makes the overseer of the road liable to a penalty, and likewise for such damages as may be sustained by reason of his failure to discharge his duty as required by law. The county authorities may be indicted for failure to exercise their powers as the statute provides, but they are not liable civilly, certainly, in their corporate capacity.

There is a well settled distinction in respect to the liability of a county as distinguished from that of a city or town, for failure to discharge corporate duties. The latter are liable generally when specific duties are imposed for damages occasioned by a failure to discharge such duties, and to exercise corporate powers conferred to that end; but this goes upon the ground that corporate powers are granted specially to the citizens of the city or town at their solicitation and for their special benefit and advantage, in many respects. The corporate powers are in some respects larger and more specific than those conferred upon counties; and they are conferred, not so much to aid in the administration of the government of the state as for local advan-

tage and convenience. *Meares* v. *Wilmington*, 9 Ired., 73; Dill. on Corp., §§10*a*, 753, 785.

The court erred in holding, upon the findings of the jury upon the issues submitted and the facts admitted in the pleadings, that the defendants were liable in this action for the injuries sustained by the plaintiff, and giving judgment accordingly; and for such error the judgment must be reversed, and judgment entered in this court for the defendants. Judgment accordingly.

Error. Reversed.

E. L. McCORMAC and others v. COMMISSIONERS OF ROBESON.

Counties and County Commissioners—School Districts—Legislative Power.

1. Where the legislature by special statute authorized an election to be held in "school districts number one and two" to obtain the sense of the electors in those districts upon the question of the establishment of a graded school, and an annual assessment for its support, *it was held* that the county commissioners had no power, after the passage of the act, to change the boundary line of the districts, or to consolidate districts number one and three, and designate it "district number one." The election in the district so constituted, and also that held in district number two, were void and the assessments illegal.

2. But the court intimate that the mistake of the commissioners may be remedied by holding an election in the districts as they existed when the act was passed, upon giving reasonable notice—treating the time fixed in the act as merely directory.

3. The power of the legislature to subdivide the state into counties, school districts, &c., either directly or through agencies invested with power for that purpose, discussed by MERRIMON, J.

(*State* v. *Jones*, 1 Ired., 414; *Mills* v. *Williams*, 11 Ired., 558; *Love* v. *Schenck*, 12 Ired., 304; *Taylor* v. *Com'rs*, 2 Jones' Eq., 141; *Manly* v. *Raleigh*, 4 Jones' Eq., 370; *Hill* v. *Com'rs*, 67 N. C., 367; *Com'rs* v. *Com'rs*, 79 N. C., 565; *Watson* v. *Com'rs*, 82 N. C., 17; *Grady* v. *Com'rs*, 74 N. C., 101; *Buckman* v. *Com'rs*, 80 N. C., 121, cited and approved).

Motion for injunction in an action pending in Robeson Superior Court, heard at Chambers in Fayetteville in December, 1883, before *McKoy, J.*

The act "to establish a graded school in Shoe Heel districts number one and two for white children," ratified on the 8th day of March, 1883, among other things, provides as follows:

Acts 1883, ch. 282:—

Section 1. That the board of commissioners of Robeson county shall submit to the qualified voters of Shoe Heel districts known as districts number one and two for white children in said county, on the first Thursday in April, 1883, under such rules and regulations as said board may prescribe, whether an annual assessment shall be levied therein for the support of a graded public school for the white children in said school districts. Each voter shall vote on a written or printed ballot with the words "for school" or "no school," and said election shall be conducted under the same rules as are prescribed by law for the election of members of the general assembly; provided that two ballot-boxes shall be used, and those electors who reside in district number one shall deposit their ballots in one box, and those electors who reside in district number two shall deposit their ballots in the other; and if a majority of the electors of one district shall vote "for school," and not a majority of the electors of both districts combined, then in that event the school shall be established in the district where the said majority of the ballots were cast, and the trustees named in this act who reside in the said school district shall be trustees of said school.

Section 6. That J. C. McCaskill (and others named) in school district number one, and J. B. Wilkinson (and others named) in school district number two, be and they are hereby constituted a board of trustees for the graded school for the whites in school districts number one and two, and are incorporated by the name of the Shoe Heel Graded School, and may sue and be sued, have a common seal, purchase and hold real and personal property, not

exceeding ten thousand dollars in value; and shall have power to fill all vacancies occurring in said board; to employ and dismiss teachers and regulate their salaries; to suspend and expel any pupil, and do all such acts as shall be necessary to carry on said graded school. They shall elect one of their number chairman, and one as secretary, and prescribe their duties.

Section 8. The board of trustees may admit as pupils in said graded school children who reside without the boundaries of said school district, upon the payment of such rates as shall be fixed by the board.

Section 10. Provides that the funds raised for these districts under the general school law shall be used for the benefit of said graded school.

Next before, at the time of, and next after the passage of this act, there were established in the county of Robeson, Shoe Heel districts number one, two and three, each being separate and distinct from the other, as provided by law. After the passage of the act, the county commissioners undertook, by their order, made at the request of citizens of district number three, to consolidate districts one and three, and at the election held under the act, these two districts were treated as district number one, and the registered voters in both districts voted as electors in district number one. A majority of the votes cast in this consolidated district were "for school," as were a majority of the votes in district number one, as constituted before the consolidation. A majority of the votes cast in school district number two were for "no school."

Treating the election held as regular, and there appearing to have been a majority of the votes cast in district number one in favor of the graded school, the county commissioners proceeded to levy the tax as allowed by the statute, for the support of the school, and placed the tax-list in the hands of the sheriff for collection, and the sheriff was about to proceed to collect the same.

The plaintiffs allege in their complaint that they are taxpayers in Shoe Heel school districts number one and three for white children in the county of Robeson; that the county commissioners had no authority to consolidate school districts number one and three, and that their action was therefore null and void; that as a consequence, the election held under the act was illegal and nugatory; that the tax laid was therefore unlawful, and the said sheriff had no legal authority to collect the same; and they demanded judgment that an injunction issue restraining the defendants and their agents from collecting the said tax, and from paying to the trustees named in the said act any part of the public school money for the graded school contemplated by the act.

Upon notice and motion the court granted an injunction restraining the defendants, their agents and servants, from collecting any tax levied in and on account of school district number three for white children for a graded school, until the hearing of this action. From this order the defendants appealed.

Messrs. J. D. Shaw and *Frank McNeill,* for plaintiffs.
Mr. T. A. McNeill, for defendants.

Merrimon, J. That it is within the power and is the province of the legislature to subdivide the territory of the state and invest the inhabitants of such subdivisions with corporate functions, more or less extensive and varied in their character, for the purposes of government, is too well settled to admit of any serious question. Indeed, it seems to be a fundamental feature of our system of free government, that such a power is inherent in the legislative branch of the government, limited and regulated, as it may be, only by the organic law. The constitution of the state was formed in view of this and like fundamental principles. They permeate its provisions, and all statutory enactments should be interpreted in the light of them, when they apply.

It is in the exercise of such power that the legislature alone

can create, directly or indirectly, counties, townships, school districts, road districts, and the like subdivisions, and invest them, and agencies in them, with powers corporate or otherwise in their nature, to effectuate the purposes of the government, whether these be local or general, or both. Such organizations are intended to be instrumentalities and agencies employed to aid in the administration of the government, and are always under the control of the power that created them, unless the same shall be restricted by some constitutional limitation. Hence, the legislature may, from time to time, in its discretion, abolish them, or enlarge or diminish their boundaries, or increase, modify or abrogate their powers. It may provide that the agents and officers in them shall be elected by the electors, or it may appoint them directly, or empower some agency to appoint them, unless in cases where the constitution provides otherwise, and charge them with duties specific and mandatory, or general and discretionary in their character. Such power in the legislature is general and comprehensive, and may be exercised in a great variety of ways to accomplish the ends of the government. *State* v. *Jones*, 1 Ired., 414; *Mills* v. *Williams*, 11 Ired., 558; *Love* v. *Schenck*, 12 Ired., 304; *Taylor* v. *Commissioners*, 2 Jones' Eq., 141; *Manly* v. *Raleigh*, 4 Jones' Eq., 370; *Hill* v. *Commissioners*, 67 N. C., 367; *Com'rs of Currituck* v. *Com'rs of Dare*, 79 N. C., 565; *Watson* v. *Commissioners*, 82 N. C., 17; Cooley Const. Lim., 191-2-3; 1 Dill. Mun. Corp., §10 and note, 381; Cooley on Tax., 110, *et seq.*

It is not essential that such subdivisions of territory shall always be created directly by legislative enactment. In many cases, certain existing agencies, or agencies to be provided, are required by statute, to establish them, and when established, they become, by the force of law, invested with certain powers and required to discharge prescribed duties

Whenever such agencies are created, whatever their purpose, or the extent or character of their powers, they are the creatures of the legislative will and subject to its control, and such agen-

cies can only exercise such powers as may be conferred upon them and in the way and manner prescribed by law.

The powers conferred upon such political agencies are either express or implied. The express powers are such as are conferred in terms by statute; the implied powers are such as are necessary to carry into effect those expressly conferred, and are therefore presumed to be granted. It may not always be easy to determine the extent of the powers thus conferred, but they are to be construed with reference to the object of their creation, and given such reasonable interpretation as the terms of the statute and the purposes had in view by it will warrant. When particular powers are conferred and specific things are required to be done, and nothing is left to discretion, the power must be strictly observed, at least there must be a substantial compliance with the statutory direction. If there should be a material departure from the directions of the statute, in the exercise of a power not conferred, the act done would be void.

Now applying these principles to the case before us, we are clearly of opinion that the county commissioners exceeded their authority and the election held was void.

By the general school law of this state, The Code, §§2545, 2546 and 2549, county commissioners are constituted the board of education for their respective counties, and as such board of education, they are charged with the general management of the public schools in their counties; they are empowered to decide all controversies and questions relating to the boundaries of school districts, and to see that the general school laws are enforced; and it is further made their duty to "lay off their repective counties into convenient school districts, consulting as far as practicable the convenience of the neighborhood. They shall designate the districts by number, as school district number one, school district number two," and so on. Their powers as the county board of education are derived from public school laws, and apply only to such schools; they do not apply to other schools, unless in cases where they may be extended to embrace them by

particular statute; and in such cases they could only exercise the special powers conferred.

It appears that the county commissioners of Robeson county, in their capacity as the county board of education, had, prior to the 8th of March, 1883, laid off their county into convenient school districts, and especially, for the purposes of this case, they had laid off "Shoe Heel school districts known as districts number one and two, for white children;" and also Shoe Heel school district number three. These districts were established and entirely separate and distinct, each from the other, as the law required and allowed.

The legislature, for causes satisfactory to it, probably upon application of the people, passed the act of 1883, ch. 282, the plain purpose of which is to extend to Shoe Heel school districts, known as number *one and two,* in addition to the advantage of the ordinary public schools, that of a graded school, if the electors of *those districts* should vote at an election to be held for the purpose in favor of levying an annual assessment upon the taxable property and polls in those districts, as prescribed by the act, for the support of such graded school. The advantage intended to be conferred was special and local, and it involved the exercise of the taxing power for an indefinite period of time in the future. The school provided for was to be separate and distinct from the ordinary public schools, and outside of the general public school laws, and, therefore, not under the management of the county board of education. So much of the public school moneys as might be due to those districts was to be paid to the proposed graded school authorities. This appears upon the face of the act itself. It provides for a board of trustees, incorporates and confers upon them important corporate powers, giving them the entire supervision and control of the school. There is nothing in the act going to show that the county board of education should have control or management of the school in any respect, when established. The graded school provided for, and the corporate authority conferred upon its board of trustees, embraced the definite area of the two districts number one

and two, and no power could change this boundary, except the legislature. The act embraced and applied to those boundaries and none others, and neither the board of education nor any other agency was authorized to change them. The effect of the act for the purposes of the graded school, is to put those two districts beyond the control of the county board of education for any purpose, under existing laws.

It is to be presumed there were special and weighty considerations—such as the number of inhabitants, the number of school children, the amount of the taxable property, the convenience of the people, and the like considerations, that prompted the passage of the act. There is nothing in it that indicates a general purpose to extend the benefit of such schools to the people generally; on the contrary, as the general school law of the state provides schools for all classes of people, the inference is that such was not the purpose. Besides, graded schools in many localities in the state, for local considerations, are incorporated by special statute for the purpose. The purpose of the act before us was special and local. Particular agencies invested with defined powers and supplied with appropriate means, were provided to effectuate that purpose. The school districts were established, known, particularly designated, under the law.

It was convenient and appropriate to charge the county commissioners with the particular duty of holding the election to take the voice of the people as to the assessment. They being the county board of commissioners, in the ordinary course of such things, ought to direct, supervise and determine the result of the election. This duty, however, involved no exercise of judgment, except to ascertain the result of the vote; and with this exception it was purely ministerial. They were charged simply to hold the election and determine the result, and the act contemplates, that if the school shall be established, it is not to be under their control, but under the control, supervision and direction of the board of trustees.

There is not the slightest intimation in the terms of the act,

or arising by implication, of a purpose to embrace any school district except the two therein mentioned. There is not the remotest implication arising from any words or provisions in the act, or any general legislative policy of which we have any knowledge, or from the office and duties of the county board of education, of authority in the county commissioners to consolidate the school districts number one and three, for the purposes of the proposed graded school. Indeed, as we have said, the effect of the act is to put the two districts mentioned in it, outside of and beyond their control, while they continued to have the general management of the other public school districts in their county. The act contemplates a permanent school to be kept up indefinitely as to the time of its existence, and by the special agencies and means provided in those districts.

We cannot see the slightest authority in the county board of education for consolidating the districts one and three. They might as well assume to consolidate school districts four and five, or all the school districts in the county, with district number one with a view to give them the benefit of the graded school.

It appears that the people in district number three desired to have the benefit and advantages arising from the graded school. Then, they ought to have asked the legislature to embrace them in the act providing for it. The legislature might or might not have granted their application. It alone could do so. It was not unmindful that pupils outside of districts one and two might desire to attend the school, for it is provided in the act that such pupils may attend, in the discretion of the trustees. This provision tends to show that the legislature advisedly did not intend to embrace any but the two districts mentioned in the act.

We are forced to the conclusion that the county commissioners, in their capacity as the county board of education, misapprehended the extent of their powers, and that they had no authority to consolidate the school districts number one and three, and

that their action in that respect was, therfore, void and of no effect.

We think, also, that the election held was illegal and void, because it was not held as directed by the statute. What effect the consolidation of districts number one and three may have had upon the minds of the electors voting, inclining them to vote for the assessment, and upon other electors who did not vote, in keeping them from the election, it is impossible to determine.

It may be, that the mistake of the county commissioners can be remedied by holding an election upon reasonable notice in districts number one and two, as directed by the act, treating the time fixed in the act for holding the election as directory, but that question is not before us, and we are not at liberty to decide it. *Grady* v. *Commissioners*, 74 N. C., 101; *Buckman* v. *Commissioners*, 80 N. C., 121.

The court properly granted the injunction, and there is no error in this respect. Let this be certified.

No error. Affirmed.

IN SAME CASE:

MERRIMON, J. In this case both plaintiffs and defendants appealed to this court. We have decided the material questions presented in the defendants' appeal, *supra*.

The plaintiffs appealed on the ground that the court refused to restrain the defendants from collecting the assessments levied in school district number one. For the reasons stated in the opinion in the defendants' appeal, we held that the election held in Shoe Heel district number one, as consolidated with school district number three, was illegal and void. Most of the reasons assigned in support of that decision apply here. We think the election held was wholly void as to both the districts number one and three, and in number two as well, and therefore the assessments in district number one were improperly levied and cannot be collected.

The plain purpose of the statute, was the establishment of a graded school for white children in Shoe Heel district known as districts number one and two. With that object in view, the act provides that an annual assessment as provided for, should be levied upon the taxable property and polls in those districts, for the support of such school, if a majority of the electors therein should vote at the election directed to be held, "for school," or, in case a majority should vote in one district "for school," and a majority in the other should vote "no school," then the assessment should be made in the district voting "school," as allowed by the act.

Thus it will be seen, that there was a common purpose as to both districts, and the election directed to be held was to materially affect this purpose in both or either, as it might result one way or the other in each. If there should be a majority "for school" in each, then the assessment should be levied in both; if there should be such a majority in but one, then the assessment should only be made in that one. A variety of considerations might readily influence the electors in both districts to vote "for school," or for "no school."

If the population, number of school children, the property subject to assessment, and other considerations, in their extent and variety, should combine to make the contemplated school a useful and successful one, the elector might readily vote "for school"; on the other hand, if these considerations should be such as not to give promise of such results, he might just as readily vote "no school." And so, an elector in either district, might be influenced to vote "for school," if district number three, with its population, school children, taxable property and like favorable considerations, could be brought into and made a part of school district number one.

In another view, an elector might justly have refused to attend the election and vote one way or the other, upon the ground that he believed the election to be illegal. Indeed, it appears, that a very considerable number of the electors did not vote at the

election, for this or some other cause. The purpose of the election was to ascertain the true voice of the electors in both districts upon the question of the annual assessment, in view of the condition and circumstances of those districts, uninfluenced by considerations beyond and outside of them. The view we have taken goes to show that the election as held did not serve that purpose, at all events, it may not have done so, and it was not, therefore, the election contemplated and required to be held by the statute.

The county commissioners misapprehended the extent and nature of their power. It is very clear that they had no authority to consolidate districts number one and three, and, however praiseworthy their motives may have been to extend the benefits of the graded school to district number three, their action was unauthorized and void, and the election held was likewise illegal and inoperative. The object of the statute was such as we have attributed to it. To what extent and in what way the unwarranted action of the commissioners influenced the electors in district number two to vote "for school," and others of them not to vote, as they would have done if the election had been properly held, it is impossible to ascertain.

The election was illegal and void, and hence the assessment levied upon the property and polls in district number one was unauthorized and illegal, and the court below ought to have granted the injunction as prayed for by the plaintiffs, until the final hearing of the action.

Other questions as to the validity of the act were discussed on the argument before us, but the view we have taken and the grounds upon which we base our decision, render it unnecessary to decide them now.

There is error, for which the judgment of the court below must be modified, by granting the injunction as prayed for, restraining the defendants from collecting the assessments levied in district number one, and to that end, let this opinion be certified to the superior court of Robeson county. It is so ordered.

Error. Reversed.

J. H. CALDWELL v. COMMISSIONERS OF ROBESON COUNTY.

Counties and County Commissioners—School Districts.

See syllabus in preceding case.

MOTION for injunction in an action pending in ROBESON Superior Court, at Chambers in Fayetteville, in December, 1883, before *McKoy, J.*

The plaintiff appealed.

Mr. J. D. Shaw, for plaintiff.

Mr. T. A. McNeill, for defendants.

MERRIMON, J. This case is in all material respects like that of *McCormac* v. *Commissioners, ante.*

The statute, Acts 1883, ch. 292, is in no material respects different from the statute, Acts 1883, ch. 282, construed in the case cited *supra*, except that it provides for the "Lumberton Graded School," to be established in Lumberton school district, known as district No. 70 for white children in Robeson county. It was ratified and became operative on the 9th of March, 1883.

At the time of the passage of the act (ch. 292), the school district No. 70 was laid off, ascertained and established according to law.

After the passage of this act, the county commissioners on the 19th of April, 1883, undertook to change the boundary of district No. 70, in question, whereby they materially reduced the same in area, and left out of the district numerous citizens and very considerable taxable property. This order seems to have been made mainly, if not wholly, at the instance of taxpayers who desired to be left out of the district, with the view to escape the assessment prescribed and allowed by the act, if a majority should vote in favor of it. The election was held at the time designated in the act, within the district as reduced in

area, the electors outside of this boundary, but within the boundary as established at the date of the ratification of the act, not voting or participating in it, and a part of the electors inside of the reduced area, not voting. The majority of the votes cast were in favor of the assessment.

The purpose of the statute was, plainly, to establish a graded school in school district No. 70 as it existed at the time the act was ratified, and to assess the taxpayers therein as prescribed, if a majority of the qualified voters therein should vote "for school." The legislature had power, and it was its sole province to so provide, and in view of the nature and importance of the thing to be done, it must be presumed that there were controlling considerations that led it to designate district No. 70 as the locality where the school should be established and within which the taxable property and polls should be assessed to support it, if the majority of the electors should vote in favor of it. The power to designate the location of the school and provide for its support rested solely in the legislature—its action was conclusive, unless it had seen fit to authorize the county commissioners, or some other agency to change it. There is nothing in the act express or implied, that we can see, that indicates any such purpose as that last mentioned, nor is there any policy of the state, or in the nature of the office of the county commissioners as such, or as the county board of education, that implies such power. The public school law confers their powers and authority to manage the public schools and establish school districts. It cannot be supposed, in the absence of any provision in the act to that effect, or in any statute, that the legislature intended to confer on the county commissioners as such, or as the county board of education, to make school district number seventy, for the purposes of the graded school, greater or smaller, or remove it entirely from where it was at the time the act was ratified, at their discretion, or as their judgment might suggest, ought to be done. It might have so provided, but it did not, and the power to do so is not inherent in the county commissioners as

such or as the county board of education. The county commissioners were required by the act to submit the question of assessment to the qualified voters of the district designated in the act. This done, their powers were to be at an end. The school, when established, was to be exclusively under the control of the board of trustees provided for, in the exercise of their corporate functions.

In undertaking to change the bounds of the district in question, the county commissioners transcended their powers under the statute. The voice of the qualified voters to be taken was not taken. The election was void, and the assessments were unauthorized. The court ought, therefore, to have granted the injunction as prayed for in the complaint. *McCormac* v. *Commissioners, ante.*

The order denying the motion for an injunction must be reversed. Let this be certified to the superior court of Robeson county to the end that the court may proceed according to law. It is so ordered.

Error. Reversed.

H. G. TROTTER v. COMMISSIONERS OF SWAIN COUNTY

Counties and County Commissioners—Contract—Counter-claim—Misconduct in Office.

1. Orders upon the county treasurer were issued to the jailer to pay for provisions furnished prisoners in jail, and assigned by him to the plaintiff. Afterwards the commissioners passed a resolution forbidding payment by the treasurer upon the ground of official misconduct in the jailer in setting the prisoners free without requiring them to pay costs for which they had been committed, thereby causing loss to the county; *Held*, that the acts imputed to the plaintiff's assignor do not constitute a bar to an action to recover the amount of the orders.

2. The malfeasance charged is a tort, and is separate and distinct from the contract out of which the cause of action arose, and therefore cannot be recognized as a counter-claim.

(*Johnson* v. *Bell*, 74 N. C., 355, cited and approved).

CIVIL ACTION tried at Spring Term, 1883, of SWAIN Superior Court, before *Avery, J.*

The defendants appealed from the judgment of the court below.

No counsel for plaintiff.

Messrs. Wiley W. Wilson and *W. S. Mason*, for defendants.

SMITH, C. J. The plaintiff as assignee of W. A. McConnell, jailer, sues to recover the moneys due for board and provisions supplied to prisoners committed to the county prison, for all of which (except a small sum contested only, as are the other claims) orders were issued by direction of the county commissioners upon the treasurer, the sheriff then discharging the duties of that office, and delivered to the assignor. After the transfer to the plaintiff and whilst the claims were held by him, the commissioners passed a resolution forbidding the payment by the treasurer, assigning as a reason for the action that information had come to them since the order for the issue, and not possessed before, of acts of official misconduct in setting prisoners free who had not paid the costs for which they had been committed, and that thereby damages and loss had accrued to the county.

The court refused to recognize the defence and submitted only two issues to the jury, to-wit:

1. Have the defendants paid the orders sued on?

2. Did the plaintiff's assignor furnish board to prisoners of the value of the additional sum claimed in the complaint?

The jury answered in the negative to the first, and in the affirmative to the second enquiry, and judgment being rendered for the plaintiff, the defendants appealed.

The answer in a series of allegations of the unlawful liberation from confinement of several prisoners by the act of the jailer in whose custody they had been placed, without the payment of the costs for which they had respectively been committed, presents this as a defence to the action and to defeat the recovery of any part of the demand. It is not offered as a

counter-claim to be ascertained and applied in extinguishing or reducing the sum claimed by the plaintiff, as it should be if so intended (*Johnson* v. *Bell*, 74 N. C., 355), and if it had been offered as such, it is not such a counter-claim as is recognized in the Code of Criminal Procedure, §101. It is not a cause of action, recoupment or equity arising out of the several contracts or transactions set forth in the complaint, "as the foundation of the plaintiff's claim, or connected with the subject of the action," for the assignor's imputed official misconduct is a matter altogether distinct and separate from his right to require payment of supplies furnished to prisoners on behalf of the county. Nor is this a claim arising out of a contract within the meaning of the second clause of the section. The malfeasance charged is a tort in contradistinction to a contract out of which a cause of action springs. To assume the act to be a breach of contract upon the theory that every person entering into office, in undertaking its duties and responsibilities, promises to perform them with fidelity and to omit none, is to confound the distinction between actions *ex delicto* and *ex contractu*, that is, between wrongs committed and contracts broken.

The statute does not admit of a construction that converts every wrongful official act into a breach of contract, upon the assumption that the incumbent promised not to do any wrongful act nor to omit any imposed duty; for if so, there can scarcely be any tort that does not involve the violation of a contract. The discharge of the prisoners may be, and without legal excuse is, a tort, the redress for which must be sought in damages commensurate with the consequent injury.

But the defendants insist that they owe and should pay nothing for these supplies, irrespective of the loss thereby falling on the county, and whether that loss is equal to the claim or not. In this view the defence cannot be sustained. Suppose an act of negligence or positive wrong is excusable in law, and productive of inconsiderable though some loss to the county, is his just demand for goods supplied, however large in amount, forfeited and

lost? Where full compensation can be obtained for the wrong is it to swell into such proportions as to wipe out the large indebtedness due? Is every act of official delinquency to absorb and destroy the whole claim?

The statement of such a proposition contains its own refutation; and these, its possible consequences, show its unsoundness. If it would not apply in the case supposed, it would apply in none, and such we take to be the true principle.

We concur with His Honor, that the acts imputed to the assignor do not, if true, bar the action, and hence were not pertinent to the issues involved in the action. There is no error, and the judgment must be affirmed.

No error. Affirmed.

J. F. MUNDAY v. WHISSENHUNT & WHISSENHUNT, Executors.

Contract—Champerty.

A contract in which the obligor engages to give the obligee (who was not authorized to appear for parties litigant and manage law-suits) one-half of the land in dispute or one-half its value in the event of recovery, as compensation for his service in the management of the suit, is against public policy, and void.

(*Barnes* v. *Strong*, 1 Jones' Eq., 100; *Martin* v. *Amos*, 13 Ired., 201, cited and approved).

CIVIL ACTION tried at Fall Term, 1883, of CATAWBA Superior Court, before *Graves, J.*

The plaintiff brought this action to recover compensation for services rendered by him to David Whissenhunt, the testator of the defendants, under a contract in writing and under seal, of which the following is a copy:

"This day I, David Whissenhunt, do agree for said J. F. Munday, of Alexander county, to have one-half of whatever I

may recover in the suit or secure in settlement, between me and W. C. Jones, for the services I have employed him to do for me in the suit, or in settlement between me and Jones; if I succeed in the recovery of the suit, or any part, he is to have the half of the land or pay from me for one-half of the worth of the land which is in dispute between me and Jones. If I fail, and save nothing, and Jones succeeds, I am not to pay him anything for his trouble or service. Given under my hand and seal, this 8th of May, 1880." (Signed and sealed by David Whissenhunt, and witnessed).

On the trial the plaintiff put this contract in evidence, and offered proof going to support the allegations contained in the complaint. After all the evidence had been introduced, the court held that upon the whole case the plaintiff was not entitled to recover, and instructed the jury to find a verdict for the defendants. The plaintiff excepted generally to this decision of the court, but assigned no special grounds of exception. The jury rendered a verdict as instructed, and the court gave judgment for the defendants. Thereupon the plaintiff appealed.

Mr. M. L. McCorkle, for plaintiff.
Mr. L. L. Witherspoon, for defendants.

MERRIMON, J. As no special grounds of error are assigned in the record, it becomes necessary to determine whether or not, in any view of the whole record, the plaintiff was entitled to recover. His counsel insisted in the argument before us, that the allegations in the complaint constituted a good cause of action, and the defendants having denied the same, the evidence introduced on the trial fully proved them, and, therefore, the court erred in holding that the plaintiff could in no wise recover.

It is a clear principle of law, that an engagement, whether under seal or by parol, to do an immoral act or service, or such acts as contravene the settled policy of the law, cannot be upheld as a binding contract, nor can the plaintiff in an action recover

compensation for services rendered under or in pursuance of such engagement. The sound maxim of the common law is, "*ex turpi contractu non oritur actio.*" Whatever contravenes sound morality, or the policy of the law, vitiates and renders void any contract or engagement into which it may enter.

In our judgment the contract sued upon in this case is illegal and void, because it stipulates for a service to be performed by the plaintiff that the law forbids, upon grounds of public policy, and denominates maintenance and champerty.

One Jones had brought his action in the superior court of Alexander county against the testator of the defendants, to recover a tract of land. The plaintiff in this action was in no way a party to or interested in that suit. He was a stranger to it, and not related to the defendant therein. He was not a lawyer, but a layman, and not authorized to manage or defend suits for other people in courts of justice. Nevertheless, he entered into a contract, the substance of which was that the plaintiff in this case should aid the defendant in the action mentioned, in defending and managing his case, and receive as compensation for his services in that respect one-half of the land in controversy, or one-half its value, if the defendant should secure it, or if the suit should be compromised, then one-half of whatever might be realized or saved by such compromise; and if the defendant should entirely fail of success, the plaintiff was in that case to get nothing for his services. This comes clearly within the meaning of maintenance and champerty.

It was not the business of the plaintiff to advise about and manage law-suits, and he had no authority to do so. He interfered in a litigation that in no way concerned him, and engaged to help one of the parties to it (the defendant), exactly how, does not appear, but in some effective way, and to receive as pay for his services one-half of whatever advantage might be realized by his employer. This is precisely what the law forbids. It does not tolerate or permit such interference. If the plaintiff might so interfere in the case referred to, he may do so in any case, and

to any extent. If he may do so, every other person may do likewise; and it is easy to see that the result would be that all manner of combinations and conspiracies would be brought about to prevent and stifle justice, sometimes in one way and sometimes in another. It is a wise, wholesome and necessary provision of the law, justified by the experience of ages, that men shall not interfere in law-suits in which they have no interest, to help one party or the other in consideration of a part of the fruits of litigation. Such contracts are not only invalid, but it is indictable at the common law to so interfere. This court has uniformly recognized and upheld the doctrine of the common law on this subject. In *Barnes* v. *Strong*, 1 Jones' Eq., 100, it was held, that a contract between a father and his son, made during the pendency of a suit against the father, whereby the son agreed to defend the suit for the father, in consideration of receiving a part of the property in controversy, in case of success, is void, as coming within the prohibition of the common law against champerty. This case is a stronger one than that.

It was insisted on the argument, that the purpose of the plaintiff was to bring about a compromise of a law-suit, and not to foment strife. If that be granted, it was still an interference and taking sides for a part of the advantage to be gained. But the contract shows very clearly it was contemplated that defence was to be made, and an effort to secure the whole land in controversy, in which case, the plaintiff was to have one-half of it, or half its value in money. This was champerty, and rendered the contract void. *Martin* v. *Amos*, 13 Ired., 201; *Barnes* v. *Strong*, *supra;* 7 Wait's A. & D., 73, *et seq.;* 2 Bacon Abr. *Title*, champerty.

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

No error. Affirmed.

J. D. ABBOTT v. GEORGIA & NORTH CAROLINA RAILROAD COMPANY.

Contract—Officer of Railroad Company—Compensation.

1. The plaintiff was elected secretary and treasurer of a railroad company at a salary fixed by one of its by-laws, and entered upon and discharged the duties of that office, until his successor was chosen; *Held,* in an action to recover his salary, that the plaintiff is not required to show that such services as appertained to the office were performed, where the answer of the defendant admits the duties were discharged and offers no evidence to support any objection to the manner and kind of service rendered.
2. *Held further:* The by-law constitutes the contract between the parties, and under a stipulation contained therein, the compensation, though measured by the day, is continuous during the term of service, and not dependent upon each day's work.

CIVIL ACTION tried at Fall Term, 1883, of CHEROKEE, Superior Court, before *Gudger, J.*

The plaintiff alleges that in the month of November, 1878, he was elected to the office of secretary, associated with that of treasurer, of the defendant company, by its board of directors, acting in pursuance of the by-laws, at a fixed compensation of two dollars per day for his services and necessary expenses, and immediately entered upon the discharge of his official duties; that he continued to serve the company in that capacity until August 10, 1882, when his resignation, according to its terms, took effect by the appointment of a successor; and he has received several sums of money, amounting to $786, which credited upon the sum claimed to be due ($2,348), reduces it to $1,502, and for recovering this residue the action is brought.

The answer of the company admits the election at the time specified, and that the plaintiff at once proceeded to discharge his assumed duties, but it denies that he continued in the company's service up to August, averring that he ceased to act on the 17th day of May preceding, and that the books and valuable papers in his custody then passed into the hands of the presi-

dent of the company, and were held by him thereafter, except as they were necessary for the succeeding secretary and treasurer to have them at meetings of the directory. It is denied that the plaintiff served during his term of office for 1,174 days, as alleged by him in the complaint.

The answer charges, in reference to the credits, that the moneys represented in them came into the possession of the plaintiff in his official capacity, and could not be appropriated to his own use, nor to any other, unless by order of the board of directors, and that this attempted application of the fund to the plaintiff's demand is an act of official misconduct, and in direct violation of his fiduciary obligations to the company.

There were no issues prepared for submission to the jury as directed by a rule of this court, and now by THE CODE, §§393 and 394, superseding the rule, but the trial was upon the matters in controversy contained in the pleadings without eliminating them severally.

The plaintiff exhibited in evidence his written resignation, tendered on May 17, 1882, and in terms to take effect as soon as a successor should be appointed, proved the election of one G. G. Whitcomb to the office on August 10th following, and his receipt on the next day from the plaintiff of the company's effects in his possession.

He also introduced certain by-laws adopted by the company relating to the offices of president, secretary and treasurer, and prescribing the duties of the two last. The first provides for the election annually, of a president, by the board of directors, at their first meeting after the annual meeting of the stockholders, and for his continuance in office for one year and until the election of a successor, with compensation at "two dollars per day, while in actual service, over and above his necessary travelling expenses while on business for the company.

Those sections which define and regulate the other two offices are as follows:

Secretary: "It shall be the duty of the secretary to keep a full record of all meetings of the board of directors and stock-

holders, and perform such other duties as may be required of him from time to time, as secretary, by the president and directors, who shall give bond for the faithful performance of the duties aforesaid, and for the delivery of all books, records and papers in his possession, as secretary, to his successor in office; said bond shall be in the sum of $1,000, to be approved by the president and board of directors before entering upon the duties of his office, and shall receive for his services two dollars per day and necessary expenses.

Treasurer: "It shall be the duty of the treasurer to take into his care and keeping all the bonds, notes, moneys and other evidences of stock and securities now belonging to said company or that may hereafter belong to the same, to be appropriated and disbursed only upon the order and direction of said company; and that he shall, from time to time, report to said president and directors as required by them, the amount of the same on hand and the manner of his disbursements, specifically stating how the same has been settled, or is now due, and what amounts and the manner of disbursements, item by item; that he shall receive no salary while acting in the capacity of secretary and treasurer, aside from the salary of secretary."

The defendant offered no evidence, and the court intimating that upon this state of the proofs the plaintiff could not recover, and so the jury would be instructed, he suffered a nonsuit and appealed.

Messrs. E. C. Smith and *Fuller & Snow*, for plaintiff.
Messrs. Battle & Mordecai, for defendant.

SMITH, C. J., after stating the case. We are at a loss to know upon what ground this ruling is made, unless it be, and this we infer from the argument here, that the plaintiff was bound to go on and show that services, such as appertain to the double offices, were rendered during the interval covered by his claim, to entitle him to a verdict, and that none had been proved. If so, we do not concur in this view.

The defendant's answer admits the plaintiff's allegation of his election at the time mentioned, and his entering at once upon the discharge of his official duties, and, in the denial that the plaintiff "continued to act as secretary and treasurer as aforesaid until the 10th day of August, 1882," for that "he ceased to act on the 17th day of May, 1882, when the books, accounts, notes and other valuable papers of the company were delivered to the president," admits also under the rules of pleading the continued discharge of those duties up to the earlier day specified. There was no necessity for producing evidence in the face of this concession of the rendition of services during the undisputed interval. But there is no denial in the answer of the plaintiff's faithful performance of every imposed duty, nor any suggestion in the answer of dereliction, except in the alleged appropriation of moneys of the company received to his own claim against it.

It is not material how onerous or light the required services were, for the compensation to be paid for them is fixed at a definite sum, and this the company contracts to pay. It is quite sufficient that the plaintiff held the offices, kept the papers of the defendant, gave the bond for his personal fidelity, and so performed the services undertaken as to be retained in office and without complaint while discharging them, or even now made, except in the particular mentioned, in the answer and defence set up to the action.

If there was any objection to the manner and kind of service, none was supported by evidence, for the defendant declined to offer any.

The counsel for defendant here contends that the compensation is *per diem* and dependent upon each day's work, ceasing when none was done and requiring proof of performance.

No such condition is found in the by-laws which constitutes the contract, for, there, the compensation is continuous though measured by the day, and it is expressly spoken of as a salary in the clause declaring that no additional compensation shall be

paid for discharging the duties of treasurer, when that office is united with that of secretary—that allowed the latter being for both.

The presence of such a condition in the provision for paying the president, that it shall be "two dollars per day while in actual service," and the absence of it in that relating to the secretary, plainly indicates an intention to establish a different rule for the latter. As long, therefore, as the defendant retained the plaintiff in its service it is bound to pay him the stipulated compensation.

The defendant has not undertaken to sustain the allegations imputing official misconduct to the plaintiff, in misapplying the funds in his possession to his own use in reducing his debt, and as they are deemed to be controverted (C. C. P., §127), they must be put out of the way. The charge itself is rather of an attempt thus to apply the moneys in his hands than a malfeasance and mismanagement; and this is covered by the bond. It is only available, if available at all in this proceeding, as constituting a counter-claim, the sum misapplied; and this result is secured by the credit voluntarily given by the plaintiff himself. It cannot be a defence to the action and be permitted to extinguish all liability incurred by the defendant to pay for services rendered, while it seems to have been so intended.

We do not undertake to determine for how long a time the plaintiff is entitled to claim his *per diem* salary or compensation, but there is error in denying him any upon the proofs offered.

The nonsuit must set aside and a new trial awarded, and it is so ordered. This will be certified to the superior court.

Error. *Venire de novo.*

BANK, Commercial National of Charlotte v. C. N. SIMPSON, Adm'r.

Contract, place of—Bankruptcy, surety not relieved by discharge of his principal in—Evidence.

An action was brought against an endorser of a note executed by a firm in renewal of a former note, the transaction taking place in South Carolina, but the note was *sent and delivered* to the plaintiff bank at Charlotte in this state to be discounted. One of the firm was adjudicated a bankrupt upon his individual petition and the note was proved against his estate, and the plaintiff bank and other creditors gave their assent as required by law to his discharge. The bank discounted the note and at maturity extended the time of payment to the makers for a valuable consideration, but reserved its rights against the endorser; *Held*—

(1) The court properly refused to charge there was no evidence of a reservation of right against the defendant surety.

(2) The court also properly refused to permit the bankrupt's schedule to be introduced as evidence that the contract was made in South Carolina. It relates to his own liabilities and was not competent in the controversy between the parties to this suit and in their relations to each other.

(3) The evidence of a member of the firm in reference to the manner of endorsement of the renewal note for the purpose of continuing the negotiated loan, was admissible, as tending to show where the contract was to be made.

(4) The contract is governed by the laws of this state—it being consummated here and efficacy given to the note by its delivery and negotiation at the bank, in pursuance of the intent of all the parties; and no demand or notice of non-payment is required to bind the endorser.

(5) A surety's liability to a creditor is not affected by the discharge in bankruptcy of the principal. Such discharge is the act of the law, and does not release one liable for the same debt, either as partner, endorser, or otherwise. And a creditor's assent to the discharge is that it be granted under the bankrupt law.

(*Bank* v. *Lineberger*, 83 N. C., 454; *Hoffman* v. *Moore*, 82 N. C., 313; *Ingersoll* v. *Long*, 4 Dev. & Bat., 293; *Oldham* v. *Bank*, 85 N. C., 240, cited and approved).

CIVIL ACTION tried at Fall Term, 1883, of MECKLENBURG Superior Court, before *Gilmer, J.*

The action is against the defendant, as endorser of two promissory notes, one executed on August 13, 1879, by the partnership

of Cureton, Audrey & Co., for $2,000, payable at thirty days, the other executed by the partnership of Stevens & Cureton on December 12, 1877, for $2,500, also due at thirty days, the former drawn payable to the defendant and endorsed by him alone, the latter drawn payable to the defendant and one William Stevens and jointly endorsed.

The parties all reside in South Carolina and the notes were prepared and assigned there, though purporting to have been made at Charlotte in this state, for the purpose of being sent to the plaintiff to be discounted, and were so sent and the money therefor obtained from the bank at Charlotte. The makers and endorsers are all insolvent except the defendant against whom the action was commenced on August 13, 1874.

In 1878, J. H. W. Stevens, a member of each of the firms who made the notes, filed his individual petition in bankruptcy, and was adjudicated such and obtained his discharge.

By the amendatory act of June 22, 1874, it is declared that "in cases of voluntary bankruptcy, no discharge shall be granted to a debtor whose assets shall not be equal to 30 per centum of the claims proved against his estate, upon which he shall be liable as principal debtor, without the assent of at least one-fourth of his creditors in number and one-third in value." Rev. Stat. of U. S., ch. 390, §9—supplement.

The debts in controversy were proved against the bankrupt's estate, and the plaintiff, with other creditors, gave the assent required by law under which the discharge was granted and without which it could not have been obtained.

Among other issues submitted to the jury, they find that the note for $2,500 was in renewal of what was due on a previous note for $3,096, and that the latter was given and accepted in part payment of the debt of $11,200 contracted to be paid in the purchase of a tract of land by Stevens & Cureton from William Stevens, and to secure which a deed of mortgage was made of the same land by the purchasers, the note for which purchase money was discounted at the bank and assigned to it, and the

plaintiff has been in possession of the mortgaged premises and is appropriating the rents and profits to its own use; that under an agreement, the interest to be paid on the notes in suit was at the rate of one per cent. per month:

And that at or about the maturity of the note for $2,000, the time of payment was extended to the makers for thirty-three days for a valuable consideration, and at the same time the bank reserved its rights and remedies against the defendant, the endorser.

Upon these facts the court rendered judgment against the defendant for the full amount demanded in the complaint with costs, and the defendant appeals.

Mr. Platt D. Walker, for plaintiff.
Messrs. Jones & Johnston, for defendant.

SMITH, C. J., after stating the case. The first exception taken by the appellant is to the refusal of the court to charge the jury, as was requested, that there was no evidence of the reservation of the right to proceed against the defendant, or, if there was, it is contained in a correspondence, and the force and effect of which should have been declared by the court as a matter of law.

Examining the accompanying exhibits upon which the objection rests, if sufficient to show indulgence, it manifests an equally clear purpose not to surrender, and to retain full rights against the surety, in the fact, that the renewal note is to be held for his signature before its acceptance. It would be most manifestly wrong to deduce from the evidence an arrangement to postpone without the associated intent to hold the defendant liable.

Upon this double finding, the authorities are clear that the defendant is not exonerated by what was done. *Rees* v. *Benington*, 2 White & Tudor's cases in Equity, note 360 (716), and cases cited; 2 Danl. Neg. Ins., §1322; *Bank* v. *Lineberger*, 83 N. C., 454.

Second Exc. The defendant proposed to read from the schedule filed with the bankrupt's petition the enumeration of the notes and the place of their contract as therein stated, in order to show that it was entered into in South Carolina and is governed by the laws of that state. This, on objection, was not allowed.

It is true it is requisite that the bankrupt state the locality whereat the several debts owing by him were made, but as his mere declaration we cannot see how it is competent upon the disputed fact between strangers and in their relations to each other. It is but the assertion on oath of the bankrupt himself in reference to his own liabilities, and was properly ruled out.

But no injury can come from the rejection of the evidence, since the fact seems not to have been denied, and the jury find that the notes were endorsed by the defendant's intestate in South Carolina.

Third Exc. Upon the cross-examination of T. J. Cureton, a member of each of the firms that gave the notes, and introduced as a witness for the defendant, he was allowed, after objection, to testify that he came to Charlotte with the note bearing the endorsement of the intestate's name; that it had been reduced, after several renewals, from $5,000 to $2,000; that it was presented to the intestate and he knew at what place and for what purpose it was to be negotiated; and that the negotiation for the loan of $3,096 was also effected in Charlotte by the witness and Stevens, the intestate not being present. His name was afterwards endorsed and he was informed that it was for a loan already negotiated in Charlotte by himself and Stevens.

We do not see why this testimony is not pertinent and proper in determining the place in which the contract was to be, and in law was consummated, and under and subject to the laws of what state.

Fourth Exc. The next exception to the ruling is that the notes being completed in South Carolina, and, as intended, sent

to the plaintiff bank for discount, and being discounted, the liability incurred by the endorsement was controlled by the laws of that state, and the note not having been protested for non-payment, and notice given to the endorser, he is exonerated.

There was no proof as to the statute in force in that state placing such notes upon the footing of inland bills of exchange, or whether the statute of ANNE is in force as a part of the common law. But however this may be, the signatures to the notes were but the putting the instruments in form—completing them—for delivery to the bank at Charlotte, and until the delivery no obligation was incurred by any one. The contract was consummated and the liabilities of the parties in their relations to the bank and to each other *fixed* at the time and place of negotiating the loan and upon the authorized delivery of the notes to the plaintiff. The law of this state must, therefore, govern in determining the legal character and consequences of the transaction, and under it no demand, protest or notice of non-payment is required to bind the endorser. THE CODE, §50; *Hoffman* v. *Moore*, 82 N. C., 313.

The authorities referred to in the argument for appellant sustain the general proposition that where a note or bill perfected and put in circulation, and endorsed in another state or states, the successive endorsements are deemed each a new drawing, and regulated by the law of the state wherein it was made. 1 Danl. Neg. Ins., §899; Story Conf. Laws, §§307, 314, 316, 360. And so it is held in the case cited, *Ingersoll* v. *Long*, 4 Dev. & Bat., 293, that one statute which makes an endorser of a note a surety is confined to such as are made and become operative as a contract in this state, and does not apply to such as are made beyond its limits. "It does not operate," in the words of GASTON, J., "upon an endorsement when it cannot operate upon the preceding endorsements." A different construction and a wider scope given to the act would obviously open the door to serious inconveniences and difficulties in its application, and disturb the relations subsisting among successive endorsers as such.

But the notes in this case are not of this kind, nor are there different rules of responsibility attaching to the parties. The intestate, the payee, is the sole endorser, and his obligation under the law of this state was created, as was the obligation of the makers, at one and the same time, when efficacy was given to the instruments by their negotiation and delivery at the bank, as intended by all. The learning in reference to divided and differing liabilities, incurred by endorsements made after the execution of the note in a different jurisdiction and under different laws, has no application.

Fifth Exc. The remaining exception has reference to the effect of the discharge in bankruptcy of the makers of the notes, a principal debtor, upon the liability of the intestate who endorsed.

It is denied that the discharge, being an act of the law, would not, without the coöperation of the creditors, exonerate the surety, but this effect is ascribed to the voluntary action of the bank in enabling the debtor to obtain the discharge.

We do not attach importance to the suggestion that the assent was not given by the authorized agent of the bank, its president, since the adjudication proceeds upon the fact that the assent of a sufficient number of the creditors was given, and among them that of the bank, a party that proved its debts; nor to the fact that the assent of a sufficient number was given, exclusive of the bank, since the latter is one of the assenting creditors contributing to the result.

It is contended in answer to this objection from the appellant that the bankrupt, having applied in his individual capacity alone, is released from his own separate debts, but the debts of the partnership remain unimpaired as to all the partners, and we are referred to cases in which such seems to have been the rulings. In the well considered opinion of LOWELL, District Judge, delivered in *Wilkins* v. *Davis*, 15 Nat. Bank. Reg., 60, a different view is taken, and it is held that the bankrupt interest in the partnership estate after the settlement of the joint debts (that is, his

share) passes to the assignee, and with the transfer the bankrupt's exoneration from the firm debts, while the other partners retain the joint estate to work out their own exoneration by applying it to the common joint debts.

But conceding that the bankrupt partner becomes released from the partnership debts, the question recurs as to its effect under the circumstances of this case upon the liability of the surety.

Our attention has been called to two adjudications in which it is expressly held that the surety is discharged. *In re McDonald*, 14 Nat. Bank. Reg., 447; *Calloway* v. *Snap*, 78 Kent. Rep., 561.

In the latter case, decided in 1880, after referring to *Brown* v. *Carr*, 7 Bing., 508, where the report has only the head-note, while the case is reported in full in 2 Russell, 60, 3 Eng. Com., Ch. Rep., 250, the Chief-Justice who delivered the opinion says: "We have only the syllabus of the opinion in *Brown* v. *Carr*, which reads as follows: A surety for a bankrupt is not discharged by the creditors signing the bankrupt's certificate, even after notice from the bankrupt not to do so. Not having access to the English bankruptcy act, under which the decision was made, it is impossible to determine how far the decision in that case bears upon the question before us." After discussing also other authorities, he proceeds: "But under our statute the assent of creditors to the discharge of a debtor who has not surrendered the requisite amount of assets, is mere matter of grace. It is not necessary to the completeness of the bankrupt proceedings, is not in the interest of creditors generally or even of those who give their consent, but is in the interest of the debtor alone and to the prejudice of the creditors." And he concludes that the assent of the creditor to the discharge of the principal debtor "was as effectual to release the surety as if she had undertaken by a valid agreement not to sue on the note for a specified time, or until after she should make demand of payment."

This decision, however, confronts several others rendered in courts of the highest authority, in which it is ruled that such a discharge is by law and does not relieve the surety of the debt.

In *Brown* v. *Carr*, the case adverted to in the opinion of the supreme court of Kentucky, the defendants, silk merchants, had sold goods, and paid acceptance for one Barber under a written guaranty of the plaintiff, and were prosecuting their action against the guarantor who resisted the claim. Pending the action, Barber was declared a bankrupt and the defendants proved under the commission their demand against him. They also after notice not to do so from the plaintiff (Brown) signed the certificate, which without their signature could not have been obtained. They afterwards obtained a verdict against the plaintiff, and he filed his bill to restrain the enforcement of the debt upon the ground that he had been exonerated by the action of the creditors.

"The LORD CHANCELLOR was of opinion that no equity arose in favor of the plaintiff out of the conduct of the defendants in enabling the bankrupt by their signature to obtain his certificate."

In *Ex-parte Jacobs*, 12 Eng. Rep., 707, L. R., 10, ch. app., 211, it was contended that the creditor had signed the resolution passed by the requisite number of creditors at a previous meeting, agreeing to a composition with the bankrupt debtor of five shillings in the pound and that this discharged the secondary liability of the drawer Jacobs. The opinion of the Lord Justice read and concurred in by JAMES, L. J., after stating the facts, proceeds thus: "There can be no doubt that if the holder of a bill, by becoming party to a deed or agreement, independently of any bankruptcy act, agrees to accept a composition from the acceptor, he thereby discharges the drawer; but on the other hand, it is equally clear that if the acceptor is discharged from his liability by operation of law by becoming a bankrupt, the liability of the drawer to the holder is not thereby affected."

Then referring to a contrary ruling in *Wilson* v. *Lloyd*, Law

Rep., 16 Eq., 60, and the many points in that case, the opinion proceeds: "On the other hand, in the case of *Megrath* v. *Gray*, Law Rep., 9 C. P., 216, the Court of Common Pleas appear to have come, after great consideration, to a directly contrary conclusion. * * * We agree in the decision of the Court of Common Pleas and in the reasons they have given for it. We think that a discharge of a debtor under liquidation or a composition is really a discharge in bankruptcy *by operation of law*.

In *Sigomney* v. *Williams*, 1 Gray (Mass.), 623, a case arose under a state insolvent law, with provisions very like those contained in the act of Congress, in which one Wood received a discharge from all his debts from the commissioner of insolvency. His assets did not pay fifty per cent., but all the creditors of the partnership, of which he was a member, and a majority in number and value of the creditors who had proved their claims against the insolvent's estate as an individual, assented in writing to his discharge. In order to such majority, it was necessary to include the note in suit, and the executors of the creditor, with knowledge of the fact, gave their assent.

SHAW, C. J., said: "It is true that as Wood's assets did not pay fifty per cent. of the claims against his estate, he would not have been entitled to his discharge, without the assent of a majority of his creditors, and that the commissioner could not lawfully have granted him a discharge without such assent. But it does not follow that this discharge derives its whole force and effect from the assent, and operates like a technical release of Wood under seal. It was an assent that Wood should receive a discharge under the insolvent law, having the force and effect given to such a discharge by the law, which is a discharge of the individual debtor, expressly reserving the liability of any partner or surety. Whether, therefore, the discharge was obtained by the consent of the creditors or without, it was a *discharge obtained pursuant to law, having the effect given to it by law and no more*, to discharge the individual, but not to discharge his partner.

But a case presenting the very question now considered under the act of Congress, is found in *Guild* v. *Butler*, 122 Mass., 498, the decision in which is pronounced by GRAY, C. J., now an Associate Justice of the supreme court of the United States. We reproduce such extracts as are necessary to an understanding of the ruling.

"By the existing acts of Congress upon the subject of bankruptcy, a bankrupt's estate may be settled and the bankrupt discharged in either of three ways:

1. The estate may be administered in the ordinary manner by assignees appointed for the purpose, and a certificate of discharge be granted by the court, with the assent, in some cases, of a certain proportion of the creditors who have proved their claims. Any person liable as surety for the bankrupt may, upon paying the debt, even after the commencement of proceedings in bankruptcy, prove the debt, or stand in the place of the creditor. U. S. Rev. Stat., §5070. But the surety's liability to the creditor is not affected by any certificate of discharge granted to the principal. U. S. Rev. Stat., §5118.

2. The estate may be wound up and settled by trustees nominated by the creditors upon a resolution passed at a meeting for the purpose by three-fourths in value of the creditors whose claims have been proved, and confirmed by the court, and upon the signing and filing by such proportion of the creditors of a consent in writing that the estate shall be so settled. *Ib.*, §5103.

3. The creditors, at a meeting ordered by the court either before or after an adjudication in bankruptcy, may resolve that a composition proposed by the debtor shall be accepted in satisfaction of the debts due them from him. U. S. Stat., June 22d, 1874, §17—substantially the English bankruptcy act of 1869.

"It has been determined in England," continues the Chief-Justice, "by decisions of high authority and upon most satisfactory reasons, that a creditor, by participating in either of the three forms of proceeding, *whether by assenting to a certificate of discharge* or by consenting to a resolution either for winding up

through trustees or for the acceptance of a composition proposed by the debtor, *does not release* or affect the liability of a surety."

In whatever way authorized by the act the discharge may be obtained, or whatever precedent conditions must be complied with in order thereto, the discharge is the *act of the law*, and that act expressly provides that " no discharge shall release, discharge or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, *endorser*, *surety*, or otherwise." U. S. Rev. Stat., §5118.

This is the restriction put by Congress upon the discharge, and whatever changes may have been subsequently introduced, hindering or facilitating the attainment of the end, the discharge, in the extent of its operation, remains unchanged. Whether the creditor gives his consent in cases where it is required or not, the force and effect of the discharge is the same, and it leaves a surety exposed to the creditor's claim on him. How can it be, then, that a discharge shall exonerate the surety, when the act says it shall not, and the provisions of the act are confined by the constitution to the judgment of Congress? We think it manifest that where the creditor's assent was required, it was not intended to modify the effect previously ascribed to the discharge, and exonerate one who, the law declares, shall be liable as before. Brant on Suretyship, §126; Bump. Bank'cy, 543.

The allegation of usury is not an answer to the claim. *Oldham* v. *Bank*, 85 N. C., 240; *Barnes* v. *Bank*, 98 U. S. Rep., 555.

Upon a full review of the record, we find no error, and must affirm the judgment.

No error. Affirmed.

JARRETT & DEAL v. W. R. SELF.

Contract—Splitting up Account—Jurisdiction.

1. Where a *single* contract is made for furnishing certain specified articles, at prices fixed for each, the plaintiff can not be allowed to "split up" the account and recover upon each item separately.
2. If there are several payments due under one and the same contract at the time a suit is brought to recover one installment, a judgment for the amount of the latter will be held to be in satisfaction of the whole, as all the sums, being due, conld have been included in the action. But it is competent for the plaintiff to sue and recover upon each as it falls due, and in the court having jurisdiclion of the same.
3. Where the plaintiff "split up" his account, due under a single contract cognizable in the superior court, and brought actions before a justice of the peace, it was held upon appeal that the superior court did not acquire jurisdiction of the whole amount by consolidating the cases into one action. The appellate jurisdiction is derived solely from the rightful one assumed by the court below.

(*Caldwell* v. *Beatty*, 69 N. C., 365; *Boyle* v. *Robbins*, 71 N. C., 130; *Magruder* v. *Randolph*, 77 N. C., 79, cited, commented on and approved).

CIVIL ACTION tried at Fall Term, 1883, of CATAWBA Superior Court, before *Graves, J.*

The plaintiffs appealed.

Mr. M. L. McCorkle, for plaintiffs.

No counsel for defendant.

SMITH, C. J. The defendant about to erect a house entered into an agreement with the plaintiffs, who are house carpenters, by which the latter agreed to construct window-frames, shutters, doors and other articles used in the building, and to do other specified work thereon at prices fixed for each, and to be paid for as they were respectively completed. When the contract had been performed there was found to be due the plaintiffs the sum of $241.14, and thereupon the plaintiffs, on December

13, 1882, filed an itemized statement of their account in the office of the superior court clerk, in order to perfect and secure the laborer's lien on the house, in pursuance of the directions of the statute. THE CODE, § 1784.

In order to a more speedy collection of the claim and enforcement of the lien, the plaintiffs separated the charges, which constituted the claim, into two accounts, one embracing items to the amount of $166.33 and the other items to the amount of the residue of the entire claim, and on January 17, 1883, commenced actions before a justice of the peace for the recovery of each as a distinct and independent demand, and on the trial recovered judgment in both actions, from which the defendant appealed.

In the superior court the actions were consolidated without prejudice to the question of jurisdiction, and tried.

The court being of opinion that, inasmuch as after completing the contract the plaintiffs had filed the whole account in the mode prescribed for claims beyond a justice's jurisdiction, they had elected to treat it as *one debt*, and it was now severable without the defendant's assent, so as to bring the parts within that jurisdiction, the action was accordingly dismissed, and from this judgment the plaintiffs appeal.

The cases heretofore decided in this court and cited in the argument for appellants, *Caldwell* v. *Beatty*, 69 N. C., 365; *Boyle* v. *Robbins*, 71 N. C., 130, and the later case not referred to, *Magruder* v. *Randolph*, 77 N. C., 79, establish the general proposition that a series of separate charges, for goods sold and delivered or labor performed, each the subject of a distinct contract, though associated and put in one account, may be divided and severally sued for in the proper jurisdiction for each, or they may be united so as to form an aggregate single indebtedness belonging to a different jurisdiction. This follows from the fact that there is a succession of contracts applicable to a succession of items in the series which make up the amount as a whole. If, however, several articles are bought at one time, so as to constitute a single understood transaction and be embraced in one con-

tract, notwithstanding each has its own fixed price, they are not separable so as to admit of separate actions.

In the case last mentioned, the defendant went through the rooms of the plaintiff's store in search of the various goods he wished to purchase, selecting and setting aside such as he wanted, with the prices made known at the time, until his bill exceeded the sum of five hundred dollars. His account was so made out and rendered with a statement of the credit allowed upon the bill. The court held that there was a single contract to pay for all the goods one sum of money, and there could be no division so as to change the jurisdiction. "Here, the dealing was continuous," in the words of the opinion, "and nothing appears on the face of it, or in the account rendered, indicating that either party intended that each item should constitute a *separate transaction and cause of action*, which could have been easily done and we are to presume would have been done, if so intended."

Again, it is plain from adjudications and upon principle that if the contract be to sell and deliver different parcels of goods, at different stated periods, each parcel to be paid for on delivery, or to pay money in future installments, the action will lie upon each failure to make payment, for each is a distinct breach of the contract, and so *toties quoties*, for the successive breaches. A case of frequent occurrence is that of a bond or note to pay a principal sum of money at a distant future period, and meanwhile to pay the semi-annual interest as it accrues. The interest is recoverable from time to time as it may become due, and one recovery is no obstruction to the recovery of interest subsequently recurring. But it is quite a different proposition to say that when all the breaches have occurred of which the contract is susceptible there can be separate suits brought for each. All that can be, must be included in one action.

The rule is thus stated by an eminent writer on the law of contracts: "If there are many parts of the contract and some have been broken, and others not yet, as if money was to be paid on the first day of every month for two years, and one year has

expired and nothing been paid, the creditor may bring his action for one or more of all the sums due, and, recovering accordingly, may, when the others fall due and are not paid, sue for them. *But if at any time he sues for a part only of the sums due, a judgment will be held to be a satisfaction of all the sums which could have been included in that action, and were due and payable by the terms of that contract,* and therefore no suit can be maintained on any of them. The reason of the rule is the prevention of unnecessary and oppressive litigation. 2 Par. Cont., 464.

"Where the action is *upon a contract,* it merges all amounts due under or arising out of the contract prior to the suit. They constitute a single indivisible demand. The plaintiff cannot be allowed to split up the various *covenants or promises contained in one contract* and to recover upon each separately." Freem. Judg., §240.

And it is said in *Bendernagle* v. *Cocks,* 19 Wend., 207, a plaintiff after one recovery may sue for "other breaches of several covenants or promises *contained in the same contract,* provided the action be brought before the subsequent breaches are committed." *Cook* v. *Wharwood,* 2 Saun., 337; *Ashford* v. *Rand,* Andrews R., 370; *Guernsey* v. *Carver,* 8 Wend., 492; *Beach* v. *Crain,* 2 Com. (N. Y.), 86; *Burritt* v. *Belfy,* 47 Conn., 323.

In the case of *The Reformed Dutch Church* v. *Brown,* 54 Barb., 191, the defendant's testator had agreed in writing to pay one hundred dollars annually for three years. After all the installments had become due, suit was brought for the first and judgment recovered. Afterwards another suit was brought for the remaining installments and it was decided that the first judgment was a bar.

In *Burritt* v. *Belfy, supra,* the action was for monthly rent which accrued prior to October 31, while a subsequent action was prosecuted to judgment before a justice, in which the previous rent might have been included, and this was relied on to defeat the other. In the opinion the court lay down this prop-

osition: "After all the payments have become due and the consideration is executed, in determining whether the cause of action is single and entire, or several, regard should be had to the obligation of the defendant under the contract at the time the action is brought. If there are several payments due under one and the same contract, they then become consolidated as one obligation on the part of the defendant and one demand on the part of the plaintiff. So that if this action was founded on the express contract, we should hold that all the payments due should be included in one action."

Accepting this as a true exposition of the law, it is manifest that a successful prosecution to final judgment of one portion of the plaintiffs' demand, where all is due, would be an impediment in the way of recovering what remains, under the plea of *res ad judica*, since the first action is deemed to embrace not only what was, but what ought to have been recovered, in the breaches of the one contract.

But as the account is made up of several distinct charges, though for infractions of the same contract, committed at different intervals in the non-payment of the money due for the several pieces of work, as they were finished, we can see no reason for refusing to entertain a suit for a separable part of the claim, if the plaintiff chose to demand and prove only such separable part at the peril of losing the other part. Certainly they are not bound to insist upon all that may be due for their work and labor. It would be otherwise if this were a single promise to pay one sum in excess of the justice's jurisdiction, notwithstanding a series of separate charges entered into and formed the consideration of the promise, as was the case of *Magruder* v. *Randolph, supra*, since a single promise is incapable of division, and must be enforced in the court having cognizance of it as an entirety.

In *Caldwell* v. *Beatty, supra*, where the account was allowed to be "split up," the reason assigned by the Chief-Justice, speaking for the court, was, that it was a "running account wherin each

item is entered and was in fact a distinct dealing, so that Beatty might, if so inclined, have warranted Caldwell for the amount of each item, the day after the article was sold and delivered; in other words, the legal effect was the same as if Caldwell had given his due-bill to Beatty for each item at the delivery of the article." The distinction which we have endeavored to point out is recognized and apparent in the rulings in this and the case of *Magruder* v. *Randolph, supra,* and its observance is necessary to mark the line which separates the jurisdiction of the superior court and the court of a justice of the peace. The course taken in consolidating the actions forcibly illustrates this. By being blended, the aggregate amount is sufficient to sustain the jurisdiction of the superior court, had the cause originated there, and yet by resort to the process of division, it has reached that court by a short and rapid route, and obtained precedence over other causes prosecuted in the regular and authorized way. The result is unavoidable when the causes of action are distinct and several, but it would be in effect to efface the jurisdiction boundary of the courts to permit this to be done when the claims and causes of action are one, and ought to be and are inseparable.

The consolidating does not obviate the difficulty, since the appellate acquired jurisdiction is derived solely from a rightful jurisdiction assumed and exercised by the justice previous to the appeal, and in this case the order was made without prejudice to the question.

The judgment below is erroneous and a new trial awarded, upon which the plaintiffs may take such course as they may be advised in the further prosecution or disposition of the cause. Let this be certified.

Error. *Venire de novo.*

C. L. SMATHERS v. J. M. SHOOK.

Settlement of Account—Evidence—Contract.

1. A settlement of mutual running accounts, by payment or giving a note for balance due, is presumed to include all pre-existing demands of either party; but this presumption may be rebutted by proof that a claim has been omitted.
2. The instructions asked in this case are not applicable to the nature of the counter-claim set up by the defendant, which is founded upon an agreement of the plaintiff, made at the time of the settlement, to allow credit, for wheat delivered by the defendant in excess of the quantity represented on the plaintiff's book of accounts.

CIVIL ACTION tried at Spring Term, 1883, of HAYWOOD Superior Court, before *Avery, J.*

Verdict and judgment for defendant; appeal by plaintiff.

Messrs. Gray & Stamps, for plaintiff.
Messrs. M. E. Carter and *Johnston & Shuford,* for defendant.

SMITH, C. J. This action, originating in a court of a justice of the peace and removed by appeal, is for the recovery of the sum of seven dollars and fourteen cents, due for goods sold and delivered, to which the defendant offers a counter-claim for wheat in amount slightly in excess of the plaintiff's demand.

The parties came to an adjustment of their mutual accounts in 1879, and the defendant then executed his note under seal for the sum of $45.10, which appeared to be the balance due the plaintiff, and this has since been paid.

The defendant contends that in the settlement he was credited with sixty and three-fourth bushels of wheat only, while in fact he had delivered seventy bushels, at the price of eighty-five cents per bushel, and was entitled to a further sum of $7.86, omitted by mistake.

Two issues were submitted to the jury with consent of parties,

the plaintiff reserving exception to the competency of any evidence introduced to show an oversight and mistake in the settlement closed by the giving the sealed note:

1. Did the plaintiff and defendant make a mistake in their settlement in 1879, whereby the defendant was denied a credit to which he was entitled? To this the jury answered in the affirmative.

2. What is the amount of the omitted credit? To this the jury responded, $7.74¼.

Upon the trial the defendant was permitted, after exception, to testify that the plaintiff held two accounts against witness, one for goods furnished at his store, another for corn and wheat-bran supplied from his mill, and that the note was given upon a settlement of the accounts for goods; that witness had delivered wheat to the plaintiff in two parcels, one of thirty bushels, hauled by one Jenkins, a teamster, and the other of forty bushels, conveyed by an employee of the plaintiff.

That the settlement was at the plaintiff's store, whose books were produced, and defendant ran over the account against himself and found it correct, but was not satisfied with the credits as being large enough, and it was thereupon agreed between them that if there was any mistake, whereby the defendant was not allowed the full amount of credits to which he was entitled, the omitted sum should be allowed the defendant in the settlement of other accounts thereafter.

The plaintiff insisted:

1. That the correction of the alleged mistake was a matter of equitable cognizance and without the jurisdiction of a justice.

2. That the mistake could not be corrected when ample means of information by which it might have been avoided were open to the defendant, and he neglected to avail himself of them; or,

3 Unless the failure to seek the information was superinduced by the fraudulent practice of the plaintiff.

The court refused to give these directions to the jury, and left it to them to find upon the preponderance of the evidence

whether such mistake occurred at the giving the note, whereby the defendant failed to be allowed for all his wheat; and if so, to respond to the first inquiry affirmatively, and proceed to ascertain the value of the omitted wheat; and that it rested upon the defendant to satisfy them of these facts.

The defendant had judgment for the small excess of his counter-claim, and the plaintiff appealed.

While it is true that every settlement of mutual running accounts by payment or giving a note for the balance is presumed to include all pre-existing demands of either which appropriately belong to such adjustment, still the presumption may be overcome by proof of the omission of any claim. The force of the presumption is stronger when the claim for wheat was included, and the alleged error lies in a mistake as to quantity. But where this presumption is met by positive proof of an agreement made at the time, that if more wheat should thereafter be found to have been delivered to the plaintiff that he did not give credit for, the excess should remain a valid charge and be admitted in adjusting another account, as is proposed to be done in the present case.

The instructions asked and refused grow out of a misconception of the defence, which is not to correct a mistake, for the note has been paid in full, but enforce an implied, and by the agreement, a positive contract, to pay for wheat delivered beyond the quantity represented on the plaintiff's book of accounts. It is a simple counter-claim for nine and a quarter bushels of wheat delivered and not paid for, because of some misapprehension of the plaintiff, and which he agrees shall be paid for in adjusting another account.

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

No error. Affirmed.

N. WHITEHURST v. J. T. HYMAN

Promise to pay debt, when not within statute of frauds—Evidence.

1. A promise based upon a new and original consideration of benefit or harm moving between the party to whom the debt is due and the party agreeing to pay the same, is not "a promise to answer the debt or default of another," and need not be in writing.
2. Therefore, where the plaintiff had judgment against a debtor and was seeking to secure payment by supplemental proceedings, and the defendant who claimed the property of the debtor promised to pay fifty per cent. of the sum due, upon plaintiff's dismissing said proceedings and not examining him as to his title, &c., which was accordingly done; *Held*, that such agreement is not within the statute of frauds, and that the defendant is liable. THE CODE, §1552.
3. The admission of irrelevant testimony cannot be assigned for error, unless it appears that the party complaining was, in fact, prejudiced by it.

(*Mason* v. *Wilson*, and cases cited, 84 N. C., 51; *Little* v. *McCarter*, 89 N. C., 233, cited and approved).

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

The plaintiff and sundry other creditors respectively obtained judgments before a justice of the peace, in the county of Martin, against T. J. Harrell. These judgments were docketed in the superior court and executions issued thereon and returned by the sheriff unsatisfied; and proceedings supplementary to the execution were commenced by the plaintiff against said Harrell, who had been examined in these proceedings on the 14th of April, 1873, and his further examination postponed for thirty days.

The defendant claimed all the real and personal property of the said Harrell, and was in possession of the same under deeds therefor. A subpœna had been served upon him to appear and be examined as a witness in the supplemental proceedings.

The officer who made service of the subpœna had charge of the collection of the plaintiff's judgment and authority to "compromise it."

At the time of the service of the subpœna on the defendant, and before he had been examined, he agreed with the officer, that if the plaintiff and the other judgment creditors would discontinue the said proceedings against Harrell, he would pay fifty per centum of plaintiff's judgment and costs; and would also pay a like sum on the other judgments against Harrell in the hands of the officer for collection.

This "compromise" was made known to the plaintiff and the other creditors, and they approved of and accepted it; and thereupon the proceedings against Harrell were "discontinued and dismissed."

Thereafter, the defendant refused to comply with his engagement and pay the plaintiff as he had promised to do, alleging that the debts against Harrell exceeded the amount stated by the officer, and he offered evidence tending to show that fact.

By consent of parties this single issue was submitted to the jury: "Did the defendant Hyman promise to pay fifty cents in the dollar of the debts in controversy without condition?" To this issue the jury responded in the affirmative.

On the trial the plaintiff offered evidence to prove that the defendant had married the only daughter of the said Harrell. The defendant objected to the same, the court admitted it, and the defendant excepted.

The plaintiff moved for judgment. The defendant opposed the motion, on the ground that the promise declared upon was "a promise to pay the debt of another for which the other person is still liable," that it came within the statute of frauds, was not in writing, and, therefore, not binding on the defendant.

The court gave judgment for the plaintiff, and the defendant appealed.

Messrs. Gilliam & Son, for plaintiff.
Mr. James E. Moore, for defendant.

MERRIMON, J. The material part of the statute relied upon

by the defendant provides that, "No action shall be brought whereby to charge * * * any defendant upon a special promise to *answer the debt, default, or miscarriage* of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party charged therewith, or some other person thereunto by him lawfully authorized." THE CODE, §1552.

It is settled by many judicial decisions in construing this statute, and others substantially like it, that where there is some new and original consideration of benefit or harm moving between the party to whom the debt to be paid is due, and the party making the promise to pay the same, such case is not within the statute; as where a promise to pay an existing debt is made in consideration of property placed by the debtor in the hands of the party promising, or where the party to whom the promise is made relinquishes a levy on the goods of the debtor for the benefit of the promisor, or where the party promising has a personal interest, benefit or advantage of his own to be subserved, without regard to the interests or advantage of the original debtor; as, for example, if a creditor has a lien on certain property of his debtor to the amount of his debt, and a third person who has an interest in the same property promises the creditor to pay the debt in consideration of the creditor's relinquishing his lien. Such promises are not within the statute, because they are not made "to answer the debt, default, or miscarriage of another person."

It may be, the performance of the promise will have the effect of discharging the original debtor; but such discharge was not the inducement to, or the consideration to support the promise.

The moving, controlling purpose of the promisor in such cases is his own advantage, not that of the debtor. It not unfrequently happens that in a great variety of business circumstances it becomes important in a valuable sense to third parties to discharge the debt of a debtor, or relieve his property from

liability to the creditor for the benefit of such third parties, without regard to the benefit, ease or advantage of the debtor.

The advantage to the third party, the promisor, is a sufficient valuable consideration to support a contract separate from, and independent of, the debt to be discharged.

Draughan v. *Bunting*, 9 Ired., 10; *Stanly* v. *Hendricks*, 13 Ired., 86; *Threadgill* v. *McLendon*, 76 N. C., 24; *Mason* v. *Wilson*, 84 N. C., 51; 3 Parsons on Cont., 24, 25 and note; *Alger* v. *Scoville*, 1 Gray., 391; *Fears* v. *Story*, 131 Mass., 47; *Williams* v. *Lepper*, 3 Bur., 1,886; *Little* v. *McCarter*, 89 N. C., 233.

In this case the plaintiff and others had judgments against one Harrell, and the plaintiff was pressing him by proceedings supplementary to the execution. The defendant claimed to own, was in possession of, and had deeds for real and personal property obtained from the debtor Harrell; he was summoned to be examined in the supplementary proceedings against Harrell, and was about to be examined as to the character of his title, his indebtedness to Harrell, and what he might know about his property. Under such circumstances he promised the plaintiff and other judgment creditors that he would pay them fifty per cent. of their judgments against Harrell if they would discontinue the proceeding in which he was about to be so examined. The plaintiff and the other creditors accepted the promise, and discontinued the proceedings. There is nothing in the record tending to show that the purpose of the promise was for the benefit of Harrell, or that his advantage was considered at all.

It is manifest, as the case appears in the record, that the defendant did not "promise to answer the debt, default, or miscarriage" of Harrell in the sense of the statute. It plainly was not his purpose to do so. He claimed to be the owner of the property sought to be reached by the plaintiff: his title was about to be scrutinized; he, himself, was about to be examined concerning it, and his indebtedness to Harrell. To avoid such scrutiny, to quiet his title for his own benefit and advantage, he promised to pay, without condition, fifty per cent. of the judgments referred to.

It appears that his purpose was to relieve himself and his property from embarrassment or question, to buy his peace, as he had a right to do, and he is bound to pay the price he agreed to pay for it.

Such a consideration is valuable, and independent of the indebtedness of Harrell to the plaintiff. He got the advantage he bargained for personal to himself without regard to Harrell, and he cannot take shelter behind the statute!

The testimony objected to but received by the court was irrelevant and immaterial, and ought to have been excluded. But it was a slight fact, and so foreign to the issue on trial, that it did not probably have any weight with the jury prejudicial to the defendant. We find nothing in the record that leads us to think so, and the exception, though not abandoned, was not pressed in this court. The admission of slight, unimportant, irrelevant and immaterial evidence that does not tend upon its face to prejudice the party complaining, is not ground for a new trial, unless it appears that the party was, in fact, prejudiced by it.

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

No error. Affirmed.

J. A. CAMPBELL and wife v. E. L. McCORMAC.

Negotiable Instruments—Consideration—Evidence.

In an action upon a promissory note, it is not necessary for the plaintiff to allege and prove a consideration. The note imports *prima facie* that it is founded upon a valuable consideration. But if the defendant rebuts this presumption, then the burden of proof is thrown upon the plaintiff to show that there was a consideration.

(*McArthur* v. *McLeod*, 6 Jones, 475, cited and approved).

CIVIL ACTION upon a promissory note, tried at Fall Term, 1883, of ROBESON Superior Court, before *McKoy, J.*

The complaint states that defendant executed his promissory note on the 29th of May, 1882, and promised to pay to the plaintiffs or order the sum of $273.33, and that no part thereof has been paid. The defendant demurred because the complaint fails to state facts sufficient to constitute a cause of action, in that it does not allege that the note was given for a consideration either good or valuable. Demurrer overruled.

Judgment appealed by defendant.

Messrs. French & Norment, for plaintiffs.

Messrs. J. D. Shaw, T. A. McNeill and *Frank McNeill*, for defendant.

ASHE, J. At the common law, promissory notes were not negotiable, but were made so by the statute of 3 & 4 ANNE, ch. 9, which was re-enacted in this state by the act of 1762, and that act was amended by the act of 1786, which declared them to be negotiable, whether expressed to be payable to order or for value received. Rev. Stat., ch. 13, §§1, 2; Rev. Code, ch. 13, §1; THE CODE, §41.

All such notes thus made negotiable import *prima facie* that they are founded upon a valuable consideration; and while such consideration is essential to their support, yet it is not necessary, in an action upon them, for the plaintiff to aver and prove such consideration; yet when evidence has been introduced by the defendant to rebut the presumption which they raise, the burden is thrown upon the plaintiff to satisfy the jury by a preponderance of evidence that there was a consideration.

It was so held in *McArthur* v. *McLeod*, 6 Jones, 475, where the court say: "Although notes as simple contracts require a consideration, it has been long settled that they import a consideration *prima facie* from the holder, so as to throw the *onus* on the other side to show the want of a consideration." The same principle is laid down in Story on Promissory Notes, 181, where it is said: "Between the original parties, and *a fortiori* between others who by endorsement or otherwise become *bona fide* hold-

ers, it is wholly unnecessary to establish that a promissory note was given upon a consideration; and the burden of proof rests upon the other party to establish the contrary, and to rebut the presumption of validity and value which the law raises for the protection and support of negotiable paper." To the same effect is Daniel on Neg. Inst., §164, and Edwards on Bills, 217.

The demurrer was properly overruled. Let this be certified to the superior court of Robeson county that the defendant may answer the complaint, if he shall be advised so to do, otherwise to abide the judgment of the court.

No error. Affirmed.

SHERWOOD PATTERSON v. JOHN McIVER and another.

Judge's Charge—Goods delivered to be sold on account—Negligence.

1. If a party be entitled to the special instructions asked, it is sufficient if the court give them in substance.
2. Where goods are received by defendant to sell on account of plaintiff, and are lost, the plaintiff is entitled to recover their value, unless the defendant used due diligence in taking care of them. But if the goods were received and held by defendant simply for accommodation of plaintiff, the defendant would be liable only for gross negligence.

(*Brink* v. *Black*, 77 N. C., 59; *Kinney* v. *Laughenour*, 89 N. C., 365; *Long* v. *Pool*, 68 N. C., 479, cited and approved).

CIVIL ACTION tried at December Special Term, 1883, of MOORE Superior Court, before *MacRae, J.*

This action was commenced in the court of a justice of the peace against McIver & Dalrymple, partners in trade, doing business in the town of Jonesboro, to recover the value of a bale of cotton.

The plaintiff alleged that in December, 1881, he, by his agent Nathan Underwood, delivered a bale of cotton weighing about 630 pounds to the defendants, and of the value of $69.30, to be

by them sold as soon as the price of cotton reached eleven cents a pound; that the price soon thereafter advanced to said sum, and plaintiff has demanded a settlement of the defendants; that he was informed by them that the cotton was not on hand, and after diligent search could not be found. Wherefore he demands judgment, &c.

The defendants denied the right of the plaintiff to recover, on the ground they did not consider that the cotton was delivered to them.

Upon the trial before the justice of the peace, judgment was rendered in favor of plaintiff, and the defendants appealed to the superior court.

In the superior court the following issues were submitted:

1. Did defendants receive one bale of cotton to sell on account of plaintiff in 1881? Answer—Yes.

2. Have defendants settled for the same? Answer—No.

3. What damages is plaintiff entitled to recover? Answer—$60 with interest from January 1, 1882.

The plaintiff testified in substance that he was a customer of defendants and owed them for guano, and had carried them two bales of cotton and settled his account. He told the defendant Dalrymple that he had two other bales he would send, and did send one of them by one Stephens, for which the defendants had settled with him. He afterwards sent the other by said Underwood, and, on going to the defendants' store soon after, said to one of defendants' clerks, "If cotton gets to eleven cents, I want you to sell my cotton." Neither of the defendants was present on that occasion. The next time he was there, he saw Dalrymple and asked him if he had sold his cotton, and his reply was that he had not, because the prospect was good for cotton to advance, and that he had not sold his own, and did not like to sell the cotton of others when he would not sell his own. The plaintiff then said the would return in about two weeks, and after some conversation in reference to price, told Dalrymple to use his own judgment. Dalrymple asked if the bale had been

weighed, and the plaintiff informed him that it had not, and thereupon they went to look for it, but were unable to find it. Dalrymple remembered that the bale was brought by Underwood. Plaintiff further testified that he sent the cotton to them to sell as they would their own, and that pay for their services was not mentioned.

Underwood, the plaintiff's agent, testified that the bale weighed over six hundred pounds, and when he informed Dalrymple he had brought it, the latter said, "all right, I'll go with you in a minute," and he did go with the witness and they put the bale on the platform, where cotton brought to that market was usually placed, and witness told him in reply to a question as to what the plaintiff Patterson said about the cotton, that the plaintiff would be there in a few days. Witness did not know whether the defendant marked the bale, but it was marked at the gin "S. P."

The defendant Dalrymple testified in substance that the platform belonged to the merchants and the railroad company (Cape Fear and Yadkin Valley), and he was there buying cotton when Underwood brought the bale in question, and he told the employee to set the bale aside that it might be out of the way; there were a number of persons with their wagons near the platform at the time; plaintiff was there two or three times afterwards, and said nothing about the cotton: that he was told by his clerk that plaintiff wanted his cotton sold when the price reached eleven cents a pound; that he sampled the same and it was not up to grade, and he so informed the plaintiff; that he considered it a friendly act to look after the plaintiff's cotton and sell it for him, but had no authority to sell unless he could get eleven cents; and that he took the same care of plaintiff's as he did of his own cotton. He further testified that the other bale was not marked in defendants' name until the day this bale was missing.

The defendants asked for the following special instructions:

1. If cotton was placed by plaintiff or his agent on the plat-

form and remained to be weighed and was not to be sold by defendant until they could realize eleven cents a pound for it, then the cotton was still in the possession and under the control of plaintiff, and there was no sale and delivery to defendants, and thereupon plaintiff could not recover.

2. If the cotton was delivered to defendants to sell for plaintiff when eleven cents a pound could be got for it, for which selling the defendants were to receive no compensation or commissions, then the defendants would be bailees for the benefit of the bailor only, and hence liable for only gross negligence.

3. That defendants would not be guilty of gross negligence in case they were informed of the intended removal of the cotton by a third party, and failed to protect the same—gross negligence being such negligence as is akin to fraud.

4. If plaintiff placed and allowed the cotton to remain on the platform exposed and unprotected, he is guilty of contributory negligence and cannot recover.

The court instructed the jury to inquire whether defendants received a bale of cotton to sell on account of plaintiff, as alleged in the complaint; and if the bale was not delivered to defendants, but was merely put on the platform to remain until defendants saw plaintiff, or until defendants got ready to sell under plaintiff's instructions, the defendants had not received the bale and were not liable to plaintiff for its value.

The court charged further: If the jury find that defendants received the cotton, then as to damages: The right to recover damages depends upon the capacity in which the defendants received it. If it was held by them simply for the accommodation of the plaintiff, they would only be liable for gross negligence or carelessness; but if they took the bale as agents and factors to sell and account for the proceeds, even though they charged no commissions, and if plaintiff was their regular customer, they are liable unless they used all diligence in the care of it—that is, unless they took such care of it as they do of their own property. If they marked their own cotton on that plat-

form, they ought to have marked all which was put in their care, and if they did not take proper care of it, the plaintiff is entitled to recover the value of the cotton, with interest if the jury see fit to give it.

The jury responded to the issues as above indicated, and the defendants appealed from the judgment rendered thereon.

Mr. R. P. Buxton, for plaintiff.
Messrs. McIver & Black, for defendants.

MERRIMON, J. The exceptions of the appellant are confined to the refusal of the court to give the jury the special instructions as prayed for.

If it be granted that he was entitled to them, the court was not bound to give them in terms, if it gave the substance of them, not impairing their force, or so much of them as the facts of the case warranted: that was sufficient. *Brink* v. *Black*, 77 N. C., 59; *Kinney* v. *Laughenour*, 89 N. C., 365.

Upon an examination of the special instructions prayed for and the charge given to the jury, we think the court gave the substance of so much of them as the defendants were entitled to have.

The defendants contended that they did not receive the bale of cotton in question from the plaintiff; that he placed it on a platform that belonged to a railroad company in the town of Jonesboro, where cotton was placed in quantities by cotton dealers to be sold and shipped; that he carelessly left it there with instructions to defendants to sell it, if the price of cotton should reach eleven cents per pound, or when they might be instructed to do so; that if in any view of the matter, they must be treated as having received the bale of cotton, they did so gratuitously, and only as matter of favor to the plaintiff, and they could be held liable only for gross negligence, and the evidence did not prove such negligence.

The court having reference to these grounds of defence, after

recapitulating the testimony, instructed the jury that they must first find whether or not the defendants received the bale of cotton as alleged by the plaintiff. The question whether they did or not was put directly before the jury, with the cautionary explanation bearing upon the evidence, "that if the bale was not delivered to defendants, but merely put upon the platform to stay there until defendants saw plaintiff, or until defendants got ready to sell under plaintiff's instructions, the defendants had not received the bale and were not liable to plaintiff for its value." This instruction embodies the substance of the first special instruction prayed for, except so much thereof as suggested a sale of the cotton to the defendants, and as to that there was not a particle of evidence tending to show such a sale; indeed it was not contended that the plaintiff had sold the cotton to the defendants.

As to the question of negligence, the court instructed the jury that if the defendants received the cotton and it was held by them simply for the accommodation of the plaintiff, in that case the defendants would be liable only for gross negligence or carelessness. This is the substance of the second special instruction prayed for, and is quite as favorable as the defendants were entitled to, for it might well be questioned whether the evidence in any view of it presented such question.

There were no facts in evidence, so far as we can see, and no aspect of the case, that called for the third special instruction prayed for. No witness testified that defendants had notice from any source that a third party intended to remove the cotton, or as to what became of it. Where there are no facts that warrant a prayer for instructions the court ought not to give them.

Nor were there facts in evidence tending to prove contributory negligence on the part of the plaintiff. If there was a delivery of the cotton to the defendants, as the plaintiff alleged, then the evidence showed that they took possession and control of it, and they were chargeable with it. There was no evidence to show that the plaintiff took control of it at all, after it was placed

on the platform by his agent. The fourth instruction was, therefore, properly refused.

The case on the trial presented two leading aspects, one contended for by the plaintiff and the other by the defendants. The court very properly submitted both to the jury, with appropriate instructions as to each. *Long* v. *Pool*, 68 N. C., 479.

Upon a careful examination of the whole charge of the court to the jury, we think that the defendants have no just grounds for complaint. The law applicable to the case was properly expounded by the court, and the matter was mainly one to be determined by the jury.

No error. Affirmed.

S. M. LOCKHART, Adm'x, v. J. J. BELL.

Rehearing—Witness—Section 590—Presumptions—Presence of Party.

1. The decision in this case, as reported in 86 N. C., 443, affirmed, and petition to rehear dismissed.
2. The transaction or communication must be shown to be between the deceased and the witness, in order to incapacitate the latter from testifying under section 343 of the Code of Civil Procedure.
3. The mere entry of a credit on a bond, due the intestate's estate, is not sufficient to raise a presumption of fact that the intestate was present at the time the credit was entered, where it appeared that the intestate's business had been conducted by an agent.
4. To raise such presumption, the nature of the transaction must be such as to require the presence of the deceased person in respect to it.
5. The witness under the facts of this case was held competent to prove the fact that the credit was endorsed on the bond; and to enable the court to pass on his competency, the witness may be permitted to testify to the court whether the transaction was between him and the deceased or not.

(*Watson* v. *Dodd*, 72 N. C., 240; *Haywood* v. *Daves*, 81 N. C., 8; *Devereux* v. *Devereux*, *Ib.*, 12; *Lewis* v. *Rountree*, *Ib.*, 20; *Woodhouse* v. *Simmons*, 73 N. C., 30; *Sumner* v. *Candler*, 86 N. C., 71; *Whitesides* v. *Green*, 64 N. C., 307; *Halyburton* v. *Harshaw*, 65 N. C., 88; *Morgan* v. *Bunting*, 86 N. C., 66; *Isenhour* v. *Isenhour*, 64 N. C., 640; *Brower* v. *Hughes*, *Ib.*, 642; *Gray* v. *Cooper*, 65 N. C., 183; *March* v. *Verble*, 79 N. C., 19; *McKee* v. *Lineberger*, 87 N. C., 181, cited and approved).

PETITION by plaintiff to rehear, heard at February Term, 1884, of THE SUPREME COURT.

The decision of the case, adverse to the plaintiff petitioner, and which she now seeks to have reversed, is reported in 86 N. C., 443.

Messrs. Thomas N. Hill and *R. B. Peebles*, for plaintiff.
Messrs. Mullen & Moore and *Day & Zollicoffer*, for defendant.

MERRIMON, J. All courts, and especially courts of final jurisdiction, should decide the cases that come before them for adjudication upon thorough examination and the most careful consideration. When they have so decided, it is of the highest importance that they adhere firmly to their decisions; they should modify or reverse them only when the error assigned is manifest. It is due to the parties litigant, and it is important in a more general and higher sense to the public in the administration of justice, that there shall be a decent and orderly end to litigation, and that the decisions of the courts shall be uniform and stable as well as correct. There can scarcely be a more serious public evil, or a greater reproach to government, than weak and vascilating courts of justice.

The decision of a case at once becomes authority—an authoritative exposition of the law as applicable to that and like cases, and it is not to be disturbed for light and trivial causes, or upon merely speculative considerations as to what the law ought to be, or because some interested party is disappointed and dissatisfied. It is scarcely to be expected that the parties to a litigation will at first, in the heat of their zeal, be pleased with a decision adverse to them.

No decided case, where the court had full and fair opportunity to understand it in all its material bearings as to the facts and the law affecting it, and gave it just and faithful consideration, ought ever to be disturbed. *Stare decisis et non quieta movere.*

A very considerate law-writer says: "The power of a court of last resort to overrule a solemn decision of its own, made upon full argument, is at least of doubtful propriety. It is well known that in England the House of Lords does not possess the power to overrule a former decision of the house, the only remedy being the passage of an act of Parliament changing the law, and it would add much to the respect which ought to be entertained for such a tribunal, if our courts of last resort were subject to a similar restriction. We have had some lamentable instances, of late years, of the overruling of former solemn decisions, on a change in the political majority of courts, which have much lessened the respect formerly entertained by the people and the profession for their judgment." Brightly Elec. Cases, 630.

Where a case was poorly argued, or not at all, or some weighty authority was not cited by the counsel and the court failed to find it, or some material matter was overlooked by inadvertence or otherwise, or the case was hurriedly, unduly decided, in such cases, if error be made to appear upon an application to rehear, the court ought promptly and cheerfully to correct the error; it certainly would hasten to do so in a clear case. It is admitted that errors do sometimes happen; no earthly tribunal is perfect or infallible; and to warrant the reversal of a solemn decision of the court, the error should plainly appear.

In *Watson* v. *Dodd*, 72 N. C., 240, the late Chief-Justice PEARSON said: "The weightiest considerations make it the duty of the court to adhere to their decisions. No case ought to be reversed upon petition to rehear, unless it was decided hastily, and some material point was overlooked, or some direct authority was not called to the attention of the court." This court has in numerous cases recognized and uniformly accepted the law as thus laid down. *Haywood* v. *Daves*, 81 N. C., 8; *Devereux* v. *Devereux*, *Ib.*, 12; *Lewis* v. *Rountree*, *Ib.*, 20. See also, Ad. Eg. (1 Am. Ed.), 758–766, and notes.

The case before us was elaborately and ably argued; the court gave it much and careful consideration in the examination of errors assigned; and the authorities cited, including many not cited by counsel, were examined and considered by the court. The facts involved in the findings of the court below and the report of the referee were duly examined. It does not appear that any material point or matter was overlooked. Nor is any important authority brought to our attention now that was not considered. Indeed, the case was very fully heard and considered in all respects. So that the substance of the application to rehear is, that the court, with substantially the same lights before it, shall retry the case and reverse its decision upon the law and the facts!

The elaborate brief of the petitioner's counsel suggests nothing either in the argument, or the authorities cited, that makes it proper for us to do so. The alleged errors are imperfectly and vaguely assigned; they certainly are not "*distinctly*" pointed out as the rule requires; and many, most of them, are alleged errors of fact already passed upon. These the court would not be at liberty to consider. Cases are reheard only upon matters of law. See the rule providing for rehearing cases, 81 N. C., 610.

The court, nevertheless, are anxious to do justice to the petitioner, and feel satisfied that she has no reasonable ground of complaint in respect to the decision of which she complains; and hence have looked through the record, re-examined the authorities cited and criticised by counsel, and have considered the whole matter; and upon such re-examination, we are satisfied that the decision is a just and proper one, and that the law applicable to it is correctly expounded in the opinion delivered by the Chief-Justice. *Lockhart* v. *Bell*, 86 N. C., 443.

The principal ground of error assigned and discussed in the brief of the petitioner's counsel is, that the court held that the defendant Bell was a competent witness to testify as to how the endorsement of credit on each of four bonds for $2,500 each,

given by the intestate of the petitioner to the defendant, came to be placed on the same, and that the same amounts were charged against him in another way and place in favor of the petitioner. The entry on one of these bonds will serve to explain the point of objection as to all. One of the entries appears in these words:

"1873, January 1st.

Received in part, six hundred dollars, being the interest on $10,000 from January 1st, 1872, to January 1st, 1873."

(Signed) "J. J. BELL."

The petitioner insisted that the *proviso* contained in section 343 C. C. P., rendered the defendant, the obligee in the bonds mentioned, incompetent as a witness in his own behalf in the action, to testify touching the credits so entered upon the bonds, because the intestate of the petitioner, the obligor therein, had died before the bringing of the action, and the entry of the credits was a "*transaction or communication*" between the said intestate and the defendant.

It did not appear otherwise than by such entries of credits, that the intestate of the petitioner was present at the time the credits were entered, or that she had any positive knowledge of them from any communication with the defendant. The petitioner contended that the entries were evidence of the fact that the *intestate* paid the money mentioned therein to the defendant in person, and that she had personal knowledge of the transaction about the credits as between herself and the defendant; and likewise, that the entries raised the presumption of the presence of the *intestate* at the time they were made by the defendant, and of such a transaction.

The court below held that the defendant was a competent witness in his own behalf to explain how the entries on the bonds came to be made; that the intestate had received credits for the same sums of money in another way and place, and that the intestate was not present at the time the entries were made, and that the defendant had no personal communication with her about

them. This court approved that ruling. See particularly 86 N. C., page 453, of the opinion in *Lockhart* v. *Bell*.

The petitioner alleges that in such affirmance there is error, and her counsel rely upon what they contend is a proper construction of the *proviso*, and the construction placed upon the same by this court in the cases of *Woodhouse* v. *Simmons*, 73 N. C., 30; *Sumner* v. *Candler*, 86 N. C., 71.

We think the defendant was competent to testify as he was allowed to do, in any aspect of the matter.

The substance of the *proviso* in section 343 C. C. P., as applicable to this case is, that the defendant is not a competent witness to testify in his own behalf, as "*to any transaction or communication between*" himself and the intestate of the petitioner in reference to the bonds mentioned or the credits thereon.

It is conceded that he could not be allowed to testify in such case, because, if the intestate were alive, she having knowledge of such "transaction and communication," might contradict what the defendant might swear as to the same. She being dead, cannot be heard in her own behalf, and in this respect the *proviso* mentioned closes the mouth of the defendant. This is the ground and reason of the statute. *Whitesides* v. *Green*, 64 N. C., 307; *Holyburton* v. *Harshaw*, 65 N. C., 88; *Morgan* v. *Bunting*, 86 N. C., 65.

Whether the *transaction* in question was one between the intestate of the petitioner and the defendant or not, was a question to be decided by the court in passing upon the *competency* of the defendant to testify as he did, and it was to be determined upon proper evidence like any other similar question.

To render the defendant incompetent, it must have appeared to the court that the "transaction or communication" was between the intestate and himself, as has been said. The petitioner insists that it did so appear from the entries of the credits as they appeared; that from them *it is presumed* the transaction about them was between the intestate and the defendant, and further, that the defendant was not a competent witness to repel such presumption.

We think this ground is not tenable. The argument is not sound. The bonds belonged to and were in possession of the defendant, and he entered the credits on them. It does not appear from them, or any words in them, that the intestate was present at the time they were made, nor that she, in person, paid the money or knew anything about the credits. There was no obligation resting on her to be present, nor did the nature of the transaction require that she should be. The entry of them could take place just as well without her presence as with it. The money could have been paid just as effectually and properly by another as by herself; and, indeed, it appearing that she was a lady who transacted most if not all her business through an agent (her son-in-law), the probability was that the payments were made in some other way than by herself in person, and this is strengthened by the fact that the entries are silent as to who paid, or how the payments were made. There is nothing in the entries, the terms, or the nature of them, or the nature of any transaction about them, that implied, at all events sufficiently implied, that the intestate was present at the making of them, or that any "transaction or communication" about them took place between her and the defendant. The mere entry of a credit on the bond of a lady who did the most of her business through an agent, without any recital as to who paid the money or how it was paid in that respect, is too slight a fact, whether reference be had to its terms or its nature and effect, to raise the *presumption* of fact, that she was present at the entry of such credit, and had knowledge of a "transaction or communication" about the same between herself and the party making the entry. To raise such a presumption in the absence of other evidence, at least, the nature of the transaction must be such as to *require* the presence of the deceased person about the "transaction or communication" in question. Certainly in this case there were no such facts and circumstances as raised such a presumption, much less was there any ground to raise a presumption of law to that effect.

There was no positive testimony going to show that the intestate was present when the defendant made the entries mentioned,

or that she ever knew anything about them from him. On the contrary, the evidence showed that she did most, if not all her business transactions through an agent, her son-in-law. Indeed, the great weight of the evidence material to the point went to show that she knew nothing of the entries or any transactions about them as between herself and the defendant.

But in any view of the matter, the defendant was a competent witness to testify that the transaction, about the entries of credit in question, was not between himself and the intestate of the petitioner, and that he had no personal communication with her about them. Evidence as to this went to the court, and this fact was independent of the main fact, as to how the entries came to be made, and the application of the money; it did not prove or tend to prove the main facts. *Isenhour* v. *Isenhour*, 64 N. C., 640; *Brower* v. *Hughes*, *Ib.*, 642; *Gray* v. *Cooper*, 65 N. C., 183; *March* v. *Verble*, 79 N. C., 19; *Pinnery* v. *Orth*, 88 N. Y., 447; Abb. Tr. Ev., 66.

It is urged by the counsel that this construction of the *proviso* will put the estates of deceased persons at the mercy of dishonest creditors. With this we have nothing to do; such a consideration might be addressed to the legislature as a reason why the law should be changed. This court must accept the statute and apply it as it finds it on the statute book. It may be said, however, that except as to "transactions or communications" between the intestate and the defendant, the latter may testify in his own behalf without limit. This may seem to the petitioner unwise. Nevertheless, the law allows it. *Whitesides* v. *Green*, *supra*; *Isenhour* v. *Isenhour*, *supra*; *McKee* v. *Lineberger*, 87 N. C., 181. This case does not come within the exception, and that is all that can be said of it. The estate of the intestate is in no worse condition than others under like circumstances.

The counsel for the petitioner lays great stress upon *Woodhouse* v. *Simmons*, *supra*, and insists that that case in principle is precisely like the present one. The two cases are indeed very

different from each other, as a slight examination will show. In that case, the *statute presumed* a payment of the bond sued upon. The obligors were dead—the surviving obligee was offered as a witness in his own behalf, to prove that the bond had not been paid, and it was properly held that he was not a competent witness to prove this fact, because, *perforce of the statute*, there was a presumption of fact that the obligors paid the debt to the obligee, and both parties personally knew the fact, each from the other. The surviving party was not competent because the deceased obligees were presumed under the statute to have knowledge of the fact of payment as a personal transaction between the parties. The court did not hold that a *credit on the bond* raised a presumption of fact that the obligors were present at the entry of it, and of a transaction between the parties. And, besides, it was proposed to establish the principal fact by the surviving obligee.

That is not the case before us. Here, there is no statutory presumption of payment—no fact appearing in the entry of the credits—nor is there anything in the nature of the transaction that reasonably could be held to raise a presumption of the presence of the intestate when the entries were made. And besides, the defendant in testifying to the absence of the intestate, was not testifying as to the principal fact to be established.

It is likewise earnestly contended that this case is like that of *Sumner* v. *Candler*, *supra*. It that case, it appears from the receipt in question, signed by the intestate of the plaintiff, the recital in it, and the nature of the transaction, that the intestate was present at the time and the place, when and where the receipt was signed. In the nature of things, the transaction could not have taken place in the absence of the intestate, and it appears from Candler's testimony that he was present. He was not offered as a witness to prove in his own behalf the absence of the intestate, or that the transaction was not between the two, but to prove and explain a transaction between himself and the intestate of which both had knowledge, each from the

other. The intestate executed a receipt at a particular place and delivered it to Candler. Plainly, this was a transaction between the parties.

We do not deem it necessary to notice further any other points presented by the petition. We are satisfied that the case was properly decided in all material respects. There is no error, and the petition must be dismissed with costs to the defendant.

No error. Affirmed.

VAN BUREN BRYAN and others v. ALBERT MALLOY and others.

Witness, deposition of—Estoppel—Former Action—Parol Proof.

1. The deposition of a witness taken in a former action is not admissible in a subsequent one, unless the parties and matters in issue in the latter are the same as in the former.
2. To render the evidence competent in such case upon the ground of privity between the parties, it must appear that the party offering it has acquired an interest in the subject-matter from a party to the former action subsequent to its institution. Privity, in the sense here used, is a privity to the former action.
3. And it must also be shown there was an action pending and properly constituted, in which the deposition was taken, involving the point in question in the action in which it is offered.
4. Where a record is set up as an estoppel to a subsequent action, the party must aver and prove the identity of the precise point on which the first action was decided; and parol proof is admissible in aid of the record of the first trial, if it fails to disclose such point. Here, there was no record and, therefore, no foundation for the offered proof.

(*McMorine* v. *Story*, 4 Dev. & Bat., 189; *Harper* v. *Burrow*, 6 Ired., 30; *Long* v. *Baugus*, 2 Ired., 290; *Yates* v. *Yates*, 81 N. C., 387, cited and approved).

CIVIL ACTION tried at Fall Term, 1883, of RICHMOND Superior Court, before *McKoy, J.*

This action was brought to set aside a deed for land, executed by Margaret Sinclair, Isabella Sinclair and Daniel Sinclair to

the defendant D. M. Kennedy, on the ground of fraud and imposition; and also to set aside a deed from D. M. Kennedy to the defendant William Gilchrist, for the same land, on the ground that Gilchrist purchased with notice of the fraud; and also for the possession of the land.

The deed to Kennedy was made January 22, 1866, and that to Gilchrist, May 5, 1879. Defendant Gilchrist also claims the land under a deed from Margaret Sinclair, Isabella Sinclair and Daniel Sinclair, being their deed to John Johnson, dated October 8, 1870, and a further deed from Henry Fairly, administrator of John Johnson, to said Gilchrist, dated October 24, 1877, made under a decree to sell the land for the payment of the debts of the intestate.

The plaintiffs claim as heirs of Evan Bryan, to whom the three Sinclairs conveyed the same land by deed bearing date 26th of June, 1866.

On the trial the plaintiffs offered in evidence all the foregoing deeds, and also the deposition of Margaret Sinclair taken in a former action, in which D. M. Kennedy was plaintiff and Margaret Sinclair, John Johnson and Archibald McLaurin were defendants. Both parties were present when the deposition was taken, and it was filed in the cause, but never read or offered in evidence.

They also offered in evidence the record of another action, in which the new defendant William Gilchrist and Mary L. Johnson were plaintiffs, and D. M. Kennedy, Berry Bryan and Kenneth McKenzie were defendants. In this action no pleadings were ever filed, and the plaintiffs introduced Gilchrist, one of the plaintiffs therein, as a witness, and proposed to show by his testimony that the action was brought to set aside the deed from the three Sinclairs to D. M. Kennedy, upon the same ground of fraud and imposition which are alleged in the present action. His Honor ruled out both the deposition and the testimony of Gilchrist. Upon this ruling the plaintiffs submitted to a judgment of nonsuit and appealed.

Messrs. Burwell, Walker & Tillett, Frank McNeill and *Strong & Smedes*, for plaintiffs.

Messrs. Geo. Davis and *J. D. Shaw*, for defendants.

ASHE, J. It is held to be a general rule of law that where a witness has given his testimony under oath in a judicial proceeding, in which the adverse litigant had the power to cross-examine, the testimony so given will, if the witness be dead, be admitted in any subsequent suit between the same parties or those claiming under them, provided it relates to the same subject, or involves the same material questions. Taylor on Evi., §434. In *Harper* v. *Burrow*, 6 Ired., 30, it was held by the court that the testimony of a witness examined in a former suit is not admissible in a subsequent suit, when the plaintiff in the latter was not a party to the former suit, because it is *res inter alios acta*. Chief-Justice NASH, who delivered the opinion in the case, said: "The testimony of a witness given in a case, after his death, can be proved in chief, only between the same parties when the same matter is in litigation; for the reason, that it would otherwise be made to affect others, who had no opportunity of cross-examining the witness, which is one of the ordinary tests provided by law for the ascertainment of truth in the courts of justice." To the same effect are *Bondman* v. *Reed's Lessees*, 6 Pet., 328; *McMorine* v. *Story*, 4 Dev. & Bat., 189; 1 Phil. on Evi., 364.

In our case the parties are not the same, but very different.

In the first action in which the deposition of Margaret Sinclair was taken, D. M. Kennedy was plaintiff and John Johnson, Margaret Sinclair and Archibald McLaurin were defendants. In the second action in which her deposition was taken, William Gilchrist and Mary L. Johnson were plaintiffs and D. M. Kennedy, Berry Bryan and Kenneth McKenzie were defendants.

In the present action Van Buren Bryan and Jefferson Bryan are plaintiffs, and D. M. Kennedy, William Gilchrist and Albert Malloy are defendants. D. M. Kennedy is the only party to the present action who was a party to the first action,

and Mary L. Johnson as plaintiff and Kenneth McKenzie as defendant in the second action, are not parties to the present action.

Taking the opportunity of cross-examining Margaret Sinclair, as the test of the admissibility of her testimony, as laid down in the case of *Harper* v. *Burrow*, *supra*, it will be seen that Gilchrist, a party to the action, was not a party to the first action and had no opportunity to examine the witnesses in that case, and Albert Malloy, who is another party to the present action, was not a party to either of the former actions and had no authority to examine the witnesses in either case. In the first action the defence set up was that the deed from the Sinclairs to Kennedy was fraudulent and void. And the second action, as alleged, was brought to set aside that deed for the same cause. But the present action was brought not only to set aside that deed, but also to set aside the deed made by Kennedy to Gilchrist, on the ground that the latter purchased the land from Kennedy with notice of the fraud perpetrated by Kennedy upon the Sinclairs in obtaining his deed from them. So that the parties are not only different, but there is a difference in the matters in issue in the present action from those in the former actions; and it is held that even where the parties are the same, yet if the same matters are not in issue in the former cause, the depositions are not evidence. Starkie on Ev., 444.

The plaintiffs contended that there was a privity between the parties; that they all derived title directly or indirectly from the Sinclairs; and that that made the depositions admissible. But that is not the kind of privity which makes a verdict, or judgment or deposition, in a former cause, evidence in one that is subsequently brought. Privity in the sense here used is a privity to the former action. To make one a privy to an action, he must be one who has acquired an interest in the subject-matter of the action, either by inheritance, succession, or purchase from a party to the action subsequent to its institution. A privity antedating the action does not work an estoppel. Verdicts,

judgments, depositions in a former cause, and the former testimony of deceased witnesses, are considered as resting on the same principle. And it may be considered as settled law, that in order to make one a privy to another so as to be bound by a judgment to which that other was a party, or to make such judgment competent as evidence against him, he must claim by a title derived since the commencement of the action. It is so laid down in Starkie on Evidence, 328, in Freeman on Judgments, §162, and 1 Wharton's Evidence, §177. Under this rule, then, there is no privity between Kennedy and the plaintiff, for they both claim under deeds made prior to the commencement of the former actions. And Gilchrist, who acquired his title from Kennedy subsequent to the commencement of the action, is no more in privity with the plaintiffs than his bargainor Kennedy.

Neither the plaintiffs nor their ancestor Evan Bryan were parties to the first action, and the deposition in that case could not be used to their prejudice, and, therefore, for want of mutuality they ought not to take advantage of it. Starkie on Evi., 412. For the foregoing reasons we are of opinion there was no error in excluding the deposition.

But there is a still stronger reason why the deposition in the second action should be excluded. For, before a party can offer in evidence a deposition taken in a former action, he must show there was an action pending, in which the deposition was taken, involving the point in question in the action in which it is offered. Starkie on Evi., 343, lays down the rule thus: "The deposition or evidence of a witness in one cause cannot be evidence in another, when the verdict would be inadmissible, for the oath cannot be given in evidence without first giving the verdict in evidence: for otherwise it would not appear that the oath was more than a mere voluntary affidavit." To the same effect is Buller N. P., 242.

In this second case, there is nothing to show that the case was ever constituted in court. The only record is a summons; no complaint; no answer; no issues and no verdict; only a judgment of nonsuit, which in that case means a *nolle prosequi*.

The plaintiffs offered parol evidence to show that the action was brought to set aside the deed made by the Sinclairs to Kennedy. But His Honor excluded the evidence and the deposition taken in the cause. The plaintiffs alleged error in these rulings, and in support of their position relied upon the cases of *Long* v. *Baugas*, 2 Ired., 290, and *Yates* v. *Yates*, 81 N. C., 397.

In the former of these cases Chief-Justice RUFFIN, who spoke for the court, said: "If the record can be aided by the averments and parol evidence, as held in New York, we find according to those cases that it can only be done when from the form of the issues the record does not and could not show the grounds upon which the verdict proceeded, and when the grounds alleged are such as might legally have been given in evidence, under the issue, and were in evidence in such way as to make it appear from the issue and verdict that these facts and grounds must have been necessarily and directly in question, or determined, and that upon these grounds, and no other, the verdict must have been found." In *Yates* v. *Yates*, the court cited this decision with approval and reiterated the doctrine there enunciated.

The principle established in these adjudications is, that parol proof is admissible, and only admissible in aid of the record; that is, whenever the record of the first trial fails to disclose the precise point on which it was decided, it is competent for the party pleading it as an estoppel to aver the identity of the point or question on which the decision was had, and to support it by proof. But there must be a record to be aided. When there is no record, as in our case, there is no foundation for the proof.

Our conclusion is, there is no error, and the judgment of the superior court must therefore be affirmed.

No error. Affirmed.

GEORGE A. SPARROW v. JOHN H. BLOUNT.

Witness, deposition of.

1. The deposition of a witness who lives more than seventy miles from the place where the court is held, though not under subpœna (act of 1881, ch. 279), may be read in evidence, subject to proper exceptions taken before entering upon the trial; but the opposite party may show that he lives within seventy miles of the court, in which case the deposition cannot be read. There was no statute requiring such witness to be under subpœna at the time the depositions in this case were taken.

2. But now, it is provided that depositions may be taken "if the witness has been duly summoned." THE CODE, §1358, sub-sec. 9.

(*Barnhart* v. *Smith*, 86 N. C., 473; *Kea* v. *Robeson*, 4 Ired. Eq., 427; *Beasely* v. *Downey*, 10 Ired., 284; *Carson* v. *Mills*, 69 N. C., 32; *Katzenstein* v. *Railroad*, 78 N. C., 286, cited and approved).

CIVIL ACTION tried at Fall Term, 1883, of CHOWAN Superior Court, before *Avery, J.*

This is an action in nature of *quo warranto*, brought by the people of the state upon the relation of George A. Sparrow against John H. Blount, to try title to the office of solicitor of the first judicial district.

The facts relating to the point decided by this court are in substance as follows: The plaintiff relator offered several depositions of witnesses taken before the clerk of the superior court of Pamlico county, acting as commissioner under order of court, and appointed at the instance of the defendant, without requiring written notice from the plaintiff. The depositions were offered to prove, among other things, that the vote of a certain precinct was returned to the board of county canvassers as required by law, and that on the return the plaintiff received a majority of sixty-nine votes. The certificate of the commissioner is as follows: "The following depositions were taken on this the 23d day of May, 1883, by the consent of the parties to the above cause, to be read as evidence in such cause now pend-

ing in Chowan county." Then come the depositions, and the official signature and seal of the clerk.

The defendant stated that the notice was from himself to the plaintiff to take depositions on Friday, and at the request of the plaintiff he agreed that the depositions of the witness, whose depositions were offered, might be taken on Wednesday instead of Friday, and that he would take no advantage of want of notice from plaintiff. The defendant was present and cross-examined the witnesses.

On the trial the defendant objected to the reading of the depositions, for that, the witnesses examined were not under *subpœna* (which was admitted), and that under the act of 1881, ch. 279, §2, the deposition of a witness could only be read *de bene esse*, and that the service of a *subpœna* was necessary to constitute one a witness. The court sustained the objection, and the plaintiff suffered a nonsuit and appealed.

Mr. William A. Moore, for plaintiff.
Messrs. Pruden & Bunch and *R. B. Peebles*, for defendant.

MERRIMON, J. We think the court erred in rejecting the deposition of witnesses residing more than seventy-five miles from the place where the court was sitting to try the action, upon the ground that such witnesses were not under *subpœna*.

Although it does not distinctly appear in the record, that the witnesses resided more than that distance from the place where the court was sitting, the counsel on both sides in their printed briefs, take it that they did, and we must take the fact so to be.

The purpose of the statute, Acts 1881, ch. 279, §§2 and 3, was plainly to save the inconvenience and cost of taking witnesses to a greater distance than seventy-five miles to testify in cases pending in court, unless the party desiring the testimony of the witnesses shall see fit to summon him to attend the court and testify in person.

A party *may* take the deposition; he is not obliged to do so;

it is optional with him whether he will or not; if he shall do so, and offers to read it on the trial, and proves or it is admitted by the opposing party, as in this case, that the witness resides more than seventy-five miles from the court, it must, under the statute cited above, be read, subject to all proper exceptions taken in apt time.

Men ordinarily stay at their home, and there arises a presumption that the witness whose deposition is offered is at his home at that time, if it then appears that he lives a greater distance than that from the court. The law does not require that the party offering the deposition shall show positively that the witness was at home, or at a greater distance, at the moment the deposition was offered; this would ordinarily be practically impossible. The opposing party may, however, show that the witness is within seventy-five miles of the court, and if he shall do so, the deposition cannot be read. In that case the plaintiff must introduce the witness, or proceed with the trial, without the benefit of the deposition, or submit to such just terms as the court might impose as to a continuance and costs.

A party is not bound to summon his witnesses in any case. It is optional with him whether he will or not. He may rely on the witness to attend without the service of a *subpœna*. Wherefore shall he summon his witnesses, unless he sees fit to do so? Whether he will or not is his own matter. It is his own peril and may be his disadvantage if he will not—not that of his opponent. There was no express statutory provision at the time the depositions in question were taken, that required the witnesses to be under *subpœna* to attend the court, and there was no such necessity, arising under the statute allowing the depositions to be taken, for their being under *subpœna* as warranted an implication to that effect. It concerned the party offering the depositions, to entitle himself to read them by showing all the necessary prerequisites.

In this case it was admitted that the witnesses, whose depositions were offered and rejected on the trial, lived more than

seventy-five miles from where the court was sitting. The presumption was that at that time they were at home, where men usually stay. The defendant had the right to rebut this presumption, and if he had done so, the plaintiff would not have been entitled to have read his depositions, and as he did not choose to summon them, he must, in such case, have suffered the consequences. Neither the statute cited above, nor any other statute in force at the time the depositions were taken required the plaintiff to summon the witnesses in such cases. *Barnhardt* v. *Smith*, 86 N. C., 473.

The law is now otherwise. THE CODE, §1358, provides in cases like that before us, that the deposition may be taken, "if the witness *has been duly summoned.*" It thus appears that the legislature deemed it wise and necessary to change the law as to this class of depositions. In numerous other classes provided for, it is not required by THE CODE that the witnesses whose depositions may be taken shall be under *subpœna* to attend the court.

The objection to the deposition, upon the ground that it was taken by a commissioner appointed at the instance of the defendant, came too late, if indeed, it had any force. The objection was to an irregularity that might be waived. It ought, therefore, to have been taken advantage of before the trial began. It could not be done afterwards. THE CODE, §1360, expressly provides that an irregularity in taking the deposition shall not be cause for quashing or rejecting it on motion first made after the trial has begun, if it shall appear that the party objecting had notice that it had been taken, and it was on file long enough before the trial to enable him to present his objection.

The defendant had notice of the taking of the deposition, for he was present and cross-examined the witnesses. This was a waiver of a formal notice. *Kea* v. *Robeson*, 4 Ired. Eq., 427; *Beaseley* v. *Downey*, 10 Ired., 284. The depositions were on file a sufficient time before the trial to enable the defendant to take his exception as allowed by statute. THE CODE, §1361;

Carson v. *Mills*, 69 N. C., 32; *Katzenstein* v. *Railroad*, 78 N. C., 286.

There is error. The judgment of nonsuit must be set aside, and the case proceeded with according to law. To this end, let this opinion be certified to the superior court of Chowan county. It is so ordered.

Error. Reversed.

J. W. PEACOCK v. HENRY STOTT.

Witness, competency of—Section 590—Partnership.

1. A witness is not incompetent, under THE CODE, §590, to testify to a conversation had with two persons, one of whom being dead at the time of the trial, in reference to a contract made between them and the witness.
2. Nor will the death of one of the partners in a firm incapacitate the witness from proving a transaction with the firm while the other partner, who was present at the interview, is living.

(*McCanless* v. *Reynolds*, 74 N. C., 301; *Thompson* v. *Humphrey*, 83 N. C., 416; *McLeary* v. *Norment*, 84 N. C., 235, cited and approved).

CIVIL ACTION tried at Fall Term, 1883, of NASH Superior Court, before *Philips*, *J.*

Upon excluding the evidence offered by the plaintiff (set out in the opinion here), the plaintiff excepted to the ruling of the court below and suffered a nonsuit and appealed.

Messrs. Connor & Woodard, for plaintiff.
Messrs. E. C. Smith and *Fuller & Snow*, for defendant.

SMITH, C. J. The plaintiff as assignee of Alvin Peacock in this action seeks to set up and establish a parol trust in the land described in the complaint, arising out of a contract entered into by Wyatt Earp, Redding Richardson and A. J. Taylor, credit-

ors, at the time when they purchased the same under the trustee's sale, and they seek to follow the land thus charged and enforce the trust against the defendant who has acquired the legal estate. Among the issues produced by the conflicting allegations contained in the pleadings, one in the following words was submitted to the jury:

Did Wyatt Earp, Redding Richardson and A. J. Taylor purchase the lands and take a deed therefor in trust to convey to Alvin Peacock, after the payment to them of the debts due them from said Alvin Peacock?

To sustain the allegation involved in the enquiry, the plaintiff introduced Alvin Peacock and proposed to put to the witness (Redding Richardson being dead) these interrogatories:

1. What conversation did you have with Wyatt Earp and A. J. Taylor, or either, regarding the purchase of your lands on the 24th day of December, 1856, sold that day by J. M. Taylor, the trustee?

2. Did you have any conversation with A. J. Taylor and Wyatt Earp, or either, at which Redding Richardson was not present, in respect to the purchase of this land? and if so, state it.

These questions asked successively were objected to, it being shown that the deceased was present at the conversation referred to in the first, and both ruled out by the court.

Thereupon the plaintiff suffered a nonsuit and appealed, and the only point presented is the admissibility of the proposed evidence when proceeding from the plaintiff's assignor.

The act which renders parties to a suit competent to testify generally, excludes, by its proviso, evidence of or in regard to "any transaction or communication between such witness and a person at the time of such examination deceased," as against his personal representative then prosecuting or defending the suit (THE CODE, §590), and unless the case is within the scope of the exception, the testimony must be received.

That offered and now under consideration was not in strictness a conversation with the deceased, but with him and two others

associated in the contract and united in interest. Nor does it come within the mischief which the restriction was intended to provide against; and the underlying principle is, in the sententious words of the late Chief-Justice, in *McCanles* v. *Reynolds*, 74 N. C., 301, at the conclusion of the opinion, "that unless both parties to a transaction can be heard on oath, a party to an action is not a competent witness to the transaction." *Thompson* v. *Humphrey*, 83 N. C., 416; *McLeary* v. *Norment*, 84 N. C., 235.

The conversation sought to be elicited by the first interrogatory was with *three persons* and to show their contract with the witness, so that these two living witnesses to the fact, to which the testimony is directed, could give their version of it, and the evidence of the witness would not be beyond the reach of correction or contradiction, and the reason for the exclusion would not exist. As then the testimony is not within the words of the excluding proviso, nor the reason of the rule that it prescribes, we are of opinion that it ought to have been admitted.

In this construction of the act, we are sustained by rulings as to the effect of similar phraseology in other states.

In *Comstock* v. *Hin*, 73 N. Y., 280, where the transaction was between the plaintiff and the partners constituting the firm of Jaycox & Green, and Green was dead, the plaintiff's testimony in relation to it was received without objection, and the court say: The death of Green did not render the plaintiff incompetent to prove the transaction while Jaycox was living. If an exception had been taken to the admission of the evidence it would not have been tenable.

So in a more recent case BOARDMAN, J., for the court, declares that the death of one of the patrners in a firm, with which the plaintiff has made an arrangement, does not render the plaintiff an incompetent witness to prove the transaction, so long as the other partner who was present at the interview is living. *Kale* v. *Elliott*, 25 N. Y., 198.

The same proposition is announced in *Bennett* v. *Frarey*, 55

Texas, 145, the court adopting the language used in 1 Whar. Evidence, §469, where author says: The exception does not incapacitate where the suit is against co-defendants of whom only one is dead, when the contract was made either with the living co-defendant or with the living and the dead concurrently.

The case is not more favorable to the defendant in that the original parties to the contract are not directly before the court, for the rule extends as well to assignors under whom the defendant derives his title, as to the several associated defendants themselves.

Our opinion then is, that there was error in the ruling out both questions, and the nonsuit must be set aside and a new trial ordered. Let this be certified.

ERROR. *Venire de novo.*

PETER McRAE, Adm'r, v. CHARLES MALLOY.

Witness under section 590.

1. A party to an action brought by the administrator of a deceased person to enforce a contract entered into between them, is not competent to testify, under section 590 of THE CODE, to a conversation had in the presence of the deceased with his agents and attorneys in relation to the execution of the contract. Though the conversation was with the attorneys, yet they were acting for the deceased, in his presence and under his direction, and the substance of the transaction was the making of the contract and personal to the deceased.

2. The agents or attorneys in such case may be examined by either party to the suit, but the disqualification of the party to the cause is not removed, as the statute makes no exception where others were present.

(*Halyburton* v. *Dobson*, 65 N. C., 88; *Morgan* v. *Bunting*, 86 N. C., 66; *Lockhart* v. *Bell*, *Ib.*, 443, cited and approved)

CIVIL ACTION tried at January Term, 1883, of RICHMOND Superior Court, before *Graves*, *J.*

The action is to enforce a contract executed by the defendant to the plaintiff's intestate in these words:

"For and in consideration of paying and discharging the balance due to Alexander Malloy, of whom I was guardian, I do hereby promise and agree to pay to said Alexander Malloy annually one-third of the net profits to be made at the factory of Malloy and Morgan during my life.

8th March, 1878. C. Malloy, (Seal)."

The defendant resists the action, and alleges that the contract was obtained by the exercise of intimidation and undue influence, practiced by the defendant and his attorneys at a time when he was in distress, and without the advice and counsel of friends.

Four issues evolved from the pleadings were submitted to the jury in form, and with responses to each, as follows:

1. Was the contract sued on obtained by surprise or undue influence? Answer—Yes.

2. Did the intestate's attorney represent to the defendant that it would be difficult for him to exonerate himself from liability to his ward on account of the loss of his papers, destroyed by Sherman's army, and that it would ruin him if he did not sign the contract? And if so, was the defendant induced by this representation to execute the contract? Answer—Yes.

3. If such representations were made, were they false? Answer—Yes.

4. Did the parties agree when the contract was made that the defendant should not be held liable for any profits until the debts, liabilities and expenses of the factory had been paid; if so, was the provision omitted by mistake or inadvertence? Answer—Yes, by mistake.

To sustain the imputations of unfairness and undue influence used in procuring the execution of the contract and the representations attending the transaction, the defendant, examined on his own behalf, was permitted, after objection made and overruled and a cautionary direction from the court not to speak of any transaction or conversation had with the deceased, to testify and say:

"I went to the house of the intestate on Monday morning, the day on which the contract was signed, and found there two attorneys of the intestate. I refused to sign one of the papers drawn and presented to me. My remark was addressed to the crowd. The first deed was read to me by one of the attorneys, who said that $38,000 was a large amount, and that it would ruin me, and I had better settle. I replied that I had been advised that I was not liable for the casualties of war. The same attorney replied, that is true, but it has been a long time since, and it would be hard to show."

"The attorney then handed me this paper (the contract sued on). I declined to sign it because the factory was in debt, and the attorney remarked, 'I can obviate that difficulty by inserting the word 'net'—and he added, 'there could be no net profits until the debts were paid.' I knew nothing of this matter before—was excited and disturbed. Morgan came in before the last paper was signed. The deed conveyed all the land I owned, except a life estate was reserved to myself. I was induced to sign the contract by representations that there could be no net profits until the debts were discharged. I was guardian to Alexander Malloy (the intestate), and became such about 1848. My guardian papers were destroyed—notes and accounts were good."

We reproduce so much of the testimony delivered by the defendant as shows the general nature and bearing of the conversation which took place in the presence of the intestate and was carried on between his counsel and the witness, and which resulted in the giving of the deed and the contract, in order that its competency may be determined.

After the rendition of the verdict, the court being of opinion that the testimony of the defendant came within the inhibiting proviso of section 343 C. C. P., and ought not to have been heard, for this and other specified erroneous rulings during the trial, set aside the verdict and awarded a new trial, and therefrom the defendant appeals. Section 299.

Messrs. J. D. Shaw, T. A. McNeill and *Frank McNeill*, for plaintiff.

Messrs. J. T. Legrand and *Burwell, Walker & Tillett*, for defendant.

SMITH, C. J., after stating the above. The question before us and the only one we find it necessary to consider and decide, is this:

Can the living party, in an action brought by the personal representative of a deceased person to enforce a contract entered into between them, testify to conversations had in the presence of the deceased with his agents or attorneys preliminary and conducive to the making of the contract, the agents or attorneys being still alive?

The act improving the law of evidence confers a capacity, not possessed before, upon the parties to a suit, the right to testify on their own behalf; thus removing the disqualification of interest, but with the restriction that if it relates to a personal transaction or communication, and one of the parties be dead, and the action be by or against his personal representative, the other who survives shall not be permitted to testify. The enactment with its proviso, introducing a great change in the law of evidence, assumes that when both are alive and can give their respective versions of the matter, it may be safely left to the jury to hear each and weigh and pass upon the testimony. But where one is dead, and incapable of contradicting the other, the temptation to swerve from the truth and make false statements is too strong in the living to allow him to be heard by the jury. In other words, the rule of disqualification, existing before, was not relaxed in such case, and where one of the persons is silent in death, the lips of the other are closed by law.

The act makes no exception where others were present, but leaves these witnesses to be called by either, and their testimony to come before the jury and be considered by itself, its credit unaffected by the testimony of the interested party. In such

case the living party is not without the means of proving the transaction or communication, and the need of his evidence is less cogent and pressing. But whatever considerations may be urged for an interpretation that does not, under such circumstances, exclude the living witness and forbid his giving testimony, it is the plain mandate of the act that it shall not be received, and we are not at liberty to interpolate in it exceptions not placed there by the legislature that made the enactment. The court must construe and enforce it according to its terms.

But admitting this to be so, the argument for the defendant is that the transaction or communication was not with the deceased, but with his counsel, who could correct any misrepresentations of what occurred, and the case is not embraced in the disabling proviso.

This is a misconception of the nature and character of what transpired on the occasion.

The attorneys were acting for him, in his presence and with his constant and direct sanction in what was said and done, conducive to the end of bringing about the execution of the deed conveying the defendant's land to the deceased, and the entering into the contract now in suit. These were the means and agencies used to influence and bring about the result to which they were directed. The substance of the *transaction* was the making of these instruments, and this was personal to the deceased, who takes the full benefit of what was thus accomplished.

Without prolonging the discussion, we are content to refer to the case of *Halyburton* v. *Dobson*, 65 N. C., 88, the facts in which are very similar, as a decisive and direct authority upon the point. It is unnecessary to recite them as they are set out in the opinion, and we only add that the ruling of the court below was in favor of the reception of the evidence. This was reversed on appeal, and READE, J., delivering the opinion, says: "His Honor held, properly, that the defendant could not testify as to what passed between himself and the testator, Harshaw. But His Honor permitted him to testify as to what passed between

said Harshaw and Pearson, both of whom were dead at the time of his examination. This was doubtless upon the idea that the defendant was not a party to the conversation, that is, it was not between himself and them. In that was His Honor's error. The case states that the defendant and Harshaw, by agreement, went to Pearson to advise with him about the matter in dispute; that they were all together, but Harshaw and Pearson carried on the conversation, and Pearson gave his advice and Harshaw acted upon it. It is striking in the dark (sticking in the bark was, we presume, intended) to say that this transaction was not between the defendant and Harshaw. It was a transaction between them, and the defendant ought not to have been allowed to speak of it."

It is true that Pearson had also died, but no stress is laid on that circumstance in the opinion, and the testimony was not rendered incompetent by that event. A party may give evidence of a transaction between himself and an agent of the deceased; nor will the agent's death affect his competency, *Morgan* v. *Bunting*, 86 N. C., 66; *Lockhart* v. *Bell*, *Ib.*, 443—same case on rehearing at this term.

At the present term we have decided that the statute does not forbid a living person to speak of a transaction between himself and others jointly interested, because of the death of one or more, as long as one survives to confront the witness. *Peacock* v. *Stott*, *ante*, 518.

Without examining the other exceptions, we affirm the ruling of His Honor in granting a new trial for the error pointed out. This will be certified for further proceeding in the court below.

No error. Affirmed.

MARY C. MEDLEY v. DUNLAP & LITTLE, Executors.

Comity—Personalty distributed under law of domicil of deceased—Year's allowance.

Personal property in this state belonging to a deceased citizen of another state, is, by comity, disposed of and distributed according to the laws of the latter state; *Hence* a widow of such person is not entitled to have her year's allowance set apart here, though she became a citizen of this state since the death of her husband.

(*Moye* v. *May*, 8 Ired. Eq., 131; *Stamps* v. *Moore*, 2 Jones, 80; *Alvany* v. *Powell*, 2 Jones' Eq., 51; *Jones* v. *Gerock*, 6 Jones' Eq., 190, cited and approved).

CONTROVERSY submitted without action under THE CODE, §567, at Spring Term, 1883, of ANSON Superior Court, before *MacRae, J.*

It appears that B. F. Medley in his life-time, with his family, went from this state and became a citizen of the state of Arkansas, and died there in December, 1881, leaving surviving him his widow, the plaintiff, and his four sons, the latter being under the age of fifteen years.

At the time of his death the defendants, citizens of this state residing in the county of Anson, had in their hands as executors of the will of the late Martha H. Little, a fund due to him (Medley) amounting to about $660, and he was indebted to citizens of this state in considerable sums of money. No administrator of his estate in this state has been appointed.

After his death, the plaintiff and her sons came to this state and became citizens of the county of Anson, and on the 29th of August, 1882, the plaintiff, as his widow, made application to have allowed and set apart to her a year's support for herself and her sons out of the personal estate in this state of her said husband. In the absence of any "crop, stock and provisions of the deceased in his possession at the time of his death," out of which to make such allowance, the commissioners allowed and assigned to her as and for her year's support $700.

The defendants contended that the plaintiff, as such widow, was not entitled to year's support to be assigned out of the personal estate of her deceased husband in this state. The court held that she was so entitled, and gave judgment accordingly, and the defendants appealed to this court.

Mr. Samuel T. Ashe, for plaintiff.
Messrs. Little & Parsons, for defendants.

MERRIMON, J. The disposition of the personal property of deceased citizens of other states and countries, situated in this state, is, by the law of comity, governed by the laws of the former state, except that the laws of this state require that the property here shall be administered and applied to the discharge of debts and liabilities of such deceased person, before any of such property can be removed to the state where the deceased owner lived at the time of his death, or be distributed according to the laws of that state. Such property is treated in the course of administration, with the exception mentioned above, as if it were in the state where the owner thereof lived at the time of his death. *Moye* v. *May*, 8 Ired. Eq., 131; *Stamps* v. *Moore*, 2 Jones, 80; *Alvany* v. *Powell*, 2 Jones' Eq., 51; *Jones* v. *Gerock*, 6 Jones' Eq., 190.

The plaintiff and her sons were entitled to the personal property of her deceased husband, whether situate in this state or in the state of Arkansas, under and as allowed by the laws of the latter state. She has no right to any portion of it under the laws of this state, as his widow and one of his distributees. It must be distributed to her and such others as may be entitled to the same, after the payment of debts, as required by the laws of Arkansas.

The fact that the plaintiff and her sons have become citizens of this state since the death of her husband, cannot alter the case, because her right supervened and accrued under the laws of Arkansas immediately upon the death of her husband, and

she takes as his widow under and according to the laws of that state through the administrator here.

If the laws of Arkansas provide for the temporary wants and necessities of widows and their families in case of deceased husbands, as it is presumed they do, then the plaintiff ought to have applied there, and had her claims allowed and paid; or if there were not sufficient assets to pay the same there, then she might have her claim thus allowed satisfied out of assets in this state upon proper application to the administrator here. But she cannot reach the assets of her deceased husband here in any other way, and for the reason that she must claim under the laws of Arkansas.

THE CODE, §2116, does not apply to or embrace widows of deceased husbands citizens of other states. If the legislature has power to do so in any case, it has not seen fit to make temporary provision for such widows and their families out of assets in this state of deceased husbands. The purpose of the statute is to make temporary provision for the widow and such members of her family as cannot take care of themselves, immediately after the death of the husband, a citizen of this state, and until some regular provision can be made for their support according to the conditions and circumstances of the estate, and as may be allowed by law.

It is very clear that the plaintiff is not entitled to a year's support as she claims, under the laws of this state, and the judgment must be reversed, and judgment entered here for the defendant. Judgment accordingly.

Error. Reversed.

J. C. McLEAN, Adm'r, v. A. A. McLEAN, Adm'r.

Motion for leave to issue execution—Judgment—Executors and Administrators.

1. Motion for leave to issue execution to revive a dormant judgment may be granted the plaintiff, although he had brought another action for the same debt and recovered judgment therein.
2. Where the plaintiff recovered a personal judgment against an administrator, and subsequently sued his administration bond alleging a breach in the non-payment of said judgment out of assets which afterwards came into his hands, and recovered judgment thereon; *Held* that the first judgment was not merged in the last, but both are separate securities for the same debt, and satisfaction of one discharges both.

(*Carter* v. *Coleman*, 12 Ired., 274, cited and approved).

MOTION for leave to issue execution on a judgment, heard at Fall Term, 1883, of ROBESON Superior Court, before *McKoy, J.*

The motion was refused and the plaintiff appealed.

Messrs. Frank McNeill, T. A. McNeill and *J. D. Shaw*, for plaintiff.

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

SMITH, C. J. The plaintiff as administrator *de bonis non* of D. H. McLean, at fall term, 1875, of the superior court of Robeson county, recovered a personal judgment for the sum of $455.61, and interest thereafter on $299.54, principal money thereof with costs, against the defendant A. A. McLean, to whom administration of the estate of G. M. McLean had been committed, on a note under seal which he had given for a debt of the intestate.

The plaintiff subsequently, in the name of the state, as relator, brought an action against the defendant and the sureties to his administration bond, executed in 1862, for the penal sum of $9,000, alleging a breach of the obligation in the non-payment

by the defendant, who had come into possession of sufficient assets, of the aforesaid indebtedness of his intestate G. M. McLean, and recovered judgment against him and the sureties at spring term, 1882. The sureties appealed and prevailed in this court, it being held that there had been no breach of the bond, but the judgment against the defendant, the principal obligor, remains undisturbed and in full force in the superior court. (88 N. C., 394).

The first judgment having become dormant by the lapse of more than three years during which no execution had been sued out, the plaintiff, after due notice, on July 24, 1883, made application under section 256 of C. C. P., for leave to issue execution and enforce payment of what remained due on it, accompanying the motion with the required oath. The motion was resisted by the defendant, upon the foregoing facts which were shown, who insisted that, the same debt being included in both judgments, the vitality of the first had been absorbed in the last, and lost, so that no execution could now be issued upon it. The clerk sustaining this view, denied the motion, and on appeal to the judge his action was affirmed, and from this ruling the plaintiff's appeal brings the case before us.

Assuming that the recovered judgment is but a renewal of the first, the one being the sole cause of action of the other, we see no reason why both may not subsist and remain in force as separate securities for the same debt, with the advantages incident to each retained. It is not correct to say that one extinguishes the obligation contained in the other, and that the plaintiff's remedy must be sought only in the last. As soon as one judgment is entered, the plaintiff may take out execution and at the same time bring another action upon the judgment, as itself a cause of action, and make a second recovery. This is clearly involved in the decision, if not directly decided in *Carter* v. *Coleman*, 12 Ired., 274.

In that case, a judgment rendered in 1842 had become dormant and a *scire facias* was sued out in 1847 to revive it. In

October, 1849, the plaintiff brought also an action of debt upon the judgment, the process in which was returnable to spring term, 1850. At this term the defendant confessed judgment in the *scire facias* and pleaded it as a bar to the action in debt. This was held not to be a defence, and RUFFIN, C. J., in the opinion disposing of the objection, uses this language: "The judgment on the *scire facias* is, that the plaintiff have execution on his original recovery, and nothing more, except as to costs. It is not at all inconsistent that the creditor should also have another judgment to recover the debt, and it cannot prejudice the defendant, as *they are but different securities for the same debt*, and satisfaction of either would be satisfaction of both judgments. A plaintiff may sue on a judgment on which he may at the time have execution."

The recovery of interest is mentioned as an advantage derived from the second action, the law then not allowing interest on a judgment enforced under execution, and benefits more important may be now secured in prolonging the lien on land in the second and displacing intermediate encumbrances arising between the dates of the judgments.

The authorities referred to on the argument for the appellant are in harmony with the ruling in the case referred to, *Small* v. *Wheaton*, 4 E. D. Smith, 427; Freeman on Judgments, §432, and numerous cases cited in the notes thereto. *Jones* v. *Fink*, 28 Conn., 112; *Simpson* v. *Cochran*, 23 Iowa, 81; *Ames* v. *Hay*, 12 Cal., 11.

But these judgments do not bear the relations supposed to each other. The one judgment is upon a *personal obligation* assumed and evidenced by a sealed instrument to pay absolutely a fixed sum of money. The other is a judgment recovered by the relator of a penal sum to be discharged upon the payment of a *debt due from the defendant's intestate*, and the assigned breach from which the action springs is the omission to pay that debt from assets which came into the defendant's hands, and ought to have been thus applied.

While one satisfaction will discharge both, there is no valid reason suggested, nor does any occur to us, why the plaintiff may not resort to the means which the law gives him to secure payment from either.

It may be that liens on land have been acquired since the rendition of the first and prior to the last recovery; and if so, the plaintiff ought to be at liberty to revive and sue out remedial writs upon the oldest.

There is error. This will be certified that the proper order may be entered in the court below.

Error. Reversed.

N. M. LAWRENCE, Adm'r, v. BENJ. NORFLEET, Adm'r.

Executors and Administrators—Statute of Limitations.

1. Suits against an administrator must be brought by creditors of the decedent within seven years next after the qualification of the administrator. THE CODE, §153. This statute, in favor of the estates of deceased persons, is an absolute bar unless suit is brought within the time specified, whether there be assets or not in the hands of the representative.
2. While the advertisement for creditors to present their claims is an indispensable prerequisite to its operation, yet, as to the time from which the statute begins to run, it is incidental.
3. And where a suit is brought by one administrator against another, it must be commenced within seven years next after the right of action vests in the plaintiff under his appointment.

(*Cox* v. *Cox*, 84 N. C., 138, cited and approved).

CIVIL ACTION tried at Spring Term, 1883, of EDGECOMBE Superior Court, before *Gilmer, J.*

Henry S. Lloyd died in the year 1860, leaving a will and therein appointing as his executors William Norfleet and William Lloyd, both of whom accepted the trust and proceeded in the discharge of the duties imposed. William Norfleet, who

survived his associate, died on December 29, 1871, having also made a will and appointed John Norfleet his executor, who renounced, and letters of administration on the testator's estate were issued on January 6, 1872, to the defendant Benjamin Norfleet.

Letters of administration with the will annexed on the unadmistered estate of the testator Henry S. Lloyd, on March 31, 1873, were issued to the plaintiff N. M. Lawrence who instituted the present action on April 2d, 1880.

At the time of his death, the testator Henry S. Lloyd was indebted in the sum of $5,773.96 by bond executed on January 5, 1860, and payable near the end of the year to Robert H. Austin and the said William Norfleet, "as executors of Dr. C. H. Dicken, deceased," on which are endorsed several successive credits for sums paid by the executors of the obligor, the first of $2,640, paid June 11th, 1861, and acknowledged by the signature of the executor Robert H. Austin; the last of $1,562.94 paid March 5th, 1871, the receipt being without any signature; and these with several intermediate credits were all entered according to their date in the life-time of the defendants' testator. There is still another and later credit entered since his death, and bearing date May 5th, 1872, for $92.74.

The defendant, in due time after his appointment, advertised for creditors as required by law.

The foregoing facts summarily set out are found by the court, the parties dispensing with a jury and consenting to the findings being made by the court; and the court also ascertains and declares "that *prima facie* there are assets or should be assets in the hands of the defendant's testator, of the estate of the said Henry S. Lloyd, to be administered.

Upon these facts the court overruled the defence under the statute of limitation set up in the answer of the defendant as a bar to the suit, and ordered a reference for a statement of the administration account of the executor with the estate of the testator, Lloyd, and from this judgment the defendant appeals.

No counsel for plaintiff.

Messrs. Connor & Woodard, for defendant.

SMITH, C. J., after stating the case. While the right of action against the defendant was in abeyance until the issue of letters *de bonis non* on the estate of Lloyd to the plaintiff, and the statute was suspended because there was no one competent to sue, it did then vest in the plaintiff and the statute was put in motion to run its course.

The limitations prescribed in the Code of Civil Procedure, which govern the present case, require an action to be brought "by any creditor of a deceased person against his personal or real representative within seven years next after the qualification of the executor or administrator, and his making the advertisement required by law for creditors of the deceased to present their claims, where no personal service of such notice in writing is made upon the creditor." THE CODE, §153.

This statute is construed in *Cox* v. *Cox*, 84 N. C., 138, and it is held that while the advertisement is an indispensable prerequisite to the operation, it is incidental, and the time must be computed from the qualification of the representative.

The statute then had run and completed its course on the 31st day of March, 1880, or rather on the day preceding, and the suit was not begun until the 2d day of the next month.

Our present limitations in favor of estates of deceased persons are unconnected with assets, and are absolute and positive in denying the remedy after a given time, and are intended to stimulate the vigilance of creditors and give repose to the estates of deceased debtors.

There is error, and it is adjudged that the defendant go without day and recover his costs.

Error. Reversed.

K. H. WORTHY, Adm'r, v. A. S. McINTOSH, Adm'r.

Executors and Administrators.

(See syllabus in preceding case).

CIVIL ACTION upon the bond of an administrator tried at December Special Term, 1883, of MOORE Superior Court, before *MacRae, J.*

The question is, upon the facts stated in the opinion here, whether the action was barred by the statute of limitations, and from the ruling of the court below that it was not, the defendant appealed.

Messrs. John Manning and *J. W. Hinsdale,* for plaintiff.
Messrs. M. S. Robins and *McIver & Black,* for defendant.

SMITH, C. J. W. R. Seawell died intestate in 1859, and shortly thereafter administration of his estate was committed to J. J. McIntosh, who, with the other defendant as surety, executed the bond now in suit, for the proper discharge of the trusts assumed.

J. J. McIntosh, without having settled the estate in his hands, also died intestate in 1870, and the defendant, Asa McIntosh, was, on September 13th of that year, appointed administrator of his estate, and proceeded at once to advertise for creditors as required by law. Bat. Rev., ch. 45, §§ 45, 46, 47.

Letters of administration *de bonis non* on the estate of W. R. Seawell were issued on March 15, 1871, to the relator who instituted this action on November 13, 1879, to recover the unadministered estate which is or ought to be in the hands of the first administrator, the intestate of the defendant Asa McIntosh.

The defence set up as a bar to the recovery is the statute of limitations prescribed in C. C. P., §32, more than seven years

having elapsed since the right of action vested in the relator by his appointment. The facts stated are found by the court, the parties waiving a trial by jury and consenting to such finding.

The court adjudged that the action was not barred, and ordered a reference to the clerk to state and report an account of the administration of the estate of the said J. J. McIntosh in the hands of the defendant Asa McIntosh, from which judgment the latter appeals.

The precise point now before us was presented at the present term in the case of *Lawrence* v. *Norfleet, ante,* 533, and it is held that the action of the administrator *de bonis non* against the administrator of a former representative of the deceased stands upon the same footing in this regard as the action of any other creditor, and is within the meaning of the second clause of section 32, C. C. P., and must be commenced within seven years next after the right of action vested in the plaintiff under his appointment, there being already a person against whom it could be brought.

The present statute is an absolute and unqualified bar, when its conditions are complied with, and gives, as was intended, a repose to the estate and puts an end to the claims against it, unless suspended under the provisions of section 164 of THE CODE.

There is error. The defendants must have judgment that they go without day and recover their costs, and it is so ordered.

Error. Reversed.

UNIVERSITY OF N. C. v. W. H. HUGHES, Ex'r, and others.

Executors and Administrators—Parties—Account.

1. Where an administrator dies before he settles the estate of his intestate, an administrator *de bonis non* must be appointed to complete the administration, and the latter is the proper party plaintiff or defendant in an

action to recover the assets or effect a settlement of the estate of the first intestate.

2. The personal representative of a deceased administrator holds the unadministered assets of the first intestate for no other purpose than to turn them over to the administrator *de bonis non*.

3. An account of an administrator audited by commissioners appointed for that purpose, whose report was returned to court and recorded, is not a conclusive settlement of the estate. The next of kin are not bound by it, and the administrator himself may, in a proper case, explain or correct it.

(*Goodman* v. *Goodman*, 72 N. C., 508; *Lansdell* v. *Winstead*, 76 N. C., 366; *Ham* v. *Kornegay*, 85 N. C., 119; *Wood* v. *Barringer*, 1 Dev. Eq., 67; *Villines* v. *Norfleet*, 2 Dev. Eq., 167; *Walton* v. *Avery*, 2 Dev. & Bat. Eq., 405, cited and approved).

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

The suit was brought on the bond of an administrator to recover a sum alleged to be due the plaintiff University as an undistributed surplus unclaimed by creditors, next of kin, or otherwise. The issues having been found in favor of the plaintiff, the court gave judgment accordingly, and the defendant appealed, assigning for error among other things that no administrator *de bonis non* had been appointed on the estate of John Lee, deceased.

Mr. R. B. Peebles, for plaintiff.

Messrs. Thomas W. Mason, W. Bagley and *S. J. Calvert*, for defendant.

MERRIMON, J. John Lee, an alien, died intestate in the year 1863, in the county of Northampton, and Samuel Calvert was appointed his administrator. At December term, 1865, of the court of pleas and quarter sessions of that county, commissioners were appointed to audit his account as administrator, and make report to the next term of the court. At March term, 1866, the commissioners made and filed their report, showing a balancee in the hands of the administrator of $3,990.35 in Confederate money. This report was ordered to be "certified and recorded."

This action was brought by the plaintiff in pursuance of the statute (THE CODE, §1504), against the said administrator and the sureties upon his bond, demanding judgment for the penalty of the bond to be discharged upon the payment of $306.69, the alleged value of the Confederate money, and the interest thereon.

Pending the action, Samuel Calvert, the administrator, died, leaving a last will and testament, and the present defendant, W. H. Hughes, duly qualified as executor thereof, and became a party to this action.

The plaintiff entered a *nolle prosequi* as to the defendant sureties, upon the bond sued on.

The defendant insists that his testator having died pending the action, the plaintiff cannot recover therein, because the fund in the hands of his testator as administrator of Lee, remained in his hands as executor only for the administrator *de bonis non* of Lee, and the latter alone was entitled to have the same, and he alone could maintain an action therefor, if indeed such fund had any existence, which was denied.

It has been decided in numerous cases in this state, that if an administrator die before he completely settles the estate of his intestate, and distributes the surplus thereof among the next of kin, an administrator *de bonis non* must be appointed to complete the administration, and therefore the next of kin cannot call for an account and distribution of an intestate's estate, not so settled, in the hands of the administrator or executor of an administrator. In such case, the estate must pass into the hands of the administrator *de bonis non*, and to him the next of kin must look for their distributive shares. *Goodman* v. *Goodman*, 72 N. C., 508; *Lansdell* v. *Winstead*, 76 N. C., 366; *Ham* v. *Kornegay*, 85 N. C., 119.

In *Lansdell* v. *Winstead*, *supra*, Mr. Justice BYNUM said: "An administration can be effected only by collecting the assets, paying the debts, and making a final distribution of the surplus among the next of kin. If an administrator dies before this is done, an administrator *de bonis non* must be appointed, and so on

ad infinitum, until a final settlement and distribution of the estate are made." * * * "The rule is therefore inflexible, that the next of kin cannot call for an account and distribution of an intestate's estate, without having an administrator before the court."

So that, the rule is, there must be an administrator while anything remains to be done; and in the case of a deceased administrator, an administrator *de bonis non*, who alone can have the legal title to the property, must be charged therewith, and held to account therefor.

But it is insisted, that in this case the administrator of Lee, the testator of the present defendant, had made a final settlement, and nothing remained to be done. This is a misapprehension. He had not paid the surplus to the plaintiff, if there were surplus, as he was required by statute to do, in the absence of next of kin; indeed he had declined to do this; denied his liability; suit had been brought against him, and he was contesting the right of the plaintiff.

The University stands upon no better footing than next of kin. In *Ham* v. *Kornegay*, *supra*, as in this case, the administrator had settled the estate of his intestate, and made final report to the probate court, showing a balance in his hands; and two of the three next of kin had received their distributive shares from the administrator, and the latter having died, the third brought suit upon the administrator's bond to recover her share. The court held that she could not maintain her action, that the administrator *de bonis non* of the intestate of the first administrator alone was entitled to sue upon the bond of the first administrator, and the next of kin must look to him for their distributive shares, and not to the administrator of the first administrator.

The plaintiff's counsel in his argument laid much stress on the fact that commissioners had been appointed to audit the accounts of the administrator; they had taken the account, made report, and the court had ordered the "settlement to be certified

and recorded." This settlement had no conclusive effect. The next of kin, if there had been such, would not have been bound by it, nor was the plaintiff, in the absence of next of kin; and the administrator himself might in a proper case explain and correct it. *Wood* v. *Barringer*, 1 Dev. Eq., 67; *Villines* v. *Norfleet*, 2 Dev. Eq., 167; *Walton* v. *Avery*, 2 Dev. & Bat. Eq., 405.

The plaintiff brought this action to recover a fund in the hands of the testator of the present defendant, an administrator of Lee. While the administrator lived, the action could be maintained; the alleged fund was in his hands as administrator, undisposed of; he could manage, control and do what he ought to do about the same. When he died, his administrator or testator held the fund, not for distribution, nor for the plaintiff, nor for any purpose, except to turn the same over to the administrator *de bonis non* of Lee *when* he should be appointed. When the administrator, the testator of the defendant, died, the plaintiff's right of action against him ceased. The right to the fund passed into the hands of the administrator *de bonis non*, and he alone had the right to sue for it. If there was no such administrator, as it seems there was not, the fund remains in abeyance, and will continue to do so until one shall be appointed. *Goodman* v. *Goodman*, *supra*.

When the present defendant was brought into the action, it was competent for him to set up the defence that the plaintiff is not entitled to maintain the action against him as executor. When a new party is brought into the action, he has the right to make the defence open to him by any proper pleading.

We think it clear that the plaintiff cannot maintain this action against the defendant executor, certainly not in the absence of the administrator *de bonis non* of Lee.

This is conclusive against the plaintiff, and we need not consider the other exceptions specified in the record.

There is error. The judgment must be reversed and the action dismissed. Judgment accordingly.

Error. Action dismissed.

D. C. WHITEHURST v. A. O. DEY, Executor.

Executors and Administrators—Admission of and promise to pay claim—Statute of Limitations—Legislative power.

1. A simple admission by an executor of the correctness of a claim against the testator's estate, and a verbal promise to pay the same out of the assets, will not arrest the running of the statute of limitations, where there is no proof that the creditor refrained from sueing at the request of the executor, or that there was any agreement for indulgence.
2. The act of assemby in reference to filing claims against a decedent's estate and their admission by the personal representative, and making it unnecessary to sue upon them to prevent the bar, applies only to those that were filed at the time of the passage of the act and were not then barred. THE CODE, §164.
3. The legislature may regulate the time in which suit may be brought against a debtor *before* the claim is barred, but it cannot expose him to suit by an act passed after the bar becomes a full defence.

(*Flemming* v. *Flemming*, 85 N. C., 127; *Oates* v. *Lilly*, 84 N. C., 643, approved. *Daniel* v. *Com'rs*, 74 N. C., 494; *Haymore* v. *Com'rs*, 85 N. C., 268, distinguished. *Pearsall* v. *Kenan*, 79 N. C., 472; *Hinton* v. *Hinton*, Phil., 410, commented on).

CIVIL ACTION tried at Spring Term, 1883, of CURRITUCK Superior Court, before *Shepherd, J.*

The action was brought to recover an amount alleged to be due upon an open account. The court held that the statute of limitations did not bar the claim, and gave judgment against the defendant, from which he appealed.

Messrs. Pruden & Bunch, for plaintiff.
Messrs. E. C. Smith and *Griffin & Temple*, for defendants.

SMITH, C. J. James M. Ferebee, the testator of the defendant, died in November, 1874, having become indebted to the plaintiff in the sum of $183.61, upon an account contracted and which fell due in April of the year preceding. Upon the issuing of letters testamentary on the decedent's estate soon there-

after, the plaintiff made out and presented his claim, supported by oath, to the defendant, who accepted the same without objection and filed it among the papers of the estate, promising then, and often afterwards repeating the promise, to make payment out of the assets in his hands.

Failing to do so, the present suit was instituted on January 22d, 1883, before a justice of the peace, and on the trial the defendant set up the bar of the statute of limitations as a defence to the recovery.

The plea being overruled upon the facts stated, judgment was rendered against the defendant for the sum claimed, and upon his appeal, the like judgment was recovered in the superior court.

The only point presented in the record for our consideration is the sufficiency of the evidence of what transpired between the parties, and of the successive promises of the defendant to remove the statutory bar and warrant a recovery. The court ruled that the running of the statute was suspended and the plaintiff entitled to judgment, and in this ruling we think there is error.

There is no provision in the limitations introduced by the Code of Civil Procedure in substitution of those previously prescribed, which, as before, when a creditor refrained from suing at the special request of the executor or administrator, arrested the running of the statute during the term of such indulgence. Rev. Code, ch. 65, §14. And if there were such, we are not prepared to say the facts in the present case would be within its operation. *Flemming* v. *Flemming*, 85 N. C., 127; *Oates* v. *Lilly*, 84 N. C., 643.

While conceding the insufficiency of an unwritten recognition, and assumption of the debt by the defendant to revive it and repel the bar, it is contended that his conduct was calculated and intended to prevent the plaintiff from bringing suit, and it would now be inequitable to permit him to avail himself of such a defence. In support of this proposition are cited *Daniel* v. *Commissioners*, 74 N. C., 494; *Haymore* v. *Commissioners*, 85

N. C., 268. These cases are essentially alike in the feature for which they are cited; and in both the intended action was deferred under an arrangement that the plaintiff's claims should await and abide by the results of suits, in the former to be brought, and in the latter then depending, for similar causes of action. The delay was consequent upon this agreement; and it would have been the practice of a successful fraud to allow the defendants to take advantage of a delay caused by themselves, and accordingly, in the exercise of equitable power, the court refused the defence.

No such fraudulent element is found in the facts of this transaction. The failure to sue was not in consequence of any request from the defendant, nor under any agreement making payment contingent or any undetermined future event, as an underlying condition requiring delay. There was a simple admission of the correctness of the claim without further proof, and a positive personal undertaking to pay it out of the testator's effects, and the case comes under the purpose and terms of those enactments which require a writing in order to the legal efficacy of the promise. THE CODE, §§172 and 1552.

It is next contended that the amendatory act of 1881 has a retrospective operation and requires in the count of time the elimination of so much as elapsed after the filing of the claim in 1874. This enactment annexes to section 43 of C. C. P. a clause as follows:

But if the claim upon which such cause of action is based be filed with the executor or administrator within the time above specified, and the same shall be admitted by him, it shall not be necessary to bring an action upon such claim to prevent the bar, provided that no action shall be brought against the administrator or executor upon such claim after the final settlement of said executor or administrator, and *this shall apply to claims already filed.* THE CODE, §164.

A reasonable and fair interpretation of this latter clause will confine it to such claims as had already been filed and had not

then become barred; and this, as it meets the requirements of the act, without disturbing rights that time has settled and fixed, must be assumed to have been the intention of the general assembly in its passage. Where, of two reasonable constructions of a statute, the one of which the legislature is clearly competent to enact, while the other infringes upon the constitution, the former will be accepted as its meaning; because it will not be supposed that an unauthorized power was intended to be exercised. This rule of construction prevails in the enforcement of laws of doubtful import and is acted upon by the courts. *French* v. *Tischemaker*, 24 Cal., 518; *Duncombe* v. *Pringle*, 12 Iowa, 1.

If, however, we are compelled by the general words used to extend the enactment so as to embrace claims which had become remediless by action at the time of its passage, and impart new life and activity to the obligation, we should be disposed to hold its operation in these cases to be an impairment of vested rights and as falling within the inhibition of the federal constitution, notwithstanding the doubt expressed by Mr. Justice READE in *Pearsall* v. *Kenan*, 79 N. C., 472, based upon the ruling in *Hinton* v. *Hinton*, Phil., 410.

The adjudications in the states are numerous to the point that while the legislature may extend the time or shorten it, leaving a reasonable interval, in which the plaintiff may and must pursue his remedy against his delinquent debtor *before* the statutory bar becomes complete and effective for the protection of the debtor, it cannot expose him to an action and the recovery of a demand by an act of legislation passed after the statutory bar has become a full defence. As the obligations of a contract cannot be impaired to the prejudice of the creditor, so the liabilities of the defendant under it cannot be increased by a subsequent act of state legislation.

The principle is thus laid down by a recent author and fortified by references to many adjudications. "Statutes of limitation relate only to the remedy and may be altered or repealed

before the statutory bar has become complete, but not after, so as to defeat the effect of the statute in extinguishing the rights of action." Wood Lim., ch. 1, §11; *McKinney* v. *Springer*, 8 Black (Ind.), 106; *Davis* v. *Minor*, 1 How. (Miss.), 183, in an elaborate opinion by Chief-Justice STARKEY; *Terry* v. *Tubman*, 42 U. S. Rep., 158; *Terry* v. *Anderson*, 95 U. S. Rep., 628.

But these suggestions are offered in support of a construction which confines the clause to existing and future causes of action, and arrests the further running of the statute against such claims as may have been or may hereafter be filed with the personal representative according to the provisions of the section of C. C. P. (164) thus amended.

It would be scarcely respectful to the legislature to suppose more was meant than a suspending of the statute, so that the efflux of time thereafter should not be counted in ascertaining the time for the operation of the bar.

There is error in the ruling of the court, and it must be reversed and the judgment here entered for the defendant.

Error. Reversed.

THOMAS H. BATTLE, Adm'r, v. M. A. DUNCAN and others.

Executors and Administrators—Parties to petition to sell land for assets.

1. In a petition to sell lands for assets to pay debts, a mortgagee of the interest of one of the heirs-at-law was improperly admitted a party defendant. Such claims cannot be set up in this proceeding.
2. When the administration is complete and the fund to be distributed is ascertained, the mortgagee may prefer his claim to the real estate fund; and an assignee of the next of kin may also assert his in the distribution of the personal estate.

APPEAL from an order made at Chambers on the 22d of January, 1884, by *Philips, J.*

The defendants appealed.

BATTLE *v.* DUNCAN.

Messrs. Battle & Mordecai and *T. H. Battle*, for plaintiff.

Messrs. Gatling & Whitaker, Gilliam & Son and *J. B. Batchelor*, for defendants.

SMITH, C. J. F. C. Pittman, as executor of James C. Knight, filed in the superior court of Edgecombe, before the clerk, his petition for the sale of certain lands therein described, devised by the testator to the defendant Martha A. Duncan, his daughter, for life or widowhood, and in remainder one-third to the plaintiff, one-third to the defendant Alla W., wife of the defendant John H. Burnett, and the remaining third to the defendants R. E. Duncan and Paul F. Duncan, as tenants in common.

Service having been made upon the devisees and all having put in answers, judgment was rendered in December, 1875, granting the application and directing the executor to make sale of the lands for their conversion into assets to be used in a due course of administration. The lands were accordingly put up at public sale and bid off at the sum of $2,500 by one W. D. Pittman, but deeming the price entirely inadequate, the executor made no report thereof until the purchaser raised his bid to the sum of $5,000, when, in January, 1381, the sale was reported at the enlarged price and confirmation recommended.

On June 29, 1882, notice having been issued to the defendants to show cause why the price offered should not be accepted, and none being shown, the sale was confirmed and the plaintiff ordered to apply a sufficient amount of the proceeds to the payment of the testator's debts, for which his personal estate was deficient, and to hold the residue as real estate for the parties entitled.

And it was also adjudged that on payment of the residue of the purchase money, for which notes on time had been taken as required in the decree of sale, the plaintiff make title to the purchaser.

In August, 1883, Frank B. Dancy filed an affidavit in which he states that on January 2d, 1878, the plaintiff and wife and

the defendants Martha A. and R. E. Duncan, united in conveying by mortgage deed their several interests in the devised lands to N. J. Pittman, affiant's guardian, to secure a debt due for money loaned to the trust fund in his hands, in amount about $1,400, which, on arriving at full age, had been surrendered to him.

He further states therein that the purchaser is ready and willing to pay what he yet owes, on having title to the land conveyed to him, and demands that out of the shares of the moneys paid in, belonging to the mortgagors, so much shall be applied as is necessary to the discharge of the secured debt, and that he may be admitted as a party defendant.

It was on September 1, 1883, ordered that the said Frank B. Dancy be made a party to defend his rights under the mortgage. From this order the plaintiff appealed, but upon the hearing before the judge the ruling was affirmed.

On the same day citation issued under the statute against the executor, who had failed to render his final administrtion account, and on September 12, it was further adjudged that he give security for the fund, and notice given that upon his failing to do so his letters testamentary would be revoked and himself removed from office. C. C. P., §479; THE CODE, §1400. From this order the executor also appealed, but the action of the clerk was approved and sustained by the judge.

Not having complied with the order, on February 6th, 1883, the letters were recalled and the office vacated and Thomas H. Battle appointed administrator in his place, and substituted as plaintiff in the proceeding; the removed executor associated with the defendants, as a devisee, and ordered to deliver the funds derived from the sale, amounting to $3,000, with interest, to his successor in office, and further, that when the debts were discharged the administrator should convey the title.

The executor having filed an account of the fund, showing that large sums alleged to have been paid to the devisees were all disallowed by the clerk.

After notice to the several parties, the defendants J. H. and Ella W. Burnett are ordered to deliver to the administrator a bond for $1,333\frac{1}{3}$ which the executor had endorsed and delivered to her, of which $1,000 had been paid.

The executor assigned the $2,000 bonds of the purchaser of the land, one to F. H. Whitaker, in March, 1881, and the other to Spier Whitaker, in December of same year, both for a valuable consideration, and on his representation that there were no debts of the testator outstanding.

The executor endorsed a bond for $662\frac{2}{3}$ to the defendant, Paul P. Duncan, who kept it a few weeks and placed it in the custody of the executor, to be kept for him. While in possession of the infant $50 was paid on it.

On the death of Paul P. the defendant J. H. Burnett became his administrator and demands from the executor the return of the deposited bond.

In the final ruling it is ordered, of course with a view of recovering the transferred securities, that the assignees, F. H. Whitaker and Spier Whitaker and the said John H. Burnett, in his capacity as administrator of Paul P. Duncan, be severally made defendants.

The several rulings affirmed in the judgment of the superior court are before us upon appeal for our examination and determination.

In the controversies, with their complications, which have grown out of the action in its progress and the various interpretations and orders allowed, we can scarcely recognize its original aspect and purpose, as a means simply of converting land into money and providing further needed assets in completing administration of the debtor's estate.

The funds derived from this source, received by the personal representative, constiute a part of the general assets to be accounted for and paid over to the party entitled in the final distribution of what remains unused. The only difference between assets furnishsd from the personal and real estate, is in the per-

sons entitled to receive them—the next of kin or legatees in one case, the heirs-at-law or devisees in the other. And as the assignee of the former class must assert his claim in the distribution of the personal, so must the mortgagee prefer his when the real estate fund is to be paid over to those of the latter class. Both may be present to protect their respective claims to the funds when the administration is complete and what remains is to be disposed of.

The removal of the executor was in the exercise of a power confided to the clerk, acting as probate judge (THE CODE, §§1518, 1519, 1520), as was the appointment of an administrator in his place (§1521), and this required the change of parties in the unfinished action which was then made.

It was equally proper to order the displaced executor to surrender such of the funds as he then had and to modify the former order, so as to impose on his successor the duty of conveying the land to the purchaser when he had completed his payments therefor.

The pendency of the action rendered these orders legitimate and proper and tending to facilitate its termination. Beyond this, the clerk could not go without changing the character of the proceeding and introducing matters foreign to the cause and controversies and equities appropriate to a different tribunal.

The administrator has his remedy against the executor personally, and he was the proper person to sue for the unadministered assets, as if the executor had died without completing his work. So, too, the administrator could only pursue the assignees if they participated in the maladministration, in a separate and independent suit admitting any defence which they could set up against the demand. But these remedies were not capable of being sought in the collateral manner attempted, and as incidental to a proceeding which has accomplished its object when the representative possesses himself of the funds and the title has been made to the purchaser.

So far, then, as the orders attempt to make new parties, as

assignees and claimants of the funds, or as mortgagee and creditor, they are reversed and declared erroneous, as are also the rulings that the devisees defendant surrender what has been assigned to them, and the judgment is in other respects affirmed. Let this be certified.

Judgment accordingly.

ISAAC N. TILLETT v. E. F. AYDLETT and others.

Executors and Administrators—Petition to sell land for assets, discretionary power of court in.

In a proceeding to sell lands for assets to pay debts of a decedent, the court has the power to decree a sale of the whole or any particular part thereof, in such manner as to size of lots, &c., as may be most advantageous to the interest of the parties and the estate. THE CODE, §1444. The discretion as to the quantity to be sold and manner of selling is not an arbitrary one, but a sound legal discretion.

SPECIAL PROCEEDING to sell land for assets, commenced before the clerk and heard on appeal at Fall Term, 1883, of PASQUOTANK Superior Court, before *Avery, J.*

The defendants appealed from the judgment of the court below.

Messrs. Strong & Smedes and *Battle & Mordecai*, for plaintiff.
Messrs. Grandy & Aydlett, for defendants.

MERRIMON, J. The plaintiff is the administrator *de bonis non* with the will annexed of Nathan Overman, and brought this proceeding to sell land of the testator to make assets to pay debts. The clerk of the superior court made a decree, directing a sale of certain parts of the real estate of the decedent. It was insisted by a party to the action, that the clerk had no

authority to designate any particular tract or part of the land to be sold, and appealed to the judge of that court. Upon appeal, the judge decided "that the clerk of the court had not the lawful right to designate any particular tract of land devised in said will, and require the administrator to sell, or restrain said administrator from selling, as set forth in the order," and remanded the case, with instructions to the clerk, to make an order granting authority to the administrator to sell all of the tracts of land described in the petition, or so much thereof as may be necessary, &c.

The appellant contends that in making this judgment, the judge erred, and we are of that opinion.

The statute (THE CODE, §1436) allows the administrator in the contingencies therein mentioned to apply to the superior court to sell the real property for the payment of the debts of the deceased debtor. It is further provided, in section 1443, that, "as soon as all proper parties are made to the proceeding, the clerk of the superior court before whom it is instituted, if the allegations in the petition are not denied or controverted, shall have power to hear the same summarily and decree a sale"; and section 1444 provides, "that the court may decree a sale of the *whole, or any specified parcel of the premises, in such manner as to size of lots,* place of sale, terms of credit and security for payment of purchase money, as may be *most advantageous* to the estate," &c.

It is manifest that the last mentioned section confers upon the court a large power of discretion, and in terms authorizes it to decree a sale of the real estate of the decedent in whole or in part, and to designate what part shall be sold. It might, and often does happen that only a part of a deceased debtor's land is required to be sold to pay his debts, and in many cases it may be advantageous to the estate and those interested in it to sell only particular parts of it. Such a discretion must be lodged somewhere, and the legislature has chosen to confer it upon the court. This discretion is not an arbitrary one; it is a sound

legal discretion, having in view the best interests of the estate and all persons interested therein. To direct a sale of the whole or any particular part or tract of land to suit the convenience of one or two of the parties interested, to the prejudice of others having a like or similar interest, would not be a sound discretion or a just exercise of the power conferred. The court should endeavor, according to its information, to subserve the best interests of the estate, and fairly the interest and convenience of all interested in it.

The clerk of the superior court, for the purpose of decreeing a sale in the case provided in section 1443, represents and is the court, and has authority to exercise the discretionary powers conferred. Indeed *the clerk* implies the court in cases like this, as well as in many other like cases. THE CODE, §132.

We are not at liberty to decide upon the propriety and expediency of the decree made by the clerk of the court in this case, or to say that a sale of the land should not be made as directed by the judge; but we think we may properly suggest that the decree should direct a sale to be made in such way as to disturb as little as practicable the will of the testator. This is enjoined by statute. THE CODE, §1430.

There is error, and the judgment and order of the judge must be reversed. Let this be certified to the superior court of Pasquotank county to the end that the court may proceed according to law.

Error. Reversed.

J. L. CURRIE v. A. L. CURRIE.

Executors and Administrators—Penalty—Pleading.

1. In a suit for the penalty denounced in THE CODE, §1522, in reference to administering upon estates, a complaint which fails to state that the defendant "entered upon the administration of the estate without obtaining letters," is demurrable.

2. The mere act of taking possession of the decedent's property and converting it to the defendant's use, may constitute him an executor *de son tort*, and subject him to the demands of creditors of the estate, but does not render him liable to the penalty.

CIVIL ACTION tried on appeal from a justice's court, at December Special Term, 1883, of MOORE Superior Court, before *MacRae, J.*

This action was brought in the court of a justice of the peace for a penalty, under Bat. Rev., ch. 45, §144 (THE CODE, §1522), which provides that no person shall administer upon a decedent's estate without letters authorizing him so to do, under a penalty of one hundred dollars, &c.

The complaint alleges that Polly McDonald died intestate about the 5th of April, 1880, in the county of Moore, and at the time of her death was the owner of certain personal property in said county; that on or about the 5th of June, 1880, the defendant took into his possession and converted to his own use, without first having taken out letters of administration upon said estate and without other lawful authority, certain personal property of the intestate, contrary to the statute in such case made and provided in section 144, chapter 45, of Battle's Revisal.

The defendant demurred to the complaint and assigned two grounds therefor, the first of which was abandoned, and the second relied upon, which was, "that the facts alleged in the complaint do not constitute any cause of action in favor of the plaintiff and against the defendant. The demurrer was sustained and the plaintiff appealed.

Mr. J. W. Hinsdale, for plaintiff.
Messrs. M. S. Robins and *McIver & Black*, for defendant.

ASHE, J. The defendant was sued for the penalty given by the statute, which is as follows: "No person shall enter upon the administration of any decedent's estate, until he has obtained letters therefor, under the penalty of one hundred dollars, one-

half to the use of the informer and the other half to the state, but nothing herein contained shall prevent the family of the deceased from using so much of the crop, stock and provisions on hand as may be necessary until the widow's year's support is assigned therefrom, as prescribed by law." Acts 1868–'69, ch. 113, §93. This section is carried forward in Battles' Revisal, ch. 45, §144, and re-enacted in THE CODE, §1522, without any change in the phraseology.

The plaintiff in his complaint alleges that the defendant has taken certain property of Polly McDonald, deceased, into his possession and converted the same to his own use, without first having taken out letters of administration upon the estate, and without other lawful authority.

The complaint seems to have been drawn upon the idea that the penalty of one hundred dollars is given against every one who interferes with a decedent's estate, so as to constitute him an executor of his own wrong. This is a mistaken interpretation of the act. An executor of his own wrong may unquestionably incur the penalty, but he does not necessarily do so by every interference with the property of a deceased person.

The taking by the defendant of the personal property of Polly McDonald may have made him an executor *de son tort*, and subject him to the liability of being sued by the creditors, as such, to the extent of the value of the property converted by him. But the complaint fails to set forth facts sufficient to subject him to the penalty.

The mischief intended to be remedied by the act in question was to prevent persons from undertaking the administration of the estate of deceased persons without suing out letters of administration as required by law. It not unfrequently happens that when a person dies intestate, and sometimes even when wills are made, the relatives and friends, in order to save expense, undertake to settle the estate without going through the ceremonies of a regular administration, and it almost invariably happens that disagreements, contentions, heart-burnings,

and too often serious and complicated litigations, are the consequence. This was the mischief intended to be prevented by the legislature.

By section 67 of the same act, the legislature defines who are chargeable as executors *de son tort*, and if it had been intended to impose the penalty upon everyone who officiously interfered with a decedent's estate, it is reasonable to suppose the penalty would have been prescribed in that section, instead of being provided for in an independent section of the act.

To incur the penalty, something more must be done than merely taking the property of a decedent into possession and converting it to one's own use. That might make him an executor *de son tort*, but he would not incur the penalty, unless, in the words of the act, *he entered upon the administration of the estate* without first having obtained letters therefor. Administration implies management, not the mere holding the possession of property, but the performance, with regard to it, of such acts as are incident to lawful administrations; as by selling the property, or collecting and paying the debts, or distributing the estate, &c.

Nothing less than an allegation that the defendant had undertaken to administer the estate of Polly McDonald, without having first obtained letters of administration on her estate, will do to render the defendant liable to the penalty. There is no such allegation in the complaint. It therefore does not constitute a cause of action against the defendant. Consequently, the demurrer must be sustained and the judgment of the court below affirmed.

No error. Affirmed.

J. B. ALEXANDER v. P. F. PATTON, Adm'r.

Executors and Administrators—Parties.

Where the record shows that a party through his counsel assumed the defence of an action as administrator, the regularity of his admission as a party in place of his intestate is sufficiently established, though the death of the intestate as having occurred during the progress of the cause was not suggested, and no service of the notice issued to him appeared to have been made.

(*Weaver* v. *Jones*, 82 N. C., 440, cited and approved).

CIVIL ACTION tried at Spring Term, 1883, of BUNCOMBE Superior Court, before *Avery, J.*

This action was originally brought against Minerva Patton, to recover upon a bond for three hundred and fifty-eight dollars, executed by her to the plaintiff on the 26th of Octobe, 1872. On the trial, the court gave judgment against the defendant administrator, from which he appealed.

Messrs. M. E. Carter and *J. H. Merrimon*, for plaintiff.
Messrs. Reade, Busbee & Busbee, for defendant.

SMITH, C. J. In examining the record, we are at a loss to understand upon what ground and for what supposed erroneous rulings the appeal is taken. The action is upon a sealed note of the defendant to recover what is due, and its execution is admitted by the defendant. The answer, however, proceeds to set up a counter demand for goods sold to the plaintiff and not specified, for which the plaintiff was indebted at the time of giving her note—her misplaced confidence in the plaintiff who was in her service—and other matters in avoidance, every material averment in relation to which is directly and positively denied in the replication, which also interposes the statute of limitations as a bar to recovery.

The record does not mention the death of the defendant, Minerva Patton, as occurring during the progress of the cause, but it contains a copy of a notice issued in April, 1882, by the clerk, but the service does not appear, to P. F. Patton to appear and show cause why he should not be made a party defendant, and thereafter his name appears as administrator of Minerva Patton, in place of hers as defendant.

At the trial, his counsel appeared and asked for a continuance on account of his personal absence, and on being refused, stated to the court that the defendant had no testimony to offer in support of the counter claim, and would waive a trial by jury. Thereupon, the plaintiff's claim having been confessed and no evidence having been introduced to sustain the defences in the answer, the court rendered judgment for the amount due upon the face of the note.

Now it is not material that the record should show with greater particularity the death of the original defendant, Minerva, for the presence of the defendant in his capacity as her personal representative in the suit, and his assuming the defence through counsel, and his concessions at the trial, sufficiently establish the regularity of his admission as a party in the cause and in place of his deceased intestate. Indeed, the record shows no exception which we can consider under the rules, and the judgment must be affirmed, at the costs of the defendant. *Weaver* v. *Jones*, 82 N. C., 440.

Affirmed.

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*JAMES W. GRANT, Adm'r, v. JOSEPH J. BELL.

Executors and Administrators—Reference.

1. An executor who pays his personal debt out of assets of the estate commits a *devastavit*, and his creditor who knowingly receives the money thus mis-

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

applied is guilty of collusion and liable to an action for the amount, whether he believed the executor to be solvent or not. (The decision on former hearing, 87 N. C., 34, affirmed).

2. Therefore, where the executor obtains judgment against a defendant in favor of the testator's estate, and the defendant pays a part thereof in cash and a part in notes due from the executor personally; *Held*, that the latter did not operate a discharge of any portion of the judgment—the same being the property of the estate and not of the executor personally; and hence, the defendant in this case is liable to the payment of the balance due upon the judgment, but is entitled to the benefit of what may be due the executor under his testator's will.

3. Where the report of a referee is imperfect or unsatisfactory, the court will disregard the exceptions thereto and order a reference with instructions as to the manner of stating the account.

4. The points in reference to suretyship, notice and statute of limitations, argued by counsel, were held untenable and not applicable to the facts of the case.

(*Grant* v. *Bell*, 87 N. C., 34, cited and approved).

CIVIL ACTION for account and settlement tried at Spring Term, 1880, of NORTHAMPTON Superior Court, before *Gudger*, *J.*

This case is reported in 87 N. C., 34, and under a reference had in obedience to the decision there rendered, the referee (Boone) submitted his report to this court, and the cause is now heard upon exceptions thereto.

Messrs. R. B. Peebles and *T. N. Hill*, for plaintiff.

Messrs. Mullen & Moore, Day & Zollicoffer and *J. B. Batchelor*, for defendant.

MERRIMON, J. It appears that one Benjamin F. Lockhart duly qualified in 1863 as the executor of the last will and testament of William T. Bell, deceased; that as such executor he brought suit in the then court of equity of Northampton county in 1864 against the defendant for an account and settlement of sundry matters in dispute between them; that on the 25th day of November, 1868, they compromised their matters in litigation, and a decree by consent was entered in the superior court

of that county in favor of the said executor and against the defendant for $12,077.34. The defendant contended in this action that he paid and discharged this decree on the day it was entered, and took from the executor a proper acquittance in that respect.

Afterwards, the letters testamentary of the executor were revoked by the court of probate in that county, and letters of administration *de bonis non cum testamento annexo* upon the estate of the said William T. Bell, deceased, were granted to the plaintiff on the 19th day of May, 1876, and on the 10th of July, 1876, he brought this action against the defendant.

In his complaint the plaintiff alleged, among other things, that the decree above mentioned was collusive and fraudulent as between the said executor and the defendant, and that the defendant did not in fact pay but a small sum of money on account of said decree, but undertook and pretended to pay the balance thereof in personal debts of the executor due to the defendant. The defendant denied these allegations.

The action was tried in the superior court, there was judgment for the defendant, and the plaintiff appealed to this court. The appeal was heard here at October term, 1882, and a reference was ordered and the case retained for further action. 87 N. C., 34.

The said Benjamin F. Lockhart, executor, was a beneficiary under the will of which he was executor. He died on the 7th day of February, 1877.

This court established by its judgment in this case, rendered at October term, 1882, the decree in the superior court granted on the 25th of November, 1868, in favor of B. F. Lockhart, executor, against the defendant for $12,077.34. It held, also, that the defendant did not discharge so much of that decree as he undertook to do by surrendering to the executor the bonds the defendant held against him for his own personal debt. Referring to this aspect of the case, Mr. Justice RUFFIN, in delivering the opinion of the court, said: "Nor can it materially

alter the case that the executor in this instance was a legatee, as well. At most, he was only a legatee for life with remainder to his children, if any, and if not, then to his brother's children. But above all this, the defendant had notice that the executor was applying the assets out of the ordinary course of administration, and he participated therein, and must be taken to have dealt at his peril in this particular also, and he cannot be permitted to retain the fruits of his collusion so long as a single debt of the testator remains unpaid, or a legatee of any description remains unsatisfied."

"Of course he should be allowed to have the interest of Lockhart in the estate, whatever that may be. But this could only be to stop interest on the amount thus appropriated during his life; and that, provided it may not be needed to pay creditors who have the first and highest equity."

"Our conclusion, therefore, is that the settlement made in 1868, between the defendant and the acting executor, cannot be disturbed, its *bona fides* being fully established by the verdict of the jury. But that the plaintiff is entitled to judgment in this court for so much of the sum then ascertained to be due, as is unpaid, including such amounts as were attempted to be paid in the private debts of the executor, whether endorsed or not, together with interest from the death of the executor, unless otherwise directed after a reference, which, if the parties so desire, may be had to the clerk of this court to ascertain the sum still due, and to enquire touching the debts of the testator."

Thus two things were definitely settled: 1st. That the plaintiff is entitled to judgment in this court for so much of the sum of money specified in the decree mentioned, including interest thereon, as has not been paid by the defendant, excluding and disallowing such sum as he undertook to pay by the surrender to the executor, Lockhart, of the notes he held against him for his own personal debt. 2d. That the defendant should have the benefit of any interest the executor had under the will of his testator.

The court ordered a reference to ascertain the balance so due to the plaintiff. The referee has made his report at the present term, to which both the plaintiff and defendant have filed numerous exceptions and these have been elaborately argued by counsel of both parties.

Upon an examination of the report, we find it confused and unsatisfactory. It fails to ascertain definite results, and the account is not at all formally stated as required by the order of reference. Important facts appear from it, however, with sufficient certainty to enable us to decide the principal questions raised by the exceptions to it, and to make an order recommitting it with more definite instructions as to what the account shall embrace and how it shall be stated.

The report shows that the defendant paid to the executor, Lockhart, on account of the decree for $12,077.34 on the day it was entered, $4,489.16 in cash, leaving a balance of $7,588.18, which latter sum, on the same day, he undertook to discharge by delivering to the executor a bond he held against him for his own personal debt, amounting to $1,997.29; another bond that he held against the executor and three other parties, the balance due on which amounted to $4,489.16; and an arrangement by which the executor received credit for $1,101.73 on a bond that Nicholas M. Long held against the executor, with the defendant as surety thereto, the defendant, through his counsel, giving Long credit for the same sum on a bond he held against him.

The bonds thus surrendered to Lockhart, the executor, and his arrangement with Long for his personal benefit cannot be treated as a payment of the balance due upon the decree, after giving credit for the money paid, because the decree belonged to Lockhart as executor, and not in his own right; and although he had a legal title to, and the right to control it for lawful purposes, he had no authority to use it, or the money due upon it, to pay his own debts; on the contrary the law forbade this to be done, and in undertaking to do so, he was misapplying the assets of

the estate he had in charge, and committed a *devastavit*, for which, he and all persons knowingly taking benefit of such misapplication, were liable. It is clear that whoever knowingly accepts the assets of an estate in the hands of an executor in payment of his debt due from the executor personally, colludes with the latter in committing a *devastavit*, and he will not be allowed to keep them as against creditors, legatees, or others entitled to have them; as to these persons, the executor is a trustee, and he and those dealing with him in respect to such assets are held to the utmost good faith.

In *Grant* v. *Bell*, 87 N. C., 34, the court said: "The fact that payment was thus made, either in whole or in part, by the surrender of debts on the executor, is nowhere denied in the answer. On the contrary, it seems to have been conceded throughout the whole case, and was proved by the defendant's own witness and counsel." We see no reason to modify this view of the matter; on the contrary, the evidence taken and reported goes strongly to strengthen and confirm it. The nature of the whole transaction—the declarations of the defendant testified to—the fact that his counsel superintended the settlement—the fact that it is nowhere denied in the answer although charged in the complaint—indeed all the facts and circumstances go to show and satisfy us that the defendant knew of the misapplication of the assets, and that he intended to have the executor use the decree and the money due upon the same in discharging two large debts due from him personally to the defendant, and in part, one due from the executor to Long, to which the defendant was surety. If he believed Lockhart, as his debtor, to be solvent, and therefore, the estate might not suffer, this cannot alter the case, or modify his liability. He had no right to deal with and avail himself of the assets of the estate in Lockhart's hands as executor. He did so at his peril, and Lockhart having failed to pay the money, he must now make his failure good.

It is insisted, however, that Lockhart was only surety to the bond surrendered to him, in which he and three other persons

were obligors to the defendant, and therefore, he ought to have collected the $4,489.16, due upon it, from the principal therein, for the estate, and it was so intended. It appears that the parties making this bond were, by its terms, all principals, but in any view, Lockhart was liable to the defendant for the whole balance of it, and the defendant sought to have him pay it with the assets of the estate.

It is said that the defendant has no control of the bond and cannot have. That in no way concerns the estate of the plaintiff. The defendant must look to the personal representative of Lockhart in that respect, for he dealt with the latter, not with the estate in any legal or equitable sense.

It was further insisted on the argument, that the defendant gave Lockhart *an order* for $1,101.73 on Long, and he knew nothing of the arrangement whereby the latter entered a credit on Lockhart's bond due to him, and he so swears in his deposition. But his counsel knew of the arrangement, and from the nature of the transaction he was certainly put on notice. In the order of business, he would know it. It does not appear, certainly, that any order was given. It is probable that none was given, but if it had been, the defendant well knew, so far as appears to us, that he had no cash in Long's hands to pay it. He held Long's bond for money, and Long held Lockhart's bond for money, and the defendant was surety to that bond! How convenient and natural the arrangements made! Such an order, as that suggested, could not be put on the footing of a check on a bank, where money is presumed to be on deposit to meet it.

So that the balance of $7,588,18, due upon the decree, so far as appears, remains unpaid, and must be paid with interest thereon, by the defendant, unless it shall appear that something was due to Lockhart from the estate of the testator, and if so, the defendant will be entitled to the benefit of that sum, whatever it may be.

It is necessary to take an account of the estate of the testator

named, only for the purpose of ascertaining what sum was due to Lockhart at the time of his death.

It is so manifest that he took but a life estate in two-thirds of all the testator's property "of every description, whether in possession or action," after the payment of debts and the costs of administration, that we do not deem it necessary to make a word of comment upon the provisions of the will relating to him. There is no word or clause in it indicating a contrary intent.

The report shows that there are debts due from the estate in the hands of the plaintiff, to sundry creditors, amounting to $1,775.17, and these are reduced to judgment. The counsel for the defendant insisted that these judgments are all under the statute presumed to be paid, are barred by the statute of limitation, and the plaintiff is not bound to pay them, and the defendant has the right to take benefit thereby. If it be granted that the judgments are barred (and as to this we express no opinion) it cannot avail the defendant, because the whole balance of the decree, subject to the deduction of what may be ascertained to be due Lockhart, is due to the plaintiff to pay, first, the costs of administration; secondly, debts due to creditors entitled to be paid, and thirdly, for the legatees. If the judgments are barred, and the plaintiff will not pay them when he shall have assets, this may swell the sum due to Lockhart in some measure, but that view of the matter is not presented now. It is sufficient to say here that the plaintiff cannot avail himself of the statute of limitations.

In view of the imperfect report before us, we deem it better to overrule and disregard all the exceptions of both parties thereto, and recommit it, with instructions to the referee to ascertain, first, the balance due upon the decree for $12,077.34, with interest thereon from the 25th of November, 1868, excluding entirely from the account the bonds so surrendered to Lockhart, the executor, and the same so credited on his bond to Long; and secondly, to ascertain what sum of money was due to Lockhart at the time of his death, under the will of the testator. In

ascertaining the amount due to Lockhart, the referee will take into his account all debts and costs of administration properly paid by him, the costs of administration and all debts unpaid.

Let a proper order, recommitting the report in accordance with opinion, be drawn.

Judgment accordingly.

CASPER SAIN, Adm'r, v. B. BAILEY and others.

Executors and Administrators, are liable for funds received in their representative capacity.

Where one receives money in his capacity as administrator, he cannot withhold it from the next of kin of his intestate upon the ground that it is not a part of the trust estate.

(*Humble* v. *Mebane*, 89 N. C., 410; *Webster* v. *Laws*, *Ib.*, 224, cited and approved).

CIVIL ACTION tried at Spring Term, 1882, of DAVIE Superior Court, before *Avery, J.*

The plaintiff appealed.

Messrs. Watson & Glenn, for plaintiff.

Messrs. J. M. McCorkle and *D. M. Furches*, for defendants.

SMITH, C. J. The defendant, having administered on the estate of A. C. Holman, instituted proceedings for a settlement against the persons entitled thereto, in the late court of equity of Davie county, and a final decree therein was rendered at spring term, 1860. Two years thereafter certain moneys were paid over to him by Isaac Holman, to whom a receipt was given in these words:

"Received of Isaac Holman, trustee of Lydia Holman, five hundred dollars, principal, and fifty-seven dollars and fifty

cents, which was left in my (his) hands out of the Pinchback estate for Andrew B. Holman's heirs.

B. BAILEY,
Adm'r of A. B. Holman, dec'd.

13th April, 1862.

An additional sum was also paid over to him, and a similar acknowledgment taken, which has been accidentally destroyed, making an aggregate amount of more than one thousand dollars.

In the year 1876 the defendant was removed from office and the plaintiff Casper Sain appointed in his place. The fund derived from the Pinchback estate was collected under a written instrument, without seal, made on December 21st, 1848, by the said Lydia Holman, and annexed as an exhibit, the construction of which as an effectual transfer of the property therein mentioned, or as the constitution of an agency or trusteeship to carry out her benevolent purposes, under specified directions subject to recall and absolutely revoked by her will executed in June, 1857, formed the principal subject of debate of counsel in the hearing before us.

The present suit is prosecuted by the said Sain, as administrator, and the associate plaintiffs, the heirs and next of kin of the intestate Andrew B. Holman, for the recovery of these moneys, and in order thereto for a reference to ascertain what is due.

The answer opposes several defences to this claim, and among others, that the money in the hands of the agent or trustee, who paid it, Isaac Holman, was discharged of all the adherent trusts and the agency revoked by the death of said Lydia and became a part of her estate, held by him, as her executor, he being appointed such, for disposition under the provisions of the will; and it further sets up, as matter in avoidance, that the money has been expended in the support and maintenance of the plaintiffs other than the administrator under the direction and with the approval of their mother and guardian, Sarah B. Holman, to whom he is alone liable to account for the use of the fund.

A single issue was submitted to the jury: Did the defendant B. Bailey receive into his hands any funds belonging to the estate of A. B. Holman after the spring term, 1860, of the court of equity of Davie county and before this action was brought?

The plaintiff asked an instruction as follows: Whether the writing of 1848 vested the estate in remainder in A. B. Holman or not, the defendant having received the money from the trustee and treated it as such, at the time, he cannot now be heard to say that it passed under the will of Lydia Holman to Isaac Holman absolutely, and that if the jury should find that he received the money, they should find for the plaintiffs upon the issue. The instruction was refused, and under the directions given a verdict was rendered answering the enquiry in the negative.

The proposed instruction, while like the form of the issue, it does not present in very definite and precise terms the underlying proposition of law upon which it depends, does, we think, embody its substance, and that is, the fund having passed into the hands of the defendant, in his capacity as administrator, and upon the trusts involved in its reception, he cannot now withhold it from the next of kin of his intestate upon the ground that it is not a part of the trust estate and belongs to others.

In our opinion this is a correct statement of the law, and the results are not varied by any interpretation which the writing may bear under the provisions of which the fund was collected. If the attaching trusts with the agency itself were recalled by the death of said Lydia, and the property fell into the bulk of the estate of the testatrix, for disposition under its provisions, the executor himself, who in this view should have retained it, has recognized the right of the defendant's intestate, and paid over the money to him. He therefore cannot withhold it as wrongfully received, when the executor does not require its return, nor, so far as the case discloses, set up any claim to it whatever. It would be a fraud to permit the defendant to retain property thus acquired from those for whom it was received and appropriate

it to his own use without accountability to any one. The principle of law which controls in such cases is declared and defined with its limitations in the recent cases of *Humble* v. *Mebane*, 89 N. C., 410; *Webster* v. *Laws*, *Ib.*, 224; *Burke* v. *Turner*, decided at this term, and nothing further is needful to be said.

We do not pass upon other defences, but declare the ruling of the court, in regard to the directions under which the verdict was found, erroneous and entitling the plaintiffs to a new trial, and it is so adjudged. Let this be certified.

Error. *Venire de novo.*

SAMUEL RUFFIN and others v. C. B. HARRISON and others.

Guardian and Ward.

Upon the facts found in pursuance of previous adjudications in this case (81 N C., 208, and 86 N. C., 190), and upon confirmation of the referee's report, the plaintiffs are entitled to judgment against the parties to whom the money due the ward was wrongfully paid.

(*Exum* v. *Bowden*, 4 Ired. Eq., 281; *Lemly* v. *Atwood*, 65 N. C., 46, cited and approved).

CIVIL ACTION heard upon exceptions to a referee's report made to THE SUPREME COURT, and heard at February Term, 1884.

Messrs. E. G. Haywood and *Reade, Busbee & Busbee*, for plaintiffs.

Messrs. Davis & Cooke, *D. G. Fowle* and *A. M. Lewis*, for defendants.

SMITH, C. J. When the cause was before us on its merits and decided at June term, 1879 (81 N. C., 208), it was ascertained that the sum of $1,555.23, raised by a mortgage of some

of the lands bought by the *feme* defendant Harrison, had gone into the hands of her husband, the administrator, Carter B. Harrison, and with her consent applied to the creditors, including herself, a part of which may have been needed to pay the balance due the infant; and if so, the sum so misapplied could be pursued and recovered by the plaintiffs from those who had participated in the misapplication for their partial exoneration.

A reference was thereupon ordered to ascertain the sum so required to pay the residue of the infant's debt, and which had been wrongfully diverted and appropriated to other claims posterior to hers in the order of payment under the decree, and the date of the guardian's removal.

The referee made his report, in which he finds that on the 15th day of May, 1875, when the funds went into the hands of the administrator, there was an unpaid balance of $640.26 due the infant which ought to have been discharged therefrom, and that the entire amount of $1,555.23 derived from the source mentioned, and of which that balance constitutes a part, had been paid over and applied to the indebtedness to M. L. Ellis and Penelope Egerton, from the said administrator.

The referee further reports that in the absence of any record evidence of an order removing the said C. B. Harrison from the guardianship, the removal did not take place before the issue of notice thereof to the solicitor on September 7th, 1875.

The report, for want of notice, of the time of executing the order and taking the account, to the defendants, O. L. Ellis and wife, and Penelope Egerton, or their counsel, was set aside at February term, 1883, and the matter again referred to the same commissioner.

A second report, substantially the same as the former, was returned to fall term last, and the cause being continued, the matters arising out of it and the correlative liabilities of the creditors, of the second and third class provided for in the decree, to replace the misapplied moneys, were fully discussed at the hearing during the present term.

There are no exceptions taken to the report except that in regard to the date of the termination of the guardianship, which is not urged, and the complaint made before the commissioner of the limited scope of his enquiries under the reference.

In our former decision, reheard and affirmed at February term, 1882 (86 N. C., 190), it was declared that as soon as any moneys received under the decree came into the hands of said C. B. Harrison, which ought to be applied to the infant's debt, they were instantly held by him, as guardian, he filling both capacities, the transfer being effected by operation of law. The consequence is that Harrison, being thus in possession in his character as guardian, held the fund at once in trust for his ward, and its perversion to other uses was a breach of official duty, for which he himself and such as knowingly participated in the fruits of the misapplication are responsible to the infant, and, by subrogation, to the plaintiffs the sureties to the guardian bond for their reimbursement and exoneration. The principle is well recognized in a court of equity. *Exum* v. *Bowden*, 4 Ired. Eq., 281; *Lemly* v. *Atwood*, 65 N. C., 46, and numerous cases intervening.

This is entirely aside from any questions that may grow out of a maladministration of the debtor's estate by the representative, and the claims of creditors *inter sese*, to priority of satisfaction from the assets. These are matters to be considered and adjusted among them. These plaintiffs are, in our opinion, upon the confirmation of the report and upon the facts found in pursuance of the previous adjudications, entitled to judgment against the parties to whom the sum then due the infant was wrongfully paid.

The report is confirmed and the commissioner is allowed $25 for his services. A decree to this effect may be drawn accordingly for said sum of $640.26, and interest from May 15, 1875.

Judgment accordingly.

J. W. JENNINGS and others v. J. W. COPELAND and others.

Guardian and Ward—Executors and Administrators—Confederate Currency.

1. A guardian surrendered his office in March, 1863, to one whom he supposed to be his legal successor and made a settlement with him, though he was not regularly appointed guardian until December following, but in the meantime acted as such in good faith; *Held*, that the management of the fund from March to December must be treated as an exercise of an agency of the former guardian, whose bond is responsible for any loss resulting therefrom.
2. A guardian is personally responsible for the amount of trust funds used in the purchase of a note which was assigned to him individually, and without any declaration of the trust, but is not in default for converting depreciating Confederate currency into notes.
3. An administrator of a deceased guardian, under the law in force previous to the adoption of the Code of Civil Procedure, was bound to take reasonable steps, by suit or otherwise, to secure trust funds until they could be legally delivered to a succeeding guardian.
4. And where such administrator collects rent of land, he is accountable for the same as assets.
5. An administrator is not chargeable with negligence in failing to collect a debt solvent in January, 1865, but became insolvent at the close of the war. But where he sells personal property he is chargeable with the price bid, scaled under the act of 1865-'66, ch. 38, and not for the value of the articles sold.

(*Purser* v. *Simpson*, 65 N. C., 497; *Covington* v. *Leak*, *Ib.*, 594; *Love* v. *Logan*, 69 N. C., 70; *Larkins* v. *Murphy*, 71 N. C., 560; *Alexander* v. *Wriston*, 81 N. C., 191; *Rogers* v. *Gooch*, 87 N. C., 442; *State* v. *Robinson*, 64 N. C., 698; *Washington* v. *Susser*, 6 Ired. Eq., 336; *Moore* v. *Shields*, 68 N. C., 327; *Hinton* v. *Whitehurst*, 71 N. C., 66; *King* v. *Railroad*, 66 N. C., 277, and 91 U. S. Rep., 3, cited and approved).

CIVIL ACTION heard upon exceptions to a referee's report at January Special Term, 1882, of NORTHAMPTON Superior Court, before *Graves, J.*

The facts are stated in the opinion. The defendants appealed from the ruling and judgment of the court below.

Mr. R. B. Peebles, for plaintiffs.
Mr. Willis Bagley, for defendants.

SMITH, C. J. In the year 1859, H. C. Edwards, by order of the county court of Northampton, became guardian to the plaintiffs, Joseph Futrell and Catharine, since intermarried with the plaintiff James W. Jennings, then infants residing in said county, and entered into bond in the penal sum of four thousand dollars, with sureties as prescribed by law for the faithful performance of the trusts imposed. Subsequently he executed another bond with sureties in the penalty of ten thousand dollars, with like condition, both of which were and are solvent securities for the trust estate which went into the possession of the guardian. At March term, 1863, of said court, the guardian surrendered his office, and at December term following Harrison Futrell, the intestate of the defendant James W. Copeland, was appointed in his place, and gave bond to discharge the duties assumed in the sum of ten thousand dollars, with one Samuel A. Warren and the defendant John Davis his sureties, which was accepted.

In the year 1861 the infants removed from this state to Indiana, where the said Catharine, a minor, was married to the plaintiff Jennings. She arrived at full age in May, 1867, and her brother Joseph, in August, two years thereafter.

The amounts in the hands of Edwards due his wards respectively were, according to his returns made in March, 1861, to Catharine, $777.72, and to Joseph, $789.90, which (except the small sum of $33.04) consisted of notes and bonds which were passed over by a preceding guardian and were mostly collected by Edwards in the latter part of 1862 and early in 1863.

In March, 1863, upon his resignation of the trust, Edwards, for some unexplained reason, but probably under the erroneous impression that the intestate, Futrell, had become his legal successor, came to an account and settlement with him as such guardian, paying over in currency the sum of $893.57 and

delivering to him as part of the trust estate two notes payable to Edwards as guardian, one against Goodwin C. Moore and John W. Moore, his surety, the other against James H. Bryan and Matthew Bryan, his surety, both of which were then solvent and so remained, the former until after the end of the civil war, the latter until the year 1868.

Three days after the settlement, Futrell acting as guardian and in good faith, with the funds received, purchased a note, executed by S. W. and A. M. Wood to W. W. Edwards and endorsed by Edwards by Aquilla Castellow, from the latter by whom it was assigned to Futrell individually, without any declaration of trust; and on March 31st he loaned $500 of the money to H. E. Hoggard, in good faith, for the benefit of the ward Joseph, taking his note with N. S. Hoggard as surety, drawn payable to said Futrell as guardian. These notes were solvent at the time and remained so, the first until 1866, the other until 1868.

Harrison Futrell continued to hold possession of the notes until his death in January, 1865, as has the defendant Copeland; to whom letters of administration issued since that time, and they, with the notes received from Edwards, were tendered by him to the plaintiff Jennings, as part of the trust estate before the commencement of the present suit on November 3d, 1869.

On March 25th, 1865, after due notice the administrator sold at public auction the personal property of the intestate, in presence of a good attendance of persons, for the aggregate sum of $1,060, and made due return thereof.

He also took possession of the intestate's land and rented it out annually from January 1st, 1866, to January 1st, 1872, collecting the rent money except for one year, with which he is charged, and on May 20th of the last mentioned year sold the land for the sum of $300.

Among the notes mentioned in his inventory is one against one Newlin, which, being afterwards discovered to belong not to the intestate but to his surviving wife, was restored to her.

These are the prominent and material facts found and reported by the referee under an agreed order of reference, entered on the record, upon the accompanying testimony and exhibits, into the sufficiency of which, this being an action on the guardian bond, we are not permitted to enquire, nor is it necessary to recapitulate his deduced conclusions of law.

To the findings, both of fact and law, a series of exceptions were filed, in number 18 by the plaintiffs and 15 by the defendants. Of the plaintiffs exceptions, some were sustained and others overruled, rendering needless a consideration of those of the defendants; and the court ruled in substance that the intestate, after his appointment, should have called the preceding guardian to full account of his administration, and held him responsible for the entire trust estate, in disregard of what had taken place in their settlement of March, and that for his negligence in not doing so, the intestate's estate was chargeable with the full value thereof, and this without credit or abatement for any of the retained and lost securities tendered to the plaintiffs. The account of the referee was thereupon recommitted to the clerk for correction and reformation according to the ruling.

The clerk upon this basis restated and reported the account, charging the intestate's estate with the sums specified in the official returns of Edwards, reduced under the scale of two-thirds of the respective amounts with credits for disbursements and commissions, and interest computed to the 9th day of January, 1882. The clerk also reported an account of the defendant Copeland's administration of the intestate's estate, in which he is personally made liable for the Wood and Bryan notes, as assets lost by negligence, and the amount of assets in his hands, with interest to the same time ascertained and reported to be $1,118.14, which is nearly $500 in excess of the balance first reported.

The exceptions to the clerk's report were overruled and its confirmation followed by a judgment in which the plaintiffs recover of the defendant (Copeland as administrator and Davis)

the sum of ten thousand dollars, the penalty of the bond to be discharged on payment to the plaintiffs, Jennings and wife, of the sum of $1,188.68, with interest on $587 from January 9th, 1882; and to the plaintiff Joseph the sum of $1,122.35, with interest on $554.25 from the same date—the judgment against the administrator for the amount of the assets in his hands and a judgment *quando* against him for the residue, besides costs.

The defendants' exceptions, which alone are brought up on the appeal, are confused and in some respects indefinite, but, as understood, seem to be comprised in the following objections to the action of the court:

1. The entire ignoring the settlement of March 4th, 1863, and the transfer then made of the trust estate, and the ruling that the intestate was responsible for the whole amount which should have been in Edwards' hand in December, and collected by him for the use of the wards.

2. The refusal to allow as credits the amounts due on the four several notes tendered to the plaintiffs and rejected.

3. The charges against the administrator of rents of land.

4. The charge for the personal property sold at its estimated value instead of the price it brought, reduced by the scale.

5. The ruling by which he is held personally responsible for the amount of the notes against Wood and Bryan as assets lost by his negligence.

First and Second Exc.—The first and second exceptions, which are interdependent, may be considered together.

The rejection of the four offered notes as credits rests, as we interpret the views of the court, upon the supposed absolute nullity of the premature settlement and unwarranted transfer of the guardian funds from Edwards to his successor, whose authority to take possession was conferred nine months later. This is a narrow and incorrect view of the transaction conducted in entire good faith, as the referee finds, on the part of both, and the legal consequences flowing from it. It cannot be less favorable than it would be if the former guardianship had continued

with all its attaching responsibilities, until it touched the time of appointment and qualification of the succeeding guardian. In this aspect, the management of the estate by Futrell may be treated as the exercise of an agency on behalf of Edwards, and the funds already in the hands of the former, rightfully in his possession as guardian, as soon as the authority to hold it was conferred. The result reached is the same as if the trust and its obligations rested upon Edwards until Futrell became trustee. If there had been misconduct and loss resulting during the assumed agency, the responsibility would rest upon the bond of Edwards and the duty of enforcing it devolve upon his successor. But if none such can be imputed, and the management during the intermediate period has been discreet and favorable to the wards, there is no ground upon which a default on the part of either can be charged. The enquiry, then, must be into the care and prudence with which the trust estate, after passing into the hands of Futrell in March, has been since managed, and the propriety of the investments made. Considered in this light, there seems to be no just cause of complaint for the retention of the transferred notes, nor for the conversion of the depreciating currency into the notes of Wood and Hoggard. The assignment of the Wood note was not to Futrell in his fiduciary but in his individual capacity, thus amounting to a conversion of the money used in procuring it and its appropriation to his own use. While the wards could at their election ratify the act and follow their funds into the invsstment, claiming the note as their own, they do not choose to do so, and the misapplication stands, Futrell thus rendering himself liable for the amount. The other notes were in fact and upon their face part of the infants' estate, and the loss must be theirs unless caused by subsequent negligence. The note of Moore could not be collected after the close of the war, as by its results the debtors were rendered insolvent, and no culpability is incurred by the failure to make efforts to enforce payment. It was not ordinarily the duty of the fiduciary to collect a well secured debt during the war in a depreciated

currency. *Purser* v. *Simpson*, 65 N. C., 497; *Covington* v. *Leak*, *Ib.*, 594; *Love* v. *Logan*, 69 N. C., 70; *Larkins* v. *Murphy*, 71 N. C., 560.

It is equally manifest that no blame attaches to Futrell, whose death occurred early in 1865, for retaining the notes of Bryan and Hoggard, and if responsibility for their loss must fall on his estate, it arises from the inaction and subsequent neglect of his administrator, and which the latter ought to make good.

This brings up the question whether the administrator, coming into possession of securities, upon their face shown to belong to others and held by the intestate in trust only, was bound to take steps to save them during the interval between the termination of the war and the year 1868, after which they became worthless.

Under the changes in the law, introduced by the adoption of the Code of Civil Procedure in 1868, the personal representative of a deceased guardian, coming into possession of a note payable to him, as such, and held in trust for the ward, cannot maintain an action in his own representative capacity for the recovery of the money due, unless the indebtedness to the ward has been fully paid and the fiduciary obligation discharged, whereby he would be entitled to it as his own. This is held in *Alexander* v. *Wriston*, 81 N. C., 191; and the principle reaffirmed in *Rogers* v. *Gooch*, 87 N. C., 442.

But the rule was otherwise before; and the action, for whosoever's benefit prosecuted, was required to be brought in the name of the executor or administrator, and this was the law in force during the three years of solvency of the debtors and while the notes were held by the defendant Copeland without putting forth any effort to collect by suit or otherwise. It is true the trust reposed in Futrell was personal and terminated with his life, so that his administrator could not exercise the functions of a guardian thereafter in the management and disposition of the trust estate. But the duty did devolve upon him of protecting and preserving it, until it could be legally delivered to a succeed-

ing guardian or to the infant, if there were none, on his arriving at full age. He held possession with authority to secure and enforce payment, and this is associated with the obligation to exercise the power, when necessary, to secure the fund. The preservation of the security involves the exercise of reasonable care and prudence to avoid loss from insolvency, as from other causes which ought to be guarded against. The obligation of the guardian bond extended so far as to secure the preservation and delivery over of the trust estate after death to the party entitled to receive, and is liable when, from negligence, it or any part is lost and injury comes to the infant. This is the view taken in *State* v. *Robinson*, 64 N. C., 698, and the authorities generally concur in this estimate of fiduciary duty.

"The executor or administrator of the guardian as such has no authority, for guardianship is a personal trust and not transmissible. But he should close the accounts of the deceased guardian in court and pass the balance over to his successor." Schoul. Dom. Rel., §314.

We have had some hesitancy in applying the rule to the share of the estate belonging to the *feme* plaintiff, since her husband had the right at once upon the marriage to reduce it into possession and apply it to his own use, and he has been also neglectful, during a large portion of the time when the notes could have been collected, to take any steps towards a settlement or to get possession of the property. But as the fund was not separable and each had an undivided share in each note, the vigilance required in the protection of the interest of the one would have equally served the other, and the only legal right to sue and collect remained with the possession in the administrator.

Third Exc. The rents of the land during the years in which the administrator had taken it in charge were assets for which he is accountable, as well as the proceeds of sale. When rents are collected by the guardian of an infant heir or devisee and spent in his maintenance, they are not recoverable by the representative; but when he possesses himself of them, they consti-

tute a part of the estate and are liable to the claims of creditors of the deceased. *Washington* v. *Sasser*, 6 Ired. Eq., 336; *Moore* v. *Shields*, 68 N. C., 327; *Hinton* v. *Whitehurst*, 71 N. C., 66.

Fourth Exc. The exception to the charge against the administrator of the estimated value of the articles of the personal estate, instead of the sum for which they were sold, scaled under the statute, must be sustained. The referee assigns as a reason for this charge, that the administrator could have collected such value from the purchasers, and must be presumed to have done so. In this he mistakes the law. The act of 1865–66, ch. 38, which undertook to allow a recovery, not according to the contract but the value of the contract—in other words, the value and not the price for which the goods sold—though held to be a valid enactment by this court in *King* v. *Railroad*, 66 N. C., 297, was declared by the supreme court of the United States, when the case came before it for review on a writ of error, to be unconstitutional and void. 91 U. S. Rep., 3.

As the administrator could only compel payment of the price bid, and that reduced by conversion into good money under the scale, he cannot be made accountable for more.

Fifth Exc. As the intestate's estate has been subjected to the loss of the Bryan debt which was solvent until 1868, and this arises solely from inaction and neglect of his administrator, it should fall upon the latter; and so he is properly charged in his administration account. But he ought not to be charged with the loss of the debt of Moore, for the reason that it became insolvent soon after the war, and the administrator is not in default in failing to secure it. The charge against him for this loss is erroneous, and so far the exception must be sustained. These losses in respect to the notes are alone charged against the defendant Copeland, and our ruling is confined to them in reviewing the matter of this exception.

As the referee ascertains the notes, whereof the trust estate consisted, to have been collected by Edwards late in 1862 and

early in 1863, the scale of January, 1863, should have been applied to the residue of the fund, which ought to have gone into the hands of Futrell, left after deducting the Moore debt, the loss of which the infants must bear.

The points thus reviewed, we believe, embody the substance of the defendant's exceptions, which are numerous, and often but repetitions, without examining those of the plaintiffs. The result reached requires a recommittal of the account for reformation and for a restatement upon the basis of the rulings contained in this opinion.

There is error in the particulars set forth and the judgment below must be and is hereby reversed.

Error. Reversed.

W. B. HOWERTON and others v. JOHN T. SEXTON.

Guardian and Ward—Partition, sale of land for—Setting aside order of sale—Wills.

1. The act requiring service of summons and copy of complaint upon infant defendants before appointment of guardian *ad litem*, went into operation after this proceeding was begun. THE CODE, §387, curing defects where there was no such service, adverted to.
2. This case is governed by the former law (C. C. P., §59), and the failure of the guardian to answer the petition to sell the land for partition worked no injury to the parties, it appearing that a sale was necessary to their interest.
3. In such case, the court will not set aside the sale for want of precision in the record, and in the absence of fraud.
4. The testator expressed a wish that farm profits be applied to debts and then to education of children, but they turned out to be insufficient for this purpose; and a sale of the land was upheld, as the interest on the money would more directly conduce thereto, and as there was nothing in the will to prohibit conversion.
5. This case is remanded to the end that there may be an enquiry as to the payment of the purchase money and the manner of its disposition, and that other parties defendant may be brought in if necessary.

CIVIL ACTION tried at Fall Term, 1882, of NASH Superior Court, before *MacRae, J.*

The exceptions to the referee's report in this case were overruled, and the report confirmed. Judgment; appeal by the defendant.

Messrs. J. J. Davis and *C. M. Cooke*, for plaintiffs.
Messrs. Bunn & Battle and *Battle & Mordecai*, for defendant.

SMITH, C. J. This action has for its object the annulling and setting aside of certain proceedings instituted before the clerk of the superior court of Nash for the partition and sale of a tract of land devised to the plaintiffs, William B., Wiley F. and Sallie B., wife of the plaintiff B. T. Draper, and their brother, George Howerton. The grounds on which their validity is impeached are assigned to be the irregularity and defects apparent in the conduct of the proceedings, the infancy of the several tenants in common, and the absence of any defence of their interests, and the terms contained in the devise of the land to them.

The cause was referred, and is before us upon the defendant's appeal for a revision of the numerous exceptions taken to the report and findings of fact and law. It is necessary for us to consider but the preliminary conclusion arrived at by the referee and affirmed by the judge, that the proceedings in the probate court terminating in a sale of the land of J. R. Moore, by deeds from whom the defendant derives his claim, are inoperative and void, and that the plaintiffs' title thereto was not divested and transferred to the purchaser.

The transcript from the record of the probate court shows the following successive steps to have been taken in that action:

1. The filing of a petition by the said George T. Howerton, wherein he alleges himself to be of the age of twenty years and without guardian; his intention to institue suit against the present plaintiffs, his co-tenants, for the partition and sale of certain

real estate derived from their mother, the said Henrietta, and asks for the appointment of John A. Drake, the executor named in the will of the testatrix, a competent and responsible person, as his guardian *ad litem* to prosecute the suit in his behalf.

2. The order of the probate judge, in response to the application, making the appointment and authorizing him to prosecute the proposed action.

3. The filing of the petition of the said George T. against the said William B., Wiley T. and Sallie B. Howerton, reciting that they are tenants in common of certain real estate, consisting of about four hundred acres, in the county of Nash; that the petitioner will arrive at full age before the first day of January, 1871, and desires to have his separate one-fourth part thereof; that an actual equal division cannot be made without injustice to some of the tenants, inasmuch as the dwelling and out-houses, with a few acres, would exceed the ratable value of a share, the residue being in large part uncleared and not in fit condition for cultivation, and that it would be to the interest of all to have a sale in order to a partition. The petitioner thereupon asks for an order of sale and the designation of the said J. A. Drake as commissioner to make it.

4. The application in the names of the three infant defendants, showing their respective ages, the youngest, Wiley T., being over fourteen years old, and none having a regular guardian; the institution of the action for partition; and praying for the appointment of John T. Sexton, a competent and responsible person, as their guardian *ad litem* to defend their interests therein.

5. The order of the court declaring the said Sexton to be competent and responsible, and appointing him to such office, with authority on behalf of the infant applicants to defend the action.

6. The summons issued against said Sexton on October 27th, 1870, and his acceptance of service thereon on November 7th following:

7. The decree of sale made on the day last mentioned, declar-

ing it to be for the benefit of the tenants that the land be sold, and ordering and directing "that John A. Drake, commissioner, have a license to sell the said land described in the petition for division," at the place and on the terms and conditions therein specified and prescribed.

8. The report of the sale made by the commissioner on December 12, for the sum of three thousand nine hundred and ten dollars, but without mentioning the name of the purchaser, the said J. R. Moore.

9. The decree of confirmation as follows: "This cause coming on to be heard, and it appearing that the said J. A. Drake, commissioner, on the 7th day of December, 1870, sold at public sale to —— the lands described in the petition at the price of $3,910, upon the following terms, to-wit:

"Thirty dollars cash, balance on a credit of six months, &c., and the said sale appearing to be just and reasonable, it is therefore ordered and decreed that the same be in all respects confirmed, and that the said J. A. Drake, commissioner as aforesaid, upon payment of the purchase money, after first paying costs of suit, shall distribute the surplus among such persons as would have been entitled to the land according to law.

"It is further ordered that upon the payment of the purchase money and every part thereof, the said J. A. Drake, commissioner as aforesaid, execute and deliver to the purchaser a deed for said lands. This 7th day of December, 1870."

There is a repugnancy between the date of the commissioner's report and the date of the decretal order of confirmation, but the recitals in the latter show it was in fact posterior in time to the report, and thus the seeming difficulty is removed.

10. A second report from the commissioner dated on February 12th, 1872, representing that the purchaser had failed to pay the residue of the purchase money, that the land sold for a good price, and the bond taken was entirely solvent, and asking for further directions in the premises.

This terminates the action in the probate court, but the evi-

dence shows, and the referee so reports, that the said Moore, being unable to pay, or becoming tired of his bargain, on September 1st, 1872, sold and conveyed the land to the said Sexton for thirty-four hundred dollars, a loss of more than $500 on his own bid, and at the same date took a conveyance of title from the commissioner. The concurrent testimony of all the witnesses established the fact that a full price was bid for the premises, and the estimates of most of them put that sum largely in excess of the true value, so that no detriment has thereby come to the several owners.

The said George T., at whose instance the sale was made, has received his share of the proceeds, and being content therewith refuses to unite with the other tenants in the prosecution of the present action, to disturb what has been done in the probate court.

The plaintiffs impeach the validity of the proceedings for partition upon several grounds, to which we now direct our attention.

It is objected:

1. The infant defendants were not properly before the probate court and are not concluded by what was done:

It is to be observed that the law, then in force, is that contained in the Code of Civil Procedure, §59, part 2, which authorizes the appointment of a guardian *ad litem* to defend an action against an infant "upon the application of an infant if he be of the age of fourteen years and apply within twenty days after service of summons."

The subsequent act requiring service of summons and a copy of the complaint upon one or more infant defendants, before the power of appointment can be legally exercised, went into effect on April 5th, 1871, and has consequently no application. Acts 1870–71, ch. 233, §2.

The application in the present case was presented and acted on at once, before and without the issue of the summons, the service of which would give notice of the pending of the suit,

and of this they already had information without such service.

2. The guardian *ad litem* put in no answer and thus failed to protect the interest committed to his keeping and defence:

It does not appear that any successful resistance could have been made to the prayer of the petition, or that any injury accrued therefrom to any of the defendants. His silence *then* we cannot *even now* see to have been to their prejudice or to involve any dereliction of duty to them.

3. It was not shown that an actual division could not have been made advantageously to the tenants, and that a sale was necessary.

The petition assigns the reasons why an actual separation of the land into parts could not be effected without injury to the interests of the parties, and the decree of sale itself recites "that it would be of benefit to said heirs to sell said land for division." Nor does it now appear to the contrary of the finding of the probate judge.

4. The written application of the defendants for the appointment of a guardian *ad litem* and the designation of the person chosen by them, does not bear the signatures of any of them, and is, as is also the order of appointment, without date:

While this is true, the names of all do appear in the body of the petition, and it is accepted and acted on as their petition, and becomes part of the record. The date is not of the essence of the application and its recitals fix the period of its presentation as being *after* the filing of the petition for partition and *before* the decree of sale.

While it must be conceded there is a want of precision and a great disregard of form manifest in the record of proceedings, they are not in our opinion sufficient to invalidate the sale made under the order of the court in the absence of evidence of any fraudulent practice in bringing it about, and when it plainly appears to have been to the interest of all to have the sale confirmed.

The complaint further alleges that the sale was in contraven-

tion of the terms of the devise of the land, and, therefore, void:

The testatrix does express a wish that the farm be managed by her sons, George T. and William B., under the advice of her executor, and the profits be applied in payment of her debts and in the education of her two younger children, Wiley T. and Sallie B. But the proceeds of the farm were insufficient to accomplish this purpose, and if the interest on the money for which it sold would more directly conduce thereto, there is nothing in the will to prohibit conversion.

In this connection we advert to the curative statute, passed after the amendment that requires personal service of the summons upon the infants or some of them in order to their being brought into court and made parties, which in express terms declares valid, effectual and binding against such, all decrees and judgments rendered in actions pending on March 14th, 1879, or determined before that time, although no personal service of summons had been made. THE CODE, §387.

While, then, we cannot pronounce null the proceedings by virtue of which the land was sold, and thus needlessly disturb public confidence in the efficacy of judicial action, we are not satisfied as to the payment of the purchase money and the manner of its disposition, and we think these plaintiffs have a right to an enquiry in reference thereto. To this end the judgment must be reversed and the cause remanded in order that this enquiry be made, and if necessary other parties defendant be brought in.

This conclusion dispenses with the examination of the other exceptions, which are consequent upon the ruling that the proceedings for partition are a nullity and the sale void, and involve the adjustment of equities growing out of that adjudication and dependent upon it.

There is error. The judgment must be reversed and the cause remanded for further proceedings according to this opinion.

Error. Reversed.

HARRY BURKE and wife v. J. M. TURNE.

Guardian and Ward—Payment under mistake of law.

1. A guardian who receives money by virtue of his office and for his ward cannot exonerate himself from liability by showing that the same belonged to the ward's father, as a part of his life estate interest as tenant by the courtesy, but was paid by him to the guardian.
2. The fund here belonged to the ward, subject to the life estate interest of the father, and if paid by the latter to the guardian, under a mistake of law as to his rights, he cannot successfully assert a claim to recover it back.

(*Humble* v. *Mebane*, 89 N. C., 410, cited and approved).

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, where the judgment of the court below was affirmed, except as to the allowance of commissions to the defendant J. M. Turner, upon the two items therein specified, and as to these the account was corrected, and submitted at the last term of this court, when an order was made setting aside the last report and referring the matter to the clerk of this court to state the account in accordance with the opinion then rendered (89 N. C., 246), and in pursuance thereof he submitted his report to the present term, upon the consideration of which, and the exceptions taken and argued by counsel, the following directions and judgments were made:

Messrs. J. M. Clement, Battle & Mordecai and *R. Z. Linney,* for plaintiffs.

Messrs. D. M. Furches, Robbins & Long and *Armfield & Armfield,* for defendants.

MERRIMON, J. The account heretofore taken in this case has been attended with considerable complication and some confusion. The very lucid statement of the account and the report thereof

made to the present term by the clerk of this court, make it manifest that so much of the opinion delivered at the last term (89 N. C., 246) as directed the sum of $1,024.19, theretofore allowed the defendant as a credit for board and clothing of the *feme* plaintiff, daughter of the former guardian, to be added to the indebtedness of the defendant therein specified, was erroneous. This was not an item of charge. The defendant was simply not entitled to have a credit for the payment of that sum which he alleges he had made. The directions in all other respects were correct.

The clerk will correct his report so as to make it conform to this direction. Judgment accordingly.

Upon the coming in of the report in obedience to the above directions, and the attention of the court being called to an error in the former account submitted under the ruling in this case as reported in 89 N. C., 246, an order of reference was made as follows:

MERRIMON, J. The clerk of this court has stated the account and made report thereof as directed in the opinion delivered at the last term, and modified by a further opinion at the present term. To this report no exception is taken, and it appearing to be just and acceptable to the parties, the court approves it.

Ordinarily, a judgment should be entered at once for the sum so ascertained to be due the *feme* plaintiff, but her counsel bring to the attention of the court an item of charge of $1,628.69, with interest on the same from the first of September, 1866, which they insist was admitted by the defendants to be due—was charged against them in the account as taken in the court below, and to which charge the defendants took no exception; and which they further insist ought to be added to the sum now appearing to be due the *feme* plaintiff.

The defendants, on the contrary, earnestly contend that they did not admit the item to be due, and that the exceptions to the report taken in the court below embrace it. They insist that it is of a real estate fund in which the former guardian of the *feme*

plaintiff had and has a life estate as tenant by the courtesy, and for which they are in nowise liable.

We are unable to determine satisfactorily, from what appears in the record and the explanations and arguments submitted by counsel, whether or not the *feme* plaintiff is entitled to recover the item of charge in question. We are left in doubt and perplexity as to the source from which it comes, and do not feel at liberty to dispose of the matter without further enquiry.

It is strange indeed that so large an item in the account was not thought of and considered in the repeated and earnest contests growing out of the exceptions: that it was not, can only be explained and excused upon the ground that the account has been a complicated one, and the taking of it attended with confusion.

The plaintiffs now contend that they thought it was admitted and settled in their favor. The defendants on the other hand insist that this claim has not been insisted upon until the present time. There seems to have been mutual mistake and misunderstanding.

In this state of the matter it must be referred to J. B. Connelly to enquire and report at this term of the court from what source the item of charge mentioned and referred to, came; and especially, whether it was part of the real estate fund in which the former guardian of the *feme* plaintiff had a life estate as tenant by the courtesy, or what part of the same, if any, came into the hands of the defendants. It is so ordered.

In obedience to the above directions, the referee submitted his report at this term, when the following ruling and judgment were made:

MERRIMON, J. The referee reports, that of the item of $1,628.69, that the plaintiffs seek to charge the defendants, and in respect to which an enquiry was ordered at the present term, $984.43 was of the fund in which the former guardian and father of *feme* plaintiff had a life estate as tenant by the courtesy, and bears interest from the first day of September, 1866. The

balance of the item is embraced in the account stated and approved, and no further question is made about it.

It thus appears that the former guardian paid to the defendant guardian $984.43, in which he had a life estate as tenant by the courtesy, and which he might, under the ruling of the court below, have refused to pay to his successor. That court held that the defendant guardian was not required by law to take steps to secure or recover that fund for his ward, in which the former guardian had a life estate as tenant by the courtesy, and was not, therefore, chargeable with that fund; but it did not decide that if Benjamin Turner *had paid* the defendant guardian that fund, or any part of it, he would not be chargeable with the same. So that it is an open question whether or not he is liable, and this is now presented for our decision.

The question of how far the defendant guardian might have been held liable, as guardian, for his failure to see that the fund in which Benjamin Turner had a life estate as tenant by the courtesy was secured, is not before us. The court below held that he was not so liable, and there was no appeal from that decision, and we are not at liberty to review it.

The fund belonged to the *feme* plaintiff, subject to the life estate interest of the father. If for any cause he chose to waive his right and pay the fund, or any part of it, to his daughter's guardian for her, we can see no reason why he might not do so. He had the right to do with his interest as he saw fit. If he chose to give it to his daughter he had the right to do so without question on the part of the defendants. If he so paid the $984.43 under a mistake of law as to his rights, he could not probably have reclaimed it; and if he became insolvent and wasted the balance of the fund, or appropriated the same to his own use, as the evidence tends to show he did, then, in equity, he would not be allowed to reclaim the sum so paid to the guardian. At all events, the defendant guardian having received the money as guardian and in trust for his ward, he is chargeable with it; and neither himself nor his sureties can now be heard to insist that he is not.

The father does not set up claim to the money so paid, and if he were to do so, he could not successfully assert such claim in the courts. He is estopped by his own act to set up such claim. In *Humble* v. *Mebane*, 89 N. C., 410, the Chief-Justice said: "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 money in trust for his wards, and is accountable therefor, as their estate, which he cannot be permitted to dispute." This authority bears directly and with conclusive force upon the question now before us, and must be decisive of it.

The *feme* plaintiff is entitled, in addition to the sum already approved, to have that sum enlarged by adding thereto the sum of $984.43, with interest thereon from the first day of September, 1866. Let judgment be entered accordingly.

Judgment accordingly.

CHARLES PRICE, Adm'r, v. JAMES JOHNSON and others.

Wills, defeasible estate, when it becomes absolute.

1. Where an estate is defeasible and no time fixed in the will for it to become absolute, the time of the devisor's death will be adopted, in preference to that of the devisee, unless there be words to forbid it.
2. But, if there be an intermediate period between the death of the devisor and devisee to which the contingency can have reference, then the intermediate period must be adopted.
3. *Therefore*, where the will provides that John, upon his arriving at the age of twenty-five years, "can take possession of the estate and do with it as he pleases," but if he die without issue, then to be limited over, and he attains the said age and dies without issue; *Held*, that the intermediate period to be adopted is his attaining the age of twenty-five years. After that event, the estate in John became absolute, and the contingency of

dying without issue not happening before that time, the limitation over cannot take effect.

(*Hilliard* v. *Kearney*, Busb. Eq., 221; *Davis* v. *Parker*, 69 N. C., 271; *Webb* v. *Weeks*, 3 Jones, 279; *Biddle* v. *Hoyt*, 1 Jones' Eq., 159; *Vass* v. *Freeman*, 3 Jones' Eq., 221; *Burton* v. *Conigland*, 82 N. C., 99; *Murchison* v. *Whitted*, 87 N. C., 465, cited and approved).

SPECIAL PROCEEDING to sell land for assets, commenced before the clerk, and heard at Spring Term, 1883, of ROWAN Superior Court, before *Graves, J.*

This proceeding was instituted by the plaintiff as administrator of John N. B. Johnson against the heirs and devisees of John I. Shaver, for the sale of the land described in the petition as belonging to his intestate, to make the same assets to pay the intestate's debts.

A jury trial was waived, and the parties submitted a "case agreed" to the court, the facts being as follows:

1. John I. Shaver died in 1873, having made a last will and testament which was duly admitted to probate, the material parts of which, as applicable to this case, are: "Item first: I give and bequeath to John Johnson, son of Harriet Johnson, the Powe plantation, near three hundred acres, being the land I bought from Dr. A. T. Powe and Hugh Powe's estate. I also give him twenty shares of North Carolina railroad stock to hold and draw the dividends until he is twenty-five years of age. He is not to sell or lease it until that time, and then he can take possession of it and do with it as he pleases. Item second: I give and bequeath to Frederick Johnson, son of Harriet Johnson, the small brick house near Mr. Shober's, and the lot around it, that part I sold once to Banston and had to take it back. I also give him twenty-five shares of railroad stock in the North Carolina railroad to draw dividends until he is twenty-five years of age. He is not to sell or lease it, or have control of it until that time, except dividends, and then he can take it and do with it as he pleases. If John dies before he has a lawful heir, his property that I have bequeathed to him, I want it

to go to his brother Frederick and his sister Victoria, equally divided. If Frederick dies before he has a lawful heir, I want his to go to his brother John and his sister Victoria, equally divided."

2. John N. B. Johnson, the intestate of plaintiff, is the John Johnson, and Victoria Johnson and James Johnson are the parties, named in the will; and all of them as well as Frederick Johnson (who died after the death of the testator Shaver, and before he became twenty-five years of age, and before the death of the plaintiff's intestate), were infants at the time of making the will and at the death of the testator.

3. At the time of the testator's death the plaintiff's intestate was about sixteen years of age, and was then, as well as at the time of making the will, of extravagant habits for one of his age; and the said James, Frederick and Victoria were the younger brothers and sister of the said intestate, and Adolphus Johnson and Samuel Johnson were his younger brothers not mentioned in the will.

4. Plaintiff's intestate arrived at the age of twenty-five years, and in two or three days thereafter died without having had issue, and without ever having actually received in possession the *corpus* of the personal estate bequeathed to him, or without having attempted to dispose of the property after arriving at said age.

5. After arriving at twenty-one but before arriving at twenty-five years of age, the intestate did attempt to mortgage the real estate to secure the sum of $1,442, borrowed money, and signed and sealed a deed accordingly.

6. Frederick Johnson died intestate without having been married.

7. The indebtedness of the plaintiff's intestate, at the time of his death, amounted to the sum of $2,342, of which $1,100 was for necessaries supplied after he was twenty-one years of age, and $1,442 for borrowed money as aforesaid, contracted after he was twenty-one years of age.

8. The plaintiff's intestate made no debts after arriving at the age of twenty-five, except doctor's bills.

The plaintiff contends that his intestate John Johnson became entitled to an absolute estate under the will, having reached the age of twenty-five years before his decease; and the defendants contend that upon the death of John without issue, the property devised and bequeathed to him became vested either wholly in the defendant Victoria, or that one-half thereof became vested in her as executory devisee and legatee under the will, and the other half vested in the defendants, as to the real estate, as heirs-at-law of Frederick Johnson, and as to the personal estate, as next of kin (in conjunction with Harriet E. Johnson, the mother of Frederick and the defendants) of said Frederick.

It is further agreed that the said John died without being possessed or seized of any property other than that mentioned in the will and the petition, and that the railroad stock is sufficient to pay the debts described as for necessaries, but not sufficient to pay both that and the mortgage debt aforesaid.

If the court should be of opinion with plaintiff, a decree of sale is to be entered; otherwise, judgment to be given dismissing petition with costs.

The court being of opinion with plaintiff, adjudged that he be appointed commissioner to sell the land for assets, and the defendants appealed.

Mr. Kerr Craige, for plaintiff.

Messrs. J. W. Mauney, Lee S. Overman and *Fuller & Snow*, for defendants.

ASHE, J. The first and most important rule in the interpretation of wills, to which all other rules must yield, is, that the intention of the testator expressed in his will shall prevail, provided it be not inconsistent with the rules of law. 1 Blk. Rep., 672. A will is defined to be "the legal declaration of a man's intentions which he wills to be performed after his death." 2

Blk. Com., 499. These intentions are to be collected from his words, and ought to be carried into effect if they be consistent with law.

In this case, it is impossible to mistake the intention of the testator. He unquestionably intended that the land devised to John N. B. Johnson should vest in him absolutely, upon his attaining the age of twenty-five years; and it was also his intention that, if John died without lawful issue, the land should go to his brother Frederick and his sister Victoria. But as the testator failed to declare his intention as to the time when the contingency of dying without issue must happen, upon which the limitation over was to take effect, we must necessarily look to the context of the will, and resort to the rules of construction which have been established by judicial decisions.

It is a rule of construction that the whole will is to be considered together, and every part of it made to have effect, so as to effectuate the intention of the testator; and if there are any apparent inconsistencies in its provisions, it is the duty of the court to reconcile them if possible.

The testator wills that if John Johnson should die without an heir, that is, by virtue of our statute, without issue, then the land is to go to Frederick and Victoria. If this were all, the estate vested in John absolutely upon his surviving the testator. *Hilliard* v. *Kearney*, Busb. Eq., 221. In that case, it was held, when the estate was defeasible and no time is fixed for it to become absolute, and the alternative is either to adopt the time of the death of the devisor or that of the devisee, the former will be adopted, unless there be words to forbid it, or some consideration to turn the scale in favor of the latter. But if there be an intermediate period between the death of the devisor and that of the devisee, to which the contingency can have reference, then that must be adopted. The decision in that case has been cited with approval in the following cases: *Davis* v. *Parker*, 69 N. C., 271; *Webb* v. *Weeks*, 3 Jones, 279; *Biddle* v. *Hoyt*, 1 Jones' Eq., 159; *Vass* v. *Freeman*, 3 Jones' Eq., 221; *Bur-*

ton v. *Conigland*, 82 N. C., 99; *Murchison* v. *Whitted*, 87 N. C., 465.

Here, the testator, while he wills that upon the death of John without issue the estate devised to him shall go over to his brother Frederick and his sister Victoria, expressly declares that John, upon arriving at twenty-five years of age, "can take possession of the estate and do with it as he pleases." That is the time when his estate was to become absolute; and consequently it must be intended that the contingency upon which the limitation over was to take effect must happen before that event. So that, whether the will is susceptible of the construction that the contingency is referable to the death of the testator, or to the attainment of John to the age of twenty-five years—and it must be the one or the other—in either case, the estate of John was absolute at his death, and the defendants acquired no interest in the land devised to him, upon his death.

There is no error. This must be certified to the superior court of Rowan county, that the case may be proceeded with according to law and in conformity to this opinion.

No error. Affirmed.

STARKEY McDANIEL v. SUSAN KING and others.

Will—Latent Ambiguity—Evidence of testator's intention.

Where a testator devised his "home plantation," describing it in such manner as that upon the face of the will the court can see what land was meant to be included within its boundaries, *it was held* that evidence as to what the testator, at the time of making the will, "called and considered his home plantation," was properly excluded. Evidence *dehors* is only received to explain an instrument in case of a latent ambiguity, and no such ambiguity appears here.

(*Barnes* v. *Simms*, 5 Ired. Eq., 392; *Stowe* v. *Davis*, 10 Ired., 431; *Institute* v. *Norwood*, Busb., Eq., 65; *Jones* v. *Robinson*, 78 N. C., 396, cited and approved).

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

Plaintiff appealed from the ruling and judgment of the court below.

Messrs. Battle & Mordecai, Batchelor & Clark and *Strong & Smedes,* for plaintiff.

Messrs. Green & Stevenson, H. R. Bryan and *Walter Clark,* for defendants.

MERRIMON, J. James McDaniel, senior, died in 1854, leaving a last will and testament, which was duly established, by which he devised and bequeathed to his numerous sons severally sundry tracts of land and much personal property, consisting of slaves, live stock, farming implements, &c.

Both the plaintiff and the defendants claimed to derive title to the land, the subject of this action, under the seventh paragraph of this will, the material parts of which provide as follows:

"Item 7th. I give and bequeath unto my son James McDaniel certain pieces or parcels of land, beginning at the mouth of the ditch at 'Cherry Tree Island,' then up the fresh ground cotton-patch ditch, thence to the centre of the water-oak flat, then a straight line to Pollock's Pocoson bridge, until it strikes or intersects with Starkey McDaniel's avenue, then with the avenue to the main road leading from Trenton to Trent bridge, then down said road to Antwine branch, then down the various courses of Antwine branch to Trent river, thence up the various courses of Trent river to my Comen's line near the bridge across said river at Trenton, then with the Comen's line to the main road near the mills, then up the mill pond to high water mark to the Comen place, then with said line to the main road above Trenton, then up the various courses of said main road leading from Trenton to William H. Bryan's line, and then with my own and Will. H. Bryan's line to Croocked run, then across said Croocked run and up with the various courses of said Croocked

run to the first station or beginning, including all improvements, dwellings and appurtenances, with the exception of the mills and mill seat near Trenton." * * * "To have and hold said estate of land and slaves to him and his heirs and assigns forever: *Provided, always,* should the said James McDaniel die leaving no lawful issue or heir surviving him, then said estate of land, slaves and personal property shall be equally divided as near as possible between my five or surviving sons, with the exceptions hereinafter named, share and share alike. And it is my will and desire that the *lands* bequeathed to my son James and known as my "*home plantation,*" *and bounded as above,* and including the commons below Trenton, shall, at the death of my son James, he leaving no lawful heir or issue surviving *him,* descend to my son Nathan McDaniel, or his lawful heir or issue surviving him, to him, his heirs and assigns forever."

The plaintiff claims, as the sole surviving son of the testator, his brother James McDaniel, Jr., the first and principal devisee named in the paragraph cited, having survived all the other sons of the testator, except the plaintiff Starkey, and having died *without issue,* before the bringing of this action. He insists that the land in question, although within the boundary of land specified above, did not on the death of his father James pass to his brother Nathan McDaniel, or his heirs under the last clause quoted above, because, he alleges, it was outside, and not a part, of the "*home plantation*" of the testator; that is, he insists that the boundary specified in the 7th paragraph embraced more than the "home plantation," *mentioned and intended,* and that the land claimed by him was not a part of it, but outside of it within the same boundary.

The defendant contended that the words "home plantation" and *bounded as above,* and including the commons below Trenton," set forth in the last clause of the paragraph, constitute the "home plantation" as designated by the testator, and if so, it is conceded that the land in question is embraced by it.

On the trial in the court below, the plaintiff, contending that

it did not certainly appear upon the face of the will what constituted the "home plantation" of the testator, mentioned in the last paragraph as set forth above, asked a witness what the testator, at the time of the execution of the will, "called and considered his home place?" This question was objected to by the defendant and the court sustained the objection, and to this ruling the plaintiff excepted.

We think the court properly excluded the testimony thus offered. The testator certainly had the right to devise his "home plantation" and define what land and how much it should embrace, and that without regard to what had theretofore been designated by the description. It is very clear that he exercised that right with intelligence and unusual precision. He seems to have had a settled purpose to leave as little to doubt and construction as possible, and has succeeded, certainly in the clause of his will under consideration.

In the same paragraph, only parts of which are set forth above, he devises to his son James several other tracts of land, designating them not by boundary, but by name and locality. He likewise bequeaths to him numerous slaves and other personal property. All this property he gives to his son James, "his heirs, assigns forever," and adds, in the same immediate connection: "Provided always, should the said James McDaniel die leaving no lawful issue or heir surviving, then said estate of land, slaves and personal property shall be equally divided as near as possible between my *five, or surviving sons, with the exceptions hereinafter named,* share and share alike; and it is my will and desire, that the lands bequeathed to my son James, and known as my '*home plantation,*' *and bounded as above,* and including the 'commons' below Trenton, shall, at the death of my son James, he leaving no lawful heir or issue surviving him, descend to my son Nathan McDaniel, or his lawful heirs or issue surviving him, to him, his heirs and assigns forever."

Now, it is admitted that the testator's home, and what the

plaintiff insists was the "home plantation," are within the boundary specified. There is but one boundary set forth in the paragraph; that boundary is *above* the provision as to the "home plantation" "and bounded as above"; there is no sub-boundary or any boundary specified inside the boundary given; it is one and one whole boundary, starting at a fixed point, "the mouth of a ditch," and passing in many directions, embracing a large body of land and ending at "the station or beginning."

There is nothing to which the words "and bounded as above" can have any, the remotest, reference, if they do not refer to the boundary mentioned. If they do not apply to it, they must be treated as meaningless and mere surplusage.

This is unreasonable and cannot be allowed. There is nothing in the paragraph under consideration, or in any other part of the will, that warrants such a construction. The words "and bounded as above" coming next after the words "my home plantation," plainly indicate, and were certainly intended to indicate, what the testator meant by my "home plantation." He knew that his home plantation was composed of sundry tracts of land, bought from various persons, at different times, and that it was important that he should define his meaning in that respect. In the first part of the paragraph he therefore fixed the boundary with certainty, and afterwards he devised his "home plantation, *and bounded as above*," to his son Nathan, in the contingencies mentioned. It appears also that he well understood his purpose and how to effectuate it. He had devised to his son James several tracts of land and much personal property, besides the land included in the boundary. All this property he gave to his son James absolutely, unless he should die without issue, in which case this property so given him should go to his surviving sons, "*with the exception hereinafter named.*" Then immediately he provides the exception, to-wit, the exception of the "home plantation, and bounded as above," which he devises to his son Nathan, in the contingency that James should die without issue, thus leaving to the surviving brothers the tracts of land outside

of the boundary, and all the personal property, including the slaves. The phrase "and bounded as above" not only serves to indicate definitely what the testator meant by "my home plantation," but it points out with certainty and identifies the land devised to Nathan McDaniel in the contingency provided for, as certainly as if there had been a devise to him directly. "Home plantation" might be definite—it might not; but the boundary designated, specified, made it definite and certain.

If the testator had simply excepted his "home plantation," then a question might have been raised as to what lands composed it, and his meaning in respect thereto.

There is no ambiguity; nothing is left in doubt. The testator had the right to declare what should constitute his "home plantation"; he did so by fixing a definite boundary to it—one that leaves no doubt as to what he meant, looking at the plain legal import of the terms he employed to express his purpose in the will. It is so certain there is nothing to be explained or qualified.

Evidence cannot be heard to explain, add to, take from, modify, or contradict a will when its terms plainly indicate the testator's purpose as to persons or things mentioned in it. In such a case, it must be construed upon its own terms, just as a deed or other written instrument must be construed. If a will is sufficiently distinct and plain in its meaning as to enable the court to say that a particular person is to take, and that a particular thing passes, that is sufficient; and it must be construed upon its face without resorting to extraneous methods of explanation to give it point. Any other rule would place it practically within the power of interested persons to *make* a testator's will, so as to meet the convenience and wishes of those who might claim to take under it.

It is only where the will upon its face is intelligible—sufficiently certain—free from a doubt and ambiguity in its terms and phraseology, but ambiguity is raised by something, or circumstances, extraneous, outside of, or collateral to it, that evi-

dence *dehors* can be received, not to interpret or affect the will itself, but to explain and make certain the person or subject-matter to which it refers and applies.

In case the will describes and points to the person, object or subject intended, and there is more than one person, object or thing of like description, evidence is received to remove the ambiguity, and enable the court to reject one or more of the persons or things to which the description of the will applies, and to determine the person or the subject-matter the testator understood to be signified by the description in the will. For example, if a testator devise property to his cousin John Smith, and he has two cousins of that name; in such case, parol evidence will be received to explain which of the two the provision applied to. And so, also, if a testator have two "home plantations," one in one direction from his dwelling-house and the other in another, and he devises the home plantation to his son James, James may aver and prove that the devise to him applies to, and embraces, the one lying to the eastward of the other. Mr. BROOM in his Legal Maxims gives this apt illustration on this subject: "A devise was made of lands to M. B. for life, remainder to her three daughters, Mary, Elizabeth and Ann, in fee, as tenants in common. At the date of the will M. B. had two legitimate daughters, Mary and Ann, living, and one illegitimate, named Elizabeth. Extrinsic evidence was held admissible to rebut the claim of the last mentioned, by showing that M. B. formerly had a legitimate daughter named Elizabeth who died some years before the date of the will, and that the testator did not know of her death, or of the birth of the illegitimate daughter." Broom's Legal Maxims, 475; *Barnes* v. *Simms*, 5 Ired. Eq., 392; *Stowe* v. *Davis*, 10 Ired., 431; *Institute* v. *Norwood*, Busb. Eq., 65; *Jones* v. *Robinson*, 78 N. C., 396.

The case before us does not present a question of *latent ambiguity;* the question is, what constituted the "home planta-

tion" of the testator; he settled that definitely, and therefore the testimony offered was incompetent.

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

No error. Affirmed.

J. H. EDWARDS, Adm'r, v. W. WARREN and others.

Wills, when subsequently acquired lands pass—Instruction to Executors.

1. A devise of "the whole of my lands" to devisees, includes land acquired by the testator after the publication of his will when no intention to the contrary appears. A subsequent clause in the will here, directing "my other property of every kind not before mentioned to be sold," refers to other personal property.
2. So much of the judgment below as undertakes to settle the rights of the defendants, beyond the instructions to the executor, is not authorized in this proceeding.

(*Tayloe* v. *Bond*, Busb. Eq., 5; *Robinson* v. *McDiarmid*, 87 N. C., 455; *Champion Ex-parte*, Busb. Eq., 246; *Brawley* v. *Collins*, 88 N. C., 605, cited and approved).

CIVIL ACTION tried at Spring Term, 1882, of NORTHAMPTON Superior Court, before *Bennett, J.*

The plaintiff appealed from the judgment of the court below.

Messrs. Peele & Maynard, for plaintiff.

No counsel for defendants.

MERRIMON, J. The single question presented in the record for our decision is, whether or not it is the duty of the administrator with the will annexed to sell the land acquired by the testor *after* the publication of his will? The decision of any other question in this action would be beyond our jurisdiction and in-

operative. The action is not brought to construe the will and settle the rights of the devisees and legatees under it, nor are the pleadings adapted to such purpose. Hence, so much of the judgment of the court below as undertook to settle the rights of the parties defendant beyond instructions to the executor, was unauthorized and improper. The action is brought by the executor to obtain the instructions of the court in regard to the discharge of a present duty by him. *Tayloe* v. *Bond*, Busb. Eq., 5; *Robinson* v. *McDiarmid*, 87 N. C., 455.

By the first clause of the will, the testator devises to his mother and grandmother a life estate for their joint lives, and for the life of the survivor of them, in the tract of land designated "as the plantation on which I reside," and he makes other provision for them therein.

It does not appear upon the face of the will that he owned lands at the time of its publication other than the tract devised as above stated; it seems that he did not; it is possible, however, that he did. But be this as it may, he devised the "whole" of the land he then owned to the persons named in the second clause of the will, "at the death" of his mother and grandmother. The second clause provides as follows:

"*Item* 2. At the death of my grandmother and mother above named, I give and bequeath to my sisters, Elizabeth Warren, wife of Wiley Warren, Mary E. Johnson, wife of George T. Johnson, Lucinda Britt, wife of K. R. Britt, Julia A. Brittle, wife of John T. Brittle, Delia Sumner, wife of Isaac Sumner, my nephew W. H. Atkinson, son of J. H. Atkinson, deceased, *the whole of my lands*, to be equally divided among them during their natural lives, and at their death, to their children forever: except the burying-ground, containing a half acre of land, which I reserve as a burying-place for the family."

It will be observed that the testator provides first, for his mother and grandmother; after them the persons named in the above recited clause were the exclusive objects of his bounty. He gave them his whole estate of every nature and kind, after

paying his debts and the costs incident to winding up the same. He devised to them "the whole of my (his) lands." It is manifest that he then intended they should have his lands, and that he had no expressed desire that any part or parcel of them should be sold, nor does it appear that he had any motive to direct a sale of any part of them, nor is there anything in the will that raises a reasonable implication that he intended a sale of them; nor does it appear that he ever afterwards changed his purpose as to any land he owned or acquired up to his death.

Then it is clear that at the time of the publication of the will, the words in the fourth clause, "my other property of every kind not before mentioned be sold," &c., do not embrace or refer to the land, or any part of it. By the terms "other property," was meant such other personal property, farming utensils, wagons, corn, cotton, bacon, &c., as his mother and grandmother might not require. This provision looked to a prompt winding up of his estate, and this view is strengthened in some degree by the fact that he directs in the third clause of the will, that "the personal property" he "loaned to his mother and grandmother should, at the death of the survivor of them, be divided equally among the persons named in the fourth clause (my sisters and nephew before named). This property is not to be sold.

There is no provision in the will, that in terms refers to the land acquired *after* its publication, nor is there anything in the nature or circumstances of its provisions that indicate that such land shall serve any special purpose, or go otherwise, than as the same would do if the will had been executed just before the death of the testator.

Ordinarily, a will is to be construed as having been made immediately before the death of the testator. THE CODE, §2141, provides that "every will shall be construed, with reference to the real and personal estate comprised therein, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

There is nothing in the will before us by which it appears that

the testator intended it to be construed as speaking otherwise than at his death. All its provisions may operate and take effect, as if he had executed it just before he died. And so construing it, the "whole" of his lands passed to the devisees, and there is no power, express or implied, conferred upon the executor to sell any part of it for any purpose. *Champion Ex-parte,* Busb. Eq., 246; *Brawley* v. *Collins,* 88 N. C., 605.

Looking at the whole will, the general purpose of the testator, as well as the particular provisions of it, we are satisfied that he did not intend, or provide, that any part of his land should be sold.

The court, therefore, properly held, "that the administrator with the will annexed is not authorized under said will to sell the lands acquired by his testator subsequent to the publication of his will"; and this much of the judgment must be affirmed. Judgment accordingly. Let this be certified.

No error. Affirmed.

JOHN W. VAUGHAN v. W. D. FARMER.

Wills—Power of executor to sell land.

1. After a bequest of personal property, the testator devises lands (one-sixth; part to be given to devisees named), and, upon the death of his wife, provides that the same "be sold for the best price that can be obtained, and the money divided as hereinbefore named, that is to say, into six parts," with a similar provision in other clauses of the will in reference to land and personalty, but without saying by whom to be sold; *Held,* that the executors have a power of sale by implication.

2. The general rule, that executors have no power to sell lands directed to be sold for division among devisees, when no one is designated to make the sale, does not apply where by a proper construction of the will the intent of the testator to vest such power in the executors appears by implication or otherwise.

(*Foster* v. *Craige,* 2 Dev. & Bat. Eq., 209; *McDowell* v. *White,* 68 N. C., 65; *Hester v. Hester,* 2 Ired. Eq., 330, cited and approved).

VAUGHAN *v.* FARMER.

SPECIAL PROCEEDING commenced before the clerk and heard at Spring Term, 1882, of WILSON Superior Court, before *Gilmer, J.*

This was a proceeding for an order to sell certain mill property for partition. The plaintiff alleged that the sale of the same by executors under the power supposed to be conferred upon them by the will of the testator, was contrary to law. Upon the facts agreed, which are set out in the opinion here, the court below held that the plaintiff was not entitled to maintain his action, and from the judgment dismissing the same, the plaintiff appealed.

Messrs. Connor & Woodard, for plaintiff.
Messrs. Strong & Smedes, for defendant.

SMITH, C. J. John Batts died in the year 1858, seized and possessed of certain real estate, known as his mill, and leaving a will which was in April proved before the county court of Wilson, and the executors therein appointed (William B. Batts and William W. Batts), at the same time accepted the trust, took the prescribed oath, and entered upon the discharge of their duties. The mill is devised in the first clause of the will as follows:

Item 1. "I give unto my wife, Mary Batts, during her life or widowhood, one feather bed and furniture, one blue chest, one cow and calf, one sow and pigs, one claybank mare, one sideboard, and one blue beaufet, all the kitchen furniture; and also one hundred acres of land, together with the dwelling and other improvements, with the whole of the grist-mill and contents; and after the death or widowhood of my wife, Mary Batts, I give to my son, David W. Batts, the same hundred acres of land, as given to my wife; and after the death or widowhood of my wife, Mary Batts, I give to all my living daughters, and to my granddaughter, Mary A. Gay's living children one-sixth part of the above named mill; unto my daughter, Kessiah Morris' living

children one-sixth part of the said named mill; I give unto my daughter Rebecca Batts one-sixth part of the said mill; I give unto my daughter Bashaba Williford one-sixth part of the said mill; I give unto my daughter Eveline Parker one-sixth part of said mill; I give unto my daughter Milly Batts one-sixth part of said mill, and devise, after the death or widowhood of my wife, for said mill to be sold for the best price that can be obtained, and the money divided as herinbefore named—that is to say, to be divided into six parts."

The life tenant and surviving wife went into possession and occupied the devised lands until her death in 1863.

In May, 1864, the executors, in the assumed exercise of the power conferred and in accordance with the understood directions of the testator, advertised and sold the mill property for the sum of one thousand dollars on a credit of six months (two-thirds of the purchase money required to be paid in coin and one-third in currency) to the defendant, and rendered an account thereof to the said county court. The price being paid, the executors conveyed by deed the said mill property to him, and he has since remained in the occupation and use of the same.

The devisee and daughter, Milly Batts, intermarrid with one Vaughan and died in 1860, leaving the plaintiff, John W. Vaughan, their only child; and the father also died before the institution of this action, on April 21st, 1879.

The other divisees have assigned their interest in the mill to the defendant.

The plaintiff, assuming the nullity of the deed made by the executors, demands in his complaint that the mill be sold and his part of the proceeds separated and secured to him.

The only question presented in the plaintiff's appeal and argued before us is as to the validity of the action of the executors in undertaking to execute the directions of the testator in the disposition of the remainder in this property.

It is conceded to be the rule enforced in the courts of England, that where lands are directed to be sold in order to a division

among the devisees, and no persons are designated to make the sale, the power cannot be exercised by the executor, whose functions are confined to the administration of the personal estate. The same rule, where some statute does not interpose, prevails generally, and is recognized in the adjudications in this country. But, as it is a matter of construction with a view of ascertaining the testator's intention, the power vests in the executors when that intent appears by implication or otherwise.

Thus, if there be a mixed fund consisting of both real and personal estate, as the latter is in the hands of the executor and he must dispose of that, it will be inferred that the testator meant that he should dispose of both estates.

And the same inference is drawn from a direction to pay debts or provide a fund for the discharge of legacies, and, indeed, whenever it is seen that the funds derived from the sale are to go into the hands of the executor as such, in order to give effect to the will. In all such cases the power is deemed to vest in the executors by necessary implication. Sugden on Powers, 134; *Foster* v. *Craige*, 2 Dev. & Bat. Eq., 209; and the numerous authorities referred to in the opinion of DANIEL, J., *McDowell* v. *White*, 68 N. C., 65; *Devol* v. *Fanning*, 2 John. Ch. Rep., 252; 4 Kent. Com., 327.

In a more recent case before Vice-Chancellor Wigram, where the testator devised certain copy-hold lands to be sold at public auction without saying by whom, and he bequeathed the money arising from the sale among certain persons, it is said: "I think, upon the authorities as they now stand, I am bound to hold that the executors have a power of sale by implication, and that they are therefore properly made parties to this suit. *Curtis* v. *Fulbrook*, 8 Hare Ch., 25.

As the intent of the testator may be ascertained from the association of both kinds of property in the devising clause itself, or from the requirement of service appropriate to the office of executor, so it may be from other provisions of the instrument where similar terms are used, for it is reasonable to suppose they are meant to bear the same sense and meaning in each.

The first clause gives to the wife many specific articles of personal property as well as the lands for her life or widowhood, and of these the remainders in only two are bequeathed.

In the second clause the testator gives to his daughter Rebecca the sideboard, and in the third clause a blue beaufet, after his wife's death, both of which are mentioned in the bequest to her in the first clause.

In the sixth clause he uses this language: "The balance of my land, together with all other property belonging to me of every description, not otherwise disposed of, I wish, after my death, *to be sold* for the best price that can be obtained, and after paying all my just debts to whomsoever owing, and the balance, if any, to be divided among all my living children."

In the next he declares his wish, that after the death or widowhood of his wife, "*all the property as is left her and has not been given away before, to be sold*, and the proceeds of said sale to be equally divided among my living children."

In neither of these clauses is any person designated to make the sale, and yet, in the last, it is of *personalty* only; and in the former, both land and personalty; of which the proceeds are to be applied to debts so far as necessary. And it is plain the executors possess the power to act in both, upon the interpretation already mentioned.

Now, in the first clause, the mill is to be sold, and in the last, the personal articles, limited for the life of the wife, at her death; and how can the conclusion be avoided that the same agency was to be employed in the disposal of both? And this purpose is the more manifest, that the residue consisting of undisposed of real and personal estate is to be converted into money for the primary purpose of discharging the testator's debts. These duties devolve upon the executors, and it is wholly inadmissible, where there is a like silence in reference to the person to sell in all, that the same general direction should not be carried into effect by one and the same agency.

It was suggested that our statute (Rev. Code, ch. 46, §40) confers this authority upon executors and renders needless any

specific imposition of the duty upon them. The statute was passed obviously not to enlarge the powers conferred upon executors, but to provide for cases where some die or refuse to act; or where all die or refuse to act; or where none are nominated, and give the same power, conferred upon all, to such as will assume the trust, or to an administrator with the will annexed. The first portion is a substantial re-enactment of the act of 21 Henry VIII, ch. 4, with an amendment to supply an omission and provide for the case where no executors are appointed, which was, however, by construction held to be within the scope of the statute, in *Hester* v. *Hester*, 2 Ired. Eq., 330.

It is true the amendment confers the power where no executor is named "in a will devising lands *to be sold or to be sold by executors;* but a larger operation, given to these words than those used previously, which vest the power in a part of the executors, when the will directs" land *to be sold by his executors*, would result in the bestowal of more power upon the administrator than could be exercised by the executors, and this cannot be deemed the meaning of the law. They are omitted in THE CODE, §1493, and the latter conforms to the first part of the statute.

There is no error in the record and the judgment must be affirmed.

No error. Affirmed.

H. F. PITMAN, Executor, v. R. G. ASHLEY and others.

Will construed on application of Executor for advice.

1. A testator expressing a wish that his executor shall close the administration of the estate in a particular manner, said: "As I hope the bonds and coupons will pay all of my just debts and considerably more, and save the lands, he is empowered to sell them as I would or he may think proper"; *Held*, that the word "them" refers to the bonds and coupons and does not embrace the lands.

2. Where he designates certain lands to be sold and says, "I wish my sisters to sell," the sisters are empowered to sell and convey the same.

(*Taylor* v. *Bond*, Busb. Eq., 5; *Robinson* v. *McDiarmid*, 87 N. C., 455, cited and approved).

CIVIL ACTION for construction of will heard at Spring Term, 1882, of ROBESON Superior Court, before *Shipp, J.*

This action was brought by the plaintiff executor of John W. Powell, deceased, to obtain the advice of the court in reference to his duty in administering the estate of his testator. The clauses of the will affecting the administration of the personal estate, and upon which only the court gives advice, under the authority of the cases cited, are sufficiently set out in the opinion here.

The plaintiff appealed from the ruling of the court below.

Mr. W. F. French, for plaintiff.

Messrs. Rowland & McLean, *McNeill* and *Walter Clark*, for defendants.

SMITH, C. J. The executor in this proceeding is entitled to the advice of the court for his guidance and direction in the discharge of his own fiduciary duties only; and of the numerous interrogatories propounded for solution, there is but one at all doubtful in which he has any personal interest to be affected. That enquiry is as to the import of the concluding clause, wherein the testator uses this language in reference to the executor:

"I wish him to wind up as slowly as he can, as I hope the bonds and coupons will pay all my just debts and considerably more, and save the lands. He is empowered to sell them as I would, or he may think proper."

The question asked is whether the word "*them*" embraces the lands as well as the bonds and coupons, or the latter only, and we concur in the interpetation of His Honor which excludes the land and confines the power conferred to the bonds and coupons.

The other interrogatories, more than twenty in number, are in reference to the real estate devised; the respective interests of the sisters as life tenants; and of the grandchildren who are entitled in remainder; and the persons to make the sales mentioned to Stephen and Andrew Ashley.

Of these it is only necessary to say that the executor discharges his duty in delivering the property given to the sisters to them, and to the survivor, O. M. Fuller, if he has not done so while both were alive, and with any controversy which may arise among the grandchildren as to their respective shares, after the death of the surviving life tenant, the executor has nothing to do. That controversy they must settle among themselves when it becomes a practical one.

We have remarked that possibly one other enquiry was proper to be answered; and that is, who are to make the conveyances to Stephen and James Ashley?

The language of the will is too plain to admit of a doubt, since the testator says in positive terms, "I wish my sisters to sell," and then designates tracts to be sold and the terms of sale, which lands are part of those devised to them and in remainder to their grandchildren.

The principle which governs the court in entertaining applications of this kind, and the cases in which advice will be given, is so clearly stated in *Tayloe* v. *Bond*, Busb. Eq., 5, by the late Chief-Justice, and is so appropriate to the present case as to dispense with further comment. See *Robinson* v. *McDiarmid*, 87 N. C., 455.

We find no error in the rulings of the court upon the enquiries of which it could take rightful cognizance in this proceeding, as we have explained, and none others are intended to be decided.

There is no error. Let this be certified.

No error. Affirmed.

C. A. CAMP and others v. ELIZA PITTMAN, Ex'x.

Will—Testamentary Guardian.

1. A testator cannot appoint a testamentary guardian except to his own children. THE CODE, §1562.
2. After a devise of land to two children, the testator expresses a wish that their father shall manage the property for them and act as their guardian until they become of age; *Held*, that the direction for him to act as guardian does not constitute him a testamentary guardian, but the father has the right to take possession of and manage the estate, as trustee, and without being required to qualify as guardian and give bond, as prescribed by statute.

(*Williams* v. *Jordan*, Busb. Eq., 46; *Fairbairn* v. *Fisher*, 4 Jones' Eq., 390; *Wilkins* v. *Harris*, Winst. Eq., 41; *Neighbors* v. *Hamlin*, 78 N. C., 42, cited and approved).

CONTROVERSY submitted without action in a case pending in HALIFAX Superior Court, and heard at Chambers on February 11th, 1884, before *Avery, J.*

The defendant appealed from the judgment of the court below.

Messrs. Mullen & Moore, for plaintiffs.
Messrs. R. O. Burton, Jr., and *R. B. Peebles*, for defendant.

SMITH, C. J. The case agreed and submitted without action under section 567 of THE CODE involves the construction of several provisions contained in the will of Robert W. Pittman, the defendant's testator, and the appeal is from one only of the several rulings of the judge in the court below. To this our attention is confined.

The testator died in December, 1883, leaving a will which bears date in August preceding, and has been duly proved. He nominated therein his brother Ruffin A. Pittman executor and his wife P. Eliza Pittman executrix, of whom the former renounced and the latter accepted the trust and took the prescribed

oath early in January. They are authorized in express terms to take possession of the property, without being required to give security for the faithful management and accounting for what passes into their hands.

In the second clause of the will the testator devises to his wife a tract of land of 100 acres, in addition to the devise of the home place in the preceding article, and proceeds in the third as follows:

"I also will and bequeath to my said wife one-half of all my horses, mules, cows, hogs, corn, fodder, one buggy to her, plantation implements, and in fact everything belonging to the place; all household furniture and kitchen utensils which she may claim after my death. And after her death, I wish all of the above to go to Viola E. Camp and Mary R. Camp equally."

After a devise, contained in the fourth article, of a plantation of 357 acres to the said Viola E. and Mary R. Camp, described as the "children of C. A. Camp," in equal parts, and a bequest to them in the fifth of "one-half of all mentioned in No. 3, except the buggy," the testator in the sixth declares:

"It is my will and wish that C. A. Camp shall take charge of this property and manage it for the children, and act as guardian until they become of age. And in case both of these children should die before they become of age, without lawful issue, I wish this above property to revert or be turned over equally to the children of my brother Ruffin A. Pittman."

The testator left a considerable personal, and much of it ishable estate, specifically mentioned in the case, and much in value than is required to pay the debts and charges of ac tration, and the executrix is prepared and ready to deliv r to the party entitled to the excess not needed for that pu but is advised that she cannot safely surrender it to the sai A. Camp under the will, until he shall qualify as guardian an the bond prescribed by the statute.

The plaintiff st that no such condition is imposed, and that the said C. mp, as trustee, is entitled, upon executing

a refunding bond only, to take possession and manage the property for his children. This is the only point presented in the appeal, the parties acquiescing in the rulings of the court upon the other matters in controversy set out in the case.

The direction that the plaintiff C. A. Camp, the father, shall "act as guardian" in the use and management of the estate committed to his custody during the minority of the infants, does not constitute him a testamentary guardian, for he can appoint such only to his own children under the statute (THE CODE, §1562), and the care of these infants is by law reposed in their father. A testator cannot appoint a testamentary guardian even to his own grandchildren. *Williamson* v. *Jordan*, Busb. Eq., 46.

The use of these words in that connection is rather to define the authority conferred and indicate the degree of care and attention to be given in its exercise, assimilating them to such as attach to a guardian appointed under the statute.

The testator in disposing of his property has a perfect right to designate in whose hands it shall be placed for management for the benefit of others during a specified interval, as much so as to commit the whole estate to executors in whose capacity and integrity he confides; and in such cases no security will be required, and no interference allowed, until by mismanagement, actual or imminent, it appears that confidence is misplaced and injury may result.

In *Fairbairn* v. *Fisher*, 4 Jones' Eq., 390, RUFFIN, J., thus answers an application to the court to intervene for the protection of property against an insolvent executor:

"There does not appear to be any change, for the worse at least, in the property or credit of the executor, since the death of the testator. The mere poverty of the executor does not authorize the court, against the will of the testator, to remove him by placing a receiver in his place. There must be, in addition, some maladministration, or some danger of loss from the misconduct or negligence of the executor for which he will not be able to answer by reason of his insolvency."

This statement of the rule is reiterated by BATTLE, J., in *Wilkins* v. *Harris*, 1 Wins. Eq., 41, and again approved by the court in *Neighbors* v. *Hamlin*, 78 N. C., 42.

The testator has clothed the father, as trustee, with the right to take possession of and manage the estate for the advantage of the infants, and has not required any security other than that furnished in his personal fitness for the imposed trust, and his parental relation to the beneficiaries for whom he is to act; and we cannot impose terms or conditions which the testator has not imposed in his will. In dispensing with any security as to his executors, which, as he seems to have known, was under some circumstances required (THE CODE, §1515), but not such as existed in this case, he shows that his attention was called to the matter, and his silence on the subject in appointing the trustee was not the result of inadvertence, but of a positive purpose to impose no such obligation upon him.

There is not a suggestion, inviting the intervention of the court, of a want of fitness and capacity in the trustee, of any manifested disposition on his part to misuse the trust estate, or inability to make good the damages if he should misuse it in disregard of both fiduciary and parental duty, and it would be an unwarranted exercise of judicial power in the court, in unchanged circumstances, to require what the owner of the property did not see fit to require, further security for personal fidelity in the discharge of the imposed trusts.

We, therefore, concur in the ruling of the court and declare there is no error. This will be certified to the end that the cause may proceed to find judgment in the court below.

No error. Affirmed.

SARAH TAYLOR and others v. JANETTE MARIS and others.

Wills—Tenancy in Common—Survivorship—Parol Testimony, when admissible to explain instrument—"So forth"—Ambiguity, latent and patent.

1. "I give to my four daughters the plantation on which I now live. They may sell the land and divide the money, or one may sell to another, but they must not divide the land. * * * If any of my daughters die without issue, their portion is to be equally divided among the three survivors, &c."; *Held*, there is no direction that the land shall be sold, but only that the devisees may sell if they wish to do so. And hence the land is not converted into personalty by the terms of the will.
2. *Held further:* Upon the death of the testator the daughters became seized as tenants in common of a fee simple estate defeasible upon the death of any one of them without issue.
3. And on the death of one, her portion goes to her three sisters; and upon the happening of this contingency the words of the will are satisfied and a succession of survivorships excluded.
4. Testimony offered to explain the intention of the testator in the use of the "&c." and to show that the portion of each daughter dying was to go to the survivor or survivors, was properly ruled out. It is a patent ambiguity arising on the face of the instrument and a question for the court.
5. Parol evidence is admissible only where there is a latent ambiguity arising *dehors* the will—as to the person or thing meant to be described, or to rebut a resulting trust.

(*Hilliard* v. *Kearney*, Busb. Eq., 221, cited and approved).

SPECIAL PROCEEDING for sale of land for partition, commenced before the clerk, and heard at Fall Term, 1883, of ORANGE Superior Court, before *MacRae, J.*

The plaintiffs allege that they and the defendants are the heirs-at-law of Eliza Carden, who died intestate in the year 1882, and as such are entitled as tenants in common of a tract of land descended from the intestate, situate in Orange county on the waters of Back creek, adjoining the lands of John Carden, John McCracken and others, known as the "Cox place."

containing about one hundred and eighty acres. They further allege that they and the defendants are also the heirs-at-law of William Maris, who died in the county of Orange in the year 1864, leaving a last will and testament which was duly proved and recorded at August term, 1864, of the court of pleas and quarter sessions of said county, and that they and the defendants as such are entitled as tenants in common of a tract of land in said county lying on the waters of Eno river, adjoining the lands of Samuel H. Hughes, John Thompson, Alexander Anderson, and Mrs. Annie Hughes, containing four hundred and sixty acres more or less.

The defendants made no objection to the sale of the land descended from Eliza Carden, and none of them, except Frances Jones and her husband Thos. J. Jones, objected to the sale of the Maris tract, and they filed their answer denying that they were tenants in common, with the other parties to the petition, of that tract of land, and alleged that the said Frances was sole owner thereof, by virtue of the sixth item in the will of William Maris, which is as follows:

"I give and bequeath to my four daughters Martha, Eliza, Emily and Frances, the plantation on which I now live. They may sell the land and divide the money, or one may sell to another, but they must not divide the land. I also give and bequeath to my daughters Martha, Eliza, Emily and Frances, (certain slaves, naming them). If any of my daughters die without issue their portion is to be equally divided among the three survivors, &c."

The question of sole seizin of Frances Jones being thus raised by her answer, that issue was sent up to the superior court to be tried, and at fall term, 1883, the parties having agreed that the parties to the action are the heirs-at-law of William Maris, and that the point of controversy between them was the construction of the said sixth item of the will of said Maris, the question was submitted to the decision of the court.

On the trial it was conceded that the daughters of the testator mentioned in the sixth item of the will, to-wit, Martha, Eliza

and Emily were all dead without issue, having survived their father the testator—the said Emily dying first, Martha next, and then Eliza, leaving Frances Jones the sole survivor of them all.

The defendants, Jones and his wife Frances, offerred to show by the draftsman of the will that the testator's intention was, that the sole survivor of the four sisters should have the whole of the land upon the death of the other three without issue, and that was what was intended by the character "&c.," at the end of the sixth clause. But His Honor, holding that such evidence was incompetent, ruled it out and the defendants excepted.

It was insisted by these defendants that Frances, as sole survivor of her sisters, was entitled to the whole of the land; and if not, to the one-third thereof upon the death of her sister Emily. It was also contended by them that in no event were the plaintiffs entitled to any part of the land, as by the terms of the will, the same was converted into personalty and goes to the personal representative, and not to the heirs-at-law of the deceased daughters.

The court adjudged that Frances Jones was not seized in fee-simple absolute of the tract of land devised in the sixth clause of the will of William Maris, but that upon his death the four daughters, Martha, Eliza, Emily and Frances became seized absolutely of the land as tenants in common, and upon the death of Martha, Eliza and Emily, their shares in the land descended to their brothers and sisters in general, or their issue, in equal proportions. From this judgment T. J. Jones and wife Frances appealed.

Mr. A. W. Graham, for plaintiffs.
Messrs. Graham & Ruffin, for defendants.

ASHE, J. We concur with His Honor in holding that there is no foundation for the position taken by the defendants, that the land devised in the sixth item of the will of William Maris was converted into personalty, and therefore the plaintiffs could not sustain their petition. There was no conversion in fact and

none in equity, for there is no direction in the will that the land shall be sold, but only that the devisees may sell if they shall choose to do so.

But we do not concur with His Honor in the further construction he has put upon this sixth item of the will. His construction, we presume, was based either upon the idea that the last clause in that item of the will, limiting the portion of any of the testator's daughters, who might die without issue, over to the other three, applied only to the bequest of the slaves and not to the devise of the land; or, that the contingency upon which the limitation was to take effect had reference to the death of the testator, and as neither of them died in his life-time, their estates became absolute upon his death. Both views, in our opinion, are erroneous.

The former, because after the first clause of the "item" devising the land, there is a full stop, and after the bequest of the slaves, there is another full stop; and then follows the clause creating the contingent limitation. If the last clause had been separated from the second by a comma, we should have concurred in His Honor's construction, but the last clause is an independent sentence and has no more reference to the one clause than the other. It is general in its terms and broad enough to embrace both the devise and bequest, and we are of the opinion it was intended to embrace all the property disposed of in that "item" of the will.

And the latter view we think erroneous, because the rule of construction laid down in the case of *Hilliard* v. *Kearney*, Busb. Eq., 221, has no application to this case. The rule laid down in that case and others that might be cited, is, "where the estate is defeasible, and no time is fixed on at which it is to become absolute, and the property itself is given and not the mere use of it, if there be an intermediate period between the death of the testator and the death of the legatee, at which the estate may fairly be considered absolute, that time will be adopted. * * * But if there be no intermediate period, and the alternative is either to adopt the time of the testator's death or the death of

the legatee, generally, at sometime or other whenever it may happen, as the period at which the estate is to become absolute, the former will be adopted, *unless there be words to forbid it,* or some consideration to turn the scale in favor of the latter."

In the will under consideration there are words which forbid the reference of the contingency of *dying without issue* to the death of the testator. The will, after devising to testator's four daughters the plantation on which he lived, proceeds, "they may sell the land and divide the money or one may sell to another," giving to them a power over the land which they could not exercise until after his death. They could not sell before the title vested in them, and no title could vest until after the death of the testator. It follows, then, that the happening of the contingency is referable to the death of the devisees, and upon the death of the testator they become seized as tenants in common of a fee simple estate defeasible upon the death of *any one* of them without issue. The words of the will being that "if *any* of my daughters die without issue, *her* portion is to be equally divided among her *three sisters,*" necessarily, by every reasonable construction, confine the survivorship to the death of the first daughter who might die, and exclude a construction of a succession of survivorships to the last surviving sister. For, upon the death of one, her portion is to go to her three sisters, and when two of them die, the words of the will cannot be applicable to the two who are left. When one died and her moiety went to the three sisters, the words of the will were satisfied, and there was no further survivorship. *Hilliard* v. *Kearney, supra.*

That being so, then, when Emily died her moiety survived to her three sisters to be equally divided between them, by which Frances Jones, the defendant, became seized absolutely of one-third of the land devised; then, when Martha died, her moiety, not surviving, went to her sisters Eliza and Frances and her brothers and other sisters and their respective representatives; and so, when Eliza died her moiety went to Frances and her brothers and sisters and their respective representatives.

But the defendants contended that the character "&c." at the

conclusion of the sixth "item" of the will, shows that it was the intention of the testator to give over the portion of each daughter, as they might successively die without issue, to the survivors, and that all being dead without issue except the defendant Frances, she was entitled to the whole estate absolutely, and to show that that was the intention of the testator by the use of the "&c." the defendants offered the testimony of the draftsman of the will, but the evidence was ruled out by His Honor, and the defendants excepted.

There is no error in the ruling of His Honor. "It is well settled that parol evidence is not admissible to supply any omissions or defects in a will, which may have occurred through mistake or inadvertence. 1 Redfield on Wills, ch. 10, §37, sub-divs. 3, 4, 5; 2 Lomax on Executors, 11; *Higgins* v. *Carlton*, 28 Md., 115.

The only cases in which extrinsic evidence is admissible to show the intention of the testator are where there is a latent ambiguity, *e. g.*, where there is a devise to a person by name, and there are two or more persons of that name; or where there is a devise or bequest of a thing, and there are more than one answering the description, and there is no clue afforded by the will to point out the real person or object of the testator's bounty.

But the "&c." in this will is not an ambiguity of that nature. It is a patent ambiguity, which is defined to be such as arises on the face of the will itself, from the uncertainty of the language used or the vagueness of the description or expression; and this can only be explained by the context and sound sense of the instrument.

In *Man* v. *Man*, 1 Johns., Ch. Rep., 231, Chancellor KENT lays down the rule. He says "it is a well settled rule that seems not to stand in need of much proof or illustration, for it runs through all the books from Cheny's case (5 Co. Rep., 68) down to this day, that parol evidence cannot be admitted to supply or contradict, enlarge or vary the words of a will, nor to explain the intention of the testator, except in two specified cases; 1st, where there is a latent ambiguity, arising *dehors* the will, as to

the person or subject-matter meant to be described; and, 2d, to rebut a resulting trust. All the cases profess to go upon one or the other of these grounds."

And Mr. REDFIELD (in vol. 1, ch. 10, §37) says: "Perhaps a solitary *dictum* may be met with (for there are volumes of cases upon wills, *immensus aliarum super alias cumulus*) in favor of the admission of parol evidence to explain an ambiguity or uncertainty appearing on the face of a will, though LORD THURLOW says 'there is no such case; if there be, we may venture to say it is no authority.' If a will be uncertain or unintelligible on its face, it is as if no will had been made, *quod voluit non dixit.*"

There is error. Let this be certified to the superior court of Orange county that further proceedings may be had according to law and in conformity to this opinion.

Error. Reversed.

In the matter of C. H. MILLER and others.

Wills—Sale of land cannot be had during continuance of estate for life.

The testator devised land to his daughter for life with remainder to such children as she may leave her surviving; *Held*, that the land cannot be sold for partition during the continuance of the estate of the life tenant (*Williams* v. *Hassell*, 73 N. C., 174, and 74 N. C., 434), for, until the death of the life tenant, those in remainder cannot be ascertained.

(*Watson* v. *Watson*, 3 Jones' Eq., 440; *Dodd, ex-parte*, Phil. Eq., 97; *Williams* v. *Hassell*, 73 N. C., 174, and 74 N. C., 434; *Maxwell* v. *Maxwell*, 8 Ired. Eq., 25; *Hassell* v. *Mizell*, 6 Ired. Eq., 392; *Parks* v. *Siler*, 76 N. C., 191, cited and approved).

PETITION to sell land for partition commenced before the clerk and heard on appeal at Spring Term, 1884, of BUNCOMBE Superior Court, before *Graves*, *J.*

The clerk refused the prayer of the petitioners upon the ground that it could not be ascertained who would be entitled to the estate limited over under the will of James M. Smith until the expiration of the estate of the life tenant, Elizabeth A. Smith. This ruling was affirmed by the judge, and the petitioners appealed.

Messrs. J. H. Merrimon and *M. E. Carter*, for petitioners.

SMITH, C. J. By a codicil to his will made in the month of February, 1856, and proved in the county court of Buncombe at July term of the same year, James M. Smith devises certain lots, describing them, in the town of Asheville to his daughter Elizabeth A., wife of J. H. Gudger, "to her sole and separate use and benefit for and during her natural life, with remainder to such children as she may leave her surviving, and those representing the interest of any that may die leaving children."

The offspring of this marriage are the petitioners, L. R., intermarried with C. H. Miller, senior, Polly V., intermarried with J. W. Stepp, and J. H. Gudger; and the other petitioners are the infant children of the others mentioned. Their father died in 1859, and the said Elizabeth afterwards married one Winslow Smith, who also died in 1872 without issue, and she has conveyed her life estate in the premises to the said C. H. Miller, senior.

The object of this suit commenced before the clerk of the superior court is for partition and sale of the premises, the petitioner, owning the estate for the life of the devisee Elizabeth A., now of the age of fifty-five years, assenting to the proposed sale for division and expressing his willingness to accept from the proceeds a sum *in solido* measuring the value of his precedent estate in money, and to allow the residue to be apportioned and secured to those entitled in remainder according to their respective shares and interests. The clerk declined to entertain the petition and grant its prayer, and his ruling being affirmed by the judge, the subject is brought before us by the appeal.

This is not an application preferred by the guardian of infant

owners of property for its sale in order to pay off incumbent debts and demands, or for its conversion into other estate, upon representations from him sustained by proofs that this would materially promote the interests of the wards, under the provisions of the statute which confers upon the court the authority to order the sale. THE CODE, §§1602, 1603, 1604. The tenants in whom vests the estate in remainder are of full age and competent to dispose of what they own. The interests of their children are contingent and uncertain, and no court would for one moment listen to a suggestion of their being sold for any supposed benefit to accrue to them. The proceeding professes to be and is for a division by means of a sale under the law (THE CODE, §1892 and following), and its apparent purpose thereby to divest the estate of all ulterior contingent limitations and transmit it unaffected by them to the purchaser. To this end the children, now living, are associated with the parents as petitioners.

Can the court proceed to make such a decree as will cut off the claims of all contingent remainder-men to the estate and pass an absolute title thereto? The solution of this enquiry renders it necessary to look into past adjudications, of which there are several, in regard to the possession and exercise of the assumed judicial authority to make such decretal order.

In *Watson* v. *Watson*, 3 Jones' Eq., 400, the devise of the land was to the plaintiff for life and at his death to such of his children as might be then living, and the issue of any who may have meanwhile died, and, in the event of the plaintiff's dying without issue, then over to other persons designated by name. The plaintiff had never been married. The court refused to order the sale, BATTLE, J., who delivered the opinion, declaring that "the counsel for the plaintiff are compelled to admit that, after a diligent search, they cannot find a case in which a court of equity has undertaken to order the sale of land limited to persons not *in esse*."

In *Ex-parte Dodd*, Phil. Eq., 97, under a similiar clause in a

will where there were children of the life tenant, who, if they survived him, would take in immediate remainder with others who should thereafter be born and who survive him, the court asserted its authority, in a proper case, to order a sale and bind all, distinguishing the case from the other in the fact that the children as a class were represented in those children who were parties, and all would be concluded by the decree.

In *Williams* v. *Hassell*, 73 N. C., 174, the limitation after an estate for life was "to the living issue" of the tenant in fee, and READE, J., says: "They are not the children of the testator's son Henry that take Henry's share in remainder; but only *such* of his children as may be living at Henry's death. And so of the rest. It will be seen, therefore, that the persons who are to take the remainder *are not ascertained.* They may be the same who are now in existence, or they may be added to by subsequent births, or diminished by deaths. As the persons who may be entitled to the remainder are not ascertained, so they cannot be represented; and as their numbers and conditions are not known, so the propriety of a sale of the lands cannot be determined. *It was error to order a sale of the land.*

The same case was again before the court at the next term (74 N. C., 434), on a petition filed in behalf of all the parties to the action to determine whether Hassell, as administrator *de bonis non*, had the right to sell the land, and the same judge says: "The opinion filed at last term declares that inasmuch as the lands are devised to first takers for life only with remainder to such of their *children as should be living at their death*, it cannot be ascertained *now* who are to take the remainder; and not being ascertained *they cannot be represented or bound by any proceeding, and therefore the lands cannot be sold at all.*"

This case is so precisely in point with that under consideration, and so clear an exposition of the principle upon which a court of equity acts in assuming authority to dispose of estates, that we give it an unhesitating approval, and sustain the ruling of the court below.

We have not adverted to another impediment in the way of a successful prosecution of the present proceeding, for that partition is made only of estates whereof the tenants in common have the seizin and possession, and not of estates in remainder after a life estate (*Maxwell* v. *Maxwell*, 8 Ired. Eq., 25; *Hassell* v. *Mizell*, 6 Ired. Eq., 392; *Parks* v. *Siler*, 76 N. C., 109); nor have we adverted to the obvious difficulties to be met in securing or making a proper present disposition of the fund to meet future contingencies.

We allude to them, lest our silence may be misinterpreted into an approval.

No error. Affirmed.

CLARK & BATTLE, Executors, v. S. D. ATKINS and others.

Will—Bonds pass under description of bank stock, when.

1. The testatrix owned railroad and state bonds which were placed on special deposit in the Citizens Bank of Raleigh, where she had a thousand dollars to her credit; she also owned shares of stock in the Merchants and Farmers' bank of Charlotte, but owned none in the Citizens bank; and among other things she bequeathed to legatees "bank stock" in both of said banks, and then in a subsequent clause disposed of the said thousand dollars; *Held*, that the railroad and state bonds passed under the description "bank stock," as it plainly appears from the general context of the will that the testatrix did not intend to die intestate as to any portion of her estate. The description of the subject of the legacy, as "bank stock in the Citizens bank," resulted from inadvertence.

2. *Held further:* The executors have the power to invest and control the legacy until the legatees arrive at full age—the interest to be paid to their guardian in the meantime. And also, that the money necessary to carry out the provision of the will in reference to the care of the legatees, shall be paid out of said legacy.

(*Proctor* v. *Pool*, 4 Dev., 370; *Alexander* v. *Summey*, 66 N. C., 577: *Lassiter* v. *Wood*, 63 N. C., 360, cited and approved).

CIVIL ACTION tried at January Term, 1884, of WAKE Superior Court, before *Shepherd, J.*

The plaintiff executors, Walter Clark and R. H. Battle, brought this action to obtain a construction of the will of their testatrix, Eleanor H. Swain. The complaint states:

1. That in the month of February, 1883, the testatrix died in the county of Wake, leaving a last will and testament of which the following is a copy:

"RALEIGH, N. C., January 8th, 1883.

"I, Eleanor H. Swain, of the city of Raleigh, and state of North Carolina, do make and publish this my last will and testament, hereby revoking all others:

"(1). My farm in Pitt and Edgecombe counties, I give to the children of my deceased daughter, Mrs. E. H. Atkins. I wish, from the proceeds of the farm or some other source, that my sister Felton, if surviving me, shall receive two hundred and fifty dollars annually, during her life. The balance of rents go to the children of my daughter. If a sale of the farm is preferable, in time, then the money paid for it must be invested in some kind of stock or property yielding dividends or interest. When Dykins, son of my daughter, becomes of age, there may be a division of this property, each child having an equal share.

"(2). Bank stock in Citizens bank of Raleigh, and in Merchants and Farmers' national bank of Charlotte, with the remaining debt still due from the Kimberly estate in Buncombe county, I leave to be equally divided between the children of my deceased daughter, E. H. Atkins—receiving the interest only, until after each becoming of age.

"(3). Money due me as the sole legatee of my deceased husband, D. L. Swain, from the trustees of the University of North Carolina, I will to my grandson, S. Dykins Atkins.

"(4). The historical collection made by my husband, D. L. Swain, in consideration of his great zeal in providing a good and reliable history of his native state, though unfinished, I

leave with the executors of this will to dispose of by a sale, or a gift, as they believe to be best to insure a fulfillment of the work to the state of North Carolina.

"(5). A tract of land, near Dalton, Georgia, I give to Lula Swain, my granddaughter, and advise her to go and live on it—said to be valuable. Some mountain land, in Buncombe county, in the care of R. V. Blackstock, for sale, with some notes due from sale of same, I give to Lula Swain.

"(6). The debt due with interest, from the estate of the late Jessy Siler, of Franklin, Macon county, I give one-half to Lula Swain, the other half, to be equally divided, to Dot. and Susan Atkins, my granddaughters.

"(7). The University Magazine, I give to Dykins Atkins, my grandson, and all other books I have, if he desires, except my Portrait Gallery, in 4 volumes, I give to Lula Swain, and 2 volumes of the New Testament, I give to Dot. Atkins.

"(8). My family portraits, I leave to the children of my deceased daughter, E. H. Atkins, and always remain with some relation of their mother. They shall not be removed from the old family mansion so long as it may be occupied by one of the family.

"(9). A waiting servant, kind and of good morals, must be provided for the care of my youngest and dearest little Susan Atkins, paid for with bank interest. The same thing may be done for and by Dot. and Dyke., if they like.

"(10). If there should be a residue of the estate not embraced in this will, but may be found among the bonds or notes in the hands of my friend R. H. Battle, attorney, who has in part the management of my business, it will add to the closing up of my earthly affairs. I owe no debt unless in the settlement with Mr. Battle, and in paying any account his father may have left unsettled against me. This matter will be attended to as soon as practicable. I have some funds in Citizens national bank ($1,000), one thousand dollars; after my burial expenses and medical bills are paid, should there be a balance of funds remaining and everything settled, divide between my four grandchildren.

"By the death of my sister, Susan White, I am made by her will sole heir to all but one-fifth of the two acre-lots on which we have lived, my sister Felton owner of a fifth. My will leaves her in possession of the house and lot, which she may retain as long as she lives, without molestation or charge for rents from my heirs, the children of my daughter, E. H. Atkins, deceased. With my sister Felton's consent, I will have the privilege of retaining as engaged, two lots of one-third acre each, fronting New-Berne avenue, extending from eastern corner, and running back south one-half acre, for friends whatever sum the lots are valued, from it I will deduct from each lot five hundred dollars, as a compensation for services freely rendered to my afflicted sisters; names shall be given elsewhere. A tombstone to the memory of my two sisters, Susan and Emma, joined at the head with an arch resting on two stones or pillars. Inscription: Susan White, born August 16th, 1795, born of the spirit July 16th, 1811, died 18th October, 1882. Emma C. White, born February 12th, 1802, died September 23d, 1882. United in life, undivided in death.

"I wish to have a tombstone at the grave and to the memory of my son Richard C. Swain, buried in Freeport, Illinois. Inscription: Sacred to the memory of Richard Caswell Swain, son of Hon. David L. Swain and Eleanor, his wife, of North Carolina. Born in Raleigh, November 28th, 1837. Died by accident on railroad, near Shannon, Illinois, January 29th, 1872. Erected by his affectionate mother, E. H. Swain, of Raleigh, N. C.

"I appoint Walter Clark and Richard Battle, attorneys, trustees of my will. Should they refuse, I want them to appoint other reliable persons for the benefit of the heirs, my grandchildren.

"ELEANOR H. SWAIN."

"*A disposal of my household goods:* The furniture in the big room up stairs shall remain as it is so long as the children of my deceased daughter, E. H. Atkins, shall live here or continue to

visit this old home of their grandmother E. H. Swain. When a sale is desired, the money arising from the articles named, wardrobe, bureau, wash-stand, 2 marble-top tables, 1 lounge, sewing machine, 3 chairs, half dozen cane-bottom chairs, 1 rocking chair, &c., 2 small tables like the one I gave sister Felton, 1 pair of large shovel and tongs, large looking-glass, proceeds shall be given to my grandson Dykins; my carpet I give to Dot. and Susan Atkins, also my large bed, 2 pair linen sheets, 2 bed Marseilles covers. Should they desire a division of the bed, it will make a single bed for each, with 2 pair of pillows, 1 pair to each. The small single bedstead, with small feather bed, 2 mattresses and pair of pillows, 2 pair of blankets, are for Dykins. The Marseilles quilts, if too large, may be sold for Sue and Dot. My second size feather bed I give to Lula Swain, also my white plated castors and 11 dinner knives. My white metal tea-set for Dot. Atkins. My large breakfast and dinner blue china set to be divided between my three granddaughters, Lula Swain, Dot. and Sue. Atkins; if a sale is preferable, divide the sum accordingly; 2 large water pitchers, wash-bowl and pitcher to match, 1 dozen goblets, 1 dozen small checkered set, 2 milk basins, divide or sell, money divide between the 3 granddaughters. Tins, pots, kettles, chairs, old blankets, all such trumpery, everything not saleable for its worth, give the servants. Some things are especially given them, my marble-top wash-stand (broken on one corner) I give to Theny, also a brittania tea pot and sugar bowl. To Sarah a table with 2 leaves, and 3 cain chairs, a coffee-grinder and block, also sausage-grinder and stuffer and bench; my old white merino scarf I give to Matilda, purple woollen shawl to Mary Ned, black cashmere dress and sacque to Emmeline, my water-proof cloak, black velvet and merino shawls to Dot. Atkins. Spoons, knives, forks, will be labelled for those intended for. My new black bunting dress I give to Theny, my old wrapper, two flannel shirts and a good black dress bought and given to Ollie.

"Books and everything I have not specially named may be

given or sold. Dotty may be competent to decide and give to Lula any little thing or things that will be of benefit.

"Matilda, Theny, Sarah, Hetty, Mary, Emmeline, aunt Dicey Lane, our Dicey and Eliza are the servants I consider in my will to have something. Annie's gold thimble and my gold spectacles for little Susa, 6 new large silver table spoons and 2 old ones for Sue. Atkins, 1 dozen silver forks for Dot., 10 breakfast steel knives for Dot., cream ladel for Sue., 7 silver tea spoons for little Susa, and a gold breastpin cross for Susa, Annie's silver fork and a butter knife for Dykins, silver fruit knife marked D. E. P. for Susa.

"This is hurriedly done. If I live a few years longer, I hope to dispose of the most of my effects without this trouble.

"Memorandum, E. H. Swain. Dot. has all her mother's jewelry. May 8th, 1883. (?)

"The furniture of my sisters Susan and Emma will be given or disposed of by sale, for the benefit of my grandchildren, to each an equal share, 2 dozen silver knives, of Susan and Emma's, and a tea white metal set, is for my little Susa, and a silver soup ladel for Lula Swain.

"The names I offer to sell lots to are Walter Clark and Dr. A. Knox. They have their own convenience for payment to the heirs of E. H. Atkins.

"E. H. SWAIN."

2. That said will was duly admitted to probate and letters testamentary issued to the plaintiffs who qualified as executors thereof.

3. That the defendants Eleanor H. Atkins, Smith D. Atkins, Jr., and Susan W. Atkins are the grandchildren of the testatrix, they being the children of E. H. Atkins (a deceased daughter of the testatrix) and the defendant Smith D. Atkins, Sen. The said children are infants of the respective ages of about four, nine and twelve years, and reside with their father at Freeport, in the state of Illinois.

4. The said infants have no guardian in this state, but their

father, Smith D. Atkins, has been appointed their guardian in the state of Illinois.

5. That said Eleanor H. Atkins is the same person who is called "Dot. Atkins" in said will. Smith D. Atkins, Jr., is the same who is called "S. Dykins Atkins," "Dyke Atkins" and "Dyke" in said will. And Susan W. Atkins is the same person who is called "Susan" and "Sue. Atkins" in said will.

6. That said Lula Swain is the granddaughter of the testatrix and is about nineteen years of age, and resides with her step-father, B. P. Steele, in Shelbyville, in the state of Tennessee. She has no guardian in this state, but the said Steele is her guardian in Tennessee.

7. That Walter Clark and the defendants (with the exception of Smith D. Atkins, senior and said Steele) are the sole legatees and devisees under the will of the testatrix, and are all and the only persons interested therein, Elizabeth Felton, the sister of the testatrix, having died since the death of the testatrix, and all the legacies to servants having been settled.

8. That the testatrix owned at her death an undivided four-fifth interest and share in lots Nos. 174 and 175 in the plan of the city of Raleigh, and said lots adjoin each other and were together occupied as a residence of the testatrix at her death, and contain one acre each; a plantation in Pitt and Edgecombe counties in this state, containing about —— acres; a tract of land containing about 400 acres near Dalton, in the county of Murray, in the state of Georgia; about 1,000 acres of mountain land in Buncombe county, in this state, which she had placed in charge of R. V. Blackstock, of Buncombe county, for sale; two thousand dollars of notes of individuals given for land in Buncombe county, sold by the testatrix through her agent R. V. Blackstock.

9. The testatrix had one thousand dollars to her credit in the Citizens national bank at Raleigh, North Carolina, and she owned bonds of the North Carolina railroad company of the face value of $2,500, and bonds of the state of North Carolina

of the face value of $300, which bonds were in the Citizens National bank of Raleigh, and held by said bank as a special deposit by the testatrix. She also owned ten shares of the capital stock of the Merchants and Farmers' national bank of Charlotte, North Carolina, but she did not own at the time of her death any shares of the capital stock of the Citizens national bank of Raleigh, and never had any of the capital stock of said bank. That there was due the testatrix at the time of her death from the estate of John Kimberly, late of Buncombe county, $6,500.

10. That other moneys and specific chattels were owned by the testatrix, about the disposition of which there is no controversy.

11. All the debts except one, not admitted to be due, have been paid by the executors who are anxious to settle and distribute the estate; but they encounter difficulties in the construction of the will, arising from its obscurity in many of its clauses, for a solution of which they ask the court for its directions, in the following particulars, to-wit:

1. Shall the executors surrender to the defendants Eleanor H. Atkins, Smith D. Atkins, Jr., and Susan W. Atkins or their general guardian hereafter to be appointed in this state, the possesion and control of the farm in Pitt and Edgecombe counties, and devised in the first item of the will? Or is it the duty of the executors or trustees to hold said plantation and collect the rents and profits thereof until said Eleanor H., Smith D., Jr., and Susan Atkins arrive at lawful age?

2. Have said executors, as executors or trustees under said will, the power to sell said plantation mentioned in item one of said will.

3. Is it the duty of the executors, as trustees, to hold and invest and control the legacies to said Eleanor H., Smith D., and Susan Atkins set forth in the second item of the will, until the legatees arrive at lawful age, or is it the duty of said executors to deliver and pay over said legacies to the proper guardian of the legatees, when such guardian shall be legally appointed?

4. Do the North Carolina railroad bonds and the bonds of the state of North Carolina held by the Citizens national bank at Raleigh, as a special deposit for their testatrix as alleged in the complaint, pass to Eleanor H., Smith D., and Susan Atkins, or to the executors in trust for them by the terms of the will?

5. Does the $1,000 to the credit of the testatrix in said Citizens national bank of Raleigh pass to said Eleanor H., Smith D., and Susan Atkins, or to the executors in trust for them by the terms of the second item of said will?

6. Is it the duty of the executors to retain money enough in their hands to satisfy the directions in item nine of said will? And if such is their duty, shall they retain such money out of the legacies to the Atkins children or out of the residuary fund?

7. What is the duty of the executors in regard to the lots in the city of Raleigh, devised or directed to be sold to Walter Clark and Dr. A. W. Knox?

8. Is it the duty of the executors, as trustees, or have they the power to sell the interest of their testatrix in said lots, Nos. 174 and 175, in the plan of the city of Raleigh?

9. Have the executors, as trustees, any control over said interest of their testatrix in said lots Nos. 174 and 175, and if so, what are their duties with respect to said lots?

All of the defendants were made parties, and guardians *ad litem* were appointed for the infant defendants, who severally answered the complaint and admitted the correctness of the several allegations thereof, and thereupon His Honor rendered the following judgment:

1. That said executors have no control over the plantation in Pitt and Edgecombe counties, and that they surrender the same to the management and control of the said Eleanor H., Smith D., and Susan W. Atkins or their general guardian when such shall be appointed in this state, and that they (the said executors) have no power to sell said plantation or farm.

2. That it is the duty of the executors to hold and invest and control the legacies bequeathed by the second item of the will

until the legatees arrive at full age, paying over the interest and income thereof to the guardian or guardians of the legatees.

3. That the bonds of the North Carolina railroad company and the bonds of the state of North Carolina, described in paragraph nine of the complaint, do not pass to said Eleanor H., Smith D., and Susan Atkins by the terms of second item of said will, and it is the duty of said executors to dispose of the same as part of the residuary fund.

4. That the sum of one thousand dollars on deposit in the Citizens national bank, as described in paragraph nine of the complaint, does not pass to the said Eleanor H., Smith D., Jr., and Susan W. Atkins by the terms of second item of the will, and the executors shall dispose of the same as part of the residuary fund.

5. That the executors shall comply with and carry out the directions of item nine of the will, and the money necessary thereto they shall pay out of the legacies to said Eleanor H., Smith D., Jr., and Susan W. Atkins, as set forth in second item of the will as construed by this judgment.

6. That the executors have no power or control over the devises and legacies to A. W. Knox and Walter Clark.

7. That Walter Clark and R. H. Battle have no power, either as executors and trustees, to sell or otherwise control the testatrix's undivided interest in lots Nos. 174 and 175 in the plan of the city of Raleigh, and they have no duties to perform in connection therewith.

The only exceptions to the judgment of the court below from which the defendants appealed, were taken by the guardian *ad litem* of Eleanor H., Smith D., and Susan W. Atkins, and they are as follows:

1. For that it declares that the bonds of the North Carolina railroad company and the bonds of the state of North Carolina, described in paragraph nine of the complaint, do not pass to the said Atkins' children by the terms of the second item of the will, and it was the duty of the executors to hold and dispose of the same as part of the residuary fund of their testatrix.

2. For that it declares that the executors shall comply with and carry out the directions of item nine of the will, and the money necessary thereto they shall pay out of the legacies to Eleanor H., Smith D., Jr., and Susan W. Atkins.

3. For that it declares it to be the duty of the executors to hold, invest and control the legacies of Eleanor H., Smith D., Jr., and Susan W. Atkins, bequeathed by the second item of the will, until the legatees arrive at full age, paying over the interest and income thereof to the guardian or guardians of the legatees.

Mr. S. F. Mordecai, for the executors.

Messrs. Haywood & Haywood and *Gatling & Whitaker, contra.*

ASHE, J. There is no error, in our opinion, in the construction given by His Honor upon the second item of the will, except as to the state and railroad bonds.

The second item reads: Bank stock in Citizens national bank of Raleigh and in Merchants' and Farmers' national bank of Charlotte, with the remaining debt still due from the Kimberly estate in Buncombe county, "I leave to be equally divided between the children of my deceased daughter E. H. Atkins, receiving the interest only, until after each becoming of age."

The testatrix owned at the time of her death one thousand dollars, to her credit in the Citizens national bank, and she owned bonds of the North Carolina railroad company of the face value of $2,500 and bonds of the state of North Carolina of the face value of $300, which bonds were in the Citizens bank, and were held as a special deposit by the testatrix. She also owned ten shares of the capital stock of the Merchants' and Farmers' national bank, but she did not own at the time of her death and never had owned any shares of the capital stock of the Citizens bank.

The first question presented is, did the railroad bonds and the North Carolina state bonds pass to the children of E. H. Atkins,

under the description of *bank stock in Citizens national bank of Raleigh.*

In the construction of wills, the intention of the testator is always held to be the only guide in its interpretation. "It is a *lex legum*, a general rule, a universal maxim, that in all cases, the design and intent of the framer, when it can be indisputably ascertained, shall prevail; *quod verba intentioni inservire debent.* And the intention may be collected either from the particular provision or the general context." Potter's Dwarris on Statutes, 174, 175. To the same effect is *Procter* v. *Pool*, 4 Dev., 370, in which Chief-Justice RUFFIN says: "No positive rule can be laid down for ascertaing the intention of the maker of a deed or other instrument, but his intention is to be collected from the whole instrument taken together." See also *Alexander* v. *Summey*, 66 N. C., 577; and *Lassiter* v. *Wood*, 63 N. C., 360.

In looking to the general context of the will of Mrs. Swain it must be evident to every plain mind, unbiased by the technical rules of construction, that it was her intention to bequeath by the second clause of her will the state and railroad bonds which she had on deposit in the Citizens bank, and that calling them "bank stock" was the result of ignorance or inadvertence. She had no bank stock, but she manifestly intended to bequeath something. What was it? It was something she had in the bank. It was not the thousand dollars she had deposited there, for she expressly mentions and disposes of that in the tenth clause of her will. The bonds then are the only other things she had in the bank, and the inference is irresistible that they were the *things*, which she, by a misdescription, called "bank stock," intended to bequeath.

In viewing the will in all its parts, it is evident she did not intend to die intestate as to any portion of her estate, and that she believed she had disposed of every part thereof. For in the tenth clause, she directed that, "if there should be a residue of the estate not embraced in this will, but may be found in the hands of my friend, R. H. Battle, attorney, who has in part the

management of my business, it will add to the closing up of my earthly affairs. * * * I have some funds in the Citizens national bank, one thousand dollars; after my burial expenses and medical bills are paid, should there be a balance of funds remaining and everything settled, divide between my four grandchildren."

This is the only legacy in the will directed to be divided between the four grandchildren, and it consisted of the balance of the residue of her estate, after the payment of *burial expenses* and medical bills; and she restricts the residue to the *bonds* or notes in the hands of R. H. Battle and the one thousand dollars deposited in the Citizens bank. It is evident, when she made the residuary bequest, that she thought she had disposed of the state and railroad bonds by the second clause of her will; and to hold that those bonds fall into the residue to be divided between her four grandchildren, would be doing violence to the intention of the testatrix.

The case lies so close to the shadowy lines of distinction between general and specific legacies, and latent and patent ambiguities, that very little light is to be derived from the application of the technical rules of construction. But we find the following authorities which serve to sustain the construction we have given:

In *Gallini* v. *Noble*, 3 Mer. Chan. Rep., 690, where the testator bequeathed all his money in the Bank of England to his daughters, it appeared that he never had money in the bank, but was entitled to some 3 per cent. and 5 per cent. bank annuities, and it was held that the annuities passed. It was compared to the case of an incorrect description of the intended legatee, and to the case where leaseholds have been held to pass under the devise of lands, "there being no other property to answer the description." *Quennell* v. *Turner*, 13 Beav., 240.

In *Door* v. *Gray*, 1 Ves., 255, where a husband bequeathed to his wife seven hundred pounds East India stock, having none, but there were seven hundred pounds bank stock to which

his wife was entitled as executrix, which he afterwards transferred in his own name, LORD HARDWICK held that the bank stock should go to the widow—the judge being of opinion that it was a case merely of error of description.

In *Penticost* v. *Ley*, J. & W., 207, a testator bequeathed one thousand pounds Long annuities, "now standing in my name or in trust for me." At the date of the will the testator had no Long annuities, but had 3 per cent. reduced annuities, and it was held that that sum passed by the bequest.

These cases, like that of the bequest of the "white horse" under the description of a black horse, were evidently sustained upon the principle of the maxim *falsa demonstratio non nocet.*

We do not think there was any error in the directions given by His Honor upon the point which constitutes the defendants' second ground of exception. It would be manifestly unjust, and could not have been intended by the testatrix, that the legatee Lula Swain should bear any part of the expenses of providing servants for the other legatees, the Atkins children.

As to the third exception, we are of opinion His Honor's construction of the second item of the will, in the particular of that exception, was correct. The testatrix leaves the legacies passing by that item "to be equally divided between the children of my deceased daughter E. H. Atkins, receiving the interest only, until after each becoming of age." It is clearly a legacy to each of the children *to be paid* on his or her attaining the age of twenty-one years, receiving the interest in the meantime. Who is to pay the legacies when the legatees arrive at age, and the interest accruing in the interim? Of course, the executors. The fund remains in their hand until such time as they can execute this clause of the will by paying over to each legatee his or her share of the legacy, as they respectively arrive at the age of twenty-one years.

Our conclusion is, that the judgment of the superior court must be affirmed, except as to the directions of His Honor with regard to the disposition of the state and railroad bonds, and we

think in that there is error. Our opinion is that these bonds passed by the second clause of the will to the children of Eleanor H. Atkins, and that the judgment must be reformed in conformity to this opinion, and costs must be paid out of the residuary fund, and to that end this opinion must be certified to the superior court of Wake county.

Judgment accordingly.

TWITTY & CHURCHILL v. A. M. MARTIN and others.

Will—Lapsed and void Legacies.

1. Where there is no residuary clause in a will, a bequest to a child by name who dies before the testator, lapses, and goes to the next of kin, and not to the other named legatees of the same class of which the deceased child was a member.
2. A legacy to one deceased at the time the will is made is void, and goes to the next of kin.
3. A legacy to the children of a deceased uncle, to be equally divided between them, is confined to those children who are living at the testator's death.

(*Johnson* v. *Johnson*, 3 Ired. Eq., 426; *Winston* v. *Webb*, Phil. Eq., 1; *Mebane* v. *Womack*, 2 Jones' Eq., 293; *Robinson* v. *McIver*, 63 N. C., 645; *Scales* v. *Scales*, 6 Jones' Eq., 163, cited and approved).

CIVIL ACTION for construction of will, heard at Spring Term, 1883, of RUTHERFORD Superior Court, before *Shipp, J.*

The plaintiff executors of the will of Sarah Hamilton, deceased, ask for advice and directions as to how to carry out the provisions of the will of their testatrix, the material clauses of which are set out in the opinion here.

It appearing that the estate had been reduced to personalty, His Honor adjudged:

1. That the legacy to Rachel, wife of John T. Sayers, she having died after the will was made and before the testatrix, is

a lapsed legacy, and goes to the plaintiffs to be distributed among the next of kin.

2. The legacy to Margaret, wife of J. M. Comer, she having died before the making of the will, is void, and the fund must be distributed among the next of kin.

3. That the one-third part of the estate bequeathed to the children of Abner Sayers, goes to those of his children who were alive at the time of the death of the testatrix, to be equally divided between them.

From this ruling and judgment the defendants appealed.

Mr. J. A. Forney, for plaintiffs.

No counsel for defendants.

MERRIMON, J. It is very clear that the testatrix directed the whole of her estate, both real and personal, except the devise and bequest, to Phillis Maslin, provided in the fourth paragraph of the will, to be turned into a cash fund, and (after the payment of debts, costs of administration and a legacy of $1,000 to William H. Miller) divided into three equal parts. To this end she devised the whole of her real estate, with the exception mentioned, to her executors, with power to sell the same "at public or private sale," in such way as in their judgment would prove "most advantageous to my estate."

One of these three equal parts she bequeathed to Joanna Bailey and Mary Allison, daughters of her uncle David Sayers, to be divided equally between them. As to this part no question is raised.

In respect to the second of the three parts the will provides: "One part to the children of my deceased uncle, James Sayers (except Reuben), and to Jossie, daughter of William Sayers, deceased (who was a son of my uncle James), namely, John G. Sayers; Rachel, wife of John T. Sayers; Elizabeth, wife of Stephen Kirby, and Jossie above named; the children of Reuben Sayers, who is a son of my uncle James, namely, J. Howe

Sayers; Lettie, wife of A. C. Dunn; Lizzie, wife of J. G. Dedrick, and Margaret, wife of J. M. Comer, all to represent their father, so that this one-third of the proceeds of the sale of lands and the other moneys will be divided into five parts, one of which is to be given to John G. Sayers, one to Rachel Sayers, one to Elizabeth Kirby, one to Jossie, daughter of William Sayers, deceased, and one to the children of Reuben above mentioned."

Of the legatees named in this clause of the will, Rachel Sayers, a widow, died in February, 1881, *after* the execution of the will and *before* the death of the testatrix, in September, 1881, leaving children surviving her.

It was insisted in the argument before us, that it appears sufficiently upon the face of the will, that the testatrix, in dividing her estate into three equal parts, intended to give the greater part thereof to the children of her three uncles, to the exclusion of a great number of other next of kin; and in case of the lapse of a share intended for a particular child named, it should not lapse generally for the benefit of the next of kin, in the absence of a residuary provision in the will, but for the benefit of the children of such child, or for the benefit of the legatees of the class of which he or she was a member.

We cannot accept this as a proper construction of the will. It does not appear who were her next of kin, or what number she had, from anything stated, or suggested in it. There is nothing in its terms or general provisions that indicate such a purpose as that suggested, or, that the property should pass in any other way than according to the ordinary rules of law applicable in cases of valid and lapsed legacies. She does not mention any general purpose or plan she had in view as to the circumstances or number of her family, or her relatives, or other considerations, that led her to make the specific dispositions of her estate provided for. Nor is there any special provision in respect to lapsed legacies, or in favor of the children of a legatee who might die before the death of the testatrix, or of any other per-

son or class of persons. Why she failed to make such provision, we have no means of knowing; nor are we at liberty to enquire or conjecture. We must construe the will as it comes to us. We cannot add to, take from, or modify it, by conjecture founded on vague and remote inferences as to her intention, in the various contingencies growing out of her will that have happened since her death. We might conjecture that her purpose was one thing; the counsel, another; the executors, a third; and the persons interested, others still. The will must be construed by what is said and provided in it, according to well settled rules of construction.

There is nothing in the will that indicates any purpose of the testatrix that any of its provisions should take effect before her death. Hence it speaks as of the time she died. THE CODE, §2141.

In the absence of any express or implied provision in favor of the children of Rachel Sayers, the court cannot supply one; to do so, would be to supplement and make her will in this respect. She made no such provision in terms or effect, and therefore, the ordinary rules of law must apply.

It is plain that the legacy intended for her lapsed; and hence, it must go to the next of kin according to law. The bequest was to the children of James Sayers and others, naming each one of them. It was not a bequest to a class collectively, but to them severally and *nominatim*. In such a case the lapsed legacy goes, in the absence of residuary legatees, to the next of kin. *Johnson* v. *Johnson*, 3 Ired. Eq., 426; *Winston* v. *Webb*, Phil. Eq., 1; *Mebane* v. *Womack*, 2 Jones' Eq., 293; *Robinson* v. *McIver*, 63 N. C., 645.

Margaret Comer, mentioned as a legatee in the will, died in the year 1876, *before* the will was executed. This legacy was void. There was no one in being, at the time the will was executed, to take it, and there is no provision indicating a purpose to give it to the surviving husband or children of the supposed legatee, or any other person. It does not pass to the other legatees, because the bequest

was not made to a class collectively, of which she was intended to be one, but to the several persons named. The legacy intended for her, therefore, passes to the next of kin of the testatrix. *Scales* v. *Scales*, 6 Jones' Eq., 163.

The clause of the will disposing of the third of the three parts mentioned, provides that "the remaining third of the proceeds of the sale of land and other moneys is to be given to the children of my deceased uncle, Abner Sayers, and equally divided among them—their names, except that of William Sayers, I do not know."

John T. Sayers was a son of Abner Sayers, mentioned in the last recited clause, but he died in the year 1865. He is not mentioned by name in the will. He died many years before it was executed, and it cannot be construed as having any reference to him. The clause speaks of and provides for a class or family, and it means a class of living children. It embraces only the children of Abner Sayers living at the time of the death of the testatrix. *Scales* v. *Scales*, *supra*.

Joanna Allison, as the complaint states, was a daughther of Abner Sayers mentioned in the last recited clause. She died in January of 1881, *after* the execution of the will, leaving children surviving her. No legacy was given to her by name. She was one of a class of legatees who took collectively and not *nominatim*. The bequest went, therefore, to her brothers and sisters surviving at the death of the testatrix. *Winston* v. *Webb*, *supra*.

There is no error in the advice and direction given by the court below, and we approve and affirm the same.

No error. Affirmed.

THOMAS G. LYTLE v. JOHN LYTLE and others.

Appeal—Justification of Bond.

1. An appeal will be dismissed on motion if the appeal bond is not justified, unless the record shows that the appellee has waived the same in writing.

2. An affidavit of a surety to such bond is fatally defective if it does not state that the affiant is worth double the amount specified in the bond.

MOTION by plaintiff to dismiss an appeal heard at February Term, 1884, of THE SUPREME COURT.

Mr. W. W. Flemming, for plaintiff.
Messrs. Sinclair & Sinclair and *J. B. Batchelor*, for defendants.

MERRIMON, J. The appellee moved to dismiss the appeal upon the ground that the undertaking upon appeal had not been justified as required by the statute.

It does not appear in the record, or otherwise, that the undertaking, or a deposit of money with the clerk, ordered by the court, was *waived* by a "written consent on the part of the respondent," the plaintiff. An affidavit of the surety accompanies the undertaking upon appeal, but it is fatally defective, in that it does not state that the affiant "is worth double the amount specified therein." The statute is peremptory in requiring this fact to be stated. *Harshaw* v. *McDowell*, 89 N. C., 181; *Morphew* v. *Tatem*, *Ib.*, 183; *Hemphill* v. *Blackwelder*, decided at this term, *ante*, 14.

It is manifest that the appellee is entitled to have his motion allowed. It is so ordered.

Appeal dismissed.

W. W. McCANLESS v. H. W. REYNOLDS.

Appeal.

Appeals will be dismissed if the bond on appeal is not given within the time required by law.

CIVIL ACTION tried at Spring Term, 1878, of DAVIDSON Superior Court, before *Buxton, J.*

There was a verdict and judgment in favor of defendant, and the plaintiff appealed. Motion by defendant to dismiss the appeal.

Messrs. Clement, Pinnix, Smith and *Fuller & Snow,* for plaintiff.
Messrs. J. M. McCorkle and *Watson & Glenn,* for defendant.

ASHE, J. There was a motion in this court to dismiss the appeal upon the ground the plaintiff had not complied with the requirements of the law in perfecting his appeal. The judgment from which the appeal was taken was rendered at spring term, 1878, and no bond was given to secure the costs on appeal until the 6th day of January, 1879, and we find nothing in the record to indicate that there had been any waiver by the defendant. In all such cases it is the uniform rule of this court to dismiss the appeal. *Wade* v. *Newbern,* 72 N. C., 408; *Sever* v. *McLaughlin,* 82 N. C., 332; *Wadsworth* v. *Carroll, Ib.,* 333; *Royster* v. *Burwell, ante,* 24.

The appeal is dismissed with costs against the appellant.

Appeal dismissed.

ROWLAND BROTHERS v. R. J. MITCHELL & SON.

Appeal, cause remanded.

Where a transcript on appeal contains only the judgment of the court below, and shows no process or pleading, the cause will be remanded.

(*Weil* v. *Everitt,* 83 N. C., 685, cited and approved).

APPEAL from a judgment rendered at Fall Term, 1883, of GRANVILLE Superior Court, by *MacRae, J.*

The plaintiff appealed.

Messrs. J. B. Batchelor and *L. C. Edwards,* for plaintiff.
No counsel for defendant.

SMITH, C. J. The transcript of the record before us certified to be "fu ll and accurate," contains only the judgment rendered in the superior court, reciting that the case comes up on appeal from a justice's court, the case embodying the exceptions signed by the respective counsel, and the appeal undertaking.

There is no process, nor waiver, nor pleading by which we can see that the cause was properly constituted in the superior court, nor, except from the case, what was the subject of contention.

We cannot assume jurisdiction upon such a record, and must, according to the rules for such imperfections, remand the cause. *Weil* v. *Everitt*, 83 N. C., 685.

STATE v. WILLIAM KERNS.

Appeal in criminal cases.

1. An appeal in a criminal action without bond to secure the costs, will not be entertained, unless the defendant is allowed to appeal upon his affidavit of inability to give such bond.
2. Where an appeal without bond or affidavit in such case was allowed "by consent," it was held not to be in compliance with law.

(*State* v. *Spurtin*, 80 N. C., 362; *State* v. *Patrick*, 72 N. C., 217, cited and approved).

INDICTMENT for burning a mill, tried at Fall Term, 1883, of MECKLENBURG Superior Court, before *Gilmer, J.*

The defendant was indicted for the said offence and convicted in the inferior court, and appealed from its judgment to the superior court, where the judgment below was affirmed, and the defendant then appealed to this court.

Attorney-General, for the State.

No counsel for the defendant.

ASHE, J. The record transmitted from the superior court shows that "by consent the defendant was allowed to appeal without bond." This court will not entertain an appeal in a criminal action without a bond to secure the costs of the appeal, unless the defendant, upon his affidavit of inability to give such bond, has been allowed by the court to appeal *in forma pauperis*.

In the case of *State* v. *Spurlin*, 80 N. C., 362, the appeal was dismissed, because no bond to secure the costs accompanied the record, and there was no order of the court allowing the defendant to appeal without the usual security. The same point was ruled in *State* v. *Patrick*, 72 N. C., 217.

Neither the judge nor the solicitor has authority to allow a defendant to appeal in a criminal case without complying with the requisites of the law.

The appeal must be dismissed and this opinion certified to the superior court of Mecklenburg county, that the case may be remanded to the inferior court, to the end that the case may be proceeded with according to law.

Appeal dismissed.

STATE v. EDITH SAUNDERS.

Appeal.

Appeals in criminal actions will be dismissed where the record fails to show there was a final judgment.

(*State* v. *Bailey*, 65 N. C., 426; *State* v. *Keeter*, 80 N. C., 472; *State* v. *Wiseman*, 68 N. C., 203, cited and approved).

INDICTMENT for fornication and adultery, tried at Fall Term, 1883, of WATAUGA Superior Court, before *Graves, J.*

The defendants Edith Saunders and Columbus Anderson were indicted for fornication and adultery, and the defendant Edith was alone on trial. There was a verdict of guilty, and the de-

fendant appealed. Motion by the state to dismiss the appeal upon the ground that the record does not show that judgment was pronounced.

Attorney-General, for the State.
No counsel for the defendant.

ASHE, J. In looking into the record, we find there was no judgment rendered in the court below upon the finding of the jury. The appeal therefore cannot be sustained. It has been repeatedly decided by this court that no appeal lies in a criminal action at the instance of either party, where there is no final judgment. *State* v. *Bailey*, 65 N. C., 426; *State* v. *Keeter*, 80 N. C., 472; *State* v. *Wiseman*, 68 N. C., 203.

Lest, however, the case may be brought up again to this court upon the exception taken on the trial, we take occasion to say that upon a careful perusal of the record and statement of the case, even if there had been a judgment in the court below, there is no ground for a new trial.

Appeal dismissed.

STATE v. THOMAS LEE and others.

Appeal.

Appeals in criminal actions must be perfected and the case for the supreme court settled, as provided in civil actions. THE CODE, §1234.

(*State* v. *Randall*, 88 N. C., 611, cited and approved).

INDICTMENT for murder, tried at Fall Term, 1883, of FORSYTH Superior Court, before *Shipp, J.*

This case was tried a few days after THE CODE went into operation—the superior court of Forsyth county being held on

the 7th Monday after the 4th Monday in September, 1883. There was a verdict of guilty, and the prisoners appealed from the judgment pronounced, and the presiding judge made up the case on appeal.

Upon the call of the case in this court, the prisoners moved for a writ of *certiorari*, for the reasons set forth in an accompanying affidavit, to the effect that they had not been allowed the right to make up the case as provided by THE CODE, §1234; that at the time the appeal was taken, neither the judge nor the counsel was cognizant of the change in the practice of making up appeals in criminal actions, by reason of the fact that the laws were then in the course of publication and were not distributed until after said trial.

Attorney-General, for the State.
Mr. T. R. Purnell, for prisoners.

MERRIMON, J. It was settled in *State* v. *Randall*, 88 N. C. 611, that it was the duty of the judge who presided at the trial of a criminal action in which an appeal should be taken, to settle the case upon appeal for this court, and that continued to be the practice until it was changed by statute. THE CODE, §1234, regulating appeals in criminal action, provides, * * * "and the appeal shall be perfected and the case for the supreme court settled as provided in *civil actions*." This statute went into effect on the first day of November, 1883, and its provisions are too plain to be misunderstood or require interpretation.

This action was tried and appeal taken therein *after* THE CODE went into effect, but before it had been published, and before the change of the law was known, in fact, by the courts. The judge, not being informed or advertent to the change of the law in respect to appeals in criminal cases, settled the case upon appeal for this court. But owing to the change mentioned, he had no authority to do so, and the case made up by him must go for naught. Ordinarily, nothing else appearing, the pre-

sumption would be that he settled the case upon appeal by consent of the prisoners and the solicitor for the state, but such presumption is rebutted by affidavits submitted that satisfy the court here that the court below acted under a misapprehension of the law.

It was the duty of the prisoners within ten days after rendition of the judgment against them, to cause the appeal to be entered by the clerk on the judgment docket of the court, and notice thereof to be given to the solicitor for the state, and to prepare a concise statement of the case, embodying the instructions of the judge, as signed by him, if there were exceptions thereto, and the requests of the counsel of the prisoners for instructions, if there were any exceptions on account of the granting or withholding thereof, and to state separately, in articles numbered, the errors alleged, and to cause a copy of this statement to be served on the solicitor for the state within five days from the entry of the appeal taken. Within three days after such service the solicitor should have returned the copy so served upon him, with his approval, or such amendments as he might specify, endorsed on, or attached thereto. If he approved the case as presented by the prisoners, then it should have been filed with the clerk as part of the record; and if not returned with objections, then it would have been deemed approved; but if returned with objections within three days after such notice, then the prisoners should have immediately requested the judge to fix a time and place for settling the case before him, as directed in THE CODE, §550, the solicitor representing the state. This, however, was not done.

Notwithstanding the mistake of the judge as to the state of the law, the prisoners have the right to have the case settled upon appeal according to law, and substantially in the manner suggested above. They are not satisfied with, or willing to accept it as settled by the judge, and as neither the court, nor the prisoners, nor the counsel, were informed as to the change of the law, and could not under the circumstances have been so by

reasonable diligence, the prisoners are entitled, upon their application, to the writ of *certiorari*, to the end that the case upon appeal may be settled and the record perfected according to law; and when so perfected, the clerk shall certify a true and perfect transcript thereof to this court.

The appeal was taken in apt time, but the case upon appeal was not settled, for the reasons stated, within the time prescribed by the statute. This failure was not through the negligence or default of the prisoners, and the law will not, therefore, allow them to suffer prejudice in that respect, but the court can and will, in exercising its authority to grant the writ of *certiorari*, afford them opportunity to settle the case upon appeal as if this had been done in strict accordance with the statute. This authority is incident to that to grant the writ, when it is employed as a substitute for an appeal. In such a case, the court has power to permit and direct the appeal, and its incidents, to be perfected and rendered effectual.

The application for the writ of *certiorari* is granted, and an order allowing the same in conformity to this opinion may be entered. It is so ordered.

Certiorari ordered.

STATE v. S. M. LEAK.

Appeal, withdrawal of, by accused.

An appeal of the accused in misdemeanors may be withdrawn by his counsel with the consent of the attorney-general, and in such case this court will not examine the record. But in felonies, it must appear affirmatively that the prisoner advisedly assents to and desires the withdrawal of his appeal.

(*State* v. *Overton*, 77 N. C., 485; *State* v. *Weaver*, 13 Ired., 203; *State* v. *Jenkins*, 84 N. C., 812; *State* v. *Epps*, 76 N. C., 55; *State* v. *Paylor*, 89 N. C., 539; *State* v. *Sheets*, *Ib.*, 543; *State* v. *Valentine*, 7 Ired., 141, cited and approved).

STATE *v.* LEAK.

INDICTMENT against the defendant and others for fornication and adultery, tried at Fall Term, 1883, of RICHMOND Superior Court, before *McKoy, J.*

An appeal was taken from the judgment pronounced upon a verdict of guilty, and upon call of the case here, the defendant's counsel asked for leave to withdraw the appeal, the state assenting thereto.

Attorney-General, for the State.
Messrs. Little & Parsons, for defendant.

MERRIMON, J. The counsel for the appellant moved at the present term to withdraw the appeal, and the attorney-general consented that the motion might be allowed.

In a criminal case the appeal brings it into the court and its jurisdiction at once attaches. The appellant has not absolute control of the appeal, nor can he withdraw or dismiss it at his will. It is under the control of the court for all lawful purposes, and to be heard and determined according to the course of procedure in such cases.

The appeal is supposed to be for the benefit of the appellant, and to affect him mainly, if not altogether. The court would, therefore, ordinarily grant leave to him, certainly with assent of the attorney-general, to withdraw or dismiss it, and direct the order granting such leave to be certified to the court below, with instructions to proceed in the case according to law.

The court having obtained jurisdiction of this case by the appeal, and the defendant being absent, the question whether or not the court ought to examine the record and decide any questions properly presented by it was suggested, and we find it one of some practical importance.

It is not necessary in any criminal case that the defendant shall be present in this court when his case is heard and determined. Indeed, he is seldom, if ever present. He appears here generally by counsel. He is not tried or convicted, nor is

any judgment rendered against him here. This court decides whether or not there was error in the proceedings in the case in the court below, and orders that its decision be certified to that court to the end that the proper judgment may be entered there. *State* v. *Overton*, 77 N. C., 485.

The motion to withdraw or dismiss the appeal in a criminal case is an important one, and ought not to be made lightly, or without a careful consideration, especially on the part of the defendant. Because, if the appeal is withdrawn, he is bound by the errors, if there be any in his case in the court below, unless that court can and will, in a possible case, correct its own errors before the final judgment. The defendant has the right to have any errors assigned by him examined and considered in this court, and if they be found to exist, to have them corrected. This the court will always do, unless the defendant shall, by proper application, withdraw or dismiss his appeal, and such application must be made with the assent and by the direction of the defendant himself. This court must, therefore, in all cases be satisfied that the defendant makes such application.

It is competent for counsel to make the application to withdraw or dismiss the appeal in case of misdemeanors. In such cases it is presumed that the counsel, nothing else appearing, has been instructed to make such application. But in capital cases, and in other serious felonies, it must appear affirmatively that the prisoner advisedly assents to, desires and directs that his appeal be withdrawn or dismissed. There is in this respect, as well as in others, a marked difference in misdemeanors and offences of a higher grade. The law is specially careful to see that the rights of the prisoner in capital cases, and in other serious felonies, are properly guarded, and that nothing shall be done to his prejudice without his knowledge and opportunity to be heard. *State* v. *Weaver*, 13 Ired., 203; *State* v. *Jenkins*, 84 N. C., 812; *State* v. *Epps*, 76 N. C., 55; *State* v. *Paylor*, 89 N. C., 539; *State* v. *Sheets*, *Ib.*, 543.

If the attorney-general assents to a motion to withdraw or

dismiss the appeal, the court will grant it, without looking into or considering the record, because he is counsel for the state and is supposed to have carefully considered the rights of the state and assents to the justice of the matter. It has been held that where the attorney-general, upon an appeal by the defendant, on an indictment, informed the court that he had looked into the record and consents that the *venire de novo* prayed for should be granted, the court would of course grant the prayer without examining into the errors assigned. *State* v. *Valentine*, 7 Ired., 141.

The motion to withdraw the appeal is allowed. This will be certified to the court below, to the end that that court may proceed according to law.

Motion to withdraw appeal allowed.

STATE v. DANIEL GOULD.

Judge's Charge, recapitulating evidence—Reasonable Doubt—Indictment—Variance—Tampering with the Jury—Discretionary Power.

1. It is sufficient if the judge in charging the jury gives the substance of the testimony of the witnesses; and especially so, where he asks counsel if a recapitulation of the evidence in detail is desired, and no request for the same is made.
2. A charge upon the subject of reasonable doubt cannot be made the subject of exception, upon the ground that the judge superadded an explanation thereof when such explanation is in itself a proper one.
3. An indictment for murder charged that the mortal wound was inflicted with a rock, and the proof was that the instrument used was a stick; *Held*, no variance. The instrument of death laid in the bill and that proved are of the same character and nature.
4. Whether a new trial will be granted because the jury have been tampered with, is matter of discretion with the presiding judge upon the facts found by him. No undue influence upon them is shown here.

(*State* v. *Grady*, 82 N. C., 643; *State* v. *Reynolds*, 87 N. C., 544; *State* v. *Jones*, *Ib.*, 547; *State* v. *Tilghman*, 11 Ired., 513; *State* v. *Miller*, 1 Dev. & Bat. 500; *State* v. *Brittain*, 89 N. C., 481, cited and approved).

STATE *v.* GOULD.

INDICTMENT for murder removed from Anson and tried at Fall Term, 1883, of MONTGOMERY Superior Court, before *Gilmer, J.*

There was much evidence adduced in behalf of the prosecution and the prisoner, but the facts are substantially as follows:

The deceased William B. Carpenter came to his death on the night of the 6th of December, 1881, caused by a wound on the left side of his head, producing a very bad fracture of the skull.

On that night a festival was given by persons in the county of Anson, to which the deceased went about eight or nine o'clock, and after remaining a short time disappeard, and about the same time the prisoner (who was also there) disappeared and was absent about a half hour.

One Dunlop, a witness for the state, testified that some time after the deceased had left, a half or three quarters of an hour, the prisoner came to him and said he had something to tell him, and took him outside of the house and asked him if he was a friend of his, and whether he would hurt him, to which the witness replied, "I'll not hurt you if you will not hurt yourself"; and the prisoner said, "well, I've knocked Bill Carpenter with a rock." When the witness started home after the festival, the prisoner called to him and said, "let's go over the branch and see how things are." He went with him, and after passing a certain place in the road the prisoner said, "here is the place." They then went on, but turned back, and on passing the same place a second time the prisoner again said, "here is the place." Persons leaving the festival were along the road, and witness and prisoner did not stop at the place until they had passed it the third time, when witness saw a black object lying four or five feet from the road. He did not go to the object, but passed on. But the prisoner went back to it and called out to witness, "this is him." He called to the prisoner to come on, and they went to the house of the witness and stayed together there that night.

There was evidence offered tending to sustain, as well as to impeach the character of this witness, and to show that the prisoner had made threats against the deceased.

The prisoner was examined in his own behalf and denied all knowledge of the homicide. He also offered testimony to show that he did not leave the festival that night.

The state introduced evidence of the finding, near the place of the homicide, a rock and a stick—the latter having at its large end several knots or stumps of limbs which had been cut off, in the end of one of which was found human hair, corresponding in color with the hair of the deceased.

The rock and stick were exhibited on the trial, and the physician who testified for the state in regard to the description and character of the wound, stated that such a wound could not have been made with a rock of the shape of the one produced in court, but might have been made with a rock which had jagged ends; and that the wound might also have been made with the stick produced in court.

There was no exception taken by the prisoner to the reception or rejection of evidence.

The court, in its charge, did not read to the jury the notes of the evidence taken on the trial, but stated briefly the substance of the testimony of each witness, by name, remarking at the time and in the presence of the prisoner and his counsel, that the court did not deem a more detailed recapitulation of the evidence necessary, and would not give such, unless specially requested to do so by prisoner's counsel, and no such request was made.

After telling the jury, among other instructions, that they could not convict unless they were satisfied of the prisoner's guilt beyond a reasonable doubt, the judge added that this simply meant, that after the consideration of all the evidence, in all the light in which it had been presented to them in the arguments and under the instructions of the court, the jury ought not to convict the prisoner unless they felt that their minds were involuntarily led to the conviction that he was guilty as charged in the bill of indictment.

After a verdict of guilty, the prisoner moved for new trial, and assigned as grounds therefor:

1. That the court failed to read to the jury the testimony of the prisoner as taken down during the trial.

2. That the court erred in adding the explanation or definition as a part of the charge upon reasonable doubt.

3. That the bill charged the prisoner with having killed the deceassd with a rock, whereas the proof showed that the mortal wound was inflicted with a stick.

4. That the jury had been tampered with, and in support of this, the prisoner's counsel read to the court the affidavit of two of the jurors who sat on the case, to the effect that during one night in the progress of the trial the jury were kept in the court room and the outer door thereof was unlocked; and while there, one Siler passed through the room, and one George Graham remained in the room from the time the jury went in until after ten o'clock that night, and afterwards came back and remained until sometime before day-break. The court, upon consideration of the motion, and after examination of other persons, found the facts to be as follows:

On Wednesday night during the trial, the jury, who had occupied, during the recess of the court, the jury-room opening into the court room, were allowed by the officer in charge of the jury to sleep in the court room; that said Graham who had fallen asleep in a drunken condition on one of the rear benches in the room, during the afternoon session of Wednesday, roused up during the night, while the jury were in the court room, and, being then for the first time discovered by the officer, was by him led out of the room, still in a drunken, stupid condition; and in a short time he returned in the same condition, and was again led out by the officer, and was seen by him no more that night; that there was no communication between Graham and the jury or any member thereof; that there were two doors at the west end of the court room, leading by a stairway each to the first floor, which doors, while the jury remained in the room that night, were not locked, but latched; that said Siler, who resides in the town, also passed through the room during the time the jury were there,

but had no communication directly or indirectly with the jury or any member thereof.

The motions were refused, and the prisoner appealed from the judgment pronounced.

Attorney-General, for the State.
Mr. Allen Jordan, for the prisoner.

ASHE, J. The first exception taken by the prisoner was upon the ground that the judge failed to read to the jury the testimony of the prisoner, as taken down by him during the trial. The exception is founded upon section 237 of the Code of Civil Procedure, and section 413 of THE CODE, which make it the duty of the judge in charging the jury, whether in a civil or criminal action, to state in a *plain* and correct manner the evidence given in the case, and declare and explain the law arising thereon. The language of these sections is the same as that of section 130 of chapter 31 of the Revised Code, except that in the two former sections the word *plain* is substituted for the word *full* in the latter. The sections, as they stand in THE CODE and C. C. P., have been repeatedly construed by this court.

In *State* v. *Grady*, 82 N. C., 643, it is held that if evidence favorable to the prisoner be omitted by the judge in recapitulating the testimony to the jury, it is the duty of the prisoner's counsel to call it to the attention of the court, that the same may be supplied; and after verdict, an exception grounded on such omission will not be sustained. This decision was cited and approved in *State* v. *Reynolds*, 87 N. C., 544; and to the same effect is *State* v. *Jones*, *Ib.*, 547.

The error assigned in the second exception was to the superadded remarks of the judge in his charge on the subject of reasonable doubt. We are unable to conceive upon what ground the prisoner should have supposed that he could have been prejudiced by those remarks. His Honor told the jury that reasonable doubt meant that, after a consideration of all the evidence,

with all the light derived from the argument of counsel and the instructions of the court, they ought not to convict the prisoner, unless they felt that their minds were involuntarily led to the conviction that the prisoner was guilty as charged. So far from impairing the force of his charge on the subject of reasonable doubt, the explanation of His Honor was more favorable to the prisoner than was perhaps warranted by law.

The next exception was founded upon an alleged variance between the instrument with which the mortal wound was inflicted and that charged in the bill of indictment. The bill charges that the wound was given with a rock, and the proof rather tended to show that it was inflicted with a stick. It can make no difference whether the deceased was struck with a rock or a stick. For it is held that where the instrument of death laid in the indictment and that proved are of the same nature and character, and the method of the operation is the same, though the instrument is different, there is no variance: as if it be proved that the deceased was killed by any other instrument, as with a dagger, sword, or the like, capable of producing the same kind of death as the instrument stated in the indictment, the variance will not be material. *Rex* v. *Mackally*, 9 Co., 67*a*; Gilbert Evi., 231; *Rex* v. *Briggs*, 1 Moody C. C., 318. And where the offence was charged to have been committed with a sharp instrument, and the evidence was that the wound was partly torn and partly cut, and was done with an instrument not sharp, it was held that the charge in the indictment was proved, and the degree of sharpness was immaterial. *Rex* v. *Grounsell*, C. & P., 121.

The remaining ground urged for a new trial is that the jury were tampered with. But the judge having found the facts to be, that one person passed through the room where the jury were kept during the night, and another was found asleep in a stupid, drunken condition on a bench in the rear of the room, and was put out of the room as soon as discovered, but that neither of them had any communication with any member of

the jury, there is no ground for even a suspicion that there was an undue influence brought to bear upon the jury. And even if the circumstances had been such (which was not the case here) as to show that there was an opportunity and chance for exerting an influence upon them, it would have been a matter of discretion with the presiding judge, whether he would have granted a new trial. *State* v. *Tilgham*, 11 Ired., 213; *State* v. *Miller*, 1 Dev. & Bat., 500; *State* v. *Brittain*, 89 N. C., 481.

There is no error. Let this be certified to the superior court of Montgomery county that the case may be proceeded with in conformity to this opinion and the law of the state.

No error. Affirmed.

STATE v. GEORGE WASHINGTON.

Discharge of jury before verdict — Jeopardy — Jurors, standing aside in capital cases—Right of prisoner to have them tendered before resorting to special venire.

1. The rule announced in *State* v. *Washington*, 89 N. C., 535, recognizing the power and duty of a judge to withdraw a juror and order a mistrial in order to guard against fraudulent practices, affirmed. In such case there is no jeopardy, and the prisoner may again be put upon his defence.
2. Jurors of the original panel constitute a distinct panel; and when the same is gone through with without forming a jury for the trial of a capital offence, the jurors stood aside at the instance of the prosecution (when such is the case) must be brought forward and challenged, or tendered to the prisoner, before resort can be had to the special venire.
3. The special venire is in aid of the original panel, and only such jurors are taken from it as are required to form a jury after the original has been exhausted.

(*State* v. *Shaw*, 3 Ired., 532; *State* v. *Arthur*, 2 Dev., 217; *State* v. *Benton*, 2 Dev. & Bat., 196, cited and approved).

INDICTMENT for murder tried at Fall Term, 1883, of PAMLICO Superior Court, before *Avery, J.*

The prisoner is charged with the killing of one Augustus Rhor, on the 28th of May, 1883, in the city of Newbern, in the county of Craven, and the trial of the indictment was removed, upon an affidavit of the state solicitor, to the county of Pamlico. Verdict of guilty; judgment; appeal by prisoner.

The facts relating to the points decided by this court are sufficiently set out in its opinion.

Attorney-General for the State.

No counsel for the prisoner.

SMITH, C. J. In reviewing the prisoner's appeal and the numerous exceptions shown in the record to have been taken to the rulings of the judge upon the trial in the court below, we deem it necessary to consider and dispose of two only:

1. The prisoner's counsel moved that he be released from further prosecution for the imputed felony, for the reason that he had before been put in peril before a jury regularly constituted and empaneled to pass upon his plea, and the judge had without warrant in law ordered a mistrial and disbanded the jury before rendering their verdict.

The right of the prisoner to set up this defence upon his trial, if deemed available, was recognized, and its merits left undetermined to enable him to do so, when his application for the writ of *certiorari* to bring up the record and move for his discharge on this ground, was before us and denied at the last term. 89 N. C., 535.

The case now presented is essentially unchanged in the facts, except in the addition of the prisoner's own affidavit denying that he had tampered with any juror or was in complicity with others, if any, who may have done so. The facts found by the judge who then presided remain upon the record.

The subject was fully examined in the light of past adjudications, the later relaxing somewhat the rigorous rule announced in the earlier cases, and the conclusion arrived at, was, that be-

sides a physical necessity produced by the illness of a judge or juror in incapacitating him to proceed, or other such cause, there was another controlling necessity, growing out of the duty of the judge "to guard the administration of justice against fraudulent practices," and assuring a fair and impartial trial, which equally sanctions the exercise of the power.

The views before expressed are still entertained as to the action of the court in interposing to prevent the consummation of the attempted fraud by the false oath of corrupt jurors.

The power confided to the judge of ordering a mistrial, even in case the charge is for a capital felony, with the restraints attending its exercise, is sufficiently stringent to afford every reasonable protection to the accused and secure a fair and impartial trial; and while he can rightfully demand no more, the protection of the public from crime, by the punishment of the offender, will admit of nothing less.

In the larger number of the states and in several of the circuit courts, presided over by judges of the supreme court of the United States, it has been decided that the matter of discharging a jury before verdict rests in the sound discretion of the court, and its exercise formed no legal obstacle to a second trial upon the same bill, and that the prisoner has not been in peril in the sense of the law. The cases on the subject are commented on in 1 Whar. Cr. Law, sections 575 to 586 inclusive, and among them that of *United States* v. *Peres*, 9 Wheat., 579, in which Mr. Justice STORY says, in reference to a discharge of the jury because they were unable to agree: "The prisoner has not been convicted or acquitted and may again be put upon his defense."

2. The second exception is to the refusal of the court to recall three of the thirteen jurors constituting the regular panel who were set aside, at the instance of the solicitor, until the others were called, in order that the causes of challenge be passed on, and they tendered before proceeding to call the one hundred jurors summoned on the special venire.

In this ruling of the court there is error, and those jurors

ought to have been recalled and the sufficiency of the causes assigned for the challenges enquired into, and, if found competent, the jurors tendered before seeking any from those of the special venire. This was the right of the prisoner and it ought not to have been denied. The list of special jurors is in aid of those of the original panel, and only such are to be taken from it as are required to form a jury, after the original panel has been exhausted, without completing it. This legal right, vesting in the prisoner, to have the jury which is to try him made up out of the regular jurors, where a sufficient number of competent unchallenged jurors can be obtained, and if not, the deficiency only supplied from the special venire, is expressly recognized and declared in *State* v. *Shaw*, 3 Ired., 532. There, one of the regular jurors was challenged by the state for cause, sustained in the court below, and held to be insufficient in law upon the appeal; and it was argued that as the jurors were all unobjectionable, the exclusion of a competent juror worked no harm to the prisoner, whose right was not to select acceptable jurors, but to exclude obnoxious jurors from the panel. Upon a careful examination of the cases supposed to sustain this view (*State* v. *Arthur*, 2 Dev., 217 and *State* v. *Benton*, 2 Dev. & Bat., 196), GASTON, J., thus states the law:

"It is an obvious corollary of the principles thus asserted, if it be not decided by the case (referring to *State* v. *Benton*) that in legal contemplation the jurors of the original venire constitute a distinct panel. Where that panel is perused or gone through with, without forming a jury, any individual member thereof, who upon the challenge of the state has been set aside to see whether a jury might not be formed from the panel without him, *must be brought forward and challenged or taken before another panel can be resorted to.*"

The principle thus announced applies with equal force to the facts of the present case, and it meets our full concurrence. Indeed this case is more favorable to the prisoner, as it does not appear that he possessed any peremptory challenges, up to the

completion of the jury, so as to enable him to free it from some of the latter jurors who might not have been reached, had one or more of those, made to stand aside, been called and accepted.

There is error, and the prisoner is entitled to have the verdict set aside and a *venire de novo* awarded, and it is so ordered. This will be certified.

Error. *Venire de novo.*

STATE v. J. MARION CARLAND.

Homicide—Discharge of jury before verdict—Jeopardy—Trial—Jurors—Judge's Charge.

1. The jury were considering of their verdict in a capital case for ten days, and upon twice coming into court and being polled, each time they declared the jury would never agree, and the court directed a juror to be withdrawn and a mistrial entered; *Held*, no error, and the prisoner was not in jeopardy. The facts found by the court are conclusive, but the law reviewable.
2. Where the trial in such case was removed from one county to another, the prisoner has no right to have the whole transcript of the record read to the jury, and the judge properly refused to allow more than the indictment and so much of the record as showed the jurisdiction of the court to be read.
3. A juror summoned on a *special venire* is qualified to serve if he be a freeholder only. THE CODE, §1738.
4. But tales-jurors and those of the original panel are required not only to be freeholders, but to have paid their taxes for the preceding year, which, under section 1722, is the year preceding the one in which the tax returns, from which jurors are selected, are laid before the county commissioners. *State* v. *Watson*, 86 N. C., 624, corrected.
5. The finding of the judge in the court below as to whether a juror has paid such tax is not reviewable on appeal.
6. On trial for murder the judge charged the jury, among other things, that the prisoner is not required to prove matters of excuse or mitigation beyond a reasonable doubt, but to the satisfaction of the jury; "but the

degree of proof is not so far relaxed that he may establish them by a bare preponderance of evidence, but must do so to the satisfaction of the jury"; *Held*, no error. The meaning of the instruction is, that the jury must be *satisfied;* and if not satisfied, a *bare* preponderance of proof will not do.

(*State* v. *Ellick*, 2 Wins., 56; *State* v. *McGimsey*, 80 N. C., 377; *State* v. *Washington*, 89 N. C., 535, and cases cited; *State* v. *Whitley*, 88 N. C., 691, and cases cited; *State* v. *Griffice*, 74 N. C., 316; *State* v. *Wincroft*, 76 N. C., 38; *State* v. *Willis*, 63 N. C., 26, approved; *State* v. *Peter Johnson*, 3 Jones, 266, *Commonwealth* v. *York*, 9 Metc., 93, and *State* v. *Watson*, 86 N. C., 624, corrected).

INDICTMENT for murder tried at Spring Term, 1884, of HENDERSON Superior Court, before *Graves, J.*

This case was removed from Buncombe, and the whole record was made a part of the statement of the case on appeal. When the solicitor for the state announced his readiness for trial, the prisoner moved for his discharge upon the ground that he had heretofore been in jeopardy upon the same charge which he was then called upon to answer. Motion overruled, and the prisoner excepted.

The prisoner then moved the court to adjudge upon the record that he had heretofore been tried and acquitted of the crime charged in the indictment, and that, having been so acquitted, he could not be put upon another trial for any offence under this bill of indictment. Motion overruled, and the prisoner excepted.

The prisoner asked the court to adjudge upon the record that he had been heretofore acquitted of the charge of murder, and to adjudge that he could not then be put on his trial for any greater offence than manslaughter. His Honor overruled this motion, and directed the trial to proceed upon the charge of murder as preferred in the indictment. Prisoner excepted.

To sustain the preceding motions, the prisoner relied upon the record of the proceedings had before Judge Avery in the superior court of Buncombe, before the case was transferred to Henderson county, in which it appeared that a mistrial had been ordered upon the ground that the jury were unable to agree upon a verdict. The facts in reference to this are stated in the opinion here.

In selecting the jury, one Dalton, summoned on the special venire, was challenged, and being sworn on his *voir dire*, said, "I owe one tax; I have paid all except the last tax." The judge was of opinion that it did not appear that the juror had not paid his tax for the preceding year, and adjudged the cause of challenge insufficient. The peremptory challenges allowed to the prisoner were exhausted before the jury was completed. The prisoner excepted.

Upon proceeding to empanel the jury, the prisoner asked that the entire record be read in the hearing of the court and jury. The court directed the bill of indictment and so much of the record as was necessary to show the jurisdiction of the court to be read, and that no more should be. The prisoner excepted, insisting that the whole transcript should be read.

There was only one exception taken to the instructions given to the jury: The evidence as to the killing was full, tending to show a legal provocation by an assault and mutual combat, and that the prisoner acted upon the principle of self-defence. The court charged the jury that "when the law devolves upon the prisoner the burden of proof, it relaxes the rule as to the degree of proof; for while the prosecution is held to the rigid rule, and required to satisfy the jury beyond a reasonable doubt, when the prisoner comes to show his matters of excuse or mitigation, he is not required to prove these matters beyond a reasonable doubt, but he is required to prove them to the satisfaction of the jury, but the degree of proof is not so far relaxed that he may establish his matters of excuse or mitigation by a bare preponderance of proof, but must do so to the satisfaction of the jury." This instruction was excepted to upon the ground the court charged that a greater degree of proof was required of the prisoner in showing excuse or mitigation than a bare preponderance of the evidence.

The jury found the prisoner guilty of manslaughter, and he appealed from the judgment pronounced.

Attorney-General, for the State.

Messrs. M. E. Carter, J. H. Merrimon and *Reade, Busbee & Busbee*, for prisoner.

ASHE, J. The first three exceptions taken by the prisoner related to the right claimed by him to be discharged by consequence of the proceedings had, when he was theretofore on trial under the same bill of indictment, in the superior court of Buncombe county, before the case was removed to the county of Henderson. They embrace these grounds:

1. That he had theretofore been put in jeopardy of life for the same offence.

2. That he had been acquitted of every offence charged in the bill of indictment, and that he could not again be put on trial for any offence charged in the bill of indictment.

3. That he had been theretofore acquitted of the crime of murder, and that he could not be put on trial again for any greater offence than manslaughter.

There is no force in any of these exceptions: As to the jeopardy, it is now well settled that even in capital trials the superior courts have the power to grant a mistrial whenever a proper case occurs for its exercise. And whenever a judge undertakes to exercise the power, he must distinctly find the facts and set them out in the record. When he does so, the facts are conclusive, but the law is reviewable. *State* v. *McGimsey*, 80 N. C., 377.

In this case the judge carefully complied with the requirements of the law. He finds as facts, that the case was committed to the jury in the afternoon of Friday, March 23, 1883, being Friday of the second week of the term. The jury were put in charge of a sworn officer, and were kept together until Saturday, March 31, 1883, being Saturday of the third and last week of the term, about four o'clock in the afternoon, when the jury were brought into court, and polled in presence of the prisoner, and in response to questions propounded to each juror

by the court, six of the jurors said that the prisoner was not guilty, and six said he was not guilty of murder, but was guilty of the felonious slaying. The jury asked for further instructions, and the court, after instructing them upon the point about which instructions were asked, sent them out again in charge of the officer, and entered an order upon the minutes of the term that the term of the court should be prolonged until Monday, April 2, 1883, unless the jury should sooner agree as to their verdict. On Monday, April 2, 1883, at ten o'clock A. M., the jury came into court, and they were again polled, and seven of them said the prisoner was not guilty, and five of them said he was not guilty of murder but was guilty of the felonious slaying. And all of the jury, being severally interrogated by the court, declared that they did not believe the jury would ever agree. The court found as a fact that the jury could not agree, and thereupon ordered that a juror be withdrawn and a mistrial had.

There is no error in this ruling. His Honor strictly complied with the requirements of the law, and the facts of the case as found by him, without question, warranted the course pursued. *State* v. *Jefferson*, 66 N. C., 309; *State* v. *Washington*, 89 N. C., 535; *State* v. *Honeycutt*, 74 N. C., 391. In the latter case the jury had the case six days, and on Saturday of the second week of the term came into court, and, being polled, it was found as a matter of fact that they could not agree, and it was held that the judge committed no error in withdrawing a juror and directing a mistrial. But this is a stronger case than that for the state; for here, the jury were twice polled, and had the case ten days before the mistrial was ordered.

We hardly think it necessary to notice the exception taken upon the ground of a former acquittal, for there could be no acquittal without a verdict of not guilty; and here, there was no verdict. There could be none so long as the jury disagreed.

The prisoner's fourth exception was to the refusal of the court to allow the entire record of the proceedings connected with the

trial in Buncombe county to be read in the hearing of the jury. His Honor restricted the reading of the record to the bill of indictment and so much of the record as showed the court of Henderson had jurisdiction, and forbade that part of the record in regard to the mistrial to be read. In no event could it be read in the hearing of the jury except as evidence that there was no issue or question before the jury, to which it was applicable as evidence. Whether the prisoner had been once in jeopardy, or had been acquitted, were questions exclusively for the court.

The fifth exception was to the refusal of His Honor to allow the prisoner's challenge to Dalton, who had been summoned as a juror on the "special venire," and was challenged for the cause that he had not paid his taxes for the preceding year. This exception is groundless for several reasons:

1. Because the act of assembly only requires that the persons summoned on a "special venire" should be *freeholders*. THE CODE, §1738. They are not tales-jurors, who are required, not only to be freeholders, but to have paid their taxes for the preceding year, as is required of jurors on the original panel. *State* v. *Whitley*, 88 N. C., 691; *Lee* v. *Lee*, 71 N. C., 139.

2. Because the tax of the preceding year, so far as relates to this case, refers to the tax due for the year preceding the first Monday in September, 1883. Act of 1868, ch. 95, §1; THE CODE, §1722; *State* v. *Griffice*, 74 N. C., 316. The juror stated that he had paid all his taxes but the last. The last tax was that due on the first of September, 1883, but the tax of the preceding year was that which was due on the first of September, 1882; and that he had paid. So that the judge did not err in holding that he had paid his tax for the preceding year.

3. Because, even if His Honor was in error, his ruling upon the question was conclusive and not reviewable as to the fact. *State* v. *Wincroft*, 76 N. C., 38.

We take occasion here to correct an inadvertence fallen into by the court in the case of *State* v. *Watson*, 86 N. C., 624, where it was said "the preceding year" referred to the year pre-

ceding the finding of the bill of indictment. The qualification of the juror was not the question then before the court, but only whether the exception had been taken in apt time; and consequently the court did not give a critical examination to the question of qualification.

The next and last exception of the prisoner was to the instructions given by His Honor to the jury, and the ground of the exception is that the court charged that a greater degree of proof was required of the prisoner in showing mitigation or excuse than a bare preponderance of evidence. The charge was: "When the prisoner comes to show his matters of excuse or mitigation, he is not required to prove these matters beyond a reasonable doubt, but he is required to prove them to the satisfaction of the jury; but the degree of proof is not so far relaxed that he may establish his matters of excuse or mitigation by a *bare preponderance* of proof, but must do so to the satisfaction of the jury."

We are unable to see in what respect the charge of His Honor is obnoxious to the prisoner's exception. The plain meaning of the instruction is, that a *bare* preponderance of proof will not do to show matters of mitigation or excuse, unless it produces satisfaction of their truth in the minds of the jury. We can well conceive of cases where there may be a bare or slight preponderance of proof on one side, which yet fails to produce satisfaction, and still leaves the mind in an uncertain and dubious state. His meaning evidently is, and so we think any one would take it, that the jury must be *satisfied;* and if not satisfied, a bare preponderance of evidence will not do.

In giving the charge, His Honor seems to have followed with particularity the rule laid down by this court in *State* v. *Willis*, 63 N. C., 26. Before that case was decided, there had preceded it the *Commonwealth* v. *York*, 9 Metc., 93, and *State* v. *Peter Johnson*, 3 Jones, 266. In the former case the court held that where there was any evidence tending to show excuse or mitigation, it is for the jury to draw the proper inferences of fact from

the whole evidence, and to decide the fact on which the excuse or extenuation depends, according to the *preponderance* of evidence; and in the latter, that it was incumbent on the prisoner to establish the matter of excuse or extenuation beyond a reasonable doubt. The error in both of these cases is corrected by this court in *Willis'* case; Judge BATTLE, speaking for the court, said: "We prefer to stand *super vias antiquas*, and to adhere to the rule laid down in *State* v. *Ellick*, 2 Winst., 56. In that case, the erroneous statement we had inadvertently made in *State* v. *Peter Johnson*, that it was incumbent on the prisoner to establish the matters of excuse or extenuation beyond a reasonable doubt, is corrected. In it, is also corrected what we also consider as erroneous in the decision of the court in *Commonwealth* v. *York*, that the matter of excuse or extenuation which the prisoner is to prove must be decided according to the preponderance of evidence. It is more correct, we think, that they must be proved to the *satisfaction* of the jury." It was so held in *State* v. *Ellick*, where the court say, when it is proved that one has killed intentionally with a deadly weapon, the burden of showing justification, excuse or mitigation is on him, and the jury must be *satisfied* by the testimony that the matter offered in mitigation is true. And the same principle is laid down in Foster, at page 290, where it is said, whoever would shelter himself under the plea of provocation must prove his case to the *satisfaction* of the jury. The presumption of law is against him till the presumption is repelled by contrary evidence. This exception of the prisoner cannot be sustained without overruling the case of *State* v. *Willis*, *supra*, which has been repeatedly approved by adjudications of this court. Let this be certified.

No error. Affirmed.

STATE v. JOSEPH MAZON.

Oath, administration of to witness—Homicide—Judge's Charge.

1. An oath administered substantially in the form prescribed by statute is sufficient, and hence it was held that the omission of a witness to repeat the words "so help me God," is not assignable for error. The words are no part of the oath.
2. A witness for the state was required to swear that his evidence "against" the prisoner at the bar shall be the truth, &c.; *Held*, that the oath exacts from the witness, under penalties of perjury, all he knows material to the issue, and comprehends as well what mitigates as what tends to estalish guilt. But the court recommend that the form prescribed by law be followed.
3. The rule laid down in *Willis'* case, 63 N. C., 26, that the burden of proving matter of mitigation rests upon the prisoner, &c., and affirmed by repeated decisions of the court, is the settled law of this state.
4. The court charged the jury in this case that "if deceased attacked with the rock and knife, the prisoner, not having provoked the fight nor willing to engage in it, might use the necessary means of self-defence, but the jury and not the prisoner must judge of the necessity. And if a deadly weapon was used, and the attack indicated a purpose to endanger the prisoner's life or inflict great bodily harm, he was not compelled to flee, but might defend his person and pursue his adversary, to disarm him, but for no other purpose"; *Held*, no error.

(*State* v. *Paylor*, 89 N. C., 593; *State* v. *Willis*, 62 N. C., 26; *State* v. *Ellick*, 2 Winst., 56; *State* v. *Haywood*, Phil., 376; *State* v. *Smith*, 77 N. C., 488; *State* v. *Brittain*, 89 N. C., 481; *State* v. *Harris*, 1 Jones, 190), approved.

INDICTMENT for murder tried at Spring Term, 1883, of POLK Superior Court, before *Shipp, J.*

Verdict of guilty; judgment; appeal by the prisoner.

Attorney-General, for the State.

Messrs. W. J. Montgomery, D. Schenck and *Reade, Busbee & Busbee*, for the prisoner.

SMITH, C. J. The prisoner is charged in the bill of indictment with the murder of C. F. Lawrence, committed in the month of June, 1882, and on his trial before the jury was found guilty.

1. The first exception presented in the record is to the form of the oath taken by the witnesses, none of them repeating its closing words and making a personal appropriation of them to himself by adding "so help me God," and especially to the manner in which the witnesses for the state were sworn.

The oath prescribed by the statute to be administered to every witness in a capital trial is as follows:

"You swear (or affirm) that the evidence you shall give to the court and jury in this trial between the state and the prisoner at the bar shall be the truth, the whole truth, and nothing but the truth, so help you God," Bat. Rev., ch. 77, §6, par. 34; and then the witness is directed to repeat "so help me God," and kiss the Holy Gospels, §1.

The oath was thus taken by the witnesses of the prisoner, except in the omission to repeat, while it was administered to those of the state in this changed phraseology:

"You solemnly swear the evidence that you and each of you shall give to the honorable court and jury against Joe Mazon, the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth, so help you God," with the like omission.

The discrepancy in the manner of swearing the two classes of witnesses was not observed by the judge, solicitor or prisoner's counsel while the trial was in progress, nor until after the charge; the jury had retired to consider the case and make up their verdict. Then it was discovered by prisoner's counsel, and the fact was made known to the judge and an exception thereto noted.

How this oversight occurred, and why a different oath was administered to the separate classes of witnesses when the law furnishes one form for all, is unexplained, nor does any satisfactory reason therefor occur to us. It is a singular circumstance that the regular mode of swearing one set of witnesses should have been pursued and another mode adopted for the others, and this not communicated by counsel until after the cause had passed into the hands of the jury.

But we are of opinion that the omission and variation do not constitute such substantial departures from the provisions of the

statute as to fatally infect the verdict and entitle the prisoner to another jury. The general assembly could not have intended, in putting in form the different oaths to be taken by officers, public agents and others to insure the faithful performance of their respective duties, to prescribe an inflexible iron formula, admitting of no deviation in words, while the substance is preserved; but rather to direct and point out the essential matters to be embraced in the oath.

To hold invalid an oath that did not follow the very words of the statute, might prove disastrous to the public interests. "Perjury and slander," in the language of the supreme court of Tennessee, "could often find, in slight variances from the prescribed forms of oath, the means of escape from condign punishment which justice invokes. Undoubtedly an oath, administered substantially according to the prescribed form, will be valid, and if taken falsely the party will be guilty of perjury." *Sharp* v. *Wilhite*, 21 Tenn., 434.

"The legislature did not design," says GREEN, C. J., "to prescribe the precise form of the oath, the slightest deviation from the phraseology of which would prove fatal," *State* v. *Daylor*, 3 Zab. (N. Y.), 49.

"As to the form of the oath, when it is prescribed by statute," remarks Mr. BISHOP, "the statute is to be construed in some sense directory only, so far at least that a departure from the words, in matter not of substance but of form merely, does not exempt the person taking it from the pains of perjury." 2 Bish. Cr. Law, §§862, 982.

A witness for the state was required to swear that his evidence given "against Joe Mazon, the prisoner at the bar, shall be the truth," &c., and this the counsel interprets as imposing an obligation upon the conscience of the witness to testify truly where his testimony is adverse, which does not rest upon his conscience where it may be favorable to the prisoner. If this criticism were well founded, it would be of great force; but in our opinion it is not warranted by the form of the oath taken.

In a general sense every witness is understood to testify for the party introducing him, and the aggregate evidence offered is the evidence of such party. No distinction is drawn between such as sustains the one side or the other. The testimony is said to be for the state or for the accused, accordingly as it proceeds from witnesses produced by the one or the other.

If a witness be produced and sworn for the King, yet if that witness allege any matter in his evidence that is for the prisoner's advantage (as many times they do) that stands as a testimony on oath for the prisoner as well as for the King. Regularly the *King's evidence is given upon oath against the prisoner*, and ought not to be admitted otherwise than upon oath. 2 Hale P. C., 283, 284.

In 4 Chitty's Criminal Law, 313, this form is given for swearing a witness for the King:

"The evidence which you and every of you shall give *for our sovereign Lord, The King, against the prisoner* at the bar shall be the truth, the whole truth and nothing but the truth, so help you God." It cannot admit of doubt that such an oath reaches the conscience of the witness and exacts from him, form under the penalties of perjury, a disclosure of all that he knows material to the issue of the prisoner's guilt, and comprehends just as much what mitigates or excuses the charge as what tends to establish the prisoner's guilt.

Substantially the obligations assumed under either form of oath are the same, and perjury may be assigned in the corrupt withholding of known facts favorable to the accused in the one case as well as in the other.

In reaching this conclusion we wish to mark our decided disapproval of the practice of departing from well established forms, and the more so, where they have been prepared and prescribed by the law-making power.

The other branch of the exception based upon the omission to repeat the words "so help me God" by the witness is equally untenable. Indeed, the very point is disposed of in the recent

case of *State* v. *Paylor*, 89 N. C., 539, and we should be content with a simple reference to it, but that we find the same ruling to have been made in the court of Queen's Bench in *The Lancaster & Carlisle Railway Co.* v. *Heaton*, 8 Ellis & Black (92 E. C. L. Rep.), 952. In that case, the same words prescribed in the statute, "so help me God," were omitted in taking the oath. LORD CAMPBELL, C. J., in answer to the objection, said the words, "so help me God," were not part of the oath. They only point out the mode of administering it, adding, and such was the decision in *Solomon* v. *Miller*, 3 Exch. (W. H. & G.), 778.

The testimony produced by the state to support the charge was in substance this:

The prisoner, deceased and others were in the employment of the Spartanburg and Asheville railroad company, under the control of one Cook, who on the day of the homicide, ordered the "push-car" to be put on the track. The prisoner came out of the tool-house, with a green hickory stick in his hands some three feet in length and one and a half inches thick, which the deceased, not himself, had been directed to bring out to be made into a handle for a hammer. Cook directed him to put the stick on the car and go to work, instead of which he retained it, a part of the time resting upon his shoulder. Cook, while walking behind the moving car, some 90 or 100 yards from it, saw the prisoner and deceased in the road, in a quarrel, and hastened towards them. When about half way he heard the prisoner call the deceased a damned liar, the latter then standing on the track and looking down. The prisoner advanced on him, when deceased picked up a rock and threw it at the prisoner, a part of it striking him on the breast.

The parties then approached each other and met, and prisoner, with the stick in both hands, gave a blow on the side of the head of the deceased, who seemed to be dodging, and knocked him down. In attempting to rise, a second blow was given. The deceased had a knife in his hand, and while apparently dodging, shifted it from one hand to the other. The blow on the head

brought on concussion of the brain from which death ensued in a few hours. There was some evidence of threats and previous ill will on the part of the prisoner towards the deceased.

The witnesses for the prisoner gave a somewhat different version of the matter. They represent that the offensive words, "damned liar," first came from the deceased, and in response were repeated by the prisoner and applied to the former; that when the rock struck the prisoner, the deceased run at him with an open knife, and when near enough was felled to the ground by the blow given by the prisoner, and a second blow, over the shoulder, was stricken after deceased had fallen from the first; that deceased had carried his knife for 200 or 300 yards, and it was seen by prisoner put up under his sleeve; that when the parties came together after the throwing of the rock, the deceased went under the prisoner, with his knife in hand, bent as if about to cut with it, both advancing to the fight.

This summary of the evidence is sufficient for a proper understanding of the charge and the exceptions to it now to be reviewed on the prisoner's appeal.

These instructions were asked for the prisoner upon the different aspects of the evidence:

1. If the jury find that the prisoner killed deceased with a stick of the dimensions prescribed, the rule laid down in *State* v. *Willis*, that the burden of showing matter in mitigation, excuse or justification to the satisfaction of the jury rests upon the prisoner, does not apply, and if the jury have a reasonable doubt upon the whole evidence, the prisoner is entitled to it.

2. If the matter in mitigation, excuse or justification arise out of the evidence adduced for the state, the burden is not on the prisoner, and he is entitled to the benefit of any doubt arising therefrom.

3. If the parties fought upon a sudden quarrel by consent, with deadly weapons and on equal terms, no undue advantage being taken, the killing is manslaughter.

4. If the prisoner was assaulted by the deceased with the

rock and immediately resented the blow by killing the deceased, acting in heat of blood, his offence is manslaughter.

5. If the deceased after throwing the rock immediately advanced on the prisoner with a drawn knife, intending to kill or inflict some great bodily harm, the prisoner was not bound to retreat, but had a right to stand his ground and kill the deceased, and not only to do this, but to pursue his assailant till out of danger himself, and if in the conflict that followed he slew his adversary, it would be justifiable.

6. If when the prisoner gave the fatal blow he had reasonable ground to believe, and did believe, that deceased was about to take his life or inflict some great bodily harm, he had a right to defend himself, and, if necessary, kill the assailant.

In response to the prayer for instructions, the court proceeded to charge the jury as follows:

After describing the several grades of homicide and declaring the instrument used to be a deadly weapon, to which there was no exception, the court said:

1. If the prisoner made the threats, prepared the stick with a view of provoking and bringing on the fight, and did provoke and bring it on, with intent to use the stick and kill the deceased, his crime would be murder in killing him.

2. If the affray was sudden, both parties being willing to fight, and no undue advantage taken by the prisoner, the killing would be manslaughter.

3. If the deceased made the attack with the rock and a knife, the prisoner not having provoked it nor willing to engage in it, then the prisoner in self-defence might use the necessary means therefor, and that the jury, not the prisoner, must judge of the necessity.

4. If a deadly weapon was used and the attack on the prisoner made so as to indicate a purpose to endanger life or inflict great bodily harm, he was not compelled to flee, but had a right to defend his person and to pursue his adversary to disarm him, but for no other purpose.

At the close of the charge and at the instance of the prisoner's counsel and his suggestion that the jury had not been directed in case they had a reasonable doubt of the guilt of the accused, the court added that if the jury had a reasonable doubt as to the fact of the homicide, the prisoner was entitled to the benefit of it.

The two first instructions asked are but an effort to induce the court to reconsider and reverse its repeated rulings in the assertion and enforcement of the doctrine declared in the case referred to, *State* v. *Willis*, 63 N. C., 26, and the preceding cases of *State* v. *Ellick*, 2 Winst., 56, and *State* v. *Haywood*, Phil., 376, and which has since been affirmed in *State* v. *Smith*, 77 N. C., 488; *State* v. *Brittain*, 89 N. C., 481, and *State* v. *Garland*, at this term, *ante*, 668.

If anything can be settled and put at rest by judicial decisions, this principle has been, and we cannot now permit it to be drawn in question without impairing the confidence which ought to be reposed in the integrity and stability of the judicial administration of the law.

The third instruction requested was given in substantially similar terms.

The response to the fourth instruction, conforming more to the aspect of the evidence favorable to the prisoner, differs from that requested by inserting the additional words, "he, the prisoner, not being willing to engage in the fight and not provoking it," and concluding that "the jury, not the prisoner," must judge of the necessity of the means employed in repelling the assault. The modification gives to the prisoner all the protection the law affords him in mitigation of his act by reason of the heat of blood. But it was proper to qualify the general proposition, by excluding the idea of the prisoner's voluntary participation in bringing on or provoking the fight, or that the law made him the judge of the necessity of resort to a deadly weapon, instead of leaving to the jury to determine whether he had reasonable grounds for his conduct.

The last instruction varies from that asked in one material particular only, and of this the prisoner cannot complain. The jury were told that the prisoner not only was not compelled to flee from the fierce impending assault which menaced life or great bodily harm, "but had the right to pursue his adversary for the purpose of disarming him, and for no other," but they were not directed, in the words of the prayer, that the prisoner could pursue his assailant till out of danger himself, and if a conflict was thus brought on and the prisoner killed the deceased, this act would be justifiable. The charge is more appropriately guarded in confining the pursuit of the deceased to the object of disarming him and averting personal peril to himself. Human life is sacredly guarded by the law, and while indulgence is shown to passion suddenly aroused by adequate legal provocation, as an infirmity in nature, life can never be lawfully taken unless when another is put in imminent peril, and then only where there are no reasonable means of protecting it but to take the life of the assailant. *State* v. *Ellick*, *supra*, and authorities referred to; *State* v. *Harris*, 1 Jones, 190.

The court might have declined giving this instruction as not called for in any view of the evidence. When the deceased fell under the first, the mortal blow, and was struggling to get up, it can hardly be said that this and the next which fell upon his shoulders were in self-defence and for the prisoner's safety, and this is the most favorable aspect of his case.

Upon the whole, we think the charge obnoxious to none of the objections so earnestly urged in the effort to save his life.

The case seems to have been fairly explained to the jury, and the conclusion they have reached, under the directions of the court, we must leave undisturbed.

There is no error, and this will be certified to the end that the court below proceed to judgment according to the verdict.

No error. Affirmed.

*STATE v. JOHN TWIGGS.

Appeal—Certiorari—Discharge of jury before verdict.

1. No appeal lies from an order directing a mistrial and discharging the jury before verdict; and in this case the prisoner is not entitled to the writ of *certiorari* because it is not shown, by the facts set out in his petition, that the jury were improperly discharged.
2. The denial of the *certiorari* does not preclude the prisoner from setting up, on another trial, the defences relied upon in his petition.

(*State* v. *Bailey*, 65 N. C., 426; *State* v. *Jefferson*, 66 N. C., 309; *State* v. *Wiseman*, 68 N. C., 203; *State* v. *Honeycutt*, 74 N. C., 391; *State* v. *McGimsey*, 80 N. C., 377; *State* v. *Locke*, 86 N. C., 647; *State* v. *Washington*, 89 N. C., 535, cited and approved).

INDICTMENT for murder tried at Fall Term, 1883, of RUTHERFORD Superior Court, before *Gilmer*, *J.*

The prisoner appealed from the ruling of the court below.

Attorney-General, for the State.

Mr. M. H. Justice, for prisoner.

SMITH, C. J. The prisoner being put upon his trial on his plea of not guilty, and the testimony and argument of counsel having been heard, the jury, after being charged by the court at midday of Wednesday of the second and last week of the term, retired to consider the case and to make up their verdict. They returned into court the next, and again the following day, and declared their inability to come to an agreement, and were directed to return to their room and consult further. They came a third time into court on Saturday and announced the same result. Thereupon the court interrogated the jurors separately as to the probability of their arriving at a verdict, and, receiving the same answer from each, some of them saying they could not agree if kept together a month, and finding and

*Mr. Justice MERRIMON did not sit on the hearing of this case.

adjudging the fact of their inability to come to an agreement, ordered a mistrial and the jury to be discharged.

There was evidence adduced on the trial which the prisoner claimed secured to him the benefits of the amnesty act.

Upon these grounds the prisoner demanded his discharge, and from the refusal of the court to grant it he appeals.

It is settled by a series of adjudications that no appeal lies in a criminal action until after the rendition of final judgment in the cause. *State* v. *Bailey*, 65 N. C., 426; *State* v. *Jefferson*, 66 N. C., 309; *State* v. *Wiseman*, 68 N. C., 203, which were all cases of capital felony, and the error assigned was in discharging the jury without a verdict. This appeal must be disposed of as were the other appeals by an order of dismission. This will be certified.

SMITH, C. J. Failing in his appeal the prisoner applies for the writ of *certiorari* to bring up the record to the end that the correctness of the ruling of the court in refusing his discharge may be examined and determined.

The petition simply states that the jury retired to their room at 1 o'clock P. M., of Wednesday of the last week of the term, and not having agreed, were discharged on Saturday following. No facts are set out to show, nor are any averments made, that this was not a legitimate exercise of judicial power based upon an ascertained inability to agree, which we must assume to be the case upon the rule, *omnia præsumuntur rite esse acta*, until there be evidence or allegations to the contrary. So far from this, the petitioner states that the jury were kept together for four days in consequence of their disagreement, and were only released and allowed to separate on the last day of the term. The petition shows no facts sufficient to warrant the award of the writ.

If we were allowed to look outside of the petition into the case disclosed in the transcript sent up on the appeal, it would furnish no aid in support of the application, for there it appears that the jurors were separately examined and their answers with

the accompanying circumstances convinced the judge, and he so finds the fact to be, that an agreement was impracticable and the longer confinement of the jury would lead to no result. He had, under these circumstances and his finding their inability to arrive at a verdict, the right to order the mistrial. If there had been error in the ruling, the remedy is only by *certiorari* and in this way only can our revisory jurisdiction in such case be exercised. The matter is settled by former adjudications. *State* v. *Jefferson*, 66 N. C., 309; *State* v. *Honeycutt*, 74 N. C., 391; *State* v. *McGimsey*, 80 N. C., 377; *State* v. *Locke*, 86 N. C., 647; *State* v. *Washington*, 89 N. C., 535; and *State* v. *Washington* and *State* v. *Carland*, decided at this term.

The other ground of complaint that the prisoner's case comes within the provisions of the act for amnesty and pardon (acts 1872–'73, ch. 181), and he is entitled to be released, depends upon facts that have not been passed on and ascertained, and in reference to which we have the testimony of the witnesses, and it cannot now be considered.

This defence, if it be well founded, as well as the legal consequences of the disbanding of the jury, may be set up on the trial of the prisoner, if he shall be so advised; and the denial of his present application is not intended, as was said in *Washington's case*, to preclude him from doing so.

Motion denied.

STATE v. THOMAS L. SHIELDS.

Homicide—Evidence.

The prisoner and his sister were examined as witnesses in his behalf, from which it appears that the prisoner, having heard that an improper intimacy existed between his sister and the deceased, and that the latter was about to leave the neighborhood, went to see him and urged him to marry her before he left. The deceased peremptorily refused to do so, and thereupon a difficulty ensued in which the prisoner killed the deceased. In reply to the testimony of the female witness and to contradict her and the prisoner, the

state introduced a letter, written by the deceased to the female witness the night before the homicide, addressed to but never received by her; *Held*, on trial for murder:

(1) Upon an inspection of the testimony and the letter, as set out in the record, that the latter does not contradict the former, and it was therefore incompetent for that purpose.

(2) The letter was not competent to prove any fact stated by the deceased, and especially that he intended to marry her, because in this view it was hearsay merely.

(3) Nor was it competent as original evidence of the state of the affections of deceased towards her, from which the jury might draw the inference that the deceased intended to marry her, since it does not contain anything indicating a purpose on his part to do so.

(*Ingram* v. *Watkins*, 1 Dev. & Bat., 442; *State* v. *Waters*, 3 Ired., 445; *Churchill* v. *Lee*, 77 N. C., 341; *March* v. *Verble*, 79 N. C., 19; *State* v. *White*, 89 N. C., 462; *State* v. *Allen*, 1 Hawks, 6; *Patton* v. *Porter*, 3 Jones, 539; *Hislop* v. *Hoover*, 68 N. C., 141; *State* v. *Mikle*, 81 N. C., 552; *Winborne* v. *Lassiter*, 89 N. C., 1, cited and approved).

INDICTMENT for murder tried at Fall Term, 1883, of MECKLENBURG Superior Court, before *Gilmer*, *J.*

The prisoner is charged with killing one Joseph G. Sitton. Numerous exceptions were taken on the trial, but it is not deemed necessary to an understanding of the opinion of this court to set out more than is applicable to the point decided.

The state introduced evidence tending to show that on Tuesday, 5th of June, 1883, the prisoner, who lived with his father's family, about 250 yards from the house of his brother, David Shields, who had married a sister of the deceased, went to the house of the latter, where the deceased boarded, between six and seven o'clock in the forenoon, with his gun, and, after some conversation with his brother's wife, went into a room where deceased was reading. Prisoner said to deceased, "lets' go upstairs," and they went up to deceased's room. In a very short time thereafter, the report of a gun was heard in the room. The prisoner came out of the house with his gun, and upon meeting his brother David, was asked by him, "what are you doing frightening this child"—referring to his wife, who was alarmed; and the prisoner said, "you needn't be frightened, for I have

killed him"—the deceased; and upon being asked why he had done this, stated that the deceased had seduced his sister, Mollie Shields. He was then told that the deceased loved Mollie and wanted to marry her, and the prisoner said, "I've just asked him to marry her, and he said he would not do it." Nothing was said by prisoner about acting in self-defence.

The prisoner testified, among other things, in his own behalf that he went to see the deceased for no other purpose than to induce him to marry his sister and repair the wrong he had done her, and they went up to deceased's room; that deceased was in the habit of carrying a pistol, and not knowing what would be the result of the interview, the prisoner took his gun with him and put it just outside the room door. After some conversation about an account, the prisoner said to deceased: "I want you to marry my sister Mollie before you leave," telling him at the same time that he had seduced her, and deceased replied: "I can't do it, I'll die first," and put his hand in his hip pocket as if to draw a pistol, which was in his hip pocket, and the prisoner immediately reached for his gun and fired upon the deceased without taking aim, and then went down stairs and told what he had done. On Wednesday night before the homicide he saw deceased come out of his sister's room through a window.

Mollie Shields was introduced as a witness, in corroboration of the prisoner's statement, and testified (among other things set out in the opinion here) that the deceased had connection with her once; that she had known him about a year, and that she had engaged herself to him, and he had promised to marry her; that he visited her at night only and without the knowledge of the prisoner; that at the signal of a light at her room window the deceased would come; that when the prisoner told her he was going to see deceased and ask him to marry her, and said that she need not be surprised if there should be trouble, she replied: "I don't care what you do, the way he has treated me."

On cross-examination of this witness, the state exhibited to her and read to the jury, without objection, a number of letters,

bearing date from September 22, 1882, up to and including June 2, 1883, which she identified as letters written by her to the deceased.

The state, in reply to her evidence, and as tending to contradict both her and the prisoner, also offered in evidence a letter dated June 4, 1883, which was proved to be in the handwriting of the deceased (who was writing till a late hour on the night before the homicide) and found in his trunk with other letters and papers, after his death on the next morning. The state admitted that this letter was never mailed and never received by Mollie Shields. The prisoner objected to its introduction, but the court allowed it to be read to the jury and the prisoner excepted.

The extracts from these letters, set out in the opinion of the court, are sufficient to show the nature and character of the correspondence between Mollie Shields and the deceased.

The jury returned a verdict of guilty, and the prisoner appealed from the judgment pronounced thereon.

Attorney-General, for the State.
Messrs. W. P. Bynum and *Wilson & Son*, for prisoner.

MERRIMON, J. The letter of the deceased, written the night before, and found in his trunk soon after the homicide, addressed to, but never received by Mollie Shields, the witness and sister of the prisoner, and admitted in evidence, was incompetent and ought to have been rejected.

The prisoner was examined on the trial as a witness in his own behalf, and his sister Mollie was likewise examined for him, her testimony tending mainly to corroborate his. The principal purpose of their testimony was to show that the prisoner, having learned that the deceased had seduced his sister and was about to leave the neighborhood, went to see him for the purpose of urging him to marry her before he left; that he saw the deceased in the latter's chamber, and said to him: "Joe, I want you to marry

Mollie before you leave"; telling him at the same time that he had seduced and must marry her; whereupon the deceased replied, "I can't do it, I'll die first," and rose up, putting his hand to his hip pocket as if to draw his pistol, which was in his hip pocket, and shoot the prisoner, when the latter reached outside the door, got his gun and shot him, without taking any aim.

It was contended for the state that these witnesses had not testified truly, and an effort was made to discredit their testimony. The case settled upon appeal states that "the state, in reply to her evidence (referring to the witness Mollie Shields), and as tending to contradict both her and the prisoner, offered in evidence a letter dated June 4, 1883, a copy of which is also attached hereto as a part of the case, which the state proved was in the handwriting of the deceased, who was writing till a late hour on the night before the homicide, and was found in his trunk with other letters and papers after his death the next morning. The state admitted that this letter was never mailed and never received by Mollie. The prisoner objected to the introduction of this letter, but the court allowed it to be read to the jury, and the prisoner excepted."

It thus appears that the avowed purpose of introducing the letter in question was to reply to and contradict the testimony of the prisoner and his sister.

The case as presented by the reccord fails to specify in what respect, or how the letter contradicts or tends to contradict what was sworn to by them, nor did counsel on the argument inform us. Upon a careful examination and consideration of their testimony and the letter, we are unable to discover wherein the latter contradicts the former in any material respect. Indeed, in several particulars, the letter tends strongly to confirm what the witnesses said. Their testimony might be true, and yet the letter might represent the feelings of the deceased, as he therein expressed them, at the time it was written. The letter is a ridiculous, rhapsodical protestation of love for, and wild, unreasonable devotion to, the girl. Its whole spirit is that of unbridled pas-

sion. It suggests lustful desire, rather than pure affection and honorable devotion flowing from it. It protests the writer's burning love for the girl *ad nauseum*, but no reference whatever is made in it, by terms or reasonable implication, to marriage. Reference, however, is repeatedly made to the last interview the writer had with the girl on Wednesday night next preceding the homicide. That was the night the prisoner swore he discovered the deceased in his sister's room, and it was the occasion on which he debauched her, as she testified. Referring to the occasion, he says in the letter: "Darling, I want you to remain true to me, and when I do come I want to see you as loving as you were the last time I saw you." And again referring to it, he says: "Yet I hope it shall not be for a great while until I see you, and then, darling, I want you to be the same loving Mollie to me that you were when last I saw you." In another place he says: "Well, darling, five to eleven o'clock to-night, and I am sadly disappointed again. I have been waiting and watching that light, but reckon I'll have to give it up and go to bed." It is also stated in the letter that the writer was about to take his departure from the neighborhood for an indefinite length of time.

All this wild manifestation of passion was not inconsistent with the testimony of the prisoner and his sister. The prisoner testified that he asked the deceased to marry his sister, and he peremptorily refused to do so. This may or may not have been true, but the letter makes no reference to marriage; it does not hint at it, unless words expressive of wildest passion could be construed to imply it. As he was about to depart from the neighborhood for some time, if he was looking forward to marriage, how natural and appropriate that he should have made some reference to his purpose to return as soon as practicable, and claim her for his wife. But he makes no reference in the letter to any such purpose. The prisoner swore that he discovered the deceased in his sister's room on the Wednesday night next before the homicide, and that he told the deceased he had seduced his sister. The letter does not contradict this; it cannot

be so construed; on the contrary, it might be contended that it tends rather to confirm it.

The witness Mollie Shields swore that she had written to the deceased the letters attributed to her, and as well those sent up as part of the case. In their extravagant expressions of love, they are not unlike that of the deceased; but they are not inconsistent with it. She swore that he had criminal intercourse with her on the night mentioned; that she had known him about twelve months and had engaged herself to him; that he visited her in the night-time only; that at the signal of a light at the window he would come to it; that he had promised to marry her, and, on the Wednesday night mentioned, had promised to come back on the next Monday night; that she never talked with him after that Wednesday night, though she saw him; that she said to the prisoner at the breakfast table on the morning of the homicide, "I don't care what you do, the way he has treated me." This, whether true or false, was in nowise inconsistent with the letter; nor did it contradict what she said in any particular.

In our judgment, the letter did not contradict the prisoner or his sister, either in substance or effect; and it did not, therefore, serve the purpose for which it was put in evidence.

It seems that it may have been intended to prove, by an inference the jury might draw from the letter, that the purpose of the deceased was not seduction; that he was earnestly and sincerely attached to, and his purpose was to marry the girl; and, therefore, it was not probable, but altogether improbable, that he said to the prisoner when requested by him to marry her, "I can't do it, I'll die first," and made an effort to draw his pistol and shoot the prisoner.

Putting out of view for the present the remoteness of such an inference, the letter was not competent to prove the facts that warranted it. It must be treated as containing the declaration of the deceased, and it cannot have any other or greater pertinency, as evidence, than if he had said orally what he wrote in

the letter. If he had said in the hearing of witnesses what he wrote in the letter, his oral declarations would not have been competent. If the inference sought to be drawn from the letter had been embodied in terms, and declared by the deceased in the presence of witnesses, such declaration would not have been competent as evidence.

Thus, if, instead of saying what was written in the letter, the deceased had said the night before the homicide in the presence of witnesses, "I am engaged to marry Mollie Shields; I intend to marry her; I am going off on matters of business, but will return in a month, and we shall then be married"; this would have been incompetent, because it would have been hearsay. And if the letter had contained these or the like expressions, it would have been on the same footing. As evidence of what it contained, either in terms or by implication, it was hearsay. It contained the declarations of a third party not under oath, nor a witness on the trial whom the prisoner had an opportunity to cross-examine. Such evidence in a case like this is not admissible. *Ingram* v. *Watkins*, 1 Dev. & Bat., 442; *State* v. *Waters*, 3 Ired., 455; *Churchill* v. *Lee*, 77 N. C., 341. See also Stephens' Digest of the Law of Evi., ch. 3, art. 11.

Nor was the letter competent as original evidence, as an expression of the feelings of affection of the deceased towards the girl. This was in nowise material. Whether he loved her sincerely and his motives were pure, or his purpose was to gratify his lustful appetite, was not a material inquiry on the trial.

If it be said that his purpose was pure, and to marry the girl, and the jury might properly infer this fact from the state of his affections as manifested by the letter, we cannot yield our assent to such a proposition. If so remote an inference could be allowed in any case, it could not be allowed in this; for the purpose to marry the girl as manifested in the letter by any state of the affections developed by it, is so remote, indefinite, uncertain and shadowy, that it cannot be treated as evidence warranting an inference.

As we have said, the letter makes no reference to marriage, although the occasion on which it was written was appropriate to do so, if the writer contemplated it. It is replete with expressions of burning passion, and repeated references to and hints at pleasures very questionable, and that do not point to wedlock. There must be *evidence* from which an inference may be drawn, when it is allowable. *March* v. *Verble*, 79 N. C., 19; *State* v. *White*, 89 N. C., 462, and cases there cited.

So that in any view of the case, without intending to intimate any opinion as to the guilt or innocence of the prisoner, we think that the letter was not competent as evidence.

What measure of influence the letter had upon the minds of the jury, we cannot determine. It is sufficient that we can see that it might possibly have been used with considerable effect to the prejudice of the prisoner. Where incompetent and irrelevant evidence, objected to, is admitted, that might reasonably prejudice the party complaining, he is entitled to a new trial. *State* v. *Allen*, 1 Hawks, 6; *Patton* v. *Porter*, 3 Jones, 539; *Hislop* v. *Hoover*, 68 N. C., 141; *State* v. *Mikle*, 81 N. C., 552; *Winborne* v. *Lassiter*, 89 N. C., 1.

There is error, for which the prisoner is entitled to a new trial. Let this opinion be certified to the superior court of Mecklenburg county, to the end that that court may proceed in the case according to law.

Error. *Venire de novo.*

STATE v. F. A. MCNINCH and another.

Assault—Judge's Charge—Arrest by officer—Towns and Cities.

A police officer, in arresting one for violating a city ordinance, was indicted for an assault. The prosecutor alleged that the force used was excessive, and the judge charged the jury if such was the case the defendant was

guilty, but failed to call their attention to the good faith in which the officer claims to have acted; *Held*, error. The amount of force necessary to make the arrest is left to the judgment of the officer when acting within the scope of his general powers and actuated by no ill-will or malice.

(*Neal* v. *Joyner*, 89 N. C., 287; *State* v. *Staleup*, 2 Ired., 50; *State* v. *Pendergrass*, 2 Dev. & Bat., 365; *Furr* v. *Moss*, 7 Jones, 525, cited and approved).

INDICTMENT for an assault tried at Spring Term, 1883, of MECKLENBURG Superior Court, before *MacRae*, *J.*

The defendants McNinch and Healy, police officers of the city of Charlotte, are charged with assaulting the prosecutor, Robert C. Mason.

The prosecutor testified that while he was in the back yard in rear of Snider's bar-room, the defendant Healy came up and took him by the arm and told witness to go with him, and witness refused, and asked for his authority. Healy then jerked him and carried him into the bar-room, and struck at him with a stick, and also struck him under the eye with his fist. Witness was then taken to the guard-house. The defendant McNinch was present. Witness again resisted, when Healy put him in the guard-house and jerked him down on the floor, and locked him up. He was kept in confinement a half hour or more, and then released on bail for his appearance before the mayor of the city. Witness further testified that he was not drunk, was making no noise, and was not in any manner exposing his person; but that he was sick and went in the yard because it was not so warm there as in the house; and that McNinch came out into the yard about the time Healy struck him. He does not think he told the officers he was sick.

There was also evidence to the effect that defendants were pulling Mason and trying to get him along, and that he was advised to go with the officers; that Mason was not drunk; his nose was bleeding.

The city ordinance against drunkenness was put in evidence, and Healy testified that having received an order from McNinch (his superior officer) he went to the back-yard and found the

prosecutor there apparently drunk and asleep; that the prosecutor after he was roused up caught the witness by the throat and choked him, and the witness struck him a blow on the nose; did not strike or offer to strike with the stick he had at the time. The prosecutor was then taken to the guard-house, and upon his resisting, the witness pushed him in the guard-house, but did not jerk him upon the floor. Another witness testified that the prosecutor was cursing and making a considerable noise in the yard, and McNinch stated that in consequence of this he directed Healy to go and arrest him.

There was also testimony tending to show that Mason was indecent by exposing his person, and that on one side of the yard was a hotel and on the other a boarding-house—some of the windows of each overlooking the yard.

Several special instructions were asked by defendants, but they are not necessary to an understanding of the point decided. The opinion here sets out that portion of the judge's charge of which the defendants complain.

Verdict of guilty; judgment; appeal by defendants.

Attorney-General, for the State.
Messrs. Burwell & Walker, for defendants.

SMITH, C. J. The defendants are charged with assaulting and beating the person of one Robert C. Mason, and for arresting and maltreating him while in their custody. The defendants, in support of their plea of not guilty, sought to justify, as peace officers of the city of Charlotte, the arrest and detention of the prosecutor, upon the ground that he was found in a state of intoxication and behaving in a boisterous and disorderly manner, in violation of a city ordinance they were required to enforce, and no excessive or unreasonable force was used to overcome his resistance and convey him to the guard-house for a temporary confinement.

The evidence as to the condition of Mason, and his behavior and the manner in which the defendants exercised their power,

was somewhat conflicting, and needs not to be repeated to present, their exceptions, which their appeal from the judgment following correction brings up for review. The charge of the court, in response to the prayer for instructions asked and refused, and of which complaint is made, is in these words:

"Should you be satisfied from the testimony that Mason was drunk, or using loud and profane language, or indecently exposing his person in the place described, then you must enquire whether the defendant Healy struck him a blow that was unnecessary to enable Healy to complete the arrest. If he did, he is guilty of assault and battery; but McNinch would not be guilty of this assault and battery unless he was present aiding and abetting—that is, ordering, counseling or encouraging him."

"And you must further enquire whether more force than was necessary was used by Healy and McNinch, or either of them, in presence of the other at the guard-house, for if there was more than was necessary for his confinement used at the guard-house, and both were present aiding in the use of such force, or the one encouraging the other in the use, they would both be guilty of assault and battery."

The exception to the charge is that it transfers the honest exercise of the judgment of the accused, as to the degree of force required to overcome resistance and the means appropriate and adequate to secure submission, under the attending circumstances, to the cooler judgment of the jurors taking a retrospective view of the occurrence. It moreover ignores the question of the good faith in which the accused aver they acted in enforcing the ordinance and preserving public order and quiet.

This is, to say the least, a harsh measure of responsibility to hold officers to, when engaged in the public service and acting without malice or improper motive. It may be that less force would have sufficed; but should the misjudgment of the officers, while engaged in subduing opposing force, expose them to a rigid accountability, as criminals, because of the excess now seen to have been used, while nothing was done beyond the use

of such means as are ordinarily employed in such cases and which evince no malicious feeling or purpose?

While the individual citizen is protected by law against every invasion of personal security, he is equally interested in the maintenance of public order and the repression of crime for which the public agencies are formed and entrusted necessarily with large discretionary authority.

In making an arrest upon personal observation and without warrant, the officer will be excused when no offence has been perpetrated, if the circumstances are such as reasonably warrant the belief that it was (*Neal* v. *Joyner*, 89 N. C., 287), and the jury must judge of the reasonableness of the grounds upon which the officer acted.

On the other hand, the amount of force and the employment of the usual means in making the arrest and detention, when within the compass of the means ordinarily resorted to for securing one found committing a criminal act, must be left to the discretion and judgment of the officer, when, actuated by no ill-will or malevolent impulse, he is engaged in discharging a public and official duty.

In the words of GASTON, J., commenting on an instruction which directed the jury to determine "whether a man of ordinary prudence would not have deemed it necessary and proper to secure the prisoner by tying him," for doing which the accused constable then on trial had been indicted for an abuse of authority: "The act of tying is therefore within the limits of the officer's authority and of the propriety and necessity of adopting this mode of securing the prisoner; *the officer is the judge, and the jury cannot supervise the correctness of his judgment.* *State* v. *Stalcup*, 2 Ired., 50.

So where a teacher was charged with inflicting an excessive whipping upon a pupil, the same learned judge said: "Within the sphere of authority, the master is the judge when correction is necessary and of the degree of correction necessary: and like all others entrusted with a discretion, he cannot be made penally responsible for error of judgment, but only for wickedness of pur-

pose." * * * But the master may be punishable when he does not transcend the powers granted, if he grossly abuse them. If he use his authority as a cover for malice, and, under pretence of administering correction, gratify his own bad passions, the mask of the judge shall be taken off, and he will stand amenable to justice as an individual not invested with judicial power." *State* v. *Pendergrass*, 2 Dev. & Bat., 365.

The rule laid down in *State* v. *Staleup*, *supra*, is reasserted in *Furr* v. *Moss*, 7 Jones, 525, wherein MANLY, J., after declaring that a justice of the peace acting in his judicial capacity is not exposed to an action for a judgment however erroneous or malicious, proceeds: "It is not so, however, with regard to such acts as are not judicial but merely ministerial. With respect to the latter, if the officer transcend his powers maliciously (*mala fide*), he will be amenable to the person injured."

When this case was before us on a former appeal (87 N. C., 567) the exception passed on did not present the question of an excess of police power, but whether the arrested party was acting in violation of the law at the time.

While then the jury must say whether the defendants had reasonable grounds to warrant the arrest, and the charge in this respect is not obnoxious to criticism, there is error in an instruction which makes the criminal act depend, not upon an honest exercise of the judgment of the defendants as to the degree of force necessary to be exerted, under the restraints mentioned, but upon the conclusion of the jury, in a review of the facts, that the force was needless and the same result would have been obtained by the use of less. There must be a *venire de novo* and it is so ordered. This will be certified.

Error. *Venire de novo.*

STATE v. G. H. CRUMPLER.

False Pretence—Punishment.

The offence of obtaining goods by false pretence is a misdemeanor punishable by fine not less than $100 nor more than $1,000, or by imprisonment in the penitentiary for not less than one nor more than five years, or both, at the discretion of the court.

INDICTMENT for false pretence tried at Spring Term, 1883, of CUMBERLAND Superior Court, before *Shipp, J.*

The indictment is in the usual form charging the offence as a misdemeanor. After verdict of guilty, the counsel for defendant moved in arrest of judgment upon the ground that the offence of obtaining goods by false pretence is a felony, and the word "feloniously," which was necessary to characterize the offence, having been omitted in the indictment, no offence against the criminal law of the state is charged. The motion was overruled by the court, and the defendant appealed from the judgment pronounced—four months in the county jail.

Attorney-General, for the State.

Messrs. E. W. Kerr and *Walter Clark*, for the defendant.

ASHE, J. The cause assigned for the arrest of judgment is groundless. The offence of obtaining goods by false pretence is a misdemeanor, because it is not made a felony by statute. Bat. Rev., ch. 32, §67.

But we think His Honor committed an error in sentencing the defendant to four month's imprisonment in the county jail. The punishment imposed was the punishment for a misdemeanor at common law, which His Honor had no right to award. "Offences made misdemeanors by statute, where a specific punishment is not prescribed, shall be punished as misdemeanors at common law; but the punishment prescribed in section 29 of this

chapter shall be used only for crimes that are infamous or done in secrecy and malice, or done with *deceit and intent to defraud.*" Bat. Rev., ch. 32, §108.

For the offence of obtaining goods by false pretence, the legislature has prescribed a specific punishment, and His Honor had no power to impose any other punishment than that mentioned by the statute. In section 67, *supra,* the offence of obtaining goods by false pretence is defined, and the punishment prescribed is either by a fine not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the penitentiary of the state for a term not less than one year or more than five years, or both, at the discretion of the court.

The provisions of this statute have not been changed in any respect by THE CODE—see section 1026.

There is error. Let this be certified to the superior court of Cumberland county that that court may proceed to judgment in conformity to this opinion and the law.

Error in the judgment pronounced.

STATE v. BILL J. JAMES.

Larceny—Evidence—Judge's Charge.

1. There is no evidence in this case connecting the defendant with the alleged larceny, and the court should have so instructed the jury.

2. To constitute evidence, the acts and declarations of the accused must in themselves, or taken in connection with other facts, imply criminality in regard to the offence charged, and not a mere suspicion of guilt.

(*State* v. *White,* 89 N. C., 462; *State* v. *Patterson,* 78 N. C., 470; *State* v. *Rice,* 83 N. C., 661, cited and approved).

INDICTMENT for larceny tried at Fall Term, 1883, of BEAUFORT Superior Court, before *Avery, J.*

The defendant is charged with stealing two barrels of pork, the property of A. N. Vail & Son. The indictment was found by the grand jury in Washington county and removed to Beaufort county for trial.

The evidence was, "that a warehouse in which the pork was stored was broken open on Saturday night before the finding of the bill, and the pork taken therefrom; and it was found by witness on the following Tuesday morning in the water, near the bank of the Roanoke river, in the town of Plymouth—one end of each barrel being a little above the water." "Another witness testified that on Monday night after the alleged larceny the defendant told him that another man (naming him) had thrown some pork overboard into the river, and said to the witness, 'Let us go down and get it'; that defendant took the witness to a point on the bank of the river, near where the first witness stated he found the pork, and the defendant and the witness felt with poles for a few minutes for the pork, and for some reason the witness left the defendant and went off. There was no other testimony offered."

The defendant's counsel asked the judge to instruct the jury that there was no evidence to go to the jury of the defendant's guilt, but this was refused. There was a verdict of guilty. The defendant moved for a new trial upon the ground of insufficiency of evidence and the refusal of the court to charge as requested. The motion was overruled, and the defendant appealed from the judgment pronounced.

Attorney-General, for the State.
No counsel for the defendant.

MERRIMON, J. There was evidence to prove the larceny of the pork by some person, but in our judgment, what the defendant said to the witness did not constitute evidence to go to the jury to prove that he stole the pork, or received the same knowing it to have been stolen.

There was no fact or circumstance with which he had any connection, so far as appears, tending to show his guilt, apart from what he said to, and did in the presence of, the witness. What he said about the pork may have been true; it might be, and was, so far as appears, consistent with his innocence; it did not naturally, necessarily imply his guilt, or guilty knowledge of a larceny. If there had been other facts or circumstances, even slight in their nature, pointing to him as the guilty party, what he said and did might be important; but taken alone it simply creates a suspicion.

It does not appear that he knew of the larceny at the time he talked with the witness, nor that he and the witness discovered the pork when they went to the river, nor that he knew at the time that what he said was false. He said that a person, naming him, "had thrown some pork overboard in the river." He thus suggested means of contradicting himself; he was not contradicted; he and the witness went to the river, and "felt with poles for a few minutes for the pork"; it does not appear that they found it. There was neither concealment of anything, nor secrecy enjoined, nor word or act, that in its nature suggested in itself, guilt on the part of the defendant, unless it be the unusual and improbable fact that a man should honestly throw "some pork overboard" and that he should go to get some of it. This fact raises suspicion against him. The man, however, might have thrown pork overboard with criminal intent, and the defendant may have had no connection with such criminal purpose.

To make evidence, what is said and done must in itself imply criminality in regard to the offence charged in the indictment; or taken in connection with another fact, or other facts and circumstances, many or few, must imply criminality, not a mere suspicion; but it must imply it so strongly, as that, taking the fact, or the whole together, as true, the jury would reasonably be warranted in finding the defendant guilty. Facts short of this do not constitute evidence.

It is settled that facts and circumstances, to constitute evidence to go to the jury, must be such as would reasonably justify them in finding a verdict of guilty, if they believe the evidence to be true. A single fact may be strong evidence; a multitude may be so slight and so slightly bearing upon each other, tending to support an allegation, that they do not altogether make evidence; a multitude of little facts and circumstances, each proving nothing in itself, taken in their relative natural bearing upon each other, may make the strongest evidence. *State* v. *White*, 89 N. C., 462, and the cases there cited; *State* v. *Patterson*, 78 N. C., 470; *State* v. *Rice*, 83 N. C., 661.

We are of opinion that, taking the facts as true, bearing upon the defendant, they were not evidence to be submitted to the jury to prove him guilty. The court erred in refusing to so adjudge. For this error the defendant is entitled to a new trial. New trial awarded. Let this be certified according to law.

Error. *Venire de novo.*

STATE v. JESSE HEWELL.

Public Road—Easement—Concealed Weapon.

1. The laying off a highway over one's land does not deprive him of the freehold covered by the road. The public acquire only an easement—the right to pass and repass.
2. On trial of an indictment for carrying a concealed weapon off the defendant's own premises, the jury found specially that defendant, a minor, was seen with a pistol in a public road which ran over his father's land, and the judge ruled he was not guilty; *Held*, no error. In contemplation of law the son was not off his own premises.

(*State* v. *Davis*, 80 N. C., 351, cited and approved).

INDICTMENT for carrying concealed weapon, tried at Fall Term, 1883, of MITCHELL Superior Court, before *Graves, J.*

The indictment was found at spring term, 1883, as follows: "The jurors for the state upon their oaths present, that Jesse

Hewell, late of the county of Mitchell, on the first day of March, 1883, with force and arms at and in the county aforesaid, unlawfully and wilfully, and not on his own premises, did carry concealed about his person a certain pistol, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state."

The defendant pleaded not guilty and the jury returned the following special verdict: "That the said Jesse Hewell was in the public road with a pistol; that the road was over the land of the defendant's father; and that the defendant was a minor living with his father." Upon this finding, the court held that the defendant was not guilty, and the state solicitor appealed.

Attorney-General, for the State.
No counsel for the defendant.

ASHE, J. The defendant was indicted under the act of 1879, ch. 127, the first section of which declares it "shall be unlawful for any person in this state, except when upon his own premises, to carry concealed about his person any pistol, bowie-knife, dirk, dagger, slung-shot, loaded cane, brass or metallic knuckles, or other deadly weapon of like kind." And the third section provides that "any person being off his own premises and having on his person any deadly weapon described in section one, such possession shall be *prima facie* evidence of the concealment thereof."

According to the finding of the jury, the defendant was not guilty of a violation of this act.

The public road, in which the defendant was seen with the postol, was a road running over the land of his father.

The fact that a public road is laid off on a man's land does not deprive him of the freehold of the land covered by the road. His title continues in the soil, and the public acquire only an easement, that is, the right of passing and repassing along it. *State* v. *Davis*, 80 N. C., 351; *Dovaston* v. *Payne*, 2 Smith, L.

C., 90. The father certainly could not be indicted for carrying a pistol on the road over his own land, because it is on his own premises; and the son being a minor and living with his father as a member of his family, is in contemplation of law not off his own premises when on his father's land, where he has a right to be.

There is no error. Let this be certified to the superior court of Mitchell county that the defendant may have his discharge.

No error. Affirmed.

STATE v. TAYLOR BURNS.

Bigamy.

Bigamy was a misdemeanor at the time the indictment in this case was found, but it is made a felony by THE CODE, §988.

(*State* v. *Barnett*, 83 N. C., 615, cited and approved).

INDICTMENT for bigamy tried at Fall Term, 1883, of SWAIN Superior Court, before *Gudger, J.*

The defendant was indicted at spring term, 1882, and on the trial the jury found a special verdict to the effect that the offence was committed four years prior to the commencement of this prosecution, and submitted the question to the court whether the same was barred by the statute of limitations.

His Honor being of the opinion that the offence is a misdemeanor, held that it was barred by the statute and directed a verdict of not guilty to be entered, and the state solicitor appealed. This is the only question presented by the record for the determination of this court.

Attorney-General, for the State.

No counsel for defendant.

ASHE, J. From the researches we have made, we have been unable to find any satisfactory authority for holding that bigamy was an indictable offence at common law.

In the reign of EDWARD I., it was a matter under ecclesiastical cognizance, and in the reign of EDWARD IV. the cognizance of the plea of bigamy was declared by statute to belong to the court christian. A doubt as to whether the offence was cognizable in the temporal courts gave rise to the statute of JAMES I., which declared it to be a felony, and that statute was the substantial prototype of our act of 1790, which also declares the offence to be a felony, and that the person so offending should suffer death as in the case of felony. Of course the defendant was entitled to the benefit of clergy.

But to make the act more penal, the benefit of clergy was taken away from those convicted of the offence, by the act of 1809, and it was declared to be a capital felony.

This statute was followed by the act of 1829, which, though it declared it to be a felony, restored the benefit of clergy, and prescribed for the offence the punishment of fine and imprisonment, and one or more public whippings, and to be branded on the left cheek with the letter "B." The act as brought forward in the Revised Statutes, ch. 34, §14, reads:

If any person now married, or who shall be hereafter married, doth take to himself or herself another husband or wife, while his or her former husband or wife is still alive, *every such offence shall be felony*, and the person so offending shall suffer death, as in cases of felony, provided that he or she shall be entitled to the benefit of clergy, as in cases of felony at common law. And if any person shall be convicted of this offence and have the benefit of clergy allowed him or her, it shall and may be lawful for the court, before whom the offender shall be convicted, to sentence the offender to be fined and imprisoned, and to receive one or more public whippings, and to be branded on the left cheek with the letter "B."

But in the enactment of 1854-'55, with regard to the offence of bigamy, the words, "every such offence shall be felony," were omitted, and section 15 of chapter 34 of the Revised Code is in other respects substantially the same as that of the Revised Statutes, except with respect to the proviso in regard to the benefit of clergy, which was abolished by section 22 of chapter 34 of the Revised Code. The punishment is exactly the same. The words, "every such offence shall be felony," must have been omitted with a purpose, and we can conceive of no other purpose than to make the offence of bigamy a misdemeanor. But it can make no difference whether the omission occurred through design or inadvertence, for the felonious quality of the offence is taken away by the said 15th section of the Revised Code, which provides that "if any married person doth take to him or herself another husband or wife while his or her former wife or husband is still alive, the person so offending shall be fined and imprisoned and receive one or more public whippings, and be branded on the cheek with the letter 'B.'" And the subject of this section having been thus *revised* and *re-enacted*, all acts on the same subject were expressly repealed by section 2 of chapter 121 of the Revised Code; consequently, section 14 of chapter 34 of the Revised Statutes, which made bigamy a felony, was repealed, and as it is not made a felony by the Revised Code, or any subsequent act, it must have been a misdemeanor when this indictment was found. It was so declared in *State* v. *Barnett*, 83 N. C., 615.

It is now again made a felony by THE CODE, §988, but this indictment was found prior to the time when THE CODE went into operation, and the statute under which it was preferred was not repealed, but saved by THE CODE, §3870.

There is no error. Let this opinion be certified.

No error. Affirmed.

STATE v. ALEXANDER EDWARDS.

Indictment.

An indictment charging a misdemeanor as a felony does not raise the grade of the offence: calling it a felony does not make it one.

(*State* v. *Slagle*, 82 N. C., 653; *State* v. *Watts*, *Ib.*, 656; *State* v. *Staton*, 88 N. C., 654; *State* v. *Upchurch*, 9 Ired., 454, cited and approved).

INDICTMENT for burning an uninhabited house tried at January Term, 1884, of CUMBERLAND Superior Court, before *MacRae, J.*

The indictment was found at fall term, 1883, and is in substance as follows: The jurors, &c., present that the defendant, &c., did unlawfully, wilfully, maliciously and feloniously set fire to and burn a certain uninhabited house, the property of J. C. Blocker, with intent to destroy said house and to injure said Blocker, contrary, &c.

The jury returned a verdict of guilty, and the defendant moved in arrest of judgment, which motion was sustained and the state solicitor appealed.

Attorney-General, for the State.

Messrs. J. W. Hinsdale and *W. A. Guthrie*, for defendant.

ASHE, J. The defendant is indicted for burning an uninhabited house, which by statute is made a misdemeanor (Bat. Rev., ch. 32, §93), and the defendant moved to arrest judgment upon the ground that the offence, being only a misdemeanor, is charged to have been done "feloniously," and that the indictment was therefore defective. But this court has repeatedly held that the use of the term "feloniously" in an indictment for a misdemeanor does not raise the grade of the offence, and the word is to be treated as surplusage: that calling a misdemeanor a felony does not make it one. *State* v. *Slagle*, 82 N. C., 653; *State* v. *Watts*, *Ib.*, 656; *State* v. *Staton*, 88 N. C., 654; *State* v. *Upchurch*, 9 Ired., 454. There is error.

Error. Reversed

STATE v. MONROE CANNON.

Indictment—Motion in Arrest.

A motion in arrest of judgment cannot be grounded upon the fact that the prosecuting witness was foreman of the grand jury and endorsed the bill of indictment.

(*State* v. *Roberts*, 2 Dev. & Bat., 540, cited and approved).

INDICTMENT for false pretence tried at Fall Term, 1883, of BURKE Superior Court, before *Graves, J.*

After a verdict of guilty, the defendant moved in arrest of judgment, upon the ground that the bill of indictment found against him had been found by the grand jury at a term of the court when J. A. Lackey (the prosecutor) was the foreman of the grand jury, and signed his name on the bill as such, to the finding of the indictment as a true bill—the said Lackey having testified that he was the owner of the goods described in the indictment. His Honor refused the motion, and the defendant appealed from the judgment pronounced.

Attorney-General, for the State
Mr. Isaac T. Avery, for defendant.

ASHE, J. The cause assigned by the defendant for the arrest of judgment is groundless, and would be so if it appeared upon the face of the record. But a judgment can only be arrested for matter appearing, or the omission of matter which ought to appear in the record.

The record does show that Lackey was foreman of the grand jury; and it appears from the transcript that Lackey's name was endorsed on the bill as a witness, sworn and sent to the grand jury, but the endorsements on the bill of indictment form no part of the bill, and consequently no part of the record.

If an indictment be found without legal evidence, it may be quashed, or the matter may be pleaded in abatement, but not in arrest of judgment. *State* v. *Roberts*, 2 Dev. & Bat., 540.

There is no error. Let this be certified to the superior court of Burke county, that the case may be proceeded with according to law.

No error. Affirmed.

STATE v. W. H. ROSE.

Indictment—Removal of Crop.

1. An indictment for removal of crop in violation of the THE CODE, §1759, charging the defendant with removing the same "without satisfying all liens on said crop," is defective. The words of the statute, "before satisfying all the liens *held by the lessor or his assigns* on said crop," should have been followed. *Merritt's case*, 89 N. C., 506, approved.
2. The lessor himself is indictable under this statute for removing the crop or any part thereof, where he has previously conveyed his interest in the same to a third party.

(*State* v. *Merritt*, 89 N. C., 506, cited and approved).

INDICTMENT for misdemeanor tried at Fall Term, 1883, of NASH Superior Court, before *Philips, J.*

The defendant is charged with a violation of the act of 1876–'77, ch. 283, §6 (THE CODE, §1759), in removing crops. The indictment is substantially as follows:

The jurors, &c., present that one Eli Leggett rented from W. H. Rose (the defendant) certain land for agricultural purposes, and that Rose, for a valuable consideration, conveyed his interest in the crop and in the rent of the land to the Rocky Mount Mills; and that afterwards, the said Rose did unlawfully and wilfully remove from said land a part of the crop without the consent of said Mills, and without giving to the same or its

agent five days' notice of such intended removal, and "without satisfying all liens on said crop," contrary, &c.

The defendant moved to quash the bill upon the following grounds:

1. Because the statute upon which the indictment is founded has no application to the lessor (Rose) of the crop.

2. Because the indictment does not negative the consent of the lessor to the alleged removal of the crop.

His Honor allowed the motion and the state solicitor appealed.

Attorney-General, for the State.

Messrs. J. J. Davis and *Reade, Busbee & Busbee*, for defendant.

MERRIMON, J. The Attorney-General very properly conceded that this case must be governed by that of *State* v. *Merritt*, 89 N. C., 506, which is substantially like this. Here, there are two counts in the indictment, and in each it is charged that the seed-cotton was removed by the defendant "without satisfying *all liens* on said crops." The language here quoted from the indictment is not that of the act (THE CODE, §1759), nor does it embody the substance of it.

The act provides, "and before satisfying all the liens held by the lessor or his assigns on said crops." There might be *liens* on the crop other than those in favor of the "lessor or his assigns," and it would not be indictable to remove the crop or a part of it before these were satisfied. The indictment does not aver that the "lessor or his assigns" had liens on the crop. It may be, it is possible, he did not; it may be that other persons had; in either case, there would be no criminal offence under the statute.

The indictment ought to charge the relation between the "lessor or his assigns" and the lessee or the assigns of the latter, the liens on the crop, and that the defendant as lessee, or his assigns, or some other person, as the case may be, pending the relation, removed the crop or a part thereof from the land, "without the consent of the lessor or his assigns" (as the case may be), and

without giving him or his agent five days' notice of such intended removal, and before satisfying all the liens held by the "lessor or his assigns on the crops."

The court properly quashed the indictment. There is no error.

No error. Affirmed.

STATE v. JOHN LANIER.

Indictment—Motion in arrest and to quash—Endorsement on bill no part of record.

1. Judgment can be arrested only for matter appearing, or for some matter which ought to, but does not appear in the record.
2. Neither a motion in arrest nor a motion to quash will lie upon the ground that the endorsement on a bill that the witnesses were sworn and sent to the grand jury is not signed by the clerk, for it is no part of the record.
3. There is a presumption in favor of the legality of the finding of the jury.
4. But where the accused establishes the fact that the bill was found without evidence or upon illegal evidence, it may be quashed or the matter pleaded in abatement.

State v. *Thompson*, 83 N. C., 595; *State* v. *McIntire*, 2 Car. Law Rep., 287; *State* v. *Roberts*, 2 Dev. & Bat., 540; *State* v. *Harward*, Winst., 228; *State* v. *Guilford*, 4 Jones, 83, cited and approved).

INDICTMENT for larceny tried at Fall Term, 1883, of BEAUFORT Superior Court, before *Avery, J.*

Attorney-General, for the State.

No counsel for the defendant.

SMITH, C. J. The defendant charged in the bill with larceny was put on trial in the inferior court of Beaufort upon his plea of not guilty and convicted by the verdict of the jury. His counsel thereupon moved in arrest of judgment for the reason

that it did not appear that the witnesses, whose names were endorsed upon the bill as being examined by the grand jury, had been sworn. Opposite the name of each witness was a cross, and underneath were written the words, "those marked thus X sworn and sent," without signature. The motion was sustained and the state appealed.

The statement of counsel sent with the record to the superior court represents that a preliminary motion was made to quash, the consideration of which was reserved until after the rendition of the verdict, and was then allowed and the appeal then taken.

Upon the hearing in the superior court the judgment in the inferior court was reversed and ordered to be certified to that court, from which ruling the defendant appeals, and brings up for review the correctness of the reversing judgment.

As an appeal from an inferior court to a superior court is only allowed "for error assigned in matters of law in the same manner and under the same restrictions provided by law for appeals from the superior courts to the supreme court," and the record proper bearing the signature of the judge shows a reversal of the judgment in arrest made after trial, we are confined to an examination of that ruling alone. THE CODE, §809; *State* v. *Thompson*, 83 N. C., 595.

The judgment of His Honor was entirely correct and finds ample support in principle and authority, and the motion could not be entertained after verdict.

In *State* v. *McIntire*, 2 Car. Law Rep., 287, an indictment for murder, removed from Rutherford to Lincoln county for trial, where the objection was that the transcript did not show the bill to have been found upon evidence under oath, or that any witness was sworn and sent to the grand jury, in answer to the objection, TAYLOR, C. J., says: "The bill was found a true bill by the grand jury, and it cannot be presumed that it was found without evidence."

Upon the same point we quote fuller remarks of RUFFIN, C. J., in *State* v. *Roberts*, 2 Dev. & Bat., 540, also an indictment for murder: "Judgment can be arrested only for matter

appearing in the record, or for some matter which ought to appear and does not appear in the record. If a bill of indictment be found without evidence or upon illegal evidence, as upon the testimony of witnesses not sworn in court, the accused is not without remedy. *Upon the establishment of the fact*, the bill may be quashed or the matter may be pleaded in abatement. But the *judgment cannot be arrested*, for it is no part of the record, properly speaking, to set forth the witnesses examined before the grand jury or the evidence given by them, more than it is to set out the same things in reference to the trial before the petit jury. A memorandum of the witnesses intended to be used is generally made on the bill by the prosecuting officer for his own convenience, that he may know whom to call; and the clerk usually avails himself of it, and marks the names of such as are sworn, in aid of his memory, if the fact should be disputed. But none of these endorsements are parts of the bill, or are proper to be engrossed in making up the record of a superior court, which merely states that it was presented by the jurors for the state upon their oaths." *State* v. *Harwood*, Winst., 228; *State* v. *Guilford*, 4 Jones, 83; 1 Whar. C. L., §489.

The rule applies, if not with equal force, to the preliminary motion to quash *upon the same grounds.*

The same author cited above, in section 520, lays down the rule in these words:

"An indictment will not be quashed upon the ground that the endorsement upon it, stating that the witnesses were sworn and sent to the grand jury, is not signed by the clerk," and in support of the proposition he cites, *State* v. *Tucker*, 20 Iowa, 508; *State* v. *Cole*, 19 Wisc., 120; *State* v. *Fee*, *Ib.*, 562; *State* v. *Logan*, 1 Nev., 509.

The principle is, that proof that illegal evidence was heard by the grand jury or none was before them, in order to impeach their action, must come from the accused; and if none such is produced, the presumption in favor of the legality of their finding will prevail.

If the memorandum is to be considered as evidence that the witnesses named were examined, it is also evidence that they were sworn, and before a person competent to administer the oath.

There is no error in the judgment of reversal rendered in the superior court, and this will be certified.

No error. Affirmed.

STATE v. JAMES COLVIN.

Indictment for an attempt to commit a crime.

In an indictment for an attempt to commit a crime (here burglary), some overt acts of the accused, which in the ordinary course of things would result in the commission of the particular crime, must be alleged and proved.

(*State* v. *Utley*, 82 N. C., 556; *State* v. *Jordan*, 75 N. C., 27, cited and approved).

INDICTMENT for an attempt to commit burglary, tried at January Term, 1884, of ROBESON Superior Court, before *MacRae, J.*

The defendant was tried upon a bill of indictment which is substantially as follows: The jurors, &c., present that the defendant, &c., about the hour of ten in the night of the same day, with force and arms, &c., did feloniously attempt to break and enter the dwelling-house of Edward Surles, with intent the goods and chattels, &c., feloniously to steal, take and carry away, against the form of the statute, &c.

The jury found the defendant guilty, and thereupon his counsel moved in arrest of judgment upon the ground that the bill fails to state any acts of the defendant in carrying out his alleged design. The court allowed the motion and the state solicitor appealed.

Attorney-General, for the State.

Messrs. French & Norment, for defendant.

ASHE, J. The attempt to commit a crime is an indictable offence at common law. It, however, must be an attempt which stands in such connection with a projected deliberate crime that the crime, according to the usual and likely course of events, will follow from the attempt. 2 Whar. Cr. Law, §2705. And the same writer proceeds to say: "It is a familiar principle of criminal pleading, that where an act is only indictable under certain conditions, then these conditions must be stated in the indictment."

In examining the authorities upon the subject, we find this principle of criminal pleading to obtain with unvarying uniformity. The only exceptions are when the indictments were drawn under statutes declaring what shall be indictable attempts.

In Virginia, an indictment simply averring that the defendant did attempt feloniously to maim, was held to be insufficient because it did not allege some act done by the defendant of such nature as to constitute an attempt to commit the offence mentioned in the indictment. *Clark's case*, 6 Gratt., 675.

In Connecticut, it was held that though an attempt to commit a crime involves both a guilty intent and an *overt act*, yet it is not enough to charge an attempt merely, but both the intent and the overt act must be specifically alleged, and the overt act must be such as is in itself adapted to produce the effect intended. *State* v. *Wilson*, 30 Conn., 500.

In Wharton's Precedents (386) the form of an indictment at common law for an attempt to break into a dwelling-house is given, which is said to have been drawn by the Attorney-General of Pennsylvania in 1787, and it contains no averment of any overt act. But in 1821, in the case of *Randolph* v. *Commonwealth*, 6 Sergt. & R., 397, the supreme court of that state decided that an indictment, charging an attempt to pick the pocket of one B with intent to steal the money, property, goods and chattels of the said B, was too vague and uncertain to be supported. The court in the conclusion of the opinion use the following language: "To say that a man made an attempt is very uncertain

language. We cannot pretend to say what it is the defendant is charged with doing, and without knowing that we cannot determine whether what he did was an indictable offence. There is no precedent in support of such an indictment, and it appears to the court to be too loose, too vague, too uncertain to be supported." See upon same point 2 Bennett & Heard, L. C. C., 171.

In the case *State* v. *Utley*, 82 N. C., 556, and *State* v. *Jordan*, 75 N. C., 27, which are the only cases we have met with in our Reports where defendants were indicted for an attempt to commit a crime, the indictments conformed to the principle of pleading mentioned in the above cited cases, by averring the overt act constituting the attempt.

From an investigation of the authorities upon the subject, our conclusion is, that, to warrant the conviction of a defendant for such an offence, it is essential that the defendant should have done some acts intended, adapted, approximating, and, in the ordinary and likely course of things, would result in the commission of a particular crime; and this must be averred in the indictment and proved.

This indictment contains no such averment, and the judgment must therefore be arrested. There is no error. Let this be certified to the superior court of Robeson county.

No error. Affirmed.

STATE v. NELSON PORTER.

Indictment for burning a barn.

An indictment under the statute for burning a barn must aver that the act was done "with intent thereby to injure or defraud" some person. THE CODE, §985, sub-div. 6. And an indictment for such offence at common law must charge that the barn contained hay or grain, or is parcel of the dwelling-house.

STATE *v.* PORTER.

INDICTMENT for burning a barn tried at Spring Term, 1884, of MECKLENBURG Superior Court, before *MacRae, J.*

This was an appeal from the inferior court of Mecklenburg county, where the defendant was convicted.

The indictment: "The jurors for the state upon their oath present, that Nelson Porter and Dock Howard, of Mecklenburg, in the county of Mecklenburg, on the 1st day of November in the year 1883, with force and arms, a certain building, to-wit, a barn, the property of one H. K. Reid, there situate, feloniously, wilfully and maliciously did set fire to and burn, against the peace and dignity of the state and against the form of the statute in such case made and provided."

In the inferior court the counsel for the defendant moved in arrest of judgment, but the court refused the motion and the defendant appealed. In the superior court the motion was renewed and His Honor being of opinion that the indictment was good at common law, affirmed the judgment of the inferior court, and the defendant appealed.

Attorney-General, for the State.

No counsel for the defendant.

ASHE, J. The judgment pronounced by His Honor was erroneous. The judgment should have been arrested. The indictment cannot be sustained at common law or under the statute. Not under the statute, because it fails to charge that the act was done *with intent to injure or defraud some person.* THE CODE, §985, sub-div. 6. Nor can it be sustained at common law, because it was not an indictable offence at common law to burn a barn, unless the indictment contained the averment that it contained hay or grain, or was a parcel of the dwelling-house.

The following definition of the offence at common law is given by Sir MATTHEW HALE: "The felony of arson or wilful burning of houses is described by LORD COKE to be the mali-

cious and voluntary burning the house of another by night or day. It extendeth not only to the very dwelling-house, but to all out-houses that are a part thereof, though not contiguous to it, or under the same roof, as in case of burglary, the barn, stable, cow-house, sheep-house, dairy-house, milk-house. But if the barn or out-house be not parcel of the dwelling-house, it is not felony unless the barn have hay or grain in it." 1 Hale P. C., 566–7. All the writers of criminal law give substantially the same definition. See 2 Russell on Crimes, 1024; Wharton on Criminal Law, vol. 2, §1058. If the indictment had charged that the barn contained hay or grain, or that it was a parcel of the dwelling-house, the indictment would have been good at common law. The common law only threw its protection over such houses as were used for the habitation of man. The judgment must be arrested. Let this opinion be certified to the superior court of Mecklenburg county.

Error. Judgment arrested.

STATE v. MARTIN PHIFER.

Indictment for burning warehouse—Intent must be charged and proved.

1. In an indictment for burning a warehouse under THE CODE, §985, sub-div. 6, the intent to injure the owner is made an ingredient of the offence and must be charged and proved; it was therefore error in the court not to submit the question of intent as one of fact to the jury.

2. There is a presumption of law that one intends the natural consequences of his act, but this establishes only a *prima facie* case against the accused, and throws the burden of proof upon him to rebut the presumption.

(*State* v. *Jaynes*, 78 N. C., 504: *State* v. *Blue*, 84 N. C., 807, cited and approved).

INDICTMENT for burning a warehouse tried at Spring Term, 1884, of MECKLENBURG Superior Court, before *MacRae, J.*

STATE *v.* PHIFER.

This prosecution was commenced in the inferior court of Mecklenburg county, and the defendant is charged with burning a warehouse, the property of Springs & Burwell, in violation of THE CODE, §985, sub-div. 6. The defendant was convicted, and from the judgment pronounced appealed to the superior court, and the only exception there relied upon was that which was taken to the charge to the jury in the inferior court.

On the trial in the inferior court, the defendant asked this instruction: "That in order to convict the defendant, the jury must be fully satisfied, not only that he set fire to the warehouse, but that he did it with the intent to injure Springs & Burwell"; and the instruction given was: "This is true, but if the jury find that the defendant set fire to the warehouse purposely, the law presumes that every man intends the natural and necessary consequences of his own acts; and if he set fire to the warehouse and an injury to Springs & Burwell was the natural and necessary consequence of his act, the law presumes that he intended injury to them." The defendant excepted upon the ground that the statute required the intent to be charged (and this indictment charges that the offence was committed "with intent &c."), and insisted that whatever is necessary to be alleged it is necessary to prove; and if necessary to be alleged and proved, it was a question for the jury, and the court had no right to withdraw its consideration from the jury and decide it as a question of law in any state of the facts of the case.

Attorney-General, for the State.
No counsel for defendant.

ASHE, J. When the case was brought to a hearing in the superior court, His Honor held that "while the statute was intended to reach certain cases which were deemed not to be sufficiently provided for by law, it was not meant to repeal the old established rule of law raising a presumption that one intends the necessary consequences of his own act, and if the jury find

that the defendant wilfully burned the warehouse, there is a presumption both of law and fact that it was with the intent to injure the owners, and it was proper the court should so instruct the jury."

But the inferior court did not so instruct the jury, and in that consisted the error complained of by the defendant. The question presented by the record is, was there error in the charge given to the jury in the inferior court? We are of the opinion there was, for the reason that the court did not submit the question of intent, as one of fact, to the jury; and the superior court was in error in not reversing the judgment of the inferior court.

As a general proposition, it is true there is a presumption of law that every man intends the natural consequences of his acts, but this presumption has no other or greater effect than to establish a *prima facie* case against the defendant, and throw upon him the burden of proof. In the absence of opposing proof, the jury are bound by it. But when there is opposing proof it is a question for the jury to decide whether the presumption is rebutted. And here there was some evidence of that character, and in this respect the case at bar differs from that of *State* v. *Jaynes*, 78 N. C., 504, which was relied upon by His Honor to support his judgment in the superior court.

The confessions of the defendant were offered in evidence by the state, to the effect that he had stolen some cotton from the factory, and that he had set fire to the warehouse to prevent the detection of his theft. It was some evidence tending to rebut the *presumption of law* that the defendant burned the warehouse with intent to *injure* or *defraud* Springs & Burwell, and directly raised the question of intent, which was one of fact that should have been left to the jury. And especially must it be so, when the intent, as in this case, is made by statute an ingredient of the offence.

The intent then becomes a material fact, which must not only be charged, but proved, either by direct testimony or by circumstances from which the fact may be inferred by the jury.

If there had been, in this case, a special verdict, and the jury had found the burning without finding the intent to injure or defraud Springs & Burwell, the verdict would have been fatally defective, and a *venire de novo* would have been awarded. It was so held in the case of *State* v. *Blue*, 84 N. C., 807, which was an indictment for obtaining goods by false pretence under Battle's Revisal, ch. 32, §58, and the jury failed to find the intent with which the false representation was made. The court held the intent to *cheat* and *defraud* was an essential ingredient of the crime, and was a material fact which should have been found by the jury, and for the want of such finding a *venire de novo* was awarded.

There is error. The judgment of the superior court of Mecklenburg county is reversed. Let this opinion be certified to that court, that it may be certified to the inferior court of that county, to the end that a *venire de novo* may be awarded.

Error. *Venire de novo.*

STATE v. ERNEST WILLIAMS.

Burglary—Store-house—Indictment.

1. A store-house is a dwelling-house in which burglary may be committed, where it appears that a clerk or servant of the owner habitually slept in a bed-room therein, even though for the purpose of protecting the property. See next case.
2. The indictment in such case which lays the property in the owner of the store "then occupied" by the clerk, is in accordance with the suggestion in *State* v. *Outlaw*, 72 N. C., 598

(*State* v. *Outlaw*, 72 N. C., 598; *State* v. *Jenkins*, 5 Jones, 430; *State* v. *Potts*, 75 N. C., 129, cited, distinguished and approved).

INDICTMENT for burglary tried at Spring Term, 1884, of MECKLENBURG Superior Court, before *MacRae, J.*

The jurors, &c., present that the defendant, about the hour of two in the night, &c., a dwelling-house, the property of L. M. McLendon, then occupied by L. J. Hooks, feloniously and burglariously did break and enter with intent, &c.

It appears from the evidence that L. M. McLendon was the owner of a store-house in which there were goods, at Matthews, in the county of Mecklenburg, situate across the street from his dwelling-house, and upon a lot separate from any other house; that there was an upper floor in the store-house in which some goods were kept, on the back part of which a space was partitioned off in the corner for an office, and in the rear of the office part there was a bed-room reached through the office; that McLendon's clerk, L. J. Hooks, occupied this bed-room as his sleeping apartment and boarded with McLendon; that the room was built and the clerk put there to sleep for the purpose of protecting the property; that Hooks, the clerk, habitually slept in this bed-room, kept his trunk and clothing there, and that it was his home; that a part of the consideration for his services was his board and the sleeping apartment; that on the night of the 30th of December, 1883, Hooks and three other persons occupied the sleeping-room; that about two o'clock in the morning, they were awakened by a watchman from the outside of the building, and having armed themselves they made search in the house for a supposed burglar; that they found the prisoner, under a counter, and upon his person sundry articles of value, that appeared to have been taken from the stock of goods in the store; that other goods were found that appeared to have been removed by some one from the show-cases in which they properly belonged.

There was evidence tending to show that the prisoner had entered the house through an upper window, which he reached by placing boxes one upon another; that a pane of glass had been removed from the window-sash by using a butcher-knife found inside the window with putty on it; that the window through which the breaking was made was closed in the even-

ing, the early part of the night of the burglary, when Hooks retired to his sleeping-room.

The court charged the jury that, "if Hooks was a clerk of McLendon and occupied the room because it was convenient to occupy it, even though it was also for the protection of the goods in the store, and had his sleeping apartment there, which he habitually used as such, it was a dwelling-house belonging to McLendon, and occupied by Hooks, and the breaking into it in the night-time with intent to commit a felony would constitute the crime of burglary."

To this charge the prisoner excepted, and prayed the court to instruct the jury that, according to all the evidence in the cause, he could in nowise be convicted of burglary, because the store-house was not a dwelling-house in the sense contemplated by the law relating to that crime. This instruction the court declined to give, and the prisoner excepted. There was a verdict of guilty and judgment of death, from which the prisoner appealed.

Attorney-General, for the State.
Messrs. Wilson & Son, for prisoner.

MERRIMON, J. This case is in all material respects like that of *State* v. *Outlaw*, 72 N. C., 598, and must be governed by it.

The store-house and the goods therein belonged to McLendon. Hooks was his clerk, boarded with him and *habitually* slept in the store-house as his home, for the protection of the property. He had no lease or estate in the property, nor did he claim any, not even in the office or his bed-chamber adjoining it. He occupied it as his employer's clerk, and by virtue of that relation. The employer constructed the bed-chamber to be used by his clerk habitually, the motive being the protection of the property. The fact that the clerk got less wages because his employer boarded him and furnished the sleeping apartment in no sense changed the relation of the parties as employer and clerk. The latter occupied the room only as clerk, and there is no evidence

that he had or claimed to have any right to stay there in any other capacity. He neither owned nor controlled the use of his bed-chamber or the office adjoining it.

The property, therefore, was properly alleged in the indictment to be in McLendon. Indeed, the indictment seems to have been framed in pursuance of a suggestion made in the case above cited.

The sleeping apartment in the store-house communicated, up and down the stairs, directly and indirectly, through the office adjoining it, inside of the house with the store apartments, and was used by the owner McLendon as a sleeping chamber for his clerk, and the latter so occupied it, and habitually slept there. He kept his trunk and clothing there and it was regarded by him as his home. He did not sleep there only *occasionally:* he slept there *habitually*, and it was intended by his employer to be a regular sleeping place. This material fact distinguishes this case from that of *State* v. *Jenkins*, 5 Jones, 430. In that case the late Judge BATTLE said: "The breaking into a store-house, then, as such, is not burglary, and cannot become so, unless its situation makes it a part of the dwelling-house or unless it is otherwise made to assume the character of a dwelling-house. This may be done by being used *habitually and usually*, by the owner or his clerk or servant, as a place for sleeping, but not by being used *occasionally, only*, for such a purpose."

It was suggested on the argument that the clerk slept in the house "for the purpose of protecting the property." Grant that he did, this does not modify or affect the material and essential fact that he slept there *habitually*—that he had his trunk, his clothes, his home there, and that his employer and the owner of the property so intended, provided and directed, and therefore the law extended to the clerk, while he slept there, and to the house in which he slept, that measure of protection it extends to all men while they take repose in their dwelling-houses in the night-time.

This and like cases are clearly within the wise purpose of the law creating and defining the crime of burglary. The law treats the

habitations of men as sacred and regards them with particular favor at all times, and especially in the night-time, when they are closed and men are presumed to take quiet repose in sleep. Then, they have the right to rest securely in their dwelling-houses, free from fear, terror or danger. It is hence made a great crime to break into and invade the sanctity of the dwelling-house for a felonious purpose, thus producing terror and unusual peril to the inmates.

This law embraces, not a particular class of dwelling-houses, but all dwelling-houses, having about them the quality of permanency, in which men regularly, habitually sleep at night, no matter to what other purpose they may be devoted, nor what the motive prompting the owner of the house to establish it as a sleeping place for himself, his family, his clerks, his agents or his servants. Nor is a party confined to one dwelling-house; he may have two, three or more, and the law extends its protecting arm to all. And so, he may have one dwelling-house, and other houses; a store-house for example, near to his dwelling-house, in which members of his family, himself, his clerks and servants, or some one or more of them *regularly* and *habitually* sleep at night, and such houses are treated as part and parcel of his dwelling-house, and the law protects the same as part of it.

The counsel for the prisoner pressed upon our attention the case of *State* v. *Potts*, 75 N. C., 129. In that case, Mr. Justice RODMAN, while recognizing the law as properly laid down in the case of *State* v. *Outlaw*, *supra*, draws a nice and subtle distinction between the case where the person occupying the store-house is its owner or a member of his family or his servants, and the case where the person sleeps in it solely for the purpose of protecting the premises. In the latter case, he insists that the occupant is only a watchman, and the store-house cannot be regarded as a dwelling-house, although it had been occupied regularly as a sleeping place by the owner, his clerk or some other person by his license for about four years.

It is difficult to see how, if the store-house had become a dwelling-house in the eye of the law, the sleeping there by a *watchman* to protect the premises could change or destroy that feature. For, if one break into a dwelling-house in the night-time for a felonious purpose, though the owner and his family be temporarily absent, and no one be in it, it is burglary; and so it would still be burglary, though a watchman were sleeping in it to protect the property. His presence, no matter for what purpose, could not change the character of the house as a dwelling-house.

However, the distinction he seems to take and which is taken in some of the cases he cites, seems to be, that where one sleeps in a house simply as a watchman to protect the property, and sleeping there is merely incidental to the chief purpose of watching the property, then the house cannot be treated as a dwelling-house, and to break into it in the night-time with a felonious purpose would not be burglary; but if sleeping in such a house shall be regular and habitual in the ordinary course of living—not occasional, and merely incidental—and the protection of the property is only incidental, though intended, then, such a house would be a dwelling-house in which burglary might be committed.

However well founded this nice distinction may be, it does not affect the case before us, because the owner of the store-house had established the sleeping apartment in it, and his clerk slept there regularly and habitually. It was his sleeping place, and the protection to the premises was incidental. He was not there simply to watch and protect. He was there to sleep, and his presence there at night afforded some incidental protection to the property.

We have examined the record and find no error in it. The judgment must therefore be affirmed. Let this be certified.

No error. Affirmed.

STATE v. ADOLPHUS PRESSLEY.

Burglary—Store-house—Preliminary Examination.

1. See syllabus in preceding case.
2. The fact that the clerk in this case did not "board" with the owner of the store is immaterial; and there was no evidence that he leased the bedroom as a tenant so as to give him exclusive control over it.
3. The law does not require the examination of a committing magistrate to be certified under seal.

(*State* v. *Jake*, 2 Winst., 80; *State* v. *Outlaw*, 72 N. C., 598; *State* v. *Wilson*, 1 Hay., 243; *State* v. *Jenkins*, 5 Jones, 430; *State* v. *Potts*, 75 N. C., 129; *State* v. *Davis*, 77 N. C., 490; *State* v. *Parish*, Busb., 239, cited and approved).

INDICTMENT for burglary tried at Spring Term, 1884, of MECKLENBURG Superior Court, before *MacRae, J.*

It is not necessary to an understanding of the opinion to state the facts of this case, as they are very similar to those of the preceding case of *State* v. *Williams*.

The special instructions asked by the prisoner were to the effect that if the clerks occupied the room in the store-house, where the burglary is alleged to have been committed, solely for the purpose of protecting the property, and were not members of the family of E. D. Latta, or his servants, but occupied the same under an arrangement to receive less salary in consideration of such occupancy, then, that their sleeping in it habitually would not make the building a dwelling-house, so as to constitute the act of breaking with intent, &c., burglary. And that the jury be instructed to find whether Latta received a consideration for the use of the room, and if so, a tenancy between them would be established, and in such case to make the offence burglary the room so occupied would have to be broken into.

His Honor refused the instructions, and among other things told the jury that if they believed the evidence, they were clerks, that is, servants of Latta, and that there was no evidence of a tenancy—a renting of the room so as to give the clerks exclusive control of the same.

There was a verdict of guilty, and the prisoner appealed from the judgment pronounced.

Attorney-General, for the State.
Mr. Platt D. Walker, for prisoner.

MERRIMON, J. The indictment contains three counts, laying the ownership of the dwelling-house, first in E. D. Latta, secondly in his clerks jointly, and thirdly in one of them. The court instructed the jury that the evidence, if believed by them, proved the ownership in Latta, thus cutting the prisoner off from the defense that the clerks had leased the sleeping chamber from their employer, and it was not, therefore, a part of the store-house, and that the latter could not be treated as a dwelling-house.

It is insisted that this is error. We think otherwise, and that the instruction given by the court was correct.

Latta was the owner of the store-house and the stock of goods therein. He did not lease, or profess to lease, to his clerks the sleeping apartment, nor did they in any legal sense become his tenants. They occupied it by virtue of their relation to their employer, as clerks, and had no other control over it. Their employer agreed to pay them stipulated wages, or salary, and supply them with their sleeping place designated, and necessary gas; and one purpose had in view by both parties was that they should sleep there regularly, as a protection to the goods in the store. They were to occupy the room as a part of the service they had agreed to render as his clerks.

Besides, it is unreasonable, and altogether improbable, that the owner of the store-house and the goods in it would let to any one a chamber in his store, communicating with all parts of it, so that he could not in his discretion control it at any time and have the absolute occupancy of it. The nature of the transaction goes to show conclusively that Latta was the owner of the sleeping chamber, and his clerks occupied it under and for him,

and by virtue of their employment. Their possession was his possession. *State* v. *Jake*, 2 Winst., 80; *Rex* v. *Stock*, R. & R., 185.

This case is almost identical with that of *State* v. *Williams*, decided at this term, *ante*, 724. It differs from it only in the fact that the clerks did not "board" with their employer. In this respect it also differs from the case of *State* v. *Outlaw*, 72 N. C., 598.

This is not a material fact. The term "board" is used in the sense of taking meals with the employer in his house or elsewhere. It is not essential that a man's clerks shall eat at his table, or in his house, in order to establish the relation of employer and clerk. He may feed them in his own house, at a hotel, a restaurant, or in the store house, or they may "board" themselves wherever it suits their convenience.

The essential purpose of the law creating and defining burglary is to protect the house of men where they regularly dwell and habitually sleep in the night-time. It is to afford a large measure of protection to a man while he sleeps in his regular place of abode for sleeping. And in this sense, one person may have several dwelling-houses for his own comfort and convenience, and that of his family, servants and employees; and he may make a house where he carries on a business, as for example, sells goods, or manufactures and sells tobacco, or other things, a dwelling-house in which he may sleep himself, or have his clerks and servants sleep regularly and habitually. And it is none the less a dwelling-house in the eye of the law, because the leading motive for making it so is the incidental protection afforded the property stored in it. The question is, does the owner, or his clerks, or his servants, or employees, regularly abide, and habitually sleep there as their place of rest and repose.

There is no legal reason why men may not make their business houses also their dwelling-house, and have all the benefits legitmately arising therefrom. Indeed, on the contrary, there are cogent reasons in many supposable cases why they should

do so, and it is not at all uncommon in the course of business life. *State* v. *Wilson*, 1 Hay., 243; *State* v. *Jenkins*, 5 Jones, 430; *State* v. *Jake, supra; State* v. *Outlaw, supra; State* v. *Potts*, 75 N. C., 129; *State* v. *Davis*, 77 N. C., 490.

The counsel for the prisoner objected on the trial to the reading of his examination before the committing magistrate, the mayor of Charlotte, on the ground that the certificate of the mayor attached thereto was not under seal, and that the examination only set forth that the prisoner was informed of his rights in that respect, and was not examined in the presence of the witnesses. The court overruled this objection and the prisoner excepted.

This exception was not pressed on the argument before us, but nevertheless, we feel called upon to advert to it. The examination is not sent up, but the summary of it set forth in the case settled upon appeal for this court, shows that the statute was fully observed by the mayor in his caution to the prisoner. In addition to what he said by way of caution, he read the statute to him, and he has no ground of complaint in this respect. The statute does not require that the examination shall be certified under the private or official seal of the committing magistrate. The exception cannot be sustained. *State* v. *Parish*, Busb., 239.

We find no error in the record, and the judgment must be affirmed. Let this be certified.

No error. Affirmed.

STATE v. HARDY ALLISON.

Cruelty to Animals—Indictment—Jurisdiction.

1. An indictment for cruelty to animals, charging that the defendant "did unlawfully and wilfully" cruelly beat, &c., was held to be sufficient under the act of 1881, ch. 368 (THE CODE, §2482), and cognizable in the superior court.

2. Such offence, under the act of 1881, ch. 34, must be charged to have been done "maliciously," and is within the jurisdiction of a justice of the peace.

(*State* v. *Simpson*, 73 N. C., 269; *State* v. *Parker*, 81 N. C., 548, cited and approved).

INDICTMENT for cruelty to animals tried at Spring Term, 1883, of IREDELL Superior Court, before *Graves, J.*

The defendant was indicted at spring term, 1883, for a violation of the act of assembly in reference to cruelty to animals. The indictment is substantially as follows: The jurors &c., present that the defendant, with force and arms, &c., "did unlawfully and wilfully overdrive, torture, torment, cruelly beat and needlessly mutilate a certain cow, the property of, &c., by beating said cow and twisting off her tail," contrary, &c. The jury found the defendant guilty, and on his motion the judgment was arrested and the state appealed.

Chapter 368 of the acts of 1881, referred to in the opinion of this court, provides that one who violates the same "shall for every offence be guilty of a misdemeanor." And by chapter 34 of the acts of the same session, it is provided that any person who shall "maliciously" kill, cruelly beat, &c., "shall be guilty of a misdemeanor, punishable by fine of not more than fifty dollars, or imprisonment not more than thirty days."

Attorney-General, for the State.

No counsel for defendant.

MERRIMON, J. No ground for arresting the judgment is specially assigned in the record, and a careful examination has not enabled us to discover any. The indictment sufficiently alleges the offence denounced by the statute. Acts 1881, ch. 368.

It was suggested that the court below may have regarded the offence charged as coming within the provisions of chapter 34 of the acts of 1881, and therefore a justice of the peace had exclusive original jurisdiction of it. If the court entertained

such view, it was erroneous. That act is confined to *malicious* injuries of the kind therein specified, and the indictment for violations of it must charge the offence to have been done *maliciously*. The measure of the punishment is specifically prescribed in it, and a justice of the peace, because of this, has jurisdiction in such cases.

The act first mentioned above is essentially different from it, and it is much more comprehensive in its terms and scope. Under its provisions, the acts forbidden and which constitute the offence, are in several respects different from those specified in chapter 34, of the acts of 1881, and the offence was complete whenever the act done was unlawfully and wilfully, though not maliciously done. This act makes the offence a misdemeanor, but does not specifically prescribe the punishment for it. The superior court, therefore, has jurisdiction.

The indictment charges that the defendant "unlawfully and wilfully did overdrive," and do sundry other acts not mentioned in chapter 34, but which are mentioned in chapter 368. This latter act omits the word *malicious*, and it is not provided in terms that the acts forbidden must have been done "unlawfully and wilfully," but this is plainly implied. It cannot be supposed that the legislature intended that a person who should accidentally do the acts prohibited should be indicted therefor. This court has repeatedly and expressly held otherwise in construing statutes containing similar provisions. The pleader, in preparing the indictment, properly alleged that the acts charged were done "unlawfully and wilfully." *State* v. *Simpson*, 73 N. C., 269; *State* v. *Parker*, 81 N. C., 548.

The court ought, therefore, to have given judgment for the state. There is error, for which the order arresting the judgment must be reversed. Let this be certified to the superior court of Iredell county, to the end that that court may proceed to judgment according to law. It is so ordered.

Error. Reversed.

STATE v. JOSEPH T. WILSON.

Comments of Counsel.

The alleged improper remarks of counsel in this case do not constitute ground for a new trial, since the judge cautioned the jury that the words complained of should not be permitted to make any impression on their minds unfavorable to the defendant.

(*Overcash* v. *Kitchief*, 89 N. C., 384; *State* v. *Suggs*, *Ib.*, 527; *State* v. *Bryan*, *Ib.*, 531; *State* v. *Sheets*, *Ib.*, 543, cited and approved).

INDICTMENT for larceny tried at Fall Term, 1883, of ASHE Superior Court, before *Graves*, *J.*

Testimony was offered by the defendant tending to show an *alibi*, and one of the witnesses examined for this purpose was the defendant's son, about twelve years of age, who testified that he was at home on the night of the alleged larceny, and that his father (the defendant) came home that night about one o'clock and slept with him in the same bed until the next morning.

On the argument before the jury, one of the counsel assisting in the prosecution said, in substance, "that the testimony of the little boy is not to be relied on; that if the defendant had been at home that night he would not have contented himself with the testimony of a child necessarily under his influence, but would have called his wife to the witness stand," and then the counsel proceeded to speak of the defendant's wife as a woman of high character.

This course of argument did not escape the notice of defendant's counsel, and he made no objection to it at the time, but it did escape the attention of the judge who was considering written instructions which had been submitted.

After the argument closed, the defendant's counsel excepted, and called the attention of the judge to the language used, and he replied that it was improper and counsel would have been stopped if he had observed it at the time. Defendant's counsel

then remarked that "the wife of defendant is not in court; she is sick." Whereupon the opposing counsel said, in a tone loud enough to be heard by the jury, "she was here yesterday, for I saw her."

The court told the jury they must not consider statements made by counsel, but must find the facts from the testimony of the witnesses, and that it was not proper for counsel to have commented on the fact that the defendant had not introduced his wife to testify in his behalf; that the defendant was under no obligation to do so, and by the express words of the statute it was declared that his failure to do so could not be used to his prejudice; and that the argument and words complained of should not be permitted to make any impression on their minds unfavorable to the defendant.

There was a verdict of guilty. The refusal of the court to grant the defendant's motion for a new trial upon the grounds as above stated constitutes the only exception taken upon the trial. The defendant appealed from the judgment pronounced upon the verdict.

Attorney-General, for the State.
Mr. R. Z. Linney, for defendant.

MERRIMON, J. The counsel who, in his argument to the jury, transcends the limits of just debate by stating facts outside of the case, or making arguments and drawing inferences, not only not allowed, but forbidden by the law, seriously violates professional propriety, whether prompted by undue zeal for his client's cause or less worthy considerations. We believe that this is not often done by counsel in this state, but if occasionally it is, we are sure that under the check and rebuke of the court, it recoils more or less upon the client of him who thus forgets his duty and his station as a lawyer.

In this case the zeal of the counsel led him to go an unwarranted length, but the just judge was prompt to explain fully to

the jury the law applicable, and to caution them in plain, strong terms that what the counsel had said improperly ought not to prejudice the defendant. It does not appear that it did in the slightest degree. The judge who presided at the trial could best determine whether or not harm was done to the defendant by the matter complained of. We are very sure that if he had thought so, he would have been prompt to grant a new trial, as he had the power to do.

We have repeatedly held recently that the ground assigned in this case as error is not sufficient for a new trial. *Overcash* v. *Ketchie*, 89 N. C., 384; *State* v. *Suggs*, *Ib.*, 527; *State* v. *Bryan*, *Ib.*, 531; *State* v. *Sheets*, *Ib.*, 543.

No error appearing in the record, this judgment must be affirmed, and to this end let this opinion be certified to the superior court of Ashe county. It is so ordered.

No error. Affirmed.

STATE v. LEWIS RIVERS.

Injury to Stock—Statute, repeal of—Comments of Counsel.

1. A party charged with injury to stock running at large, cannot be allowed to set up, as matter of defence, the provisions of the "stock law" making it unlawful for the owner to permit his stock to run at large.
2. Section 94, chapter 32, of Battle's Revisal, was not repealed by the act of 1881, ch. 172; but the court intimate that the same has been changed by THE CODE, §1002.
3. The exception in this case in reference to remarks of counsel is not sustained The prompt interposition of the court counteracted any improper effect they might have had upon the jury.

(*State* v. *Woodside*, 9 Ired., 496; *Roberts* v. *Railroad*, 88 N. C., 560; *State* v. *Suggs*, 89 N. C., 527; *State* v. *Sheets*, *Ib.*, 543, cited and approved).

INDICTMENT for a misdemeanor, tried at Spring Term, 1883, of ANSON Superior Court, before *MacRae, J.*

Verdict of guilty; judgment; appeal by the defendant.

Attorney-General, for the State.
Mr. Sam'l T. Ashe, for defendant.

MERRIMON, J. The defendant is indicted for unlawfully and on purpose killing a bull running at large in the range in the county of Anson, with intent to injure the owner, in violation of section 94, chapter 32, Battle's Revisal. He insists that this statute is repealed as to the county of Anson by the act of 1881, ch. 172. This act is in force in that county, and by its provisions it is made unlawful for any live stock to run at large, and any person who shall permit his or her live stock to run at large therein shall be deemed guilty of a misdemeanor, and provision is made for impounding cattle seized while so at large.

It is contended for the defendant, that, as it is thus made unlawful for live stock to run at large in the county of Anson, the occasion for the statute upon which the indictment is founded, and the purpose for which it was enacted, to-wit: the protection of cattle running at large in the range where they may lawfully do so, no longer exists, and therefore, it is repealed by the act mentioned.

We cannot yield our assent to this interpretation of the statutes referred to. A statute, or parts of it, may be repealed by a subsequent one, when the intention of the legislature to repeal it is expressed in clear and unambiguous words. And also, where a subsequent statute contains provisions manifestly repugnant to, and inconsistent with, a former one, it impliedly repeals or modifies the latter. But the law does not favor a repeal by implication, and it will not be allowed, except where the repugnancy is plain, and the repeal is necessary to effectuate the legislative intent. Such repeal is never allowed, if both statutes can operate consistently, each with the other. *State* v. *Woodside*, 9 Ired., 496; Broom Leg. Max., 24; Dwarriss on Stat., 154, *et seq.*

The act of 1881 does not expressly repeal said section 94, nor does it do so by necessary implication. The repealing clause in it embraces "all laws and clauses of laws in conflict with" its provisions, but it does not in terms repeal any particular statute. Although it makes it unlawful for live stock to run at large in Anson county, and the owner guilty of a misdemeanor for allowing them to run at large, still, it does not authorize any person to kill or injure such stock found at large in violation of its provisions; on the contrary, it provides for their protection by impounding them. It is still unlawful to "kill, maim or injure" live stock, though found at large in the range, and there is nothing in the act of 1881 inconsistent with the statute that makes it indictable to "unlawfully and on purpose kill" live stock running at large in the range in Anson county, with intent to injure the owner, or with other unlawful intent. It may well be, it is not unreasonable to suppose, that the legislature did not intend to repeal or modify section 94. It is certainly not inconsistent with the act of 1881. It is not unreasonable that a statute should make it indictable to kill or maim stock unlawfully running at large in the range, with unlawful intent, if the legislature should deem it wise and necessary for the public good. It was competent for the legislature to repeal section 94, but it did not do so, and it cannot be taken that it did not act advisedly and with due consideration; on the contrary, it is presumed that it did. It is very clear that the two acts in question are not inconsistent with each other, as contended; but that both may operate, and it must be held that they do. *Roberts* v. *Railroad*, 88 N. C., 560.

It would seem, however, that THE CODE, §1002, has changed said section 94. It makes it indictable to kill, maim or injure any live stock "*lawfully*" running at large in the range. We express no opinion in this respect, as the question whether a change is made or not is not before us. The change could not in any view of it affect this case. THE CODE, §3870.

The exception as to the improper remarks of counsel cannot

be sustained. It does not appear that the jury heard what was said. It is probable they did not. But be this as it may, the court promptly reprimanded the counsel in the hearing of the jury, and in such way as to counteract any improper effect the remark might have had, if heard by the jury. It does not appear that the defendant suffered any prejudice on account of it. Besides, the objection was not made till after verdict. *State* v. *Suggs*, 89 N. C., 527; *State* v. *Sheets*, *Ib.*, 543.

There is no error. Let this opinion be certified to the superior court of Anson county, to the end that that court may proceed to judgment according to law.

No error. Affirmed.

STATE v. W. A. VOIGHT.

Liquor Selling—Evidence—Introduction of Original Records—Criminal Intent.

1. A license to retail liquor can issue only upon the application of the party to the board of county commissioners for an order directing the sheriff to grant the same. Permission given by the sheriff to retail without such order previously made, is in violation of the law and does not protect the seller from prosecution.

2. An order granting license may be revoked at the same session of the board.

3. Evidence of the understanding of a witness as to the meaning and import of orders and decrees is not admissible. They are ascertained by the terms in which the orders are drawn.

4. The contents of a public record may be proved in any court by the original record itself. The rule allowing a properly certified copy of such record to be admitted in evidence is grounded on the inconvenience of obtaining the original.

5. The criminal intent is involved in the intent to do the act which the law pronounces criminal.

(*Scott* v. *Green*, 89 N. C., 278; *State* v. *Moore*, 1 Jones, 276; *State* v. *King*, 86 N. C., 603: *Cheatham* v. *Hawkins*, 80 N. C., 161; *Ward* v. *Saunders*, 6 Ired., 382; *State* v. *Collins*, 3 Dev., 117; *State* v. *Reid*, 1 Dev. & Bat., 377; cited and approved).

STATE *v.* VOIGHT.

INDICTMENT for retailing without license, tried at Fall Term, 1883, of CAMDEN Superior Court, before *Avery, J.*

Verdict of guilty; judgment; appeal by the defendant.

Attorney-General, for the State.

Messrs. Grandy & Aydlett, for defendant.

SMITH, C. J. The charge against the defendant, of which he was found guilty, is for retailing spirituous liquors without license by the small measure, in the first count, less than a quart, in the second, less than a gallon, to the same person.

Upon the trial, after proof of the selling in the month of February, 1883, as charged, the defendant offered in evidence, as a license authorizing the act, the following writing:

"CAMDEN COUNTY, N. C., Dec. 4th, 1882.

Received of W. A. Voight one hundred dollars and seventy-five cents, in payment of retail liquor license to carry on the trade or profession of retail liquors until the 4th day of December, 1883.

Register's fee, 50 cents. Sheriff's fee, 75 cents.

D. M. SPENCE, Register of deeds.

M. N. SAWYER, Sheriff."

To rebut this evidence, the solicitor proposed, and after objection was allowed to show by the sheriff that the license was in fact issued the last of January, 1883, but was dated as of December 4, 1882, and so drawn as to cover the intervening space, because the defendant had requested him to apply at the December session of the board of county commissioners for permission to retail, and the witness, after speaking to one of them on the subject, directed the defendant to sell and he would apply for the order at the January session.

The state further offered in evidence the original book of entries of orders of the board, proving the fact of their being such by a member of the board who two years before had been clerk, and had himself, as such, made therein entries of the action

of that body. The proof of authenticity was received as sufficient, and the book admitted in evidence, to both of which rulings the defendant excepted.

The following entries, bearing date January 1st, 1883, appear therein:

"Ordered by the board that retail liquor license be granted to W. A. Voight to carry on a business at Hastings' corner for twelve months, to take effect Dec. 4, 1882."

"Ordered by the board that the retail license granted to W. A. Voight to do business at Hastings' corner be revoked."

The sheriff further testified, on being recalled, that the defendant was present at the making of both orders, and that, with the defendant's knowledge, the license was issued subsequent to the action of the board.

Upon cross-examination, the witness stated his understanding of the object of the first order passed by the board to be, and it was put in a form for, the protection of the defendant in any sales he may have made during the interval between the two sessions.

The defendant proposed, but was not allowed to enquire of the witness whether he considered himself directed by the board to issue the license, and again whether the board did not intend by the second order to revoke the first and prevent the sheriff from issuing the license.

The defendant asked that the following instructions be given to the jury:

1. The license was valid, and protected the defendant in the sale thereafter.

2. If the defendant did not intend to evade the law, or believed he had the right to sell he would not be guilty.

The court charged that if the jury were fully satisfied that the license was issued after January 1, 1883, and defendant knew it was subsequent to the revoking order, and thereafter sold the liquor as charged by measure less than a quart, they should convict, notwithstanding at the time of the act he had possession of the license.

The jury found the defendant guilty and from the judgment rendered he appeals to this court.

We approve of all the rulings of the court to which the record shows exceptions to have been taken during the trial, and in our opinion they furnish no legal grounds for complaint to the defendant.

1. The court very properly refused to receive evidence of the witness' understanding of the import of the orders, and whether he did not regard them as authorizing the issue of the license. The force and legal effect of the action of the board in passing the successive orders must be ascertained from the terms of the orders, and not the inconsistent and erroneous impressions made upon the mind of the witness by extraneous attending circumstances. The meaning of the board must be derived from the orders themselves and upon a fair interpretation of the language in which it is expressed. It is manifest from inspection that the last revokes and annuls the first, and this the board was clearly competent to do at the same sitting, if not after an adjournment. *State* v. *Green*, 89 N. C., 278.

2. The case was fairly put to the jury and the instructions asked were properly withheld.

The license was unauthorized, for it could only issue upon the application of the defendant to the board for an order directing the sheriff to grant the license. His act without this sanction could not confer a legal right to retail or protect the defendant in the act of violating the law. The issue of the license by the officer may involve him in criminal responsibility for the illegal selling, but does not excuse the defendant. *State* v. *Moore*, 1 Jones, 276.

Nor is it a defence to a criminal accusation that the defendant did not intend to violate or evade the law, or supposed he had a right to sell, when he intended to do and did do the criminal and forbidden act. The criminal intent is inseparably involved in the intent to do the act which the law pronounces criminal. It is needless to elaborate the point since the recent case o

State v. *King*, 86 N. C., 603; see also *Cheatham* v. *Hawkins*, 80 N. C., 161.

The last and only serious question, in whose solution we have had some hesitancy, relates to the admission of the original book in which are recorded the orders and proceedings of the board, instead of certified copies as authorized by section 715 of THE CODE.

This doubt arises out of the ruling in *Ward* v. *Saunders*, 6 Ired., 382, delivering the opinion in which case, RUFFIN, C. J., says in reference to the introduction of the original record in evidence: "Where the evidence is offered in the same court in which the proceedings were had, no difficulty can occur; because the court knows its own proceedings and records and can *instanter* order the enrollment and give the parties the benefit of it, in its complete state. Where the proceedings are in one court, and they are offered in evidence in another, regularly the original documents or minutes, which may need evidence to identify them, are not evidence, but only *the record made up, or a copy from it authenticated by the seal of the court.*"

So it is said by Mr. GREENLEAF: "As to the proof of records, this is done by the *mere production of the records*, without more, or by a copy." * * * "Where a record is the gist of the issue, if it is not in the same court, it should be proved by an exemplication." 1 Greenl. Evi., §501.

In the next section he adds: "The record itself is produced only when the cause is in the same court, whose record it is, or where it is the subject of proceedings in a superior court."

It will be observed that neither of these extracts deny the competency of the original record when a copy would be admissible, if the authenticity is fully established; and if it can be produced it is difficult to understand why a copy should be received, and not the original, as evidence. The inconvenience of obtaining the original induces the necessity of admitting the copy, not only under the certificate of the clerk or custodian, but as examined and its correctness verified by oral testimony. *Ib.*, §508.

The very objection now relied on was made in the case of *Gray* v. *Davis*, 27 Conn., 447, and overruled, the court remarking: "The object being to lay before the triers the real contents of the record, it would be absurd to hold that the best possible evidence, when adduced, should be excluded because inferior evidence by copy would be admissible." Referring to the same clause we have quoted from Mr. Greenleaf, the opinion proceeds with this comment: "But he (the author) does not say, and it is obvious he does not mean, that the contents of a record cannot in any court be proved by the original record itself, if it can be produced, but only to state the manner in which proof may be and usually is made." See also 2 Taylor Evi., §1393.

So this court has declared where conflicting transcripts are sent up to this court the clerk may be compelled to bring up the original record for the inspection of the court. *State* v. *Collins*, 3 Dev., 117; *State* v. *Reid*, 1 Dev. & Bat., 377.

But assuming the rule to be that when the evidence contained in the proceedings had in one court of record is required in the progress of a cause depending in another, it does not extend to proceedings had in an inferior tribunal. In such case the original is not excluded.

The same author declares in section 513: "The judgments of inferior courts," and to this class belongs the board of county commissioners in the exercise of judicial functions, "are usually proved by producing from the proper custody the book containing the proceedings."

While therefore a certified copy of the orders under the statute were admissible, the original orders were themselves competent, the authenticity of the book in which they were entered having been adjudged by the court.

There is no error. This will be certified to the end that the court below proceed to judgment according to the verdict.

No error. Affirmed.

STATE v. EDWARD BRYSON.

Sunday Laws, violation of—Indictment, proof to sustain—Liquor Selling.

An indictment charging the commission of an offence on Sunday (here selling liquor), when the doing the act on that day is the gist of the offence, though it names the day of the month which does not fall on Sunday, is sufficient, and may be supported by proof of its commission on a Sunday.

(*State* v. *Wool*, 86 N. C., 708; *State* v. *Drake*, 64 N. C., 589, cited and approved).

INDICTMENT for misdemeanor tried at November Special Term, 1883, of NEW HANOVER Criminal Court, before *Meares, J.*

The defendant is charged with selling liquor on Sunday in violation of THE CODE, §1117. There was a verdict of guilty, and the defendant appealed from the judgment pronounced.

Attorney-General, for the State.

No counsel for defendant.

SMITH, C. J. The defendant, indicted under the act of January 11th, 1877 (THE CODE, §1117), on his trial before the jury, was found guilty of the offence of selling intoxicating liquors without the prescription of a physician and not for medical purposes, on the 10th day of June, 1883, the said day being Sunday as charged in the bill. Upon the trial it was proved that the defendant, a licensed retailer of spirituous liquors, in the city of Wilmington, sold two drinks of whiskey to the witness, one for himself and one for his companion, on a Sunday either in the month of June or July, 1883, but on which Sunday in those months the witness was unable to say.

The defendant's counsel asked that an instruction be given to the jury that the verdict should be for the defendant, because the state had failed to prove the particular Sunday specified in the bill.

The court refused the prayer, and charged the jury that it was sufficient for the state to show that the retailing was on Sunday in one or other of the months mentioned by the witness. To this direction, as well as to the refusal to give that asked, the defendant's counsel excepted, and judgment being rendered on the verdict, the defendant appealed.

The statute is general in its terms, and applies to licensed retailers as well as to others (*State* v. *Wool*, 86 N. C., 708), and the appeal presents the single question whether the state is required to prove, not only that the selling was on a Sunday, but that it was on the day of the month mentioned in the bill.

The proposition is so utterly at variance with the well settled rules of criminal pleading and the uniform course of adjudications, that we are at a loss to find any plausible ground upon which the exceptions can be placed. It is due, however, to the accused that we consider the merits of his appeal.

An eminent author on criminal law lays down the principle governing in such cases in these words:

"The statement of the day of the month in an indictment for an offence on Sunday, though the doing of the act on that day is the gist of the offence, is not more material than in other cases; and hence if the indictment charge the offence to have been committed on Sunday, though it names the day of the month which does not fall on Sunday, it is good." 1 Whar. C. L., §§263 and 275. To the same effect, 1 Bishop C. L., §250.

It is expressly so ruled in the following cases: *State* v. *Frazier*, 5 Mo., 536; *State* v. *Eskridge*, 1 Swan (Tenn.), 413; *Megonon* v. *Commonwealth*, 2 Metc. (Ky.), 3; *People* v. *Ball*, 42 Barb. (N. Y.), 324.

In entire accord with these adjudications is our own ruling in *State* v. *Drake*, 64 N. C., 589, where the day of the month charged to be the Sabbath day did not in fact fall on the Sabbath.

The court quoted and approved the rule laid down by Mr. WHARTON in the passage which we have quoted.

There is no error in the ruling of the court; nor upon inspection do we discover any grounds for arresting the judgment. This will be certified to the court below that the court may proceed to judgment according to the verdict.

No error. Affirmed.

STATE v. SIDNEY B. HOLT.

Trial by Jury, cannot be waived in criminal cases.

A jury trial cannot be waived in a criminal action; hence where the facts were agreed upon by the state and the accused and submitted to the judge for his decision, *it was held*, that such a procedure is not warranted by the law.

(*State* v. *Stewart*, 89 N. C., 563; *State* v. *Moss*, 2 Jones, 66, cited and approved.)

INDICTMENT for cruelty to animals, tried at January Term, 1884, of WAKE Superior Court, before *Shepherd, J.*

The defence is former conviction, the plea being set out in the record. And then comes the following: "The court heard said plea upon the following facts agreed between the state and the defendant, to-wit: that the defendant at June term, 1883, of said court, came into court in his own proper person and entered his plea of guilty to a bill of indictment then pending, to-wit, an indictment for cruelty to certain domestic animals described as 'game cocks'; that it was stated to His Honor, the then presiding judge, that certain other bills were then under consideration by the grand jury, for cruelty to domestic animals; that the said bills are the same as that now pending against this defendant, and no other bills; that the counsel for the state stated to the court that there were other bills pending before the grand jury, and that the cock-fight had continued for three days and the judgment should be heavier on that account, and the judge

remarked, 'let every tub stand on its own bottom,' and fined the defendant in that case (at June term, 1883) twenty-five dollars, and held the defendant to answer in the other cases." Signed by the counsel for the defendant and the solicitor for the state. "That the various bills including this one were for fighting on different days, but in the same main." Signed by defendant's counsel and the solicitor.

His Honor overruled the plea of former conviction. Thereupon the defendant pleaded guilty, and from the judgment imposing a fine of twenty-five dollars the defendant appealed.

Attorney-General, for the state.

Messrs. T. P. Devereux and *J. E. Bledsoe*, for defendant.

MERRIMON, J. The defendant indicted under THE CODE, §§2482 and 2483, prohibiting "cruelty to animals." He pleaded "former conviction." The case was called for trial. It does not appear that the defendant waived or undertook to waive his right to a trial by jury, but the case states that it was "agreed between the state and the defendant" that a statement of facts submitted to the court were the facts of the case. This statement was not submitted in the shape of a special verdict, but it seems that it was intended to be so treated.

The court, upon consideration of the facts thus submitted, found the issue raised by the plea against the defendant, gave judgment for the state, and the defendant appealed to this court.

The constitution (Art. I, §13) provides 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. The legislature may, however, provide other means of trial for petty misdemeanors with the right of appeal."

The substance of this provision is taken from *Magna Charta*. For centuries the right of trial by jury in criminal cases has been regarded by the English people as one of their chief and sure defenses against abitrary power. The colonists in this

country brought that right to this, from the parent country, and it has become a part of the birthright of every free man. The people of the American Union, and especially the people of this state, have, ever since their existence as a people, regarded and treated this provision in their organic law as an essential feature in free government, and as one of the fundamental bulwarks of their civil and political liberty. They have always given it a place in that part of the constitution denominated, because of its superior importance, The Declaration of Rights. They guard it with jealous care and unceasing solicitude, and any open infraction of it would certainly give rise to general alarm and deep discontent, resulting sooner or later in the reassertion of constitutional supremacy or flagrant civil strife.

This solicitude of the people is not unnatural, unnecessary or unworthy. They show but a reasonable appreciation of a provision in government of the highest moment to them. The just purpose and excellence of trial by jury, especially in criminal cases, are not imaginary and whimsical, or the outgrowth of popular ignorance and persistent clamor. While it is not perfect as a method of trial, has its imperfections, and is sometimes perverted and prostituted, nevertheless, the practical experience of one of the freest and most enlightened nations of the earth for centuries and of this country during all the time of its existence, the sanction of it by the wisest statesmen and jurists in different ages, as well as common sense, have proved its inestimable value as the best method of trial, in criminal cases especially, and the necessity for it as a constituent provision in any system of free government. Judge STORY, in his Commentaries on the Constitution, thus points out its great purpose and the ends it subserves: Section 1780. "The great object of a trial by jury in criminal cases is to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people. Indeed, it is often more important to guard against the latter than the former. The sympathies of all mankind are enlisted against the revenge and

fury of a single despot, and every attempt will be made to screen his victims. But how difficult is it to escape from the vengeance of an indignant people, roused to hatred by unfounded calumnies, or stimulated to cruelty by bitter political enmities, or unmeasured jealousies? The appeal for safety can under such circumstances scarcely be made by innocence in any other manner than by the severe control of courts of justice, and by the firm and impartial verdict of a jury sworn to do right, and guided solely by legal evidence and a sense of duty. In such a course there is a double security against the prejudices of judges who may partake of the wishes and opinions of the government, and against the passions of the multitude who may demand this victim with their clamorous precipitancy. So long, indeed, as this palladium remains sacred and inviolable, the liberties of a free government cannot wholly fall. But to give it real efficiency, it must be preserved in its purity and dignity, and not with a view to slight inconveniences, or imaginary burthens, be put into the hands of those who are incapable of estimating its worth, or are too inert, or too ignorant, or too imbecile to wield its potent arm."

It is scarcely to be supposed that in this country any serious danger could arise to the citizen or to the country generally from an open or flagrant violation of the fundamental right in question. Occasional instances have occurred in times of public danger and trouble wherein the citizen was deprived of his right to a trial by jury, and his life was unlawfully sacrificed, but such cases have been few, and have met with very general condemnation.

A greater danger arises from practices and precedents that insidiously gain a foothold and power in courts of justice, by inadvertence and lack of due consideration. The great importance of trial by jury is sometimes lost sight of, even in courts of justice, in the disposition of petty misdemeanors, cases of no great moment, and what are called "plain cases." In the economy of time, the hurry of business, lack of attention, hasty

consideration, irregular and unwarranted methods of trial are adopted, allowed, tolerated, and thus vicious practices spring up, creating sources of danger to constitutional right.

It is the province and the duty of the courts to keep strict watch over and protect fundamental rights, in all matters that come before them. Those who administer the law should never forget that decided cases make precedents, precedents oftentimes of little moment in themselves, but which, in their accumulated power may, in some emergency, overturn principle and subvert the rights of many people.

Mr. Justice BACKSTONE, in commenting upon the great excellence of trial by jury, thus points out the evil to which we advert: "So that the liberties of England cannot but subsist so long as this palladium remains sacred and inviolable, not only from all open attacks (which none will be so hardy as to make), but also from all secret machinations, which may sap and undermine it by introducing new arbitrary methods of trial by justices of the peace, commissioners of the revenue, and courts of conscience. And however convenient these may appear at first (as doubtless all arbitrary powers, well executed, are the most *convenient*), yet let it be again remembered that delays and little inconveniences in the form of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon the sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution, and that, though begun in trifles, the precedents may gradually increase and spread, to the utter disuse of juries, in questions of the most momentous concern."

These observations are not made, so much with reference to this particular case, as for counteracting what seems to be a tendency in this state to ignore, sometime in matter of moment, trial by jury, in cases where, under the constitution a trial must be had in that way. The case of *State* v. *Stewart*, 89 N. C., 563, was like this in its material features, except, that in that case, a trial by jury was expressly waived, and the court was requested

to find and did find the facts. Cooley, on Const. Law, 239; *Cancemi* v. *People*, 18 N. Y., 128.

There was not the remotest purpose in this case, we are sure, to infringe the right of trial by jury in a criminal action, but for convenience sake and to save time (because the facts were not disputed), the facts of the case were agreed upon by the state and the defendant, and submitted to the judge, instead of letting a jury hear the evidence, and render a verdict upon the issue, or find a special verdict.

In our judgment, this was not only irregular, but wholly without the sanction of law. There is no statute that authorizes such procedure, and the constitution forbids it. "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court." No jury was empaneled to try the issue; there was no verdict of a jury; there was no conviction! The judgment of the court had nothing to warrant it, and there was nothing upon which it could properly rest.

The defendant could not consent to a conviction by the court. It had no authority to try the issue of fact raised by the pleadings. The defendant did not plead guilty; he did not enter the plea of *nolo contendere*, or submit"; he pleaded *antrefois convict*, and a jury must try the issue raised by that plea. *State* v. *Stewart*, *supra*; *State* v. *Moss*, 2 Jones, 66; 1 Bish. Cr. Pl., §759, and cases there cited; *Cancemi* v. *People*, 18 N. Y., 128.

The legislature has not provided a means for the trial of cases like this, different from the ordinary method provided by law.

The court erred in passing upon the facts agreed upon and submitted to it without the finding of a jury, and for such error the judgment must be reversed and the court proceed to dispose of the case according to law.

Error. Reversed.

STATE v. STEPHEN ROYAL.

Verdict, impeachment of.

The verdict of a jury cannot be impeached by one of its members. (*State* v. *McLeod*, 1 Hawks, 344; *State* v. *Smallwood*, 78 N. C., 560; *State* v. *Brittain*, 89 N. C., 481, cited and approved).

INDICTMENT for an assault tried at Fall Term, 1883, of CUMBERLAND Superior Court, before *McKoy, J.*

The defendant was charged with an assault with a deadly weapon upon one Benjamin Walker, and was found guilty by the jury. He then moved for a new trial upon an affidavit of one of the jurors who tried the case, to the effect that "the jury came to the conclusion of the defendant's guilt because he failed to have present and examine his son, who it was in evidence was present at the time of the alleged assault." But His Honor refused to hear the affidavit, and pronounced judgment, from which the defendant appealed.

Attorney-General, for the State.
Mr. W. A. Guthrie, for defendant.

ASHE, J. There is no principle of law better settled in this state than that evidence impeaching their verdict must not come from the jury, but must be shown by other testimony. *State* v. *McLeod*, 1 Hawks, 344; *State* v. *Smallwood*, 78 N. C., 560; *State* v. *Brittain*, 89 N. C., 481.

It is therefore ordered that the motion for a new trial be overruled, and that the superior court of Cumberland county proceed to judgment against the defendant agreeably to this opinion according to law.

No Error. Affirmed.

APPENDIX.

CASES CITED.

INDEX.

8. The deposition of a witness taken in a former action is not admissible in a subsequent one, unless the parties and matters in issue in the latter are the same as in the former. *Bryant* v. *Malloy*, 508. See also, *Sparrow* v. *Blount*, 514.

9. To render the evidence competent in such case upon the ground of privity between the parties, it must appear that the party offering it has acquired an interest in the subject-matter from a party to the former action subsequent to its institutions. Privity, in the sense here used, is a privity to the former action. *Ib.*

10. And it must also be shown there was an action pending and properly constituted, in which the deposition was taken, involving the point in question in the action in which it is offered. *Ib.*

11. Where a record is set up as an estoppel to a subsequent action, the party must aver and prove the identity of the precise point on which the first action was decided; and parol proof is admissible in aid of the record of the first trial, if it fails to disclose such point. Here, there was no record, and, therefore, no foundation for the offered proof. *Ib.*

12. There is no evidence in this case connecting the defendant with the alleged larceny, and the court should have so instructed the jury. *State* v. *James*, 702.

13. To constitute evidence, the acts and declarations of the accused must in themselves, or taken in connection with other facts, imply criminalty in regard to the offence charged, and not a mere suspicion of guilt. *Ib.*

14. Evidence of the understanding of a witness as to the meaning and import of orders and decrees is not admissible. They are ascertained by the terms in which the orders are drawn. *State* v. *Voight*, 741.

15. The contents of a public record may be proved in any court by the original record itself. The rule allowing a properly certified copy of such record to be admitted in evidence is grounded on the inconvenience of obtaining the original. *Ib.*

16. The criminal intent is involved in the intent to do the act which the law pronounces criminal. *Ib.*

not be assigned for error in this court. The party complaining should have submitted a prayer for special instructions upon the trial. *Brown* v. *Calloway*, 118.

2. An error in the charge of the judge, which is not unfavorable to the party complaining, is not ground for a new trial. *Cowles* v. *Hall*, 330.

3. It is the duty of the judge, at the request of a party to an action, to put his instructions in writing and read them to the jury. THE CODE, §414. But where the court, as here, gave oral instructions not differing from those set out in the written charge, and the appellant makes no suggestion to the contrary, his exception to the oral part of the charge does not constitute ground for a new trial. *Currie* v. *Clark*, 355.

4. If there be error in the charge of the judge, it is deemed excepted to without filing any formal objection by the party complaining (THE CODE, §412), and may be taken advantage of for the first time in this court. *Lawton* v. *Giles*, 374.

5. If a party be entitled to special instructions asked, it is sufficient if the court give them in substance. *Patterson* v. *McIver*, 493.

6. It is sufficient if the judge in charging the jury gives the substance of the testimony of the witnesses; and especially so, where he asks counsel if a recapitulation of the evidence in detail is desired, and no request for the same is made. *State* v. *Gould*, 658.

7. A charge upon the subject of reasonable doubt cannot be made the subject of exception, upon the ground that the judge superadded an explanation thereof when such explanation is in itself a proper one. *Ibid.*

8. On trial for murder the judge charged the jury, among other things, that the prisoner is not required to prove matters of excuse or mitigation beyond a reasonable doubt, but to the satisfaction of the jury; "but the degree of proof is not so far relaxed that he may establish them by a bare preponderance of evidence, but must do so to the satisfaction of the jury"; *Held*, no error. The meaning of the instruction is, that the jury must be *satisfied;* and if not satisfied, a *bare* preponderance of proof will not do. *State* v. *Carland*, 668.

9. The rule laid down in *Willis'* case, 63 N. C., 26, that the burden of proving matter of mitigation rests upon the prisoner, &c., and affirmed by repeated decisions of the court, is the settled law of this state. *State* v. *Mazon*, 676.

10. The court charged the jury in this case that "if deceased attacked with the rock and knife, the prisoner, not having provoked the fight nor willing to engage in it, might use the necessary means of self-defence, but the jury and not the prisoner must judge of the necessity. And