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NORTH CAROLINA REPORTS

VOL. 92.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA.

FEBRUARY TERM, 1885.

REPORTED BY
THEODORE F. DAVIDSON.
(Vol. 1.)

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JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA,

FEBRUARY TERM, 1885.

CHIEF JUSTICE:

WILLIAM N. H. SMITH.

ASSOCIATE JUSTICES:

THOMAS S. ASHE, AUGUSTUS S. MERRIMON.

ATTORNEY-GENERAL:

THEODORE F. DAVIDSON.

CLERK OF THE SUPREME COURT:

WILLIAM H. BAGLEY.

MARSHAL OF THE SUPREME COURT:

ROBERT H. BRADLEY.

JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA.

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FREDERICK PHILIPS,	2d	"	W. J. MONTGOMERY,	8th	"
H. G. CONNOR,	3d	"	JESSE F. GRAVES,	9th	"
WALTER CLARK,	4th	"	ALPHONSO C. AVERY,	10th	"
JOHN A. GILMER,	5th	"	WILLIAM M. SHIPP,	11th	"
ALLMAND A. MCKOY,	6th	"	JAMES C. L. GUDGER,	12th	"

SOLICITORS.

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CRIMINAL COURT JUDGE.

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

SOLICITORS.

BENJAMIN R. MOORE.....New Hanover.
GEORGE E. WILSON.....Mecklenburg.

LICENSED ATTORNEYS,

FEBRUARY TERM, 1885.

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SAMUEL WEIR DICK.....Guilford.
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WILLIAM LEIGH WILLIAMS.....Bertie.
GEORGE GREGORY WILSON.....Guilford.

CASES REPORTED.

CASES CITED.

FEBRUARY TERM, 1885.

CASES CITED.

ERRATA.

Mr Justice Merrimon, having been of counsel, took no part in the decision of Syme, Administrator, v. Badger, page 706, or in University v. The Bank, page 651.

Page 21, line 15, from the bottom, for "two-thirds" read "two-fifths."

Page 102, line 4, from the bottom, for "reversion" read "remainder."

Page 101, line 2, from the bottom, for "Martha" read "Mary," and for "Suttle" read "Hay."

Page 117, line 15, from bottom, for "ten" read "one."

Page 119, line 5, of the opinion, for "§1270" read "§1276."

Page 120, in paragraph 3, for "§1270" read "§1276."

Page 147, in line 2, from top, for "by" read "of."

Page 460, in line 2, from the top, for "compliance" read "acceptance."

Page 548, in the line next to the last, in paragraph 2, after the word "plaintiff" insert the word "as."

Page 549, line 22, for "irregular" read "singular."

Page 549, line 7, from the bottom, for "proper" read "purpose."

Page 550, in line 9, from the bottom, for "explained" read "expressed."

Page 552, line 11, for "resist" read "insist."

Page 644, line 14, for section "596" read section "550."

Page 619, line 5, for "involved" read "invoked."

Page 507, last line, for "violate" read "vitiate."

Page 733, line 4, of the head note, for "when" read "before."

CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA,

AT RALEIGH.

FEBRUARY TERM, 1885.

CAMILLA GRUBER, by her next friend S. E. F. GRUBER v. THE WASHINGTON AND JAMESVILLE RAILROAD COMPANY.

Appeal Bond—Waiver of Justification of—Corporations, Torts of—Ultra Vires—Negligence.

1. Where the case on appeal, made out by the presiding judge, uses the words "Bond fixed at $25, bond given," it was held a waiver of the statutory requirement that the surety to the undertaking on appeal must justify.
2. Where the approval of an unjustified bond is the act of the clerk, there is no waiver, unless the appellee is present, or afterwards assents.
3. Where the owners of a steamboat provided a pass-way which was exposed to escaping steam, and a passenger was injured in consequence by the escaping steam; *Held* that the owners were liable.
4. *It seems*, that where by its charter, a corporation was empowered to cut and manufacture lumber and to ship the same to market, it can, in providing means of transportation for its own products, as incidental to its own business, carry the goods of others and passengers.
5. It is no defence to an action of tort, that the tort complained of resulted from an act which was *ultra vires*. So, where a corporation undertook to carry passengers, one of whom was injured by the negligence of the corporation, it was immaterial to inquire in an action for damages on account of such negligence, whether the corporation had the power under its charter to carry passengers, or not.

(*Hancock* v. *Bramlett*, 85 N. C., 393; *Harshaw* v. *McDowell*, 89 N. C., 181, cited and approved. *McMillan* v. *Nye*, 90 N. C., 11, distinguished).

CIVIL ACTION tried at Spring Term, 1883, of MARTIN Superior Court, before *Shepherd, J.*

The appellant, a corporation formed under an act of the General Assembly for the purpose of cutting and forwarding to market timber growing upon lands in certain specified counties, and with authority to construct and operate a railroad through said lands between the towns of Washington and Jamesville on the Roanoke river, in furtherance of the objects of its organization had employed steamers to run, as common carriers of persons and freight, between its last named terminus and the town of Elizabeth City, touching at Edenton on their way. In October, 1881, the plaintiff, an infant of tender years, with her parents and under their care, took passage from Elizabeth City to Edenton on the Juniata, one of the two steamers constituting the line. The boat arrived at Edenton, and, when the gang-way plank to the wharf was announced clear for passengers to go out, the plaintiff, passing along the way to the wharf, was struck by a jet of steam or hot water issuing with great force from the condenser in the engine-room through an unclosed door, and falling upon the gang-way where the plaintiff and others were, from which she was scalded and badly injured. The action is to recover damages in compensation therefor.

Several issues were submitted to the jury which, omitting needless verbiage, with the responses, so far as they pertain to the appellant's liability, were as follows:

I. Was appellant, the railroad company, the proprietor of the steamer on which the injury occurred, and was she engaged in conveying passengers and freight between Jamesville and Elizabeth City? Answer—Yes.

II. Did the appellant receive the plaintiff as a passenger on said boat at Elizabeth City for conveying to Edenton? Answer—Yes.

III. Did the said company so negligently and unskillfully conduct themselves in the management of said boat as to injure

the person of the plaintiff by the escaping steam or water? Answer—Yes.

IV. Did the plaintiff contribute to the injury sustained thereby? Answer—No.

The answer to the other issue was but in an assessment of damages.

The only exceptions, shown by the record to have been taken, were to the refusal of the court to give these instructions:

I. If, as the evidence discloses, the injury was caused by defective machinery and not by the negligence of the agents and officers of the company, the plaintiff was not entitled to recover, and that,

II. Taking the facts to be as testified to by the witnesses, the company had incurred no liability to the plaintiff.

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

The defendant moved in the Supreme Court to dismiss the appeal on the ground that the undertaking was defective.

Mr. George H. Brown, Jr., for the plaintiff.
Mr. James E. Moore, for the defendant.

SMITH, C. J., after stating the above: The motion to dismiss the appeal for want of a justification of the sufficiency of the sureties to the undertaking filed must be denied.

The case settled by the presiding judge with consent of parties on September 14th, 1883, and bearing his signature, contains these words:

Judgment—appeal by railroad company—bond fixed at twenty-five dollars—*bond given*—notice waived—by consent defendant given 30 days to serve statement of case.

The undertaking had been executed early in July preceding, and consequently has been accepted in its present form. We interpret the language of the judge, as importing that the undertaking was proposed to be entered into with the named sureties in court, and no objection to their sufficiency then made.

The subsequent execution of the instrument in accordance with the appellant's offer, and the acquiescence of the appellee therein, must be deemed a waiver of the statutory requirements in this regard.

In *Hancock* v. *Bramlett*, 85 N. C., 393, the case made out by the judge contained words essentially the same, "filed and approved," and were held to indicate a tender and acceptance in open court to which the appellee, having then made no objection, could not be heard to make it in this court.

To the same effect is *Harshaw* v. *McDowell*, 89 N. C., 181.

The ruling, in *McMillan* v. *Nye*, 90 N. C., 11, is not repugnant to these cases, since the filing and approving is there the act of the clerk and appears in his certificate, it not being shown that the appellee was present or ever assented.

It is to be observed that the instructions asked, were entirely inappropriate in the form of directions to the jury, for they were not pertinent to a single inquiry before them. The jury were to find the facts in response to the several issues, and not the law arising upon the findings. It was the province of the court to determine, when the facts were thus ascertained, whether the company was responsible for the wrong done, or, in other words, whether the plaintiff was entitled to judgment for the damages she had sustained.

But assuming the intent of the prayer to have been to present to the court the alleged repugnancy of the proofs to the averments in the complaint, as to the manner in which the injury was inflicted, the refusal of the court was entirely correct.

If the machinery was defective and unsafe, it is not less true, that there was that want of watchfulness and care on the part of the employés, by which the injury might have been avoided. The steam was seen previously to have issued; a pass-way out was provided which was exposed to it, and the door was left open, through which it was permitted to pass and smite those who were there passing. If this be so, there was great culpability on the

part of the employés and the damage directly resulted from their carelessness and inattention in not providing against it.

The second instruction points to no specifically assigned error and to give it any significance, we must suppose it was predicated upon the proposition that the company's undertaking the business of common carriers by water is outside the scope of its corporate powers—*ultra vires*—so that in that capacity, it would not render itself liable to persons or for property conveyed in its steamers.

It is somewhat questionable whether there has been in this respect such a departure from the purpose of the organization, as to make the establishment of the line of water communication as a further means of reaching a market, an exercise of power not within the operation of the principle intended to be expressed in those words.

By the words of the charter the company was authorized "to cut and manufacture lumber and *ship the same to market*," (Acts 1868–'9, chapter 37), and in providing this means of transportation for its own forest productions to a market it may, perhaps as incidental to its own business, carry the goods of others, and passengers.

In *South Wales Railway Company* v. *Redmond*, 10 C. B. (N. S.), 675, a contract made by a company whose railway terminated at Milford Haven, with another for steam-vessels to run from that point to Ireland, was held not to be *ultra vires* and that the defendant having provided an unseaworthy vessel was liable in damages, Erle, C. J., remarking, "so far from a contract by this company to facilitate the forwarding of passengers and goods to Ireland being illegal, I rather gather that the legislature contemplated and intended that a railway terminating at Milford Haven should forward traffic to and from Ireland, and therefore this contract would be entirely within the scope and object of the company's incorporation and extension."

But if it is conceded that the line of steamers was not within the contemplation of the charter and was unwarranted by it, it by no means follows that upon the wrongful assumption of the

business of common carriers, it can be conducted without incurring the obligations for safe transportation which belong to the exercise of those functions. It can be no defence to the company which undertakes to receive and carry persons for hire, that they had no legal right so to do, when charged with responsibility for wrongs coming to those who commit their personal safety to the agents of the company, and who suffer from their negligence and misconduct.

"Herein" remarks a late writer, "consists a great distinction between *tortious* and *contractual liability* for acts *ultra vires*. It is no defence to legal proceedings in tort, that the torts were *ultra vires*. If the torts have been done by the corporation, or by their direction, they are liable for the result, however much in excess of their powers, such torts may be." *Green's Brice's Ultra Vires*, 265.

In *Merchants' Bank* v. *State Bank*, 10 Wall 604 (645), the court say: "Corporations are liable for every wrong of which they are guilty and in such cases the doctrine of *ultra vires* has no application."

"A corporation will be held to respond in a civil action at the suit of an injured party for every grade and description of forcible, malicious or negligent tort or wrong which it commits, however foreign to its nature or beyond its granted powers, the wrongful transaction or act may be." *Green's Brice's Ultra Vires*, 241, note; *Railroad Co.* v. *Schuyler*, 34 N. Y., 30.

It is needless to pursue the subject further. The instruction was properly withheld and the proposition not acted on.

There is no error and the judgment is affirmed.

No error. Affirmed.

B. B. WINBORN v. W. A. BYRD.

Appeal—Certiorari—Duties of Counsel.

1. Where the appellant's counsel told him that he (the counsel) would do everything necessary towards perfecting his appeal, but the counsel failed to file a proper appeal bond; *Held*, no ground for a *certiorari*.
2. If an appellant fails to perfect his appeal, either by his own negligence, or that of his agent, he loses it absolutely.
3. In this class of cases, the appellant is only entitled to the writ of *certiorari* as a substitute for an appeal, where he has lost his appeal by no act or neglect of his own, or of his agent, but by the error or neglect of the Court or its officers, or by the contrivance of the appellee or his agent, or by their acts or declarations, reasonably calculated to mislead, or where by some insurmountable obstacle, he is prevented from perfecting his appeal.
4. It is immaterial that it was the appellant's counsel who neglected to file a proper appeal bond, as it was not his duty as counsel to do so.
5. *It seems*, that any neglect by an attorney of his duties as counsel, will entitle a party to relief.

(*Davis* v. *Marshall*, 2 Hawks 59.; *Baker* v. *Halstead*, Busb. 41; *McConnell* v. *Caldwell*, 6 Jones 469; *Griel* v. *Vernon*, 65 N. C. 76; *Francks* v. *Sutton*, 86 N. C. 78; *Geer* v. *Reams*, 88 N. C. 197; *Elliottt* v. *Holliday*, 3 Dev. 377, cited and approved).

This was a petition for a writ of *certiorari* as a substitute for an appeal.

The facts are fully stated in the opinion.

Mr. R. B. Peebles for the plaintiff.

No counsel for the defendant.

MERRIMON, J. The plaintiff obtained judgment against the defendant at the Spring Term of 1883 of the Superior Court of the county of HERTFORD, and the defendant appealed to this court.

At the February term of 1884 of this court, the appellee in that appeal moved to dismiss the same upon the ground that the undertaking upon appeal had not been justified. The motion was allowed and the appeal dismissed.

This is an application for the writ of *certiorari* to bring up the case and have it heard as upon the appeal thus dismissed. Granting that there was reasonable cause for the appeal, lost as above indicated, the petitioner fails to state and show such grounds for his application as entitle him to the writ as prayed for in his petition.

It appears that he took the appeal, but did not give the undertaking required by law; that his counsel informed him, in reply to his inquiry, that he need not remain longer at the court on account of his suit, or give his appeal any further attention, that he, the counsel, "would do all that was necessary further to be done in the premises, and see that his case was properly carried to the Supreme court," and that, relying upon his counsel to perfect the appeal he gave it no further attention. His counsel gave the undertaking upon appeal for the sum of money designated by the court, but he neglected to justify the same as required by the statute.

The law requires the appellant in all cases to perfect his appeal in the way it prescribes, and if he fails to do so by reason of his own neglect or that of his agent, he loses it absolutely. Mere ignorance of the legal requirements in executing or filing the undertaking upon appeal will not excuse and entitle him to the writ of *certiorari;* nor will he be entitled to it, if he relies upon the promise of a third party, as his counsel or agent, to perfect the appeal, and through forgetfulness, such counsel or agent fails to do so within the time, or in the way prescribed by law. He is presumed to know the law, and must inform himself in respect to what it requires of him, and he must be responsible for the acts, or the failure to act, in proper cases and respects, of his agents. He, and they as well, must be diligent and careful in complying with the requirements of the law; it will not excuse or help the slothful, the careless and negligent litigant; he sleeps upon his rights, forgets and neglects his duties at his peril. He must faithfully do what the law requires of him, and it will not excuse his neglect or that of his agent.

In cases like that before us, it is only where the appellant fails to perfect his appeal by reason of some error or improper act of the court, or the neglect or omission of the clerk of the court, or the contrivance of the appellee or his agent, or some act done or something said by them reasonably calculated to mislead the appellant, or some interposing obstacle beyond his control or power to avert it, that he becomes entitled to the writ of *certiorari*, to bring up his case for review and the correction of errors assigned. He becomes entitled to this writ, because, by no act or neglect of his own, but by the declarations, or the act, or the failure to act, of some person not his agent, on whom he had the right to rely, or by whom he is governed, or the interposition of some obstacle he could not control or avert, he has failed to do, or been prevented from doing what is required of him by the law in perfecting his appeal. *Elliott* v. *Holiday*, 3 Dev. 377; *Davis* v. *Marshall*, 2 Hawks 59; *Baker* v. *Halstead*, Busb. 41; *McConnell* v. *Caldwell*, 6 Jones 469; *Clark's Code*, 325—327, and cases there cited.

The case is not altered by the fact that it was the counsel of the appellant who engaged to perfect the appeal. In that respect he was not counsel, nor was it any part of his duty as counsel to do so—he was simply the agent of the appellant for that purpose. He had not failed or misled his client as to anything he said, or did, or ought to have done as counsel; if his duty as counsel required that he should do something that he failed to do, to the prejudice of his client, it might be, in some cases, that such failure would be cause for relief like that sought in this application. This is so, because the counsel has the legal right to conduct cases and matters in courts of justice, and their clients may with the sanction of the law, to some extent, rely upon them to do what in the course of their duties as counsel they ought to do. Hence, where a litigant had employed counsel to enter his pleas in an action, and the counsel had failed to do so, this was held to be surprise, and the failure of the client to see that his pleas were

entered, was held to be excusable neglect. *Griel* v. *Vernon*, 65 N. C. R. 76; *Francks* v. *Sutton*, 86 N. C. R. 78; *Geer* v. *Reams*, 88 N. C. R. 197.

This case is one of plain, inexcusable neglect in the eye of the law, and the application must be denied and the petition dismissed. *It is so ordered.*

W. J. BURNETT, Adm'r, v. JANE F. SAVAGE, Ex'trix.

Evidence—Code, section 590.

Where an executor or administrator is examined in his own behalf, concerning a transaction or conversation with his decedent, the other party to the action is competent to testify concerning the same transaction or communication.

(*Hawkins* v. *Carpenter*, 85 N. C., 482, *and Murphy* v. *Ray*, 73 N. C., 588, cited and approved).

This was a civil action tried before *Gilmer, Judge,* and a jury at Spring Term, 1883, of EDGECOMBE Superior Court.

The action was brought by the plaintiff to recover the value of his services rendered the defendant's testatrix for several years preceding her death in managing her farm, &c.

The plaintiff introduced evidence to show that he had rendered her such service, in the general supervision and management of her farm; and that the said farm had been managed previous to his undertaking the management by John Savage, a grandson of the testatrix, who was paid by her three hundred dollars a year for his services, and that the service rendered by the plaintiff was worth as much as that rendered by the said John Savage.

The defendant then introduced witnesses who testified that plaintiff's services were not worth as much as claimed by him. The defendant then took the stand and gave evidence in her own behalf in substance as follows:

That she had often heard plaintiff say that he was going and had gone to his grandmother's (the defendant's testatrix), to live with her as long as she lived; that she had heard her testatrix, tell the plaintiff to do small services about the place, that she was supporting him and his family, and feeding his horse, and that he would not do anything for her; and that she had heard her testatrix say often at other times when the plaintiff was not present, that the plaintiff's services were worth nothing, and that she had not agreed to pay him anything.

The plaintiff then offered himself as a witness and was requested by his counsel to state the terms of his contract with the defendant's testatrix and everything connected with their transactions in the matter. The defendant objected to the plaintiff's giving such testimony, but the court overruled the objection, and the plaintiff testified that the testatrix told him when he first went to her place, that she would pay him what his services were worth; that she would pay him for what she could hire another man.

To the admission of this evidence the defendant excepted. The exception was overruled and the defendant appealed.

Messrs. Haywood & Haywood, R. B. Peebles, J. L. Bridgers, Jr., and *Dossey Battle*, for the plaintiff.

Messrs. Pruden & Vann, for the defendant.

ASHE, J., after stating the case: The only question presented by the record is, did his Honor commit an error in admitting the evidence given by the plaintiff and excepted to by the defendant. We are of the opinion he did not. It is provided by section 590 of The Code that a party to a suit interested in the suit shall not be examined as a witness in his own behalf against the executor of a deceased person, concerning a personal transaction or communication between the witness and the deceased person. But to this there is an exception, when the executor is examined in his own behalf concerning the same transaction or communication. In such a case the defendant opened the door by his own

evidence as to such transaction; the matter is set at large and the plaintiff's contradictory testimony becomes competent. *Hawkins* v. *Carpenter*, 85 N. C., 482; *Murphy* v. *Ray*, 73 N. C., 588.

The ruling of the court below was so manifestly correct as not to admit of a doubt. There is no error.

The judgment of the superior court is affirmed.

No error. Affirmed.

J. D. SIMMONS and NANCY E. SIMMONS, Guardians, v. E. L. MANN.

New Trial for Newly Discovered Evidence—Issues—Evidence—Fraud—Duress.

1. The Supreme Court will grant a new trial for newly discovered evidence, where it is clear that substantial injustice has been done upon the trial below because of unavoidable failure to produce the evidence there, and where it is probable another trial will enable the right to prevail; but it will never be granted where the newly discovered evidence is merely cumulative or corroborative of the testimony offered on the former trial.

2. It is the duty of litigants to eliminate and tender such issues as they consider essential to present the merits of the action, before the trial begins; *after* the trial the objection that possible issues were not made comes too late.

3. The contents of a letter written to the plaintiff by his agent and borne by the defendant, but of which he was ignorant, are not competent evidence on the trial though they may be material to the issue.

4. The mere threat to employ force, or procure the arrest of the obligor in a bond if he refused to accept Confederate money in payment unaccompanied by any attempt to put the threat into execution, is not fraudulent *per se.*

5. The simple act of a guardian receiving Confederate money on debt due the estate of his wards in the year 1863, was not fraudulent, or the evidence of fraud as to them.

6. *Duress* was the only issue raised by the record in this action, and it was properly submitted to the jury.

(*Houston* v. *Smith*, 6 Ire. Eq. 264; *Dyche* v. *Patton*, 8 Ire. Eq. 295; *Dyche* v. *Patton*, 3 Jones Eq. 332; *Henry* v. *Smith*, 78 N. C. R. 27; *Cannon* v. *Dillenger*, 90 N. C. R. 226; *Kidder* v. *McIlhenny*, 81 N. C. R. 123; *Moore* v. *Hill*, 85 N. C. R. 218; *Alexander* v. *Robinson*, Id. 275; *State* v. *Shields*, 90 N. C. R. 687, cited and approved).

SIMMONS *v.* MANN.

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

The plaintiff brought this action to recover the money alleged to be due upon a single bond, executed by the defendant to the plaintiff, Joseph D. Simmons, guardian for two infant wards, dated the 10th day of February, 1860, for the sum of $422.18.

The defendant admitted the execution of the bond, but alleged that he paid on account of the same the sum of $500, and on the 7th day of July, 1863, took from the obligee therein his receipt in writing for that sum to be credited on the bond.

The plaintiff, Joseph D., alleged that the defendant, if he paid any money at all as alleged by him, paid only "Confederate money" to his agent, John R. Donnell, and procured the receipt mentioned from him by *duress.* He alleged in his complaint, that in June, 1863, the defendant "threatened that if said Simmons did not receive payment in Confederate money, that he would report him to the War Department in Richmond, said Mann then being a member of the Legislature, and as said Simmons believed, having power to cause his arrest and have him carried to Richmond; afterwards, during the month of July, 1863, in consequence of said threats, and fearing that Mann would have him arrested and carried off, he signed a receipt for five hundred dollars ($500.00) as part payment of said note due said wards, Mann telling him that he had made the same all right with Judge Donnell at Raleigh; but whether said sum of $500 was ever received by Judge Donnell for him, he did not know with certainty, he having written Judge Donnell to exercise his judgment in receiving it."

It appeared that the said Joseph D., at the times mentioned, resided in the county of Hyde, and that the late Judge Donnell, then residing at Raleigh, was his agent and adviser; and on the 8th of July, 1863, wrote him a letter from Raleigh, which was carried by the defendant and delivered to the said Joseph D. at his home in Hyde county. It did not appear otherwise than by

it that the defendant had any knowledge of the contents of the letter, or on what account or subject it was written. This letter was dated at Raleigh July 8th, 1863, and the material parts of it are in these words: "Dear Sir: I received yours by Mr. Mann. Your instructions did not allow me to receive his $500 as a payment on your note against him. * * * * He requested as a favor to leave the $500, however, which is left with Mr. Jones, subject to your order, if you shall think proper to receive it: otherwise to his order. I gave Mr. Mann a writing showing how it was received, which he will show you and which also extends to your $1,000 sent up by him."

On the trial the court, without objection, submitted to the jury only one issue, which is in the following words: "Was the alleged receipt of plaintiff for $500.00, dated July 7th, 1863, given under duress?" To this issue the jury responded "No," and the court gave judgment in favor of the plaintiffs for the sum of money mentioned in said bond with interest, less $500 paid upon the same, and the plaintiffs excepted.

The plaintiff Joseph D. was examined on the trial as a witness for himself, and testified fully in support, and to the effect of the allegations made by him in the pleadings.

The defendant was examined as a witnesss for himself, and denied that he made the threats as alleged, or any threats whatever, and testified that at the request of the plaintiff Joseph D. he paid $500 in Confederate money to his agent at Raleigh, Judge Donnell; that he voluntarily agreed to receive the Confederate money, and so executed the receipt in question.

On the trial, the plaintiff offered to put in evidence the letter received by him mentioned above. The defendant objected to the same—the court sustained the objection, and the plaintiff excepted.

After the trial the plaintiffs insisted that the pleadings raised the issue of payment and that the court erred in not submitting such issue to the jury.

The plaintiffs requested the court to instruct the jury, "that if the plaintiff had voluntarily received Confederate money in payment of the bond to him as guardian, it was a fraud in him against his wards, and defendant was a participant in such fraud and not entitled to avail himself of such fraudulent payment."

The court instructed the jury that there was no evidence of fraud in procuring the receipt mentioned, nor in the payment of the Confederate money to the plaintiff, and that the sole question was that presented by the issue submitted to them.

The plaintiffs assigned as error, first, that the court rejected the letter mentioned above; secondly, that the court instructed the jury that there was no evidence of fraud in procuring the receipt mentioned, or in the alleged payment of the Confederate money.

In this court, the plaintiffs moved for a new trial, and assigned as ground for the motion, that they had discovered new and material evidence since the trial in the superior court, that would prove the alleged duress, that they did not know of before and could not, by reasonable diligence, produce on the trial. The material part of the affidavit of the witness relied upon to support the motion is, that the witness "has heard the defendant Edward L. Mann say that he did make or get Joseph D. Simmons to take Confederate money on a claim, the amount he does not know, during the late civil war, by threatening to report him to the War Department at Richmond for refusing to take the currency of the Confederacy; that he has never disclosed the fact to plaintiff until this day."

Verdict and judgment for the defendant, and the plaintiff appealed.

Messrs. G. H. Brown, Jr., and *Rodman & Son*, for plaintiff.
Messrs. Gilliam & Son, for defendant.

MERRIMON, J., after stating the facts as above: The motion in this court for a new trial founded upon alleged newly discovered evidence, cannot be allowed. Such motions are treated with

scrutiny, and the court is not disposed to grant them, except for substantial cause in cases that come strictly within the established rules of law applicable to them.

The evidence relied upon to support the motion is very general, indefinite and unsatisfactory in its character; it has no reference to the transaction in question, unless by remote inference; it may or may not refer to it. Besides, it is mainly cumulative in its application in this case. The plaintiff was examined as a witness for himself and testified to the facts constituting the alleged duress in strong and direct terms. If the newly discovered evidence can be treated as having reference to the transactions referred to by the plaintiff, it tends mainly, but not very strongly, by reason of its indefiniteness, to corroborate him. The witness states in general terms, that the defendant told him, that during the late civil war he induced the plaintiff Joseph D. Simmons to take Confederate money, by threatening to report him to the War authorities at Richmond for refusing to take the currency of the Confederacy. He mentions neither the time nor place, when and where the defendant said so, nor is he able to designate the debt referred to, nor the amount of money mentioned. So vague a statement cannot have much weight, however it may be applied.

This court will not grant a new trial for newly discovered evidence for light causes and considerations; it will do so, only in cases where it is very probable that substantial injustice has been done, by reason of the unavoidable failure to produce the evidence on the trial, and when also, it is probable that upon a new trial, a different result will be reached and the right will prevail. The court ought to be satisfied that the evidence has been discovered since the last trial; that it could not, by reasonable diligence, have been produced on that trial; that the witness will give the evidence; that it is probably true; that it is material; and such as, if believed, will, in a substantial degree, affect the question in issue.

The law affords the largest opportunity to litigants to have a just and fair trial, and this once had, ought to be the end of con-

troversy. A litigation ended, ought not to be renewed, except for substantial considerations, and because it appears with a reasonable degree of certainty that material injustice has been done.

Houston v. *Smith*, 6 Ire. Eq., 264; *Dyche* v. *Patton*, 8 Ire. Eq., 295; *Dyche* v. *Patton*, 3 Jones' Eq., 332; *Henry* v. *Smith*, 78 N. C. R., 27; *Cannon* v. *Dillenger*, 90 N. C. R., 226.

As is said above, the evidence relied upon is mainly cumulative in its application, and this is an objection to it in view of the purpose for which it is brought before the court. It is a well settled rule of law, that a new trial will not be granted upon the ground of newly discovered evidence, if the evidence is merely *cumulative*, or in corroboration of evidence received on the former trial in respect to a particular point, or in support of a particular allegation. Every party ought, if he can, to produce evidence on the trial sufficient in point of pertinency and weight to establish his allegation. If he fails to do so, it is his misfortune or his folly. The law will not multiply trials simply to enable him to correct his mistakes of judgment. The policy of the law is against multiplying trials in the same action. *The People* v. *The Superior Court*, 5 Wend., 114; The same case, 10 Id., 285; *Gordon* v. *Mitchell*, 6 Pick., 114; Graham on New Trials, 485, *et seq.;* Hilliard on N. T., 499, *et seq.*

The exception that the court did not submit to the jury an issue in respect to the alleged payment of the bond, or part thereof, cannot be sustained. The defendant admitted the execution by him of the bond sued upon, but he alleged in his answer that he paid upon the same $500, on the 6th of July, 1863, and took a receipt therefor. The plaintiff, on the contrary, alleged that if the payment was made, it was made in "Confederate money," and that the defendant obtained from him the receipt put in evidence, by duress. The whole pleadings and the evidence show that the real and the only issue was, whether or not the plaintiff executed the receipt mentioned under duress. The issue was submitted alone without objection, and it seems to have been accepted by the parties and the court as the sole material

one. If the plaintiff received the Confederate money and executed the receipt voluntarily, then, there was a payment; if, on the other hand, the money was received and the receipt executed by the plaintiff under duress, then there was no payment. This was the real contention, and there was no necessity for submitting an issue as to payment.

Besides, the plaintiffs did not suggest or ask that such an issue be submitted. If they desired it, they ought in candor to have said so; they had a right to suggest to the court such issues as they insisted were raised by the pleadings, or as were necessary to reach the alleged merits of the matters in controversy. Parties are required to be vigilant and cautious in the prosecution or defence of actions, and when they are not so, particularly in respect to matters they may or may not insist upon, it is too late after the time has passed by to do so, to complain that something was not done, to their supposed disadvantage. It is too late after the trial to complain that possible issues were not submitted to the jury, if they were not insisted upon before the trial. *Kidder v. McIlhenny*, 81 N. C. R., 132; *Moore v. Hill*, 85 N. C. R., 218; *Alexander v. Robinson*, Id., 275.

The letter offered in evidence was material, if competent, but it is very clear that it was not competent, because it was hearsay. The defendant bore a letter from Donnell to one of the plaintiffs. It does not appear that he had any knowledge of its contents, or had anything to do with it, except simply to carry it from the person who wrote it to the person to whom it was written. The writer was not the agent of the defendant, and the latter is not bound by or presumed to know anything he said, did or wrote, except, perhaps, that he gave instructions to deliver it. It cannot, therefore, be treated as a part of the transaction between the plaintiff, Joseph D. Simmons, and the defendant. It is plain that if it were proposed to prove something that Donnell said in respect to the money in the absence of the defendant, it would not be competent against him—it would be hearsay, a statement not made under oath in an action or proceeding where the defend-

ant might cross-examine him. What he said in writing under the same circumstances must stand on the same footing—the statements made in the letter were not made under oath—they were no more than his simple declarations in writing, with which, so far as appears, the defendant had no connection. *State v. Shields*, 90 N. C. R.

If the threats were made as alleged, they were not *per se*, or necessarily, fraudulent. It is not alleged that the defendant resorted to any shift or combination to circumvent the plaintiff Joseph D.; he simply made empty threats; he did not claim that he had any authority to execute them, nor does it appear that he took any steps towards doing so. The mere threat of a purpose to employ force and unlawfully seize and detain the person, is not of itself fraudulent in any legal sense.

It was in no sense fraudulent, or a fraud upon his wards, for the guardian simply to receive Confederate money upon a bond payable to him for them in 1863. It was not unlawful to receive or pay Confederate money in discharge of debts in that year. The guardian may have received it at the peril of making himself liable to his wards for neglect; but to take it in good faith in payment of a debt, was not fraudulent, nor evidence of fraud or fraudulent intent—it was not unlawful to take it; indeed it was, at the time mentioned, the principal currency used in all business transactions, public and private. So that the court properly told the jury that there was no evidence of fraud, as contended by the plaintiffs. It might have been otherwise if the letter offered had been competent.

It might be questioned, whether if the facts were as alleged by the plaintiffs, there was duress or constraint exercised by the defendant over the plaintiff Joseph D. in the execution of the receipt in question, recognized by the law, but the court and the parties treated the question of duress as properly raised, and the issue as to the same was fairly submitted to the jury. No exception was taken to the rulings of the court in respect to this issue. The plaintiff was examined as a witness for himself, and

the defendant likewise for himself, and the jury found that there was no duress.

We are unable to discover any error in the record, and the judgment must be affirmed. It is so ordered.

S. S. HARRELL & CO. v. DAVID BUTLER.*

Deed—Description—Seal.

1. A description of land in a deed in these words: "All my interest in a piece of land adjoining the lands of J. J. Jordan and Joseph Keen and others" is too vague to admit of extrinsic evidence to "fit the description to the thing," and is void for want of certainty.
2. Where the conveyance contains specifications or localities by which the land may be located, the number of acres constitutes no part of the description; but in doubtful cases may have weight as a circumstance, and in some cases, in the absence of other definite description, may have controlling effect.
3. A seal to a deed, although not on the line with the signature of the vendor, if it purports to be his seal and is referred to as his seal, is valid and will be held to be the act of the vendor.

(*Dickens* v. *Barnes*, 79 N. C., 490; *Farmer* v. *Batts*, 83 N. C., 387, cited and distinguished; *Reddick* v. *Leggat*, 3 Mur., 539; *Proctor* v. *Pool*, 4 Dev. 370; *Cox* v. *Cox*, 91 N. C., and *Kea* v. *Robeson*, 5 Ired. Eq., 373, cited and approved).

ISSUES joined in a special proceeding for partition before Clerk of HERTFORD Superior Court, and tried before *Shepherd, J.*, at Spring Term, 1883.

This was a special proceeding for the partition of land instituted before the Clerk of the Superior Court of Hertford county.

The plaintiffs in their complaint claimed four-fifths of the land in question, and the defendant, in his answer, alleged that he was entitled to two-fifths and the plaintiffs to only three-fifths, and thus issues of law and facts were raised by the pleadings, which were transmitted to the Superior Court in term to be tried.

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

The only issue submitted to the jury was whether the defendant was entitled to only one-fifth, as admitted by the plaintiffs, or to two-fifths, as contended by the defendant.

On the trial it was admitted by the defendant that the verdict should be in favor of the plaintiffs, unless the defendant should show that he had a better title to the disputed one-fifth than the plaintiffs.

The defendant, in support of his title, offered in evidence a deed made by James Butler to David Butler, conveying "*all of his interest in a piece of land adjoining the lands of J. J. Jordan, Joseph Keen and others.*"

The conclusion of this deed was as follows:

"In testimony whereof I, the said James Butler, have hereunto set my hand and seal, this the 20th day of November, 1880.

JAMES his X mark BUTLER.

Witnessed by

"JOHN P. BUTLER, [SEAL.]"

If the deed passed any title to the land in question, it was conceded the defendant was entitled to two-thirds of it; but its introduction was objected to by the plaintiffs—upon two grounds. First, because it was too vague and uncertain to convey real estate and it was void, and that it was not susceptible of being made certain by parol evidence; and, secondly, that the deed was not under the seal of James Butler.

The Court overruled both objections, and admitted the deed in evidence, and also parol evidence to fit the description to the land in dispute. To which the plaintiffs excepted. The jury found in favor of the defendant, and there was a judgment in his behalf, from which the plaintiffs appealed.

Messrs. Winborne & Brother, for the plaintiffs.

No counsel for the defendant.

ASHE, J., after stating the case as above: The decisions of the Court upon the question, whether a defective description of land

contained in a deed is too vague and uncertain to admit of parol evidence to "fit the description to the thing" lie so closely to the line of distinction between what is too uncertain and what is not so, that we find it somewhat difficult to reconcile them.

But upon a careful examination of the adjudications upon the subject, we are led to the conclusion that the deed in question executed by James Butler to David Butler, falls within the class of deeds that are too vague to admit of extrinsic evidence to identify the land.

In *Farmer* v. *Batts*, 83 N. C., 387, the description is, "One tract containing one hundred and ninety-three acres, more or less, it being the interest in two shares, adjoining the lands of James Barnes, Eli Robbins and others," and it was held that the description was not too indefinite to admit of parol evidence to identify the land. But in the case of *Dickens* v. *Barnes*, 79 N. C., 490, the land was described as one tract of land lying and being in the county aforesaid, adjoining the lands of A and B, containing twenty acres, more or less; and it was held the description was insufficient and could not be aided by parol proof.

These descriptions are very similar, the only difference being, that in the former deed the words "and others" are superadded, which seem to have been considered as giving more certainty to the deed than the description in *Dickens* v. *Barnes*, in which they were omitted. But in both of those cases the description is aided by reference to the number of acres which they contained—an element of description which is wanting in the case under review—and even assuming that the case of *Dickens* v. *Barnes* is overruled by that of *Farmer* v. *Batts*, our case is distinguishable from that by the fact that it contains no specification as to quantity. It simply describes the land as "all my interest in a piece of land adjoining the lands of J. J. Jordan, Joseph Keen and others," while in *Farmer* v. *Batts* it is described as consisting of 193 acres, which, it is true, ordinarily constitutes no part of a description, and none when there are specifications or local-

ities given, by which the land might be located, but in doubtful cases may have weight as a circumstance in aid of the description; and in some cases, in the absence of other definite descriptions, may have a controlling effect. *Reddick* v. *Leggat*, 3 Mur., 539; *Proctor* v. *Pool*, 4 Dev., 370; and *Cox* v. *Cox*, 91 N. C., 256. In *Kea* v. *Robeson*, 5 Ire. Eq., 373, it was held that "when a deed fails to describe the subject matter of a conveyance, so as to denote upon the face of the instrument what it is in particular, it is totally inoperative unless it contains a reference to something which renders it certain. The want of such a description or reference in a deed is a defect which renders it totally defective." There is nothing on the face of this deed by which the land sought to be conveyed can be identified. Nor is there any reference to anything which renders it certain. The fact that it is described as adjoining the lands of J. J. Jordan and Joseph Keen and others cannot have that effect, for that description applies to one tract as well as another that adjoins those lands. It might, according to the description, lie as well on the one side as the other of the lands belonging to those persons.

As to the objection that the paper-writing in question was no deed because there was no seal, we are of a different opinion. Whether inspecting the instrument with a *natural* or *judicial eye*, we can see no room for doubting that it was the seal of the grantor. The fact that the scrawl is on the same line with the name of the subscribing witness can make no difference. It is under the name of the grantor and purports in the conclusion of the instrument, to be his seal, but not that of the witness. There is error. The judgment of the Superior Court is reversed and a *venire de novo* ordered.

Error. Reversed.

JOSHUA B. HILL v. S. T. NICHOLSON AND WIFE.

Tax Title—Notice—Mortgagee.

1. A sale of land for taxes will not pass the title unless the notice of the levy and sale has been first served upon the "delinquent" as directed by the revenue law.
2. By "delinquent" is meant the *legal owner* of the land proposed to be sold; a mortgagee is such an owner, and entitled to have such notice.
3. The act incorporating the town of Washington (Acts 1846-'47, ch. 199) requires the method of procedure, in levying upon and selling real estate for municipal taxes, to conform to that of the general revenue law in force at the time of the levy and sale.

(*Whitehurst* v. *Gaskill*, 69 N. C., 449, and *McCrary, Ex-parte*, 84 N. C., 63, cited and approved).

CIVIL ACTION tried before *McKoy, J.*, at Spring Term, 1882, Superior Court BEAUFORT county.

The plaintiff derived title to one moiety of a lot in the town of Washington, numbered 62, under a sale for taxes, and a deed therefor executed on March 10, 1870, by Jesse M. Pringle, tax-collector, to S. W. Stilley, and subsequent conveyances of said moiety to himself. The tax, for which the sale was made, was levied the preceding year by the board of town commissioners upon the lot given in for that purpose by James H. Williams, and included in a list made out under their direction and delivered by their clerk to said Pringle for collection in September, 1868, together with a warrant, under their several hands and seals, "commanding him to proceed and collect" the taxes specified in the list, and to "use all lawful means to enforce the payment of the taxes and make return as required by law."

Under this authority, and after a personal demand, the collector issued a written notice of the proposed sale, specifying time and place, on the said Williams, and, after due advertisement, sold the lot at the court-house door of the county in said town to the said Stilley for the sum of $3.25, that being the tax on a moiety of the lot with the costs incurred in making the sale.

The sale was ordered by the board, and, on report thereof, a deed of conveyance directed to be made to the purchaser.

The lot was conveyed on October 16, 1854, by said James H. Williams and wife Frances, one of the defendants, and John G. Williams to Jesse B. Lucas, in a deed of mortgage to secure a debt of $400 due by bond of the same date and payable with interest on the corresponding day of the following year. Payments were made towards the debt, the last of $500 being made on March 28, 1859, and endorsed on the mortgage in the handwriting of said Lucas.

In February, 1876, suit was instituted by the heirs-at-law of the mortgagee, to recover possession of the lot, to which his administrator afterwards became a party, and they demanded a foreclosure and sale, against certain defendants, and among them the *feme* mortgagor, in defence to which they alleged a satisfaction of the mortgage by payment of the secured debt. The asserted payment was contested and judgment rendered at June term, 1880, of Beaufort Superior Court for the residue of the debt, after deducting the several partial payments, and directing a foreclosure and sale. The evidence of this proceeding was offered to show the mortgage subsisting and in force and that the title was in the mortgagee or his heirs at the time of the collector's sale, and was admitted by the court, after objection from the plaintiff. It was conceded that no notice of the proposed sale was given the mortgagee who resided in the county and was accessible for that purpose. The court ruled that for want of such notice the sale made by Pringle was void and passed no title to the purchaser.

There was a verdict for the defendant and judgment, from which the plaintiff appeals.

Messrs. C. F. Warren and *Rodman & Son*, for the plaintiff.
Mr. Geo. H. Brown, Jr., for the defendants.

SMITH, C. J., after stating the facts as above: We pass by the objection to the admissibility of the record of the foreclosure proceedings, with the remark that during the interval between the last endorsed partial payment in March, 1859, and the institution of the suit for foreclosure in February, 1876, the ten years had not elapsed (excluding the period in which the statute raising the presumption of satisfaction from lapse of time did not operate), and the debt remained and was adjudged to be due, and that presumption does not arise upon the facts now stated; so that the objection, not so much to the introduction as to the effect of the record of that proceeding, is without force.

The single point presented is whether the notice has been served upon the proper person, and if not, is that an essential prerequisite to the statutory authority conferred upon the collector to sell and divest the estate of the legal owner in the lot.

We do not feel at liberty to disturb the decision in *Whitehurst* v. *Gaskill*, 69 N. C., 449, and approved in *McCrary, ex-parte*, 84 N. C., 63; and consider the construction of the revenue law settled that, the notice directed to be personally served on the delinquent, has reference to the legal owner, and when the land is under mortgage the mortgagee is such owner and the person entitled to have such notice. The language contained in the act applicable to the facts in *Whitehurst* v. *Gaskill*, and there construed, is that "he (the sheriff) shall notify the delinquent of such levy, and of the day and place of sale by service of a notice, stating those particulars, on *him personally*."

The enactment in force when the sale was made by the town tax-collector is found in chapter 22, section 55 of the Acts of 1866, and directs that the sheriff shall return to the next county court held after the 1st day of January, "a list of the tracts of land which he proposes to sell for taxes, therein mentioning the *owner or supposed owner* of each tract, and if such owner be unknown, the last known or reputed owner," &c.

It further provides in the succeeding paragraph that, the "Court shall order the clerk to issue notice to every person

whose land is returned as aforesaid, and a copy of the notice shall be served by the sheriff upon the *owner* or his agent, and returned to the next county court," &c.

The substantial change in the later enactment is the substitution of the word "delinquent" for "owner," and to require the sheriff to prepare and serve the notice on the delinquent tax debtor, and the former more clearly indicates the person upon whom the required service must be made. The decision is, therefore, in this particular, more appropriate to proceedings in the enforcement of tax collections by sheriffs under the law of 1866, and, thus interpreted in 1873, the same words have been inserted in all subsequent legislation prescribing the method of raising revenue, receiving thereby the sanction of the law-making power to their meaning.

The next inquiry is whether the town collector must pursue, as far as practicable, the same mode of procedure as the sheriff is required to adopt in selling lands for unpaid taxes, and if so, the provisions of the statute existing at the time of the enactment of the charter of the town, or that in force at the time of sale.

The eighteenth section of the act incorporating the town of Washington, which alone has any bearing upon the present controversy, is in these words:

That on or before the first day of August (since changed to September) in each and every year, the said board of commissioners shall cause the said town clerk to make a fair copy of said list, made by him as aforesaid, and they shall deliver said copy to said collector, together with a warrant under the hands and seals of them or a majority of them, authorizing and directing said tax-collector to collect said taxes in said list mentioned, and to make return thereof, and of said warrant, on a certain day to be therein mentioned; and the said collector is hereby *vested with all the powers and rights for the collection of said taxes which the sheriffs have for the collection of State taxes*, and said tax-list and warrant shall be of the nature of a judgment and execution

for the taxes therein mentioned. Acts of 1846-'47, ch. 199, sec. 18.

It is quite obvious, we think, that the required conformity of procedure on the part of the town officer to that prescribed for the sheriff was a continual conformity allowing any statutory changes made for the latter as far as practicable. The mandate is to the officer to pursue the course prescribed for the sheriff in his office of collector, not only as the law then was but as it might be amended thereafter. When other or variant powers and rights were conferred upon the latter officer, then the same were vested in the former by the very words of the act, for they must always, as far as may be, be the same as to both.

The method of proceeding prescribed for the sale of land for taxes by the town officer is closely assimilated to the general law regulating the action of the sheriff as collector, and then follow the words which bestow on the former "the powers and rights" possessed by the latter, and, of course, with the like conditions and limitations attached.

It can scarcely be contended that the municipal has larger power than the county collector or is exempt from his restraints. As this notice to the land owner of the proposed sale, whether prepared and served by the officer or issued from the authority that gives him the enabling process to sell, is an underlying condition and prerequisite to the exercise of the legal authority to make the sale when the sheriff is to act, so must such notice be indispensable to a valid sale when made by the collector of the town. No good reason can be suggested why it should be dispensed with in the one case rather than in the other, and such a construction would be repugnant to the terms and evident meaning intended by the General Assembly. But if it were otherwise, and the mode of enforcing payment of taxes by a sale of the delinquent's land, prescribed for the town collector, as it existed when the incorporating act was passed, is fixed and must be preserved by him notwithstanding subsequent variations in the statutory directions to the sheriff, the result would not be

more favorable to the case of the plaintiff, for the absence of the necessary notice, under the decision referred to, would be equally fatal to the title thus derived.

There cannot be an exact conformity in the proceedings, nor does the statute require it in all particulars, but they are assimilated as far as may be, and the substantial directions must not be disregarded.

We do not undertake, nor is it needful, in passing upon this appeal, to draw the line of separation between those directions of the statute which are mandatory and essential and those which are directory merely; nor to say to what extent an observance of these directions is requisite to an effectual sale, when it is apparent from the relations of the officers to the taxing body from which each receives its authoritative process, they cannot pursue the same precise line of action. But the giving notice is necessary in both cases, in order to the divesting of the owner's estate by a sale, and this whether it proceeds from the county court or from the commissioners and is served by the officer in the one case, or is the sole act of himself. Such is the ruling of the court and this is an indispensable prerequisite in exercising effectually the special authority conferred.

The plaintiff's counsel further asserts in his argument here that he was denied the opportunity of showing an adverse occupation of the lot under the deed as color of title for a sufficient time to perfect it, and that in this there is error.

It is true the record shows that the plaintiff was proceeding to show possession of the southern part of lot No. 62, from a period soon after the execution of the collector's deed nearly up to the commencement of the suit, but for what purpose does not appear, when the defendant was, without objection, allowed to introduce evidence showing the invalidity of the deed for want of notice; and when the ruling was made of its insufficiency, he did not insist upon any ground of recovery, such as is now urged. On the contrary, the whole argument then pressed was directed against the decision in reference to the deed, and if the plaintiff

intended to rely upon possession under color, he should have asked that this ground of claim be also passed on by the jury. The judge adhered to his opinion, and without more, in deference thereto the jury rendered their verdict for the defendant. The controversy hinged upon the question of the efficiency of the sale, and was determined by the ruling of the court upon that question.

The exception is not taken to this disposition of the case, and it cannot be now entertained upon the appeal.

The judgment must therefore be affirmed. It is so ordered.

C. L. HARRIS v. A. W. SHAFFER.

Reference—Right to Jury Trial on Exceptions to Report.

1. Where a reference is made at the instance of the plaintiff, and without objection by the defendant, it is a reference by consent.
2. It is doubtful whether the Court has power to allow parties to agree that a trial by jury may be had on exceptions to a referee's report, when the reference is by consent.
3. Where an order of reference contained the provision that either party might demand a jury trial upon exceptions to a referee's report, if entitled to a trial by jury at all, it must be demanded when the exceptions are filed.

Appeal by plaintiff from an order made at August Term, 1884, of WAKE Superior Court, by *Gudger, Judge,* refusing a trial by jury of exceptions to the report of a referee.

The facts are stated in the opinion.

Messrs. Batchelor & Devereux, for the plaintiff.
Messrs. Gatling & Whitaker, for the defendant.

MERRIMON, J. The pleadings raised issues of fact and law, and at August Term, 1878, the following order of reference was entered:

"Upon motion of plaintiff, it is ordered that this action be referred to A. W. Haywood, Esq., to hear and decide the issues raised by the pleadings herein, the referee to pass upon the fact and the law, and report to the Court the evidence and his findings both of law and fact, and the findings, to be subject to review by the Court. Either party may demand a jury trial, upon exceptions to the referee's report."

The question presented by the plaintiff's exception is whether or not he waived his right to a trial by jury, as reserved in that order.

It appears that the referee made his report at August Term, 1883, and leave was granted to the parties to file exceptions thereto. At February Term, 1884, the plaintiff filed sundry exceptions, but he did not then demand a jury trial, nor did he at the June Term of that year. At the August Term, the case was placed on the motion docket, and also upon the trial calendar for trial on a day designated in the term. On the call of the motion docket, the plaintiff demanded a trial by jury, not having done so at any previous time, or given any notice of his purpose to do so at that or any other term.

The order of reference was made by consent of the parties. It was entered on the motion of the plaintiff, and the defendant being present, and not objecting, the presumption was that he consented to it, and it must be so taken. The reference is singular in that, it provided for a trial by the referee, and in the event either party for any cause should not be satisfied with such trial, he might except and have a second trial by jury. Can this be done? Where the parties to an action agree upon one method of trial allowed by law, can they agree that if either party shall be dissatisfied with a trial thus had, a new trial shall be had at the instance of either party, by a different method? The law does not provide that parties may, as of right, have a trial of the issues of fact by two distinct methods in the same action. When parties adopt a method of trial, they ought to be bound

and concluded by it according to the course of procedure applicable to it.

If it be said this order was made with the sanction of the Court, then, the question arises, can the Court direct or assent to the trial of the issues of fact arising in an action by two distinct methods? Courts have no authority to temporize with the trial of actions; the essential course of procedure must be observed and upheld accordingly as it is established by law. No doubt the Court might, in a proper case, for cause, and with a view to the ends of justice, grant a new trial, and by a different method of trial, but this is very different from allowing the parties to stipulate in the order of reference to have two methods of trial in the discretion of either party.

But, without settling these questions definitely, we think the plaintiff waived his right to demand a trial by jury, as provided in the order of reference. The law requires prompt and orderly proceedings in every action—it does not encourage or allow unnecessary delay in the controversy; it requires just expedition. Nor does it allow undue advantage in any respect—the spirit of the law is absolute justice. When, therefore, the plaintiff reserved the right to except to the referee's report and demand a trial by jury, the law implied that he meant that this demand should be promptly made and notice thereof given on the record or otherwise at the time of filing the exception to the report, to the end, that the opposing party might prepare for such a trial. It is presumed that plaintiff filed his exceptions upon due consideration—he and his counsel understood his case and there was no necessity in contemplation of law for delay in deciding whether he waived, or would not demand a trial by jury. In the absence of express stipulation to that effect, the law did not contemplate that the plaintiff might wait until the case should be called for trial after the lapse of an indefinite period of time, and then demand a jury trial. The defendant could not be expected to be then prepared for such a trial—he had the right,

in the absence of notice to the contrary, to expect that the exceptions would be heard and disposed of by the court in the ordinary way in such cases. It would have been manifestly unjust to require the defendant to proceed in a jury-trial without opportunity to prepare for such a trial. And if he had prepared for it, the plaintiff might have said, with propriety, that he had not demanded and did not then demand a jury trial, and the defendant must pay the needless expense of such preparation.

It cannot be contended that, in the order of proceedings, it was intended that the order should stand open until the action should be called for trial, for the plaintiff to demand a jury trial, and then give the defendant time to prepare for it; the law does not allow such causeless delay. Nor can it be contended with the slightest show of reason, that it was expected that the plaintiff would signify, in filing his exceptions, that he would not demand a trial by jury.

The judgment must be affirmed. Let this opinion be certified to the Superior Court according to law.

Affirmed.

T. T. GRANDY v. J. K. ABBOTT and others.

Evidence—Agency—Payment.

A executed a note to plaintiff. To secure this and other debts A conveyed a tract of land, by deed in trust, to B as trustee. Afterwards B, as attorney for plaintiff, having the note in his hands for collection, it was agreed between A and B that B should borrow for A, a sum of money sufficient for the payment of the note, from C, which was done. To secure this debt to C, A executed another deed in trust conveying the same tract of land to B. On this deed was an endorsement signed only by A, the deed and endorsement being registered together. A's note to plaintiff was delivered to A, by B, after he had received the money from C. This action was brought by plaintiff against the executors of both A and B, who had died before the action was com-

menced, and also against C, for the recovery of the amount alleged to be due on A's note, and for the sale of the said tract of land for payment thereof. The executors of A have the note in possession, and their defence is that it was paid to the trustee and attorney for plaintiff by their testator with the money thus borrowed from C. The payment thus relied on was the only issue submitted to the jury.

Held 1st, that the last mentioned deed in trust and the endorsement thereon were admissible in evidence against plaintiff and in favor of defendants in this issue; 2nd, that it was not error in the Court to instruct the jury that if it was agreed between A and B as attorney for plaintiff, that B should borrow the money from C and apply it to the payment of A's note, as soon as the money was thus received by B from C, it was *eo instanti* applied in extinguishment of the note.

(*Claywell* v. *McGimpsey*, 4 Dev., 89, and *Ruffin* v. *Harrison*, 81 N. C., 208, and 86 N. C., 190, cited and approved).

CIVIL ACTION, tried at Spring Term, 1884, of Superior Court for CAMDEN county, before *Gudger, J.*

The facts are stated in the opinion of the Court.

Verdict and judgment for defendants, from which plaintiff appealed.

Messrs. Gatling & Whitaker and *Pruden & Vann*, for plaintiff.

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

SMITH, C. J.: William K. Abbott, the testator of the defendants, John R. Abbott and Alfred Abbott, being largely in debt to the plaintiff, and under an arrangement for compromise, on March 1st, 1867, executed to him a note under seal in the sum of $4,537.40 payable in equal parts in the three years next ensuing with interest from date, and to secure the same and certain other debts therein recited, by deed made on the same day, conveyed a valuable tract of land to William F. Martin, with the usual provisions for sale in case of default. Among the debts thus secured is one due the trustee himself. Some payments have been made by the testator which are endorsed as credits on

the plaintiff's note. The trustee died in January, 1880, and Abbott, the debtor, in September or October of the following year, each leaving a will. Their executors and devisees, with C. M. Wood, are defendants in the present action, the object of which is to recover judgment for the residue claimed to be due the plaintiff on said note, and for a foreclosure and sale of the land in order to its discharge. The other secured debts have been paid, as is admitted in the pleadings. The executors of the debtor have possession of the note and their defence is that it was paid by the testator in his life-time to the trustee, who as the plaintiff's attorney, had the note in his hands for collection and surrendered it to the debtor.

The sole controversy, as the case is presented in the appeal, is as to the truth of this allegation in defence, and it was embodied in an issue submitted to the jury followed by an affirmative finding. Thereupon judgment was rendered for the defendant, and the plaintiff appealed. Upon trial, testimony was offered by the defendant's executors, which the plaintiff admitted to be true, that the said W. F. Martin, at the request of the testator, W. R. Abbott, effected a loan and borrowed from the defendant, C. M. Wood, a sum of money for the purpose of paying and more than sufficient to pay, the debt due the plaintiff, and now in suit: that the note under seal dated on July 1, 1879, executed to C. M. Wood and secured by a conveyance of the same land to the same trustee and upon similar trusts, was for the money to be used in payment of the plaintiff's debt. The former note bears an endorsement dated July 1, 1879, by the said Martin, acting for and in the name of the plaintiff, to the lender, but it did not leave his possession.

Sometime in October the testator came to the office of said Martin, who directed the witness, his son, to get the note from the safe and hand it to Abbott, remarking that he had received money enough to pay it and some other notes.

The deed of July 1, 1879, which secures the larger note given for money borrowed of C. M. Wood, was proved and admitted

to registration on October 4th of that year. Annexed is an exhibit C, with the signature of said Abbott alone, in these words:

"This trust is made as a renewal of the trust to Wm. F. Martin, dated March 1, 1867, Mrs. Wood having advanced the money to take up the notes secured in trust of March 1, 1867, or so much as was due on same, except the notes payable to D. Pritchard, Matchet Taylor, which have been paid by me and said notes and trusts assigned to Mrs. Wood and to be held by her to be good and valid until the note secured in this is paid, when both trusts are to be cancelled and notes surrendered. Witness my hand and seal this July 1st, 1879.

WM. R. ABBOTT, (*Seal*).

Witness, R. B. MARTIN."

The introduction in evidence of the deed in trust, and this appended part, which were registered as one instrument, was allowed, after objection, and this is the subject of the first exception of the plaintiff.

Aside from the competency of the deed as evidence of its own existence against all persons, while its recitals are evidence only against parties and privies, as held in *Claywell* v. *McGimpsey*, 4 Dev. 89, the deed is referred to in the complaint and its material provisions set out with the superadded words "as in and by said deed, or a certified copy thereof to which the plaintiff craves leave to refer for the particulars thereof, when produced will appear."

The production of the deed, when its contents are thus introduced in the complaint for greater certainty as to its terms, and the original by reference incorporated in the complaint and made part of it, cannot surely afford any just ground of exception to the plaintiff.

The plaintiff requested two instructions to be given to the jury, the second only of which was refused, and is in these words:

(2). If the jury find that William F. Martin was the attorney of Mrs. Wood to lend money, of Abbott to borrow money, and

of the plaintiff to collect money from Abbott, and while occupying that triple relation he received from her, the lender, it did not amount to a payment of the note due the plaintiff unless there was a special application to said debt, even though Mrs. Wood and Abbott both understood it was to be used to pay that note.

After giving the first instructions asked instead of that rejected, the jury were charged:

"1. That if, at Abbott's request, Martin borrowed the money from Mrs. Wood to pay the note sued on, then to the extent of the money so received by Martin it was a payment, and the payment was complete whether Martin paid the money over to Grandy or not. You are to consider all the relations of the parties and determine from the evidence whether Martin was the agent of all three, whether he was acting in a double or triple capacity. If Abbott directed that the money he borrowed from Mrs. Wood to pay on his debt to the plaintiff, and Martin so received it, it was a payment.

"The burden of showing the payment rests on the defendants. Abbott had the right to direct the application of the money so borrowed, if it was so borrowed. If the jury find as a fact that the money was paid to Martin as agent of the plaintiff, they will say the note has been paid. When the simple relation of debtor and creditor exists and the same person represents both, the one to pay and the other to receive, the possession of money that ought to be applied to the debt is in law thus applied. When a person is clothed with a double capacity, and a balance remains after a full execution of the one trust, it belongs to the other, and the law makes the application."

The plaintiff's exceptions embrace the refusal to give the direction asked and the directions that were given.

If the facts conceded rendered the denied instruction appropriate, or those given were calculated to mislead the jury, we should be disposed to set aside the verdict and give the plaintiffs another trial. While the general rule laid down in *Ruffin* v. *Harrison*,

81 N. C., 208, and reiterated upon the rehearing, 86 N. C., 190, is that when one and the same person representatively becomes both debtor and creditor, and it becomes his legal duty to appropriate funds received in the former capacity to claims held in the latter, the law deems to be done what ought to be done, because there is no superior to enforce the appropriation. But the principle does not extend to the case of an agent of several principals, one of whom owes the other, since they can respectively control and direct in the execution of the several agencies, and as the agent is responsible to each principal for moneys coming into his hands by virtue of his authority only as the agent of such principal, the law will not imply a payment from the mere possession of funds of the debtor, nor change his obligation therefor.

But it was correct to tell the jury that if the money was borrowed by and for the debtor Abbott, under an express arrangement that it should be for the discharge of the debt of the plaintiff, which the attorney then held for the purpose of collection by the plaintiff's authority, the debtor has the right to consider the appropriation made as soon as the money sufficient to discharge the claim was thus raised upon his credit. In this the contract is between the debtor and the attorney and agent of the plaintiff, acting in this for his creditor principal. The case is not unlike one in which a debtor places claims against other persons in the hands of the creditor or of his collecting agent, under an agreement that any money derived from the claims shall go in discharge of the debt. If moneys sufficient are thus received they are *eo instanti* applied in extinguishment of the debt, precisely as if the debtor had paid the money, for he does thus pay the money as soon as it passes into the hands of the collecting agent, and must be deemed to be thus applied. Such are in substance the facts in the present case.

The money obtained on the loan belonged to Abbott, and not only with his consent, but under an agreement as to its disposition, was to be used in payment of the plaintiff's note, and the

surrender of the note was but the recognition of the agreement and its complete execution.

The instructions complained of must be interpreted in their relation to the admitted facts, and do not go beyond the rule when thus understood and applied. Nor were there such facts as entitled the plaintiff to the instruction refused. It is not a case where there is no agreed management for the disposal of funds, and the party in possession exercises a threefold agency. There was an agreement between debtor and creditor as to the appropriation of the money, and it can make no difference that the loan was effected through the instrumentality of Martin. He acted as agent for the plaintiff in agreeing to receive the money and as such he made the application under a contract which Abbott did not, and perhaps could not at will recall.

The endorsement seems to have been intended to preserve the note for the benefit of the lender, until consummation of the arrangement for securing the large debt by a registration of the deed, which took place in October, and then it was returned to the debtor. This, in no manner, aids the plaintiff, since his agent for him received full payment.

No error. Affirmed.

JERRY GREGORY v. MOSES HOBBS and wife and others.

Appellate term of Supreme Court.

When an action is tried at a term of a Superior Court which term expires less than ten days' before the next term of the Supreme Court begins, the appellate term of the latter court for such action is that which begins next after the expiration of the time allowed by law for perfecting the appeal.

CIVIL ACTION, tried at Fall Term, 1884, of the Superior Court of CHOWAN COUNTY, before *Graves, J.*

The court intimating an opinion that the plaintiff could not maintain his action, he submitted to a nonsuit and appealed.

In this court there was a motion to dismiss the appeal.

Messrs. Reade, Busbee & Busbee, for plaintiff.

Messrs. Pruden & Vann, for appellee.

SMITH, C. J. The cause being on trial at the term of the Superior Court of Chowan, begun and held on the first Monday after the fourth Monday in September, 1884, the court intimating an opinion against the plaintiff's right to maintain the action, he submitted to a nonsuit and appealed. The term of the court, limited to a single week, expired on Saturday, the 27th day of that month, and the appeal undertaking in the sum fixed by the court was perfected by a justification of the sufficiency of the sureties before the clerk on the 6th day of October, nine days after the termination of the Superior Court and on the first day of the session of the Supreme Court. The transcript was sent up and filed on the 22d day of January, 1885.

The counsel for the appellees moved to dismiss the appeal, assigning as the ground therefor, that the appeal was not taken to the term of this court next after the rendition of judgment in the court below.

The appellant had ten days in which to perfect his appeal, that is, to comply with all the statutory requirements to render it effectual, and among them are the execution and justification of the undertaking. Until this was done the case was not in a condition to be sent up. The term next ensuing the completion of this prerequisite is the present, and the transcript is filed in time under the rule.

The motion must therefore be disallowed, and the cause remain for hearing.

JOSEPH PRITCHARD and wife v. T. L. SANDERSON and others.

Recordari—Amendment.

1. *Recordari* will not be issued unless party applying shows (1) excuse for laches and (2) meritorious grounds.
2. Amendment of petition, &c., is matter of discretion and not subject to review.

(*Betts* v. *Franklin*, 4 D. & B., 465; *Kelsey & Brigham* v. *Jarvis*, 8 Ired., 451; *Luncefford* v. *McPherson*, 3 Jones, 174; *McConnell* v. *Caldwell*, 6 Jones, 469, cited and approved).

MOTION for *recordari*, heard at Fall Term, 1884, of the Superior Court of PASQUOTANK COUNTY, by *Graves, J.*

The facts are stated in the opinion of the court.

From the judgment of the court refusing the motion, the defendants appealed.

Mr. E. C. Smith, for plaintiff.

Messrs. Grandy & Aydlett, for defendant.

SMITH, C. J. The plaintiff in an action before a justice of the peace upon a money demand, on February 1st, 1884, recovered judgment against T. L. Sanderson and wife Fanny, executrix of George W. Charles, and Susan Perry, executrix of Kader Perry, from which the two first named defendants alone appealed. The defendant Susan, not uniting in the appeal, applied by petition to the judge of the Superior Court, and obtained an order for the issue of a writ of *recordari* in order to a reviewal of the judgment, under which the proceedings had before the justice were certified to the Superior Court, and an answer thereto put in by the plaintiff.

At the hearing the court dismissed the petition for the assigned reason that it does not allege that the defendant Perry has a good, meritorious defence to the action.

The defendant then moved for leave to amend her petition and set up a meritorious defence, which the court refused to allow.

The petitioner then asked that the case be docketed for trial, as the joint appeal of all the defendants, insisting that such is the proper rendering of the record; and, this being denied, she proposed to use the petition as an application for a writ of false judgment, supplementing it with an affidavit that the plaintiff's complaint states no cause of action. This also was disallowed.

From the judgment of dismissal the petitioner appeals, and the record brings up for consideration the exceptions to the several rulings of the court mentioned.

The petition in substance sets out in support of the application for the removal of the cause, as to her, to the superior appellate jurisdiction, that her son who, as her agent, was present at the trial before the justice, was misled into the belief that the appeal was for all the defendants, their defence being common, by the remark of the attorney who represented the others, that there was no need of her employment of counsel, in consequence of which none was retained and her appeal lost.

There is no allegation of a meritorious or other defence to the action, nor any statement of the subject-matter in controversy from which it can be inferred. We think it clear upon the authority of adjudged cases and on principle, that such an averment is indispensable to warrant the interference of the court with the judgment rendered. The rule governing applications for relief by means of the writ of *certiorari*, or when the analogous remedy by the writ of *recordari* is sought, has been clearly and distinctly laid down in numerous cases by this court.

In *Betts* v. *Franklin*, 4 Dev. & B., 465, RUFFIN, C. J., in reference to the practice of setting aside a judgment by default rendered in an inferior court and allowing a defendant to plead, by the process of *certiorari*, says: "But that can never be done unless the party shows two things: first, an excuse for the laches in not pleading: and, secondly, *a good defence.*"

The practice has been similarly declared and in words almost indentical by BATTLE, J., in *Kelsey & Brigham* v. *Jarvis*, 8 Ire.,

451; in *Lunceford* v. *McPherson*, 3 Jones, 174, and in *McConnell* v. *Caldwell*, 6 Jones, 469.

II. The refusal to allow an amendment to the petition by inserting an allegation of merits is a matter of discretion, as we have so often said, and is not subject to review.

III. The suggestion that the record shows that the appeal was taken by both parties is without support.

(1). The record made up and returned by the justice contains these words following the judgment: "From which the defendant Sanderson and wife appealed; costs of appeal 30 cents, paid. The defendant Susan Perry did not appeal; nor did she make any answer or defence."

(2). The undertaking on appeal is signed by the other defendants with surety and not by the petitioner.

(3). The petitioner states that no counsel was employed in her behalf at the trial and that she trusted to the counsel of her associate defendants.

IV. The remaining exception requires no further answer than that it is also untenable.

The court does not find the facts, nor was it necessary to do so.

The ruling is that, assuming to be true every fact stated in the petition, it is fatally defective for the omission already pointed out, and that an averment of some meritorious defence is an indispensable prerequisite to the granting the relief asked.

No error. Affirmed.

J. D. MOORE et als. v. W. J. EDWARDS, Adm'r.

Creditor's Bill—Statute of Limitations—Evidence—Justice's Judgments.

1. Where, in proceedings under a creditor's bill, a party's claim has been disputed, he must get a standing in court by establishing his own claim, before he can dispute that of another creditor.

2. Where a creditor's claim is resisted in a creditor's bill, on the ground that the cause of action upon which the judgment was rendered was barred by the statute; *Held*, that the judgment having been rendered by a court of competent jurisdiction, it is not competent to go behind it.

3. An entry on the docket of the Superior Court, showing that a transcript of a justice's judgment has been filed, is *prima facie* evidence that the judgment has been rendered by the justice. The fact of docketing the judgment is *prima facie* evidence of its existence.

4. Judgments of justices of the peace regularly docketed in the Superior Court, cannot be collaterally impeached.

(*Reid* v. *Spoon*, 66 N. C., 415, cited and approved).

CIVIL ACTION, tried before *Avery, Judge*, and a jury at Spring Term, 1884, of NORTHAMPTON Superior Court.

This was a creditor's bill, commenced by J. D. Edwards as a creditor of J. M. Edwards, deceased, and against W. J. Edwards as administrator of J. M. Edwards, before James D. Boone, clerk of the Superior Court of Northampton county.

Moore filed his complaint, setting forth as a cause of action, that J. M. Edwards, at the time of his death, was indebted to the plaintiff in the sum of forty-five ($45) dollars, and that on the 6th day of June, 1876, he reduced said claim to judgment, in an action against defendant, before W. H. Parker, a justice of the peace, and on the 25th day of August, 1876, said judgment was docketed in the Superior Court of said county, and that there were not assets sufficient to pay the debts in full.

On the 29th day of May, 1879, plaintiff filed and published a notice requiring all other creditors of said Edwards, deceased, to come in and file evidence of their debts within the time required by law. In response to this notice defendant filed a list of the claims which had been presented to him; among them was the claim of W. J. Rogers, as surviving partner of J. M. S. Rogers & Son. Moore disputed this claim, and Rogers filed his complaint alleging that defendant's intestate was indebted at the time of his death, to him (Rogers) as surviving partner, in the sum of $459.94, due by account on February 7th, 1872. Rogers denied the allegations in Moore's complaint—that Edwards was

indebted to him, or that he had ever obtained judgment against the administrator: he further pleaded the statute of limitations to the cause of action upon which said alleged judgment was founded.

Moore answered Rogers' complaint denying his (Rogers') debt, and pleading the statute of limitations thereto.

Upon the issues raised by the pleadings, the cause was removed to the Superior Court in term. At Spring Term, 1884, the cause came on for trial before Avery, Judge.

Rogers insisted that he had a right to go behind the judgment, if any, obtained by Moore against the administrator and require Moore to prove that he had a *bona fide* claim or cause of action against the estate at the time the judgment aforesaid (if at all) was obtained.

That he had a right to plead the statute of limitations to said cause of action, notwithstanding said judgment, and if said cause of action was barred at the time said judgment was obtained, the judgment would not protect Moore as against the statute when pleaded by Rogers, and requested His Honor to submit issues to the jury embracing these facts.

His Honor ruled that Rogers could not go behind the judgment, and refused to submit the issues. Rogers excepted.

His Honor then submitted the following issues:

(1). Is the account of Rogers barred by the statute of limitations;

(2). Did Moore obtain judgment against defendant administrator, and was same docketed in the Superior Court as alleged by Moore?

To support the second issue, Moore offered to introduce as evidence an entry upon the docket of the Superior Court, showing that upon the 24th day of August, 1876, transcript of judgment was filed as alleged.

Rogers objected to this entry as evidence of a judgment against him, and insisted that the original judgment-roll before the justice was the only proper evidence.

Objections overruled. Moore was allowed to introduce the entries and transcript. Rogers excepted.

The jury found both issues in the affirmative. Motion for a new trial upon the ground of refusal of His Honor to submit the issues asked for by Rogers, and the admission of improper evidence.

Motion overruled. Appeal.

Messrs. T. W. Mason and *T. N. Hill*, for plaintiff.
Mr. W. C. Bowen, for the defendant.

ASHE, J., after stating the facts: This is an anomalous case. The plaintiff, who is a judgment creditor of the defendant, brings his action in his own behalf and in that of all the creditors of the defendant who will make themselves parties to the action for a settlement of the estate of defendant's intestate. A number of claims are presented to the administrator, and among them, one by the creditor Rogers. The plaintiffs dispute the claim of Rogers, and say it is barred by the statute of limitations. Rogers then files his complaint, and instead of establishing his claim and securing a status in court by showing that his account was not barred by the statute of limitations and that he was entitled as a creditor to share in the fund, he resists the claim of the plaintiff upon the grounds: first, that he never had a judgment against the defendant, and secondly, if he had, the cause of action upon which his judgment was founded was barred by the statute of limitations.

His Honor very properly held that the judgment having been rendered by a court of competent jurisdiction, it was not competent for Rogers to go behind the judgment. *Reid* v. *Spoon*, 66 N. C., 415.

Under this statement of the case it would seem to us that the only issue to be submitted to the jury was, whether the claim of Rogers was barred by the statute of limitations, for if his claim was barred he could acquire no footing in court. He would

have no right to share in the fund and should not be permitted any more than a mere stranger to interpose an objection to the claim of another creditor.

But His Honor saw proper to submit the following issues to the jury:

1. Is the account of Rogers barred by the statute of limitations?

2. Did Moore obtain judgment against defendant administrator, and was the same docketed in the Superior Court, as alleged by Moore?

Both issues were found by the jury in the affirmative.

To support the second issue, Moore, upon objection by Rogers, was permitted to introduce as evidence an entry upon the docket of the Superior Court, showing that on the 24th day of August, 1876, transcript of judgment was filed as alleged.

To the admission of this evidence Rogers excepted, contending that the original judgment-roll before the justice was the only proper evidence.

We think there was no error in admitting the evidence. The transcript being filed and docketed is at least *prima facie* evidence of a judgment rendered by the justice, and is supported by the maxim "*omnia præsumuntur rite acta esse.*" The bare fact of docketing the judgment is *prima facie* evidence of its existence, and that it was rendered as the transcript imports.

In *Reid* v. *Spoon, supra*, it is held that a judgment rendered according to the course of the court cannot be collaterally impeached, and that *judgments of justices' courts regularly docketed upon the judgment docket of the Superior Court form no exception to the principle above stated.*

There is no error. Let this be certified that the case may be proceeded with according to law.

No error. Affirmed.

McG. MANNING v. ELLIOTT BROS. AND J. P. ELLIOTT, Trustee.

Usury—Mortgage—Notice of Sale.

1. Where a mortgagor brings an action to restrain the mortgagee from selling the mortgaged property, on the ground that the debt secured is usurious, an injunction will be refused, if the mortgagee waives the usurious parts of the contract.
2. Where a debtor comes into a court of equity, and asks relief against an usurious contract, he must pay the defendant the money justly due him, with lawful interest thereon. This rule, however, does not apply when a creditor comes into court asking the enforcement of an usurious claim.
3. Where an action is brought to enjoin a sale under a power of sale contained in a mortgage, the court having acquired jurisdiction of the parties and the subject-matter, may direct a sale of the land; and is not bound to direct such sale in strict accordance with the terms contained in the deed.
4. Where in such case a mortgage provided, that the mortgagee should have the right to advertise at once upon failure to pay the amount due, the court properly allowed the mortgagor sixty days within which to pay the debt, before advertisement for the sale.
5. In the absence of express stipulations in the mortgage, a mortgagor is not entitled to notice of the intention of the mortgagee to foreclose.

(*Bridges* v. *Morris*, 90 N. C., 32, cited and approved. *Capehart* v. *Biggs*, 77 N. C., 261, overruled on one point).

MOTION to continue a restraining order until the hearing, made before *Shepherd, Judge*, at Spring Term, 1884, of PITT Superior Court.

The plaintiff alleged in his complaint, that on January 17th, 1883, he borrowed of the defendants the sum of $2,000, and executed to them a bond signed by himself and his wife, payable on the 1st day of December, 1883, with interest at six per cent. That to secure the payment of this bond, plaintiff and his wife executed a mortgage to J. P. Elliott, as trustee, on his farm in Pitt county. That as part of the consideration for the loan, the defendants (who were commission merchants) required the plaintiff to ship them for sale 100 bales of cotton, or in lieu thereof should pay them during the year 1883, $150. He further alleged, that in pursuance of this contract, during the year 1883,

he shipped six bales of cotton to the defendant, but had declined to ship any more, because the returns of sales made to him by the defendants were wrong and unjust, and that on November 29th, 1883, he had paid the defendants the sum of $100 in cash; but that no part thereof, nor of the proceeds of the sales of cotton had been applied to the mortgage debt, but that these sums had been applied to the payment of the $150—and of an additional charge of 2½ per cent. for the loan of the money. He further alleged, that on account of the said 2½ per cent., and sum of $150, which were in addition to the legal interest, the contract between him and the defendants was usurious and illegal. The relief asked was, that the defendants be restrained from proceeding under the mortgage, and that the contract of January 17th, 1883, be declared usurious.

The defendants, in their answer, say that they are commission merchants in the city of Baltimore, and only loan money to those persons who deal with them, and upon an understanding that the loans so made should be considered as allowances, upon which a commission of 2½ per cent. should be paid, and that the person to whom loans were made should ship cotton to them for sale at the rate of five bales for each $100 loaned, or otherwise should pay the legitimate commission thereon which they would have received if such cotton had been actually shipped. The defendants further say that the $100 has been credited on the bond of January 17th, 1883, and that the proceeds of the cotton have been paid to the plaintiff by paying his drafts on them for the full amount of such proceeds.

It was admitted by the plaintiff's counsel that the plaintiff had drawn upon the defendant at the time of the shipment of the cotton, and it was further admitted that, after giving the plaintiff every credit he claimed for said cotton on account of unfair returns, the amount in controversy would not exceed $25.

The defendants agreed to surrender all claim against the plaintiff for failure to ship the cotton to them.

The mortgage provided that in case of failure to pay the bond at maturity the trustee might at once advertise for 30 days, and sell said land for cash, or on credit, as he might think best. It contained no provision for any notice to the mortgagor before advertising.

Upon these facts, His Honor refused to continue the restraining order to the hearing, and adjudged, further, that unless the plaintiff pay the sum of $2,000, with interest at 6 per cent., less the $100 paid November 28th, 1883, and less the $25 in controversy, into court within sixty days from the date of the order, then the trustee mentioned in the mortgage shall proceed to sell the mortgaged lands according to the terms of the said mortgage.

From this judgment the plaintiff appealed.

No counsel for plaintiff.

Messrs. Haywood & Haywood, for the defendants.

MERRIMON, J. We cannot hesitate to affirm the judgment of the court below. It manifestly granted all that the plaintiff could in conscience ask, and, perhaps, more than in strictness he was entitled to have.

If it be granted that the several things agreed to be done were all essential parts of the same contract, as alleged in the complaint, (and this is by no means certain), and that the contract was in any aspect of it usurious, nevertheless, every usurious feature of it was abandoned and surrendered by the defendants, and the court simply allowed them the money due them and the lawful interest thereon.

The plaintiff, a debtor comes into court, asking equitable relief, and this the court will grant to the extent he shows himself entitled; but, in doing so, it will compel him to do equity in respect of the matter in controversy towards the party against whom he seeks relief; he must pay the defendants the money justly due them, and they are entitled to the full benefit of the security for it provided in the deed of trust mentioned in the

pleadings. A just maxim of equity is, that he who seeks equity must do equity, and applying this rule, a court of equity will not set aside a contract or transaction in an action brought by the borrower of money for that purpose, unless upon the terms and requirements that he will pay the lender the sum of money that is *bona fide* due him. This rule, however, does not apply to the case of a lender of money who comes into court asking the enforcement of his usurious claim; he would encounter another maxim, which requires him who would sue in a court of equity to come with clean hands.

The court, having by this action acquired jurisdiction of the parties to the deed of trust, the deed itself and the property conveyed by it, had power to direct a sale of the property specified in the deed, and to make all proper orders and decrees to that end.

It was not bound to direct a sale of the property in strict accordance with the terms prescribed in the deed; in this respect, it ought to exercise a sound discretion, having due regard, under the circumstances of the case, for the rights of the debtor and the creditors respectively.

Hence, the court properly provided in its judgment, that the plaintiff might, within a reasonable time, sixty days in this case, pay the money due from him to the defendants into court, and if he failed to do so, then, that the trustee named in the deed should sell the property according to its terms. We see nothing unreasonable or unjust in the judgment, towards the plaintiff. The cause is retained for further orders. If the money shall be paid as required, proper orders and decrees discharging the debt and property will be entered at the next or subsequent term of the court; if the property shall be sold, like orders and decrees in respect to passing the title to the purchaser, and disposing of the money, the proceeds of the sale, will be made.

It is scarcely necessary to remark upon the plaintiff's claim set forth in the complaint, that he had the right to have notice of the defendants' purpose to advertise and sell the property

before they did so, because the bringing of this action and what has been done in it, has obviated all question in that respect. Lest, however, it may be supposed that we passed it by unnoticed, we will add, that the plaintiff was not entitled to notice to pay the debt mentioned in the deed of trust before advertisement of the property for sale by the trustee. Such notice was not provided for in the deed; it was expressly provided that in default of payment of the debt as provided, the trustee should sell the property and apply the money, the proceeds of the sale, as therein directed. In the absence of any express stipulation to that effect, there is nothing in the deed, or its nature, or the character or circumstances of the debt, that implied a right to such notice; nor is there any rule of law or equity that gives such right, and for the plain reason, that the parties to the deed agreed in terms that in the contingency provided for, the trustee might sell the property. The plaintiff thus obliged himself to take notice of the time of payment and his default in failing to pay, and the defendant's right to sell consequent thereupon.

The parties had the right to make such agreement, and when made in good faith and in the absence of fraud or some inequitable cause, the contract must operate according to its legal effect. All persons competent to contract may make such lawful contracts as they see fit to make, unrestrained by courts of justice, either in the making or enforcement of them.

A court of equity cannot make a contract for parties, nor has it the power to modify or defeat one when made, if it be valid. The office and purpose of such a court is to enforce such contract, stripped of fraud, oppression, mistake or undue advantage, or like defect or objection, and according to the true intent and meaning of the parties to it.

Courts of equity in some cases nullify or set aside contracts for causes that render them void or voidable; they, in other cases, uphold contracts accordingly as the parties really make them, without regard to forms or imperfection, and require, as nearly as may be, each party to do exact justice to the other.

We are not unmindful of what was said in *Capehart* v. *Biggs*, 77 N. C. R. 261, in respect to notice to the debtor of advertisement and sale of property conveyed to a trustee with power of sale to pay debts. With great respect for the opinion of the eminent Judge who delivered the opinion in that case, we are very sure that the rule as to notice in such cases, as laid down by him, has only what he there said to support it, and it must in our judgment, apply to that case alone. We reiterate what was said in *Bridgers* v. *Morris*, 90 N. C. R. 32, in respect to the case above cited.

The judgment must be affirmed. Let this opinion be certified according to law.

No errror. Affirmed.

J. L. SUITER v. E. W. BRITTLE, *et als.*

Appeal—Certiorari.

Where an appellant allowed the term of the Supreme Court to which his appeal should have been taken to pass without either causing his appeal to be docketed in the Supreme Court, or obtaining a *certiorari* in lieu of an appeal; *Held*, that he was not entitled to a *certiorari* at the next term of the Supreme Court.

(*Suiter* v. *Brittle*, 90 N. C., 19, cited and approved. *Howerton* v. *Henderson*, 86 N. C., 718, distinguished and approved).

PETITION for a *certiorari* heard at October Term, 1884, of the Supreme Court.

The petitioner alleged in substance that the judgment was rendered against him on the 13th day of April, 1883, and on the same day he caused a notice of appeal to be filed in the record and filed his appeal bond and statement of the case on appeal. That his counsel instructed the clerk of the Superior Court to send a transcript of the record to the October Term, 1883, of the Supreme Court, which the petitioner alleges, that the clerk did, but the transcript was never received by the clerk of the Supreme Court.

That, in November, 1883, petitioner's counsel first ascertained that the transcript had not been received by the clerk of the Supreme Court, and he at once requested the clerk of the Superior Court to make out and forward another transcript, which the petitioner says said clerk alleges he did.

That, early in December, 1883, one of his counsel, being in Raleigh, ascertained that the second transcript had never been received by the clerk of the Supreme Court, and being obliged to leave the State on account of sickness in his family, he requested the clerk of the Supreme Court to write to another of petitioner's counsel informing him that the transcript had not been received, which the said clerk at once did.

Petitioner's counsel then requested the clerk of the Superior Court to make out and forward a third transcript, but the clerk informed him, that owing to sickness in his family, he could not do so before the session of the Supreme Court would end.

This petition was filed on April 21st, 1884, during the Spring Term, 1884, of the Supreme Court.

Messrs. T. W. Mason and *R. B. Peebles*, for the plaintiff.
Messrs. T. N. Hill and *Day & Zollicoffer*, for the defendants.

MERRIMON, J. The action mentioned in the petition was tried at Spring term of 1883 of the Superior Court of Northampton county, and there was judgment for the defendants, from which the plaintiff appealed to this court. This appeal was not docketed in this court at the term thereof next after the appeal was taken, which was its October term of 1883, nor was it docketed here until the 2d day of February, 1884. At the Spring term of 1884 of this court, it was dismissed, because it was not brought up to the October term next preceding that term, and no steps had been taken at the October term mentioned, before this court to bring it up. *Suiter* v. *Brittle*, 90 N. C., 19.

The appellant having thus lost his appeal, makes this application for the writ of *certiorari* to bring up the case as upon appeal.

There was manifest and inexcusable negligence on the part of the petitioner. Regularly, the appeal lost ought to have been brought to the October term of 1883 of this court. This was not done, and no steps were taken at that term to bring it up, and no reasonable excuse appears for the failure to do so. The appellant's counsel were aware that it was not then here as it ought to be, and repeatedly urged the clerk of the Superior Court to send it up. The affidavit of the clerk is not filed as part of the evidence, but it is said that he claims to have twice sent the transcript by mail to the clerk of this court. If he did, so far as appears, it miscarried. But this, if true, is not reasonable diligence or excuse.

Appellants must be vigilant in prosecuting their appeals. The appellees have rights as well as they, that must be respected; and besides, it is important in a high degree, that the order of procedure shall be upheld. The rule is plain and well settled, that appeals must be brought to the next term of this court after they are taken, and if, for any cause, they fail to get here, proper steps must be taken at that term to bring them up; else, the appeal will be lost. There may be possible cases where this rule might be relaxed, but this case is clearly not one of them.

The counsel for the petitioner relied upon *Howerton* v. *Henderson*, 86 N. C., 718. That case does not support the petitioner's contention. There, the appeal was taken at the Fall Term of 1881, of the Superior Court, during the October term of that year of this court. It was not brought to the February term of this court next thereafter as, regularly, it ought to have been, and at that term the application for the writ of *certiorari* to bring it up was made. In that case, the Court says, that "if he (the petitioner) had omitted to ask for a *certiorari* at this term, then according to the authorities he would have forfeited his claim to the aid of the Court."

It is said, this and like cases are "hard cases," as to the appellants, who so lose their appeals. We are not at liberty to consider the *hardship* of the case, if we were disposed to indulge

our sympathies in such matters. The law requires in plain, strong and stringent terms, that an appellant shall duly perfect his appeal, and if he fails to do so, the appellee at once, as a consequence, acquires rights, that he may assert, if he chooses, and that the Court is as much bound to respect and uphold as any other right given and secured by the law. Courts of justice have no authority to allow "hard cases," as they are called, to affect their judgments, unless in cases where the relief sought lies in their discretion, and then they should be careful not to lose sight of justice!

The prayer of the petitioner must be denied, and the petition dismissed. It is so ordered.

L. P. FORTESCUE et als. v. M. MAKELEY et als.

No Evidence—Agent—Judge's Charge.

1. Where the only evidence to show an agency was that some money belonging to the alleged principal had been paid to the party sought to be proved an agent, and the alleged agent had done sundry acts of kindness for the alleged principal; *Held*, no evidence to create an agency.
2. Evidence which only gives rise to conjecture is calculated to bewilder and mislead a jury, rather than to lead them to a just conclusion.
3. Facts to be given in evidence to prove any particular matter, should, in their bearing upon each other, tend to prove the matter to be established, and should point to it with such degree of certainty as will prove it to the satisfaction of a reasonable mind.
4. It is error for the Court to leave a material fact to the jury upon which there is no evidence.

(*Cobb* v. *Fogleman*, 1 Ired. 440; *State* v. *White*, 89 N. C., 462; *State* v. *James*, 90 N. C., 702, cited and approved).

CIVIL ACTION for the possession of land, tried before *Graves*, *J.*, and a jury at Fall Term, 1884, of HYDE Superior Court.

The plaintiffs brought this action to recover possession of the land described in the transcript, and claim to derive title thereto from Mrs. C. E. Slade, who executed to them a deed therefor,

dated the 20th day of April, 1870. This deed purports to have been made in consideration of one dollar, and natural love and affection for the grantees named therein, who are the plaintiffs and the nephews and nieces of the grantor.

In the year 1870, there were docketed judgments in the Superior Court of the county of Hyde, against the said Mrs. Slade in favor of John L. Northam and other creditors, founded on debts contracted prior to the year 1867. Executions issued upon these judgments, and the land mentioned, situated in the said county, was sold under the same by the sheriff of that county, and the defendant, W. H. Fortescue, became the purchaser thereof at the price of $370, and on the 4th day of March, 1872, the sheriff executed to him a proper deed therefor. This deed purported to convey to the purchaser all the right, title and interest of the defendant in the execution in the lands to the purchaser.

In September of 1878, W. H. Fortescue sold and conveyed the lands mentioned to his co-defendant M. Makeley.

The defendants contend that the deed executed by Mrs. Slade to the plaintiffs was, voluntarily, fraudulent and void as to creditors, and that she did not retain property fully sufficient and available to discharge the debts and obligations owed by her at the time of the making of the conveyance under which the plaintiffs claim.

The plaintiffs, on the other hand, contend that Mrs. Slade retained property ample in value and available to pay all debts due from her at that time; and they further allege, that the defendant W. H. Fortescue, at the sheriff's sale mentioned, purchased the land as the agent of, and for Mrs. Slade, and paid for it with her money, and that this sale was therefore void.

On the trial the defendants, among other things, contended that there was no evidence that W. H. Fortescue purchased the land at the sheriff's sale as the agent of Mrs. Slade and paid for it with her money; and they requested the Court to so instruct the jury. The Court declined to give this instruction, but told

the jury, "that if W. H. Fortescue purchased the lands at execution sale as Mrs. Slade's agent and with her funds, the sale would be void, because an execution debtor cannot purchase at his sale, and therefore, that if the plaintiff's deed was delivered, the plaintiff would be entitled to recover."

There was no positive evidence introduced on the trial to prove such agency, and the only evidence from which it could possibly be inferred, was the following:

One witness testified that:

"In 1872, sold some corn off Slade farm and gave money to W. H. Fortescue, from $40 worth to $80—between those two limits; it was fifteen or twenty barrels of corn. This was in the winter or spring of 1872, unable to say which. Upon cross-examination witness said, "I do not know that I testified last court, that it was in the latter part of spring."

Another witness said, "can't say who Mrs. Slade lived with generally; sometimes with W. H. Fortescue, and sometimes at her place with John Fortescue."

Another said, "I did not deliver rent to Porter Fortescue in 1869; W. H. Fortescue not to deliver any corn until he gave me orders; W. H. Fortescue delivered the corn to his brother Porter Fortescue; I rent the farm from W. H. Fortescue. Will Russell and W. H. Warren used part of the corn out of rent barn. I satisfied W. H. Fortescue when rent was ready; I left in February, 1870. In 1868–'69 Mr. Fortescue got some rents from two or three acres that had been lying out; I would not have paid over $50 rent for a certainty, in condition land was in; Harrison Fortescue supported Mrs. Slade and paid her bills; the rent of land did not yield enough to support Mrs. Slade; Mrs. Slade had no other land that I know of; sold some cattle for Mrs. Slade in 1869, and paid money to Porter Fortescue at her request; Porter and John Fortescue attended to Mrs. Slade's matters as well as Harrison; saw Harrison paid one account for Mrs. Slade."

Another said, "Mrs. Slade boarded with me, in 1869 or 1870, about twelve months; W. H. Fortescue paid me her board; being in the family I charged her $8 per month."

On the 18th of March, 1872, Mrs. Slade empowered the defendant Fortescue to receive and receipt for the money in the office of the clerk of the Superior Court, the proceeds of the sale of the land, not required to pay the execution in the hands of the sheriff.

This sum was $30.

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

Messrs. Pace & Holding and *Latham & Skinner*, for the plaintiffs.

Messrs. Geo. H. Brown, Jr., Rodman & Son and *C. F. Warren*, for the defendants.

MERRIMON, J., (after stating the facts as above.) We think that the court ought to have instructed the jury, that there was no evidence to prove that the defendant Fortescue purchased the land in question at the sheriff's sale, as the agent of and for Mrs. Slade, and paid for the same with money furnished for that purpose by her.

It clearly does not appear positively from the evidence, that she requested or instructed him to purchase it, or that he had of her money any considerable part of the sum of money required to pay for it. Nor does it so appear, that he engaged to purchase it for her, or that such relations existed between them as would reasonably imply any, the slightest obligation resting on him to do so. It does not appear, that he was her general agent in any respect, or that he did more than occasional acts of friendly service, while others did like service for her, from time to time. Nor does it appear, that he made purchases for her at all—it only appears, that in the spring of 1872, he received of rents due her between $40 and $80, and that she authorized him to receive

for her $30, the surplus of the purchase money paid for the land, and to execute a receipt therefor.

It is no where intimated in the evidence that Mrs. Slade manifested by word or act, any desire to purchase the land at the sheriff's sale, or that she thought there was any reason why she should do so; nor does the evidence show that she had the money required for that purpose.

Indeed, one witness stated that the rents of the land were not sufficient to support her.

Nor does the evidence show, that the defendant Fortescue, ever said anything, or did any act, that implied, or tended in itself to prove, that he purchased the land for her, or engaged to do so.

The slight facts relied upon by the plaintiffs, as sought to be applied, are vague and uncertain, and certainly do not of themselves imply, or tend reasonably to prove such agency as that alleged; nor are they such, taken severally or together, as make evidence from which the jury might reasonably infer it; and much less, do they create any presumption of such agency. The facts do not suggest or point to it with any degree of certainty; in their nature, and in the orderly course of things consequent upon them, it was not in any view of them essential; they did not make it necessary or probable; they barely give rise to vague conjecture. Such facts for such purpose are too uncertain and indefinite to produce conviction upon the mind, or to act upon in the ordinary course of business life; they were calculated to bewilder and mislead the jury in finding the fact sought to be established, rather than lead them to a rational and just conclusion.

Such facts are too slight in their nature and combination for the purpose contemplated to constitute evidence. To make evidence, they should together, and in their bearing each upon the other, tend reasonably to prove the fact to be established; in their nature, they should suggest and point to it with such degree of certainty as to prove it to the satisfaction of the reasonable

mind. This, in our judgment, the evidence failed to do. *Cobb* v. *Fogleman*, 1 Ired. 440; *State* v. *White*, 89 N. C. 462; *State* v. *James*, 90 N. C. 702.

The agency of the defendant Fortescue, as alleged by the plaintiffs, was treated on the trial as a material and controlling fact. The Court in refusing to tell the jury, as requested by the defendants, that there was no evidence to prove the alleged agency, and in telling them that if the defendant Fortescue purchased the land as agent of Mrs. Slade, the plaintiffs were entitled to recover, in effect instructed them that there was evidence from which they might find such agency to have existed. In this there was error, for which the defendants are entitled to a *venire de novo*, and to that end, let this opinion be certified to the Superior Court. It is so ordered.

ARNOLD GREEN v. JOHN T. DAWSON.

Appeal—Statement of the Case.

Where no statement of the case accompanies the record, the judgment will be affirmed, unless upon looking into the record it is found that there is a want of jurisdiction, or it is apparent from the whole case that the plaintiff is entitled to no relief.

(*Meekins* v. *Tatem*, 79 N. C., 546; *Turner* v. *Foard*, 83 N. C., 683, cited and approved).

CIVIL ACTION, tried on appeal from the judgment of a justice of the peace, at Fall Term, 1882, of CRAVEN Superior Court, before *McKoy*, *J.*, and a jury.

There was a verdict and judgment for the plaintiff.

Appeal by the defendant.

Messrs. Strong & Smedes, for the plaintiff.

Messrs. Nixon, Simmons & Manly, for the defendant.

ASHE, J. This was a civil action begun before a justice of the peace and carried by appeal to the Superior Court for the county of Craven, where, at the Fall term, 1882, of the Superior Court for said county, the case was tried before *McKoy, Judge*, and a jury, when there was a verdict and judgment rendered in behalf of the plaintiff, from which the defendant appealed to this court.

The action was brought before the justice to recover one bale of cotton, the property of the plaintiff, which he alleged had been wrongfully detained by the defendant to plaintiff's damage sixty dollars.

There was a judgment before the justice for fifty dollars' damages, and in the Superior Court the verdict was for fifty-four dollars, and the judgment for the same amount.

The appellant in this case has failed to comply with the requirements of the Code in taking an appeal—sec. 550 of the Code, C. C. P., 311, requires that the party appealing to the court shall prepare a concise statement of the case, embodying the instructions of the judge as signed by him, and the request of counsel of the parties for instructions, &c. This was not done in this case, and we are not informed upon what ground the appeal was taken. There are no exceptions taken and no errors pointed out. In such a case it is the uniform practice of this court to affirm the judgment, unless in looking into the record it is found that there is a want of jurisdiction, or, upon the whole case, it is apparent that the plaintiff is entitled to no relief. *Meekins* v. *Tatem*, 79 N. C., 546; *Turner* v. *Foard*, 83 N. C., 683.

There is no error, and the judgment of the Superior Court is affirmed.

No error. Affirmed.

B. F. MOORE v. JOHN R. DUNN, Adm'r, et als.

Annuity—Exoneration—When proceeds of personal property to be used by an administrator to discharge mortgage.

1. A mortgage given to secure an annuity provided that in case the annuity was not promptly paid, the annuitant might sell the mortgaged land, and after paying the overdue instalments, might either re-invest the money or might estimate the cash value of her annuity at the day of sale, and retain the amount out of the proceeds. The annuity was in arrears, and a suit was brought by a second mortgagee to foreclose. The annuitant elected to take the cash value of her annuity, but died pending the action to foreclose; *Held*, that her administrator was only entitled to the unpaid arrears of the annuity and interest thereon.

2. The rule that the personal estate must be used in discharging debts secured upon real estate, in order to its exoneration, operates among persons who derive their interest directly from the deceased owner, and does not extend to creditors, secured by a mortgage. These must first exhaust the appropriated land, and look to the personalty only for the residue.

(*Creecy* v. *Pearce*, 69 N. C., 67, cited and approved).

This was a civil action heard before *Gudger, Judge*, at August Term, 1884, of WAKE Superior Court, upon exceptions to the report of a referee.

The facts appear in the opinion.

His Honor overruled the exceptions of the defendants, and they appealed.

Messrs. Pace & Holding, for the plaintiff.

Messrs. D. G. Fowle, Fuller & Snow, E. C. Smith, and *Strong & Smedes*, for the defendants.

SMITH, C. J. On the 26th day of September, A. D. 1873, Elizabeth Carver, the surviving widow of Job Carver, and as such, entitled to an estate for life in one-third of the lands descended from the intestate to Miles E. Carver their son and his heir-at-law, conveyed her interest as tenant in dower, to the latter in consideration of his covenant expressed in the deed

executed by both, to pay her during life an annuity of $400; whereof one moiety was payable on the first day of October following, and thereafter equal parts of the whole on the first day of April and October of each year.

At the same time and immediately thereafter, the said Miles E. Carver alone, his wife Octavia J., not joining in the deed, reconveyed a full estate in one of the tracts mentioned in his mother's deed to him, to secure the performance of his contract in regard to the annuity, with a condition that upon a default in payment continuing for twenty days, the mortgagee might sell the premises and, after discharging the overdue instalments, invest the remaining proceeds of sale in such manner as she may deem best, for securing the payment of said annuity, or to require of the purchaser with his consent, that he give adequate security for such future sums as might thereafter become due; or the said Elizabeth might, at her option, estimate the cash value of the said annuity, at the time of sale, according to the rules of law, and pay said amount out of the cash proceeds of sale in addition to such instalments as were then due. The mortgage was admitted to registration on the 11th day of December, 1873.

On December 1st, 1874, Miles E. Carver obtained a loan from B. F. Moore in the sum of $2,500; and executed his note therefor with John R. Dunn and Peterson Dunn, as sureties, payable at six months with interest at eight per cent. payable semi-annually, with like interest on each semi-annual payment, not provided for. To secure this indebtedness the said Miles E. Carver and wife, by deed of mortgage executed at the same time, conveyed to said B. F. Moore two tracts of land therein particularly described, with a power of sale in case of the failure of the mortgagor to meet the note at maturity and a right to apply the moneys thence derived to its satisfaction.

M. E. Carver died intestate in August, 1877, and letters of administration on his estate issued to the said John R. Dunn, a surety to the note.

On the 21st day of December, 1877, the said B. F. Moore commenced this action against the said John R. Dunn individually and as administrator of said M. E. Carver, deceased, Octavia J. Carver his widow, Elizabeth Carver and Pearl Carver their two infant children, who are defended by their guardian *ad litem* Willie D. Jones, and Peterson Dunn the other surety to the note, to reduce the same to judgment for the balance due, and for a foreclosure and sale of the premises in order to its discharge.

Answers were put in by the said Octavia, in which she sets up a claim to dower and insists that the personal estate of her intestate husband be appropriated to the payment of the mortgage debt and the land exonerated therefrom; by the infants insisting on the exoneration; and by Elizabeth P. Carver, who relies upon the priority of her lien on the land conveyed to secure her annuity, and in the event of an ascertained deficiency of personal assets in the hands of the administrator J. R. Dunn, consents to a sale, and demands a payment of her over-due instalments and also of the "cash value of the said annuity to be ascertained by law."

The defendant Peterson Dunn died, pending the suit, and his administrators D. D. Gill and J. J. Dunn have been made parties in his stead.

The personal estate of M. E. Carver is insufficient to pay the debts and costs of administering it.

At August term, 1879, it was "ordered with consent of all parties, that all the issues of law and fact involved in this action, be referred for determination to Alfred W. Haywood, Esq., under the provision of the Code of Civil Procedure." Under a decree of sale made during the reference, the commissioner appointed for the purpose sold said lands on October 14th, 1882, and made report thereof to the court, from which it appears that the tract securing the annuity was bid off for $2,300.

Elizabeth P. Carver, the annuitant, died on the 21st day of February following, before the referee had completed the refer-

ence and made his report, and her administrator W. B. Smith was admitted to defend in her place.

To the referee's findings and rulings only two exceptions are taken and these, not sustained by the court, are alone presented in the record for review by us.

The referee ruled that the annuity was to be paid up to the annuitant's death, with interest on the successive instalments from the time when each became due, the value being definitely ascertained by her death; while the appellants, W. B. Smith and the infant defendants insist upon a valuation fixed at the day of sale upon an estimate of the probable duration of life and irrespective of its termination soon after. The referee finds her expectation of life to be ten years from October 1st, 1882, the present value of which would be $3,096.19.

He reports as due on the successive unpaid instalments from October 1st, 1875, up to the death of the annuitant on February 21st, 1883, $2,985.30, and this sum reduced by appropriating to it the $2,300 arising from the sale of the land to $636.64, he rules to be entitled to share *pro rata* with other creditors in the distribution of the personal estate of the debtor.

The appellants' exception to this ruling is that the value of the homestead fixed at $1,000 should be first deducted from the sum received upon the sale of the land and the balance alone used in reducing the debt to $1,685.30, which should participate in the division of the fund.

The validity of these exceptions, and no others, we are called upon to consider in the voluminous record brought up by the appeal.

(1). The claim to the value of the annuity upon the basis of the probable duration of the annuitant's life at the time of the sale. We do not put the suggested construction upon the clause in the mortgage deed, that, in case of the conversion of the land into money by sale, it contemplates an estimate of the annuity as a future fruit-producing fund, when there is a certain and definite method of arriving at its value. The other was intended to be

resorted to from the necessity of the case, when the annuitant was living, and it was a substitute for the semi-annual payments of indefinite continuance. This is manifest from the provision, that in place of setting apart a sufficient portion of the purchase money, the purchaser and annuitant might arrange for an adequate security, for the subsequent instalments. But when the right to these ceased before any appointment or appropriation of the fund was made, and its duration was determined by death, the claim to an exhausted annuity terminated also and was confined to such instalments as then remained unpaid.

Such was the condition of the fund when the annuity expired, and it would be an extraordinary proceeding to recur to a period when the annuitant was living and ascertain the sum she should receive upon the basis of the probable duration of her life, in the presence of the fact that it came to a close four months afterwards. The referee committed no error in his ruling and properly restricted the claim.

(2). The sum that is entitled to share in the apportionment of the insufficient personal estate among creditors.

There is no objection made by the appellants to the appropriation of $1,000 as the value of the homestead exemption, from the purchase money, and it is clear that the residue of it must be taken from the entire debt due the deceased mortgagee, before the latter can come in for participation in the funds to be administered. The rule that the personal estate must be used in discharging debts secured upon real estate in order to its exoneration, operates among persons who derive their interest directly from the deceased owner, when he has made no inconsistent disposition of his property. It does not extend to creditors who have a lien upon real estate, as is expressly decided in *Creecy* v. *Pearce*, 69 N. C., 67. These must first exhaust the appropriated land and look to the personalty for what remains when there is a deficiency of assets to pay all. This principle is announced by Lord Chancellor Hardwick in *Bartholomew* v. *May*, 1 Atk., 487, and seems to have been since recognized. 2 Williams, Ex., 1042.

The widow is, however, entitled to have the personal assets in relief of her dower. *Creecy* v. *Pearce, supra.*

We, therefore, sustain the last exception and reverse the ruling in reference thereto, and affirm the judgment upon the first exception. The costs will be paid out of the sales of the land.

Let this be certified. Reversed.

JOHN M. HUNTER v. ELI YARBOROUGH.

Demurrer—Jurisdiction—Parties.

A, by deed, conveyed slaves to her daughter, I. C. H., for her own use during life, and in the deed proceeds "to constitute and appoint" the said I. C. H., a trustee to hold said negroes during her natural life for all, and singular, "the children of said I. C. H., their heirs and assigns forever." The husband of I. C. H., before 1860 and during the life of his wife, sold said slaves and assisted in their removal beyond the limits of this State. I. C. H. died in 1880, and her husband refusing to account for the fund or any part of it, the plaintiff, one of the children of I. C. H., brought this action against the husband to recover his share of the price for which the slaves were sold. Defendant demurred and assigned as ground of demurrer, that it appears upon the face of the complaint "that the court has no jurisdiction of the subject of the action"; *Held*, that the demurrer was defective in not stating the ground of objection to the complaint; but as this defect was jurisdictional, it could not be waived, and could be taken advantage of at any time—even in this court; (2) that plaintiff had an equitable right to part of the proceeds of the sale of the slaves, and that the Superior Court, and not a justice of the peace, had jurisdiction; (3) all the children of I. C. H. were necessary parties, but this defect can be cured in the Superior Court.

(*Love* v. *Commissioners*, 64 N. C., 706; *Gaskill* v. *Commissioners*, 85 N. C., 278; *Tucker* v. *Baker*, 86 N. C., 1; *Hawkins* v. *Hughes*, 87 N. C., 115; *Gill* v. *Young*, 82 N. C., 273; *McKeil* v. *Cutlar*, 4 Jones Eq., 381; *Isler* v. *Isler*, 88 N. C., 576; *Cheshire* v. *Cheshire*, 2 Ired. Eq., 569; cited and approved.

CIVIL ACTION, tried at Fall Term, 1884, of the Superior Court of MOORE county, before *Shepherd, J.*

The facts are stated in the opinion of the Court.

From the judgment of the Court overruling the demurrer, the defendant appealed.

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

SMITH, C. J. In the month of October, 1854, Priscilla Thomas, being then the owner of two young female slaves, by deed of gift conveyed them to her married daughter, Isabella C. Hunter, for her own use during life, and as trustee to hold the remainder during the period of her own limited possession and enjoyment, for the use and "benefit of all and singular the children of the said Isabella C. Hunter," designating by name, as such, in the deed, Jane Elliott and Martha Adaline. Besides these two, other children, B. W. and John M. Hunter, the plaintiff, were born during the marriage. Upon the death of her husband, the said Isabella C. intermarried with the defendant, Eli Yarborough, by whom she had six other children.

Sometime previous to 1860, and during his wife's life, the defendant disposed of said slaves, and their issue subsequently born, as his own, by selling them to be removed, and in assisting in their removal beyond the limits of the State, receiving in payment therefor $1,750 in money.

Isabella C. died in August, 1880, and the defendant refusing to account for said remainder or any part thereof, the plaintiff assenting to the sale, seeks in this action to charge him with the principal money, and recover his share thereof.

The defendant demurs to the complaint, for that upon its face it appears "that the court has no jurisdiction of the subject of the action."

Upon the hearing of the issue raised by the demurrer, it was overruled and the defendant allowed to answer the complaint, from which judgment the defendant appeals.

The demurrer fails to specify the grounds of objection to the complaint, as it should do, according to the construction put

upon the statute in *Love* v. *Commissioners*, 64 N. C., 706, and in its present form was wholly needless, since the want of jurisdiction cannot be waived and may be taken advantage of at any time, even in this court. *Code*, §§240, 242; *Gaskill* v. *Commissioners*, 85 N. C., 278; *Tucker* v. *Baker*, 86 N. C., 1; *Hawkins* v. *Hughes*, 87 N. C., 115.

But in the argument supporting the demurrer, it is contended the action is founded on an implied contract to keep and pay over the principal fund to those entitled in remainder at the expiration of the precedent particular estate, and as the part claimed by the plaintiff is less than $200, cognizance of the claim resides in the court of a justice of the peace.

This is a misconception of the action as presented in the complaint. Assuming the defendant's obligation to rest upon an implied contract, it is a contract to account for and pay over the entire sum received to those entitled, and not a series of contracts to pay over to each his and her ratable part of it.

This view of the case shows that all the remaindermen, personally or by representation, ought to be parties to the cause, so that one recovery may be effected for all and the defendant not exposed to a succession of separate suits by each.

The demurrer, if taken to the defect of parties plaintiff, would have been effectual; *Code*, §239, ¶4; *Gill* v. *Young*, 82 N. C., 273.

The action, however, rests upon an equity of the persons entitled in remainder to waive the tortious disposition of the slaves and follow and secure the substituted fund resulting from the sale.

In *McKeil* v. *Cutlar*, 4 Jones Eq., 381, Pearson, C. J., uses this language: "We are satisfied that Catharine Cutlar, the defendant's intestate, sold the slave out and out, with the intention that he should be run off and taken to parts unknown, and that she received $500 as the price. Having only a life estate, it was against conscience for her to sell the absolute interest except upon the footing that, as the charge of a criminal offence, which

was made against the slave, rendered it expedient for the remainderman, as well as for herself, to sell him, she would do so, and hold the price for their mutual benefit. This is a *clear equity*, which the plaintiff has a right to enforce against the personal representative of Mrs. Cutlar to the extent of the assets."

After a full discussion of the learning on this subject, and an examination of the adjudged cases not found to be in entire harmony, the result is arrived at and announced as the true doctrine by our late associate, Mr. Justice Ruffin, in *Isler* v. *Isler*, 88 N. C., 576: "The Court feel at liberty to adopt their own rules with regard to the matter, and to them none seems as simple or just as the one laid down in *McKeil* v. *Cutlar*, *supra*, which was also recognized in *Cheshire* v. *Cheshire*, 2 Ired. Eq., 569, allowing the price to represent the slave and to be enjoyed by the life-tenant during the residue of his life, and then without abatement to him in remainder; provided he shall elect to ratify the sale and take the fund." These suits were in the court of equity and the fund was pursued and reached in the hands of the life-owner, as a trustee, liable to account for the money as such.

The present case is stronger, for, besides the relations of the owners of the particular towards the owners of the remainder estate, in her deed, the donor proceeds in direct words "to constitute and appoint the said Isabella C. Hunter, a trustee to hold the said negroes during her natural life for all and singular the children of said Isabella C. Hunter, their heirs and assigns forever."

The demurrer was therefore properly overruled, and the necessary parties can be made in the Court below, and the defect already noticed in this respect removed.

Let this be certified for further proceedings in the Superior

No error. Affirmed.

CASWELL POLLARD v. SUSAN SLAUGHTER.

Dower—Jurisdiction of the Superior Court over—Executory Devises.

1. Where there is a devise in fee simple, with an executory devise over, the wife's right to dower attaches on the first estate, and is not defeated on its determination.
2. A widow is entitled to dower in all lands of which her husband was seized during coverture, and which any child she might bear him could by possibility take by descent.
3. The equitable jurisdiction of the Superior Court over dower has not been taken away by giving cognizance of such matters to the clerk; but in order for the jurisdiction to attach as a general rule, some equitable element should appear in the application.

(*Campbell* v. *Murphy*, 2 Jones' Eq., 357; *Jones* v. *Gerock*, 6 Jones' Eq., 190, cited and approved).

CIVIL ACTION to recover land, tried at February Term, 1884, of WAKE Superior Court, before *Avery, Judge.*

The facts appear fully in the opinion.

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

Messrs. Fuller & Snow, D. G. Fowle and *E. C. Smith*, for the plaintiff.

Messrs Battle & Mordecai, for the defendant.

ASHE, J. This was an action to recover land, tried before *Avery, Judge*, at the February Term, 1884, of WAKE Superior Court.

A jury trial was waived and the action submitted to the decision of the Court. The plaintiff claimed the land in controversy under the will of Berry Surles, which said will is as follows, to-wit:

"First, I give and bequeath to John Pollard, one negro girl named Jane, to him and his lawful heirs begotten of his body;

dying intestate, such to return to Caswell Pollard and Thomas Slaughter, or their lawful heirs begotten of their bodies.

"Then second, I give Caswell Pollard one negro girl by the name of Hannah, to him and his lawful heirs begotten of his body, dying without such, to return as above directed.

"Thirdly, I give to Thomas Slaughter, one negro girl named Pat, to him and his lawful heirs begotten of his body, dying without such, to return to John and Caswell Pollard, or their lawful heirs begotten of their body, and the balance of my land and negroes to be equally divided between John Pollard, Caswell Pollard and Thomas Slaughter, after paying all my just debts; with this exception, Buck, it is my desire that he be sold to a speculator, and it is my desire that all of my stock of all kinds to be sold and equally divided between them as above stated, also my money and notes to be divided in the manner above stated, equally, my three sons which is named in this will. It is my desire if they all should die without such heirs, to return to my brothers and sisters or their lawful heirs."

It was admitted that John Pollard, one of the devisees, died, leaving no issue of his body, and his interest in said land was divided between Caswell Pollard and Thomas Slaughter, by a decree of the Superior Court of Wake county, and that Thomas Slaughter, on the——day of———, 18—, died, leaving no issue of his body, but leaving a widow, the defendant in this action.

The defendant, in her defence to the plaintiff's action set up as a counter-claim that she was entitled to dower in the land in controversy, as the widow of Thomas Slaughter, who was seized thereof at his death of an estate of which her issue might have been heirs, and demanded judgment that she have dower allotted to her in the same.

The Court rendered judgment in behalf of the plaintiff, and the defendant appealed.

The case was argued in this Court at considerable length and with great ability by counsel on both sides, and the only question

mooted by counsel was, whether the plaintiff was entitled to dower in the lands described in the complaint.

Both parties claim under the will of Berry Surles, and the question in controversy depends upon the construction of the will. The plaintiff contends that the proper construction of the will is, that the same conditions and limitations attached by the testator to the personal estate apply as well to the devises, and that upon the death of either, John Pollard, Caswell Pollard or Slaughter, without heirs of his body at the time of his death, his share passed to the survivors, and upon the death of another of the devisees without heirs of his body, his share went to the last survivor with the accrued interest of him who first died, because the testator directed that upon the death of *all* the named devisees, without such issue, the *whole* estate should go over to his brothers and sisters, and that when either one of the devisees died without having issue, his estate at once ceased by the limitations to the survivor, and the estate ceasing, all the incidents of the estate, such as dower, ceased with it.

The defendant insisted, that conceding the construction contended for by the plaintiff to be correct, that, by the will and the operations of the act of 1784, (CODE, sec. 2180,) a fee simple estate was vested in each of the devisees, to be defeated by the happening of the contingency of dying without heirs of the body, and when one of them died, without having had issue, leaving a widow, she would be entitled to dower, because her husband had been seized of an estate of inheritance in the law, during the coverture, to which any child she might have had by him would have been heir. If the construction contended for by the plaintiff is not the proper interpretation of the will, then the only other construction of which it is susceptible, is that the devise in the will vested in each of the devisees an absolute estate in fee simple, without any of the conditions or limitations annexed to the bequests of personalty.

But in the view we take of the case, it is needless to decide which is the proper construction, and we, therefore, express no

opinion upon that point, for whichever way it is taken, in our opinion the defendant is entitled to dower.

From the leading and most reliable authorities upon the subject of a widow's right of dower, the criterion for determining in any case whether she is entitled to dower, is whether her husband was seized of such an estate during the coverture, as any child she might have by him could by possibility take it by descent. Littleton in 1 Thomas' Coke, sec. 53, page 450, lays down the rule to be, in "any case where a woman takes a husband seized of such an estate in tenements, &c., so as by possibility it may happen that the wife may have issue by her husband, and that the same issue may by possibility inherit the same tenements of such an estate as the husband hath, as heir to the husband, of such tenements she shall have her dower—not otherwise."

The same rule is laid down by Blackstone, who adds that if the land abides in him (the husband) for the interval of but a single moment it seems that the wife shall be endowed. 2 Bl., 132. To the same effect are the opinions of Scribner, in his work on Dower, and Washburn on Real Property.

Perhaps there is no subject in the law which has given rise to a greater diversity of opinion and elicited more learned disquisitions than the question involved in this case, whether the widow of one to whom by executory devise an estate is given in fee simple, but if he should die without issue, then over to another in fee, is entitled to dower.

The first and leading English adjudication on this subject was the case of *Buckworth* v. *Thirkell*, 3 Bos. and Pull., 652, note. The facts in that case were substantially that an estate by executory devise was given to M. B. in fee simple in the event she should attain the age of twenty-one, or her marriage. Upon the happening of either event she was to take an estate in fee simple. But in case she should die before attaining the age of twenty-one and without having issue, in that event the estate was limited over. She married one Hansard, had a child by him, the child died, and then she died under the age of twenty-one, without

leaving issue. The case was twice argued in the King's Bench, and after due consideration, it was held, that the husband of M. B. was entitled to his *curtesy*. The principle there decided after such careful consideration was, that the determination of an estate by operation of an *executory devise*, does not defeat the right of the husband to be tenant by the *curtesy*, nor the widow of her right of dower. For the same principle applies as well to the one estate as to the other, only in the case of *curtesy*, the wife must be actually seized, and a child born capable of inheriting the estate.

This was deemed a leading case in England upon the subject involved, and was followed by the case of *Moody* v. *King*, 2 Bing., 447—where there was a devise to A and his heirs, but if he should have no issue, the estate devised was, on his decease, to become the property of the heirs-at-law. A died without issue, and it was held, upon the principle laid down in *Buckworth* v. *Thirkell, supra*, that the wife was entitled to dower, and was also followed by *Doe* v. *Timins*, 1 B. and A., 549; *Goodmorst* v. *Goodmorst*, 3 Prest. Abs., 372.

In *Moody* v. *King, supra*, C. J. Best says that, though the opinion of Lord Mansfield, in the case of *Buckworth* v. *Thirkell*, has been questioned, it has been the settled law in England, and cites in that connection Littleton, sec. 52.

In the United States, the decision announced in that case has been generally approved and adopted. In a South Carolina case, *Millidge* v. *Lamar*, 4 Dessaus., 637, where the devise was to Thomas and his heirs, but should the said Thomas die without any heir of his body begotten, then over; it was held, that upon Thomas dying without issue, his wife was entitled to dower, and the Court spoke with approbation of *Buckworth* v. *Thirkell* and *Moody* v. *King*, and cited Littleton, sec. 52, in support of the principle that the widow is entitled to dower when any child she might have would take the estate by descent.

In Kentucky, where there was a devise to A and his heirs, but if he should die without heir, the estate should go to his sis-

ters—and A married and died without issue; it was held, that his widow was entitled to dower, upon the ground that in all cases where the husband is seized of such an estate *that the issue of the wife, if she had any, would inherit it,* she was entitled to dower, though the estate is limited over, upon his dying without issue, and he does die without such issue—12 B. Mon., 65. And in Pennsylvania, by an executory devise, an estate was given to two sons, A and B, their heirs and assigns, but if either should die without having lawful issue living at his death, his estate should vest in his surviving brother and his sister; it was held that the widow of one of those sons, who had died without issue while the other son was living, was entitled to dower, and it was awarded her. *Evans* v. *Evans*, 9 Penn., 190.

The same doctrine is maintained by the Court of Appeals in Virginia in the case of *Taliaferro* v. *Barnwell*, 4 Call., 321, and by the following text-writers with unqualified approval: 2 *Minor's Institutes* (marginal page), 116; *Scribner on Dower*, 306; 1 *Washburn on Real Property*, 248; 1 *Jarman on Wills*, 668, and 2 *Crab on Real Property*, 167. Against this array of authorities the plaintiff's counsel relied, for the support of his position that the defendant was not entitled to dower, upon *Scribner on Dower*, *Park on Dower*, 11 Law Library (marginal), 166; *Sumner* v. *Partridge*, 2 Atkyns, 47; *Coke upon Littleton*, sec. 241, Note "A," Butler; *Adams* v. *Buchanan*, 1 *Page*, 634; 4 *Kent*, 49; *Willes* v. *Willes*, 28 *Barb.*, 538. But the principal authorities relied upon are *Kent's Com.*, *Park on Dower*, and *Butler's Note to Coke.*

Chancellor Kent, on the page referred to by defendant's counsel, after stating, as an undisputed proposition, that dower will be defeated by the operation of collateral limitations, proceeds to say: "The estate of the husband is, in a more emphatic degree, overreached and defeated by the taking effect of the limitations, than in the case of collateral limitations, and the ablest writers on property law are evidently against the authority of the case of *Buckworth* v. *Thirkell*, and against the dowress, where the fee of

the husband is determined by executory devise, or shifting use," and the authorities referred to to sustain his position in the note, are Butler's note, *supra*, *Sugden on Powers*, 333; 3 *Preston on Abstracts of Titles*, 372, *and Park on Dower*. Park in his treatise does disapprove of the judgment of Lord Mansfield in *Buckworth* v. *Thirkell*, and he has made a very long, elaborate and learned argument against his lordship's decision in that case, but he does not seem to be very well supported by the authorities cited to sustain his position—for instance, he takes the case of *Sumner* v. *Partridge*, 2 Atkyns, 46, as an authority for his position.

That was a devise to A and his heirs, and if she died before her husband, he to have twenty pounds a year for life, remainder to her children; it was held, the husband of A was not entitled to *curtesy;* and it was properly decided upon all the authorities, for the children of A did not take by descent, but by purchase; *curtesy* necessarily arises out of an inheritance. He refers to *Sugden* and *Preston* as sustaining his position, and says Mr. Sugden, in his valuable treatise on Powers, has intimated his opinion that the case of *Buckworth* v. *Thirkell* was not rightly decided, and adds, "such appears to have been formerly the opinion of another conveyancer of great eminence," (meaning Mr. Preston). But he admits in the later writings of that gentleman there appears to be an inclination to retract his former opinion. To show how much weight should be attached to Mr. Park's comments upon the decision of Lord Mansfield, in the conclusion of his criticism, he suggests, that the reader should receive his observation with caution, saying, "until the law of *Buckworth* v. *Thirkell* (if it be a decision for the point understood), shall be reconsidered before a competent jurisdiction, it cannot be considered in practice but that a title of dower does exist under the given circumstances, and the remarks of the writer, although not standing alone, can have no other influence, than as they may tend to show that there is a possibility that that decision may not be followed." There is a clear admission that

the practice, and therefore the weight of authority, is in accordance with the decision of Lord Mansfield, and this is the main authority upon which Chancellor Kent's opinion was based.

The next authority relied upon by the defendant's counsel was Butler's note to Coke, with a very high and learned encomium upon Mr. Butler. His note was cited as containing a decided condemnation of the decision in *Buckworth* v. *Thirkell.* But Mr. Butler does not do anything of the kind. In his note he cites Fitzherbert's Natura Brevium, 159; *Tlone* v. *Ven,* 1 Roll. Abr., 676, and one or two other authorities, and says the principle deduced from them is, "that when the fee in its original creation is only to continue to a certain period, the wife is to hold her dower, and the husband his curtesy, after the expiration of the period to which the fee charged with the dower or curtesy is to continue; but that when the fee is originally devised in words imparting a fee simple or fee-tail absolute and unconditional, but by subsequent words is made determinable upon some particular event, then, if that particular event happens, the wife's dower and the husband's curtesy cease with the estate to which it is annexed. Such appears to be the distinction established by the foregoing cases. But a different doctrine as to cases of the latter description seems to have been laid down in the case of *Buckworth* v. *Thirkell,* determined in the King's Bench. He then proceeds to state the facts in that case, and the unanimous opinion of the court that the husband was entitled to his curtesy, and he concludes his observations by referring to several authorities, in which much useful learning on the subject of his note may be found, but there is not a word of condemnation or even disapproval of the decision. His own opinion is only to be inferred from the context.

Gibson, C. J., of the Supreme Court of Pennsylvania, in *Evans* v. *Evans, supra,* in commenting upon their note, says, "I cannot apprehend the reason of his (Mr. Butler) distinction in the note to Coke Litt., 241, between a fee limited to continue to a particular person at its creation, which curtesy or dower may survive,

and the devise of a fee simple, or a fee-tail, absolute or conditional, which, by subsequent words, is made determinable upon some particular event, at the happening of which curtesy or dower will cease. In *Doe* v. *Hutton*, Lord Alvanly spoke doubtingly of it; and, without absolutely dissenting from it, refused to give it his approbation. He says, "the system of estates at common law is a complicated and artificial one; but still is a system complete in all its parts and consistent with technical reason. But how to reconcile to any system of reason, technical or natural, the existence of a derivative estate, after the extinction of that from which it was derived, was for him to show; and he has not done it."

The plaintiff's counsel, besides the cases cited by him and heretofore commented upon, relied upon the decisions in *Adams* v. *Burkman*, 1 Page, 31, and *Willes* v. *Willes*, 28 Barb., 538. In the former case the widow was held not entitled to dower, because her children did not take as heirs of their father, but as contingent legatees of the proceeds of the sale of land converted into money—and in the latter case the Court followed the opinion of Chancellor Kent, and was one of the very few authorities to be found in support of the plaintiff's position.

From all the authorities to which we have had access we are of opinion the defendant is entitled to dower in the land in controversy.

We have not overlooked the fact that the defendant has no right, as widow, although entitled to dower, to hold the possession of the land against the plaintiff before the assignment of her dower, but that point was not taken by the plaintiff's counsel in his argument before us, and from the known astuteness and acumen of the learned counsel, we must assume that it did not escape his attention, but that it was his purpose, in order to prevent another proceeding against his client "*in forma pauperis*," to have the whole matter in controversy determined in this action. This can be done under the equitable jurisdiction of the Superior Court over the subject of dower, which we do not think has been taken away by giving cognizance of such matter to the clerk of that court.

In *Campbell* v. *Murphy*, 2 Jones Eq., 357, C. J. Pearson says the jurisdiction of the courts of equity over the subject of dower is well established; and in *Jones* v. *Gerock*, 6 Jones Eq., 190, a bill in equity to have dower assigned was entertained, and a decree for dower rendered—but the application to the equity jurisdiction of the courts should, as a general rule, contain some equitable element. But inasmuch as in this case the parties are before the court, and a determination of the whole matter in controversy will prevent a circuity of actions, which it is the policy of The Code to encourage, we have, therefore, deemed it proper to take cognizance, in this case, of the defendant's equitable right to dower and decide the case upon its true merits. The judgment of the Superior Court must, therefore, be reversed, and this opinion certified to that Court that proper proceedings may be had to assign to the defendant her dower in the land described in the complaint.

Error. Reversed.

M. A. ROGERS, Ex'trx, v. A. K. CLEMENTS, *et. al.*

Issues—Presumption of Payment—Evidence—Assignment by Distributees—Cessat Executio.

1. Where no issues are eliminated and submitted to the jury, but the record shows "that the jury find all issues in favor of the plaintiff," the Court will understand it to mean all matters in controversy arising on the pleadings are as found for the plaintiffs. Necessity of eliminating issues as required by The Code commented on by Smith, C. J.
2. Where a bond, executed by two obligors, is presumed to be paid by the lapse of time, the declarations of one of the obligors is not competent to rebut the presumption as to the other.
3. In order to rebut the presumption of payment, it must be proved that the bond has not been paid by any of the debtors. The separate acknowledgment of one debtor is not even sufficient to charge him.
4. Where, in an action by an executor, the defendant pleads that the fund is not needed for the payment of debts, and that he has purchased the interest of a number of the legatees; *Held*, that while it cannot defeat the action, yet upon paying the amount of the shares which he has not purchased, the defendant is entitled to a *cessat executio*.

(*Campbell* v. *Brown*, 86 N. C., 376, and *Baker* v. *The Railroad Company*, 91 N. C., 308, cited and approved.)

This was a CIVIL ACTION, tried before *Avery, Judge*, and a jury, at March Special Term, 1884, of WAKE Superior Court.

The plaintiff in her complaint alleged that the defendants, on the 28th day of October, A. D., 1857, executed to one G. H. Alford their note, under seal, for the sum of $900, payable one day after date; that said note was afterwards endorsed by said Alford for value to Mary A. Rogers, the testatrix of the plaintiff, and that on the 15th day of October, 1859, the interest then due on said note had been paid, and also $193.80 of the principal, and that no other payments had been made thereon. The defendant W. W. Clements filed no answer, and the defendant A. K. Clements filed an answer, in which he denied the execution of said note, alleged payment of the same, and also a release of said note by the plaintiffs, Maulsey A. Rogers, Pamelia Collins, and Nancy B. Goodwin, who, with the said A. K. Clements, were legatees under the will of the plaintiff's testatrix, and as such solely entitled to the proceeds of said note at the date of said release, and that said proceeds were not necessary for the payment of any debts or charges against the estate of said testatrix, or for any other purpose connected with said estate.

One H. C. Olive was introduced as a witness for plaintiff, and plaintiff proposed to show by him, in order to rebut the presumption of payment by W. W. Clements, that the said W. W. Clements, in the absence of the defendant A. K. Clements, declared that he had not paid the note sued on. The defendant A. K. Clements objected. The plaintiff insisted that the *onus* was on her to rebut the presumption of payment as to both defendants, in order to recover of the defendant A. K. Clements, and the declaration was admissible to show that W. W. Clements did not pay. The objection was overruled, and defendant excepted.

The witness then testified that in the latter part of the year 1881 or 1882, said W. W. Clements told witness, in the absence of A. K. Clements, that said note had not been paid by him. The said A. K. Clements further objected, because it appeared

that said W. W. Clements made said statement after the presumption of payment had arisen. Objection overruled and defendant excepted.

Witness, upon cross-examination, testified that by the will of Mary A. Rogers, a small tract of land was devised to a colored woman, and that all the balance of the estate, both real and personal, was devised one-fourth each to J. W. Rogers, A. K. Clements, Nancy B. Goodwin, absolutely, and the remaining fourth to Pamelia Collins for life, and after her death to her children. That said Pamelia Collins died about the middle of August, 1881, after the death of Mary Ann and John W. Rogers, leaving a number of children, who are not parties to this action. That said John W. Rogers died, leaving a will which has been duly admitted to probate, in which the said Maulsey Ann Rogers is executrix and sole legatee. That the estate of Mary Ann Rogers was solvent, and perfectly good for all liabilities outside of this note sued on, and of the devise to the colored woman above named, and that said liabilities, so far as they had been ascertained, could be satisfied out of the personal property of the estate without resorting to the note sued on.

The defendant A. K. Clements then offered to prove the execution by the said Maulsey A. Rogers, Pamelia Collins and Nancy B. Goodwin, of the following words endorsed on the back of the note sued on: "We, the legatees of Mary A. Rogers, deceased, hereby agree to release A. K. Clements from the payment of the within note, or any part thereof. This September 22, 1880. Witness our hands and seals.

MAULSEY A. ROGERS, (*Seal*).
PAMELIA COLLINS, (*Seal*).
NANCY B. GOODWIN, (*Seal*).

Test: H. C. OLIVE.

The plaintiff objected to the introduction of this evidence, and it was excluded by His Honor, upon grounds not material to be stated.

The defendant A. K. Clements, at the close of the evidence, asked the Court to instruct the jury:

1st. If the presumption of payment is not rebutted as to W. W. Clements, the jury must find the issue upon the question of payment in favor of the defendant.

2nd. There is no evidence rebutting the presumption of payment by the said W. W. Clements.

His Honor gave the first and refused the second instruction, and the defendant excepted.

The record does not show that any issues were submitted to the jury, but states that the jury find all issues in favor of the plaintiff.

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

Messrs. D. G. Fowle, Fuller & Snow and *E. C. Smith*, for the plaintiff.

Messrs. A. M. Lewis & Son and *Strong & Smedes*, for the defendant.

SMITH, C. J. The complaint alleges the execution of the bond set out therein by the defendants, and its endorsement to the plaintiff's testatrix, and the action is to recover the residue remaining unpaid. No defence is made by the defendant W. W. Clements, and the defendant A. K. Clements, in his answer, relies upon the statutory presumption raised by the lapse of time since the obligation became due, and in subsequent amendment sets up an alleged release from a portion and the larger number of those entitled to the estate of the testatrix, accompanied with an averment, that there were not, nor are there now, any unpaid debts or charges requiring the collection.

There were no issues eliminated and submitted to the jury, as is expressly prescribed by The Code, sections 395 and 396, though in the record it is stated that "the jury find all the issues in favor of the plaintiff," or, as we must understand, all matters

in controversy arising upon the pleadings. We pause to say that this statutory requirement must be complied with, not alone because it is a legislative mandate, but because under the present system it conduces to a clear and distinct apprehension of the disputed fact and the pertinency of the evidence which may be offered.

The controversy seems from the case stated to have been confined to the defence of presumed payment, and evidence introduced in rebuttal, and that offered and rejected in support of the release as an abatement of the demand. The exception to the denial of an instruction asked for the defendant, depends upon the competency of testimony the admission of which takes away the force of the exception.

The plaintiff was allowed, after objection, to prove a declaration made by the other defendant in the absence of the appellant, and after the presumption had been raised that he had not paid the debt. This declaration was admitted to show non-payment by that obligor, it being necessary to prove non-payment by both in order to remove the presumption as to each under the ruling in *Campbell* v. *Brown*, 86 N. C., 376, and antecedent cases referred to in the opinion.

The testimony would seem to be superfluous in presence of the fact that the obligor W. W. Clements, in failing to answer, and exposing himself to a judgment by default, had, in the most effectual way, admitted his own continued liability, and the declaration was not needed as an acknowledgment affecting himself. But it is received as evidence against the appellant, and to take from him the protection of the statute and defeat his defence. The effect given it is to charge the appellant, not his co-obligor, whose liability is already definitely fixed by his failing to contest the allegations of the complaint. As the lapse of time raised a presumption of payment made by some, not designating whom, of the debtors, the repelling evidence must extend to embrace all, and to charge either it must be shown that payment has been made by none. The separate acknowledgment of one debtor

that he has not paid the debt is insufficient to charge him even, unless it is also shown that none of the others had made payment.

In *Campbell* v. *Brown*, 86 N. C. 376, Ruffin J., in a well considered review of the cases, remarks that "even if there should be evidence of an acknowledgment sufficient to repel the presumption of payment as to one of two makers of a bond, still if the presumption was not repelled as to the other, the case would come within the rule as to both and both would be protected by the statutory presumption."

While therefore, in order to establish the continuing obligation of the appellant and remove the presumption raised for his benefit, it was necessary to show that payment had not been made, as well by the non-contesting obligor, as by the former, the proof offered and received was not of the *fact* but of his *declaration of the fact*, made, too, after the presumption had arisen. The declarations as acknowledgments of the debtor making them are admissible to charge him, but are they competent to charge the appellant, uttered in his absence, where they would not if untrue be contradicted by him? They are but hearsay—unsworn statements coming from one not a party to the issue. Upon principle and authority they are clearly inadmissible and their exclusion results from the necessity of disproving the assumed fact that the debt had been extinguished by some of the debtors, of which acknowledgments can only be received as evidence against him from whom they came and to affect his personal liability.

This error renders a new trial necessary, but as the other defence arising out of the alleged release may again come up, should its execution be proved, it is proper for us to suggest that while it cannot defeat the action, if there are no reasons for the fund passing into the hands of the plaintiff, except at once to account for and pay over to those entitled under the will, the judgment should not be enforced against the defendant as to the shares embraced in the release, but only for the benefit of those who retain their shares. Upon payment of the latter a perpetual

cessat executio should be entered. This is the course pursued in *Baker* v. *Railroad*, 91 N. C. 308, and is appropriate to the present action if the obstacle to a recovery should be put out of the way in another trial.

There is error and this will be certified to the end that a *venire de novo* be awarded.

JOHN BRANCH and wife v. SUKEY WALKER, et als.

Excusable Neglect—Attorney—Notice—Judgment.

1. A notice of a motion to set aside a judgment may be properly served on the attorney of record of the opposing party.
2. An attorney of record cannot withdraw from an action without leave of Court, and his relation to the matter continues until the judgment is satisfied.
3. This Court cannot review the findings of fact of the court below on a motion under section 274 of The Code.
4. Where a judge made a general order allowing parties time to file pleadings, but after leaving the court-house for the term, he made an order allowing plaintiffs, who desired judgments for want of answers, to note on the summons docket that answers would be required during the term; *Held*, a judgment for want of answer, under such circumstances, will be set aside for excusable neglect.
5. Neither parties nor counsel are required to take notice of orders made after the Judge has left the court-house for the term.
6. Except in cases of consent, and where otherwise provided by statute, orders and judgments should be signed in open court.

(*Walton* v. *Sugg*, Phil. 98; *Rogers* v. *McKenzie*, 81 N. C., 164, cited and approved).

This was a motion to set aside a judgment, heard before *Avery, Judge*, at January Special Term, 1884, of BERTIE Superior Court.

Notice of the motion to set aside the judgment was served on one of the plaintiff's attorneys on October 19, 1882, and the Fall Term of Bertie Superior Court began on October 29, 1882.

The defendants employed an attorney, whose name was entered on the appearance docket, but no answer was filed. On Thursday of the last week of the term, His Honor, Judge McKoy, made the following order:

"Ordered, that in all cases that appear on the summons docket, when complaint or answer is not demanded during the term, plaintiffs are allowed sixty days to file complaint, and defendants one hundred and twenty days to file answers."

Just below this order, on the minutes of the Superior Court, another order appears, as follows:

"When parties desire judgments of this term for want of answer, they will enter on the summons docket 'answer demanded at this term', and then they will be entitled to judgment for failure to answer at this term. ALLMAND A. MCKOY, Judge."

Judge McKoy left the court-house during the afternoon of Thursday, and did not return to the court during the term. When leaving he instructed the sheriff not to adjourn court, but to allow it to expire by its limitation.

The second of the orders above set forth was made by Judge McKoy at his own room, after he had left the court-house for the term. After the second order was made, one of the plaintiff's attorneys entered on the summons docket opposite this action the words, "Answer demanded at this term." After the expiration of the term of the court, and after Judge McKoy had left the county of Bertie, he signed and sent to counsel a judgment against the defendant for want of an answer. About twenty days after signing this judgment, without notice to the parties, Judge McKoy signed and sent to the clerk another judgment modifying the judgment by default, and allowing the defendants to answer upon their filing a bond for costs and damages within twenty days, and filing an answer setting up a substantial defence.

The defendants' counsel had no notice of the orders made during the term in regard to filing pleadings, nor did he have notice of the entry made on the summons docket by the plaintiffs' counsel.

Upon these facts, His Honor set aside both of the judgments, and the plaintiffs appealed.

Mr. R. B. Peebles, for the plaintiffs.
No counsel for the defendants.

MERRIMON, J. The Court held properly that the notice of the motion to set aside the judgment was sufficient.

It was served on the attorney of the plaintiffs on the 19th day of October, 1882, and nine days next before the term of the court began, at which the motion was made. At that time, the statute (C. C. P., 346) required only eight days' notice of such motions, and it applied to this case. The motion as to time was, therefore, sufficient. The law as to time of notice has been changed—*The Code,* §595, prescribes that ten days' notice of such motions shall be given, unless the judge, in an order to show cause, shall prescribe a shorter time.

It was sufficient to give the notice to the plaintiffs' attorney of record. After his name was entered on the record as counsel, he could not withdraw from the action without the leave of the Court. It is a mistaken notion that an attorney can become counsel of record in an action, and cease to be counsel at his own will, pleasure and convenience. He is, in an important sense, an officer of the Court, and under its direction and control in respect to matters affecting the Court and the administration of public justice, and as soon as he is duly retained in an action or proceeding, he has, by virtue of his office, authority to manage and control the conduct of the action on the part of his client during its progress, subject to the supervision of the Court, and he is the proper person on whom notice should be served in respect to matters pertaining to the conduct of and proceedings in it after it is brought; and his authority and responsibility continue until it is completely determined in the Court wherein it is pending. The counsel is responsible to the Court and his client, and generally, the Court recognizes him as having charge of the

action, and authorized and bound to take notice of all motions and proceedings in it. This is so upon general principles that govern Courts ordinarily in the administration of justice; and in this State, *The Code*, §597, in respect to notices and the filing and service of papers, expressly provides that service may be made on the party or his attorney.

But it is said that the plaintiffs having obtained judgment, for want of an answer, the relation of the counsel to the action ceased, so that he had no further connection with or control over it, and, therefore, notice to him was not sufficient. We do not think so. The action in this case was not completely ended when the judgment was obtained. A variety of motions might, in the order of procedure, be made in respect to the judgment. A motion might be made to set it aside for alleged irregularity. So a motion might be made at any time within twelve months to set it aside, because of mistake, surprise or excusable neglect. There might be a motion to modify the provisions of the judgment, or as to the character of the execution, in a case like this, or like motions might be made, some of them at a subsequent term, some of them in vacation. The course of the law and the progress of the action contemplate that such motions may be made after judgment. Surely neither the client nor the counsel in an action would ever agree that the counsel's services in it were ended when he simply obtained a judgment thus open to attack. It has been held, in many cases, that, in actions to recover money, the counsel might give directions in respect to the execution, and give receipt for the money when collected. It may be said, generally, that the relation of the counsel to the action does not cease, in any case, until the judgment in the court where it is pending is consummated; that is, made permanently effectual for its purpose, as contemplated by law. In this case, we are sure that neither the client nor the counsel contemplated that the latter's work, as counsel, was done, until the judgment should be made effectual. The action was not ended when the judgment was entered. The record stood open for motions like the one before us, and other

motions that might be made; and it was the duty of the counsel to give them attention, when made, as occasion might require, until it should be ended. *Walton* v. *Sugg,* Phil., 98; *Rogers* v. *McKenzie,* 81 N. C., 164.

The motion to set aside the judgment was made within one year next after the time it was entered. *The Code,* §274 provides among other things, that the judge may "in his discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order or other proceeding taken against him, through his mistake, inadvertence, surprise or excusable neglect." The court below found the facts upon which the motion is founded, and we have no authority to review or disturb such findings; and if in any view of them there was "mistake, inadvertence or excusable neglect" on the part of the defendants, in respect to the judgment they seek to set aside, we cannot interfere with the exercise of the discretion of the judge in setting it aside as he did. The discretion was his, not subject to review by the court.

The facts show surprise and excusable neglect that the judge might well consider, and upon the same exercise his discretion.

The summons docket had not been called during the term at which the judgment was taken. The plaintiffs' counsel did not move before the court for judgment, nor call the attention of the defendants' counsel of record to his entry on the summons docket, "answer demanded at this term," made after the judge had approved and signed the minutes and left the court house, the last time during the term. The defendants' counsel did not see or have notice of the entry last mentioned, nor of the general order made by the judge allowing parties time to plead, nor of the one allowing plaintiffs, in default of answer demanded, to have judgment. Neither the defendants nor their counsel were required to take notice of judgments and entries made after the judge had left the court-house for the term; on the contrary they might reasonably infer that no business would be done after the judge left. It is true, the judge instructed the sheriff not to adjourn the court

formally, but to let the term expire by its own limitation; but this surely did not imply that decisions were to be made and judgments entered, *not granted*, after the judge had left the court-house for the term and in his absence! Such a practice, if it prevails at all, is vicious and ought not to be tolerated, much less upheld. Every judgment should, *must* have the sanction of the court, unless in case of consent judgments, and these must be entered with its knowledge and permission. In this case, the judge signed the judgment after the term was over, and under a misapprehension of material facts affecting the plaintiffs' right to have it, because, within a few days after the signing it, he made an order setting it aside upon the conditions in the order specified. It cannot avail the plaintiff to say that he was entitled to judgment by default for want of an answer. If he was so entitled the defendants might, probably would, have answered during the term, or obtained further time to answer as of the term. It seems, the judge, after signing the judgment, thought they ought to be allowed to answer. It is improper to take judgments and orders after the judge has left the court-house for the term. Such judgments and orders, in no proper sense, have the sanction of the court. A practice allowing this to be done would be subject to dangerous abuses and give rise to distrust and confusion. The clerk does not represent or act for the court in term time—all proceedings had after he leaves the place where the court is held have not his judicial sanction, and parties are not bound to take notice of such proceedings; and if a party fails to do so, and judgment shall be taken for want of an answer, it may be treated as surprise and excusable neglect. This is essential to the general integrity of judicial proceedings. By this, however, we do not mean to be understood as saying, that parties may not consent to a judgment or order, with the approval of the judge, after term, or that the judge may not grant certain classes of orders and judgments out of term time and at chambers, having the parties litigant before him as the law prescribes. The courts are always open, in the way prescribed by law, for some purposes.

The order of the Court below setting aside the judgment complained of, does not specify the particular ground upon which it rests, but, as it appears that the judge may have founded it upon surprise and excusable neglect of the defendants, we must take it that he did so. The answer that the defendants propose to file, and which was used as an affidavit before the Court to support the motion, discloses substantial grounds of defence, if they should be established in the further progress of the action.

The judgment must be affirmed. Let this opinion be certified according to law.

Judgment affirmed.

N. B. WARD et als. v. FARMER & SOUTHERLAND.

Tenants in Common—Statute of Limitations.

The rule, declared in *Caldwell* v. *Neeley*, 81 N. C., 114, that an ouster of one tenant in common by another will not be presumed from an exclusive use of the common property and the appropriation of its profits to himself for a less period than twenty years; and the result is not changed when one enters to whom a tenant in common has, by deed, attempted to convey the entire tract—affirmed. This rule extends to purchaser of the interest of a tenant in common at execution sale, and to his vendees.

(*Day* v. *Howard*, 73 N. C., 1, explained and approved; *Cloud* v. *Webb*, 3 Dev., 317; *Caldwell* v. *Neeley*, 81 N. C., 114; *Covington* v. *Stewart*, 77 N. C., 148; *Neeley* v. *Neeley*, 79 N. C., 478, cited and approved).

This was a special proceeding for partition of land commenced before the clerk of Wayne Superior Court, and the defendants having pleaded they were sole seized of the lands in question, and issue having been joined thereon, said issue was transferred for trial by jury in term to the Superior Court of said county; and the said issue having come on for trial at January Term, 1885, of said court, before His Honor, Judge Gudger: It was

admitted that one Josiah Ward was, in his lifetime, seized in fee of said land, and that the plaintiffs and one W. W. Ward were the only heirs-at-law of the said Josiah Ward, who died prior to the year 1865.

It was further admitted that the plaintiff Frances Kelly, was entitled to recover one fourth, and the plaintiffs John B. Ward and Jane F. Padget together, one eighth of said land.

It was proved that on the 25th day of November, 1870, a judgment against the said W. W. Ward was duly docketed in the county of Wayne, in which said land was situated, and that under an execution duly issuing thereon, the interest of the said W. W. Ward in said land was regularly sold by the sheriff of Wayne county to one A. Day, to whom the said sheriff executed a deed in fee, conveying the interest of said W. W. Ward, in said land, on the 7th day of October, 1870, and that thereafter, to-wit: On the 1st day of January, 1873, the said A. Day conveyed in fee to each of the defendants a part of said land, together constituting the whole thereof, by deeds professing to convey the whole, and not an undivided part thereof to the said grantees. The following issue was submitted to the jury, to-wit:

Were the defendants in the adverse possession of the land in controversy from the 1st day of January, 1873, to the 2nd day of November, 1883? And under said issue the defendants offered a witness, who testified as follows:

The defendants, M. B. Farmer and Needham Southerland, had been in possession of the land in controversy from January 1st, 1873, to November, 1883; that no one else had been in possession, and that the defendants occupied and used the same, claiming it as their own, under their deeds from A. Day; that they built upon the land, cleared it, and otherwise improved the same; that there were marked and visible lines around the land, and that they occupied up to the lines in face of the public, and paid taxes on same.

After argument of counsel, the court instructed the jury that no possession short of twenty years, except after an actual ouster,

would be adverse as against tenants in common, and instructed them to find said issue in the negative. The defendants excepted. The jury found said issue in the negative, and thereupon, His Honor adjudged that the cause be remanded to the Clerk of the Superior Court, in order that further proceedings might be had for the partition of said lands according to law. The defendants excepted.

From this judgment the defendants appealed.

Messrs. Faircloth & Allen, for plaintiff.
Mr. Geo. V. Strong, for defendants.

ASHE, J., after stating the facts: The only issue presented for our determination by the record in this case is—were the plaintiffs barred by the statute of limitations.

The counsel for defendants contended that by the sheriff's sale of the interest of W. W. Ward in the land in controversy he acquired an absolute right in said interest freed from the obligations of facts arising out of the co-tenancy which existed before the sale, between the said Ward and the plaintiffs, and when he conveyed in fee to each of the defendants, a part of said land, constituting the *whole* thereof, by deeds professing to convey the whole and not an undivided part thereof, and they took and held possession thereof, and used and occupied it, claiming it as their own, under their deeds, the law presumed an *actual ouster* after a lapse of ten years—and as it was proved that the defendants held such possession from the 1st day of January, 1873, 'till November, 1883, the plaintiffs could not recover, and for this position the defendants' counsel relied upon the case of *Day* v. *Howard,* 73 N. C. 1. But upon an examination of the decision in that case, it will be seen that it does not sustain the position.

The facts in that case, briefly stated, were as follows: The plaintiff, Mary Day *nee* Joyner, was the only child of Margaret Joyner, who was a tenant in common with others in the land then in controversy. Margaret Joyner was the wife of Robert

Joyner, who was tenant by the courtesy initiate in the share of his wife. Mary was married to W. H. Day in 1830, when she was only eighteen years of age. Her father, Robert Joyner, having survived his wife, Margaret, died in 1854. W. H. Day died on the 14th day of November, 1859, and this action was commenced by summons on the 4th day of November, 1871. During the life of Margaret Joyner, two of her co-tenants sold the entire tract of land to one Battle by deed in fee-simple, who took possession of the whole tract immediately, and the defendants and those under whom they claim have had possession ever since, claiming the land as their own, by mesne conveyances from the said Battle. The portion of the opinion of Ch. J. Pearson, who spoke for the court in that case, upon which the defendants' counsel relies, as follows: "By an analogy taken from the statute by which the time for putting an end to stale demands and quieting titles is reduced from twenty years (fixed by the judges in England as the rule of the common law) to ten years, we are inclined to the opinion that a purchaser from a tenant in common, who buys and takes a deed for the whole tract, and under this deed holds exclusive possession of the whole tract for ten years (the co-tenant being under no disability and there being no particular estate to prevent an immediate assertion of the title), acquires a good title by the presumption of an "*actual ouster*" and his adverse possession. That state of facts is not presented in this case, and we give no opinion."

It will be observed that this was a mere "*obiter dictum*," and the learned Chief Justice only says, he is "inclined" to the opinion and expresses none, because *that state of facts is not presented.* But why are they not presented? They are substantially the very facts presented by the record in the case. The defendants were purchasers of the whole of the land in fee simple from two of the tenants in common and held exclusive possession of the land, claiming it as their own, under their deed, beginning at a period long before the plaintiffs disabilities were removed, and continued to the commencement of the action, and the plaintiff

delayed bringing her action for twelve years after her disabilities were removed by the death of her husband. If the dictum was law, it ought to have governed that case. But yet in the same opinion, the principle upon which the case was decided in favor of the plaintiff is announced, that "if a tenant in common conveys to a third person, the purchaser occupies the relation of a tenant in common, although the deed purports to pass the whole tract and he takes possession of the whole; for in contemplation of law his possession conforms to his true and not his pretended title. He holds possession for his co-tenant and is not exposed to an action by reason of his making claim to the whole and having a purpose to exclude his fellow."

The case was decided in favor of the plaintiff upon the authority of *Cloud* v. *Webb*, 3 Dev., 317, where the action was brought by the plaintiff fifteen years after her disabilities were removed, against the defendant, who, and those under whom he claimed, had held possession of the land for forty years, claiming it under *mesne* conveyance purporting to convey the whole, from a purchaser of the interest of three of the tenants in common.

In the more recent case of *Caldwell* v. *Neeley*, 81 N. C., 114, where there were two tenants in common and one of them undertook to convey the whole tract and a full estate therein to the defendant, and he took possession immediately and claimed to be absolute owner: It was held that the ouster of one tenant in common by another will not be presumed from an exclusive use of the common property and the appropriation of its profits to himself for a less period than twenty years; and the result is not changed when one enters to whom a tenant in common has, by deed, attempted to convey the entire tract.

This case is so similar in its state of facts, and so decisive of the case before us, that we would have been content to have rested our opinion upon that authority alone, without more saying, but for the seeming confidence with which the learned counsel for defendants pressed the decision in *Day* v. *Howard*, as an authority in support of his position.

Our conclusion is that, when the sheriff sold the interest of W. W. Ward the purchaser only acquired such interest as Ward had, and when he by deed purporting to convey the *whole* tract to the defendants and they took possession, they held it by virtue of their true and not pretended title, and there was nothing in their possession under such title to change the relation of co-tenants which had subsisted between their grantor and the plaintiff.

Their possession was the possession of the plaintiff, and nothing less than an "actual ouster" or an adverse possession for twenty years, receiving the rents and profits and claiming the land as their own, from which an "actual ouster" would be presumed, could change that relation. *Day* v. *Howard*, *Cloud* v. *Webb*, *Caldwell* v. *Neeley*, *supra*, *Covington* v. *Stewart*, 77 N. C., 148; *Neeley* v. *Neeley*, 79 N. C., 478.

We are not unmindful of the fact, that in some of the States, for instance, in New York, Pennsylvania and Tennessee, a different doctrine is held from that announced in *Caldwell* v. *Neeley*, but in California the same principle is maintained as in that case. *Seaton* v. *Son*, 32 Cal., 481. But whatever may be decisions in other States, the doctrine declared in *Caldwell* v. *Neeley* must be held as the law in this State.

There is no error. Let this be certified to the Superior Court of Wayne county, that the case be remanded to the clerk of the Superior Court of that county, that the case may be proceeded with according to law.

No error. Affirmed.

JOHNSON KING et als. v. NATHAN SCOGGIN et als.

Reversions and Remainders—Descents.

1. Where a reversion or remainder, expectant upon a freehold estate, comes by descent, and the reversioner or remainderman dies during the continuance of the particular estate, a person claiming the estate by inheritance must make himself heir to the original donor who erected the particular estate.
2. Where the reversion or remainder comes by descent and is conveyed by deed or devise to a stranger, before the determination of the particular estate, the donee takes by purchase, and the estate will descend to his heirs.
3. Where the remainder or reversion is acquired by purchase, one claiming the estate by descent must make himself heir to the first purchaser of the remainder or reversion at the time when it comes into possession.
4. So where an estate was devised to M for life, remainder to G in fee, and G died in lifetime of M; *Held*, that, as G took the remainder by purchase, it descended to his heirs, although he was never actually seized, and not to the heirs of the devisor.

(*Lawrence* v. *Pitt*, 1 Jones, 344, explained and approved).

This was a CIVIL ACTION for the recovery of land tried before *MacRae, J.*, and a jury, at Spring Term, 1884, of RUTHERFORD Superior Court.

The facts are as follows:

George Hay, Sr., owned the land in dispute and was in possession from 1815, and conveyed the same to George Hay, Jr., his son, in 1838 in fee, and died in 1840. George Hay, Jr., was in possession until his death in 1842. George Hay, Sr., had three children, James, Sarah and George, Jr. James went away thirty years ago and never was heard of. Sarah married George Suttle and died, leaving two children, Sarah and Mary, who are the plaintiffs Sarah King and Mary Webb. George Hay, Jr., married Martha Wesson, who, before her marriage, had two illegitimate children—there were no children after the marriage. The two illegitimate children were named Mary Wesson and George Wesson, *alias* Hay.

George Hay, Jr., devised the land as follows:

"I give and bequeath to my beloved wife Martha the tract of land whereon I now live, for her to hold and enjoy during her natural life or widowhood, and at her death or marriage, to my beloved son George Hay, *alias* Wesson."

Martha Hay remained a widow and continued in possession until her death in 1858 or 1859.

George Hay, *alias* Wesson, died in the lifetime of his mother in 1850, unmarried and without issue, leaving a sister, Mary Wesson, the other illegitimate child of Martha.

The defendants claim as follows:

1st. By deed from George W. Suttle and wife Mary, who was the illegitimate daughter of Martha Wesson, afterwards wife of George Hay, Jr., executed 25th March, 1861, to Benjamin Washburne, in fee simple.

2nd. Deed from Mary Suttle (daughter of Sarah), now Mary Webb, plaintiff, to Mary Suttle, wife of George W. Suttle, 21st of March, 1860. Defendants contend that this deed conveyed an estate in fee simple.

The presiding judge held that it conveyed only a life estate. Defendants excepted.

It is admitted that Mary, the wife of George W. Suttle, died before this action was begun.

The plaintiffs claim that George Wesson, *alias* Hay, having died during the life of his mother, Martha Hay, the life tenant, the inheritance descended to them as the only surviving heirs of George Hay, Sr., and George Hay, Jr., under the rules of descent, Revised Statutes, ch. 38, §6, which required actual seizin in the person from whom the estate descended.

The defendants, who are the heirs of Benjamin Washburne, claim that the freehold and inheritance having passed by the devise of George Hay, Jr., and vested for life in Martha Hay, with remainder in George Wesson, that they took the estate by purchase, and that the inheritance vested in George Wesson, and upon his death descended to Mary Suttle, his sister, and only heir-at-law, who, with her husband, George W. Suttle, had con-

veyed the same by deed to their ancestor, Benjamin Washburne, in fee.

The presiding judge, being of opinion with the plaintiffs, instructed the jury that, upon the evidence the plaintiffs were entitled to recover. Defendants excepted.

Judgment for plaintiffs. Defendants appealed.

Messrs. J. A. Forney and *W. P. Bynum*, for plaintiffs.
Messrs. M. H. Justice and *Hoke & Hoke*, for defendants.

ASHE, J. George Hay, the owner of the fee-simple of the land in controversy, devised it to his son, George Hay, Jr., who occupied it until his death in 1842.

George Hay, Sr., had three children, James, Sarah, and George, Jr. James, it is supposed, died many years ago without issue. Sarah married one Suttle, and had two children, Sarah and Mary, who are the four plaintiffs in this action.

George Hay, Jr., married Martha Wesson, who, before her marriage, had two illegitimate chiidren, George Wesson and Mary Wesson, and none after marriage. George Hay, Jr., left a will, in which he devised the land to his wife Martha for life, and, after her death, to his son, George Wesson, in fee. George Wesson died during the continuance of the life estate of his mother, Martha.

The plaintiffs claim the land as the heirs of George Hay, Jr., the person last actually seized of the land, contending that as George Wesson died during the continuance of the particular estate, and consequently never having had actual seizin, the land descended upon his death to the heirs of George Hay, Jr., who created the remainder in George Wesson, and was the person last actually seized of the land in fee-simple.

The defendants claim under the deeds of conveyance from Martha Webb, the plaintiff, and Mary Suttle, the illegitimate daughter of Martha Suttle, the wife of George Hay and sister of George Wesson.

We deem it unnecessary to inquire whether the defendants had any title to the land. The plaintiffs must recover upon the strength of their own title, and we, therefore, proceed to address ourselves to the question whether the plaintiffs have title.

This question is not free from difficulty, but the complexity of the subject is mainly attributed to confounding the estates of reversions and remainders, which, though having some resemblance to each other, are quite distinguishable. Blackstone defines a remainder to be an estate limited to take effect and be enjoyed after another estate is determined; and it not only requires a particular estate to support it, but it must vest in the grantee during the continuance of the particular estate, or *eo instanti* that it determines. 2 *Blackstone*, 163—168. The same author defines a reversion to be "the residue of an estate left in the grant, to commence in possession after the determination of some particular estate, granted out by him. A reversion is, therefore, not created by deed or writing, but arises from construction of law. A remainder can never be limited unless either by deed or devise." *Ibid*, 175–6.

There is a marked difference in some of their incidents, notably in the liability for debts, and in the modes of descent. A remainderman was not liable for the debts of the grantor from whom he derived the estate, whilst a reversioner was bound to pay his ancestor's specialty debts, to the extent of the value of his reversion; and at common law a reversion descends like the old inheritance, of which indeed, it is a part, in the same line therewith and keeping to the blood of the *same first purchaser;* whilst a remainder is a new estate, acquired by purchase, and passes in the line of a new purchaser, 2 *Minor's Institutes*, page 442, and this position is supported by *Sir Wm. Blackstone*, who lays down the doctrine, that "If one seized of a particular estate in fee, makes a lease for life with reversion to himself and his heirs, this is properly a mere reversion, to which rent and fealty shall be incident, and which shall only descend to the heirs of his father's blood and not to his heirs general, as a remainder limited

to him would do. 2 *Blk.*, 176. This seems to be a clear recognition of the doctrine, that when one owning the fee simple conveys it to one for life, remainder to another, that remainderman takes by purchase and becomes a new *stirps* of the inheritance; and we think that is the principle to be gathered from the authorities.

The counsel for the plaintiffs seems to have relied chiefly upon the decision of *Lawrence* v. *Pitt*, 1 Jones, 344, which was decided before the rule was changed, which required that "Inheritance should lineally descend to the person who died last actually seized." But it is no authority for the position maintained by the defendants' counsel. The decision in that case was right.

There the person owning the estate in fee simple, and actually seized thereof, died leaving several children. His widow had dower assigned her in the parcel of land in controversy. Upon a partition among the children, the portion allotted to one of the daughters was covered by the dower. This daughter died before the widow, leaving a grandson who died without issue, and his father, the plaintiff, claimed the land under the provision of the the rule of descent, *Revised Statutes, chapter* 38. It was held that he could not recover, for his son was not heir to his grandmother, because she was never actually seized of the estate in fee simple. The court held the rule to be, as to reversions and remainders expectant upon estates in freehold; "That unless something is done to intercept the descent, they pass when the particular estate falls in, to the person who can make himself heir of the original donor, who was seized in fee and created the particular estate, *or if it be an estate by purchase, the heir of him who was the first purchaser of such reversion or remainder.*

In laying down the rule, the court omitted one very important element of the rule, to wit, when the remainder or reversion comes by descent, as it was in that case, all the authorities agree that, where there is an estate for life and remainder over, and the remainderman dies pending the particular estate, the estate descends to the donor who erected the particular estate, or

to him who can make himself heir to such donor; but this is only when the remainder, like the reversion, comes by *descent*, as was the case in *Lawrence* v. *Pitt*, *supra*. It is true, remainders are created by deed or writing, but the estate is sometimes created so that what is called a remainder is, in effect, only a reversion; as, for instance, when an estate is given to one for life, remainder to the right heirs of the grantor (2, Washburn on Real Property, 692; Burton on Real Property, 51), and this must be the kind of remainder classed with reversions which go to the donor or to him who can make himself heir to him; but it cannot be that when the owner of the fee conveys it by deed, or will, to one for life and after his death to another in remainder in fee, that the estate could under any circumstances return to the donor, for he has parted with all his interest, and according to the rule as laid down by the Court in *Lawrence* v. *Pitt*, the person who claims the estate must make himself heir to the remainderman who is the *first purchaser of the remainder*. Because being the first purchaser of the remainder, he thereby becomes a new stirps of the inheritance.

The distinction lies in acquiring the remainder or reversion by descent or purchase. In the one case it goes to the donor who who created the estate, for it is the *old inheritance*, and in the other it goes to the heirs of the remainderman, because his estate was acquired by purchase, and falls into a new line of descent. This distinction is recognized by all the authorities. Washburn in his work on Real Property, Vol. 3, p. 13, uses this language: "As there can be no actual seizin and possession of a remainder or reversion dependent upon a particular estate of freehold, although the same will descend through a line of successive heirs until the estate vests in some one in possession, the rule of the common law seems to be this: If such remainder or reversion *comes by descent* from the donor of the particular estate who created the same, the person who claims it when it vests in possession must trace his descent from the donor who was last actually seized, irrespective of all who in the meantime may have been

entitled to the same as heirs, the donor or creator of the particular estate being the the stirps from which the descent of the one who is to take, is to be traced. But it would be competent for any one to whom such right had descended to have sold it or divided it, whereby the grantee or devisee, as purchaser, would have constituted a new stirps, and he would take the estate, when it vested in possession, who could trace the descent to himself from such new stirps."

Judge Kent says, "It is a well settled rule of the common law that if the person owning the remainder or reversion expectant upon the determination of a freehold estate, dies during the continuance of the particular estate, the remainder or reversion does not descend to his heir, because he never had a seizin to render him the stock or terminus of an inheritance." The learned Judge in this passage evidently has reference to such reversions and remainders as come by deecent, for he proceeds to add as a part of the rule, "The estate will descend to the person who is heir to him who created the freehold estate, *provided the remainder or reversion descends from him;* or if the expectant estate had been *purchased,* then he must make himself heir to the *first purchaser of such remainder or reversion,* at the time when it comes into possession. The purchaser becomes a new stock of descent, and on his death, the estate passes directly to his heirs at law." With only slight variation in the phraseology, is the rule laid down by Beverly, Judge, in the case of *Vanderheyder v. Crandall,* 2 Den., 24, which is as follows: "It is a well-known rule in the law of descent, that a reversion or remainder, expectant on a freehold estate, will not, during the continuance of such freehold estate, pass by descent from a person in whom a title thereto had *vested by descent,* as a new stock of inheritance, unless some act of ownership which the law regards as equivalent to an actual seizin of a present estate of inheritance had been exercised by the owner over such expectant estate. But it is otherwise when the future estate was acquired by purchase, because the purchaser becomes a new stock of descent, and on his death the estate passes directly to his heirs at law."

We understand what is meant by the qualification of the rule expressed in the sentence, "unless some act of ownership which the law regards as equivalent to an actual seizin," is when the reversioner or remainderman, to whom the estate has come by descent, conveys his estate to a stranger, he is a purchaser and as such becomes the stirps of a new stock of descent, and any one claiming the land after his death must make himself heir to him and not to the original donor from whom the estate was originally derived. The conveyance takes the estate out of the old line of inheritance and puts it in one entirely new. That being so, *a fortiori* is the effect of a conveyance by deed or devise from the original owner to one for life, remainder in fee to a stranger, where the absolute estate is parted with.

The rules above cited would seem to embody these three propositions,

(1) When the reversion or remainder expectant upon a freehold estate comes by descent, and the reversioner or remainderman dies during the continuance of the particular estate, he who would claim the estate by inheritance, must make himself heir to the original donor, who erected the particular estate, for it is the old inheritance;

(2). Where the reversion or remainder comes by descent, and before the determination of the particular estate it is conveyed by deed or devise to a stranger, the donee takes by purchase; he becomes a new stock of descent and the estate will descend to his heirs.

(3). Where the remainder or reversion is acquired by purchase, then he who would claim the estate, must make himself heir to the first purchaser of the remainder or reversion at the time when it comes into possession; for the remainderman or reversioner, by such purchase, has becomes a new stirps of descent.

This last proposition, in addition to the authorities already cited, is supported by the following: In *Doe* v. *Hutton*, 3 Bos. & Pul., 650; Lord Alvanly, C. J., in speaking of reversions and remainders, after citing numerous authorities uses this language :

"These, and many other cases which I shall forbear to mention, prove that where there is an intermediate estate (freehold), there is no seizin, though as I before observed, if a man purchase a reversion expectant upon a freehold, it will descend to his heirs, though it has never come into possession;" and *Burton on Real Property*, p. 48, thus mentions the same doctrine. "If a person has purchased, *i. e.* acquired by conveyance or devise, lands and tenements in fee simple, of which from the nature of the estate he cannot obtain seizin, these on his intestacy will descend to his heirs. Of such a nature is a remainder expectant upon a particular estate of freehold, and this remainder, vesting in the heir by descent, will not, if it remain untolled, descend to his heir, as such, but still to the heir of the first purchaser," which we find thus illustrated by another author: "If A, the reversioner, remainderman, or executory devisee died before the event which brought the interest into possession, such interest did not so attach in B the then heir of A, as to carry it upon B's death to C the heir of B; but D the heir of A at the time of the interest falling into possession was entitled." *Hubback on Evidence of Succession*, 136; *Cap.*, 15*a*; *Butler's Note*, 6.

Our conclusion is, the plaintiffs cannot establish a title to the land in controversy by claiming as heirs of George Hay, Jr., and are, therefore, not entitled to recover in this action.

The judgment of the Superior Court is, therefore, reversed, and judgment must be entered here that the defendants go without day and recover the costs of the appeal.

Error. Reversed.

J. H. SMITH v. S. BYNUM.

Mortgage—Satisfaction of.

If a mortgagee has a settlement with a mortgagor and takes a new note for the balance due, with a new mortgage to secure it on the same property, and after the execution of the first, but before the execution of the second mortgage, the mortgagor sells and delivers the property mortgaged; *Held*, that by the settlement and the taking of the new note and mortgage, the prior mortgage was discharged, and the purchaser got a good title.

This was an action of claim and delivery of a mule, tried before *MacRae, J.*, and a jury, at July Special Term, 1884, of GREENE Superior Court.

The plaintiff offered in evidence a mortgage executed by Ketter Vines and Frank Vines to King & Smith, recorded in March, 1881; a mortgage from same parties to J. H. Smith, plaintiff, executed and registered in January, 1882, and a mortgage from same parties to J. H. Smith dated January 8th, 1883, and registered February 22nd, 1883. J. H. Smith, plaintiff, testified that defendant had the mule described in the three deeds in his possession at the commencement of this action; that plaintiff is successor and assignee of King & Smith; that the mortgages have never been settled.

Cross-examined, plaintiff further testified that he had a settlement with the mortgagors at the end of the year 1881, and the amount found to be due plaintiff was $243.10; plaintiff then took a new mortgage to himself for the amount due upon the former mortgage, and undertook to make further advances to the mortgagors to the amount of $50, and at the end of 1882 had another settlement, when it was ascertained that the mortgagors were still indebted to him in the sum of $243.53, and thereupon plaintiff took another mortgage for this amount and to secure further advances. At the time the last mortgage was executed, plaintiff does not know whether the mule described therein was in the possession of the mortgagors or not. In February or

March, 1883, the mule was in possession of one Dunn. Dunn said he got it from Frank Vines. Plaintiff found mule in possession of defendant and brought this action.

Testimony was also introduced as to the value of the mule.

William Dunn, for the defendant, testified that he got the mule from Frank Vines in December, 1882, without notice of any mortgage, and traded it to defendant.

The presiding judge charged the jury that the first and second mortgages were satisfied by the annual settlements and giving of new mortgages, and that if they found that the mule described in the last mortgage, which was admitted to be the same as that described in the first and second, had been disposed of by the mortgagors before the last mortgage was made and executed, and was not in their possession at the time the last mortgage was made, the plaintiff was not entitled to recover. Plaintiff excepted.

Verdict for defendant. Rule for new trial. Rule discharged. Judgment for defendant, and plaintiff appealed to the Supreme Court.

Mr. W. C. Monroe, for plaintiff.

No counsel for defendant.

ASHE, J. (after stating the facts). The plaintiff claimed the mule in controversy by virtue of several mortgages executed by Ketter Vines and Frank Vines. The first, a mortgage recorded in March, 1881, to King & Smith, to which the plaintiff succeeded as their assignee. On the 9th of January, 1882, the plaintiff settled the first mortgage by taking a new note for two hundred and forty-three $\frac{10}{100}$ dollars payable to himself, and due on the first of November, 1882, to secure which he took from the Vines a second mortgage bearing even date with the note, which was recorded on the 10th day of January, 1882, and on the 8th day of January, 1883, he came to a settlement with the mortgagors upon the last mortgage, and received from them a new note for two hundred and forty-two $\frac{53}{100}$ dollars payable like

the last, due the first of November, 1883, to secure which he procured from the Vines the third mortgage bearing the same date with the note, and recorded on the 21st day of February, 1883.

The defendant claimed the mule by purchase from one Dunn, who was introduced by him as a witness and testified that he got the mule from Frank Vines in December, 1882, without notice of any mortgage, and traded it to the defendant.

There was no error in the instructions given by His Honor to the jury. If the plaintiff had not come to a settlement with the mortgagor on the mortgage of the 9th day of January, 1882, and taken a new note with another mortgage to secure it, his lien under that mortgage would have continued and he would have had the right to recover in the action, but by his settlement and taking a new note in settlement, with a mortgage to secure it, the mortgage of the 9th day of January, 1882, was discharged, became extinct and the plaintiff lost his lien under it, and the defendant having purchased the mule prior to the date of the last mortgage, acquired a good title. The judgment of the Superior Court is therefore affirmed.

No error. Affirmed.

D. G. McMILLAN et als. v. M. A. BAKER.

New Trial—Surprise—Defendants' Bond in Ejectment—Striking out Answer Reviewable.

1. When a new trial is awarded by the Supreme Court on appeal, the case goes back to the Superior Court for a new trial on the whole merits, and the court below ought to proceed with the trial, as if no former trial had taken place. It is immaterial that the evidence is the same as that used on the former trial.
2. Where in an action to recover land, the defendant failed to file a bond to secure costs and damages as required by *The Code*, sec. 237, it is error to strike out the answer on a motion made at the trial term, without giving the defendant an opportunity to file a bond at that time.

3. The bond under this section of The Code is for the benefit of the plaintiff, and he can waive it, and will be deemed to have done so, if he allows a number of terms of court to pass without demanding it. If not waived entirely, it is waived until demanded.

4. An order of the Superior Court, striking out an answer in an action of ejectment for want of a bond by the defendant, is reviewable, where the defendant has been led to assume that the plaintiff has waived the bond.

(*McMillan* v. *Baker*, 85 N. C., 291; *Isler* v. *Koonce*, 83 N. C., 55; *Meroney* v. *McIntyre*, 82 N. C., 103; *Ferguson* v. *McCarter*, Taylor's Term R. 107; *Brittain* v. *Howell*, 2 D. & B., 107; *Russell* v. *Sanders*, 3 Jones 432, cited and approved).

This was a civil action, for the possession of land, tried before *Philips, J.*, at Spring Term, 1884, of CUMBERLAND Superior Court.

This case was before the Supreme Court, at October Term, 1881 (see 85 N. C., 291), and a *venire de novo* was awarded. When the case was called for trial and both sides had announced their readiness, the plaintiff, before the jury were impanelled, called the attention of the court to the opinion of the Supreme Court rendered on the former appeal, and took the position that the question of title was settled, and that there was nothing to try but the question of damages—and stated that the plaintiffs had the very same proofs as to title that were used on the former trial as referred to in the opinion of the Supreme Court.

The defendant contended that the Supreme Court had granted him a new trial out and out, and asked that the identical issues submitted on a former trial, as stated in the record, be again submitted to the jury, and stated that the documentary proof would be identically the same, but that he did not rely on that entirely.

The plaintiffs contended that the former trial and decision of the Supreme Court, together with the statement by plaintiffs and defendant, that the deeds, records, and decrees, and other documentary proof as to the title would be identically the same, was decisive of the first issue as submitted on the former trial, and asked that the answer of the jury as to the first issue should be in favor of the plaintiffs, and that it be reformed so as to read "Yes" instead of "No."

The court ruled that the Supreme Court judgment rendered on an appeal from a former trial, the documentary proof now offered being the same, was decisive of the question of title, and remarked to defendant's counsel that he would not attempt to overrule the Supreme Court, and, thereupon, directed that only the issue as to damages should be submitted to the jury.

After the jury had been selected and before it had been impanelled, the plaintiffs moved to strike out the defendant's answer, because this being an action for possession of land, he ought to have filed a bond for costs and damages as required by statute, before filing his answer, but had failed to do so. The Court, after inquiry, ascertained that no such bond had ever been filed, allowed the motion, and struck out the answer and gave plaintiffs judgment for want of an answer, and directed the inquiry as to damages to proceed. Defendant excepted.

After the answer had been stricken out on plaintiffs' motion, for above stated reasons, the defendant asked leave to file a bond, stating that the case had been standing for a long time, and that he was taken up by surprise, and stated further that the defendant was well able to answer in damages.

The Court declined to grant leave to file the bond as asked for, and defendant excepted.

After the jury was impanelled on the issue as above stated, the plaintiffs offered evidence as to the amount of damages sustained by them on account of the defendant's possession and closed the case.

There was a verdict assessing the plaintiffs' damages, judgment, and appeal by the defendant.

Messrs. N. W. Ray and *W. A. Guthrie*, for the plaintiffs.
Mr. John W. Hinsdale, for the defendant.

MERRIMON, J. This case came before this court by a former appeal at the October term, 1881, and the questions presented by the record in that appeal, were then considered and decided.

(See *McMillan* v. *Baker*, 85 N. C., 291). It is too plain to admit of serious question, that the Court then held that there was "error and there must be a new trial"; not a new trial in respect to part of the case, or to particular aspects of it, but upon the whole merits of the action as it then might appear before the court. The plaintiffs were left to prove their case over by the same or other and additional evidence, and the defendant was likewise left at liberty to make good his defence if he could do so.

The court below ought, therefore, to have proceeded with the trial of the issues of fact arising upon the pleadings, just as if no former trial had taken place, applying the law as expounded and laid down by this Court in its opinion in the case. It might be that the trial of the issues of fact, in view of the decision of this Court upon the questions of law, and the proofs, would certainly lead to a particular result, but there might be other proofs on the one side or the other, or both; at all events, it was necessary to try the issues over, and submit an issue as to damages, with proper instructions. It was erroneous simply to submit an issue as to damages. *Isler v. Koonce*, 83 N. C., 55; *Meroney v. McIntyre*, 82 N. C., 103.

This being an action to recover the possession of land, the plaintiff, after the jury had been selected, but before it had been impanelled, moved to strike out of the record the defendant's answer, because no undertaking to secure costs and damages had been given by the defendant before answering the complaint, as required by The Code, §237. The Court allowed this motion. The defendant, however, then asked leave to file a proper undertaking, suggesting that he was well able to answer for the damages, that the case had been pending for a long time, and that he was taken by surprise. We think the Court ought not to have allowed the motion to strike out of the record the defendant's answer, without first giving him an opportunity to give a proper undertaking to secure costs and damages. Under the circumstances of this case, he had the right to be allowed such opportunity. The undertaking, required by the statute in such cases,

is for the benefit of the plaintiff, and it ought to be strictly required unless waived by him; but he may waive it if he sees fit to do so. It is very clear that the plaintiffs did so in this case; at least, and certainly until they should demand it.

The action was begun on the 3d day of April, 1879. The plaintiffs filed their complaint and the defendant filed his answer without objection; the action was tried in the Superior Court, and there was an appeal to this Court. This Court granted a new trial. In the court below, just at the time the trial of one issue was about to be had, the plaintiffs, for the first time, moved to strike out the answer, upon the ground that an undertaking for costs and damages had not been given. There could scarcely be a stronger case of waiver by implication. The Court had the power to require the undertaking to be given at so late a period in the progress of the action, upon application of the plaintiffs; but the defendant had the right, after such waiver, to have opportunity to give it, and having given it, as the Court might require, to have his answer remain of record, and have the full benefit of it.

This court has the authority to revise the action of the court below, in respect to the motion and order in question. It did not lie in the discretion of the court to strike the answer from the record, because the waiver of the undertaking on the part of the plaintiffs, created a right in the defendants to give it when required. They may have deemed the defendant abundantly solvent and able to pay costs and damages; or, for reasons satisfactory to them, they may have abstained from insisting on their strict rights. As they did not, by their silence as to the undertaking, they invited or permitted him to proceed in the action with his defence, without it. Having done so, it would be unjust, and a violation of good faith at the least, at their pleasure, to cut him off from his defence. The law will not permit them to do so; he is entitled to give the undertaking under the direction of the court; if he will not or cannot, and in the latter case, cannot obtain leave to defend as a poor person, then the plaintiffs' motion

to strike out the answer must be allowed. *Ferguson* v. *McCarter*, Taylor's Term R., 107; *Brittain* v. *Howell*, 2 D. & B., 107; *Russell* v. *Sanders*, 3 Jones, 432.

There is error. The defendant must be allowed to give an undertaking to secure costs and damages, as the court may direct. If he fails to do so, in that case, the court may allow the motion to strike the answer from the record, and proceed according to law. If the undertaking shall be given, in that case, the court will proceed in the action according to law. To that end, let this opinion be certified to the Superior Court of the county of Cumberland. It is so ordered.

JAMES J. DUNLAP, Adm'r, v. JAMES H. HENDLEY, Adm'r.

Statute of Limitations.

1. In October, 1870, A as administrator of B obtained judgment against C. In August, 1880, A died, and in June, 1883, D became administrator *de bonis non*, &c., of B. In February, 1881, C died, and in September, 1883, E qualified as his administrator. In January, 1884, D, the administrator *de bonis non* of B brought this action against E, the administrator of C, to collect the amount due on the judgment above mentioned. Defendant relied upon the bar of the statute of limitations; *Held*, that the action was not barred. *The Code*, §164.

2. Defendant, in the Supreme Court, made the objection that leave of the Superior Court in which the judgment was rendered to bring this action, was not obtained by plaintiff; *Held*, that the objection ought to have been raised by motion or in the answer, and now came too late, and must be taken to be waived. Besides, §14, C. C. P., is not brought forward in The Code.

(*Lynn* v. *Lowe*, 88 N. C., 478, cited and approved).

CIVIL ACTION, tried at Fall Term, 1884, of Superior Court for ANSON county, before *Shepherd, J.*

The facts are sufficiently stated in the opinion of the Court.

Verdict and judgment for plaintiff. Appeal by defendant.

Mr. J. A. Lockhart, for plaintiff.

Messrs. Little & Parsons, for defendant.

MERRIMON, J. At the Fall Term of 1870 of the Superior Court of Anson county, which began on the 17th day of October of that year, Nathaniel Knight, as administrator *cum testamento annexo* of Hannah P. Dunlap, deceased, recovered two judgments against John S. Kendall and David Carpenter—one for the sum of $333.83, and the other for $405.69, with interest thereon, and $45.60 for costs.

The said Nathaniel Knight died on the 14th day of August, 1880, and on the 29th day of June, 1883, the plaintiff Dunlap duly became administrator *de bonis non, cum testamento annexo* of the estate of the said Hannah P. Dunlap.

John S. Kendall, above named, and against whom the judgments mentioned were obtained, died on the 19th day of February, 1881, and on the 5th day of September, 1883, the defendant qualified as the administrator of his estate.

The plaintiff brought this action on the 14th day of January, 1884, to recover judgment for the money specified in and due upon the two judgments above mentioned.

The defendant pleaded and relied upon the statute of limitations. The Court held that the action was not barred by the statute, and gave judgment for the plaintiff. The defendant excepted, and appealed to this Court.

In the absence of any interposing cause, the cause of action created by the judgments sued upon would have been barred by the statute of limitations after the lapse of ten years next after the rendition of them. Two events, however, did happen that suspended that statute:

First, Nathaniel Knight, administrator *cum testamento annexo* of Hannah P. Dunlap, died on the 14th day of August, 1880, less, by more than two months, than ten years next after the rendition of the judgment, mentioned, in his favor. His death suspended the statute. *The Code*, §164, provides, that "If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives after the expiration of that time, and within one year from his death."

It is plain, and not denied, that the action did survive. It appears that more than a year did elapse after the death of Knight, the administrator, before the action was brought; but it must be observed that no administrator *de bonis non cum testamento annexo* of the estate of Hannah P. Dunlap was appointed until the 29th day of June, 1883, when the plaintiff was appointed, and during the time next after the death of Knight, until this appointment of the plaintiff, the statute did not run, because there was no person that could sue. The statute just cited suspended the statute of limitations in the case provided for, and it contemplates that it shall not run again until some person competent and authorized to sue shall be appointed by the proper authority; otherwise its purpose would be defeated. *Lynn* v. *Lowe*, 88 N. C. R., 478.

So that the action was not barred by the statute at the time the plaintiff became administrator. He, however, delayed to bring the action for more than six months, and, thus, more than ten years elapsed while there was a person competent to sue before the action was brought.

The statute recited above provides that the representatives of the person entitled to bring the action may do so "within ten years from his death." It is very questionable whether this clause could help this case. It seems that the administrator ought to bring the action within ten years while the statute is running. But it is not necessary to decide definitely whether this is so or not, because a second event happened before the statute began to run a second time, as above indicated, that prolonged its suspension. John S. Kendall, the intestate of the defendant, and against whom the judgments sued upon were given, died on the 19th day of February, 1881, and long before the plaintiff became administrator and competent to sue.

The defendant was appointed administrator on the 5th day of September, 1883. The plaintiff, however, did not bring this action until the 14th day of January, 1884, and after the lapse of more than ten years, while there was a person competent to

bring it. But the statute did not begin to run a second time as soon as the plaintiff became administrator, nor could it until one year next after the defendant became administrator. The Code, §164, in a second clause provides that "If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his personal representative *after the expiration of that time, and within one year after the issuing of letters testamentary or of administration.*

So that the statute of limitations did not run at all after the death of Knight, the administrator *cum testamento annexo*. The action was not barred at his death, and, hence, it was not barred at the time it was brought.

The counsel for the defendant made the objection in this court for the first time in the course of the action, that the plaintiff did not obtain leave from the Superior Court in which the judgments sued upon were granted to bring an action upon them, as required by C. C. P., §14. This objection ought to have been raised by the defendant in the Superior Court, by a proper motion before pleading on his part, at all events, in his answer. It does not affect or go to the substance of the plaintiff's right, and the defendant could waive it. It must be taken that he did so. In any view of the matter, it is too late to make it here.

Besides, sec. 14, C. C. P., is not brought forward in The Code, and is not, nor was it in force at the time this action was begun; and, therefore, the objection would not be tenable, if it had been made in apt time.

Judgment affirmed.

BETTIE STRAYHORN v. C. B. GREEN.

Trustee—Bond of.

1. It is not necessary in substituting one trustee for another in pursuance of sec. 1270 of *The Code*, to require a bond of the substituted trustee.
2. Whether a trustee so substituted shall be required to give bond, rests in the discretion of the court, and upon proper reasons being assigned, the court would require a bond to be given, if the nature of the trust required it.

(*Gray* v. *Gaither*, 74 N. C., 237, cited and approved).

MOTION in a cause pending in DURHAM Superior Court, heard at Chambers, on September 18th, 1884, by *Philips, Judge.*

His Honor refused the motion, and the plaintiff appealed.

The facts appear fully in the opinion.

Messrs. Manning & Manning, for the plaintiff.
Messrs. Long & Strudwick, for the defendant.

MERRIMON, J. As well as we can learn from a very imperfect record, it appears that an action was brought before the clerk of the Superior Court of the county of Durham, on the 14th day of December, 1882, to substitute a trustee, as allowed by *The Code*, §1270, in the place of Green Blalock, to execute the trusts provided and created in a deed dated the 2d day of May, 1877, executed by John Strayhorn to the said Blalock, as trustee for Bettie Strayhorn, the appellant. What the trusts are, does not appear in the record before us.

On the 23d of March, 1883, the appellee was appointed as substituted trustee, and he was not required to give any bond, as such trustee, nor does it appear that the appellant interposed any objection on this account.

Afterwards, on the 6th day of September, 1884, the clerk, at the instance of the appellant, gave notice of a motion in the cause, to be made before him on the 10th day of September, 1884, to require the appellee to show cause why he should not give a proper and sufficient bond as such trustee.

The only grounds assigned by the appellant for the motion were as follows:

(1). "That by a petition filed the 14th December, 1882, and an order made thereon 23d March, 1883, C. B. Green was appointed the trustee of said Bettie Strayhorn, to execute the trust arising upon a deed of trust executed by John Strayhorn to Green Blalock 2d May, 1877.

(2). That said C. B. Green has never filed a bond to secure the proper administration of said trust, nor for the better security of the trust estate."

The appellee resisted the motion upon these grounds:

(1). That the court had no jurisdiction to hear and pass upon the question raised in the petition, by requiring the trustee to give bond under the deed mentioned.

(2). That the powers and duties imposed upon him are conferred upon him by deed, and the court had no power to require a bond or other security from him in respect to the trusts.

(3). That there is no allegation that the trustee is dead, removed from this State, or has become incompetent or unworthy for any cause to perform the duties as trustee.

The appellant's motion cannot be sustained. It seems to rest upon the unfounded assumption, that all substituted trustees appointed, as allowed by *The Code*, §1270, are required to give bond conditioned for the faithful discharge of their duties. In many, perhaps most cases, they are not required to give such bonds; their duties might be such as not to require it. In other cases, no doubt, they might be required to do so, and whether they should be so required or not, rests in the sound discretion of the Court.

It does not appear that there was any reason why the appellee should have given bond at the time of his appointment. It seems that there was no objection to it; and we must take it that the clerk deemed that there was no necessity for requiring a bond.

After a trustee has been appointed, causes for requiring him to give a proper bond might arise, such as insolvency in some cases.

In such cases, the cause should be duly assigned and made to appear, and the Court would promptly grant relief. *Gray* v. *Gaither*, 74 N. C., 237. But it is not alleged by the appellant that the trustee is insolvent; that he is misapplying or wasting the trust funds, if there are such trust funds; or, that there is any cause that has arisen since, or that existed at the time of his appointment.

We are of opinion that the appellant shows no sufficient grounds to support her motion. The judgment of the judge at chambers must therefore, be affirmed. Let this opinion be certified according to law.

Judgment affirmed.

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* HINSON & CUMMINGS v. ADRIAN & VOLLERS.

Foreclosure Sale—Waiver of Homestead—Resale.

1. In a sale of land by order of Court, the Court has the power to re-open the bidding, and order the land to be sold a second, and possibly a third time, for extraordinary cause, but the power should be exercised cautiously.
2. Where, in an action brought by mortgagees and judgment creditors to have the mortgaged property sold for the payment of the mortgages and judgments, a sale is made without objection by the debtor, it is too late for the debtor to ask for a homestead by metes and bounds after such sale has been made. His homestead can be paid to him in money.
3. A mortgagor is entitled to a homestead in an equity of redemption, and if the land is certainly of greater value than the mortgage debt, the homestead may be assigned by metes and bounds, but if by doing so the value of the homestead would be impaired, it is competent to order a sale, and assign the homestead in the money arising therefrom.

(*Cheatham* v. *Jones*, 68 N. C., 153; *Burton* v. *Spiers*, 87 N. C., 87; *Wilson* v. *Patton*, *Ibid*, 318, cited and approved).

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* Mr. Justice Ashe did not sit upon the hearing of this case.

This was a motion in the cause heard before *Philips, J.*, at Spring Term, 1884, of ANSON Superior Court.

The facts are fully set out in the opinion.

The motion was overruled and the defendant Knotts appealed.

Messrs. J. D. Shaw, J. A. Lockhart and *John W. Hinsdale*, for the plaintiff.

No counsel for the defendants.

MERRIMON, J. This action was brought to Fall Term, 1880, and the complaint and answers were filed at and subsequent to said term. At the Fall Term of 1881, the defendant Knotts filed an affidavit alleging that there were other judgment creditors and a mortgagee who had not been made parties to the action, and asking that they be made parties. The court declined to make them parties and rendered judgment. The defendant appealed to the Supreme Court, and at February Term of 1882, of that court, the case on appeal was heard and the court pronounced judgment that the other mortgage and judgment creditors were necessary parties to the action and should be made such, whereupon, at Fall Term of 1882, of the Superior Court, the other mortgage and judgment creditors were made parties to the action, and a decree was made by consent of all the parties thereto. The defendant Knotts failed to comply with the conditions of that decree by failing to pay the first and other installments of the debts, as therein required to be paid, and the commissioner named in the decree, upon default made in the payment of the first installment, advertised and sold the lands described in the pleadings, and made report to Spring Term of 1883, of the Superior Court, at which sale the land brought the price of six thousand two hundred and ninety-five dollars ($6,295). Thereupon, at that term, by the procurement, and at the instance and request of the defendant Knotts, an advance bid of ten per cent. was made by one C. M. Burns and accepted by the court, and upon motion of the defendant Knotts, based upon his affidavit, a resale was ordered. A resale was

made by the commissioner, and a report thereof was made by him to Fall Term, 1883, at which sale the land brought, in the aggregate, $6,931.50. Before the bid and terms of sale were complied with, the plaintiffs Aaron & Rheinstein made an advance bid, increasing the price to the sum of $8,331, all of which was reported to the court at that term by the commissioner. The advance bid was recognized by the court and a resale was ordered. Under the order of resale, the commissioner sold the lands again in separate tracts, as they are described in the pleadings and in accordance with the order of the court. The plaintiffs Aaron & Rheinstein became the purchasers of all of the tracts, at the price of $8,331.

At the Spring Term of 1884, upon the report of the commissioner, the plaintiffs, and also the judgment creditors, and the defendants Adrian & Vollers, moved for a confirmation of the sale and a distribution of the funds arising therefrom according to the consent decree made in the cause. The defendant Knotts moved upon affidavit that the sale be set aside and that his homestead be allotted and set apart to him by metes and bounds out of the lands. The judgment creditors admitted that the defendant Knotts is entitled to one thousand dollars of the proceeds of the sale of the lands as his homestead, but deny his right to have the sale set aside and his homestead allotted by metes and bounds out of the lands so sold.

It is found as a fact, that the lands brought, at the last sale, $8,331, and that the debts secured by mortgages to Adrian & Vollers and R. T. Bennett amount to $3,169.05, with interest on the principal thereof from May 14th, 1883, and that the lands brought more than enough at any one of the sales to pay the mortgages in full and allow the defendant Knotts his homestead. The motion of the defendant Knotts was overruled, and the motion of the plaintiffs, the judgment creditors and Adrian & Vollers was allowed.

The court gave judgment that the sale of the commissioner be confirmed; that the commissioner make title to the purchasers or

their assigns; and that the clerk of the court pay out and make distribution of the proceeds of sale as follows:

1. That he pay the mortgage debts of Adrian & Vollers and interest accrued thereon.

2. That he pay to H. T. Knotts, the appellant, one thousand dollars as his homestead.

3. That he pay the costs of this action, to be taxed by the clerk, including one hundred dollars ($100) for making sale of lands, paying out proceeds and making title.

4. That he pay the other creditors mentioned in the decree, according to their respective priorities, as evidenced by the judgments and schedule hereto annexed.

The defendant Knotts excepted and appealed.

The appellant has no just grounds of complaint at the judgment of the court appealed from. The court granted him every reasonable indulgence, indeed, unusual favor, perhaps greater than was strictly consistent with the rights of the mortgage and judgment creditors. While the court had power to re-open the biddings and order that the land be sold again, and perhaps a third time for extraordinary cause, the power ought to be exercised cautiously and only for substantial cause, having due regard for the rights of all the parties interested.

The land was sold three times by order of the court, once at the instance of the appellant, it seems, without objection from the creditors. They now insist upon a confirmation of the sale and the payment of their debts.

If the court ought in any case to re-open the biddings so often and might do so yet again, no substantial excuse for doing so is assigned and shown. It is not suggested that the sale was in any respect irregular or unfair, or that the land did not sell for a fair price.

The appellant after the last sale of the land and before the same was confirmed, suggested to the court for the first time in the course of the action that he was entitled to homestead in the land and to have the same allotted to him. The judgment cred-

itors conceded that he was entitled to $1,000 of the proceeds of the sale of the land as for homestead, but denied his right now to have the sale set aside and have it allotted to him by metes and bounds. The law favors the homestead, and this Court has held that the mortgagor is entitled to have it in an "equity of redemption," subject to the right of the mortgagee to have his debt paid with the proceeds of the sale of so much of the land as may be necessary for that purpose. *Cheatham* v. *Jones*, 68 *N. C.*, 153. When it is made to appear that the land is of value certainly greater than the mortgage debt, and that the mortgagor may have homestead assigned to him, the court would in a proper case direct it to be assigned by a proper proceeding, perhaps in the same action. But in many cases, it might be impracticable to assign it in the land itself, as for example, when from the smallness of the quantity of the land, or its character and condition, or other like considerations, to assign it would impair its real value or lessen the price that might be obtained for it, and thus defeat it in part or altogether. In such and like cases, it is competent and proper, certainly by consent of parties, to set apart the value of the homestead in money, the proceeds of the sale of the land to the party entitled, and if the whole cannot be had, then so much as may be.

This doctrine is founded in the policy of the law that favors the homestead. If the party entitled cannot have it assigned in the land, for causes such as those indicated, the Court will allow to him money in lieu of it, of the proceeds of the sale of the land, after the debt of the mortgage shall be paid, or the lien that stands in the way of it shall be discharged, to the end that he may purchase other land, and thus obtain a homestead. If this were not done, in many instances it would be lost. The policy of the law is to help the party entitled to homestead, in that respect, as far as may be, without undue prejudice to the creditor entitled to have his debt paid in any case. *Burton* v. *Spiers*, 87 N. C., 87; *Wilson* v. *Patton*, *Ibid*, 318.

In cases involving circumstances like those mentioned, and in the present case, the party entitled to homestead may waive his right to have it assigned to him in the land; it might be materially to his advantage to do so, and it will be so taken, if he shall say nothing to the contrary at the proper time. He is presumed to know what is most advantageous for himself and his family, if he have one. The court cannot know how this may be until it shall be duly informed, and it must be informed in some orderly way, and in apt time, to enable it to do justice to all the parties interested, including the creditors.

In this case, the appellant wholly failed, through the whole course of the action, to set forth and insist upon his right to have the homestead assigned to him in the land, until after the rights of the parties had been settled, and the land had been sold three several times, and the motion had been made to confirm the sale. This savors of trifling with the court. No excuse is given for the delay, nor is it suggested that any special advantage can be gained by the assignment as demanded.

The Court could not see that the appellant was entitled to homestead in the land sold, or to have money in lieu of it, in whole or in part—it might well be, that he had a homestead in other lands; indeed, he says in his application that he has other lands of the value of $600 or $700. If he had made his application in apt time, it is probable, in view of the facts as they now appear, that the Court might have directed the assignment as demanded, but his demand came too late, especially as the creditors conceded that he might have, and the Court allowed him $1,000 of the proceeds of the sale of the land as for his homestead. This, as the facts appear, was very liberal on the part of the creditors, and probably more than in strictness he was entitled to have. It does not appear how the appellant can suffer unduly from the action of the Court; if, unhappily, he shall suffer any inconvenience, he has only himself to complain of; he ought to have made his application at the proper time. Coming at so late a stage of the action and the delay unexplained, it seems captious,

and to be interposed to annoy and delay the creditors entitled to be paid. A court is a serious tribunal, and no party before it can be allowed to trifle in its proceedings in any respect; its office and purpose is to administer exact justice as nearly as may be to all parties before it, without favor to any. The debtor is entitled to have his rights administered and protected, but in no larger measure than the creditor.

There is no error, and the judgment must be affirmed. To this end, let this opinion be certified to the Superior Court according to law.

Judgment affirmed.

W. H. BORDEN v. LOUIS D. GULLY.

Evidence—Code, Section 580.

In an action to rescind a contract for fraud, which fraud consisted in representing a bond, dated prior to August 1, 1868, to be unpaid, the obligor in such bond is a competent witness to prove that it has been paid. The *proviso* in section 580 *of The Code*, making any person incompetent to testify, who, at any time, has had an interest in such bond, only applies to actions *founded* on the bond.

This was a civil action tried before *Gudger, Judge*, at January Term, 1885, of WAYNE Superior Court.

The plaintiff appealed.

The facts are stated in the opinion.

Messrs. Faircloth & Allen and *G. V. Strong*, for the plaintiff.

No counsel for the defendant.

ASHE, J. This action was brought to rescind, for fraud, a contract, whereby the defendant, for a valuable consideration, had sold to the plaintiff a note under seal, executed by one Curtis H.

Brogden to one W. R. Brogden, deceased, on the 14th day of March, A. D. 1864, for the sum of four hundred dollars, or to recover damages on account of said fraud.

Evidence was given to the jury by the plaintiff, tending to prove said contract; and that the defendant, at the time thereof and just previous thereto, had represented to the plaintiff that said note was not paid, and that there were no set-offs against it; and that this representation was reasonably relied upon, by the plaintiff, and that it was a motive inducing to the contract on his part.

The plaintiff then offered the said Curtis H. Brogden as a witness, to prove that at the time said representation was made, and at the time of said contract, said note had been paid, and that the said payment was known to the defendant. The defendant objected, on the ground that said witness was incompetent to prove these facts, under section 580 of The Code. The court sustained the objection and ruled out the evidence, whereupon the plaintiff excepted, submitted to a judgment of non-suit, and appealed to this court.

Whether there was error in the ruling of His Honor in excluding the testimony of Curtis H. Brogden, depends upon the construction of section 580 of The Code, which reads: "A party to an action may be examined as a witness, at the instance of the adverse party, or of any one of several adverse parties, and for that purpose may be compelled in the same manner, and subject to the same rules of examination as any other witness, to testify, either at the trial or conditionally or upon commission: *Provided*, no person who is or shall be a party to an action founded on a judgment rendered before the first day of August, 1868, or on any bond executed prior to said date, or the assignor, endorser or any person who has at the time of the trial, or ever has had any interest in such judgment or bond, shall be a competent witness on the trial of such action."

The language of the section is too plain to admit of a doubt as to its construction. The restriction in the *proviso* has refer-

ence exclusively to an action upon the class of judgments and bonds mentioned therein.

The evident meaning of the *proviso* is, that no person who is, or shall be, a party to an *action founded* on a judgment, or to an *action* on any bond, or the assignor or endorser of such bond upon which the *action is founded*, or any person who has, at the time of the trial of such *action*, or ever has had any interest in such judgment or bond upon which the *action is founded*, shall be a competent witness on the trial of such *action upon* the said bond or judgment.

But here the action is to rescind a contract for a fraudulent representation as to the bond, and is not brought on the bond, and consequently the witness, Curtis H. Brogden, does not come within the restriction of the proviso, and its provisions have no application to this case.

There is error in the ruling of His Honor in excluding the testimony of Curtis H. Brogden. Therefore the judgment of the Superior Court is reversed. And this opinion must be certified to the Superior Court of Wayne county, that a *venire de novo* may be awarded to the plaintiff.

Error. Reversed.

SARAH LASSITER v. DANIEL LASSITER.

Divorce and Alimony—Condonation.

1. In applications for alimony, under The Code, §1291, it is competent for the husband to controvert the allegations of the complaint by affidavit or answer, and the judge must find the facts, and set them forth in the record.
2. Where the facts as found by the judge would, if found by the jury on the final hearing, warrant a divorce from bed and board, they *per se* constitute sufficient ground to award alimony *pendente lite*.
3. Condonation is forgiveness upon condition, and the condition is, that the party forgiven will abstain from like offences afterwards. If the condition is violated, the original offence is revived.

4. Much less cruelty or indignity is sufficient to revive transactions occurring before condonation, than to support an original suit for divorce.

5. In an application for alimony it need not be found as a fact that the plaintiff was a faithful, dutiful and obedient wife.

(*Gordon* v. *Gordon*, 88 N. C., 45, cited and approved.)

Application for alimony *pendente lite*, in an action pending in the Superior Court of RICHMOND county, heard before *Philips, Judge*, at chambers.

There was a judgment allowing alimony, and the defendant appealed.

The facts fully appear in the opinion.

Messrs. J. D. Shaw, J. W. Hinsdale and *J. C. Black*, for the plaintiff.

Messrs. Le Grand & Tillett and *W. A. Guthrie*, for the defendant.

ASHE, J. This was an application for alimony *pendente lite* in an action brought by the plaintiff against the defendant in the Superior Court of Richmond county, and heard at Chambers by His Honor, *Judge Philips*.

Upon considering the complaint of the plaintiff and the answer of the defendant, and the affidavits offered by both plaintiff and defendant, His Honor found the following facts:

1. That the plaintiff and defendant were married in or about the year 1852, and they have ten children, the oldest of whom is about thirty years of age, and the youngest about seven years of age.

2. That the defendant has offered such indignities to the person of the plaintiff as to render her condition intolerable and life burdensome. That rejecting altogether the acts and indignities mentioned in affidavits not set forth or alluded to in plaintiff's complaint, and considering only those allegations contained in the pleadings, and the affidavits filed in support of those allegations, as well as those in denial, His Honor found the following particular facts:

(1). In or about September, 1880, without any just cause or provocation, the defendant abused plaintiff, called her a liar and choked her.

(2). In or about October, 1880, the defendant, without just cause or provocation, encouraged the children of plaintiff and defendant to mistreat and disobey plaintiff, and told her he would give her fifty lashes if she attempted to exercise any control over said children.

(3). In or about August, 1881, the defendant, without just cause or provocation, threatened to strike plaintiff in the face with a tea-cup, throw her off the steps, wouldn't let her have anything to eat, and wouldn't let her come into the house. That in consequence of such treatment, plaintiff left the house of defendant, and remained away until January, 1882, when, having nothing to live upon, and hoping that defendant might treat her kindly and support her, she returned, when defendant arrayed her children against her, and encouraged them and upheld them in abusing and mistreating her. That defendant continued his threats and abuse until about February, 1882, when he ordered plaintiff to go to the woods to rake straw, and upon her telling him she was unable to do this kind of work, he pulled her out of the house, called for a hame-string, wrapped it around her arm and forced her to the woods in a cruel manner.

(4). In or about March, 1882, the defendant, without cause or provocation, threatened to strike plaintiff in the face with an ear of corn, and did strike her with a brush and inflicted bruises on her person.

(5). In or about May, 1882, one of their children struck plaintiff with a chair, and the defendant shook his hand at her, and told his children to resist any effort on her part to correct them.

3. That by reason of such treatment, plaintiff was forced to leave the house of defendant, and remain away without means of support, except such as she could procure from neighbors and friends. That in January, 1883, she instituted proceedings for divorce and alimony, when she was prevailed upon by defendant

to withdraw said proceedings and return to his house, he promising to treat her with all the respect due from a husband to a wife, and to make his children treat her with respect, and trusting to his promise, she was induced to withdraw her suit and return to his house, which she did in February, 1883.

4. That, in the month of May, 1883, the defendant, without cause, again commenced to abuse and maltreat plaintiff as he formerly did, and he continued this treatment in the presence of their children; that he failed to provide for her; that he did not allow her enough to eat; that he only gave her one cotton dress in the way of clothing; that he borrowed one dollar from her and refused to pay it back; that he would frequently call her "old devil" and "old liar," "no account," in the presence of their children, and encouraged them to abuse their mother.

5. That, by reason of such treatment continued by the defendant, after plaintiff had abandoned her suit for divorce and alimony in February, 1883, and returned to his home by his promises, plaintiff was forced by such treatment to leave defendant's house again.

6. That plaintiff is about fifty years of age, in feeble health, owns no property, and is utterly without means to subsist upon during the prosecution of this suit, and to defray the necessary and proper expense thereof.

7. That defendant owns about three hundred acres of land, and that a fair rental value of said land with the stock and implements thereon is six hundred dollars per annum.

Upon consideration of the above facts, it is ordered and adjudged that the custody of the youngest child be committed to the plaintiff. It is further ordered and adjudged, that the defendant pay into court, for the use of the plaintiff, or to the plaintiff, the sum of one hundred and fifty dollars per annum *pendente lite*, and that the sum of seventy-five dollars be paid on or before the first day of July next, and that the sum of seventy-five dollars be paid on or before the first day of December next.

It is further ordered that the clerk of the Superior Court of Richmond county, issue a copy of this judgment to be served on the defendant, and that if he fails to commit the care of the youngest child to the custody of the plaintiff, or if he fails to pay the sums as above specified, notice shall issue to him to show cause why he shall not be attached for contempt.

From this judgment the defendant appealed, and filed the following exceptions:

The defendant, Daniel Lassiter, excepts to the order of His Honor, Judge Philips, allowing alimony and awarding the custody of the youngest child of plaintiff and defendant to the plaintiff, and assigns as errors in making said order:

(1). That the facts alleged in the complaint, after the condonation, are not stated with such definiteness and particularity, as is required in the petition for a divorce.

(2). That the facts alleged in the complaint, after the condonation, are not sufficient to obliterate the condonation, which is alleged in the complaint, and to revive the transactions alleged to have occurred before the separation or condonation.

(3). That the complaint does not state facts sufficient to entitle the plaintiff to a divorce.

(4). That His Honor refused to find, after being asked by defendant, the facts alleged in second allegation of complaint, viz.: as to whether the plaintiff was "a faithful, dutiful and obedient wife."

(5). That His Honor found as a fact, "that plaintiff was forced by such treatment to leave defendant's house again;" meaning treatment after the condonation, when it had not been alleged in the complaint.

(6). That His Honor found as facts matters that are not sufficiently, definitely, and particularly alleged in the complaint, to-wit: all matters alleged since the first of May, 1883.

(7). That the allegations in the complaint and findings thereon by His Honor, do not entitle the plaintiff to a divorce or alimony.

This action was brought under subdivision 4 of §1286 of *The Code*, which provides, that a divorce from bed and board may be granted when either party "shall offer such indignities to the person of the other as to render his or her condition intolerable and life burdensome;" and in the action the petition applied for alimony, under the provisions of §1291 of *The Code*, which reads, "If any married woman shall apply to a court for a divorce from the bonds of matrimony, or from bed and board with her husband, and shall set forth in her complaint, such facts, which, upon application for alimony, shall be found by the judge to be true, and to entitle her to the relief demanded in the complaint, or other proof that she has not sufficient means whereon to subsist during the prosecution of the suit, and to defray the necessary and proper expense thereof, the judge may order the husband to pay her such alimony during the pendency of the suit, as shall appear to him just and proper, having regard to the circumstances of the parties." And the act provides, in all such cases, it shall be admissible for the husband to be heard by affidavit, in reply or answer to the allegations of the complaint. This proviso was added to the original act, Bat. Rev., ch. 37, §10, by the Act of 1883. Prior to that act the allegations of the complaint were taken to be true for the purpose of alimony, and if they were sufficient to warrant the Court to adjudge a divorce either from the bonds of matrimony or from "bed and board," the Court might award alimony to the petitioner. But since that act the husband may, by affidavit or answer, traverse the allegation of the complaint, and it is made incumbent on the Court to find the facts and set them forth in the record.

This has been done in this case with strict compliance with the act as amended, and His Honor has given his conclusions of law upon his findings, to which defendant filed exceptions.

We are of opinion the exceptions taken by the defendant cannot be sustained, and that there is no error in the judgment pronounced by His Honor upon the facts as found.

The third and seventh exceptions are to the sufficiency of the allegations of the complaint to constitute such a cause of action as would entitle the plaintiff to the relief demanded.

The facts set forth in paragraphs one, two, three, four and five of the findings, we think, are amply sufficient, if they should be found to be true by a jury, to entitle the plaintiff to separation from "bed and board," and that being so, they *per se* constituted sufficient grounds for awarding to the plaintiff alimony *pendente lite.*

But the defendant contended, that even if that be so, the plaintiff has condoned those causes of divorce; and his first and second exceptions are to the effect, that the facts alleged in the complaint to have occurred after the condonation, are too indefinitely stated, and are not sufficient to obliterate the condonation and revive the transactions alleged to have occurred before the separation.

The facts occurring after the separation, and the plaintiff's return to the house of the defendant in February, 1883, as alleged in the complaint, and found by the court, are, that in the month of May, 1883, the defendant, *without cause*, again commenced to abuse and maltreat plaintiff as he formerly did, and he continued this treatment in the presence of his children; that he failed to provide for her; that he did not allow her enough to eat; that he only gave her one cotton dress, in the way of clothing; that he borrowed one dollar from her and refused to pay her back; that he would frequently call her "old devil," "old liar," "no account," in the presence of his children, and encourage them to abuse her.

We think it is expressed with sufficient definiteness, that the defendant failed to supply the plaintiff with sufficient food and clothing; that he used and applied opprobrious epithets to her in the presence of his children, and encouraged them to abuse her, and these were indignities better calculated than anything short of blows, to annoy and wound the feelings of a wife and mother. And this presents the main question in the case, whether such

conduct as this, towards an old and feeble wife, the mother of ten children, was such treatment as was sufficient to obliterate the condonation and revive the original causes of complaint.

Condonation is forgiveness upon condition, and the condition is, that the party forgiven will abstain from like offence afterwards, and moreover treat the forgiving party, in all respects, with conjugal kindness; and, if the condition shall be violated, then the original offence shall be revived. *Bishop on Mar. and Div.*, 53. In *Durant* v. *Durant*, 1 Hag. Ec., 733—731, the condition attached to condonation is defined to be, that the suffering party shall be treated with conjugal kindness. *Westmeath* v. *Westmeath*, 2 Hag. Ec., supp., 1; *DeAguila* v. *DeAguila*, 1 Hag. Ec., 781; and Mr. Bishop says this may be deemed as settled English law.

In *Johnson* v. *Johnson*, 4 Paige, 460, which was a bill for divorce on the ground of the husband's adultery, which had been condoned, but, to prove the effect of the condonation, the fact was shown on the part of the wife, that though there had been no subsequent adultery, or even actual violence, yet the husband had totally neglected to attend to her comfort, had insulted her with opprobrious epithets and offensive language, and had pursued towards her a course of conduct, calculated to wound her feelings and obliterate her affections; it was held that the condonation had been destroyed. Much less cruelty or indignities are held to be sufficient to revive transactions occurring before condonation, than to support an original suit for divorce. In *DeAguila* v. *DeAguila*, *supra*, it is held that words of heat and passion, of incivility or reproach, or perhaps of rebuke, though not sufficient to support an original cause, would be sufficient to obliterate condonation, if such words, on former occasions, had been accompanied with acts, especially, if it is apparent, that the party had been in the habit of following up words with blows. To the same effect is *Robbins* v. *Robbins*, 100 Mass., 162; *Johnson* v. *Johnson*, *supra*; *Threewits* v. *Threewits*, 4 Desaus., 560; *Gordon* v. *Gordon*, 88 N. C., 45, and cases there cited.

The fourth exception was to His Honor's refusal to find, after being asked by the defendant, "Whether the plaintiff was a faithful, dutiful and obedient wife." This is not one of the issues which the law requires to be submitted to a jury in an action for divorce. There was, therefore, no error in the refusal of His Honor to make a finding upon that question.

The fifth exception was to the finding, by His Honor, of the fact that the plaintiff was forced to leave her husband's home, by his treatment after the condonation, without an allegation in the complaint to that effect. But it was expressly alleged in the complaint, paragraph 5, that in consequence of his treatment, after she had abandoned her suit for divorce and returned to his home, she was forced to leave his house again.

The exceptions were all properly disallowed and there is no error.

The defendant must pay the costs of this Court, and this opinion must be certified to the Superior Court of Richmond county, that the cause may be proceeded with according to this opinion and the law of the land.

No error. Affirmed.

CHARLES F. WARREN v. HARVEY & FOWLE.

Excusable Neglect—Res Adjudicata.

1. His Honor in the court below refused to extend the time to file an answer, and signed a judgment, but stated that if an answer was filed before 12 o'clock at night of the last day of the term, he would strike out the judgment. An answer was filed before 12 o'clock but the judgment was not stricken out; *Held*, excusable neglect.

2. *Quære?* Whether a defendant has until this time to file an answer?

3. The refusal of the judge to extend the time to file an answer is not *res adjudicata* in this motion to set aside such judgment for excusable neglect.

(*Stell* v. *Barham*, 86 N. C., 727; *Simonton* v. *Lanier*, 71 N. C., 498; *Bank* v. *Foote*, 77 N. C., 131; *Hudgins* v. *White*, 65 N. C., 393; cited and approved).

MOTION to set aside a judgment heard at Fall Term, 1884, of BEAUFORT Superior Court, before *Graves, Judge.*

On the 27th day of March, 1884, a summons was issued in this cause, which was duly served, and a verified complaint was filed.

On the last day of Spring Term, 1884, the cause was called upon the summons docket, and the plaintiff asked for judgment for want of an answer, and the defendant asked for further time to answer, which was refused. A judgment for want of an answer was thereupon handed to His Honor to be signed, when counsel for the defendant asked if an answer was filed before 12 o'clock at night, if the judgment would not be vacated. His Honor gave it as his opinion that it would, and verbally directed the clerk, upon the filing of a verified answer before 12 o'clock at night, to strike out the judgment. The judgment was signed and the court adjourned about dark of the same day.

At 10:30 o'clock, P. M., the defendant filed a properly verified answer. The judgment at this time was signed, but was not on the minutes and was not docketed, but subsequently it was docketed, and the plaintiff was proceeding under it.

After notice, the defendant moved to set this judgment aside, (1) because it was vacated by filing the answer before 12 o'clock; (2) because the answer having been filed before the hour fixed by the judge, as well as by law, there could be no judgment for want of an answer; and (3), because of excusable neglect.

His Honor refused to set aside the judgment, and the defendants appealed.

Mr. George H. Brown, Jr., for the plaintiff.
Mr. George A. Sparrow, for the defendants.

SMITH, C. J. Here several grounds are assigned in support of the motion made by defendant, Harvey, to be relieved from the judgment by default rendered against him at a previous term.

1. That it was conditional and superseded by the answer afterwards filed;

2. That it is irregular; and

3. That it was the result of surprise and excusable neglect under *The Code*, §274.

The ruling of the Court is, that the facts do not constitute a case of excusable neglect, and that the denial of the application for an extension of the time for putting in an answer was an adjudication upon the matter involved in the present motion.

We propose to consider the correctness of the ruling in its interpretation of the provision of The Code, which, in this single feature, has been a prolific source of litigation, as is shown in the numerous cited cases appended to the section. It is impracticable to define in general terms and with greater accuracy, the scope and meaning of the words contained in the statute, "*surprise or excusable neglect*," and especially the latter part, when referring to the rendition of a judgment, than the words themselves import. Hence, the necessity is imposed upon the Court of determining in each presented case, whether the circumstances attending it can amount to a surprise, or reasonably excuse the neglect, for some neglect is assumed, of the defendant in making opposition thereto.

The series of adjudged cases show the difficulty of running the separating line which distinguishes from others the class in which the interposition of the judge is authorized and a discretion reposed in him. While the rulings may not all seem to be in harmony with the essential purpose of the act, and perhaps not with each other, it is our duty in each case to decide upon the reasonableness of the excuse offered for the delinquency which has led to the adverse adjudication, and as far as possible to put our decision within the compass of some comprehensive proposition in furtherance of the objects of the enactment.

We have little hesitancy in placing the present application within the discretionary power committed to the Court, which the judge, holding the neglect not excusable, did not undertake to exercise.

When the judgment was prepared and handed to the judge for his signature after his refusal to enlarge the time for the answer, and on the last day of the term he was asked by defendants' counsel if the judgment would be vacated and stricken out provided a sworn answer was filed before midnight, and an opinion expressed by His Honor that such would be the effect, and in such case he directed the clerk to strike out said judgment and give notice thereof to the plaintiff and his counsel. The answer thus verified was put in at the hour of 10:30 the same night and the clerk gave the required notice. The judgment had not then been entered upon the docket.

It is manifest that the defendant relied upon this declaration and may have relaxed his efforts in consequence to put in his answer at an earlier hour. Even assuming it to have been an erroneous opinion as to the defendants' rights, was it unreasonable for him to have confided in a declaration proceeding from the judge, who was then passing upon the effect of his own act in signing the judgment, and can it be imputed as inexcusable neglect in the defendant upon such assurance to suspend the active efforts, which might otherwise have been used to put in his defence? Undoubtedly this was calculated to mislead, and indeed this action of the judge falls little short of giving this further time indicated, as he had the power to give it, and his belief that the law allowed the whole period up to the expiration of the term by limitation and that it was sufficient may have prevented the exercise of his discretion in giving it himself. In every aspect of the case, the defendants' delay thus brought about must be regarded as a neglect excusable and the entry of an absolute judgment a surprise. In *Stell* v. *Barham*, 86 N. C., 727, the defendant applied for leave to appeal without giving security, under the act of 1873-'74, chap. 60, (Code, sec. 552), and it was granted, the judge declaring it would be sufficient within twenty days thereafter for the necessary affidavit and certificate to be filed. The order was made on the last day of the term. The appeal was dismissed, because the order was made prematurely,

but, on application for a writ of *certiorari* as a substitute, this court, in reference to the effect of the erroneous order say: "As this ruling dispensed with the necessity of immediate efforts to procure the affidavit, even if it were practicable, during the last day of the term, when the cause was concluded, we think it a proper case in which to grant the writ." If the neglect to comply with the provisions of the law, thus misconceived by the presiding judge, was excusable and entitled the applicant to relief, is not a similar misleading opinion of the judge a sufficient excuse under the statutes for the defendants' neglect? We do not see any dissimilarity in the cases unfavorable to the present application. A misconstruction which takes away the authority to set aside the judgment so that the discretion conferred may not have been exercised, constitutes an error capable of review and correction by appeal. *Simonton* v. *Lanier*, 71 N. C., 498; *Bank* v. *Foote*, 77 N. C., 131, following *Hudgins* v. *White*, 65 N. C., 393.

Again, there is error in the ruling that the present motion had been before decided and the matter had become *res adjudicata*.

The former judge refused an extension of the time allowed by law for filing an answer, holding that the defendant had until 12 o'clock at night under the law to put it in. The denial was of a longer time. Within that time the answer was put in, and the present motion is to set aside a judgment which the judge supposed would be set aside by the act of filing before that hour. Surely the matter of the present application has not been passed on or at least passed on adversely to the defendant.

There was, therefore, error in the ruling that the facts do not show "*surprise or excusable neglect*" within the intent of the statute, and the application must be re-heard to the end that the reasonable discretion confided to the judge may be exercised in the premises upon the facts as they now appear before us.

Reversed.

REBECCA MORRIS v. JOHN R. MORRIS.

Costs—Undertaking on Appeal.

1. The undertaking for costs, required on appeal, is to secure the costs of the appellee; therefore, the surety is not liable for the appellant's costs, where the judgment is reversed.
2. Each party may be required by the clerk to pay his costs when they are incurred. When this is not done, the clerk must look only to the party incurring them, except when the appellee recovers costs, in which case the surety on the appeal bond is liable.

(*Clerk's Office* v. *Lockman*, 1 Dev., 146; *Clerk's Office* v. *Huffsteller*, 67 N. C., 449: *Shepperd* v. *Bland*, 87 N. C., 163, cited and approved).

MOTION by the surety on an undertaking on appeal to recall an execution, heard at February Term, 1885, of the Supreme Court.

No counsel for the plaintiff.
Messrs. Graham & Ruffin, for the defendant.

MERRIMON, J. The defendant appealed from the judgment of the Superior Court of Orange county to this Court. This Court decided that there was error, and directed the judgment to be reversed in the court below, and gave judgment for the costs here against the appellee. Thereupon execution issued and the same was returned unsatisfied for lack of property out of which to levy the costs.

The clerk of this Court then issued execution against the appellant, the defendant, and *his* surety in the undertaking for costs upon the appeal, for the defendant's own costs. The surety comes and suggests that the execution was improvidently issued as to him, because the condition of the undertaking upon appeal did not embrace the appellant's own costs, but only such costs as the appellee might recover in this Court, and he moves that the execution as to him be quashed. *The Code*, §552, requires that

the appellant, in appeals to this Court, shall give an undertaking with good and sufficient surety in such sum as the Court may direct, not exceeding two hundred and fifty dollars, "to the effect that the appellant will pay *all costs* which may be awarded against him on the appeal."

Seemingly the words "all costs," in the clause of the statute just quoted, are broad enough to embrace any costs in and about the appeal, that might, in any case, be awarded against the appellant; but they cannot be so interpreted. Regularly and strictly, the appellant and the appellee, may each be required to pay his costs as and when he incurs the same, and if he should do so, then there would be no occasion for a judgment for costs, unless the appellant should be cast in his appeal, in which case the appellee would be entitled to be reimbursed as to the costs he had so expended, and to have judgment for the same. The purpose of the undertaking required, is to secure to the appellee the costs he may so expend, and the surety in it is, therefore, bound only for that cost.

It has long been the practice that the clerk and others entitled to costs indulge the party bound to pay them until the action shall be determined, and then tax and include them in the final judgment, and issue execution therefor. In such case, when the appellant recovered costs and these could not be collected from the appellee, then the appellant was required to pay the costs incurred by him, and a proper judgment or order to that end was entered, if need be, and execution issued against him for the same, but not against his surety in the undertaking upon appeal, for the reasons already stated. This practice of indulging litigants for costs due is not compulsory, but when parties are so indulged the clerk and others entitled to costs can only look to the party incurring them, except in the case when the appellee recovers costs, in which case the security in the undertaking upon appeal is bound. *Clerk's Office* v. *Lockman*, 1 Dev., 146; *Clerk's Office* v. *Huffsteller*, 67 N. C., 449; *Sheppard v. Bland*, 87 N. C., 163, and numerous cases cited. *Tourgee Dig.*, C. C. P., 717 to

721. The execution against the surety, James A. Cheek, was improvidently issued, and the motion to call in and quash the same as to him, must be allowed. A further execution as to him will not be issued.

Motion allowed.

G. E. YOUNG et als. v. N. A. JACKSON et als.

Evidence—Registration—Probate.

1. The provisions in the Acts of 1868-'69, ch. 64, requiring the certificate of probate by the Probate Judge of a county, other than the county of registration, to be passed on by the Probate Judge of the latter county, is directory only. So, where a mortgage on land in Cleveland county was proven before the Probate Judge of Mecklenburg and registered in Cleveland without being submitted to or passed upon by the Probate Judge of the latter county; *It was held*, that the probate was not void and the mortgage admissible in evidence.

(*Holmes* v. *Marshall*, 72 N. C., 37; *Rollins* v. *Henry*, 78 N. C., 342; *Keener* v. *Goodson*, 89 N. C., 273; cited and approved).

CIVIL ACTION tried before *MacRae, Judge,* and a jury, at Spring Term, 1884, of CLEVELAND Superior Court.

There was a verdict and judgment for the plaintiffs and the defendants appealed.

Messrs. Hoke & Hoke, for the plaintiffs.

Messrs. George F. Bason, McBrayer & Cobb and *Batchelor & Devereux,* for the defendants.

MERRIMON, J. It appears that a judgment for money obtained in the Superior Court of the county of Iredell by Mary C. Bell against the defendant N. A. Jackson, was duly docketed in the Superior Court of the county of Cleveland on the 16th day of December, 1876; that an execution duly issued upon that judg-

ment, and the land in question, situated in the last-named county, was sold under it on the 7th day of May, 1877, by the sheriff of that county, and the defendant E. A. Morgan became the purchaser thereof, and took the deed of the sheriff therefor, and claimed title to it by virtue of that deed.

The defendant N. A. Jackson, on the 11th day of October, 1872, executed to J. and E. B. Stowe his two promissory notes, each for $1000, and these, and certain of his other notes, were secured by a mortgage, of the same date with them, of the land mentioned and described in the sheriff's deed above referred to. These notes have not been paid, and they and the mortgage to secure them, as to them, were assigned to the defendant, the First National Bank of Charlotte, by J. and E. B. Stowe.

The execution of the mortgage deed was proven before the judge of probate of the county of Mecklenburg on the 3rd day of January, 1873, and his certificate of probate was duly attached thereto, and his official seal was placed thereon. The deed and the certificate of probate thereof were not exhibited to the judge of probate of the county of Cleveland, in which the land was situated, nor did he adjudge that the deed was duly proven, and order the same, with the certificate of probate thereto attached, to be registered in that county; but, acting upon the certificate of probate mentioned above, the register of deeds of the county of Cleveland registered the deed and the certificate thereto attached, in that county, on the 8th day of January, 1874.

The defendant, E. A. Morgan, objected to the admission of the mortgage deed in evidence, insisting that the same had not been proven and registered according to law, prior to the docketing of the judgment under which he purchased and claimed the land. He insisted, that it was essential to the validity of the registration of the mortgage deed, that it and the certificate of the probate judge of Mecklenburg county, should have been exhibited to the judge of probate of the county of Cleveland, and that he should have adjudged the deed duly proven, and ordered it and the certificate of probate attached to it to be reg-

istered. The Court overruled the objection and admitted the deed in evidence, and the defendant E. A. Morgan excepted.

These being the facts, the single question presented by the record in this appeal to be decided, is, was such registration of the deed valid? We think it was. The case of *Holmes* v. *Marshall*, 72 N. C., 37, was, in all material respects, like this. The elaborate and well-considered opinion of Justice Rodman in that case, took into consideration and construed all the statutes in respect to the registration of deeds and other instruments requiring registration, and the proving of them before judges of probate, and the Court held that "the provision requiring the certificate of probate by the probate judge of a county other than that of registration, to be passed on by the probate judge of the county of registration, is directory, and that a registration upon a probate which has not been so passed on, is not void." Regularly, the provision of this statute, requiring deeds and other instruments proven before judges of probate in counties other than the county where the land lies, and the other kind of property is situated, and the certificate of probate attached thereto, to be exhibited to the judge of probate of the latter county, and that he shall adjudge the same to be duly proven and order its registration, ought to be observed, but this requirement is directory only, and not of the essential requisites to registration; its purpose seems to be to secure greater, not essential, certainty as to the probate, and an orderly memorial of it in the county where the property conveyed is situated. The important thing required, with a view to registration, is, that the deed or other instrument requiring registration shall be proven before a tribunal or officer authorized by law to take and certify the probate.

The purpose of registration is to give authoritative public notice of deeds and other writings required by law to be registered, and their purpose, as expressed in them, to perpetuate them as evidence, and to make them *prima facie* evidence in all actions, proceedings and matters wherein they may be pertinent. The probate is not conclusive, except as to notice of the instrument,

and its purpose as expressed in it, when duly registered; it is an *ex parte* ascertainment, by authority by law, that the instrument registered is authentic and to be so treated by all persons affected by it, until in some proper way the contrary is made to appear. Now, when the instrument is proven, and the probate is certified as prescribed by law, and it is registered in the proper county, the essential purpose of registration and the law is served, and this is sufficient, notwithstanding some of the non-essential, yet helpful forms to be observed between the probate and registration of the instrument, have been omitted. The Legislature certainly has power to make forms essential, but unless it shall do so in plain terms, the failure to observe them, especially where they appear from their nature or terms to be directory, will not be allowed to defeat the chief purpose of a salutary statute. And so a statute requiring that the judge of the court should *sign* every judgment granted by him, has been held to be directory, and that a judgment that the judge failed to sign was not void. *Rollins* v. *Henry*, 78 N. C., 342; *Keener* v. *Goodson*, 89 N. C., 273.

It was insisted on the argument for the appellant, that taking *Holmes* v. *Marshall, supra*, to have been properly decided, it applied to a deed conveying only personal property, and it could not apply to the probate of deeds conveying real property, and that the learned judge who delivered the opinion in that case inadvertently omitted to consider the statute. (Acts 1868-'69, chapter 64.) We do not think so. It is not probable that so able a judge, and the whole Court, failed to see the statute referred to; but, be that as it may, the decision was put upon broad ground, and the scope of the reasoning, and the opinion, embraced deeds conveying both real and personal property; indeed, the statute mentioned as having been brought forward in Battle's Revisal, chapter 35, embraced both kinds of property. The statute subsequent in date (Acts 1868-'69, chapter 277, section 15,) to that above referred to, seems to have been intended to supersede the latter; it regulated the general subject as to both

real and personal property. But if the statute relied upon by the appellant's counsel, stood alone, the same reasoning and authorities would apply to it as were applied to the statute certainly construed.

The case cited was decided in 1875. It has been treated as a proper construction of the statute in question, and, as thus construed, it has been acted upon, no doubt, in many cases. To disturb it, would unsettle titles and give rise to much confusion and injustice. We cannot think of doing so.

The registration of the deed in question was sufficient.

The judgment must be affirmed.

No error. Affirmed.

ISAAC SHERNER, et als. v. AQUILLA SPEAR, et als.

Fraud—Par Delictum.

1. Where the jury found that the defendant administrator had, in another action in which he was plaintiff, fraudulently suffered a judgment to be entered, by which the estate of his intestate was cheated; *it was held*, that a motion would not be allowed to reinstate said action and set aside fraudulent judgment.
2. Courts of justice will not aid a party to a fraudulent transaction to force his confederates in fraud to account.

(*Turner* v. *Eford*, 5 Jones Eq., 106; *Pinckston* v. *Brown*, 3 Jones Eq., 494, cited and approved).

This was a CIVIL ACTION tried before *Gilmer, Judge*, and a jury, at Spring Term, 1884, of YADKIN Superior Court.

The defendants appealed.

The facts appear in the opinion.

Messrs. Watson & Glenn and *Clement & Gaither*, for plaintiffs.

Messrs. Coke & Williamson, for defendants.

MERRIMON, J. The plaintiffs are the next of kin of John Williams, who died intestate, in the county of Yadkin, in 1863. W. W. Long was duly appointed his administrator, and W. J. Cornelius and S. T. Spear were the sureties to his bond as such administrator.

Afterwards, W. W. Long, the administrator, died without having completed the administration of the estate in his hands, and Aquilla Spear was duly appointed, in 1875, administrator *de bonis non* of the estate of John Williams, deceased, and gave his bond in that respect with James Spear and others as sureties thereto.

Afterwards, Aquilla Spear, administrator *de bonis non*, brought his action in the Superior Court of Yadkin county against T. Long, administrator of W. W. Long, above named, and the sureties to his bond as administrator of John Williams. In that action he alleged in his complaint that W. W. Long, as administrator, in his life-time, and the sureties to his bond, were liable to account to him for a note belonging to the estate of his intestate against Thomas Williams; likewise for another note against Uriah Glenn, and he demanded judgment for an account and settlement of the estate of his intestate in the hands of W. W. Long, administrator. This action was determined at the Fall Term of 1878 of the court mentioned, and the plaintiff obtained a judgment for the sum of $29.52.

The plaintiffs in their complaint allege that judgment ought to have been obtained in that action for a much larger sum, and would have been but for the fraud and collusion of the plaintiff therein, Aquilla Spear, administrator *de bonis non*, and the defendants therein, T. Long, administrator of W. W. Long, and W. J. Cornelius, surety to the administration bond of W. W. Long. They allege that the judgment obtained was procured by the fraudulent concert of the plaintiffs and the defendants in the action; and they demand judgment, that the judgment mentioned above be declared fraudulent and void, and for an account and settlement of the estate in the hands of Aquilla Spear,

administrator *de bonis non* of John Williams, deceased, and of the estate of John Williams, deceased, remaining in the hands of T. Long, administrator of W. W. Long, administrator of John Williams, and judgment against the parties defendant according to their several liabilities, including W. J. Cornelius, surety to the bond of W. W. Long, administrator.

The court submitted to the jury the following issue, to which they responded in the affirmative: "Was the judgment rendered by his Honor, J. F. Graves, at Fall Term, 1878, of the Superior Court of Yadkin county, in the suit there pending in said court in which A. Spear, administrator *de bonis non* of John Williams, deceased, was plaintiff, W. J. Cornelius and T. Long, administrators of W. W. Long, deceased, were defendants, procured by the fraudulent agreement, contrivance or collusion of the plaintiffs in said suit and the defendants, or either of them?"

The court intimated upon receiving the verdict of the jury that he would render judgment for the plaintiffs according to the prayer in the complaint. Thereupon the defendant Aquilla Spear, administrator *de bonis non*, moved that he be allowed to bring forward and reinstate upon the docket the action mentioned in the issue submitted to the jury, and for an order directing an account of the administration of the estate of his intestate in the hands of W. W. Long, administrator of John Williams, his intestate, and for judgment for such sum as might be ascertained to be due to him from the former administrator of his intestate. The court denied the motion, and the defendant Aquilla Spear excepted.

The court very properly denied the motion of the appellant. The action, he proposed to bring forward upon the docket, re-open and try, had been determined, and if it had been a fair and honest one, the judgment in it could not be disturbed, except for just cause and in a proper way at the instance of some person entitled to move in, or in respect to it. If the judgment in it were dishonest and fraudulent, as it appears to have been, then, innocent parties aggrieved by it, as the plaintiffs in this action, might by

a proper action have it declared and adjudged fraudulent and void, and then it would remain a dishonored and useless wreck, and harmless except as to the parties participating in the fraud.

Moreover, it was not germane to, and had no proper bearing upon the conduct and determination of this action; it was distinct from, and foreign to the latter, except that the fraudulent judgment in it may have created occasion for, and given rise to the present one.

Besides, the jury have found by their verdict that the appellant, who was plaintiff in the action referred to, participated actively with the defendants therein in the collusion and fraud, by which the dishonest judgment was obtained. The court will not help him now to turn upon his confederates in fraud and call them to account and thus extricate himself from embarrassments he brought upon himself. The law will not aid one of the parties to a fraud as against another; it leaves them all, each towards the other, in that plight and condition they devised and contrived for themselves.

The appellant having destroyed the integrity of his action, must accept the judgment therein with all its badness and its ill consequences to himself. *In pari delicto, potior est conditio defendentis. Turner* v. *Eford,* 5 Jones Eq., 106; *Pinckston* v. *Brown,* 3 Jones Eq., 494.

There is no error in the refusal of the court to grant the motion of the appellant. Let this opinion be certified to the Superior Court according to law.

No error. Affirmed.

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

Evidence—Referee's Note—Official Documents.

1. The minute in writing of the evidence of a witness examined before a referee, is not admissible in evidence on the trial of an issue before a jury in the same cause.
2. Papers purporting to be exemplifications from the Treasury Department of the United States, but which were not authenticated in any manner whatever, cannot be admitted in evidence.
3. Even if such papers had been admitted as evidence before the referee, this does not make them evidence in a trial before a jury, unless by consent.

This was a CIVIL ACTION tried at Spring Term, 1883, of ROWAN Superior Court, before *Graves, Judge.*

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

Messrs. Armfield & Armfield and *Kerr Craige*, for the plaintiff.
Messrs. J. W. Hinsdale and *Walter Clark*, for the defendant.

MERRIMON, J. In this case it was referred to a referee, the defendant objecting, to take and state and report an account of frequent and complicated money transactions between the plaintiff and defendant. Before the coming in of the report of the referee, the Court submitted to the jury an issue of fact.

On the trial of this issue, the plaintiff offered in evidence a minute in writing of the testimony of a witness examined before the referee. To this the defendant objected. The Court overruled the objection and the defendant excepted. We think the exception must be sustained. The minute of the testimony was not a deposition in the sense of the statute providing for the taking of depositions to be read as evidence on trials in the courts, in the cases allowed by law, nor is there any statute or general principle of law that makes such minutes evidence on such trials. Referees are required generally to note and report the evidence received by

them in matters referred to them, but this is matter of practice, and it is required with a view to a review by the Court of their finding of facts in some cases, and in others, to enable the Court to decide upon exceptions that may be made to the report. The loose, sometimes careless and imperfect, minutes of the testimony of a witness taken by a referee would give the jury a very unsatisfactory account of what he really testified to before him. Unless by consent, such minutes are not competent as evidence in jury trials.

It may be said, that the objecting party was present and cross-examined the witness before the referee, and so he may have done, but not with the view to take his deposition; he examined him only for the purpose of the reference and before a tribunal very different from a jury.

There is neither statute, nor principle, nor practice that warrants the admission of such minutes as evidence in jury trials.

The case settled upon appeal for this Court, states that, "the plaintiff offered in evidence certain paper-writings, as and for exemplifications from the Treasury Department of the United States, copies of which are hereto appended, marked B., C. and D., as part of this case."

The defendant objected to the admission in evidence of these paper-writings. The court overruled the objection, and the defendant excepted.

We have not been favored with an argument in favor of the appellee, and, unaided by counsel, we are wholly unable to discover any, the slightest, authentication of the papers thus objected to. We find upon a careful examination of them, that they purport to be copies of correspondence between officers of the Treasury Department of the United States in respect to parts of the Internal Revenue Service in this State. They embody facts that may be very material on the trial of the cause; but they are not authenticated at all; they simply purport to be copies of official correspondence wholy unauthenticated. It does not appear from the record before us, that they were in evidence before the referee;

but, if they were, this did not make them competent on the trial of the issue of fact, submitted to the jury, unless by consent of parties.

No question seems to have been made as to the competency of the paper-writings as evidence, if they had been properly authenticated, and we express no opinion in that respect. As they appear to us, they were not authenticated at all, and the exception must be sustained.

The appellant is plainly entitled to a *venire de novo* and we so adjudge. Let this opinion be certified to the Superior Court according to law.

Venire de novo.

DAVID KINCAID v. R. C. GRAHAM.

Costs.

On a trial before a justice, the defendant claimed a credit of $50 on the note sued on, which still left a balance due the plaintiff, and which the justice decided against him. On appeal to the Superior Court, this credit being the only matter in dispute, it was found by the jury in favor of the defendant; *Held*, that the defendant is liable for the costs in the Superior Court.

CIVIL ACTION tried on appeal from a justice of the peace before *McKoy, Judge*, and a jury at Fall Term, 1884, of LINCOLN Superior Court.

The defendant appealed.

Messrs. George F. Bason and *Hoke & Hoke*, for plaintiff.
Mr. W. P. Bynum, for defendant.

ASHE, J. This action was instituted before a justice of the peace on the 15th day of January, 1883, and tried before him. The plaintiff, before the justice, declared upon a note for one hundred

dollars, dated February 16th, 1881, due ten months after date, and signed by one W. Prim as principal, and the defendant as his surety. Defendant claimed before the justice, that the said note was subject to a credit of fifty dollars which had not been paid thereon.

On the trial, the justice disallowed the credit of fifty dollars, and rendered judgment in behalf of the plaintiff for the amount of the note with interest and costs.

From that judgment the defendant appealed to the Superior Court.

In the Superior Court, after several continuances, the case was brought to trial upon the following issue: "Was the fifty dollars paid upon the note declared on."

It was admitted that fifty dollars was paid to the plaintiff; that at the time it was paid to him he held two notes, the one declared on in this action, and another for an amount more than fifty dollars, against Prim alone; and that the credit of fifty dollars was placed upon the latter note. It was further admitted that R. C. Graham was at the time of the trial and had been during the time elapsing from the date of the note sued on, entirely solvent. The jury found the issue in the affirmative. The court pronounced judgment in behalf of the plaintiff for the amount of the note, with interest, after deducting the credit, and for his costs. From which judgment the defendant appealed, excepting only to so much of the judgment as awarded costs to the plaintiff, so that the only question for our determination is, did His Honor commit error in giving judgment against the defendant for costs? We concur with the correctness of His Honor as to the costs of the action in the Superior Court. It is provided by section 542 of *The Code* that "after an appeal from the judgment of a justice of the peace shall be filed with the Clerk of the Superior Court, the costs in all subsequent stages shall be as herein provided for action originally brought to the Superior Court;" and by section 540 it is provided that on an appeal from a justice of the peace to the Superior Court, if the appellant shall recover judgment in the appellate court he shall

recover the costs of that court and those he ought to have recovered below, had the judgment of the court been correct.

As we are of the opinion there was no error in the judgment of the Superior Court in awarding costs to the plaintiff, it is needless to consider the point raised by the plaintiff, whether this Court will entertain an appeal where nothing but the question of costs is involved.

There is no error. The judgment of the Superior Court is affirmed.

No error. Affirmed.

C. B. WRIGHT et als. v. THE CITY OF WILMINGTON.

Municipal Corporations—Liability for Negligence.

1. A municipal corporation, which has the right under its charter to perform certain work, is not liable for any damages which may accrue to an individual from doing the work, provided it is done with ordinary skill and caution.
2. A municipal corporation, in preparing side drains to its streets for carrying off rain water, is not required to provide against such extraordinary and excessive rains as could not be reasonably foreseen. So, when the plaintiffs sued for damages for flooding their cellar, caused by the gutters not being of sufficient capacity to carry off the water, and it appeared that they had for five years been sufficient, and only failed on this one occasion, it was error in the court below not to submit this view of the case to the jury.

(*Meares* v. *Wilmington*, 9 Ired., 73; *Bunch* v. *Edenton*, 90 N. C., 431; cited and approved).

CIVIL ACTION tried at December Term, 1884, of the Superior Court of NEW HANOVER county, before *Avery, Judge,* and a jury.

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

The facts appear in the opinion.

Mr. C. M. Stedman, for the plaintiffs.

Mr. J. D. Bellamy, Jr., for the defendant.

SMITH, C. J. The corporate authorities of Wilmington, with a view to the improvement of one of the streets of the city, known as Nutt street, and for the greater convenience of such as should have occasion for its use, caused it to be raised and graded, without, as the plaintiffs allege and the jury find, opening sufficient side gutters or drains to convey away the superabundant waters produced by a heavy rain-fall, and protect the adjoining proprietors from an overflow. The plaintiffs owned and operated a steam mill for grinding grain on one side of the street, which, by the reason of the filling up the street, left the floor of the mill eighteen inches below the level of the middle and highest point in it. In consequence of the want of an adequate channel to carry off the superabundant rain-water that descended in July, 1881, five years after the work done on the street, it overflowed and passed into a room of the mill, wherein was wheat and other grain, doing the damage for which redress is sought in the present action.

It was conceded at the trial that the plaintiffs could have prevented the overflow and consequent injury by erecting a barrier across the two doors of the mill, through which the water entered, at an expense of ten dollars; but such a barrier would have subjected the plaintiffs to serious inconveniences in conveying articles into the mill. If the floor of the lower room had been raised to the street-level, it would not admit of a person standing upright, and the low pitch would have interfered with its use; while if the floor and street were brought to the same level, unless such barrier had also been constructed, the influx of the water would not have been arrested. It was also admitted that a gutter or drain could have been made by the workmen on the street of sufficient capacity to carry off the surface-water after a heavy rain-fall without injury to the mill in its condition when the street was raised. The damages, if any incurred, were, by consent, fixed at $250.

Two issues were submitted to the jury as involving the facts upon which the responsibility of the city for the injury sustained

by the plaintiffs is supposed to depend, to each of which an affirmative response was returned.

(1.) Was there, in 1876, in front of the plaintiff's mill a sewer or drain sufficient to carry off all surface water after a heavy fall of rain, and was said sewer or drain rendered incapable of carrying off the surface water, by want of skill on the part of defendant's servants in grading Nutt street, after a heavy fall of rain?

(2.) Were plaintiffs damaged in July, 1881, by having their mill flooded with surface water after a heavy rain, which said sewer or drain could not carry off by reason of the want of skill in its construction?

The findings of fact contrast the capability of the gutter or drain in the former condition of the street, with the capability of that in its raised condition after the repairs, to convey away without damage to the mill the superabundant water produced by a *heavy rain-fall* and the negligence is imputed in the insufficiency of the latter under such circumstances to prevent the overflow. If the street was so low as to require the raising and rounding of its bed, as must be supposed, to have caused the necessity of the work, and below the level of the ground whereon the mill stood, the street itself would obviously become a drain and secure the mill from damage, while it is manifest the elevation of the street, mostly in the middle, would turn all the descending waters into the side-gutters and require them to be of larger size and capacity to remove the water rapidly, and prevent the accumulation and overflow. This was not therefore necessarily a test of the presence or want of skill in the manner of making the improvement, nor is it made so by introducing the qualifying words "want of skill on the part of the defendant's servants" in grading the street. The facts to which we have adverted are established by the verdict; but whether they show such want of skill or negligence in the constructed work as to impose a liability upon the municipal body, for the remote consequences, is matter of law to be determined by the Court upon the facts so found. Do these facts show negligence? The work was done in 1876

and the injury occurred five years later, during which intermediate interval, it does not appear that the existing mode of drainage failed to remove all the water at each rain-fall, with sufficient rapidity to secure the plaintiff's mill from any inflow, however copiously the rain may have descended at any time. Nor is it shown that the plaintiffs, apprehensive of injury from this cause, ever made complaint to the corporate authorities, of the inadequate provisions for drainage, or took themselves any precautions to guard against the possible results thereof.

It is apparent that the single rain-fall which occasioned the damage must have been unusually abundant, while in the issue it is designated as a "heavy rain," merely, and not to have been anticipated. A heavy rain is not an unusual occurrence, and it is but reasonable to require provision to be made for such. How abundant it was in July, 1881, can only be inferred from it being the only one from which any damage is alleged to have occurred during several years after the work on the street had been done.

The question then is, whether upon the findings that the water had always previously been removed by the gutters in the street, and those in the street after the elevation and grade had proved insufficient on one occasion of a heavy rain-fall to protect the plaintiff's mill from inundation, implies negligence in the work for which the defendant is answerable. We are not prepared to sustain the affirmative of the involved proposition, nor to hold the municipal authorities while exercising their official functions for the public advantage to so rigid a rule of accountability for an individual injury that may have incidentally followed, nor are we disposed to go beyond the ruling made in *Meares* v. *Commissioners of Wilmington*, 9 Ired., 73.

In this case the street was lowered, in doing which the excavations near the plaintiff's wall, left standing after the fire on an adjoining lot, were such as to undermine it and cause it to fall. The negligence imputed was in removing the supporting soil without making some provision in its stead. The authorities bearing upon the subject of municipal responsibility for

injuries occasioned in the performance of public duty under power conferred, were examined in an exhaustive discussion of the late Chief Justice. In answer to the argument against such liability made by distinguished counsel who represented the defendant, the Court declare that this is correct, "*provided the work is done in a proper manner*," and qualifies the general rule thus: "The grant to do the work necessarily implies a condition that the work is done in a *skilful and proper manner* so that if the work be not done with *ordinary skill and caution* the corporation has not acted in pursuance of the power vested in it; its act is not lawful but is wrongful; and the damage sustained by an individual is *damnum et injuria*, for which an action will lie."

The contrary doctrine is laid down by an eminent writer in these words: "When the power is not exceeded, there is no liability to an adjacent owner for grading the whole width and so close to his line as to cause his *earth or fences and other improvements to fall, and the corporation is not bound to furnish supports or build a wall to protect it.* The abutting owner has as against a city no right to the lateral support of the soil of the street, and can acquire none from prescription or lapse of time." 2 *Dill., Mun. Corp.*, (3d Ed.), §991.

In the note, citing the adjudged cases which support the text, reference is made to *Meares* v. *Commissioners, supra*, and the ground upon which the decision rests, of which the author says: "But it seems difficult judicially to sustain this intermediate ground, however just in its results."

The test of corporate liability in such cases is the manner in which the work is done, and it is not incurred when the work is "done with *ordinary skill and caution*," in the words of the Court. The caving in of the walls in that case was the direct and obvious result of the removal of the supporting soil, the danger of which must have been foreseen and should have been provided against. There was clear negligence in this indifference to the plaintiff's interests, and for this the corporation was made liable. We do not propose to depart from this ruling nor impair the force of the decision as a precedent to guide in similar cases.

But the overflow from a heavy rain-fall, by which the plaintiff suffered, may not have been so readily foreseen, and the defective condition in which the street was left to meet an unusual demand for enlarged facilities for the prompt carrying off of the water, was not so obvious, and does not necessarily imply the absence of the "ordinary skill and caution" constituting the negligence essential to responsibility. We have no evidence of the extent of the rain-fall which occasioned the injury, and it may have been so excessive that any reasonable precautions for carrying away the water would not have been adequate at the time.

All that can be required or expected of the corporation, is to cause the streets so to be made, and with sufficient side drains, as to remove, without injury to adjacent lots, such surface-water as from experience and knowledge of the past, may be reasonably anticipated to fall and may be provided for; but the corporation is not required to provide against such extraordinary and excessive rains as could not be reasonably foreseen and provided against.

This ought to be, and in our opinion is, the measure of corporate liability. And so in the recent case of *Bunch* v. *Edenton*, 90 N. C., 431, it is said that "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."

The rain-fall in July, 1881, may have been so excessive and unusual as not to imply a want of that reasonable precaution required in guarding against its effects, and the instruction ought to have presented the case in this aspect, with the proper limitations of the rule, and the jury not left to predicate a want of skill and care upon the simple fact of the insufficiency of the drainage, if the abundance of water was beyond all reasonable anticipations based upon full information and experience of former rains. There would be no culpability exposing the corporation to a suit for damages, where it has done all that a prudent and careful

person could be expected to do for his own protection against such an unforeseen contingency.

For these reasons we think the matter should go before another jury, that the law may be properly explained and applied to the facts as developed.

There is error. This will be certified, that the verdict may be set aside and a *venire de novo* awarded.

Venire de novo.

JOHN A. ARNOLD v. L. E. ESTIS and wife.

Issues—Homestead—Execution Sale—Fraudulent Conveyance—Consideration.

1. The issues arising on the pleadings must be eliminated and submitted to the jury.
2. It is the duty of the sheriff, when selling land under execution, to lay off the homestead, even when the execution is issued upon a judgment for an old debt, to which the homestead does not apply.
3. When the sheriff sells land to which the homestead does apply without assigning it, *it seems* that the sale is void.
4. The debtor is entitled to his homestead, where judgment is rendered on a note given since the passage of the homestead laws, but for an indebtedness contracted prior to that time.
5. *It seems*, that he is so entitled, when judgment is rendered on an account some of the items of which were contracted prior, and some subsequent to the passage of the homestead law.
6. Creditors cannot sell land fraudulently conveyed, without having the homestead assigned to the fraudulent donor—for by the conveyance of the homestead, the creditor has not been obstructed in his remedy.
7. Where a father in view of the intended marriage of his daughter makes a deed to her and her intended husband for a tract of land, as an inducement to the marriage; *Held*, a valuable consideration.

(*Mebane* v. *Layton*, 89 N. C., 396; *Wilson* v. *Patton*, 87 N. C., 318; *Cable* v. *Hardin*, 67 N. C., 472; *Crummen* v. *Bennet*, 68 N. C., 494; *Duvall* v. *Rollins*, 71 N. C., 218, and *Gaster* v. *Hardie*, 75 N. C., 460, cited and approved).

ARNOLD *v.* ESTIS.

ACTION for the recovery of land, tried at Spring Term, 1884, of GRANVILLE Superior Court, before *McKoy, Judge*, and a jury.

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

Mr. J. H. Flemming, for the plaintiff.

Messrs. R. W. Winston, Fuller & Snow and *E. C. Smith*, for the defendant.

SMITH, C. J. The land in controversy formerly belonged to Chesley Arnold, the father of the plaintiff and *feme* defendant, under whom both parties undertake to derive title.

On August 10th, 1874, Chesley Arnold executed a deed conveying the land to the defendants for the recited "consideration of his natural love and affection for the said Nancy H. Estis, his daughter, and in consideration of marriage between the said Lucas E. Estis and his said daughter," accompanying which the said Lucas E., as a further consideration of the conveyance, not expressed in the deed, entered into a bond to the said Chesley, wherein he covenants under the penal sum of five hundred dollars "to maintain, support and administer to the wants and necessities of the said Chesley during his life." The evidence of this undertaking was a copy from the registry, to the admission of which objection was taken and overruled.

Chesley Arnold afterwards, on October 6th, 1880, confessed judgment to the plaintiff before the Superior Court clerk for fourteen hundred and five dollars and six cents, the balance of an account rendered, containing charges during the intervening years from 1854 to 1872, inclusive, the correctness of which he verifies by oath and superadds: "I hereby promise and bind myself to pay to the said John A. Arnold the said balance of fourteen hundred and five dollars and six cents with interest thereon from January 1st, 1880. Witness my hand and seal, this the 17th day of September, 1880.

his
CHESLEY × ARNOLD.
mark.

WITNESS: W. F. BYRD.

On this judgment execution issued, under which the sheriff sold and conveyed to the plaintiff, on January 4th, 1881, "all the right, title and interest of said Chesley Arnold," in said lands for the price of six hundred and seventy-five dollars. This constitutes the evidence offered of the plaintiff's title.

The other testimony in the cause has reference to the validity of the debt reduced to judgment by confession and the *bona fides* of the measures employed to reach the land, and in our view of the matter is not material in its bearing upon the controversy.

The plaintiff asked an instruction that if the jury should find from the evidence that the paper-writing signed *and sealed* (the seal not appearing) by Chesley Arnold and annexed to the account upon which the judgment was confessed, was an acknowledgment of a subsisting *bona fide* debt, a part of which had been contracted prior to the year 1868, and that the plaintiff acquired his title under a deed from the sheriff selling under execution issued on such judgment, that the plaintiff is entitled to recover. This was refused. This is another instance in which the matters in controversy, as they appear in the pleadings are tried without the preparation and submission of issues eliminated therefrom to the jury as is required by *The Code*, sec. 395, and which constitutes a distinguishing element in our present mode of practice; and we repeat, what has been said in a previous case determined at this term, that this statute *must be observed* in the future.

The instruction proposed groups the several facts upon which counsel assumes to defend the plaintiff's right of action, and demands that the judge shall commit to the jury the finding of the right of recovery; whereas this is matter of law to be applied to the facts when they shall be ascertained by the verdict.

It is essential, as far as practicable, in administering the law in civil suits under the present system, that the respective functions of the jury be kept separate, as The Code contemplates.

There was no homestead or exemption laid off by the sheriff at his sale, but he undertakes to dispose of all the debtor's estate in the land, as if there had been no previous conveyance to the

defendants, and the denied instruction is based upon the proposition that no exemption can prevail against the debt or any part of it; because there are items entering into the aggregate which were contracted before the homestead right had any existence in the constitution; and, further, that the deed to the defendants is voluntary and inoperative against the sale under execution.

Our first inquiry, then, is as to the effect of the sheriff's sale and deed, in passing the land as against the defendants, assuming the deed to the latter to be a donation merely.

The land sold at the execution sale for but $675, which sum, accepted as the measure of its value in the absence of other estimates, falls below the maximum value of exempted real estate allowed the debtor. If the judgment be regarded as subordinate to the constitutional provision, as are debts contracted since it went into operation, it is manifest the debtor had no real estate accessible to final process, as it was all covered by the exemption. So, on the other hand, it would have been a useless and unmeaning form to lay off the exemption if the judgment is paramount to it, since all the land is insufficient to discharge the judgment and none would be left to the debtor.

Still, without regard to results, the statutory injunction ought to be observed, so that the debtor may retain against all his debts, so much as may not be needed of his real estate to meet his paramount liabilities, and to the full value of the allowance, against subsequent and subordinate liabilities incurred.

In *Mebane* v. *Layton*, 89 N. C., 396, it is in emphatic terms declared, that "a sale without laying off the homestead, unless in case of the several exceptions mentioned above, is unlawful and void." Those exceptions have been adverted to.

This brings us to the question, whether, as against the plaintiff's judgment there is any exemption which protects it from liability when the debtor's other estate is inadequate to discharge it.

We do not concur in the suggestion that the intermixing of claims arising from contracts made before and since the adoption of the constitution, by their voluntary fusion into one judgment,

are all placed in the former class and overreach the debtor's real estate exemption. If the items become indistinguishable by the merger, it would be more reasonable to accept the result as placing them all among the latter class, in analogy to the rule which prevails where goods belonging to another are confused with one's own by his own unnecessary and voluntary act. It is his own fault that that blending takes place, and he cannot complain of consequences he himself has brought about. But the precise point has been before the court of a sister State and decided in the manner indicated. *Bachman* v. *Crawford*, 22 Tenn., 213.

The State passed an act protecting certain specified property exemptions from execution upon judgments founded on contracts entered into on and after February 1st, 1834. The account upon which judgment was rendered, consisted of items contracted before as well as after that date. In the conclusion of the opinion delivered by Green, J., the court say:

"The plaintiff, in the execution, had his right of action for the articles delivered in 1833, and if he had chosen, might have brought his suit at the end of that year for the recovery of their value. But he chose to let the account run on unliquidated and to sue for the whole in this action. He cannot, by his voluntary act, thus deprive the party against whom the execution issued of a right secured by law. The defendant could not, by any form of pleading known to the law, have caused the proceeding to be reversed, so that one judgment should be rendered for the sum due in 1833, and the other for the articles obtained after the first of Februaey, 1834. Thompson Homestead, sec. 295."

The reasoning of the court seems to us to be correct, but the maintenance of the proposition is not necessary to the solution of our present inquiry. The debtor not only admits his indebtedness, but he enters into a new contract to pay the entire aggregate sum for which judgment is entered up. This places the claim upon the basis of a contract subordinate to the right of exemption.

Thus in *Wilson* v. *Patton*, 87 N. C., 318, upon the very point the court declare that "the new note is a new contract, and when given since the adoption of the constitution of 1868, and payment is attempted to be enforced by means of a judgment and execution, the defendant has the right to claim the homestead against such a demand."

The same rule is applied to the scaling process in reference to substituted contracts in *Cable* v. *Hardin*, 67 N. C., 472.

It is true the debtor and original owner sets up no claim to an exemption, nor could he in opposition to his deed conveying his estate to the defendants. As the homestead part, which for aught that appears is co-extensive with the entire tract, could not be reached and sold under execution, the plaintiff, as a creditor, has not been obstructed in his remedy, and he has acquired no less estate than he would have if this debtor remained the owner.

In *Crummen* v. *Bennet*, 68 N. C., 494, wherein this was ruled, the late Chief-Justice, in his usual brief and explicit language, says: "The fraud did not consist in conveying the homestead, for the creditor could not have reached that by his execution had the debtor retained his homestead. But the fraud was in conveying the other part of the land that the creditor can reach by execution. As to the homestead he has no concern. That matter will rest between the fraudulent donor and donee."

To the same effect are *Duvall* v. *Rollins*, 71 N. C., 218, and *Gaster* v. *Hardie*, 75 N. C., 460.

We have thus far considered the plaintiff as contesting the right of donees, who have paid no consideration for the land, and thus discarded the evidence of the undertaking of the defendant Lucas E. But, with this evidence we incline to the opinion that upon the face of the deed, there is a valuable consideration. If the advancement was an inducement to the marriage, and the deed is equally to the husband as to the daughter, it would be a valuable consideration. But whether this is so or not, the obstacles are equally great in the way of the plaintiff's recovery. The sheriff could not sell nor his deed convey, except in subordina-

tion to the exemption, if it have any operation at all when the sale so utterly ignores the statutory mandates, and the defendants have what the owner could, and the sheriff could not convey.

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

No error. Affirmed.

E. D. SCULL, et als., v. W. D. PRUDEN, et als.*

Deed—Description of Land in—Boundary.

1. Where land conveyed by a deed was described as "The Mount Pleasant Fishery, with the land attached to the same, supposed to be one thousand yards in length, bounded by the brink or brow of the hill on one side and by the river on the other, from one end of the beach to the other"; *Held*, only that part of the beach known as the "Mount Pleasant Fishery," and the land necessary and convenient for using it passed, there being no certain beginning point.

2. The name of a place may serve to identify it, as well as adjoining lands or water courses.

3. Where the subject-matter of a conveyance is completely identified by its name, by its localities and by other certain marks of description, the addition of another particular which does not apply to it, will be rejected as surplusage.

4. Natural objects and boundaries will govern quantity in a deed. So, if A grants one thousand acres, and describes it by boundaries, all the land within the boundaries will pass, although it contain two thousand acres.

5. In questions of boundary, what are the boundaries, is a question of law; where they are, is question of fact.

(*Dismukes* v. *Wright*, 4 Dev. & Bat., 206; *Proctor* v. *Pool*, 4 Dev., 370; *Belk* v. *Love*, 1 D. & B., 65; *Smith* v. *Low*, 2 Ired., 457; *Reddick* v. *Leggat*, 3 Murph., 539, cited and approved).

This was a CIVIL ACTION for possession of land, tried at the Fall Term, 1883, of HERTFORD Superior Court. before *Avery, Judge*, and a jury.

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

The plaintiff claimed the land in controversy under a deed made to one Stephen Smith by Thomas B. Sharp, which contained the following description of the land conveyed, to-wit: "The Mount Pleasant Fishery," with the land attached to the same, supposed to be one thousand yards in length, bounded by the brink or brow of the hill on one side and the river on the other, from one end of the beach to the other.

It was admitted that the title was out of the State, and that the plaintiffs were the owners of and entitled to the possession of all the land embraced within the above recited description; but it was insisted by the defendants that the *locus in quo* was not embraced therein.

It was in evidence that Simon's Mill Creek and Nowell's Mill Creek emptied into Chowan River from the west. That the distance from one of said creeks to the other was 1,299 yards; that from Nowell's Mill Creek up the river towards Simon's Mill Creek for a distance of thirty-three yards was a marsh extending to the water's edge. That at the upper end of said marsh was a hill or ridge which extended up the river to within about five yards of Simon's Mill Creek. That the distance between the river and said hill or ridge varied from three or four feet to one hundred yards in width. That from the lower end of said hill or ridge to the upper end of the *locus in quo* was 990½ yards. That the *locus in quo* or wharf was about 270 yards below Simon's Mill Creek.

There was evidence tending to show that there was continuous beach from about thirty-three yards above Nowell's Mill Creek to about thirty yards below Simon's Mill Creek, and that one part of it was about as well adapted to the purpose of fishing as the other; only about 300 yards of the beach was actually used for landing the seine by those who operated the "Mount Pleasant Fishery," and the upper windlass of the fishery did not extend up the river as far as the *locus in quo* or Mount Pleasant Wharf.

There was evidence tending to show that from the beginning of the bluff thirty-three feet above Nowell's Creek at the marsh,

up to 265 feet above the wharf and in thirty feet of Simon's Mill Creek, there was a continuous bluff or bank and no marsh. That the bluff and bank varied greatly in its distance from the water's edge. That from the beginning of the same near Nowell's Creek up to about the lower windlass of the Mount Pleasant Fishery the water at high tide beat against the bluff or bank for forty or fifty yards. At that point it begins to recede to about what is actually used as a fishery and then again gradually approaches the water, to a point about ten feet above the upper windlass and 200 or 250 yards below the *locus in quo*, at which point the bank approaches so closely to the water, that at high tide it beats against its base, and continues thus close to it, till it reaches Simon's Creek, except at the *locus in quo*, where a narrow ravine or gulch makes out from the river of about twenty-five yards in width. That between the points near the upper and lower windlass above named a natural beach seems to be formed, above and below which, respectively, a seine could only be fished, if at all, at great cost and by cutting away the bank and building wharves. That the river-shore is not generally called beach, except when it is used as a fishery, when it is so called.

It was admitted that if the land claimed was not covered by the description in the deed, it belongs to the defendants.

The plaintiffs asked in writing the following instructions, to-wit:

1st. That the brink or brow of the hill, as described by the witness, on the one side, and the Chowan River on the other side, and the end of the beach lying between said river and said hill, are the boundaries of the land conveyed to Sophia Smith by Thomas B. Sharp by the deed offered in evidence by the plaintiffs.

2. That if the jury is satisfied from the evidence that the beach described by the witness begins at the marsh adjacent to Simon's Creek, and extends down the river to the marsh at Nowell's Creek, then the plaintiffs are entitled to recover the lands described in the pleadings.

3. That if the jury is satisfied that the beach described by the witness begins at the mouth of Simon's creek and ends at the mouth of Nowell's creek, the plaintiffs are entitled to recover the *locus in quo.*

4. That in questions of boundary the distance called for by the deed must prevail unless there be some other description less liable to mistake to control it—as where the distance called for was one thousand yards in length from end to end, and the premises described as at the Mount Pleasant Fishery, the line must continue to the end of the one thousand yards, although it goes beyond the Mount Pleasant Fishery.

The Court refused to give any of the said instructions, but instructed the jury as follows, to-wit:

The plaintiffs, bringing an action to recover possession, must recover, if at all, upon the strength of their own title, and, therefore, the burden is upon them to show, by a preponderance of testimony, that the boundaries set forth in their deeds cover and include the defendants' possession. The Court, as to the calls in the deed from T. B. Sharp to Sophia Smith, which is the description relied upon by the plaintiffs, held,

"(1) That the description of length of plaintiffs' line, supposed to be one thousand yards, is not sufficiently definite to guide the jury in ascertaining the lines of the plaintiffs, because there is no certain point ascertained for the beginning or end of the line, and the distance is not fixed at exactly one thousand yards;

(2) That the plaintiffs cannot hold or recover any land, except so much of the beach or shore as was actually used for the purpose of fishing, and extending out from the river to the brink or brow of the bluff or hill opposite to that portion of the beach used as a fishery;

(3) That the description in the plaintiffs' deed is upon its face ambiguous, and unless the plaintiffs have shown, by parol testimony, where the lines of their deed run, and also that they include the possession of the defendants at the wharf, the plaintiffs cannot recover;

(4) That if the plaintiffs have satisfied you, by a preponderance of testimony, that the wharf would be included in a boundary ascertained by running a line from the highest point on the shore or margin of the river actually used as a fishery, down the river to the lowest point actually used as a fishery, and from the point last named to the brow of the hill opposite the point of beginning, and thence to the beginning, the plaintiff must recover, and not otherwise."

The plaintiffs, in deference to the opinion of the Court thus expressed, submitted to a non-suit, and appealed, and assigned the following errors:

1. In refusing to give each of the instructions asked;
2. In the instructions as given.

Mr. R. B. Peebles, for plaintiffs.
Messrs. Day & Zollicoffer and Winborne & Bro., for defendants.

ASHE, J. (after stating the facts). The *locus in quo* is a wharf on the shore of the Chowan river, and the question presented by the record is whether the description in a deed, executed by Thomas B. Sharp to Sophia Smith, under which the plaintiffs claim, covers the wharf.

This involves a construction of the said deed. The subject-matter of the conveyance is described in the deed as follows: "The Mount Pleasant Fishery, with the land attached to the same, supposed to be one thousand yards in length, bounded by the brink or brow of the hill on one side, and the river on the other, from one end of the beach to the other."

There were two creeks emptying into the river above and below the place used for a fishery and known by the name of the "Mount Pleasant Fishery," about twelve hundred yards apart, at a point some thirty-three yards above the lower creek called Nowell's. At the upper edge of a marsh making into the river, there was a bluff or ridge which widened out as it extended up the river to the width of one hundred yards, leaving a space used

as the fishery about three hundred yards in length, and known as the "Mount Pleasant Fishery." A short distance above the upper end of this space, the ridge or hill approached within three or four feet of the river and continued along to the water's edge up to within five feet of Simon's creek, except at a point about two hundred and fifty yards above the place used for a fishery, where there was a ravine breaking into the river, at which there was a wharf. The distance from the upper edge of the marsh above Nowell's creek was 966½ yards.

The wharf is the *locus in quo*. The plaintiffs contend that the deed under which they claim by its description covers the wharf, and that the distance called for in the deed is the controlling specification.

The defendants insist that, the proper construction of the deed is, that only so much of the beach as was actually used as a fishery with the land lying between that and the ridge, is all that was conveyed by the deed, and it did not cover the *locus in quo*.

In questions of boundary, what are the boundaries of a tract of land is a question for the Court; where are the boundaries is a question for the jury; and in the construction of deeds, the first rule is, that the intention of the parties is, if possible, to be supported; and the second rule is, that this intention is to be ascertained by the deed itself, that is, from all the parts of it taken together. *Dismukes* v. *Wright*, 4 Dev. and Bat. 206; *Proctor* v. *Pool*, 4 Dev. 370.

In reading the description of the deed from Sharp to Smith, we think it is manifest that the intention of parties was to convey that part of the beach of the Chowan river which was known as the "Mount Pleasant Fishery," and actually used as a fishery, *with the land attached*, which was necessary and convenient for operating the fishery—that is, not only a place for landing the seine but, as an appurtenance thereto, a place for drying the seine after drawing. Hence the description of the "Mount Pleasant Fishery," with the land attached, bounded by a bluff or hill and the river. The name of the fishery, the natural boundaries of

the bluff and the river fully ascertain the *corpus*. Nothing more was required to identify and ascertain the subject matter of the grant. The additional specification of the length of the beach, could not affect an identification so completely established.

When the subject matter of a conveyance is completely identified, by its *name*, by its localities, and by certain other marks of description, the addition of another particular which does not apply to it will be rejected as having been inserted through misapprehension or inadvertance. *Belk* v. *Love*, 1 D. and B. 65.

Here the name of the subject-matter of the conveyance is given, to-wit, the "Mount Pleasant Fishery," with the further marks of description, the bluff or hill on one side, and the river on the other. "The name of a place," says Chief Justice Ruffin in *Smith v. Low*, 2 Ired., 457, "like that of a man, may and does serve to identify it to the apprehension of more persons than a description by *coterminous* lands and water-courses, and with equal certainty. For example, 'Mount Vernon,' the late residence of General Washington, is better known by that name than by a description of it as situated on the Potomac river and adjoining the lands of A, B and C." And in *Reddick v. Leggat*, 3 Mur., 539, it was said by Chief Justice Henderson, "when the thing referred to *has no particular name*, and there are superadded to the general description specifications, or localities, all those specifications or localities must concur to point out the object, otherwise it does not point out the thing intended; as if I grant all my lands in Dale, which I purchased of J. S. and which are in the tenure of J. N., all these specifications must concur; otherwise nothing is described. But if I grant White Acre, which I purchased of J. S., and which descends to me from my father, White Acre will pass, although I purchased it of J. N. and not from J. S., and although it descends to me from my mother and not my father." And in the same case, by way of illustration, the learned judge says, "if one grants one thousand acres and no more, bounded as follows, &c., and two thousand acres are included in the boundaries, the two thousand acres will pass, as

the butts and bounds are more certain than quantity." These authorities are cited to show the controlling effect of the *name of the place* in the description of a deed. In the deed under consideration the name of the place is given, to-wit, the "Mount Pleasant Fishery." What is a fishery? "It is a place prepared for catching fish with nets or hooks."

This term is commonly applied to the place of drawing a seine or net. 1 Bouvier's Law Dictionary, 528. This fishery then, as described by its name, was that part of the beach of the river prepared and used for drawing the seine. We do not see how the description could apply to a part of the beach never used for such a purpose, and which could only be used for fishing "at great cost and by cutting away the bank and building wharves." We concur with His Honor in holding that the description of length of plaintiffs' line, supposed to be one thousand yards, is not sufficiently definite to guide the jury in ascertaining the lines of the plaintiffs, because there is no certain point ascertained for the beginning and end of the line, and the distance is not fixed with exactness. A description so indefinite must always yield to others that are less uncertain. The description is by no means relieved from its uncertainty, as contended by plaintiffs' counsel, by the superadded words "from one end of the beach to the other," for the case states that "the river shore is not generally called *beach*, except when it is used as a fishery, when it is so called."

Our opinion is His Honor has put a proper construction upon the deed, and that there was no error in giving or refusing instructions.

No error. Affirmed.

N. BRYANT and wife v. W. W. PEEBLES.

Attorney and Agent—Demand—Statute of Limitations.

It is settled in this State that demand must be made of an attorney or collecting agent, who has collected money for a client or principal, before an action will lie or the statute of limitations begin to run. But, when the reception of the money was unauthorized and wrongful, the plaintiff can waive the tort, and sue for money had and received to his use, without demand; and in this case the statute begins to run when the money is received, and bars the action in three years.

(*Potter* v. *Sturges*, 1 Dev., 79; *White* v. *Miller*, 3 D. & B., 55; *Wills* v. *Sugg*, 3 Ired., 96; *Waring* v. *Richardson*, 11 Ired., 77; *Hyman* v. *Gray*, 4 Jones, 155; *Kivett* v. *Massey*, 63 N. C., 240; *Patterson* v. *Lilly*, 90 N. C., 82; *Wall* v. *Williams*, 91 N. C., 477; *Humble* v. *Mebane*, 89 N. C., 410; *Webster* v. *Laws*, *Ibid*, 224; *Sain* v. *Bailey*, 90 N. C., 566; *Robertson* v. *Dunn*, 87 N. C., 191, cited and approved).

CIVIL ACTION, tried at the Spring Term, 1884, of the Superior Court of NORTHAMPTON county, before *Avery, Judge.*

Judgment for defendant. Appeal by plaintiff.

Messrs. T. W. Mason and *Batchelor & Devereux,* for plaintiffs.
Messrs. W. C. Bowen and *R. B. Peebles,* for the defendant.

SMITH, C. J. The *feme* plaintiff, as sole heir-at-law of William Griffith, claims the money, sought to be recovered in this action and produced by a sale of the intestate's land, which was made by the present defendant, then clerk and master under a decree of the court of equity of Northampton.

The purchaser, Matthew Bryant, executed his note therefor under seal and with sureties payable at twelve months.

Before the expiration of the credit, the defendant retired from office and delivered the security to his successor, Geo. B. Barnes, who, after maturity, put it in suit and recovered judgment. Execution was issued to the sheriff, who collected the money from the executor of the principal debtor and paid it over to R. B. Peebles, the supposed attorney, who endorsed on the writ an acknowledgment in these words:

"Received, this the 17th day of December, 1868, of A. J. Harrell, executor of Matthew Bryant, the sum of $422.45 in full of the within execution and costs, except sheriff's commissions. R. B. PEEBLES,

Attorney, &c.

A week later the money was paid, under a similar misapprehension, to the defendant, neither being an attorney of record or having authority from the plaintiff to receive it.

The principal defence, and to this alone we direct our attention, set up against a recovery, is the statute of limitation, the suit having been commenced on the 31st day of March, 1880, within three years of which a demand for the money was made by the plaintiff.

The plaintiff meets this objection by the argument that the defendant, assuming to act as agent and attorney in receiving the money, and the plaintiff electing to treat him as such, and to ratify his act, the statute was in repose until a demand and refusal, and being then put in motion, does not bar a recovery.

If it be conceded that the assumed agency was thus rendered lawful and the defendant placed in the same relation to the plaintiff as if original authority had been conferred and the money received under it, while there is some diversity in the adjudications elsewhere as to the necessity of a demand before action, the law is well settled in this State that such demand must be made of a collecting agent who has the money, until which the action will not lie, nor will the statute of limitation begin to run.

The cases to this effect, as cited in the argument for the appellant, are numerous and concurrent. *Potter* v. *Sturges*, 1 Dev. 79; *White* v. *Miller*, 3 D. and B. 55; *Wills* v. *Sugg*, 3 Ired. 96; *Waring* v. *Richardson*, 11 Ired. 77; *Hyman* v. *Gray*, 4 Jones 155; *Kivett* v. *Massey*, 63 N. C. R. 240; *Patterson* v. *Lilly*, 90 N. C. 82.

The principle is not however without qualification, for the interval may be so long, as, with concurring circumstances, to warrant

the inference of a misapplication, strengthened by a denial of liability which will admit of an action without a formal demand and give activity to the statute.

But without considering this aspect of the case, and the effect of the delay of twelve years since the money passed into the hands of the defendant, upon his liability, we propose to inquire whether, under the admitted facts, a demand was indispensable to the maintenance of the suit.

The reception of the plaintiff's money was at the time an unauthorized and wrongful act, which, waiving the tort, she could at once pursue and recover of the defendant as money had and received to her use.

The very receiving involves a liability to account for and pay over to the plaintiff, and the action lies without demand if this be not done. The reason for a demand is that the agent being in lawful possession and holding the fund for the principal, is not in default until he is called on for the money, and the opportunity to pay should before suit be afforded, to enable the agent to pay. But when there is no such relation between the parties, the obligation to account for and pay to the person entitled, is coincident with and springs out of the very act of receiving.

An analogy is found in the case where one unlawfully takes and sells an article of personal property belonging to another. The owner may waive the tort, affirm the sale and sue the wrongdoer for the money received by him, and no previous demand is required, since the obligation to pay is at once created and is broken by a failure to do so. *Wall* v. *Williams*, 91 N. C. 477, and authorities therein referred to.

Nor when one undertakes to act for another and in such capacity gets possession of property or money of his alleged principal, is he permitted to deny the latter's right, unless he has been deprived of it, or been compelled, or held responsible to account to one who has a superior title. *Humble v. Mebane*, 89 N. C., 410; *Webster v. Laws*, Ibid 224; *Sain v. Bailey*, 90 N. C., 566; and cases cited.

The rule is thus stated by Ashe, J., in *Robertson v. Dunn*, 87 N. C., 191:

"When a note is sued on and reduced to judgment in the name of the holder, it is such a conversion, in the absence of any evidence as to his right of possession, as will give the legal owner an action of trover against him, and the action would be barred after three years from the conversion. But the legal owner, if he chooses to do so, may waive the tort and bring an action in the nature of assumpsit for money had and received to his use, where the money has been collected, and the statute in that case bars the action after three years from the time of the receipt of the money, or a demand therefor, according to the relations of the parties."

The wrongful reception of the plaintiff's money thus constituting her cause of action, and her right to sue therefor accruing immediately, the statute starts on its course, and the results of a delay beyond the prescribed period cannot be averted by a subsequent election to treat the party as a *lawful agent*, and his possession, as such, rightful from the beginning.

The plaintiff's case derives no support from the supposed similarity of relations subsisting between agent and principal and those of trustee and *cestui que trust*. There were no contract relations between the parties to this suit which could suspend the operation of the statute, and create a trust. The manner in which the defendant came into possession of the fund puts upon him an estoppel which prevents his controverting the plaintiff's right to it, and may attach to it a trust that may follow it when passing into the hands of another cognizant of the facts, but it does not interfere with the plaintiff's right to sue nor interrupt the running of the statute. It is needless to consider other assigned errors, for the plaintiff is effectually barred of her recovery, and the statutory defence is well pleaded.

The judgment must be affirmed.

No error. Affirmed.

COMMISSIONERS OF GREENE COUNTY v. COMMISSIONERS OF LENOIR COUNTY.

Local Assessments—Fence Law—Parties.

1. Special burdens imposed for local improvements by the Legislature are not unconstitutional. They are considered not so much a burden, as a compensation for the enhanced value which the taxed property is supposed to derive from the work.
2. The Legislature (Laws, 1883, chaps. 70 and 214), erected adjoining territory in two counties into a no-fence district, and directed the commissioners of the two counties to erect a fence around said district and to defray the expense by a tax on all the realty in the district. More fencing was required in one county than in the other; *Held*, that a uniform tax on all the realty in the district must be imposed to pay the expense of the fence, irrespective of the amount of fencing required in each county. It is immaterial that parts of two counties are united in creating the district.
3. In such case, where the tax-payers in such district, resident in one of the counties, have paid more than their proportion of the tax to build the fence, the county commissioners of that county are the proper parties to bring an action to correct the wrong, and when the money is collected, it will be retained as a special credit to each of such tax-payers in a general collection of county taxes.

(*Cain* v. *Commissioners*, 86 N. C., 8; *Newsom* v. *Earnheart*, *Ibid*, 391; *Shuford* v. *Commissioners*, *Ibid*, 552, cited and approved).

CIVIL ACTION tried before *Shepherd*, *Judge*, upon a demurrer to the complaint, at Spring Term, 1884, of LENOIR county.

The facts are fully stated in the opinion.

His Honor sustained the demurrer, and plaintiff appealed.

Messrs. W. C. Monroe and *E. T. Albritton*, for the plaintiffs.
Mr. G. V. Strong, for the defendant.

SMITH, C. J. In section 1, chapter 70, of the acts of the General Assembly, passed at the session held in 1883, it was enacted:

"That it shall be unlawful for any live stock (a word defined in section 10), to run at large in Lenoir and Greene counties,

within the following boundaries, to-wit: beginning on the north bank of Neuse river, at the Lenoir and Wayne county line, thence with said line to the Greene county line, thence with the line between Greene and Wayne counties to the run of Nahunta creek, thence down said creek to Contentnea creek, thence down said creek to Neuse river, thence up said river to the beginning."

The portion of this boundary formed by the last mentioned creek and the Neuse river into which it flows, as deep watercourses are declared in section 12 to be a sufficient barrier against the incursions of stock, and no fence is there required to be built. The same section requires the boards of the counties, from which is taken the territory to form the district, to erect an enclosing fence around the residue of the boundary, with gates at all the entering highways; and, to defray the expense of the required work, the act declares that it shall be lawful for the said commissioners to levy and collect an assessment upon all the realty in the aforesaid territory.

Provision is made in the section next preceding, for giving notice of the completed construction of the fence, ten days after which the act goes into full operation and its prohibitions cover the district.

A month later during the same session was passed another act, declared in its title to be "supplemental and amendatory," by which the remaining part of Greene county composed within designated lines, of which Contentnea creek (here distinguished from another stream of the same name as "Big Contentnea,") constitutes a part and separates the two sections in that county, is erected into a district and subjected to the same general conditions, chapter 214.

The other sections appropriate to the district thus established are the provisions of the former enactment relating to the construction of its enclosing fence and the raising of means to meet the expenses thereof, as well as the method of putting the act in operation. The barrier intervening between the separate districts, consisting in part of a fence and in part of a natural water course,

is not removed so as to open egress from one into the other, and thus render needful to Lenoir the boundary fence required to enclose the additional territory in Greene; but the original fencing and streams remain and are a full protection to all the territory in Lenoir. The value of the taxable real estate in the part of Greene which enters into the formation of the first district is $562,969.61, and the cost of constructing the fence therein is $1,554\frac{19}{100}$, while the value of the real estate in the part taken from Lenoir is $1,090,112, and the cost of the fence in that county is $1,725. In like manner it is ascertained that the value of the taxable real estate in the remaining part of Greene, constituting the second district, is $564,945, and the cost of erecting the necessary fence therein is $3,679\frac{68}{100}$.

The commissioners of Lenoir refused to act in co-operation with the commissioners of Greene in providing for a uniform assessment upon all the lands lying in their respective counties to meet the expenses of enclosing the first district, or to recognize any obligation resting on Lenoir to contribute at all to the erection of the additional fencing required under the second act; insisting that they were required to build the part of the line of fence in their county only. In consequence and in order to secure to Greene the benefits of this legislation, the commissioners of Greene have been compelled to provide the means of paying for the entire structure in their county.

The present action looks to a re-adjustment of the expenses incurred, and a coercing judgment against the defendants, compelling them to make such a re-assessment upon the real estate in the portion of the district taken from Lenoir as shall be uniform with that rightfully falling upon the real estate in the part taken from Greene, and upon this basis refund the excess paid by the latter.

These are the allegations of the complaint, and for the purpose of passing upon the issue made by the demurrer must be assumed to be true. The demurrer assigns, as the grounds thereof,

(1) That the lands in Lenoir are only bound to pay for so much of the structure as lies within the county limits.

(2) That the excess in the payments made under the assessment in Greene was unnecessary and officious, and furnishes no just ground for a claim against them.

(3) That the right of action, if residing in any one, is in the persons interested in having the act carried out and the district properly protected from the inroads of outside stock, and not in the plaintiffs.

Upon the hearing, the Court gave judgment sustaining the demurrer and dismissing the action, from which the plaintiffs appeal. The validity of this form of legislation, and its consistency with constitutional requirements, have been upheld in the several adjudications to which attention is called, and which are all reported in the 86th volume, *Cain v. Commissioners*, page 8; *Newsom v. Earnheart*, page 391; *Shuford v. Commissioners*, page 552. In the first of these it is said by the Court, "It creates a community of interest in upholding one barrier in place of separate and distinct barriers for each plantation, and thus in the common burden, lessens the weight that each cultivator of the soil must otherwise individually bear.

"As the greater burden is thus removed from the land-owner he, as such, ought to bear the expense by which this result is brought about. The special interest benefited by the law is charged with the payment of the sum necessary in securing the benefit. This and no more is what the statute proposes to do, and in this respect is obnoxious to no just objection from the taxed land-proprietor, as it is *free from any constitutional impediments.*"

An assessment for local improvements is not considered so much a burden as it is an equivalent or compensation for the enhanced value which the taxed property is supposed to derive from the work. It is an instance of the application of the general maxim *qui sentit commodum debet sentire et onus*, the consideration paid for the special local benefit conferred.

This is the underlying principle of the system of local assessment for local advantages, and in its development and application to the present case most manifestly requires that the lands in

Lenoir and Greene constituting the district under the first act, without any reference to county lines, should be assessed and charged according to value and at a uniform rate. The common fence dispenses with separate fences throughout the circumscribed territory for separate farms, and thus the relief is diffused generally among tax-paying owners.

The result is not affected by the fact that parts of two counties are united in creating the district, and that separate yet concurring action of the commissioners in each is necessary to the execution of the law. For the purpose of local assessment it is a single district, as much so as if constituted of part of one county, and as the levy of taxes is confined to county officers, their agency in enforcing them must of course be independently exercised. It was their duty after ascertaining the expense of the required work to inquire what *per centum* of tax upon the aggregate value of all the real estate subject to assessment in the entire district would suffice to meet it, and then levy such to raise the needed amount. The plaintiffs have cause of complaint against the defendants for refusing their co-operation. But the other territory in Greene is erected into a separate district, with a separate enclosure and must bear its own expenses. It has the benefits of the fence constructed at the cost of the first district, so far as it forms a dividing line between them.

It cannot rightfully demand a construction from the tax-payers in Lenoir whose property derives no advantage whatever from the additional fencing. Its full protection is secured by that in whose building they have to participate.

Nor do we find any difficulty in construing the sections of chapter 214 which refer to chapter 70.

They are obviously intended to introduce the mode of procedure prescribed in the former for carrying into effect the provisions, having a similar object in view, contained in the latter. No concert of action was necessary with the authorities of other counties, and hence they were to assess the lands in the separate district so as to raise a sufficient sum to meet the expense of the required fence around it.

We think, too, the mandatory authority of the court may be invoked to compel the performance of the denied obligation imposed upon the defendants.

They have failed hitherto to levy the full assessment upon the real estate in their county liable under the statute, and this has compelled an excessive levy upon the owners of real estate in Greene in order to secure the beneficial objects of the law.

The adjustment must be among those respective tax-payers, but it can only be attained through a new assessment collected and paid over to the county authorities of Greene to replace the moneys wrongfully collected in that county, and to be held in trust for those who have over-paid, as should have been that wrongfully used in payment for the fence.

The representative county agencies are the appropriate parties to an action to correct the wrong and bring about the pre-existing state of things, as if it had not been done. The very fact that said boards must unite in accomplishing what ought to have been done in the beginning shows the propriety of the present action. The trust fund when received belongs to the over-charged tax-payers and may be retained as a special credit to each in a general collection of county taxes, and thus the wrong redressed.

There is error, and the judgment must be reversed.

Let this be certified. Reversed.

F. H. PENDLETON, ex'r, v. JOHN H. DALTON.

Executor—Estoppel—Statute of Limitations—Specific Performance—Statute of Frauds.

1. Where a plaintiff sues as executor, the production of letters testamentary issued to him is sufficient to show that the testator's right of action has become vested in him. It is not necessary to annex a copy of the will to the letters, when the provisions of the will are not involved in the prosecution of the action.

2. Where a bill in equity, filed under the former system of procedure by the vendee, to enforce the specific performance of a contract to convey land, and also praying for general relief, was dismissed, it was held that such dismissal was not an estoppel to an action brought under The Code to recover a sum of money alleged to have been paid in pursuance of said contract as a part of the purchase money for the land.

3. Both legal and equitable rights may now be administered in one and the same action. Therefore, if an action is brought for the specific performance of a parol contract to convey land, to which the vendor pleads the statute of frauds, and it appears that a portion of the purchase money has been paid, the court will give judgment against the vendor for the amount which he has received.

4. A court may refuse, for equitable reasons, to compel specific performance of a contract legally binding, and leave the party to his remedy in the recovery of damages for its violation.

5. Where a defendant has successfully resisted the specific performance of a contract, he will not be allowed to set up such contract as binding in order to defeat an action brought to recover money paid in pursuance of said avoided contract.

6. Where the pendency of a former action is relied on to stop the statute of limitations, it must appear that it was between the same parties, and for the same cause of action.

(*Granbery* v. *Mhoon*, 1 Dev., 456; *Roanoke Navigation Co.* v. *Green*, 3 Dev., 434; *London* v. *Railroad Co.*, 88 N. C., 584; *Murdock* v. *Anderson*, 4 Jones Eq., 77; *Chambers* v. *Massey*, 7 Ired. Eq., 286; *Bank* v. *Harris*, 84 N. C., 206; *Wilkie* v. *Womble*, 90 N. C., 254; *Nichols* v. *Freeman*, 11 Ired., 99, cited and approved).

CIVIL ACTION tried before *Shipp, Judge*, and a jury, at Spring Term, 1884, of the Superior Court of IREDELL county.

The facts appear in the opinion.

In deference to His Honor's ruling, the plaintiff took a nonsuit and appealed.

Mr. D. W. Furches, for the plaintiff.

Messrs. Clement & Gaither, for the defendant.

SMITH, C. J. Placebo Houston died in the year 1859, seized and possessed of a large and valuable tract of land in the county of Iredell, and leaving a will, since admitted to probate, wherein he appointed two executors, of whom the defendant, John H. Dalton, alone accepted the trusts and took the oath prescribed by

law. In one of the clauses of the instrument he gives this direction and authority:

"My real estate to be sold, as my executors may deem best for the interests of the estate."

On the 18th day of October, 1862, an agreement was entered into by and between the plaintiff and the said John H. Dalton, under their respective hands and seals, wherein the latter covenants to convey to the former the land aforesaid, described by definite boundaries and its name, as the Houston tract or homestead, supposed to contain two thousand and twenty acres, with several reservations to be taken therefrom, at the price of twelve thousand dollars; to be reduced at the rate of six dollars per acre for all the excepted parts. It is unnecessary to state the provisions of the agreement in greater detail.

Some few months later, the defendant received funds from the plaintiff, which he says he understood were in part performance of the agreement, for which he gave a written acknowledgment in these words:

"Houstonville, 13th February, 1863. Received of Frederick H. Pendleton, for Dr. W. J. Pendleton of Louisa county, Virginia, six thousand and fifty-one dollars in Confederate bonds and Virginia sixes, and four thousand, nine hundred and forty-nine dollars in currency, making in all eleven thousand dollars, in part pay for the homestead tract of land, containing — acres, at six dollars per acre, belonging to the estate of P. Houston, deceased; and I bind myself, as executor of the said P. Houston, deceased, to make to Dr. William J. Pendleton, of Louisa county, Virginia, a good and lawful deed for the whole of the above homestead land, containing — acres. J. H. Dalton, Executor."

This receipt differs from the original contract in that it includes, as its subject-matter, the portions of the reserved land within the general boundaries, without any change in the price, and substitutes the said W. J. Pendleton in place of his son, who contracted in his own name, not in an assumed agency, and had entered into possession in December previous. During the same

year (1863) William J. Pendleton, as principal in the transaction, filed his bill in the court of equity of Iredell against the said Dalton, in which, making no reference to the original contract of October, 1862, and treating the written acknowledgment as alone containing the obligation, and set out as such, he asks for a decree for specific performance, and offers to pay the residue of the purchase money.

The answer sets out the agreement made in October, as in force unaltered, and asserts that the funds paid were understood to be in pursuance and part execution of its requirements, and so it was represented by the said F. H. Pendleton, who prepared the writing and brought it to him for his signature. It sets out as the true and only agreement, that made in October with the defendant in person.

The suit was removed to the Supreme Court, and upon the hearing, at January Term, 1867, dismissed with costs, the Court declaring: "We are satisfied that he (the defendant) signed it under the belief that the money paid was in part execution, by the purchaser, of the contract made a few months before, and he, on his part, had to some extent executed by putting the supposed purchaser in possession." *Pendleton* v. *Dalton*, Phil. Eq., 119.

Immediately after this disposition of the cause, another suit was brought in the same court of equity, at Spring Term, 1868, by the said F. H. Pendleton, in his own name, against the same defendant, to compel the specific performance of the contract of October, 1862, in which the receipt given in February was treated as a payment under it, in accordance with the ruling in the previous case. The bill further recited that the defendant had commenced and was prosecuting an action to dispossess him of the land, and asks that he be restrained from proceeding under it. The defence set up in the answer is fraud practiced by the plaintiff—a total failure of consideration—and that there is "no such subsisting contract between plaintiff and defendant as this Honorable Court will enforce under all the circumstances of the case."

The suit was transferred to Yadkin county, but before the hearing a recovery was effected in the ejectment action, and execution sued out to restore possession to said Dalton. To restrain its enforcement an order for an injunction was made at chambers by the judge, and the writ issued on November 21st, 1869. On application to vacate the restraining order and recall the writ made on December 18th, following, it was refused, and an appeal taken therefrom to this Court, when, at January Term, 1870, the ruling was reversed and the petition dismissed—the decree, when entered in the court below, adding the words "without prejudice." *Pendleton* v. *Dalton*, 64 N. C., 329.

The said William J. Pendleton then commenced a second suit in his own name in the Circuit Court of the United States for the District of North Carolina, in equity against the said John H. Dalton, at Fall Term, 1869, which, after the division of the State into separate districts, was transferred to the Circuit Court of the Western District. The object of this suit was to enforce execution of the contract of October, as entered into with the plaintiff, for whom his son was acting in making it, and to restrain action under the writ issued upon the recovery in ejectment.

The order for an injunction was granted and the writ issued in May, 1871.

The answer to the bill was filed on the rule day in July, but as it is not among the papers on file its contents are not known, nor is it material that they should be in the present controversy.

The death of the plaintiff was suggested at October Term, 1872, and leave given to make his heirs at law parties. This was not done, and the next year it was decreed that "the suit is abated."

Again on April 20, 1874, suit was instituted in the Superior Court of Iredell by William R. Pendleton and wife Julia, Walton Overton and wife Alice, and said Frederick H. Pendleton against the same defendant, John H. Dalton, wherein the *feme* plaintiffs and the said Frederick H. are alleged to be the heirs

and devisees of the said William J. Pendleton, and to have succeeded to the equitable estate acquired by him under the agreement of October, 1862, and therein representing that the said John H. acted, while using his own name and so covenanting in the writing, by the authority and on behalf of the deceased, as well as in using funds of his in the partial execution of the agreement, as shown in the acknowledgment given in February, they demand a conveyance of the land embraced in the agreement, offering to pay whatever, if any, amount of the purchase money may appear to be still due.

The answer reiterates the matters of defence set up in the answers in the previous suits, and relies upon the results of these suits as a bar to the present.

The judge of the district wherein is embraced the county of Iredell, having been before professionally connected with the subject-matter in controversy, the cause was removed to the Superior Court of Rowan and there tried and determined adversely to the plaintiff at Spring term, 1877.

Upon appeal to this court the judgment was reversed for an erroneous ruling, and a new trial granted. *Pendleton* v. *Dalton*, 77 N. C., 67.

The plaintiffs afterwards failed to comply with a rule requiring them "to justify the security to the prosecution bond," and the action was dismissed.

The present action is instituted in the name of the said John F. Pendleton as executor of his father against the said John H. Dalton, in both his personal and representative capacity, upon a summons issued on the 11th day of November, 1879, from the Superior Court of Iredell. The complaint, after stating the making of the contract contained in the paper-writing of February and the payment made under it, and without any reference to that of October preceding and the defendant's refusal to return the money, while repudiating the obligation, "demand judgment for eleven thousand dollars," the sum received, as shown in the receipt of February, 1883, with the interest thereon since accrued and the costs of the action.

Several defences are relied on in the answer, as follows:

(I). The absence of evidences of the alleged will, necessary to vest a right of action in the plaintiff in his representative capacity.

(II). Falsehood and fraud in the transaction, by which, in the form of the receipt, an attempt was made to modify injuriously the agreement executed in October preceding.

(III). An estoppel resulting from the several unsuccessful actions to coerce the performance of each.

(IV). The bar of the statute of limitation, since the right, if any such exists, arose.

(V). A counter-claim for rents and profits accrued during defendant's occupancy and use of the premises.

Upon the trial before the jury at Spring term, 1884, and after hearing of the evidence contained in the records, as it has been summarily recapitulated, the court intimated an opinion against the plaintiff's ability to maintain his action, in submission to which he suffered a non-suit and appealed. It does not appear upon what ground the adversary opinion was based, and, therefore, the ruling must be considered in its relation to the legal objections interposed.

(I). The production of the letters testamentary issued to the plaintiff shows his representative relation and that the *testator's right to sue* has become vested in his executor. It was not necessary to annex a copy of the will to the letters, because the provisions of the will are not involved in the prosecution of the action. This is plain upon principle and authority. *Granbery* v. *Mhoon*, 1 Dev., 456; *Roanoke Nav. Co.* v. *Green*, 3 Dev., 434; *London* v. *Railroad Co.*, 88 N. C., 584.

(II). No estoppel arises out of the successive suits to compel specific performance and their termination, notwithstanding there is a prayer for general relief.

The suits, under our former divided jurisdictions, were in equity, and the compacts were not within the statute of frauds; and the refusal to give relief was founded upon other considera-

tions connected with their execution. Had they been unwritten and for this reason their enforcement resisted, the money paid in part execution was recoverable in an action at law, as money had and received to the plaintiff's use, and to a court of law the plaintiff would be remitted. It would be otherwise if the consideration consisted in something else than money which could not be replaced by a money payment, or if the claim was for improvements, in good faith put upon the premises, in the expectation of having the legal title. *Murdock* v. *Anderson*, 4 Jo. Eq. 77; *Chambers* v. *Massey*, 7 Ired. Eq. 286.

The redress, which must have been formerly sought in one and could not be in another tribunal, according to its jurisdiction, may now be had in one, and in a single action, if the complaint be sufficiently comprehensive to embrace it. *Bank* v. *Harris*, 84 N. C. 206.

If, therefore, a parol contract, which has been in part performed by the vendee, is sought to be enforced against the vendor and is resisted by him, as being void under the statute, the Court will now proceed to adjudge the return of what he has received, or compensation in value. *Wilkie* v. *Womble*, 90 N. C. 254. This is done when no legal obligation has been incurred, for the Court may refuse, for equitable reasons, to lend its aid in compelling specific execution of a contract legally binding, and leave the party to his remedy in the recovery of damages for its violation, the measure of which, as held in *Nichols* v. *Freeman*, 11 Ired. 99, would be the value of the land less the unpaid purchase money.

(III). The remaining objection is to the form of the action and the relief sought, and to its prosecution after so long a lapse of time.

Assuming an independent and new liability to have been incurred, as the plaintiff alleges, by the defendant's execution of the written memorandum in which he acknowledges a payment to him, as executor, it was denied and distinctly repudiated in the resistance offered to its enforcement in the suit brought by the testator in his lifetime and dismissed in 1867. Indeed the relief

then sought upon this alleged contract, was denied because the court considered it as a part execution of that of October and not a substitute for it.

If the plaintiff is now at liberty to treat it otherwise and as *imposing itself an obligation* (and such is the averment in the complaint), the right then accrued to bring an action for the breach of the contract, and to obtain compensation in damages therefor. The money paid under a valid subsisting agreement is not recoverable, as money had and received to the plaintiff's use, as it is when the agreement is voidable and is avoided under the statute of frauds, or for other reason in law rendering it such.

In the latter case, there being no legal obligation created by contract, and consequently no consideration, the law implies a contract to restore. It is otherwise when payment is in part performance of an obligation and the defendant fails to comply with his. In such case the remedy is by an action for a violated contract, and the recovery is commensurate with the damages occasioned by the breach.

The statute of limitation would have begun to run in 1867, at least, but for the suspending act which arrested it till January, 1870, and the second suit commenced between the same parties in 1869 and terminated in June, 1872.

The present suit is seven years later. The operation of the statute was not interrupted by the intervening suit of F. J. Pendleton against the defendant, founded upon the agreement of October, 1862, since it was not *between the same parties* nor for the *same cause of action.* Nor was it interrupted by the action of the heirs or devisees of W. J. Pendleton which commenced in April, 1874, and terminated in the spring of the same year in which the present suit was begun, because it is not for the *same cause of action and does not grow out of the same alleged contract,* or rest upon any similar ground for its support.

If the action could be maintained at all to get back the purchase money paid under a contract, it encounters the statutory bar and must fail.

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

No error. Affirmed.

MARY JAMES et al. v. J. P. RUSSELL.

Estoppel—Agency.

1. The plaintiff claimed the *locus in quo* as devisee, and also alleged that the defendant had possession thereof as his tenant. The defendant objected to the introduction of the will under which plaintiff claimed. The jury having found that the defendant went into possession of the land as plaintiff's tenant; *it was held*, that any error in admitting the will in evidence was immaterial.
2. A tenant cannot contest his landlord's title until he has given up the possession of the land.
3. Where one stands silently by and hears a contract made for him by another, he is bound by such contract.

This was an action to recover land tried before *Avery, Judge*, at the Spring Term, 1882, of ALEXANDER Superior Court.

The plaintiffs claimed the land in controversy under a grant from the State to John Chapman in 1780, and the will of said Chapman devising the land to his children, Enoch and Letty Chapman, and a deed from them to the plaintiffs.

When the will of John Chapman was offered in evidence by the plaintiffs, the defendant objected to its introduction on the ground that it had not been duly proved.

The will was attested by three witnesses and proved by one of them. Accompanying the copy of the will as certified by the judge of probate of Alexander county, the following appears:

NORTH CAROLINA, } May Session, 1837.
WILKES COUNTY. }

This will was duly proved in open court by the oath of William C. Emmett and ordered to be recorded at full length.

Teste: WILLIAM MARTIN, Clerk,
BENJ. W. COSS, Deputy Clerk.

This was endorsed on the will:

STATE OF NORTH CAROLINA, }
WILKES COUNTY. }

I, A. H. Horten, Clerk of the Superior Court and judge of probate for the county and State aforesaid, do certify that the foregoing is a full and true copy as taken from the record of the late court of pleas and quarter sessions of said county, now on file in my office. In testimony whereof I hereunto set my hand and seal of office, at office in Wilkesboro this March 24, 1880.

(Signed) A. H. HORTEN,
Clerk Superior Court and Judge of Probate.

The plaintiff offered evidence to show that the defendant entered into and held possession of the land in controversy under the plaintiff by a verbal contract of lease, and to sustain the proposition offered, among other things, the following testimony by one Hill: That some nine or ten years before the trial witness and plaintiff went to the defendant's home. The fence around the land in dispute had gone down. At some points there was a low fence with gaps at intervals. That witness, plaintiff, defendant Peyton Russell and his father Isaac Russell, were standing at one of the gaps in the fence around the field in controversy, when either the defendant Peyton proposed to plaintiff to rent the field in controversy from the plaintiff for a pasture, or his father Isaac Russell, in presence of defendant, proposed that plaintiff should lease said field to defendant for a pasture. The plaintiff agreed to let the defendant take the field for a pasture, if he would put

a good fence around it, and the defendant or his father, in his presence, agreed to do so. The witness further stated that he is not mistaken as to the field; that they were all standing by the land in controversy and pointing to that field.

The defendant denied that the land in controversy was that referred to in the conversation as is testified to by the witness, and there was much contrary evidence offered on both sides.

The defendant also offered evidence to show that he and those under whom he claimed had been in possession of the land in dispute for forty years, and this was controverted by the plaintiff, who offered testimony to show that the field in question was not inclosed or held in possession by any person at the time when the conversation testified to by Hill was had and for some time previous thereto. On this question there was some conflict of testimony.

His Honor, among other things, charged the jury upon the question of tenancy, that "the plaintiff could recover without exhibiting or relying upon any paper-title if he satisfied the jury by a preponderance of testimony, that the defendant entered upon the land as his tenant, and had not been evicted since he so entered. That the rule of law was, that when one entered upon the land as tenant of another, he was estopped from denying the title of his landlord until evicted."

The court then instructed the jury to consider first the testimony bearing upon the question whether the defendant entered as the tenant of the plaintiff, "because it was admitted that there had been no eviction, and if the defendant so entered he would be estopped to deny the title of the plaintiff."

The court further instructed the jury in reference to the evidence upon this question, "that if the defendant asked the plaintiff to let him have the field in controversy for a pasture, and plaintiff agreed to do so if defendant would put a fence around the field, and defendant took possession under said agreement, that would constitute a contract, and the relation of landlord and tenant would be created and would continue until eviction."

The court further charged the jury upon this question, that "if Isaac Russell, the defendant's father, asked the plaintiff in the defendant's presence to allow the defendant to have the field in controversy for a pasture, the defendant interposing no objection, the effect would be the same as if the permission had been asked by the defendant."

The defendant excepted to the part of His Honor's charge as here set forth.

The jury rendered a verdict in favor of the plaintiff. There was judgment in his behalf from which the defendant appealed.

Messrs. Robbins & Long, for the plaintiff.
Mr. R. Z. Linney, for the defendant.

ASHE, J. (after stating the facts). The defendant excepted to the introduction of the will of John Chapman, upon the ground it had never been duly admitted to probate. His Honor overruled the objection and admitted the copy of the will in evidence. But as the case turned upon the question of estoppel, it was not necessary for the plaintiff to establish a paper-title, and the ruling of His Honor upon this point was, therefore, immaterial.

The main contest in the case was whether the defendant had entered into the land in controversy as the tenant of the plaintiff.

Nearly all the evidence was directed to that point and the burthen of His Honor's charge was in expounding the law to the jury upon that subject. The jury found their verdict in favor of the plaintiff and from the course of the trial it is evident the jury found for the plaintiff upon the ground that the defendant entered into the land as tenant of the plaintiff, and was, therefore, estopped to deny his title.

The only other exception taken by the defendant was to that part of the charge wherein His Honor told the jury in substance, that if defendant's father in defendant's presence, asked the plaintiff to rent the land to the defendant as a pasture, the defendant interposing no objection, this was the same in effect as if defend-

ant himself had asked the plaintiff to rent the land to him. This exception is met by one or all of the following maxims—"*qui tucet, consentire videtur*," "*qui facit per alium, facit per se*," and *omnis ratihabitio retrotrahitur et mandato priori æquiparatur*."

There is no error. The judgment of the Superior Court is affirmed.

No error. Affirmed.

JOHN BARNEYCASTLE v. JOHN WALKER.

Landlord and Tenant—Jurisdiction of J. P.—Lease and Entry.

1. The office of the summons is to bring the parties into court; the nature of the action is shown by the complaint.
2. When A leases land to B for some determinate time, it gives B a right of entry which is called his interest in the term: but after actual entry, the estate vests in him, as if by grant, and he is in possession, not properly of the land, but of the term.
3. If the lessor enters and dispossesses his lessee after he has entered upon and taken possession of his term, his remedy is by action *ex delicto;* under the former practice, an action of trespass *quare clausum fregit*, but under the present system an action for a tort.
4. There is no implied contract that the lessor will not molest the lessee, but there is an implied condition, upon a breach of which the lessee is discharged from his obligation to pay rent.
5. A justice of the peace has no jurisdiction of such an action when the damages demanded exceed $50.
6. A tenant can bring trespass against his landlord for forcibly entering and breaking his close, during the term.

(*Hatchell* v. *Kimbrough*, 4 Jones, 163; *Wilson* v. *Moore*, 72 N. C., 558; *Nance* v. *Railroad Co.*, 76 N. C., 9, cited and approved).

This was a CIVIL ACTION tried before *McKoy, Judge*, and a jury, at the February Term, 1885, of DAVIE Superior Court.

The plaintiff in his complaint alleged that in the fall of 1879 he rented the land in question from William Walker, Sr., his home place, the said Walker reserving the house and garden and

truck patches, &c., and plaintiff occupied the same until August, 1880, when he again made a contract with said Walker for the rent of the same land for the next ensuing year, 1881; sowed wheat in the fall of 1880, and occupied the land as tenant of said Walker until after the death of said Walker, which occurred in the month of January, 1881.

That after the death of said Walker, the plaintiff had sowed oats, and was preparing to plant corn, &c., when the defendant took possession of the land and, by threats, prevented the plaintiff from further occupancy of said land, and alleged that he had been damaged to the amount of one hundred and seventy-five dollars.

The defendant denied the allegation of the plaintiff that he had leased the land from William Walker for the year 1881, and contended that the lease made by William Walker expired in the latter part of the year 1880.

The following issues were submitted to the jury:

1. Was the plaintiff rightfully in the possession of the lands described in the complaint in the year 1881?

2. Was the plaintiff wrongfully dispossessed of said land by defendant?

3. How much damages is the plaintiff entitled to recover?

After evidence by both parties tending to support their respective contentions, the jury responded to the first and second issues in the affirmative, and on the third issue assessed the plaintiff's damages at one hundred dollars.

During his argument before the jury, the counsel for defendant moved the Court to non-suit the plaintiff, upon the ground that the Superior Court had no jurisdiction of this action. The Court refused the motion and the defendant excepted, and upon the return of the verdict the Court pronounced judgment in favor of the plaintiff, according to the finding of the jury, from which the defendant appealed.

Messrs. Clement & Gaither, for plaintiff.

Messrs. Coke & Williamson, for defendant.

ASHE, J. (after stating the facts). The sole question presented by the record is, whether the Superior Court had jurisdiction of the action?

The position taken by the defendant's counsel, if we understand his argument, was, yielding the agreement as to the rent of the premises for the year 1881—it was only a contract for the use and occupation of the land for a year, and that there was an implied contract on the part of the lessor that he would not disturb the possession of the lessee during the time of his lease, and the entry of the defendant, as heir of the lessor, was a breach of that implied contract, and the action was to recover damages for the breach, and as the damages were laid at a sum under two hundred dollars, the Superior Court had no jurisdiction of the action.

He referred to the summons as proof that the action was *ex contractu*, because the defendant was summoned as administrator of W. Walker.

But the answer to that is, that the summons was against the defendant as such administrator, and against him individually, and the complaint seeks to charge him only in his individual character. This meets the objection. For the only office of the summons is to bring the parties before the Court, and the Court, in determining the nature of the action, can only look to the complaint. *Wilson v. Moore*, 72 N. C., 558.

The counsel for the defendant has overlooked the distinction between an executory and an executed contract. The first, as defined by Blackstone, is only a *chose in action*, but the latter is a *chose in possession*, and differs nothing from a grant. 2 *Blk. Com.*, page 443. Thus, in a lease for years, which he defines to be "a contract for the possession of land and tenements for some determinate period, and the lessee enters thereon, the lease does not vest any estate in the lessee, but only gives him a right of entry on the tenement, which right is called his interest in the term; but the estate does not vest in him until he makes an actual entry and thereby accepts the grant, and is in possession,

not properly of the land, but of the term. 2 Blk., 140 and 144. Before the lessee enters and takes possession, his right lies only in contract, but after entry the contract is executed and the estate is absolutely vested in him, as if by grant, for the period of time mentioned in the lease, whether in writing or by parol, unless it should contain some stipulations upon the breach of which the estate is forfeited.

If the defendant had taken possession of the land before the entry of the plaintiff, there would have been much force in his argument, and the authorities cited by him would have been applicable to that state of facts. But here there were no covenants or stipulations in the lease, and the estate for a year vested absolutely in the plaintiff by his entry, before the trespass committed by the defendant, as fully and effectually as though he had a lease for life or a deed in fee simple. There is no implied contract that the lessor will not molest the lessee in his possession; but there is an *implied condition* to that effect, upon a breach of which the lessee is discharged from his obligation to payment. *Taylor's Landlord and Tenant*, section 386.

The defendant, while the plaintiff was thus in possession under his lease, entered upon the premises and dispossessed him. What was his remedy? Most clearly an action *ex delicto*. Under the former practice an action of trespass *quare clausum fregit*, but under the present system an action for a tort, of which a justice of the peace had no jurisdiction before the act of 1876. *Nance* v. *the Carolina Central Railway Company*, 76 N. C., 9; and since that act only a concurrent jurisdiction with the Superior Court when the damages claimed do not exceed fifty dollars. Here the damages claimed are one hundred and seventy-five dollars, and the jury has assessed them at one hundred dollars.

The right of a lessee for years to sue his lessor for a trespass upon the land demised, during the continuance of the lease, is expressly decided in the case of *Hatchell v. Kimbrough*, 4 Jones, 163.

There is no error. The judgment of the Superior Court is therefore affirmed.

No error. Affirmed.

A. B. WARE and wife v. A. R. NISBET, *et als.*

Certiorari—Case on appeal.

In a petition for a *certiorari* to correct a mistake in a case stated on appeal by the Judge, it must be shown that by inadvertence, mistake or accidental misapprehension, the presiding Judge misstated or failed to state something that ought to appear in the case settled on appeal, and that the Judge would probably make the correction, if the *certiorari* is granted.

(*Currie* v. *Clark*, 90 N. C. 17, cited and approved).

This was a CIVIL ACTION tried before *McKoy*, *Judge*, and a jury, at Fall Term, 1884, of RUTHERFORD Superior Court.

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

After the record was docketed in the Supreme Court, after notice, the appellant moved for a *certiorari* to correct an alleged error in the case on appeal. In support of the motion, the affiant filed an affidavit, which alleged in substance, that at the proper time, counsel for the appellant handed to the presiding judge written requests for instructions to the jury. That after His Honor had charged the jury without adverting to the requests for instructions, neither giving nor refusing them, His Honor turned to the counsel for the plaintiff and asked if they had any further instructions, and being told that they had none, he then addressed the same question to the counsel for the defendant and received the same reply. That in making up the case for the Supreme Court upon a disagreement of counsel, His Honor stated that the instructions requested by the defendant were withdrawn. The relief prayed was that the facts which His Honor declares to be a withdrawal of the prayers for instructions may be certified to this Court, together with a copy of the instructions, that this Court may determine what the effect of the same was.

Mr. J. W. Hinsdale, for the plaintiffs.

Mr. Walter Clark, for the defendant.

MERRIMON, J. The appellant suggests upon affidavit, that the Judge states in the case settled upon appeal by him, that certain special instructions to the jury were withdrawn, whereas in fact they were not withdrawn, and he desires that the Judge shall state the facts from which he inferred such withdrawal, and to that end, he moves that the writ of *certiorari* be granted to bring up a more perfect statement of the case.

The motion cannot be sustained. It does not appear from the affidavit offered to support it, or otherwise, 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," nor does it appear that the Judge "would probably make the correction" the appellant desires to have made. To entitle him to have his motion allowed, such facts ought to appear. *Currie* v. *Clark*, 90 N. C. 17.

Motion denied.

DAVIS & SCHENCK v. ALBERTO HIGGINS.

Judgment for Cost Against Assignee.

1. Section 539 of The Code does not apply to an assignment of the cause of action as collateral security for a continuing obligation;
2. Nor when the assignment is only of a *part* and not of the *whole* cause of action.
3. It applies when the assignee might, under §188 of The Code, be substituted for the original plaintiff.

PETITION by defendants to rehear, filed and tried at February Term, 1885, of Supreme Court.

No counsel for the plaintiffs.

Messrs. Batchelor & Devereux for the defendants.

SMITH, C. J. The plaintiff commenced and prosecuted his suit to recover possession of the land mentioned in the complaint and damages for the withholding, until its termination in an adverse verdict, finding that he was not the owner. Pending the action the plaintiff, in September, 1881, executed a quit-claim deed for the premises to B. G. Godin and John Hyams, who, with their wives, conveyed to Allan Schenck, a resident of New York. In the Superior Court, on proof of these deeds and the employment of counsel by the latter, the defendant's costs were adjudged against him, and this ruling was reversed in this court because he was not a party to the action. Application is now made for a reversal of this judgment and the affirmation of that rendered in the court below, as warranted by an overlooked statute, which is in these words:

"In actions in which the cause of action shall become by assignment, after the commencement of the action, or in any other manner, the property of a person not a party to the action, such person shall be liable for the costs in the same manner as if he were a party." *Code*, sec. 539.

This enactment is supplemental to another provision, which in case of the transfer of the interest of a party during the progress of the action permits it to be "continued in the name of the original party," or the substitution of the assignee in his place. *Code*, sec. 188.

The construction of the statute so greatly innovating upon the settled previous rules of practice, and apparently subverting the principle that no personal judgment can be rendered against one not by proper process made a party to the action, has not been before the court, and we find but few adjudications upon its meaning and operation in the courts of the State from whose laws this statutory provision has been borrowed. Cases have, however, been decided in those courts in which it is held that the assignments contemplated are only such as are absolute, and that such as are intended to be a collateral security only for a continuing obligation or claim are not within the purview of this act.

Thus it has been decided that an assignee could not be subjected to the payment of the costs incurred when the transfer was, as a collateral security, of a right to damages for an assault on the person of the assignor then in process of enforcement. *Wolcott* v. *Holcomb*, 31 N. Y., 125;—of judgments; *Peck* v. *Yorks*, 75 N. Y., 421;—of a demand under the mechanics' lien law. *In the matter of the lien of R. H. Dowling*, 52 N. Y., 658.

It was held further that the liability when incurred extends to costs before, as well as those occurring after the assignment. *In the matter of the lien of R. H. Dowling, supra.* The peculiar features appearing in the present case are:

(I). The suit having been conducted throughout *in forma pauperis*, no costs were recoverable of the plaintiff of record;

(II). The plaintiff's assignment was in the form of a quit-claim deed;

(III). The appellant is not the immediate assignee of the plaintiff, but the assignee of an assignee;

(IV). He is non-resident and not within the jurisdiction of the court;

(V). The entire cause of action is not transferred but only the land the subject-matter of it, and the fruits of a recovery, beyond that of possession, remain the property of the plaintiff.

These considerations embarrass in a greater or less degree the application of the statute to the case, and the shifting the burden of an unsuccessful prosecution from the plaintiff, or rather the imposition of one not before existing, upon the second assignee.

As a collateral assignment is outside of the statute, so according to one interpretation of its terms is a partial, as distinguished from a full assignment of the cause of action, not embraced in it. The action here is for the two-fold purpose of getting possession of the land and recovering a compensation in money for the alleged wrongful withholding of it. The first may inure to the benefit of the assignee, the damages to the assignor only. These are distinct and separate interests, and together constitute the cause of action. The right to all the fruits of a possible

recovery must pass to the assignee or the cause of action does not in its entirety become "the property of a person not a party to the action," since a portion of those fruits still remain to the plaintiff.

An illustration will render this clear. Suppose the action was one in trespass only, and the demand was for compensatory damages for the injury done to the land by the defendant's temporary use and occupation, and during its pendency the land was sold and conveyed to a stranger. This would not interfere with the prosecution of the suit, nor would the grantee become entitled to any part of the moneys recovered. In this case the cause of action would still reside undisturbed in the plaintiff and no part of it would pass with the title to the land. In no sense could the cause of action be considered as assigned, so as to admit of the substitution. In the present case the cause of action consists in the wrongful occupation and withholding by the defendant, and the damages sustained by the unlawful act. The land is the subject-matter of the action, and if a restoration of possession be deemed to enter into and form an element involved in the "cause of action," it is not transferred in its entirety by a transfer of an estate in the land, if indeed the title, remaining or conveyed, can in strictness be deemed a part of the cause of the action. But aside from this the statute manifestly looks to an assignment of the whole cause of action so that the assignee might be substituted in place of the assignor, having acquired all the latter's interest in the suit.

The question before us is as to the correctness of the ruling, when made, subjecting the appellant to the payment of the defendant's costs, nor can the effort to get rid of an erroneous judgment entered up without authority render it rightful and proper.

We must, therefore, deny the application, and affirm the judgment rendered upon the first hearing.

Affirmed.

S. V. GOODSON et als. v. J. MULLEN and A. J. DERR, Executors, et als.

Damages for Flooding Land—How Assessed.

1. In proceedings under the statute for ponding water on plaintiff's land, the jury have no right to go back further than one year in assessing damages, but if they do, the error may be corrected by the Court only giving judgment for one year preceding the issuing of the summons.
2. Where, in such proceedings, the annual damages are assessed at less than $20 per annum, the judgment is for five years, including the year preceding the filing of the petition, for each year's damages so assessed, with a *cessat executio* for each year after the first year.
3. Where the damages were assessed at as much as $20 a year, the judgment was the same, except that the plaintiff had his election to take judgment for five years, or only for the one year preceding the filing of the petition, in which case he was at liberty to bring his action at common law; but if the action was continued for more than five years, the judgment was for the entire amount, and the plaintiff was barred of his election.
4. Where the jury find the damages are different for different years, they should assess them separately for each year.
5. By §1860 of *The Code* the damages are to be assessed for five years, as they were prior to the Act of 1877, ch. 197.

(*Hester* v. *Broach*, 84 N. C., 251; *Gillett* v. *Jones*, 1 Dev. & Bat., 339; *Burnett* v. *Nicholson*, 86 N. C., 99; *Pugh* v. *Wheeler*, 2 Dev. & Bat., 50, cited and approved).

This was an action for damages caused by the ponding of water on plaintiffs' land—removed from the county of Lincoln, and tried before *MacRae, Judge,* and a jury, at Spring Term, 1884, of GASTON Superior Court.

The plaintiff complained that the testator, J. W. Derr, being the owner of a dam across a creek flowing through the lands of plaintiff, had at various times raised and tightened the same and thereby damaged said land $250 annually. Plaintiff offered evidence tending to prove that the dam had been raised by defendant twenty inches or more higher in 1860 than it was in 1833, and again in 1874 some twelve inches higher, and that it had so stood until 1882, when it was washed away, and had not been rebuilt, and that the plaintiffs' land was injured by reason of

said raising up to the time of trial, though the injury was not so great since the dam had been washed away. The annual damages by reason of said injury were variously estimated at from $75 to $250.

Neither party excepted to the evidence, nor to the charge. The jury found all issues in favor of the plaintiff, and assess his annual damage at eighty dollars.

The jury say for their verdict—"We find all issues in favor of the plaintiffs, and assess their damages at eighty dollars per annum, commencing from the 17th day of April, 1874, to the 17th day of April, 1877."

Rule for new trial. Rule discharged.

The presiding judge declined to give judgment for three years' damages preceding the beginning of the action, but gave judgment for the plaintiff for $642.20, this being the amount of damages estimated for the period beginning one year next preceding the bringing of the action and ending at the trial, eight years and ten days, at the rate of eighty dollars per year.

From this judgment both parties appealed to the Supreme Court.

Messrs. Hoke & Hoke for the plaintiffs.

Messrs. W. P. Bynum, Geo. F. Bason and *Batchelor & Devereux* for the defendants.

ASHE, J. This action is brought under the Act of 1868, as amended by the Act of 1877. The former act of 1868 as brought forward in *Battle's Revisal*, ch. 72, secs. 13, 14, 15, 16, 17 and 18, made no substantial change in the statute in reference to mills as contained in the *Revised Code*, except as to the mode of proceeding. But the act of 1876–'77 repealed all the sections of Battle's Revisal, ch. 72, in reference to mills, except the 17th and 18th, and, as was said in *Hester v. Broach*, 84 N. C., 251, the act of 1876–'77, ch. 197, and the 17th and 18th sections of ch. 72 of *Battle's Revisal* constituted all the statutory provisions with regard to injuries caused by the erection of mills.

The fifteenth section of ch. 72 of *Battle's Revisal*, which provides that "a judgment, giving to the plaintiff an annual sum by the way of damages, shall be binding upon the parties for *five* years from the issuing of the summons," was repealed by the act of 1877. But the 17th section was retained, which provided "that in all cases where the first judgment of the court shall assess the *yearly damages* of the plaintiff as high as twenty dollars, nothing in this chapter contained shall be construed to prevent the plaintiff, his heirs or assigns from suing as heretofore, and in such cases the final judgment aforesaid shall be binding as heretofore, and in such case the final judgment aforesaid shall be binding only for the year's damage preceding the issuing of the summons."

The act of 1877 has thrown some confusion into the subject, bnt it is evident the Legislature did not intend to destroy the remedial character of the statute. Prior to the act of 1877, the act of 1868–69, *Battle's Revisal*, ch. 72, substantially the same as ch. 71, of the *Revised Code*, had received a construction by this court which was well understood and acted upon in practice. For instance, where the annual damages were assessed by a jury at a sum less than twenty dollars per annum, the judgment was for five years, including the year preceding the filing of the petition, for each year's damages so assessed, with a *cessat executio* for the successive years after the first year. But when the annual damages were assessed as high as twenty dollars the judgment was the same, except in that case the plaintiff had his election to take the judgment for five years or only for the one year preceding the filing the petition, in which case he was at liberty to bring his action at common law. If, however, the action should be continued for more than five years and the damages assessed were for more than twenty dollars a year, then the judgment was for the entire damages up to the trial, and the plaintiff, in that case was debarred of the privilege of making an election to take the damages for the years that were past, and resort to his common law remedy, for he had no opportunity of making an elec-

tion and was by the lapse of time deprived of any other relief than that given by the statute. *Gillet v. Jones*, 1 D. & B., 339.

Notwithstanding the Act of 1877, under the unrepealed section 17 of *Battle's Revisal*, chapter 72, annual damages were to be assessed, and if for more than twenty dollars a year, the plaintiff could make his election, and take judgment only for the damages for the year preceding the issuing of the summons, and have recourse to his remedy at common law, but when he failed to do so, he was entitled to recover judgment for the annual damages up to the time when the cause was determined. *Burnett* v. *Nicholson*, 86 N. C. 99, and *Gillet* v. *Jones*, *supra*.

When the jury find that the damages are different in different years, they should assess the damages specifically for each year, and if the injury should be removed or diminished by taking down or lowering the dam, no damage or less damage, as the case might be, should be assessed for those years, but when no such facts are shown, and they assess the same damage for each year, the judgment as well in the one case as the other was for the aggregate sum of the assessment for each year, up to the time of trial. *Burnett* v. *Nicholson*, *supra*.

The only reason why it was necessary to designate the damages for each year, was to enable the plaintiff to determine whether he would make election to take judgment for the damages for the one year preceding the commencement of the action, and that the Court might see for what amount the judgment should be rendered, but when no such election was made and the plaintiff was entitled to judgment for all the damage assessed up to the time of trial, we can see no reason why the annual damages should be assessed specifically for each year. But in case they were so assessed, and the ground of the plaintiffs' exception to the judgment of the court is, that it was for only one year previous to the issuing of the summons when the jury by their verdict had assessed in damages for three years preceding the commencement of the action, beginning from the 17th day of April, 1874, to the 17th day of April, 1884, the summons having been issued on the 17th day of April, 1877.

The jury had no right to assess the damages for three years preceding the commencement of the action, but having done so, and assessed the same damages for each successive year the error in the verdict was cured by the judgment which was for the aggregate sum of the several assessments commencing one year before the action was begun. The exception is met by the decision in *Pugh* v. *Wheeler*, 2 D. & B. 50, where it was held, "If on a petition for damages caused by the erection of a mill under the act of 1809 (*Battle's Revisal*, chapter 72,), the jury returned a verdict assessing the damages for more than one year before the filing the petition, the Court may correct it, by giving judgment for the damages of only one year previous."

We think it proper to add before concluding, that by section 1860 of *The Code* the law is again changed, and the damages are to be now assessed as before the passage of the act of 1877, for five years.

We find no error in the record affecting the rights of the plaintiff. The judgment therefore, so far as it relates to his appeal, is affirmed.

No error. Affirmed.

S. V. GOODSON, et als., v. J. MULLIN and A. J. DERR, Ex'rs., et als.

Damages—Discretion—Judgment.

1. The Superior Courts may grant a new trial on the ground of excessive damages, but that is a matter exclusively within their discretion, and cannot be reviewed on appeal.

2. Where in an action for damage to land by ponding water on it, the jury found that the land was damaged eighty dollars per year, and His Honor gave judgment for a sum in gross, and not for each year's damages; *Held*, not to be erroneous.

(*Long* v. *Gantley*, 4 Dev. & Bat., 313; *McRae* v. *Lilly*, 1 Ired., 118; *Brown* v. *Morris*, 4 Dev. & Bat., 429; *Gillet* v. *Jones*, 1 D. & B., 339, cited and approved).

This was the defendant's appeal from the foregoing case, and was argued by the same counsel.

The facts appear in the opinion.

ASHE, J. This is the defendant's appeal in the case between the same parties, decided at this term of the court on the appeal of the plaintiff, and reported *supra.*

The facts of this case, the instructions of the court, the finding of the jury, and the judgment are identically the same as in that case.

We are unable to discover in the record any error to the prejudice of the appellant which is reviewable in this court. The judgment of the court as we decided in that case, was correct, and in fact was more favorable to the defendant than the plaintiff; for the jury had assessed the damages against the defendant for three years prior to the commencement of the action, and the judge, as he had the right to do, corrected the error in the verdict of the jury, by rendering upon their finding, a proper judgment for the damages for only one year preceding the issuing of the summons.

The only error in the case of which the defendant could complain was that part of the verdict in which annual damages were assessed after the dam had been taken down. But His Honor instructed the jury that they should take that fact into consideration in assessing the annual damages, and although the jury may have assessed excessive damages, that was a matter addressed exclusively to the discretion of the judge. "The Supreme Court cannot grant a new trial upon the ground that the verdict was against the evidence or the weight of evidence, that being a matter of discretion with the judge, who presides at the trial in the court below, which cannot be reviewed upon appeal." *Long* v. *Gantley*, 4 Dev. & Bat., 313; *McRae* v. *Lilly*, 1 Ired., 118; *Brown* v. *Morris*, 4 Dev. & Bat., 429.

The error mainly relied upon in the argument before this court was, that His Honor, in the court below, did not render judgment for each year's damage, according to the specific assessments made by the jury for each year's damage.

There is good reason why that should be done, when the damages are assessed for *five* years as high as twenty dollars a year, that the plaintiff might make his election and take judgment for only one year's damages and then resort to his common law remedy, or when the dam is taken down or lowered, that the defendant might, by a motion in the nature of *audita querela*, have the judgment modified or set aside, as the case might be for the residue. *Gillet* v. *Jones*, 1 Dev. & Bat., 339.

But when the damages are not to be assessed for the five years, as in this case, under the act 1876-'77, and the jury have assessed the same damages for each year, and the judgment is for the damages assessed for past years up to the trial, there can be no reason or necessity for rendering judgment for the several damages assessed for each year; "*cessante ratione, cessat lex.*"

There is no error in the judgment of the Superior Court. The judgment of the court is, therefore, affirmed.

No error. Affirmed.

G. W. ABERNATHY v. H. D. STOWE.

Bond—Condition—Encumbrance—Non-suit.

1. Where the defendant gave his bond to the plaintiff for a sum of money, which was part of the purchase money for a tract of land, to be paid when the plaintiff should remove from said property "all claims, trespasses or incumbrances," and give the defendant possession of the same; *Held*, that the incumbrances intended were such as, at the execution of the bond, had some foundation in right, or at least color of right, and not such as might be set up arbitrarily and groundlessly by a mere pretender, and the trespasses meant, were such as intruders were perpetrating on the land at the time the bond was executed.

2. Where, in deference to the opinion of the judge, a plaintiff submits to a non-suit and appeals, the non-suit will be set aside and a new trial ordered, if in any view of the evidence offered the plaintiff has made out a *prima facie* case.

CIVIL ACTION tried before *MacRae, Judge,* at Spring Term, 1884, of GASTON Superior Court.

The plaintiff brought this action to recover the sum of money mentioned in the bond sued upon, of which the following is a copy:

"$538.70. For value received, I promise to pay G. W. Abernathy five hundred and thirty-eight dollars and seventy cents, to be paid when he removes from the property which he has sold me, and for a part of the purchase money of which this note is given, all claims, trespasses, or incumbrances whatsoever, and when he gives me full possession to said property, with all the rights, powers and privileges granted to the said G. W. Abernathy and A. Goodson, by a deed of conveyance from John Clemmer, for the tract of land, of which the tract the said G. W. Abernathy sold me is a part. The said deed from John Clemmer is dated August 8th, 1849, and, if it is necessary, I am to have the privilege to apply this money, or so much of it as may be necessary, to the removal of any incumbrances existing on this land bought by me from the said G. W. Abernathy; and I agree to pay eighty-five dollars of this money next October, if necessary, to pay legal expenses incurred by said G. W. Abernathy in attempting to remove said incumbrances, and this note is to draw interest from date. This March 25th, 1880.

(Signed) H. D. STOWE. (Seal)."

The tract of land mentioned in this bond, as sold by the plaintiff, consisted of ten acres, including the "Clemmer or Abernathy mill" and the water-power and dam connected therewith.

The plaintiff alleged in his complaint that he had on his part complied in all respects with the terms, provisions and conditions provided and contained in the bond sued upon.

The plaintiff introduced a deed from John Clemmer to G. W. Abernathy and A. Goodson, bearing date August 8th, 1849, containing two hundred and thirty-seven acres, in which deed the following clause appears, being the clause referred to in the bond declared upon:

"And it is to be further understood that the said Goodson and Abernathy dam adjoining the island is to be kept up by them as high as it is, or to any necessary height clear of any claim of said Clemmer, or his heirs or assigns, in as full a manner as said Clemmer ever enjoyed, unto the said Goodson and Abernathy, and their heirs and assigns forever."

He also introduced a deed from A. Goodson to C. M. Abernathy, dated November, 1851, for one-half of two hundred and thirty-seven acres, his interest covering the land in dispute; also, a deed from C. M. Abernathy and wife to plaintiff G. W. Abernathy, dated November 2nd, 1878, for one-half of the two hundred and thirty-seven acres mentioned; also, a deed from G. W. Abernathy and wife to H. D. Stowe, defendant, dated March 25th, 1880, including the mills, and being the land for which this note was given, and containing the same condition set out in the above-mentioned deed to Goodson and Abernathy from John Clemmer; and, also, a deed from John Cathey and George Cathey to John Clemmer, dated October 30th, 1834; and, also, a deed from John Hoke to George and John Cathey, dated 1827, and a deed from John Colter, sheriff, to John Hoke, dated 1827.

The plaintiff then proved by A. L. Henderson, the surveyor, that these several deeds covered the land sold by plaintiff to defendant.

He then introduced Jonas Hoffman and G. W. Abernathy, who testified that John Clemmer and plaintiff, and those under whom they claimed, had been in possession of the land sold, claiming the same under the deeds offered by plaintiff, and operating the mills there, and keeping up the dams continuously until the year 1879 from 1837, and that the dam ran along up the river near the bank to a small island, and then across to a larger island. Jonas Hoffman further testified that he went to the mills and took charge of them himself for Clemmer in 1837, and remaining there in charge till 1844. The mill, at the time the witness went there, had the appearance of having been built some three or four years. G. W. Abernathy, plaintiff, as witness

for himself, further testified, that he sold this land to defendant in the spring of 1879, for eleven hundred dollars, and gave him a bond for title, and placed him in possession thereof; that the mills were at that time in good running order, and in same condition as provided for in the Clemmer deed, and that there were no claims, or trespasses or incumbrances thereon, that he knew of; that defendant paid something on account of the purchase money and executed the bond sued upon for the remainder at the time it bears date; and that defendant has been in possession and control of the property since the sale in the spring of 1879; that at the time the note sued on was given in March, 1880, witness made defendant an absolute deed and title, and the bond for title was surrendered; that in 1877 or 1878, C. J. Lineberger & Co., who were operating a cotton factory on the river nearly opposite the land sold, built a dam from their side of the river, commencing a little below and running across and joined to witness's fore-bay; this dam was higher than the one witness had, and gave him at his mills a greater head of water, and was no injury to his property, but a benefit; that witness built a part of this dam himself, and used the same in running his mills; that after witness sold the property to defendant, the mills were allowed to go down, and defendant hauled away some three or four hundred dollars' worth of property from the mills; that the fore-bay in the year 1879 was washed out by a freshet, and Lineberger & Co. put a temporary obstruction in the same, "a hedge"; that this was about fourteen feet wide, and could have been removed for from eight to twelve dollars; that witness told Lineberger not to put the same in, but Lineberger did, and agreed to move it at his own expense whenever the owners of the property wished to rebuild and go to work.

The witness also testified that before bringing the action he offered to remove this obstruction himself, and asked permission to do so, which was not given by defendant; and further, that at the time he made the bond to the defendant in the spring of 1879, and at the time he made the title in the spring of 1880, there was

enough water to operate the mills sold to defendant, and in same plight and condition as they were under the deed from John Clemmer to Abernathy and Goodson, of date August 8th, 1849; that he gave defendant possession and control of the property sold in the same manner and to like extent as was enjoyed by himself and predecessors under the John Clemmer deed.

The deed from John Clemmer to Abernathy and Goodson, of date August 8th, 1849, specified that it included the two mills.

The witness Abernathy testified that the race dug by Lineberger to run the lower factory was dug since his sale of the property to Stowe, and the execution of the bond sued upon.

The defendant then introduced the record of an action in Gaston Superior Court in favor of *W. A. Stowe* v. *Woodlawn Manufacturing Company*, that commenced in 1882.

To this the plaintiff objected. Objection overruled, and the plaintiff excepted.

This action was for damages caused on alleged diversion and appropriation of the water of the river above the property sold to defendant.

The defendant then offered

(1) A deed from Moses H. Rhyne and wife to M. C. Rhyne, bearing date 1871;

(2) Also a deed from C. J. Lineberger and others to the Woodlawn Manufacturing Company, dated September 1879;

(3) And a deed from C. J. Lineberger and others to the Lawrence Manufacturing Company, dated 1879.

The plaintiff objected to the introduction of each of the foregoing deeds offered by defendants. The objections were overruled and the plaintiff excepted. Defendant then introduced A. L. Henderson, who testified that the land described in the complaint in the action of W. A. Stowe v. Woodlawn Manufacturing Company, *et als.*, and claimed to be the property of plaintiff in that action, and alleged therein to be damaged, was the land sold by plaintiff to defendant, and for which the note declared upon was given. This witness also testified that the deeds introduced by

defendant included the bed of the river, adjoining the land sold to defendant, and for which the bond declared upon was given.

There was no evidence offered by defendant of any occupation of the property and assertion of any claim or right under the deeds introduced by them.

There was no evidence offered that either the Lineberger or Woodlawn Company, or Lawrence Company, or any other person or company, ever set up any claim to any part of the land or property sold to defendant by plaintiff until the commencement of the suit of W. A. Stowe v. the Woodlawn Manufacturing Company, *et als.*

The plaintiff contended that upon the evidence there was no incumbrance, claim or trespass upon the property sold, and that the conditions of the bond had been in all things substantially complied with.

The plaintiff further contended upon the evidence introduced, that there was no valid claim, trespass or incumbrance upon the property sold, and that the conditions of the bond sued upon had been in all things substantially complied with; that he had shown title to the lands, dams, mills and property sold, by possession under title for more than thirty years; that plaintiff had placed defendant in as full possession of the land as ever John Clemmer had enjoyed; that Clemmer had only a privilege, but that the possession of thirty years, under title, ripened his privilege into a good title; that the claims and incumbrances must be valid ones; that the filling up of the fore-bay was not an existing trespass; and that the incumbrances had been tried in this suit and were not valid.

The court intimated the opinion that under the facts as proven, there were incumbrances existing on the property and that plaintiff could not recover.

In deference to the opinion of the court, the plaintiff submitted to a non-suit and appealed.

Messrs. Hoke & Hoke, for the plaintiff.
Mr. W. P. Bynum, for the defendant.

MERRIMON, J. (after stating the facts). We think that the intimation of the Court, that "under the facts as proved there were incumbrances existing on the property and the plaintiff could not recover," was not warranted by any proper view of the evidence produced on the trial.

The plaintiff introduced evidence that went directly to prove a good and perfect title, *prima facie*, in him to the land mentioned and referred to in the bond sued upon, and, giving this bond a proper interpretation, nothing appeared to the contrary. The plaintiff sold the land to the defendant in the spring of 1879, and then put him in possession of it, and he continued to have such possession from that time, until and at the trial, the plaintiff, in the meantime, having conveyed the title to him by proper deed, on the 25th day of March, 1880, the day on which the bond sued upon was executed. This bond contained a condition, badly and obscurely expressed, but giving it a reasonable and just interpretation, it means that the defendant obliged himself to pay to the plaintiff $538.70 when, as soon as, and upon the condition, that the latter should relieve the land he had sold and conveyed to the former of "all *claims, trespasses* and *incumbrances* whatsoever, and when he gives me (the defendant) full possession to (of) said property, with all the rights, powers and privileges granted to the said G. W. Abernathy and A. Goodson by deed of conveyance from John Clemmer for tract of land of which the tract the said G. W. Abernathy sold me (the defendant) is a part." That is, the money was to be paid to the plaintiff as soon as he made to the defendant a clean title to the land, including "all the rights, powers and privileges" appertaining thereto, granted by John Clemmer to the persons named in the bond. If there were claims or incumbrances upon the land, or persons trespassing upon it at the time of the execution of the bond, the plaintiff was required to relieve the land from them, and to the end that this might the more certainly be done, it was stipulated in the bond, that the defendant *might* apply the money agreed to be paid, or so much thereof as might be necessary, in

the removal of any "incumbrances," and it was further stipulated, that the defendant would pay of the sum stipulated, $85, in October next after the execution of the bond, to pay "legal expenses."

It seems that the parties apprehended that there were "claims, trespasses or incumbrances" upon the land, but obviously if there were none, and the title to the land was good, including the rights and privileges appertaining thereto, then the plaintiff would be entitled to be paid the money the defendant had obliged himself to pay as part of the purchase money for the land.

The claims and incumbrances upon the land to be removed by the plaintiff were such as at the time the bond was executed had some foundation in right, or at least color of right, such as would require in some proper way an expenditure of money to remove them; they were not such as might be set up arbitrarily and groundlessly by a mere pretender. And the "trespasses" to be "removed" must imply such as intruders were perpetrating upon the land at the time the bond was executed, and as they continuously perpetrated until they were compelled to desist.

This seems to us a reasonable and just interpretation of the provisions of the bond just referred to, and the parties to it must be deemed to have so understood and accepted them.

The deeds put in evidence by the plaintiff on the trial, were not in any respect questioned, and the parol evidence introduced by him, if accepted as true by the jury, would have proven that the plaintiff had a good title to the land, including the rights and privileges conveyed by John Clemmer, and which he conveyed to G. W. Abernathy and A. Goodson; that he conveyed a good title to the same to the defendant, and that there were no "claims, trespasses or incumbrances" on the land at the time the bond was executed; unless "a hedge" temporarily put into the open fore-bay by Lineberger & Co., could be treated as a "trespass" to be removed, and as to that, the plaintiff offered before the action was begun to remove it, but the defendant would not allow him to do so, thus relieving him from further obliga-

tion in that respect, certainly, to the extent of putting such "trespass" out of the plaintiff's way to a recovery in this action.

The deeds put in evidence by the defendant failed to show the title to the land out of the platntiff at the time he conveyed it to the defendant; nor did they show any reasonable claim to, or incumbrance upon it; nor can we discover any claim to, or incumbrance on it made apparent by the transcript of the record in the action of *W. A. Stowe* v. *The Woodlawn Manufacturing Co. and others.*

These deeds were of recent date, junior by a great number of years to those introduced by the plaintiff and under which he derived title to the land, and there was no evidence going to show that any person ever had possession of the land sold by the plaintiff to the defendant claiming under them, or that any person set up any claim to this land until the bringing of the action by W. A. Stowe on the 5th of December, 1881, many months after the date of the bond, and the date of the deed by which the plaintiff conveyed the land to the defendant.

For the purpose of the appeal, it must be taken that the jury would have accepted the evidence on the part of the plaintiff as true, and so taking it, he proved a *prima facie* case on his part. It thus behooved the defendant, if he could, to disprove it, by showing some defect in the title conveyed to him by the plaintiff, or by showing that a third person had a reasonable claim to, or incumbrance upon the land, or that a "trespass" had been committed at the time the bond was executed that the plaintiff had failed to remove, or, he might have shown that he had expended the money agreed to be paid, or a part of it, in removing incumbrances, such as we have indicated. This he did not do on the trial. It was not difficult for him to show that some person pretended to have and assert a claim to the land, or an incumbrance upon it, at the date of the bond, manifestly unfounded. This might be done every day and indefinitely. The plaintiff did not agree to remove such claims and incumbrances. Taking the evidence produced on the trial by the defendant to be true,

the "claims, trespass or incumbrances" upon the land suggested by it were groundless and trifling, and not such as could seriously disturb the defendant's title to it, or his full and free enjoyment of all the rights and privileges the plaintiff undertook to convey to him. It may be that on another trial the defendant can establish a good defence to the action; we simply decide, that he did not do so on the trial had.

There is error, because of which, the judgment of non-suit must be set aside and a new trial granted.

To this end let this opinion be certified to the Superior Court of the county of Gaston. It is so ordered.

M. E. RUDASILL v. J. Z. FALLS.

Principal and Agent—Ratification—Issues.

1. Where an agent exceeds his authority, his principal must either wholly ratify or wholly repudiate the transaction. He cannot ratify that portion of the contract which is beneficial to him, and repudiate the remainder.
2. The provisions of The Code are mandatory, that the controverted allegations in the pleadings should be submitted to the jury in the shape of issues.

This was a CIVIL ACTION tried before *MacRae, Judge*, and a jury at Spring Term, 1884, of CLEVELAND Superior Court.

The facts appear in the opinion.

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

Messrs. W. J. Montgomery and *Gidney & Webb* for the plaintiff.

Messrs. Hoke & Hoke and *R. McBrayer* for the defendant.

SMITH, C. J. The plaintiff, the defendant, and one Green became co-sureties on a note by the firm of Jenkins, Homesley

& Oates, as principals, to A. V. Falls, in the sum of sixteen hundred dollars, the amount due on which, the said Green becoming insolvent, has been collected in equal parts out of the other sureties. The present action is to recover the moiety paid by the plaintiff from the defendant, upon an allegation that the latter has received from their principals property in value sufficient to discharge the entire debt.

The plaintiff testified that upon the failure of the co-partner, Jenkins, and the death of Oates, the management of the factory, for conducting the business of which the partnership had been formed, devolved upon Homesley, who, in an interview with the several sureties and one E. Black, expressed a desire to provide for his sureties and said he had the means of doing so, and if they did not get the property some one else would, but that he wished to continue running the factory. That the plaintiff and Green declined to enter into such an arrangement, and, therefore, it was agreed that the defendant, representing all the sureties, should go to the factory and take a bill of sale of the property for their indemnity to be appropriated to the debt.

That some few days after, the defendant, in answer to an inquiry as to what had been done, said to the plaintiff, "I have got a bill of sale for two thousand dollars worth of property, and it ought to pay a sixteen hundred dollar debt," adding that he and Black had leased the factory from Homesley, and were going to run it, and that the latter would appropriate the profits to the discharge of the debt due to Falls, the creditor.

That two months later the defendant, in reply to the plaintiff's question whether any part of the debt had been paid, said it had not, and if not paid soon, the defendant would sell the property and apply the proceeds to it. The plaintiff expressed the wish that this should be done as he did not want to lose.

That a month after this conversation, the factory was placed in the hands of a receiver, and Homesley turned out of possession.

That the defendant has since refused to refund the money paid by the plaintiff on the ground that he and Green declined to

enter into the arrangement made on behalf of all the sureties for the continuance of the operations of the factory under the lease.

The defendant exhibited in evidence two papers, bearing the same date and executed at the same time, in one of which, signed by Falls, Black & Co., it is certified that they have bought of Jenkins & Homesley, surviving partners, certain enumerated articles, being all the personal property belonging to the said surviving partners, for the consideration of $2,000, "to be paid as follows, to-wit: $200 to J. Z. Falls, the defendant, $800 to A. V. Falls, the creditor, and the balance to E. Black, on claims they hold against Jenkins, Homesley & Oates, and Jenkins & Homesley, surviving partners of Jenkins, Homesley & Oates, for cotton furnished them. This February 13th, 1879," and signed

FALLS, BLACK & CO.

The other writing is an agreement entered into at the same time, between Falls, Black & Co., of the first part, and Jenkins & Homesley, of the other part, wherein is recited the renting by the former, from the other party, of the factory for a year, and the employment of the latter as superintendents and managers, and the placing in their hands $600 in money and the stock of goods and mules, wagons, &c., to be used in conducting the business, and to be returned at the end of the time, with an agreement that no debts are to be made nor contracts entered into in the name of the lessees for money borrowed.

This agreement is signed,

FALLS, BLACK & CO.,
A. R. HOMESLEY,
J. JENKINS.

Witness: S. C. HOMESLEY.

The defendant's testimony in antagonism to that of the plaintiff, is in substance this: That the proposition made by Homesley was, that if Black, Green, the plaintiff and the defendant would form a company, he would turn over the factory to them, and it was then agreed that the defendant, as one of the proposed association, should go to the factory and there carry the arrangement

into effect, as was done in the execution of the said writings; that defendant showed them to the plaintiff and explained what had been done by him; that the plaintiff declined to become a party to the lease and the arrangements for running the factory, and repudiated it all; that the defendant never took any of the assigned property in possession, intending to wait until the agreement was signed by the plaintiff; that upon this decision of the plaintiff, Jenkins & Homesley were notified that the arrangement was annulled and could not be carried out as was originally intended; that the defendant did afterwards come into possession of two mules and a wagon, sent by Jenkins & Homesley in payment of cotton which had been advanced to and used by them.

The plaintiff's version of the transaction was sustained by Green, while that of the defendant was confirmed by Homesley.

The charge in general terms was, that if the plaintiff's testimony be accepted as a correct statement of what transpired, the verdict should be for him; while if that of the defendant was true, the verdict should be in his favor.

The instruction in this alternative form is unexceptionable as far as it goes. But there is an intermediate aspect of the case presented in the testimony, and perhaps warranted by it, which was not brought to the attention of the jury. The result does not necessarily depend upon the terms of the first arrangement, nor the extent of the authority conferred upon the defendant, as agent of his associate sureties.

Assuming the plaintiff's representation to be true and his memory of what occurred entirely accurate, his statement is not in accord with the understanding of Homesley, who made the proposal, and the latter may have refused to make the assignment at all, except upon the condition of a continuance of the factory operations. If then, the defendant could not effect the object of the agency under the prescribed limitations and exceeded them in what was done, the plaintiff had an election to ratify or repudiate what was done on behalf of all. This he was bound to do,

and he could not sever parts of a single agreement embraced and expressed in the two writings, so as to take advantage of that which was favorable without the whole being assumed. The agency being exceeded, he was not bound by what the agent did in the name and for the common benefit, but he was bound to take the arrangement in its entirety or not to recognize its obligations at all.

"The principal cannot of his own mere authority ratify a transaction in part and repudiate as to the rest," is the language of Mr. *Justice Story* in section 250 of his work on agency. "He must either adopt the whole or none."

Another recent author lays down the same doctrine thus: "A nullification must extend to the whole of a transaction." So well established is this principle, that if a party is treated as an agent in respect to one part of a transaction, the whole is thereby ratified. From this maxim results a rule of universal application that where a contract has been entered into by one man as agent of another, the person on whose behalf it has been made "*cannot take the benefit of it without bearing its burdens.* The contract must be performed in its integrity." *Ewell's Evans' Agency*, 70, (Ed. of 1879, p. 95.)

The rule rests upon sound reason and abundant authority. *Crawford* v. *Barkley*, 18 Ala., 270; *Hodnett* v. *Tatum*, 9 Ga., 270; *Bank* v. *Hanner*, 14 Mich., 208; *Coleman* v. *Itache*, 1 Oreg., 115.

The record, and these instructions asked, present this view of the case, and the defendant had a right to have them, or their equivalent, given for the guidance of the jury. The judge was mistaken in his hurried reading of the series of instructions asked, in supposing they were embodied in his charge.

Had they been given the result might have been different, but at least the charge ought to have presented the case in this aspect to the consideration of the jury, and there is error in his mistake to do so.

This record has a defect to which the attention of the profession has been more than once directed. There were no issues

submitted to the jury, as the statute positively requires as to all the controverted allegations in the pleadings material to the recovery or the defence. This is an inseparable incident to our present system of practice, which submits inquiries of fact to the jury, of law upon the findings by the jury to the judge, and the functions of each in trials are clearly marked and defined. It is enough that the statute is mandatory in its directness (*Code*, sections 395 and 396), but the rule commends itself as proper and salutary in its operation.

There is error in the record and there must be a new trial, to which end let this be certified to the Superior Court, and a *venire de novo* be there awarded.

Venire de Novo.

HANNAH McDOWELL et als., v. W. W. McDOWELL, et als.

Entry of Judgment—Appeal—Amendment of the Record.

1. Parties, by consent, may authorize a judgment to be rendered and entered in vacation, but such practice is not to be encouraged.
2. Where such consent is given, and the judge rendered the judgment, but went out of office before it was entered on the minutes by the clerk, a motion at a subsequent term to enter the judgment *nunc pro tunc* will be allowed.
3. The power of a court to amend its records at a subsequent term is essential, and such amendment should not be made by simply noting the order to amend, but it should be actually made by correcting the minutes of the former term.
4. Where an appeal was taken both from the order, allowing the judgment to be entered *nunc pro tunc*, and also from the judgment itself, *it was held*, that the appeal from the judgment would not be considered.

(*Shackelford* v. *Miller*, 91 N. C., 181; *Deloach* v. *Worke*, 3 Hawks, 36; *Grantham* v. *Kennedy*, 91 N. C., 148; *State* v. *King*, 5 Ired., 203; *Jones* v. *Lewis*, 8 Ired., 70; *Foster* v. *Woodfin*, 65 N. C., 29; *Logan* v. *Harris*, 90 N. C., 7; *State* v. *Woodfin*, 85 N. C., 598, cited and approved).

This was a motion to enter judgment *nunc pro tunc* heard before *Graves, Judge*, at Fall Term, 1883, of YANCEY Superior Court.

His Honor granted the motion, and the defendants appealed both from the order allowing the judgment to be entered and from the judgment itself.

The facts appear in the opinion.

No counsel for the plaintiffs.

Messrs. M. E. Carter and *Reade, Busbee & Busbee,* for the defendants.

MERRIMON, J. At the Fall Term, 1881, of the Superior Court of the county of Yancey, the court heard the case upon the exceptions to the report of the referees. By consent of the parties, the judge took time to consider of the questions raised and argued before him, and to that end it was agreed, that he might give his judgment in another county and that the same should be entered upon the record of that term.

The judge accordingly, in another county, gave judgment for the plaintiffs in writing, signed the same, and sent it to the clerk of the court to be entered in pursuance of the agreement. But, before the clerk received it, the judge granting it resigned his office and ceased to be judge.

Afterwards, at the term of the court next after the judge signed the judgment, the plaintiffs moved to enter it *nunc pro tunc* as of the Fall term, 1881. This motion was then entertained by the court and continued until the Fall term, 1883; at that term the defendants resisted, but the court allowed it, and the defendants excepted and appealed to this court.

Although such practice ought not to be encouraged, nevertheless, it was competent, the parties to the action consenting and agreeing, for the Judge to grant the judgment in vacation and in a county other than that in whose court the action was pending. In such case the judgment must be entered as of the term of the court at which the question to be decided, or the matter to be acted upon, was presented to the court, and the day of entry should be noted on the record.

This practice is upheld upon the ground that the court is at all times open, and hence the Judge has power, by consent of the parties to the action, to grant and enter the judgment out of the regular course. *Shackelford* v. *Miller*, 91 N. C., 181, and the cases there cited.

That the judge who granted the judgment ceased to be a judge after the granting, signing and sending it to be entered, and before the clerk of the court received and entered it, cannot impair its character and legal effect. It is presumed that it was duly rendered in court at the time it was agreed it should be entered and become part of the record in the action, and the consent of the parties operates so as to make that presumption conclusive as to them. Before the judge passed out of office he reached his conclusions, rendered the judgment, and did all that was necessary on his part in that respect. The judgment as signed by him, became a part of the minutes of the proceedings in the action, and the clerk, in pursuance of his order, ought to have entered it upon the book of minutes of the proceedings of the court. Generally, the record in actions is not drawn out in formal and complete order; it is kept in the minutes of the proceedings of the court, and these are usually treated as the record, but when need be they constitute the authoritative *data* from and by which the formal record may be made up. *Deloach* v. *Worke*, 3 Hawks, 36; *Grantham* v. *Kennedy*, 91 N. C., 148.

As the clerk of the court failed to enter the judgment upon the book of minutes, as he ought to have done, the motion to enter it *nunc pro tunc* was an appropriate one, and the court properly allowed it.

The power of the court to allow amendments of its record is essential and cannot be questioned, and it ought to exercise such power when it appears that some action was taken, but no minute of it was entered as ought to have been done; as when a judgment was granted, but not entered upon the minutes of the court proceedings at a former term. And an amendment should not be made by simply noting the order to amend, but it should be

actually made by turning back to the minutes of the former term and making the proper correction and entry there, so that the entry will stand and be read as if no amendment or correction had ever been necessary. *State* v. *King*, 5 Ired., 203; *Jones* v. *Lewis*, 8 Ired., 70; *Foster* v. *Woodfin*, 65 N. C., 29.

The appellants seem to have intended to appeal from the order of the court allowing the judgment to be entered *nunc pro tunc*, and as well from the judgment it was proposed to so enter. This is not orderly procedure. Indeed, there was no judgment or order entered from which they could appeal, except the order allowing and directing the entry of the judgment, and that order was vacated by the appeal. The judgment or order appealed from must appear in the record. This court acts upon what is in and of it, not what the court making intended, but by mistake, inadvertence or other cause failed to put in it. *Logan* v. *Harris*, 90 N. C., 7; *State* v. *Woodfin*, 85 N. C., 598.

When the judgment shall be entered, the appellants, if they shall then be dissatisfied with it, may thereafter, by some appropriate proceeding, have it reviewed in this court. The present appeal, in this respect, was improvidently taken and must be dismissed.

There is no error in the order allowing the judgment to be entered *nunc pro tunc*.

To the end that further proceeding may be had in the action, let this opinion be certified to the Superior Court according to law.

No error. Affirmed.

HENRY B. OWENS, et als., v. W. H. PHELPS, et als.

Appeal—Motion to Dismiss—Case on Appeal—Evidence—The Code, Section 590.

1. The absence of the judge from the district does not dispense with the requirement that he should settle the case on appeal upon disagreement of counsel.
2. When counsel disagree as to the statement of the case on appeal, and instead of submitting the two variant statements to the judge, they are both sent to the Supreme Court, that court will not dismiss the appeal, but will presume that the appellant agrees to the amendments contained in the case of the appellee, which will be taken as the case on appeal.
3. An administrator has no power to rescind a contract to purchase land, made by his intestate.
4. Where in an action brought to declare such attempted rescission a nullity, it appeared that the vendor had paid to the administrator a sum of money for which the rescission was the consideration; *Held*, that the administrator had such an interest as made him incompetent to testify.

(*Redman* v. *Redman*, 70 N. C., 257; *Weinstein* v. *Patrick*, 75 N. C., 344; *Mason* v. *McCormick*, *Ibid*, 263; same case, 80 N. C., 244, cited and approved).

CIVIL ACTION tried before *Graves*, *Judge*, and a jury, at Spring Term, 1883, of DAVIE Superior Court.

The facts appear in the opinion.

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

Messrs. Batchelor & Devereux, for the plaintiffs.

Messrs. Coke & Williamson and *Clement & Gaither*, for the defendants.

SMITH, C. J. When the writ of *certiorari* was awarded, as a substitute for a lost appeal, at the last term, the plaintiffs were allowed to prepare and serve their case on appeal, until the 25th day of January, 1885, and the settlement of any disagreement between the parties was to be made in accordance with the provisions of *The Code*, §550. This was done, and a copy duly served upon one of the counsel for the appellees. To this, excep-

tions were taken, embodied in the form of a substitute, and a copy delivered to the appellants' counsel and by him sent to the Clerk, who transmitted, by his direction, both copies, with the record, to this court, in obedience to the mandate of the court. Upon the calling of the case, defendants' counsel moved to dismiss the appeal, because the Judge who tried the case had not been notified of the disagreement, and called on to adjust the matters in dispute in the manner prescribed in the section referred to. The absence of the Judge from the district, though producing inconvenience alike to the parties and to himself, does not dispense with that statutory requirement, inasmuch as provision is made for such contingency by an amendment introduced into the section, as it now appears in *The Code*. The act of the appellant, in directing the Clerk to send to this court the two discrepant statements, must be considered as accepting that of the appellees whenever they differ, and thus it was needless to submit them for adjustment.

It is only when the appellant is dissatisfied with the proposed amendments, and requires the Judge to pass upon the exceptions, that it becomes necessary for him to interpose and settle the matters in variance.

The result of what was done, is to bring before us the case prepared by defendants' counsel as containing the exceptions to the rulings of the court, to be considered and disposed of, and the motion to dismiss, for the reason assigned, must be denied. The case then is this:

In September, 1857, a contract for the purchase of the land mentioned in the complaint was, entered into between William A. Owens and the defendant Uriah H. Phelps, wherein the former agreed to pay therefor the sum of one thousand eight hundred dollars and to secure the same, executed his three several notes of six hundred dollars each, payable at one, two and three years. At the same time the vendor executed his bond to the vendee, and therein covenanted to convey the title when the said notes were paid.

In December, 1859, W. A. Owens died intestate, and letters of administration on his estate issued to A. J. Owens, who, in the progress of the cause, at the instance of the defendants F. M. Phillips and J. H. Sparks, was brought in and made co-defendant with them.

The defendant J. H. Sparks died after the institution of the suit and before the trial. The testimony of A. J. Owens, a witness examined for the plaintiffs, in substance, is as follows:

The witness found among the effects of the intestate which came into his possession, the aforesaid title bond and two of the notes given for the purchase money of the land, while the third was in the hands of the vendor, Phelps. The witness made a demand for the conveyance of the estate, when he was informed by Phelps, that he could not make title, as he did not have it himself.

Under the advice of counsel whom he consulted, witness undertook to rescind the agreement, and took from Phelps two notes, one in the sum of $1,400; the other in the sum of $600 as representing the purchase money unpaid and due. The large note he delivered to his sister Priscilla Owens, who was the guardian of the infant children and heirs-at-law of the intestate, who with the husbands of two of them bring the present action. The smaller note, witness retained, having collected an inconsiderable part, and concedes his personal liability for the whole amount.

In January, 1868, Phelps who was then in possession conveyed one-half of the land to the said J. H. Sparks for the consideration of $1,300, its full value, and the two thereafter held a joint possession until August of the same year, when the former mortgaged his retained moiety to the defendant F. M. Phillips to secure a loan of $850.

There was evidence, tending to bring to the notice of the defendants, who purchased from Phelps, the previous contract of sale to the intestate, and other evidence tending to show the contrary.

The purpose of the present suit is to have declared a nullity the attempted rescission of the contract made with the intestate,

and to set up the bond for title as constituting an equity attaching to and following the transfer of the land to the defendants Sparks and Phillips, as purchasers with notice, who take in subordination to the prior equity.

During the examination of the witness A. J. Owens, the plaintiffs proposed to call out a conversation between him and Sparks, from which it would appear that the latter had information that the purchase money due under the original contract with the intestate had never been paid. The evidence, on objection from the defendants, was held to be incompetent under section 590 of *The Code*, on the ground that the witness had an interest in the result of the suit, and it was excluded.

The exception to this ruling alone, we deem necessary to consider, and it must be sustained.

The effect of the contract entered into between the defendant Phelps and the intestate Owens, was to vest an equitable estate in the land which, at his death, descended to his heirs-at-law, charged with the residue of the purchase money, to be paid out of the personal estate, if there was such applicable to the debt, by the administrator. He had no right further to interfere with the contract, or interrupt the descent of the acquired equitable estate to the infant heirs. His attempted rescission was unauthorized and a nullity against them, at their election on coming of age; and this right of theirs is in no manner impaired by his accepting the vendor's notes in place of and as a return of the money received under the contract, and the delivery of the larger one to their guardian.

The material inquiry then, was whether the subsequent vendees, the defendants, at or before the consummation of their several contracts, had information of the antecedent sale to the intestate and the paramount equity of his heirs, or such notice as would put a prudent man on inquiry which, if pressed, would have developed that information. The absence of any knowledge or information of the previous unperformed agreement, is the defence set up to the action, and the excluded evidence has a material

bearing upon this issue, and its rejection would be error, if the witness was not rendered incompetent to testify under the provision of The Code referred to.

The defendants contend that the witness has an interest in common with the plaintiffs in the controversy and that his proper place is with them. If this concurrent interest existed, and was adversary to that of the defendants, the conclusion would follow that he could not testify in aid of the plaintiffs, any more than he would be allowed to do upon an actual change of his relations towards the parties to the action. This ruling has been made in several reported adjudications. *Redman* v. *Redman*, 70 N. C., 257; *Weinstein* v. *Patrick*, 75 N. C., 344; *Mason* v. *McCormick*, 75 N. C., 263; and the same case reported in 80 N. C., 244.

Is this interest identical?

If the plaintiffs fail in their action, the result, so far as it effects the witness, will be to leave undisturbed what the witness has done, and exonerate him from the consequences of his unauthorized and illegal interference with the contract. If they prevail in the action, he may be called on to restore to the defendant Phelps the money wrongfully paid by him upon the attempted rescission, and he be required to pay back the purchase money received upon the subsequent sales to the other defendants. If the defendant Sparks had notice of the prior sale which the rejected evidence tends to prove he did have, the plaintiffs' equity attaching to the land, will pass with the transfer and charge the estate conveyed. The interest of the witness lies in the direction of defeating the plaintiffs' claim, while his testimony tends to sustain it. He is indeed not a necessary party to the action, since the plaintiffs are not obstructed in the pursuit of their remedy by the intermediate dealings between the administrator and Phelps, which, as to them, are still as if they had not taken place. He is made a co-defendant only that the purchasers, if held responsible and charged, may have redress on him in the same action. His interests are, therefore, not hostile but concurrent with theirs in defeating the action.

Standing in this relation to the cause and to the parties, the plaintiffs were entitled to have from his lips, in aid of their equity, the declarations made by Sparks, at least as against him.

There was error in the ruling, and must be a new trial. To this end let it be certified to the Superior Court, where it may be awarded and the cause heard before another jury.

Error. Reversed

J. A. WILLIAMSON, Administrator, v. C. A. HARTMAN et als.

Irregular Judgments—Infants—Guardian ad litem—Motion in the Cause.

1. A motion in the cause to set aside a judgment for irregularity will be entertained if made in a reasonable time, but this does not imply that every judgment affected in any degree by an irregularity will be set aside. It is only when irregularities are so serious in their nature as to destroy the efficacy of the action and render the judgment void, or when they may seriously prejudice and injure the moving party, that they occasion grounds for setting aside the judgment.

2. What is reasonable time in which the motion must be made, depends upon the circumstances of each case; but when a long period has elapsed and the rights of innocent persons have grown up under judgments, Courts will only set them aside for the most weighty considerations.

3. So, where an infant was duly served with process, and a guardian *ad litem* was appointed, but no process was served on the guardian, nor did he make any defence, and it only appeared inferentially that he knew of the pendency of the action; but it did not appear that the infant had any defence, and adults whose rights were identical with his own, sued in the same action, made no defence; *It was held*, that the judgment was not so irregular that it would be set aside on an application made several years thereafter.

4. Obtaining a judgment by fraud does not make it irregular, and after the action has been determined, the question of fraud can only be tried in a new action brought to impeach the judgment. Before the action has been determined, a party alleging fraud in any previous interlocutory order, may set up such matter by a petition filed in the cause.

5. A motion to set aside a judgment for irregularity will be entertained after the determination of the action.

(*Matthews* v. *Joyce*, 85 N. C., 258; *Vick* v. *Pope*, 81 N. C., 22; *Winslow* v. *Anderson*, 3 Dev. & Bat., 9; *Thompson* v. *Shamwell*, 89 N. C., 283, cited and approved).

WILLIAMSON *v.* HARTMAN.

MOTION in the cause heard before *Gilmer, Judge,* at Spring Term, 1884, of DAVIE Superior Court.

His Honor refused the motion and the defendant appealed.

No counsel for plaintiff.

Messrs. Coke & Williamson and *Clement & Gaither,* for the defendants.

MERRIMON, J. It appears that Shadrick Etchison died intestate in the county of Davie in the month of March, 1861. At the Spring Term, 1861, of the late court of equity of that county, his heirs-at-law, one of whom was the appellant in this case, then an infant, filed a petition for the purpose of selling the lands that descended to them from their ancestor named for partition. In that case, the appellant sued by his next friend, Orrell Etchison. At the term of the court mentioned, the court granted a decree directing a sale of the land according to the prayer of the petitioner.

The land was afterwards sold by the clerk and master of the court, and Orrell Etchison became the purchaser of the "Home tract," and Thomas Furches became the purchaser of the balance.

At the Fall Term, 1861, of the court, the sale of the land was confirmed by proper decree, and an order was made directing the clerk and master to collect the notes for the purchase money when they became due, and after paying the costs in that behalf, to distribute the funds among the heirs-at-law according to their respective rights. The purchase money remained unpaid in 1870.

Orrell Etchison was appointed administrator of Shadrick Etchison named above, in June, 1861. At the Spring Term, 1870, of the Superior Court of the county mentioned, he filed his petition against the heirs-at-law of his intestate, the petitioners in the petition first above mentioned, in which he set forth in substance, what had been done in the cause in equity above mentioned; that the purchase money for the land had not been paid; and that

the *proceeds of the sale of the land* were necessary to make assets in his hands to pay the debts of his intestate. This petition seems to have been a petition in the cause in which the land was sold for partition. A summons was issued in the action or proceeding brought by the administrator against the heirs-at-law including the appellant, then an infant, returnable to the last mentioned term of the court. Some of the heirs who were of age accepted service of the summons, on others it was served, and as to the appellant, he was named in the summons, and the same was served upon him, by delivering a copy thereof to him, and at the term of the court to which it was returnable, a guardian *ad litem* was appointed for him, and he was also named as a defendant in the petition. At that term, there being no objection, so far as appears, the court granted the prayer of the petitioner, and a decree to the effect that the administrator should use and apply so much of the proceeds of the sale of the land as might be necessary to pay the debts of his intestate, and costs of administration, and account for any surplus to the heirs-at-law was granted.

Afterwards, at Spring Term, 1878, of the court, a further order was made in the action, directing an account to be taken to ascertain whether the said Orrell Etchison, the administrator, and who had purchased the the "home tract" of the land, had properly disbursed in payment of the debts of his intestate and the costs of administration, the amount owed by him of the purchase money mentioned.

The account so rendered was taken and report thereof was made, and was considered by the court. It was then further decreed that the Clerk of the court should execute to the purchaser of the land a proper deed therefor upon the payment of the balance of the purchase money ascertained to be due, $115.85. The Clerk, shortly thereafter, made the deed, reciting therein the payment of the sum of money mentioned, and the action was no longer continued on the current dockets of the court, until at the Fall Term of the court of 1880, when, upon the motion of the appellant, it was brought forward and placed on the docket for the purpose of the motion then made by him.

The appellant then moved to set aside the judgments entered in 1870 and 1878, for irregularity, and assigned as grounds for such irregularity that he was an infant at the time the proceedings on the part of the administrator were begun, and the orders and judgments therein were entered; that no service of a summons was made upon his guardian *ad litem*, nor was any defence made in his behalf. He assigned as further grounds of his motion, that the judgments mentioned were fraudulent and void, stating facts in his affidavit tending to show fraud. He also moved to make the administrator *de bonis non* of Shadrick Etchison a party, the administrator having died.

The court denied these motions; the appellant excepted and appealed to this court.

It is true, as the counsel for the appellant insisted on the argument, that a motion in the action to set aside the judgment for irregularity will be entertained by the court, if it shall be made within a reasonable period after it was granted. This, however, does not imply that every judgment affected in any degree, directly or indirectly, by some or any irregularity in the course of the action leading to it, will be set aside. Some irregularities are unimportant and do not affect the substance of the action, or the proceedings in it; there are others of more or less importance, that may be waived or cured by what may take place or be done in the action after they happen; and there are yet others so serious in their nature as to destroy the efficacy of the action and render the judgment in it inoperative and void. Whether the court will or will not grant such a motion in any case must depend upon a variety of circumstances and largely upon their peculiar application to the case in which the motion shall be made.

Generally, a judgment will be set aside only when the irregularity has not been waived or cured, and has been or may be such as has worked, or may yet work, serious injury or prejudice to the party complaining interested in it, or when the judgment is void. The court will always, upon motion, strike from its record a judgment void for irregularity.

As has been said, a motion to set aside a judgment for irregularity must be made within a reasonable period. What is a reasonable period must depend upon the circumstances and facts of each case; but the more promptly the motion shall be made, the more inclined the court will be to grant it. There is a strong presumption in favor of the regularity of judicial proceedings, and courts are reluctant to set a judgment aside, for irregularity, when the motion to do so has been long delayed, and when rights have accrued, or important action has been taken under and upon faith reasonably reposed in it, and especially when rights of innocent third parties have arisen under and by virtue of it. In such cases courts will interfere only for weighty considerations. It is a wise rule of law, founded in a just and essential public policy, that forbids interference, for light causes, with judicial proceedings and judgments after they have been once settled and determined. *Stare decisis et non quieta movere.*

In this case the appellant was an infant at the time the proceeding was begun against himself and others, and the service of process upon him was not made strictly as required by the statute applicable and then in force; but the summons was duly served upon him, and at the appearance term, a guardian *ad litem* for him was appointed by the court. It does not appear that the guardian was served with a summons, or a copy of the petition, as regularly he ought to have been, nor did he put in any answer for his ward, as strictly he ought to have done. It is fair, however, to infer that he knew of the proceeding; he was an intelligent lawyer, practicing in the court, and the court or counsel for the petitioner informally probably called the matter to his attention, as, according to a loose and improper practice, is sometimes done. But none of the defendants, of whom there were several, made any answer or defence. These defendants had a like and common interest with the appellant, and it seems to have been considered by all the parties, and the merits of the matter showed, that the decree granted at the appearance term, in the absence of any opposition, was a necessary, just and proper one. It does

not appear that it did the appellant, or any party, injustice, or that it could, or ought to have been successfully opposed. The judgment entered at Spring Term, 1878, complained of, was not in itself irregular; it was granted in the orderly course of procedure, apart from the fact that the appellant had not been made a party strictly in the way pointed out by the statute. Whether the report of the referee and the decree confirming it were fraudulent or not, is not a question under consideration at this moment. At that term the appellant made no opposition to the judgment. It appears that he had then been of age three or four years. It is not probable that he was then ignorant of this proceeding. In the orderly course of things he would have heard of it, and if he had knowledge of it, he ought to have given it proper attention. In his affidavit he does not say that he had no knowledge of it at the time and before the judgment entered at Spring Term of 1878 was granted; the effect of what he says is, that he did not then have knowledge of the irregularities in the proceedings as to himself. Nevertheless, he ought to have given the matter such attention as would have enabled him to learn his relation to and interest in it.

Granting that the method by which the appellant was made a party to the proceeding was not strictly regular, still he has not shown that he was reasonably diligent in looking after his interest in it after he became of age, nor has he shown that he has suffered serious wrong or prejudice by reason of the irregularity of which he complains, or that he may yet probably so suffer. Indeed, it appears that the judgments complained of were just and proper, apart from any fraud that may have prevailed in obtaining them, and particularly that of the term of the court of 1878.

It appears also, that third parties have acquired rights, directly and indirectly, under the proceeding and judgments, which it is proposed to set aside.

For such irregularity, attended by such facts and circumstances, applying the rules above stated, we think the motion to

set aside the judgment ought not to be allowed. *Matthews* v. *Joyce*, 85 N. C., 258; *Vick* v. *Pope*, 81 N. C., 22; *Winslow* v. *Anderson*, 3 Dev. & Bat., 9.

The appellant also seeks by his motion to impeach the judgments mentioned, upon the ground that they were fraudulent. This is a ground entirely distinct from irregularity in the judgments. Irregularity in the proceeding or action leading to the judgments is one thing; obtaining them by fraud and fraudulent practices is another and distinct thing; and if this proceeding had not been determined before the appellant made his motion, he might, by proper charges of fraud made and sustained, have impeached them. This, however, ought to be done, not simply by affidavit, but by a petition in the cause, in which the charges of fraud should be set forth and alleged specifically and in an orderly way, so that the opposing party might, by demurrer or answer, make his defence in a like orderly way.

In this case we are of opinion that the proceeding was completely determined before the appellant made his motion, and, hence, he could impeach the judgment in question only by a separate and independent action for that purpose. This is too well settled to admit of question. *Thompson* v. *Shamwell*, 89 N. C., 283, and the cases there cited.

It was insisted by the appellant's counsel, that at least the balance of $115.83 remained in court to be disposed of by some proper order.

This does not appear. What became of the balance does not certainly appear. It ought to have been distributed to the heirs-at-law as directed by the judgment entered at Spring Term, 1870, and the inference is, that it was, as the case disappeared from the current civil issue docket for more than two years before the motion was made. As the case appears in the record, it had been completely disposed of. It is unnecessary to advert to the third exception.

There is no error and the judgment must be affirmed.

No error. Judgment affirmed.

A. A. McKETHAN, JR., et als., v. THE BOARD OF COMMISSIONERS OF CUMBERLAND COUNTY.

Counties and County Commissioners—Taxation.

Under an act of the General Assembly to enable the people of Cumberland county to establish a free bridge over the Cape Fear river, the county authorities are authorized to issue bonds and levy a tax to meet the expenses of the same.

(*Evans* v. *Commissioners*, 89 N. C., 154, cited and approved).

MOTION for an injunction, heard at Chambers in CUMBERLAND Superior Court, before *Avery, Judge.*

The General Assembly passed an Act, ratified and taking effect on March 8, 1883, entitled, "An act to enable the people of Cumberland county to establish a free bridge over the Cape Fear river at or near the town of Fayetteville, North Carolina," (Laws of 1883, ch. 260). This Act directs the county commissioners, on petition from not less than five hundred voters, presented on or before the first Monday in April, to submit the question of a free bridge to the qualified voters of the county at an election to be held on the first Thursday in May, and prescribes the manner in which it shall be conducted and the popular will ascertained.

Section five, so far as its provisions relate to the present inquiry, is in these words:

"If it shall appear that a majority of the votes cast at such election were for 'free bridge,' then the said board of county commissioners shall certify the same to the chairman of the board of justices of said county within five days of said meeting, and the chairman of said board of justices shall call a joint meeting of the justices and commissioners of said county, to be held on the first Monday in June next following, which meeting shall make or cause to be made such contract or contracts as may be necessary for the speedy establishment of a free bridge across the Cape Fear river at Fayetteville, North Carolina; *Provided*, that

if the owners of the Clarendon bridge, now across said river, will agree to sell their said bridge and franchises, together with the right of way to and from said bridge, over and across any land they may own contiguous thereto, for a sum not to exceed thirty-five thousand dollars, then a purchase of the same shall be made by said board of justices and county commissioners; but if no agreement can be made, they are hereby authorized to make any contract necessary for the erection of a new bridge across such river at or near the town of Fayetteville."

The contract being entered into, the commissioners, if in their opinion deemed best, are empowered to issue coupon county bonds, bearing date January 1, 1884, in sums not less than twenty-five nor more than five hundred dollars, at a rate of interest not exceeding seven per cent., and to mature at a period not beyond thirty years. The bonds are required not to be sold under par, and the coupons, as they become due, are receivable "in payment of taxes and other claims due the county of Cumberland." Sec. 6.

The next section authorizes and directs the annual levy of special taxes, as long as may be requisite, "sufficient to pay the coupons as they become due," and to provide a "sinking fund" to pay the principal as the bonds mature, not in any one year to exceed the sum of two thousand dollars.

If the commissioners decline to issue bonds, annual special taxes are to be levied and collected, as long as necessary, which shall not in any one year be above "ten cents on the hundred dollars' valuation of property and thirty cents on each taxable poll." Section 8.

It appears from the record, that an election was held on the day designated in the statute, wherein were cast 1,696 votes for "free bridge," and 1,142 votes for "no free bridge," but the former, who favor the proposition, are conceded not to be a majority of the number of voters in the county.

At a joint meeting of the justices and commissioners, held in pursuance of the terms of the act, they decided to purchase the

Clarendon bridge, at the price of $35,000, and the commissioners decided to issue bonds, and proceeded to levy a tax of five cents on each hundred dollars worth of taxable property and fifteen cents on the poll.

This action was instituted by the plaintiff in behalf of himself and the other tax-payers of Cumberland county, to enjoin the commissioners from issuing the bonds and also from levying the tax.

His Honor refused to grant an injunction, and the plaintiff appealed.

Mr. N. W. Ray, for the plaintiff:

The plaintiff seeks relief on the ground that the issuing of the bonds would be illegal, and that the levying and collection of taxes to pay the annual interest would cause irreparable loss to himself and the other tax-payers.

The defendants claim that chapter 260 of Acts of 1883 authorizes them to proceed. As a matter of course, if the issuing of the bonds would be illegal the collection of the tax would not be permitted.

Plaintiff says:

1. Proper notice of the election was not given.

It was a special election, held at an unusual time, and the requirements of the Act ought not to be considered directory.

The law itself was not notice, because the commissioners were to decide at their April meeting whether an election was to be held. Then, was any notice necessary? *Cooley on Con. Limitations, pages* 602 *and* 603.

If any notice was necessary, must it not be such notice as the Act required? The fact that defendants tried to give notice, and that the proposition of "Free Bridge" was discussed, cannot supply the want of notice.

2. The Act was unconstitutional in so far as it provided that "*a majority of the votes cast*" should decide the question. The

proposition was within the provisions of article 7, section 7, of the Constitution, and could not prevail "unless by a vote of a majority of the qualified voters in the county." 4,400 voters: 2,201 is the required majority. *R. R. Co.* v. *Commissioners*, 72 N. C., 486.

The construction adopted in that case is supported by comparing Article 5, §4, restricting the General Assembly from increasing the public debt unless "*approved by a majority of those who shall vote thereon*," with Article 7, §7, restricting counties and towns, "*unless by a vote of the majority of the qualified voters therein.*"

The voters had a right to consider the opinion in that case as the true construction of the Constitution; and then a vote against "Free Bridge" was not necessary, because the proposition would fail unless a majority of the qualified voters favored it by voting for it.

This, together with the want of notice, may account for the fact that so few voted.

The General Assembly may authorize the commissiorers to exceed the double of the State tax. Article 5, §6; *Brodnax* v. *Groom*, 64 N. C., 244. But, if in doing so they encounter the restrictions imposed by Article 5, §1, and Article 7, §7, they must get the approval of the voters.

To allow the commissioners unrestricted power to say what expenditure would be necessary, and then to provide for it by issuing bonds or levying taxes, regardless of the limitations in Article 5, §1, and Article 7, §7, would be carrying the doctrine of *Brodnax* v. *Groom* so far as to nullify those provisions.

The Convention of 1875, which especially considered county government, was careful to preserve Article 7, §7, which had, just before that Convention, been construed in *R. R. Co.* v. *Commissioners*, 72 N. C., 486.

Then the General Assembly cannot authorize commissioners to contract debts, pledge the faith or loan the credit of the county, unless by a vote, &c.

3. But the resolution at the June meeting, 1883, declaring the establishment of a free bridge to be a necessary expense, &c., was disapproved by the commissioners—three of them voted against it and only two voted for it.

The commissioners may say what expenditure is necessary.—(*Brodnax* v. *Groom.*) It is only when they propose an expenditure exceeding $500 that it is necessary to have the concurrence of a majority of the Justices. Acts 1876-'77, chapter 141, and Code, section 707, subdivisions 10 and 11.

Can these acts be construed to mean that a majority of the justices and commissioners, sitting as one body, shall have this power? Is it not rather as two legislative bodies? The commissioners must favor the expenditure, and when it exceeds $500 the majority of the justices must concur.

4. The resolution in August, 1883, accepting the Clarendon Bridge Co.'s proposition to sell their bridge for $35,000, and authorizing the commissioners to issue bonds, &c., was not voted for by a majority of the justices, and therefore was not properly passed.

What does the law mean when it says "*with the concurrence of a majority of the justices?*" Suppose there are 59 justices in a county; 30 is a quorum. In a meeting of 30, would the approval of 16 be sufficient?

Suppose a joint meeting with five commissioners and 30 justices: Could 18 justices authorize an expenditure that was disapproved by a majority, or even all of the commissioners, into whose hands the law places county matters.

The resolution in June declaring a free bridge a necessary expense, was disapproved by the commissioners and approved by the justices; and the resolution in August agreeing to pay $35,000 for a bridge, and authorizing the issue of bonds to that amount, was approved by three commissioners, and they failed to get the concurrence of a majority of the justices.

Then neither of said resolutions will sustain the proposed action of the commissioners.

5. The tax levied in 1883 to pay interest on the bonds proposed to be issued was in excess of the constitutional limitation. The complaint does not allege that the bridge tax of 1884 would be in excess, but the Court can take notice of the fact that for 1884 there was no State tax collected. We cannot know certainly how it will be in future years, but there is an allegation and almost an admission that the addition of the bridge tax will, in future years, cause the annual taxes to exceed the limitation.

6. The act required that if the vote was sufficient, the meeting in June should buy the Clarendon Bridge if it could be had at a price not exceeding $35,000. That bridge was offered at that price and they did not accept, and at the August meeting the proposition to buy and issue bonds did not have the concurrence of a majority of the justices.

7. The commissioners have no other authority to issue said bonds except as stated in the complaint, and base their whole proceeding on said chapter 260.

Then the question is,

Will the said proceedings be approved so as to authorize the commissioners to issue said amount of bonds upon a resolution approved by only two commissioners and a majority of the justices, as at the June meeting, 1883; or upon a resolution approved by three commissioners, but not concurred in by a majority of the justices, as at the August meeting, 1883; and so to pledge the faith and loan the credit of the county for that which has never been properly declared to be a necessary expense, and all without "*the vote of a majority of the qualified voters therein?*"

Mr. Z. B. Newton, for the defendant.

Smith, C. J. The facts presented in the present appeal from the refusal of the judge to interpose by a restraining order, and arrest the action of the commissioners in carrying into full effect

the act of March 8, 1883, ch. 260, as well as the matter of law arising thereon, are essentially the same as those considered and disposed of in *Evans* v. *Commissioners*, 89 N. C., 154.

The cases referred to in the re-argument and the issues pressed upon our attention have not unsettled our former convictions of the correctness of the conclusions then reached.

But if any disturbing doubts had been produced upon a re-examination of the subject, they are put at rest by the curative and ratifying statute passed at the present session of the General Assembly, supplemental to and amendatory of the former enactment.

This act recites the holding of the election to ascertain the popular will, the issue of the authorized county bonds, the levy of the tax, and then proceeds to declare the bonds, when disposed of at their par value, to be binding, and to direct the collection and payment into the county treasury of the taxes levied. The remaining provisions of the act are intended to facilitate and complete the transaction in the transfer of the bridge, and the last section (6) requires the disposition of the "bridge bonds" to be effected before the 1st day of June, 1885, and unless this be done, repeals the original act and all laws made in pursuance thereof.

There is no error in the ruling and this will be certified.

No error. Affirmed.

BARCROFT & CO. v. G. M. ROBERTS & CO.

Petition to Rehear.

1. Under the rule requiring petitions to rehear to be filed within twenty days after the commencement of the succeeding term, the first day of the period allowed is to be excluded from the count, and the last day also, when it falls on Sunday.

2. Under the rule, petitions to rehear are confined to alleged errors in law, or to newly discovered evidence.

3. The present petition to rehear is founded upon the erroneous supposition that this court misunderstood the facts as found by his Honor in the court below.

PETITION by the defendants to rehear, filed February 23, 1885, and heard at February term of the Supreme Court.

The case is reported in 91 N. C., 363.

The respondents moved to dismiss the petition on the ground that it was not filed within twenty days after the commencement of the term succeeding that at which judgment was given.

The reasons on which the Court was asked to reverse its former decision appear in the opinion.

Messrs. Jones & Hardwick and *John W. Hinsdale* for the plaintiffs.

Messrs. Battle & Mordecai for the defendants.

SMITH, C. J. The defendants' petition alleging errors, and asking us to review the decision made in the cause at the last term, in order to their correction, was filed on the 23rd day of February of the present term, and the defendants' counsel moves to dismiss it because it was not filed "within twenty days after the commencement of the succeeding term," under the requirements of the statute, *Code*, §966. Rule 12.

This would be so, but that the first day of the period allowed is to be excluded from the count, and the last also because it was Sunday, and this brings the filing within the time limited. The motion must therefore be disallowed and the merits of the application considered.

The error assigned, and entering into the exceptions now brought before us for review, lies in an alleged misapprehension that the findings of fact by the referee were adopted or concurred in by the judge who passed on the exceptions, instead of being overruled and corrected, as shown in the record.

In examining the form of the several exceptions, it will be seen that while some countenance is given to the suggested con-

struction, they all distinctly point to the referee's *deductions* from the facts as their essential object and not to the *facts* themselves.

The first—which we shall not repeat in full as it will be found in the report of the case—is to the referee's finding of fact, reciting his own words in reference to the reasons for delay in bringing the action and it proceeds thus, "in that no promise of defendants, or either of them, or of their attorney, was *shown to have been within three years next preceding the bringing of this action,* nor were said promises, if any, *in writing,* nor were said promises, if made within three years, *sufficient in law to repel the statute of limitations.*" Most obviously the preliminary recitals are but introductory to the material matter of the exception, and that is, that the facts so found do not impair the efficacy of the statute as a defence to the demand, as is ruled by the referee.

1. The gist of the exception is that he attributes such consequences, such legal effect, to the facts reported, and in this he is overruled by the judge.

2. The second exception is similar in expression, and its force is spent in the referee's refusal to allow the defendants a credit for the $500 mentioned in the receipt of the plaintiffs' attorney. In this the referee is also overruled.

3. The third exception is but a repetition of the first, and, both in form and effect, is to the referee's disallowance of the defence arising from the lapse of time as affected by the representations and assurances given to the attorney in charge of the plaintiffs' claim.

The exceptions upon a fair and reasonable construction of the record, all of them, involve matters of law, and, except the second, terminate in an alleged erroneous ruling that the statutory bar is displaced by what before transpired between the debtors and the plaintiffs' attorney, and in this the contention is sustained by the Court.

The final judgment "that the exceptions of the defendant to said report be sustained, and that the report be, and the same is, hereby corrected and reformed, so as to conform to the said

exceptions," must be understood to refer to the account to be modified according to the adjudication of the Court of the legal inferences deduced from the facts reported; otherwise the Court would have proceeded to find the discrepant facts and set them out as the basis of the reformed judgment.

It was therefore entirely proper in the absence of any variant or corrective finding of facts by the court, to assume that his rulings upon the law were predicated upon the referee's report. Unless this be the interpretation of the case, the present application would rest upon a supposed misconception of its facts, and not come within the scope of the rule for rehearing which is confined to a revisal of "alleged errors in law," or to cases of "newly discovered evidence." 89 N. C. 606, Rule 12, sec. 2.

This case presents another illustration of the importance of observing the rule, that upon a trial the action of the court must be complete, and so appear on the record before an appeal can be taken. Here it was not done—no change made in the statement of facts—nothing shown in the record by which it can be seen what, if any, differences existed between the judge and the referee, other than in matters of law. If this fails to carry out the intentions of the court, the fault rests upon the appellants in not having the record made complete and perfect, and in bringing it up in its present confused condition.

The argument in support of the proposed re-hearing proceeds upon an averment found in the petition that "the sustaining of the exceptions of the defendants was in effect, and in fact, a finding of the facts anew by the judge below," and this the appellate court failed to recognize. But, in answer to the allegation, the inquiry arises, what facts are so found? How can the appellate court ascertain in what particular they are variant?

But such is not the import of the judge's action upon the exceptions, and his negation must, for reasons stated, be restricted to the referee's conclusion as to the bearing and effect of the facts upon the defendants' liability for the claim.

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

No error. Affirmed.

JOS. WILLIAMS v. TYRE GLENN, Executor.

Evidence—Parol to contradict a writing—Principal and Surety.

1. The rule that parol evidence cannot be admitted to contradict a written contract, applies to actions on the contract itself, but not to such as arise collaterally out of it. So, where it appeared on the face of a note that certain parties thereto were sureties, in an action for contribution parol evidence is admissible to show that they were really principals.

(*Welfare* v. *Thompson*, 83 N. C., 276; *Cole* v. *Fox*, Ibid 463; *Goodman* v. *Litaker*, 84 N. C., 8, cited and approved.

This was a CIVIL ACTION, tried before *MacRae, Judge*, and a jury, at Fall Term, 1884, of YADKIN Superior Court.

The plaintiff sought to recover of defendant, as contribution, one-third of a sum alleged to have been paid by plaintiff as joint principal with defendant's testator, in satisfaction of a note given to J. C. Conrad, guardian, and expressed upon its face to have been given by plaintiff as principal, and defendant's testator and Nathaniel Boyden, as sureties. The deposition of N. L. Williams was read in evidence by plaintiff. Defendant objects to the following questions: State what you know about the note given by myself, Nathaniel Boyden and Tyre Glenn, which note was given in Salisbury, at Mr. Boyden's office? And defendant objects to the answer thereto, it being proposed to contradict the note, and to show that defendant's testator was not a surety, but a joint principal.

The presiding judge sustained the objection, and intimated his opinion that parol evidence could not be admitted to show that defendant's testator was not a surety. Whereupon the plaintiff submitted to a nonsuit, and appealed.

Messrs. Clement & Gaither, for the plaintiffs.
Mr. D. M. Furches, for the defendant.

ASHE, J. (after stating the facts). The plaintiffs Joseph Williams and Nathaniel Boyden, and defendant's testator executed a sealed note to J. C. Conrad, guardian of certain minor heirs, which is in the following form: "We, Joseph Williams, Jr., as principal, and N. Boyden and Tyre Glenn as sureties, promise to pay," &c. Boyden paid one-third of the amount of the note, and plaintiff the residue, and brought this action against the defendant as executor of Tyre Glenn for contribution. The defendant contended that, upon the face of the note, his testator was only surety for Joseph Williams, and was not liable to him for contribution. The plaintiff alleged in his complaint and offered to prove on the trial, that the said note was given upon a consideration for the common benefit of the three parties who signed it, and that it was agreed at the time of its execution that they were all three to be equally liable as principal, but that upon the suggestion of the attorney who drew the note, that the law required guardians to take notes with good security, it was drawn in the form as if Joseph Williams was principal and the others sureties.

The defendant objected to this evidence upon the ground that it would alter, contradict and vary the written agreement of the parties. His Honor sustained the objection, so that the question presented for our consideration is, when a note is signed by one person as principal and others as sureties, is it competent for him, who appears upon the face of the note as principal, after paying the amount of the note, in an action for contribution against those who appear to be sureties only, to offer parol evidence to show that they were all principals and equally liable.

This is the first time this question has been presented to this court for adjudication. Questions somewhat similar were decided in *Welfare* v. *Thompson*, 83 N. C., 276; *Cole* v. *Fox*, *Ibid*, 463, and *Goodman* v. *Litaker*, 84 N. C., 8. These cases differ from this, in that there they all appeared to be principals upon the face of the instrument, and parol evidence was admitted to show the fact of suretyship, upon the principle that it would be inequitable for the creditor, after knowledge of the suretyship, to do

any act impairing the rights of the surety, and it could make no difference whether the fact was brought to the knowledge of the creditor by the instrument itself or by extrinsic evidence.

In this case, one of the parties appears, upon the face of the instrument, to be principal, and the others sureties, and it is proposed by the plaintiff, the nominal obligor, to show that they are all principals. The defendant resists the proposition of the plaintiff, and to sustain his position his counsel, in his brief, has cited numerous authorities, both text-writers and decisions of this court, to establish the fact that parol evidence is not admissible to contradict, add to, or vary a contract in writing. That doctrine is admitted. But it has no application to a case like this. The principle laid down in those authorities, and relied upon in support of the defendant's position, applies to actions upon notes between the parties thereto, but has no application to actions between the makers or obligees of notes or bonds, for contribution. In the latter cases, it is well settled, we think, by the overwhelming weight of authority, that parol evidence is admissible to show the relation subsisting between the makers of a note to each other, and especially so in courts like ours, where the distinction between actions at law and suits in equity are abolished. Such proof does not contradict, add to, or vary the terms of the contract, but it simply proves a fact outside of and beyond such terms. It is a fact collateral to the contract and no part of it. It is not to affect the terms of the contract, but to prove a collateral contract and rebut a presumption; *Brant on Suretyship and Guaranty*, 17, and applied as well to bonds as promissory notes, Ibid 18. In *Robinson v. Lyle*, 10 Barb. (N. Y.), 512, it was held that "as between the makers of a promissory note and the holders, all are alike liable, all are principals; but as between themselves, their rights depend upon other questions, which are the proper subject of parol evidence. On the trial of an action, therefore, between the signers of such a note, it is right to receive extrinsic proof to show which of the parties signed the note as principal and which as sureties." To the same effect is *Sisson v. Barrett*, 2 Comst., 406.

The distinction is this: As between the makers and payee of a note, it is made for the purpose of being the proof of the contract, and is the exclusive proof of the contract, and cannot be contradicted by extrinsic proof. The only exception to this rule, is in the class of cases like *Thompson v. Welfare* and the other cases of that character cited above. But as between the signers, it was not made or intended to be exclusive proof of the agreement or relation between them. That may be shown by parol proof. "The makers, though all appearing to be joint principals, may be shown to be some principals and some sureties; an apparent principal may be shown to be a surety—an apparent surety, a principal"—*Adams v. Flanager*, 36 Vt., 400, and *Lathrop v. Wilson*, 3 Vt., 604. Where one of two parties to a note signed with the addition of *surety* to his name, and the other without any addition, it was held, that the legal *presumption* was, that the signer who had the word *surety* attached to his name was surety, but it was not conclusive, and that the real purpose and relation of the parties might be shown by parol. To the same effect is *Barry v. Ransom*, 2 Kernan, 462, *Lapham v. Barnes*, 2 Vt., 213; *Keith v. Goodwin*, 31 Vt., 268.

These decisions, in the courts of New York and Vermont, are supported by the decisions in other States on this subject, notably among which are *Lacy* v. *Loftin*, 26 Ind., 324; *Kelly* v. *Gillespie*, 12 Iowa, 55; *Crosby* v. *Wyatt*, 23 Maine, 156; *Oldham* v. *Brown*, 28 Ohio, 41. We might cite other authorities but we consider these sufficient to fortify the proposition contended for by the plaintiff.

The fact is not overlooked that the decisions cited are mostly upon matters arising upon promissory notes. But the same reasons apply with equal force to sealed instruments. *Brant on Suretyship and Guaranty*, 18; *Fowler* v. *Alexander*, 1 Heiskell, 425; *Creigh* v. *Hedrick*, 5 W. Va., 140, and *Kennebeck Bank* v. *Turner*, 2 Greenleaf, 42, where a party was permitted to show by parol evidence the actual capacity in which he became a party to the obligation.

The investigation of the question leads us to the conclusion that there is error.

The judgment of the Superior Court is therefore reversed, and this opinion must be certified to the Superior Court of Yadkin county, that a *venire de novo* may be awarded.

Error. Reversed.

W. R. S. BURBANK v. THE COMMISSIONERS OF BEAUFORT COUNTY.

Demurrer—Jurisdiction—Liability of County for Taxes Improperly Collected.

1. A demurrer "1st, that the complaint does not set forth a cause of action against the defendant, 2nd, that the Court has no jurisdiction of the matter as set forth," will be disregarded as a pleading, but a motion to dismiss for these grounds will be sustained.
2. Where the plaintiff alleged that she paid to the sheriff $51.80 for her taxes, and afterwards, on the sheriff's removal from office, that she was forced to pay this sum a second time; *Held*, no cause of action was stated against the county.
3. Even if the tax collector unlawfully collected this money, it raised no liability on the part of the county.
4. In the above case, the sum demanded being less than $200, a justice of the peace, and not the Superior Court, had jurisdiction.

(*Love* v. *Commissioners*, 64 N. C., 706; *Bank* v. *Bogle*, 85 N. C., 203; *Tucker* v. *Baker*, 86 N. C., 1, cited and approved).

CIVIL ACTION tried at Spring Term, 1883, of BEAUFORT Superior Court, before *Shepherd, Judge.*

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

No counsel for the plaintiff.

Mr. G. H. Brown, Jr., for the defendants.

MERRIMON, J. It is alleged in the complaint that the *feme* plaintiff was the owner of lands situate in the county of Beaufort, and that State and county taxes to the amount of $51.80 had been duly assessed upon the same; that she paid the same to one Satchwell, who was sheriff of that county, and authorized by law to collect and receive such taxes; that subsequently this sheriff was divested of authority to collect the public taxes for the then current year, and one Wilkerson was duly appointed in his stead as tax-collector, and authorized by law to collect the taxes due that had not been collected by the sheriff; that the tax-collector, finding the taxes above-mentioned on the list of unpaid taxes in his hands for collection, without notice to her, undertook to sell certain parcels of the land to pay the same, and one Howard became the purchaser thereof; that afterwards she paid to Howard the sum of $51.80, to relieve her land frem his claim of purchase; that she afterwards demanded of the defendants that they pay to her the sum she so paid to Howard, and they refused so to do. Thereupon she brought this action to recover from the defendants the money she so paid to Howard.

The defendants demurred to the complaint, and assigned as grounds of demurrer,

(1) "That the complaint does not set forth a cause of action against the defendants;

(2) That the court has no jurisdiction in the matter as set forth."

The defendants also moved, for the causes mentioned in the demurrer, to dismiss the action.

The court gave judgment dismissing the action, the plaintiffs excepted, and appealed to this court.

The demurrer is too general and must be disregarded as a pleading, but it was competent to dismiss the action for the causes mentioned and appearing by the complaint. *Love v. Commissioners of Chatham*, 64 N. C., 706; *Bank v. Bogle*, 85 N. C., 203; *Tucker v. Baker*, 86 N. C., 1.

In no aspect of the plaintiff's demand, as presented by the complaint, can this action be maintained. The *feme* plaintiff sues in the Superior Court of Beaufort county to recover from the defendants the sum of $51.80, which she alleges the tax-collector of that county, by virtue of his office and at the instance of the defendants, illegally collected from her, as taxes due from her, when, in fact, the taxes had been paid and she did not owe the same. It is not, however, alleged in the complaint that the tax-collector ever paid the money, so alleged to have been collected by him, to the county treasurer or the defendants. If it be granted that the tax-collector unlawfully collected the money, as alleged, this created no liability on the part of the county. He is required by the law, and not by the county commissioners, to collect the county taxes, and when he collects them, to pay the same to the county treasurer. The law prescribes and enjoins his duties; he is required to collect the taxes lawfully due, and if, in the exercise of his office, he unlawfully collects money from a citizen for alleged taxes due, which are not in fact due, or does any other unlawful act, he is answerable and not the county; he is the officer of the law and not the private agent of the county. He must do what the law requires of him, and he is not bound to do what the county commissioners order to be done, unless such order has the sanction of the law.

The county commissioners do not receive the county funds nor do they require the county treasurer to receive them. They, in most if not all cases, direct as allowed by law for what purposes they shall be applied. The county treasurer is the officer of the law and not merely the private agent of the county commissioners and subject to their arbitrary will and direction; he exercises his office under the law, and he must be answerable for his unlawful acts and not the county. *The Code*, §773, makes it the duty of the county treasurer to receive all moneys belonging to the county, to keep, apply and account for the same as required by law. He is not required to receive moneys that do not belong to the county, and if he shall do so, he must be answerable for

the same, not the county. He has distinctive legal duties as the officer of the law, and is answerable for his misfeasances and malfeasances. The county is a public municipal corporation created for political and civil purposes, and it is answerable as and when the law directs. If the county treasurer receives moneys whether as taxes collected or otherwise, purporting to belong to the county and under the orders of the county commissioners made in the course of their official duties, the same shall be applied to the legitimate purposes of the county, it may be that the real owner of the money so expended could recover the same by proper action, after proper demand that his claim be duly audited, from the county; but it is very certain that it cannot be held responsible for money it never received, nor can it be held responsible for money in the hands of the tax-collector that he improperly collected as taxes due the county, nor for money improperly in the hands of the county treasurer purporting to belong to the county, if the same has not been applied to the use and for the legitimate purposes of the county.

So that it is very clear that the plaintiff has not stated facts in the complaint sufficient to constitute a cause of action against the defendants.

But further, if the *feme* plaintiff has any cause of action, as she contends, cognizable in any court, it is manifest that the Superior Court in which this action is brought, has no original jurisdiction of her alleged claim against the county, for the plain reason that the sum demanded was less than $200. She sues as for money in the hands of the defendants for the county of Beaufort, which belongs to her, and which they, by implication and operation of law, are bound to pay to her, and which, upon demand, they refuse to pay. If the sum of money mentioned is due to the *feme* plaintiff and recoverable, it is obvious that the court of a Justice of the Peace alone could have jurisdiction of the action to recover it.

We have not been favored with an argument in behalf of the appellant, and are unable to form a plausible conjecture as to the

reason why the action was brought in the Superior Court. We cannot suppose that the purpose was to bring an action for a tort, because no tort is alleged in the complaint, nor is there any demand for judgment as in case of a tort, if, indeed, tort would lie in any possible state or view of the facts. The plain demand is for a sum of money, which taking the facts to be as alleged in the complaint, the county does not owe the *feme* plaintiff.

The judgment must be affirmed.

No error. Affirmed.

WM. H. UTLEY and WIFE v. B. K. S. JONES et als.

Mortgage—Lien of Docketed Judgments.

In this action judgment was rendered in favor of plaintiff for balance due for a tract of land sold by *feme* plaintiff to defendant, and for sale of the land for its payment. The land sold for $455, being $182.34 in excess of plaintiff's judgment, which sum remained in clerk's office after the judgment was paid. Mortgagee, to whom the land was mortgaged by defendant to secure a debt, claimed $100 of this balance under the mortgage. Several judgment creditors, with docketed judgments, also set up a claim to this balance; *Held*, that the mortgage must be paid in full; that no lien was created by docketing the several judgments, under the Act of 1876-'77, ch. 253, the debts having been contracted since 1st May, 1877, and not being for the purchase of the said real estate, nor for laborers' or mechanics' lien for work done for claimant of homestead, nor for taxes. The Code, §501, par. 4.

(*Arrington* v. *Arrington*, 91 N. C., 301; and *Markham* v. *Hicks*, 90 N. C., 204, cited approved).

CASE AGREED heard at August Term, 1884, of the Superior Court for WAKE county, by *Gudger*, *Judge*.

This action instituted in the Superior Court, to enforce payment of the residue of the debt contracted in the purchase of the land described in the complaint from the *feme* plaintiff, previous to her marriage with the other plaintiff, resulted in a judgment

therefor and for the sale of the premises. The land was accordingly sold by a commissioner for the sum of $455; which was paid into the clerk's office.

After discharging the debt and costs of the action, there remains an excess of $182.34 of which one hundred dollars is claimed by the plaintiff's attorneys, as a debt due and secured by a mortgage of the premises to them, by deed of the defendant executed on October 13th, 1883, and registered on the 5th day of January thereafter. The plaintiff W. H. Utley and two other creditors of the defendant, who do not appear in the record to have become parties to the suit, also assert claims to the money, subject to the defendant's right of exemption, by virtue of judgments rendered by justices of the peace, against the defendant, and docketed in the Superior Court as follows:

(I). A judgment in favor of the said plaintiff for $46.31, with interest from February 6th, 1883, and docketed on September 1st, 1883.

(II). A judgment in favor of H. C. Olive for $22.50, with interest at 8 per cent. from March 26th, 1879, docketed October 18th, 1882.

(III). A judgment in favor of T. H. Briggs & Sons for $123.18, with interest from October 31st, 1877, docketed on the 23d day of November, 1883.

These facts are contained in an agreed statement from the contesting claimants, and come up as a case on appeal.

The court adjudged that the attorneys were entitled to be paid their debt in full, and referred to the clerk an inquiry into the value of the life estate of the defendant in the entire sum of $182.34.

From this judgment and ruling the creditors appeal.

Messrs. D. G. Fowle and *Armistead Jones*, for plaintiffs.
Messrs. Reade, Busbee & Busbee, for defendants.

SMITH, C. J. (after stating the facts as above). There is no error in so much of the judgment as awards full payment of the

mortgage debt from the fund. The defendant having no wife, so far as the record discloses, whose concurrence would have been necessary in passing title free from the incumbering homestead under the constitution, as sole owner, could and by his deed did convey the full estate vested in him to the mortgagees, and, of course, the debt thereon secured was entitled to payment from the proceeds of the sale.

No lien was created by docketing the judgments, as we must infer from the times at which they bear interest, they were all rendered on contracts entered into subsequent to May 1st, 1877.

As to such debts the act of 1876-'77, chap. 253, declares that the property real and personal specified in subdivision 3 of this section, and the homestead of any resident of this State shall not be subject to the lien of any judgment or decree of any court, or to sale under execution, or other process thereon, except such as may be rendered or issued to secure the payment of obligations contracted for the purchase of said real estate, or for laborers' or mechanics' liens for work done and performed for the claimant of said homestead, or for lawful taxes. *Code, sec.* 501, *par.* 4.

So the law is declared in *Markham v. Hicks*, 90 N. C., 204.

As there was no lien formed by the docketed judgments, the portion of the moneys left, after discharging the mortgage debt, like moneys raised under an execution sale in excess of what was required to satisfy the judgment, belongs to the defendant. The order of reference was uncalled for and erroneous, and the residue should have been directed to be paid to the debtor whose land has been sold.

If it were not that a final judgment was the proper one to be rendered, disposing of the entire fund, we should be constrained to dismiss the appeal as prematurely taken, inasmuch as fragmentary appeals are not entertained, as ruled in *Arrington v. Arrington*, 91 N. C., 301, and the cases cited in the opinion.

Judgment will be here entered according to this opinion.

M. M. MURRAY v. HENRY S. SPENCER.

Trespass — Costs.

In an action of trespass to real property, where the plaintiff's title and the fact of trespass are both put in issue by the defendant's answer, and the jury find the issue as to the title in favor of the plaintiff, and the issue as to the trespass in favor of defendant, the defendant is entitled to judgment for costs. To entitle the plaintiff to recover costs, both issues must be found in his favor.

(*Clarke* v. *Wagner*, 78 N. C., 367, cited and approved).

CIVIL ACTION tried at Spring Term, 1884, of the Superior Court of HYDE county, before *Gudger, Judge.*

Judgment for plaintiff for cost. Appeal by defendant.

Mr. Geo. H. Brown, Jr., for plaintiff.

Messrs. L. C. Latham and *Pace & Holding* for defendant.

ASHE, J. This was a civil action, tried before his Honor, Gudger, Judge, at Spring Term, 1884, of the Superior Court of Hyde county. The plaintiff complained that the defendant broke and entered a certain close of the said plaintiff described in the complaint, and cut and carried away trees and timber of the plaintiff's, and concealed and disposed of the same to his own use.

The defendant, for answer to the complaint, said, "That he denies the allegation thereof and says that he is not guilty of the trespass so complained of, or any of them." The "case" stated that two issues were submitted to the jury, but they are not set out in the case or record.

We must assume from the statement of the case that the issues submitted were, (1) did the plaintiff have title to the land described in the complaint, and (2) did the defendant commit the trespasses complained of. The jury found the first issue in favor

of the plaintiff, to-wit: That the title to the land is in the plaintiff; and the second issue in favor of the defendant, to-wit: That the defendant did not commit the trespasses.

Upon this finding of the jury, the Court rendered judgment as follows: "This case coming on to be heard, and the jury having returned a verdict, which is recorded, and having declared upon the two issues submitted that the plaintiffs are the owners of the land in controversy and have title thereto, and, secondly, that the defendant did not trespass thereon; and it appearing to the court, and is so found as a fact, that the defendant put the title of the plaintiff in issue upon the trial, and further, that the defendant claimed the land in question upon the trial himself, and that costs were incurred upon that issue, it is ordered that the plaintiffs recover of the defendant and his bond the costs of proving the title to the land, and that the defendant recover of the plaintiff and his bond the costs upon the issue as to the trespass."

There is manifest error in the judgment of the court below. By section 525 of *The Code* it is provided that "Costs shall be allowed of course to the plaintiff upon a recovery in the following cases:

1st. In an action for the recovery of real property, or when a claim of title to real property arises on the pleadings, or is certified by the court to have come in question on the trial; and, by section 526, costs shall be allowed of course to the defendants in the actions mentioned in the preceding section, unless the plaintiff be entitled to costs therein.

In *Clarke* v. *Wagner*, 78 N. C., 367, which was an action to recover land, when the verdict of the jury established the title of the plaintiff to the land in dispute, but did not find any wrongful act done by the defendant to the land to which the title is thus established, it was held that the plaintiff was not entitled to recover damages or costs. That to enable him to do so, both allegations must be sustained.

This decision is directly in point and is so decisive of this case that it is needless to cite any other authority.

There is error. The judgment of the Superior Court is reversed, and this must be certified to the Superior Court of Hyde county, that the judgment of that court may be modified in accordance with this opinion. The plaintiff will pay the costs of this appeal.

Error. Reversed.

LOUIS HILLIARD & CO. v. E. R. OUTLAW, adm'r et al.

Usury—Contract governed by law of the place of performance—Special Verdict—Laws of other States.

1. In the absence of contrary finding, it is presumed that a contract is to be performed in the place where it is executed.
2. Whether a contract is usurious, depends upon the law of the place where it is to be performed.
3. A special verdict must find all the facts necessary to enable the court to give judgment.
4. The statute law of another State is a fact to be shown by evidence, and cannot be noticed judicially.
5. So where a special verdict found that the contract sued on was an additional consideration for the loan of money, but failed to find that such a transaction was usurious in the State where it was to be performed; *Held*, that the special verdict was defective and a *venire de novo* must be awarded.

(*Doe* v. *Sheppard*, 3 Murph., 385; *State* v. *Wallace*, 3 Ired., 195; *State* v. *Stewart*, 91 N. C., 566; *State* v. *Will*, 1 Dev. & Bat., 121; *State* v. *Jackson*, 2 Dev., 563; *Moore* v. *Gwyn*, 5 Ired., 187; *Knight* v. *Wall*, 2 Dev. & Bat., 125, and *Hooper* v. *Moore*, 5 Jones, 130, cited and approved).

CIVIL ACTION, tried on appeal from a justice of the peace, before *Avery, Judge*, and a jury, at January Special Term, 1884, of BERTIE Superior Court.

His Honor, being of opinion that, upon the facts as found by the special verdict, the contract was usurious, gave judgment for the defendant, and the plaintiff appealed.

The facts are fully stated in the opinion.

Messrs. Pruden & Vann, for the plaintiff.
Mr. R. B. Peebles, for the defendants.

SMITH, C. J. This action begun before a justice of the peace, and removed by the plaintiff's appeal to the Superior Court, is upon a covenant entered into by the intestate of the defendant Edmund R. Outlaw, and guaranteed by the other defendant in the following form:

STATE OF VIRGINIA, }
CITY AND COUNTY NORFOLK. }

For and in consideration of five dollars to me in hand paid by Louis Hilliard, doing business in the city, county and State aforesaid, under the style and firm of Louis Hilliard & Co., the receipt of which is acknowledged, I hereby promise and agree to ship to the said Louis Hilliard & Co., as my factors, on or before the first day of January next, at least (75) seventy-five bales merchantable lint cotton, and in default thereof to pay to the said Louis Hilliard & Co., as liquidated damages, two dollars per bale on all, or such portion thereof as I fail to ship as aforesaid. This is a separate and distinct transaction from all others and in itself an entirety. For the faithful performance of this contract, I bind myself, my heirs, executors and administrators. Witness my hand and seal, this 19th day of April, 1881.

The defence of usury was set up to the action, and the jury rendered a special verdict, as follows: "That the contract declared upon by the plaintiff, was executed by defendant Outlaw's intestate, and said intestate delivered only twenty-two bales of cotton under said contract, and that as an additional consideration for

the execution of the contract sued on, it was agreed between Hilliard & Co. and B. B. Gillam, that Hilliard & Co. should advance to said Gillam $1,000, which was to be paid back with 9 per cent. interest. That the money advanced or loaned under said agreement, with 9 per cent. interest, had been paid by Gillam before this suit was commenced. If, upon these facts, the Court is of opinion with the plaintiff, then they find for the plaintiff and assess his damages at $106 with interest from January 1st, 1882, until paid, and costs to be taxed by the clerk."

The Court being of opinion that the money claimed under the covenant was usurious interest, in excess of that allowed by law, upon the contemporary loan and rendered it void, gave judgment for the defendants, and therefrom the plaintiff appeals.

A special verdict, rendered in our former practice, was required to find all the facts necessary in determining the rights of the parties, with a prayer for the advice of the Court as to the law arising thereon, and concluded conditionally, that if, upon the the whole matter the Court shall be of opinion that the plaintiff has cause of action, they then find for the plaintiff; if otherwise, for the defendant. 1 *Sell. Pr.*, 472; *Eaton's Forms*, 494; *Arch. App.*, 148; *Doe* v. *Sheppard*, 3 Murph, 335. And in criminal prosecutions such must now be the form. *State* v. *Wallace*, 3 Ired. 195; *State* v. *Stewart*, 91 N. C., 566; *State* v. *Will*, 1 D & B., 121.

The condition is removed, and the verdict is complete and becomes absolute upon the decision of the question of law raised for the one or the other contending party according to the ruling of the Court. The form and force of verdicts, general and special, are somewhat different under the present practice, and they are now defined by statute.

"A general verdict is that by which the jury pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment to the Court." *Code*, §408.

The latter groups together the findings of all the controverted facts put in issue by the pleadings, which, with those admitted, constitute the case submitted to the Court for the determination of the law arising thereon. If the statement is full and sufficient, judgment is rendered according to the opinion of the Court and the action determined.

If defective, by reason of the omission to find some material fact necessary to a decision, the verdict is set aside, and the controversy goes before a new jury.

In the present verdict, it appears that the transaction, of which the giving the covenant in suit forms part, took place in the State of Virginia, and we must assume, in the absence of any contrary finding, was to be there executed. The validity of the obligation would therefore depend upon the usury law in force in Virginia when it was entered into, and the verdict does not inform us what that law is. The statute laws of another State is a fact to be shown, and is not taken judicial notice of. *State* v. *Jackson*, 2 Dev., 563; *Moore* v. *Gwyn*, 5 Ire., 187; *Knight* v. *Wall*, 2 D. & B., 125; *Hooper* v. *Moore*, 5 Jones, 130.

This imperfection in the jury findings disables the Court to pronounce judgment, and say whether the covenant is or is not illegal.

The Court cannot consider any matter extraneous to the verdict, or not derivable from the facts therein appearing, except such as are admitted in the pleadings. *Williams* v. *Jackson*, 5 John, 502.

The absence of information of the law of Virginia applicable to the contract renders it impossible for the Court to pass upon the legality of the covenant and the transaction in which it has its origin.

The judgment must be reversed, the verdict set aside and a new trial had.

To this end let this be certified.

Error. Reversed

ASA PHELPS v. WORTHINGTON & WILSON.

Appeals from Justices of the Peace.

Appeals cannot be taken from justices of the peace to the Superior Courts from interlocutory judgments; therefore, where a justice dismissed a warrant of attachment, and the plaintiff appealed to the Superior Court, which court dismissed the plaintiff's action on the ground that no service of process had ever been made; *Held*, erroneous, as no appeal lay from the order of the justice and the Superior Court should only have dismissed the appeal.

CIVIL ACTION, heard on appeal from a justice of the peace, before *Avery, Judge,* at January Special Term, 1884, of BERTIE Superior Court.

His Honor gave judgment discharging the attachment and dismissing the action, and the plaintiff appealed.

The facts fully appear in the opinion.

No counsel for the plaintiffs.

Mr. R. B. Peebles, for the defendants.

MERRIMON, J. The plaintiff brought his action on the 21st day of October, 1882, against the defendants, before a justice of the peace of Bertie county, to recover the sum of $80.40. On the same day the constable returned the summons unexecuted, and that he could not find the defendants in that county, and that they resided beyond the limits of this State. Whereupon, the plaintiff sued out a warrant of attachment and had the same levied upon property of the defendants situate in that county.

Before, however, there had been any order of publication made as required by law, the counsel of the defendants, for the purpose of the motion, moved to transfer the action for trial before another justice of the peace, and this motion was allowed. Before the latter justice of the peace had made any order of publication, the counsel for the motion of the defendants, moved to

discharge the attachment for causes assigned that do not appear in the record. This motion was allowed, and an order made directing the constable to restore the property levied upon to the defendants. Whereupon the plaintiff appealed to the Superior Court of Bertie county. That court found that no service of summons had been made upon the defendants, discharged the attachment and dismissed the appeal, and the plaintiff appealed to this Court.

There is error. The appeal from the order of the justice of the peace discharging the warrant of attachment, was improvidently taken. The order was interlocutory, and no appeal lies from such an order made in an action in the court of a justice of the peace.

The statute (The Code, 875) provides that "The party against whom judgment is rendered in any civil action in a justice's court may appeal to the Superior Court from the same," &c. This implies a final judgment—that is, one that in some way puts an end to the action. And the appeal takes the whole action into the Superior Court, where it is to be tried *de novo*, not upon a transcript of the record in the justice's court, but upon the original papers, which must be sent up with the appeal for the purpose. The Code, secs. 878, 880, 881. The plaintiff's action did not necessarily depend upon the warrant of attachment; it was not determined by the order discharging the attachment; indeed, the attachment was only incidental and ancillary to the action. The justice of the peace, in view of the affidavits of the plaintiff and the return of the constable, although he ordered the attachment to be discharged, ought to have made the order of publication as to the action.

Why he did not, does not appear. It seems to be strange that he did not. The ground upon which he discharged the attachment is not stated, and we are unable to discover it in the record. The affidavits certainly contain the facts material to warrant the attachment and the order of publication. It appears from them, in substance, that the defendants owed the plaintiff a debt, due,

of which the justice of the peace had jurisdiction; that they were non-residents of this State; that after due diligence they could not be found in this State, and that they had property therein. It is possible there was some defect as to the attachment we can not discover, and the justice of the peace may have thought the action depended entirely upon it.

But in any view of the matter, he ought to have made the order of publication as to the action; or if for any cause he would not do that, he ought to have dismissed it, so as to put an end to it. If he had given judgment dismissing it, the plaintiff might have appealed to the Superior Court. As it was, there was no final judgment from which to appeal, and hence, the supposed appeal was improvidently taken, and the Superior Court ought simply to have dismissed it and remanded the papers in the action. That court, however, found that the summons had not been served, adjudged that the order of attachment be discharged, that the property attached be returned to the owners thereof, and that the appeal be dismissed.

This judgment was erroneous, except so much thereof as dismissed the appeal; and except in this respect it must be reversed.

Let this opinion be certified to the Superior Court with directions to reverse its judgment except so much thereof as dismissed the appeal, to dismiss the appeal and remand the original papers in the action to the justice of the peace with directions to proceed in the action according to law.

It is so ordered.

WM. H. BELL v. G. HOFFMAN, and others.

Contract—Construction—Counter-claim—Issues.

On 17th August, 1882, plaintiff and defendant G. Hoffman made a written contract whereby plaintiff sold to said Hoffman the entire stock of goods plaintiff might have in his store on 1st September, 1882, Hoffman agreeing to pay for the same "*wholesale prices as per invoice from G. Oppenheimer & Son;*" and to secure performance of the contract, each gave to the other his note for fifty dollars as a forfeiture for non-compliance.

About 10 o'clock on the 1st September defendant Hoffman offered to comply with his part of the contract. Plaintiff claimed that by the proper construction of the contract ten per cent must be added to the wholesale price of the goods, and refused to comply unless this was done. Defendant refused to allow this. About two o'clock of same day plaintiff offered to let defendant have the goods according to his (defendant's) construction of the contract. Defendant then declined to do this;

Held (1), That there was no ground for plaintiff's construction of the contract; (2) that there was nothing in the contract which could give the whole day in which to execute it; (3) that plaintiff's refusal to comply unless the ten per cent. was added was a breach which was not cured by his offer to comply afterwards at 2 o'clock; (4) that the testimony objected to by plaintiff was irrelevant and immaterial, and could therefore do plaintiff no damage; (5) that the issue proposed by plaintiff, as to his offer to comply, was not raised by the pleadings and was irrelevant; (6) that defendant was entitled to judgment for his counter-claim of fifty dollars, amount of note executed to him by plaintiff.

CIVIL ACTION, tried, on appeal from a justice of the peace, at Spring Term, 1884, of the Superior Court of HALIFAX county, before *Avery, Judge,* and a jury.

This action was commenced before a justice of the peace for the recovery of fifty dollars due by the note described in the contract below set out, which the plaintiff claimed as a forfeiture by the defendant G. H. Hoffman, for non-compliance with that contract, which was as follows:

"This article of agreement entered into this 17th day of August, 1882, between W. H. Bell of the first part, and Gerson Hoffman of the second, witnesseth:

"That, whereas, W. H. Bell has this day sold to said Hoffman the entire stock of goods and fixtures he may have in store on

Main street on the 1st day of September, 1882, the party of the second part agreeing to pay wholesale prices as per invoice from G. Oppenheimer & Son, making the following payments: One half cash, balance, of two equal notes, payable in sixty and ninety days from date of said notes, the party of the first part approving security.

"Now then, in consideration of above sale and promises, the parties of first and second parts have this day given each to the other a note of fifty dollars as forfeiture of non-compliance. These notes shall be sealed and delivered in keeping with this contract.

"In witness whereof, we have hereunto set our hands and seals.

W. H. BELL, (Seal).

G. HOFFMAN, (Seal)."

The justice rendered judgment in favor of the plaintiff; from this judgment the defendant appealed to the Superior Court. By consent, the defendant pleaded, as a counter-claim, the note executed to defendant G. Hoffman, which is described in this contract.

The plaintiff testified that he was able, willing and ready to perform the contract on his part, on the day named for performance. On cross-examination, he stated that the defendant G. Hoffman came to him about ten o'clock of the day fixed by the contract and told him he was ready to comply with the contract, and that be desired to take an inventory of the goods; that he (W. H. Bell) claimed ten per centum on the prime cost price of goods; that this was what he contracted for; that this was what wholesale price, as per invoice from G. Oppenheimer & Son, meant, and that he refused then to allow the inventory to be taken, unless the said defendant would allow ten per centum to be added to the prime cost price, and unless he did so he would not trade. Hoffman refused to allow this and left. The plaintiff further testified that about two o'clock of said day he told Hoffman that he could then take the inventory, as he would settle according to his construction of the contract. Hoffman declined to do this, and stated that he had made other arrangements.

Hoffman was introduced as a witness for himself and corroborated plaintiff.

The defendant then introduced G. Oppenheimer, who testified that he was the G. Oppenheimer referred to in the contract.

The defendant's counsel asked him at what price he sold to the plaintiff.

The plaintiff objected to the question as irrelevant, as its object was to vary and alter a written contract by parol evidence, and that the answer thereto could not and did not tend to explain a latent ambiguity in the written contract. The objection was overruled and the plaintiff excepted. The witness then said, at cost price.

The Court framed and submitted these issues:

1. Did the plaintiff refuse to comply with his contract on his part on the day agreed upon for performing the stipulation of the written contract?

2. Was the defendant ready, willing and able to comply with the contract on his part when the plaintiff refused on his part?

The plaintiff asked the Court to submit this issue: "Did the plaintiff offer to comply with said contract by adding ten per centum to the prime cost price of goods, and did he offer to comply with said contract as the defendant understood its terms before sunset of said day?" The Court refused to do so.

The Court charged the jury that if they believed that the plaintiff refused to comply with his contract on the day named, when the defendant offered to comply on his part, he could not recover, notwithstanding he did offer to comply before sunset of the day named.

The plaintiff excepted to this charge and asked the Court to charge that there was no evidence that the plaintiff had refused to comply with said contract on his part. The court refused this and plaintiff excepted.

The jury responded "yes" to both issues. The court gave judgment against the plaintiff for fifty dollars, with interest from September 2d, 1882.

Whereupon the plaintiff excepted and appealed to this court.

Messrs. Kitchin & Dunn and *Mullen & Moore*, for plaintiff.

Messrs. Reade, Busbee & Busbee and *R. H. Smith, Jr.*, for defendant.

MERRIMON, J. (after stating the facts). The plaintiff failed to comply with the agreement set forth in the record, and, under its provisions, by such default, became indebted to the defendant Gerson Hoffman in the sum of fifty dollars secured to him by the plaintiff's promissory note for that sum of money.

At a reasonable hour of the day on which the plaintiff had agreed to deliver the goods to the defendant named, the latter went to and informed him that he was ready and prepared to comply with the agreement on his part, and desired to take an inventory of the goods. That he was so ready and prepared is not controverted, and that he was, must be accepted as the fact.

The plaintiff "claimed *ten per centum* on the prime cost price of the goods, that this was what wholesale price, as per invoice from G. Oppenheimer & Son, meant," and he then refused to allow the inventory to be taken, declaring that unless Hoffman would allow his demand, he, the plaintiff, "would not trade." Hoffman declined to allow this demand, and left the plaintiff.

There could scarcely be a more palpable breach of the agreement on the part of the plaintiff. He refused to comply with its terms and effect. He made a demand unwarranted by it, and, without reserve or qualification declared to the defendant that he "would not trade" unless the latter would allow his demand. Hoffman was not bound to allow it; he was bound to comply with the agreement as far as he could, and he did so, when he was ready and prepared to comply with its requirements of him and so informed the plaintiff. He was not obliged to wait indefinitely or at all to see if the plaintiff would reconsider his refusal to deliver the goods; he had no reason to believe he would do so, and there is nothing in the agreement that can be reasonably construed to mean that the parties to it, each, should have all the first day of September, 1882, in which to decide whether or not he would comply with its requirements of him; on the contrary, it

was expressly stipulated that, in case of non-compliance with it by either party, the non-complying party should pay the other fifty dollars.

The plaintiff was bound to comply with the agreement according to its legal effect; he failed to do so at his peril; and his failure and refusal to deliver the goods on the day specified, was non-compliance with it. His claim that *ten per centum* should be added to the prime cost price of the goods was obviously unfounded. The plain terms of the agreement, left nothing to doubt, the prices to be paid were fixed, and they were the "wholesale prices as per invoice from G. Oppenheimer & Son." Any question as to prime costs and *ten per centum* added thereto, was outside of and foreign to the agreement.

It seems that the plaintiff thought so himself, for afterwards, on the same day, he proposed to abandon his demand. This proposition came too late; several hours before he made it, he had refused to comply with the agreement; one flat refusal was enough; this entitled the defendant to the forfeiture of $50, and relieved him from all obligations to take the goods at any price.

The testimony of the witness Oppenheimer was irrelevant and immaterial. The agreement was not denied; its terms were plain and to be interpreted by the Court.

The issue proposed by the plaintiff, in addition to those submitted to the jury, was not raised by the pleadings, and was immaterial; it referred to evidential facts that were in evidence for the proper purpose.

There was manifestly evidence that the plaintiff refused to comply with the agreement, and the Court properly refused to instruct the jury that there was none. There is no error of which the plaintiff has right to complain, and judgment must be entered for the defendant. Judgment accordingly.

No error. Affirmed.

A. M. BRADSHAW v. THE BOARD OF COMMISSIONERS OF GUILFORD COUNTY.

Fence Law—Taxes—Injunction.

1. Where the statute provided, that upon the written application of one-fifth of the qualified voters of any district or territory in certain counties, whether the boundaries follow township lines or not, it shall be the duties of the commissioners to submit the question of "Stock Law" or "No Stock Law," and if a majority of the votes shall be in favor of the stock law, a fence shall be built; *Held*, that the commissioners have no power when several of these districts adjoin each other, to unite them into one territory, provide for the construction of one boundary fence, and assess a unform tax on all the real property in the several districts so united, to meet the expense of the fence.
2. Where the act provided that the commissioners should levy a special tax on all the real estate in said district, which was taxable by the State and county; *Held*, not to embrace the real estate of schools and railroads, which was not taxable for general purposes.
3. *Quære?* Whether it is necessary for the Justices of the Peace to act with the commissioners in levying the taxes for the local improvements under these acts; but if so, in this case, it may be obviated when the tax is to be readjusted, when the justices and commissioners may act in concert.
4. It is error to dismiss an action upon refusing to continue an injunction to the hearing. The Court should refuse the application to continue the injunction but allow the action itself to proceed.

(*Commissioners of Greene* v. *Commissioners of Lenoir*, *ante* 180, cited and approved).

This was a motion to continue an injunction to the hearing heard before *McKoy, Judge,* at Spring Term, 1884, of GUILFORD Superior Court.

His Honor refused the motion, dissolved the restraining order theretofore granted and dismissed the action.

From this judgment the plaintiffs appealed.

Mr. J. A. Barringer, for plaintiffs.
Messrs. Graham & Ruffin, for defendant.

SMITH, C. J. At the session of the General Assembly held in 1879, an act was passed, authorizing the formation of districts in certain enumerated counties, with the approval of the voters,

wherein stock should not be allowed to run at large, and directing the building of fences enclosing the same. Acts, 1879, chap. 135. In the year 1881 its provisions were extended to Guilford and three other counties with some modifications. Acts, 1881, chap. 94. Among the amendments introduced is an additional section, following section 20 of the former act in these words:

"That upon the written application of one-fifth of the qualified voters of any district or territory in Lincoln, Catawba, Alexander, Burke, Guilford, Randolph, Rowan or Gaston counties, whether the boundaries of said district follow township lines or not, made to the county commissioners at any time, and setting forth well defined boundaries of said district, it shall be the duty of the said commissioners to submit the question of said "Stock law," or "No stock law," to the qualified voters of said district, and if, at any such election, a majority of the votes cast shall be in favor of said stock law, then the provisions of this act shall be in force over the whole of said district." Section 2.

In pursuance of this enactment, an election was held on May 25, 1882, in a portion of the territory of Guilford, with its boundaries ascertained in the application to the commissioners, designated and known as the New Garden District, wherein the approval of the popular vote was given to its formation into a stock law district.

Similar proceedings, and with the same result, were had, by an election held on the 29th day of June following, and an adjacent territory, known as Page's District, put under operation of the law.

In like manner other territory, adjacent to the two preceding districts thus formed, known as "Bruce Cross Roads District," was put under the law by the result of a popular vote taken on the 30th day of December in the same year.

In giving effect to these proceedings and the directions of the statute, as undisputed by the commissioners, they have united these districts into one territory, and provided for the construction of one boundary fence to enclose the whole, and to this end

levied and assessed a uniform tax of one dollar and a half upon each one hundred dollars valuation of all the real estate subject to taxation under the general law, within the enclosing boundary, to meet the expenses of construction.

The present action is instituted by the plaintiff and other real estate owners in the New Garden District, against the commissioners to restrain the enforcement of a part of this tax, the collection of which is now being made by the sheriff, and the interposition of the court is asked upon these grounds:

(1) The plaintiffs are only liable for the expenses incurred in the erection of a fence around their district, created by a separate and independent vote.

(2) The assessment leaves out certain real estate owned by railroads, and other owned and used for school purposes.

(3) The tax was not ascertained and assessed by the concurring action of the commissioners and justices of the county, but is the sole act of the former.

After a temporary restraining order, and on notice, the plaintiffs applied to the judge for an interlocutory injunction against the collection of the tax, until the cause could be heard, and numerous affidavits were read in support of, and in opposition to, the order. His Honor denied the application and dismissed the action, from which the plaintiffs appeal.

1. The first objection to the method of assessing the tax is in our opinion well taken. The commissioners had no power to consolidate the districts into one, and raise the means of building the boundary around it upon all the lands comprised within its limits by imposing an *ad valorem* tax. The vote taken in the New Garden District was in favor of a stock-law within the area it comprises, and of a tax upon the real estate it embraces, to defray the cost of enclosing that territory alone. And so it was with each of the other territorial districts with its specific boundaries. Had a general vote been cast on a proposition to enclose all the territory of the separate districts under one fence, at the common cost of the real estate owners, the action of the commissioners

would be rightful. But no such vote was authorized and none such taken. The voters in the several districts have given their consent to the enclosing of each, without reference to any past or future action among the tax-payers upon whom the burden falls of other portions of the county, whether adjacent or distant. The effect of the erection into the separate districts of adjoining lands, may be, by mutual arrangement, to dispense with a fence and divisional lines, and thus reduce the cost to each; but it cannot obliterate them so as to make one common territory of all. The districts remain as before, distinct and independent, and in each the cost of construction must rest upon the real estate owners in each, for its protection against the incursions of stock. There never has been obtained the sanction of the voters to a proposition for enclosing the whole under one fence, an indispensable condition to the levy of an indiscriminate *ad valorem* tax upon all.

This is in conformity with our ruling in a case, presenting somewhat the same feature, decided at the present term, and renders further discussion needless. *Commissioners of Greene* v. *Commissioners of Lenoir, ante* 180.

2. The 5th section of the act of 1879 places the erection and repair of fences under the exclusive control of the county commissioners; and the next section confers upon them the right to "levy and collect, as they do other taxes, a special tax upon all real property, taxable by the State and county, within the county, township or district, which may adopt this act."

The right to tax for the local improvement can be only exercised under law, and must be subject to the limitations which it imposes.

The authority is given to tax, for the expenses to be incurred, such lands to derive benefit therefrom as are within the prescribed territory and are taxable for general purposes. The assessment must conform to the requirements of the act, or it is altogether unauthorized. Nor do we think the exemption is beyond the power of the Legislature to allow, or that it impairs the validity of the statute that non-taxable real estate is not sub-

ject to the common burden. Of this exoneration those who pass the law must be the judges, and it cannot be allowed to defeat the beneficial provision it contains. This objection cannot be sustained.

3. The remaining cause of complaint that the justices did not co-operate with the commissioners in ascertaining the sum required, and imposing the *ad valorem* tax may be obviated when the tax is to be readjusted, and the costs of enclosing each district distributed uniformly on the taxable real estate lying therein. The justices and the commissioners could then act in concurrence.

But we are inclined to the opinion that the duty of making the estimate and assessment is devolved upon the commissioners alone.

The commissioners, in the words of the act, may "*levy and collect*," as alone they were to control and manage the constructed fencing; and the other words, "as they do other taxes," are intended to point out the mode of assessment and collection to be pursued, as is required in the case of county taxes in general. There is no intimation that the justices are to participate in this action.

Again, general taxes for county purposes are leviable but once in the year, to-wit: On the first Monday in June, *Code*, §707, part 1, and it can hardly be supposed that the progress of these enterprises was to be suspended and delayed to await the joint meeting, while the commissioners, and they alone, are mentioned as the persons who are to exercise the power which is conferred in the section.

The error which has been pointed out will require for its correction a different apportionment of the tax, requiring of each a sum sufficient to secure its enclosure, and, if it were necessary, the two bodies could co-operate in the required action.

We do not inquire how the interest of the tax-payers who have lands in the New Garden District may be affected by the change in the manner of assessment, nor whether, as the plain-

tiffs insist, these taxes will be equally diminished, when they alone are required to build the surrounding fence. It is sufficient to say, they are not legally assessed under the law, and the plaintiffs have a right to a new and correct assessment.

There is also error in the final disposition of the cause. The cause was not before the court for a final hearing. The application was for an injunction to remain in force until the hearing, and was heard upon *ex-parte* affidavits. The court could do no more than refuse to make the order and let the cause proceed.

Its dismissal, except by consent, at this stage of the case was wrongful.

In our opinion, the ruling was erroneous, and the commissioners should have been directed to proceed to a re-assessment and apportionment as we have indicated. There is error. Let this be certified.

Error. Reversed.

JOHN P. LEE v. M. H. EURE, et als.

Parties.

1. The Court will not grant an order to make parties, unless it appears probable that the proposed parties are in some way necessary to a proper and complete determination of the action.
2. Where the Superior Court ordered a *nol. pros.* as to certain defendants, who appealed from the order, and moved in the Supreme Court to make other persons parties, whose presence in the action was only necessary if the *nol. pros.* had been erroneously entered; *Held*, that the motion to make parties will not be considered, until the question raised by the *nol. pros.* is disposed of.

MOTION made in the Supreme Court to make parties.

The action was tried before *Gudger, Judge,* at Spring Term, 1884, of GATES Superior Court, and was brought to subject certain lands, once the property of Wm. Lee, to the payment of a judgment rendered against him. It was alleged that said Lee had

executed a deed for the land to the defendant Eure, for the purpose of defrauding his creditors. Lee died before this action was begun, and it was brought against his administrator, his heirs-at-law, the said Eure, and Benj. Saunders, to whom it was alleged that Eure had conveyed the land with notice.

On the trial in the Superior Court, the plaintiff asked leave to enter a *nolle prosequi* as to the defendants Eure and Saunders, which was resisted by them, on grounds not now necessary to be stated.

His Honor granted the motion, and the defendants Eure and Saunders appealed.

Pending the hearing of the appeal in this court, the plaintiff died, and, without objection, his administrator was made a party. The appellants also moved in this court to make the plaintiff's heirs-at-law parties.

Messrs. Gatling & Whitaker and *Pruden & Vann* for plaintiff.
Messrs. Grandy & Aydlett and *L. L. Smith* for defendants.

MERRIMON, J. At the Spring Term, 1884, of the Superior Court of Gates county the appellee, by leave of the court, entered a *nolle prosequi* as to the appellants. Whereupon, they excepted and appealed to this court. Pending the appeal, the appellee died. At the present term of this court, his death has been suggested and admitted, and an order has been entered without objection, directing that his personal representative be made a party plaintiff.

The appellants also suggest that his heirs-at-law are necessary parties, and they desire to have relief as against them in some aspect of the action, and they likewise move to make such heirs-at-law parties plaintiff.

The Court will not grant an order to make such additional parties, unless it appears at least probable that the proposed parties are in some way necessary to a proper and complete determination of the action. Nor will the Court anticipate the possible materiality of a person as a party, and bring him into the action

before the necessity for making him such appears. The question presented by the appeal is whether or not the court below properly allowed the appellee to enter a *nolle prosequi* as to the appellants. If this question shall be determined in the affirmative, then the latter will not be parties to the action longer, and will not have any such interest in it as will entitle them to ask that the heirs-at-law of the appellee be made parties plaintiff. If on the other hand it shall turn out that the questions so presented shall be determined in the negative, then it may be proper to make the heirs-at-law parties for the purpose contemplated by the appellants, and a motion then made for that purpose will be in apt time. It does not appear that they are now necessary parties for any purpose, and it may turn out that they will not be. So the motion must for the present be denied.

Motion denied.

W. K. HUNTER, et als., v. NORFLEET KELLY, et als.

Reference—Evidence—Findings of Fact—Unregistered Deed—Color of Title—Authentication of Will Proved in Another State.

1. In references by consent, it is only when there is no evidence reasonably sufficient to warrant the referee's findings of fact, that a matter of law is presented, reviewable on appeal.
2. An unregistered deed is color of title, and may be read in evidence without registration, upon due proof of its execution.
3. Where a will, proved in another State, bears the certificate of the Clerk of the Court wherein the probate was had, to the oath of the attesting witnesses, but had no other authentication; *Held*, inadmissible in evidence.

(*Hardin* v. *Barrett*, 6 Jones, 159, cited and approved).

CIVIL ACTION, heard before *Avery, Judge*, at February Term, 1884, of WAKE Superior Court, upon exceptions to the report of a referee.

The facts sufficiently appear in the opinion.

There was a judgment for the defendants, and the plaintiffs appealed.

Messrs. A. M. Lewis & Son for the plaintiffs.

Messrs. Pace & Holding and *Walter Clark* for the defendants.

SMITH, C. J. This action was begun in the Superior Court for the partition and sale of the land described in the complaint, and of which the plaintiffs allege themselves and the defendant to be tenants in common. The answer denies the tenancy and asserts a sole seizin in the defendant. The cause was thereupon transferred, for the trial of the issues, to the civil issue docket.

At August Term, 1881, an order was entered by consent, referring the case to George V. Strong, "to find the facts and declare the law arising thereon, with a right to appeal on the same."

The referee made report at a subsequent term, of the evidence taken and his findings of fact and law, with a conclusion reached that none of the contesting parties had title.

To this report the plaintiffs filed five exceptions, all of which were overruled, and judgment being rendered for the defendant, they appeal.

The first three exceptions to the findings are, that they are against the weight of the evidence; or, which we interpret to mean the same thing, contrary to the evidence, that is, the conclusions are not fairly warranted by it. It is unnecessary to repeat what has been so uniformly held, that it is only when there is no evidence reasonably sufficient to sustain the finding of fact that a matter of law is presented reviewable on appeal.

The rulings upon these exceptions by the judge are final and conclusive.

4. The fourth exception is to the failure of the referee to ascertain and report the facts in regard to an alleged lost deed from one West, acting as attorney, to Hardy Dean, conveying the land in dispute and under which the plaintiffs claim.

Looking to the depositions to which attention is called in the exception, it will be seen that no witness examined undertakes to prove the execution of the instrument in reference to which they

testify, while very much of the testimony introduced was rejected for incompetency, and the correctness of this ruling of the referee is not before us. The registration was not indispensable to the use of the deed, as constituting color of title, and supporting the adversary possession of Dean for the fourteen years found by the referee; but proof of its execution was to give it this effect.

An unregistered deed, in the language of Ruffin, Judge, delivering the opinion in *Hardin v. Barrett*, 6 Jones, 159, "does not constitute a perfect title and cannot be read without proof of its execution as a registered one may."

And again, "Then both upon the face of the authorities and their correctness, the court holds that an unregistered deed is color of title under which a possession for seven years bars the entry of the owner."

5. The next exception is to the refusal to admit the alleged copy of the will of Faithy Harris as certified by the clerk.

This will appears to have been made and proved in the county of the residence of the testatrix in Virginia. The copy presented to the probate judge of Wake bears the certificate of the clerk of the court wherein the probate was had, with the oath of two of the attesting witnesses to the execution, but without further authentication. Aside from the necessity of authenticating the records of another State, with the supporting certificate of the presiding officer of that court, under the act of congress, the method of procedure for placing the instrument on the records departs from the requirement of our statute, *Code*, §2155.

It is, and indeed must be, re-proved by the examination of the attesting witnesses, to be in conformity with our law, under a commission issued by the Clerk of the Superior Court of the county wherein the property is found, and then adjudication of proof upon this testimony. The copy was therefore properly rejected.

The last exception to the referee's conclusions of law generally is too indefinite to be entertained. There is no error and the judgment must be affirmed.

No error. Affirmed.

B. H. TYSON v. SETH H. TYSON.

Reference—Warranty—Question of Law and Fact.

1. Where a party excepts to the report of a referee, because he fails to find on a particular matter as a fact, and the report is recommitted to the referee to pass on this matter, he cannot be allowed to except to the second report, because it is a mixed question of law and fact.
2. Plaintiff brought an action for the price of a cotton press, and the defence was a breach of the warranty that it should be capable of pressing a 500-pound bale of cotton with proper management. The referee found that it was of sufficient power to press a 500-pound bale of cotton, but that careful and intelligent management were essential to its proper working; *Held*, that the capacity of the press to pack a 500-pound bale is purely a question of fact, and that "proper management" and "careful and intelligent management" mean the same thing.

CIVIL ACTION, tried on appeal from the judgment of a Justice of the Peace, before *Shepherd, Judge*, at Spring Term, 1884, of WILSON Superior Court.

Judgment was rendered for the plaintiff, and the defendant appealed.

Messrs. Connor & Woodard, for the plaintiff.
Mr. George V. Strong, for the defendant.

SMITH, C. J. This action, begun before a justice for the recovery of the agreed price of a cotton press of the plaintiff's own manufacture, and sold by him to the defendant, was removed by the latter's appeal, to the Superior Court, where the following order of reference is entered: In this cause it is, by consent of counsel for plaintiff and defendant, ordered that the issues of law and fact be referred to G. W. Blount and A. B. Deans under the provisions of the Code of Civil Procedure, and that they report their finding to the next term of this court.

The defence to the action was, that by the terms of the contract of sale, and as a condition precedent to the payment of the

price, the press should be of sufficient strength to pack a bale of cotton weighing 500 pounds, if properly managed, and that it was not of such strength.

The referees made their report to the next term, finding the facts deduced from voluminous testimony, and among them, "that the contract was conditional, as defendant alleged, and he was not to pay for the press unless it was capable of doing the stipulated work."

They further report that it "was of sufficient power if properly used, to pack an ordinary bale of cotton, but from the examination of the model and the evidence of experts, careful and intelligent use was essential to its proper working; that such is its construction, and such the nature of the power, when applied, that disaster must happen if proper care is not used in the application of the power and to the frame work being kept in plumb." They find as a conclusion of law that there has been no breach of condition or warranty, and that the plaintiff is entitled to judgment for the contract price of the article with interest.

The defendant filed numerous exceptions, most of them originating in the admission of and acting upon alleged incompetent testimony, and the insufficiency or want of it to sustain the facts deduced and reported, which and the rulings of the court in their disposition, are not presented in the case on appeal.

Among them, however, is one that does appear in the record, and this is to the failure of the referees to pass upon the direct inquiry "whether the press was of sufficient power, if properly used, to pack a 500-pound bale of cotton according to the contract, as found by them," and to the consequent unsupported legal deduction of the defendant's liability.

The exception was sustained and the report recommitted to the referees, "to enable them to find the fact whether or not the press was of sufficient strength to pack a 500-pound bale of cotton, if properly managed."

At a subsequent term, upon a rehearing and after argument of counsel before the referees, they report, putting the very words of

the interrogatory addressed to them, in an affirmative form, that the press had this capacity.

The defendant's counsel insisting that the finding was an admixture of law and fact that did not respond to the inquiry, proposed to file exception thereto, and was given leave to do so. But no such exception was filed, while the record states it was acted on and overruled.

The defendant's appeal presents for our consideration the force and legal sufficiency of the objection to this last finding.

The objection to the first report was that it omits to state the precise matter of defence and the facts which enter into it, and that was, the warranted capability of the instrument, under proper management, to pack in bales of the specified weight.

The second reference or recommittal was to remedy this very defence, and the inquiry the referees were directed to make, was put in such specific language as to avoid all possible misconstruction as to its purpose. The defendant made no objection, and, by his silence, when, if he had any, it should have been made known, must be considered as having given his assent. The response is explicit and in exact measure with the inquiry to be made, and expressed in the same terms.

Certainly all just cause of complaint is removed after these repeated acts of acquiescence, if any existed without them.

But is the finding obnoxious to the criticism passed upon it?

The strength and capacity of the press to undergo the necessary strain in packing in one bale the specified weight of cotton, are facts with no admixture of legal principle.

What is *proper management* is not less so. It implies the supervision and working of the machine by persons of competent skill and experience, such as prudent owners, acting under the promptings of interest, are expected to employ in regard to their own matters. This is the instruction the judge would give as to the rule of law governing in such cases, and upon this the finding proceeds.

But the counsel for appellant contends that the previous finding, that "careful and intelligent use was essential," and that from its peculiar structure and mode of working, "disaster" would happen in their absence, must be deemed to be embodied in the last response, and that this is beyond "the proper management" mentioned in the contract.

We cannot perceive any substantial difference in these forms of expression, and their meaning must be the same.

The *management* must be such as the effective working of such an instrument requires. Now this would in case of mishap or breaking, subject the plaintiff to the loss of his money.

For the consequences of mismanagement, inattention, and the want of the required skill in the working, the plaintiff is not, nor does his contract in any manner make him, responsible.

There is no error and the judgment must be affirmed.

No error. Affirmed.

M. F. BRANTLY et als. v. BENJ. F. JORDAN.

Appeal.

An appeal not prosecuted for two terms of the Supreme Court will be dismissed when reached in regular order, unless good cause be shown for a continuance. Rule 2, par. 4.

MOTION to dismiss an appeal from NORTHAMPTON Superior Court, heard at the February Term, 1885, of the Supreme Court.

Mr. R. B. Peebles for the plaintiff.

No counsel for the defendant.

MERRIMON, J. The plaintiff moved at the present term to dismiss the appeal in this case upon the ground that the appellant has failed for two terms before the present term to prosecute his appeal.

It appears that the appeal was taken at the Spring Term, 1882, of the Superior Court of Northampton county and docketed in this court at its October Term of that year. The appellant has not given his appeal attention at any term since it came into this court, indeed he has wholly neglected it, and it is again reached in the regular order.

It is provided in paragraph 4 of Rule 2, among other things, as follows: "But the cases not prosecuted for two terms shall, when reached in order after the second term, be dismissed at the cost of the appellant, unless the same, for sufficient cause, shall be continued." This case comes clearly within this clause of the rule. No cause for a continuance of the case appears, and the appellees are entitled to have their motion to dismiss the appeal allowed. It is the plain duty of appellants to prosecute their appeals in this court promptly, as the law requires, and when they fail to do so the appellee has the right to have the appeal dismissed, so that he may not only have the benefit of his judgment, or the relief granted in the Superior Court, but likewise be relieved of the trouble, annoyance and cost incidental to protracted and unnecessary delay of the litigation. The motion must be granted.

Appeal dismissed.

BETTIE STRAYHORN v. D. W. BLALOCK and others.

Summons—Return of Sheriff—Practice.

The summons commanded defendants to appear on the 12th of September, 1884. The sheriff returned it with this endorsement, "Received — 188-." "Served September 5th, 1884, on defendants, D. W. Blalock," &c. On 12th September defendants entered special appearance, and moved to dismiss action because,

(1) That the sheriff failed to endorse on the summons the day of its receipt by him.

(2) That defendants had not been served with summons ten days before return day thereof;

(3) That the endorsement of the sheriff on the summons was insufficient, in that it did not state the manner of service, as required by law.

Clerk granted motion and dismissed the proceeding; plaintiff appealed to Judge at Chambers; *Held*,

(1) That Clerk had no jurisdiction of motion to dismiss;

(2) That failure of Sheriff to note on the summons the day it was received was irregular, but did not render the summons void.

(3) That if it was served less than ten days before return day the action ought not to be dismissed, but further time ought to have been allowed defendants to answer.

(4) That when the sheriff returns that he has "served" the summons, this is *prima facie* sufficient and implies that he has served it as the statute directs, until the contrary is made to appear in some proper way.

(5) That if the service was insufficient the plaintiff was entitled to an *alias*, and it was error to dismiss the action.

(6) That it was error to remand the cause to the clerk with directions. The Court ought to have reversed the order of the clerk, and the clerk, having entered the judgment, ought to have proceeded according to law.

(*Brittain* v. *Mull*, 91 N. C., 498; *Guion* v. *Melvin*, 69 N. C., 242; *Weiller* v. *Lawrence*, 81 N. C., 65, cited and approved).

SPECIAL PROCEEDING begun in the Superior Court, before the *Clerk* thereof, of DURHAM county.

The clerk having granted the motion of defendants to dismiss the proceeding, the plaintiff appealed to the judge at Chambers.

On the hearing before *Philips, Judge*, at Chambers, the order of the clerk was reversed and the case remanded to the clerk.

From this judgment of the Court the defendants appealed.

Messrs. Manning & Manning, for plaintiff.

Messrs. W. W. Fuller and *Long & Strudwick*, for defendants.

MERRIMON, J. This was a special proceeding begun in the Superior Court, before the clerk thereof, on the 29th day of August, 1884, commanding defendants to appear on the 12th day of September, 1884. The summons was returned September 5th, 1884, with the following endorsement:

"Received ..... 188... Served September 5th, 1884, on the defendants, D. W. Blalock, A. N. Blalock, J. R. Blalock and Rufus Blalock. Fee $2.40.

J. R. BLALOCK,
Sheriff Durham County.

On the 12th day of September, 1884, the defendants entered a special appearance through their attorney, and moved to dismiss the action for three causes:

1. That the sheriff failed to endorse on the summons the day of its receipt by him.

2. That defendants had not been served with summons ten days before the return day thereof.

3. That the endorsement of the sheriff on the summons was insufficient, in that it did not state the manner of service as required by law.

The clerk granted the motion and entered judgment dismissing the proceeding. From this judgment the plaintiff appealed to the judge at Chambers.

At the hearing of the appeal, the defendants moved to dismiss it because the action of the clerk was in respect to a matter resting in his discretion, and not subject to review upon appeal.

The motion to dismiss the appeal was denied by the judge, and the defendant excepted. The judge remanded the case with directions to the clerk, and the defendants appeal to this Court.

The action of the clerk was wholly erroneous.

1. The sheriff ought regularly to have noted on the summons the day of its delivery to him, as required by the statute (*The Code*, §§200 and 280), but his failure to do so did not vitiate or render the summons void. Such notation is not of the essence of the summons, or the service of it by the sheriff. Its purpose is to provide evidence convenient to fix the day the summons passed into the hands of the sheriff for any proper purpose.

2. Nor did the fact that the summons was served less than ten days before the return day thereof render it void, or defeat the proceeding. As this was a special proceeding and the summons was returnable out of term, further time ought to have been allowed to the defendants to appear, as suggested by this Court in *Guion* v. *Melvin*, 69 N. C., 242, and *Weiller* v. *Lawrence*, 81 N. C., 65.

(3) It would be more orderly and complete for sheriffs to make their returns of the service of the summous in actions, with more fullness than simply to write on it "*served*," and the date of service, and sign the entry officially; but this is sufficient—*prima facie* sufficient at all events. The statute (*The Code*, §214) prescribes that "The summons shall be served in all cases, except as hereinafter provided, by the sheriff, or other officer, reading the same to the party or parties named as defendant, and such reading shall be a legal and sufficient service."

This statute prescribes *how* the officer shall make service of the summons; it prescribes his duty as to the *manner* of discharging it. When the sheriff returns that he has "served" the summons, this implies that he has discharged his official duty in that respect, that he has read it to the defendant.

The term "served," as applied to a summons, *ex vi termini*, implies that it was read to the defendant named in it; except in a case where the statute provides for other form of service, it means served according to law; in such connection, it has a legal and technical meaning. *Bouvier* says, "to serve a summons, is to deliver it to him personally, or to read it to him." Webster says, "To *serve a writ*—to read it to the defendant; or to leave an attested copy at his several place of abode." *In general*, to serve *a process* is to read it, so as to give due notice to the party concerned, or leave an attested copy with him, or his attorney, or at his usual place of abode." *Murf. on Sheriffs*, §839. On the argument stress was laid upon that clause of the statute which provides, in respect to the service of the summons in special proceedings, that, "when executed, he (the sheriff) shall immediately return the summons, with the date and *manner* of its execution," &c. It was insisted that the word "manner," implies *how* the service was made, and that it must be fully, descriptively and specifically set forth in the return. We can see no substantial reason why such a literal interpretation should be given the term mentioned.

It seems to us, that when a sheriff uses a term, or form of expression, in his return that implies that he served the summons

as the statute directs, that the spirit and purpose of the law are complied with.

We do not mean to imply by what we have said, that the return of the sheriff is conclusive in respect to the manner of the service of the summons; it is to be taken where he returns it "served," that it was served as the statute requires in that case, until the contrary is made to appear by motion supported by affidavits, or in some other proper and pertinent way.

We may add, that if the service of the summons had been insufficient, this was no cause for dismissing the proceedings. A motion to allow the sheriff to amend his return might have been sustained, if the facts had warranted it.

In any view of the matter, the plaintiff was entitled to an *alias* summons, if the return for any cause was insufficient.

The exception based upon the supposed discretion of the clerk, not reviewable, has no foundation. The *clerk* has no jurisdiction of the proceeding; the Superior Court had jurisdiction of it, and the clerk had authority to do certain things in and about it, as and for the court, that stood as the action of the court, unless either party to the proceeding should except to it, and appeal to the judge of the court at Chambers or in term, in which case the judgment of the judge would become that of the court, unless his judgment should, on appeal to this court, be reversed or modified, in which case, the judge would be required to accept and act upon the judgment of this court as the proper one in the Superior Court. *Brittain* v. *Mull*, 91 N. C., 498.

The judge *remanded the case* to the clerk of the Superior Court with directions. This was error. The proceeding was already in the Superior Court; the court could not remand the case to itself! The court ought to have reversed the judgment dismissing the proceeding entered by the clerk as and for the court, and the clerk having entered the judgment of the judge as that of the court, ought to have proceeded according to law in the proceeding in the Superior Court. *Brittain* v. *Mull*, *supra*.

The order of the judge must be set aside, and he will give judgment reversing that entered by the clerk; and the clerk having entered his judgment, will proceed according to law.

It is so ordered.

D. W. STRATFORD v. L. E. STRATFORD.

Appeal—Continuance—Divorce—Insanity.

1. Where pending an action for divorce, the defendant becomes insane, the cause will be continued as long as there is a hope of the defendant's regaining reason.
2. In case of hopeless insanity, it is intimated that the plaintiff will be allowed to proceed with the trial.
3. Where an order grants a continuance not merely for the term, and for some incidental reason that is an adjudication which arrests the action for a length of time, it affects a substantial right, and can be appealed from.

This was a CIVIL ACTION for divorce, heard before *Graves, Judge,* at July Special Term, 1884, of RANDOLPH Superior Court.

Upon the facts appearing in the opinion of this court, His Honor continued the cause until Fall Term, 1886. From this order the plaintiff appealed.

Mr. M. S. Robins, for the plaintiff.
Messrs. Scott & Caldwell, for the defendant.

SMITH, C. J. This action is to obtain a dissolution of the bonds of matrimony, and the complaint charges one act of adultery, specifying time and place, and its repetition in general terms, afterward committed by the defendant with the same person.

The process was returnable to Spring Term, 1883, at which term a verified complaint was put in by the plaintiff, to which

there has been no answer. At a special term of the court, held in July, 1884, counsel for the defendant moved for a suspension of proceedings, suggesting her lunacy, and proposed to prove the fact by an inquisition taken in due form of law on the 16th day of July, 1883, and an order for the appointment of a guardian.

It was not denied that the defendant had become and was insane, and that she had been removed to, and then was in the lunatic asylum near Raleigh. Thereupon an order was entered, which, after reciting the inquisition and finding of the jury and the removal of the lunatic to the asylum, proceeds as follows:

"It is therefore ordered that the plaintiff be not allowed to proceed further in the prosecution of this action, and that the trial of the same be stayed until the Fall Term, 1886, of this court, unless the defendant shall become restored to her reason."

The plaintiff's appeal calls in question the legality of this order, and this is the only point before us.

Ordinarily, a continuance granted or refused rests in the breast of the Court, in the exercise of a just discretion, and cannot be reviewed in the appellate court. The ruling here is not a mere continuance of the cause for some present reason, but is an adjudication which arrests action for two years, during which nothing can be done in its further prosecution, unless, meanwhile, the defendant shall shall come to her right mind.

The ruling is, in substance, that the cause should not be tried against one whose reason has been dethroned, and who is thus rendered incapable of making answer to the charge, or aiding counsel in the conduct of her defence, in a matter so deeply affecting her well-being, and her status as a married woman, until at least a reasonable time is allowed for her restoration and recovery. We are not thus called on to decide whether the action should be altogether defeated if the insane condition becomes permanent and incapable of relief, but whether while there is any prospect of recovery or material improvement, the progress of the action should be stayed for a reasonable period to await that result.

This is all that the order undertakes to do. Mr. Bishop, in his work on Marriage and Divorce, mentions two cases decided in the English courts, where a peremptory stop was put to the proceeding when insanity has supervened. Sections 305, 305a, 305b.

In the one case, Sir C. Creswell, sitting as Judge Ordinary in the Divorce Court, refused to allow the husband to procure a divorce for the adultery of his wife, committed before her lunacy, remarking, "It will be a hard case upon the petitioner, if he is not allowed to proceed. But it will also be a hard case upon the respondent, who is not able to take part in the proceedings, if he is allowed;" and he concludes, "I cannot allow the petitioner to proceed in the present suit."

In a later case, cited also by Mr. Bishop, section 305a, *Mordaunt* v. *Mordaunt*, 2 P. & M., 103 (we have not means of access to the report), it was held by two of the three judges, that the case should not go on while the defendant was insane, yet they were unanimous in the opinion that so long as a prospect of recovery remained the case should be continued.

The author, however, arrives at a conclusion upon a review of the subject, which is announced in these words: "Therefore, if one in a lucid state has committed a breach of matrimonial duty, and the breach is not known to the other party, until the delinquent becomes insane, there would seem to be no special reason why, under proper safeguards, to prevent injustice from being done to a person who cannot exercise any discretion in the defence, the suit should not be permitted to proceed." Section 306.

And so rules the court in *Rathbun v. Rathbun*, 40 How., Pr. 328.

In this unsettled condition of the practice, we do not feel called upon to say more than that we are inclined to the opinion that in case of a permanent and incurable loss of mind, the plaintiff ought not to be debarred his right to have the marriage relation dissolved for an act of adultery committed by the wife when sane and responsible for her acts. Supervening insanity, it would

seem, ought not to be allowed to absolve the faithless wife from the consequences of her own voluntary disregard of her marital obligations.

But at the same time we are clearly of opinion that no undue haste should be permitted, and that the suit should await a reasonable time, till hopes of the delinquent's restoration have vanished. The order in this case was entirely proper.

We therefore sustain the ruling of His Honor, and declare there is no error. Let this be certified.

No error. Affirmed.

W. H. HARPER and others v. JESSE F. HARPER.

Partition—Advancement.

1. When a father, having several children, conveys a valuable tract of land to one for a nominal consideration, the presumption is, that he intends it as an advancement and to be accounted for as such.
2. Either party may introduce evidence to support or rebut this presumption.
3. The order remanding the case to the Clerk was unnecessary. The whole case was in the Superior Court, and it was his duty to enter the order for partition as soon as the issue was tried by the jury.

(*Jones* v. *Spaight*, 2 Murph, 89; *James* v. *James*, 76 N. C., 331; *Melvin* v. *Bullard*, 82 N. C., 33; *Wilkinson* v. *Wilkinson*, 2 Dev. Eq., 376; *Dixon* v. *Coward*, 4 Jones' Eq., 354; *Brittain* v. *Mull*, 91 N. C., 498; *Strayhorn* v. *Blalock*, *ante* 292, cited and approved).

SPECIAL PROCEEDING, begun in the Superior Court of Greene county and tried at July Special Term, 1884, before *MacRae, Judge.*

Verdict and judgment for plaintiff; appeal by defendants.

Messrs. Nixon & Galloway for plaintiffs.

Mr. W. C. Monroe for defendant.

MERRIMON, J. With the exception of James Moore, James N. Cobb and William A. Darden, the plaintiffs and the defendant are the only heirs-at-law of Charles H. Harper, who died intestate and seized of considerable real estate. This action is brought, to have partition thereof made, according to law.

In his life-time, the said Charles H. Harper, on the 11th day of January, 1877, conveyed to his son, the defendant, by deed of bargain and sale, the fee-simple in the tract of land in the deed mentioned and specified. The consideration recited in it, is one dollar, and it contains covenants of seizin and general warranty.

The plaintiffs contend, that the father and bargainor in the deed, conveyed the land to his son as an advancement, and that there was no valuable consideration therefor, except the nominal sum of one dollar, and that the defendant must, in the partition of the lands, be charged with, and account for, such advancement.

The defendant, on the contrary, contends that the land was not conveyed to him as an advancement, but for a substantial and valuable consideration. On the trial the court submitted to the jury the following issue, to which they responded in the affirmative, to-wit: "Did Charles H. Harper settle upon and advance to the defendant Jesse F. Harper, his son, the real estate conveyed by him to said defendant, as mentioned in the pleadings, to be accounted for by the said Jesse in the division of his said father's lands?"

If a father, in his life-time, having more than one child, conveys land to one of them in consideration of love and affection, or for a nominal consideration, as for a dollar, the land being of considerable value, and die intestate, the presumption is, that he intended the land thus conveyed as an advancement to such child, that is, that he intended, and the statute of this State requires, that the child so receiving the land, shall, after the death of the father, in the settlement of his estate, account for and be charged with it, whether it consists of real or personal property or both, as prescribed by the statute. *The Code, secs.* 1281, 1483, 1484.

The presumption in such case is, nothing else appearing, that the father intends that each and all of his children shall share equally in his estate. It is not to be supposed that naturally a father will prefer one of his children above another; in the orderly course of nature, he is supposed to regard and treat all alike, and as having equal claims upon his affection and bounty. *Jones* v. *Spaight*, 2 Murph., 89; *James* v. *James*, 76 N. C., 331; *Melvin* v. *Bullard*, 82 N. C., 33.

It oftentimes, because of one consideration or another, happens otherwise, but, in the course of business affairs and things, this must be made to appear.

In this case, the natural inquiry was, whether or not the father *intended* the land conveyed to his son, the defendant, as an advancement.

It was competent for the plaintiffs or the defendants, to introduce any evidence pertinent for this purpose. The appellees had the right to put in evidence the deed from the father to the son, and it appearing from it, that the land conveyed by it consisted of two hundred and fifty acres, and that the consideration recited in it was nominal—one dollar—the presumption was, that the land was intended as an advancement to the appellant. The appellees might strengthen the *prima facie* case thus made, by other appropriate evidence tending to show the intent of the father. On the other hand, the appellant had the right to introduce evidence pertinent to show that he paid for the land a substantial valuable consideration, or, that his father intended to convey it to him absolutely and free from all obligations to account for it as an advancement. The father had the right to give the land to his son, if he saw fit to do so, discharged of all obligation to account for it as an advancement.

It was contended on the argument, that the parol evidence introduced by the appellees, was incompetent, *because* its effect was to explain and contradict the deed. This is a misapprehension of the purpose of the evidence. The deed was not in question at all. There was no purpose to contradict, change or modify

its terms, or to change its meaning in any degree. Its office was to convey the title to the land.

The evidence was introduced in respect to a matter outside of and independent of it; it was intended to show with what intent the father and bargainor made it, apart from the purpose to convey the land to his son. It was put in evidence, not to prove title, but to show a particular intent on the part of the maker of it, in another respect distinct from it. If the deed had recited a substantial, valuable consideration, as the deed did in *Wilkinson v. Wilkinson*, 2 Dev. Eq., 376, it would not have served the appellee's purpose as evidence; in that case, the presumption would have been that the land was not conveyed to the son as an advancement, but for a valuable consideration. *Jones v. Spaight, supra; Dixon v. Coward*, 4 Jones, Eq., 354; *Adams Eq.*, 102, and note 1.

The declarations of the defendant, while he was in possession of a tract of land belonging to his father, and for which he had no deed nor contract of purchase, as to the quantity he had in possession, were incompetent, because they were irrelevant and immaterial; whether he had possession of much or little land could not throw light upon the question at issue.

The appellant introduced evidence to show that his father permitted him to take possession of and improve a tract of land, but did not convey the same to him, or agree to do so, in writing, and he insisted that the deed mentioned was made in consideration of the improvements he made upon that land and his surrender of the possession of it.

It was competent for the appellees to show by a witness, that he was a tenant of the appellant on the land he so occupied and improved, and cleared about thirty acres of it for the appellant, and paid no rent for it the first year, after clearing it, but paid for it for the second and third years one fourth of the crop produced by him.

This evidence tended to show that, in fact, the appellant had realized from the land ample compensation for the improvement

he had made upon it, and what he did thereupon constituted no part of the consideration for which his father conveyed the land to him. The evidence was relevant as going to show that the contention of the appellant as to the consideration for the deed, not recited in it, was unfounded.

The order of the court, remanding the case to the clerk, with directions to proceed according to law, was unnecessary, because the whole case was in the Superior Court, and when the issue was passed upon by the judge, it was the duty of the clerk to proceed according to law, without any orders, that is, he ought to have proceeded to enter the order, and take such action as and for the Court as the statute prescribed in such cases. *Brittain v. Mull*, 91 N. C., 498; *Strayhorn v. Blalock*, *ante* 292.

No error. Affirmed.

W. A. SMITH v. B. V. SMITH.

Contempt for Failure to pay Money into Court.

Where a party is ordered to pay money into court, or be attached for contempt in failing to do so, and swears that after every effort it is out of his power to pay it, the rule for contempt will be discharged; but where, on a return to the rule, he does not swear that he cannot borrow the money, and does show that he has some personal property, although exempt from seizure under final process for the payment of debts as personal property exemptions, the rule will not be discharged.

(*Kane* v. *Haywood*, 66 N. C., 1; *Pain* v. *Pain*, 80 N. C., 322, cited and approved).

RULE on the defendant to show cause why he should not be attached for contempt for not paying certain money into court which came into his hands as receiver, heard at Spring Term, 1884, of JOHNSTON Superior Court, before *Philips, Judge.*

His Honor discharged the rule, and the plaintiff appealed.

The facts are fully set out in the opinion.

Mr. T. M. Argo, for the plaintiff.

No counsel for the defendant.

SMITH, C. J. Pending an action brought in the Superior Court of Johnston, by the Solicitor, upon the guardian bond of W. F. Atkinson, to recover and secure the trust estate in his hands, the defendant B. V. Smith, was appointed receiver to take charge of it, and he entered into bond, with surety for the discharge of his duties as such. By virtue of his said appointment, moneys were received, and upon a reference and report, there was found to be due from him on October 15, 1882, the sum of $\$268\frac{25}{100}$, whereof $185 was principal, and he was adjudged to pay the same into court.

Failing to do so, the present proceeding, at the instance of his surety, the appellant, was instituted and a rule obtained requiring him to show cause why he should not be attached for contempt, in disobeying said orders.

In response, and as showing cause, the following answer was put in: "B. V. Smith, in answer to the rule to show cause in this action, granted at Fall Term, 1883, says that he has not complied with the order made at Spring Term, 1883, to pay into the court the balance in his hands, because he has not been able to do so; that he has been, ever since said order was made, and for some years prior thereto, insolvent; that he owns no property except a little personal estate of less value than five hundred dollars; that he has a wife and two children to support; that he is steward of the Eastern Insane Asylum near Goldsboro, and has been for over two years; that his entire time is required in the discharge of his duties as such steward; that he receives a salary of five hundred dollars, payable monthly, viz.: forty-one dollars and sixty-six and three-fourths cents, which is scarcely sufficient, with all the economy he can use, to maintain his family; that he has not been able to lay by and save any money from his salary; that he disavows any intention to disregard the mandate of the court, or to resist its authority, and is utterly unable to comply with said order of Spring Term, 1883.

"Whereupon he prays hence to be dismissed. B. V. SMITH."

"Sworn and subscribed before me, this 31st March, 1884.

20 L. R. WADDELL, C. S. C."

The court, upon the hearing, adjudged the answer in return to the rule to be sufficient, and discharged it. From this ruling the surety appeals.

"When a man is ordered to pay money into court," says Pearson, C. J., "and swears that, after every effort, it is out of his power to pay the money or any part of it (in the absence of any suggestion to the contrary), that is an end of the proceeding, for the court will not require an impossibility, or imprison a man perpetually for a debt, he having purged himself of the contempt." *Kane* v. *Haywood*, 66 N. C., 1.

So it was said in a later case that "inability to comply with an order, unlike the commitment for costs, is an answer to a rule to enforce it, and, when made to appear, discharges from its obligation." *Pain* v. *Pain*, 80 N. C., 322.

The appellee has not, in our opinion, fully met the requirements of the rule. He does not attempt to excuse his appropriation to his own use of the funds which he held in trust, and was bound to keep secure. He does not say that he has not credit to enable him to borrow an amount sufficient to replace what he has taken, and he seeks to hold on to what personal estate he has, as an exemption, which he ought not thus to apply. It is true this fund is not accessible to final process for debt, and is under his control, yet it is not more sacred than that which he has converted to his own use. This does not present a case of such inability as to entitle the appellee to exoneration and a discharge.

We do not, therefore, concur in the opinion, that upon this showing the appellee has relieved himself from liability to attachment for contempt, and we must declare the judgment erroneous.

Let this be certified for further proceedings in the court below.

Error. Reversed.

N. RHEINSTEIN, to use of JULIUS FREEBURG v. BIXBY & KATZ, et al.

Injunction—Receiver—Fraudulent Conveyance.

1. Where the applicatton for a receiver is based upon the alleged fraudulent character of a conveyance, the question of whether or not the deed is fraudulent, belongs to the final hearing of the cause, and the alleged fraud will only be considered on such motion for a receiver, as showing grounds for the protection of the fund until the final hearing.
2. In such case, a receiver will not be appointed, unless it is manifest that the fund is mismanaged and in danger of being lost, or where the insolvency of an unfit trustee is present or imminent.

(*Levenson* v. *Elson*, 88 N. C., 182, and *Thompson* v. *McNair*, Phil. Eq., 121, cited and approved).

MOTION for an injunction and receiver, in a case pending in MECKLENBURG Superior Court, heard by *Shipp, Judge*, at Chambers.

His Honor refused the motion, and the plaintiffs appealed.

Messrs. Jones & Johnston, Batchelor & Devereux and *Geo. F. Bason*, for the plaintiffs.

No counsel for the defendants.

SMITH, C. J. The defendants, Bixby & Katz, on July 10th, 1883, purchased from the other defendant, Kendrick, his stock of spiritous liquors, wines, and the like, with the bar-room fixtures, for the sum of $4,500; whereof they paid in money $1,000 and gave their notes in different sums and maturing at different periods in the future, the last, of $1500, on the first day of January thereafter.

To secure the deferred payments, they at the same time reconveyed the goods to the vendor by deed of mortgage, with the usual proviso, for the mortgagee to repossess himself of the goods, and make sale of them upon any default on the part of the mortgagors, and a stipulation that they should dispose of the stock at retail, and from time to time replenish it, so that it should be sufficient security for what was due.

On the 27th day of the same month the plaintiff Rheinstein also sold a bill of liquors to the firm for $\$394\frac{85}{100}$, and took their note and acceptance for different parts thereof, payable respectively at 60 and 90 days. The note and draft, before maturity, were assigned for value to the plaintiff, Julius Freeburg, who afterwards sued and recovered judgment on the note, and caused the draft to be presented and protested for non-payment.

Bixby and Katz have since contracted other debts in the prosecution of their business, but at the time of making the mortgage owed no other debt except that therein provided for and due to Kendrick. They were allowed to remain in possession of the goods and dispose of them as their own until early in December of the same year, when the mortgagee, by reason of their default, again took possession in order to sell, soon after which, on the 17th day of the same month, this suit was instituted.

It is not denied that Bixby and Katz are entirely insolvent and unable to pay from any other resources of their own, their indebtedness to the plaintiffs or other unsecured creditors.

Two days after the issue of the summons, and the day preceding its service, the plaintiffs obtained an order from the judge, requiring the defendants to show cause before him on the 27th of the month, why a receiver should not be appointed to take possession of the property, and the defendants be restrained from disposing of it until the hearing. In reply to the rule the defendants filed their answers to the complaint, and the application was heard upon them alone, used as affidavits, and the court refused to appoint a receiver or order the issue of an injunction as moved, and the plaintiffs appealed.

The controversy developed in the pleadings, is as to the *bona fides* of the transaction between the defendants, terminating in the giving the mortgage, and the use to be made of it for the protection of the mortgagors in the prosecution of the transferred business. The plaintiffs insist that the intent was to defraud future creditors, and such intent, if not apparent upon the face of the deed is shown in the use made of the conveyance afterwards.

The defendants expressly deny this imputation upon their good faith in entering into an arrangement that promised to be of mutual advantage to both and when there were no other creditors injuriously affected by it. The distinct issue is thus made as to the fraudulent character of the deed, whose determination belongs to the final hearing of the cause, and can only be considered at this stage of it, as furnishing grounds for an order for the security of the fund until the rights of the contesting parties are ascertained and adjudged. But the goods have been restored to the mortgagee for the purpose contemplated in the deed, and no sufficient reason is assigned for their withdrawal from his rightful custody.

It is not shown or suggested that he is not able to answer any and all demands that may be established against him, should the deed be successfully assailed for fraud and be declared invalid, for the entire value of the goods, or for any surplus in his hands after discharging the mortgage debt, if the plaintiffs fail to establish their charge.

As was said in *Levenson* v. *Elson*, 88 N. C., 182, a case in its essential features so like the present that we may well be content to refer to it as a decisive authority, "we are not called upon to pass on the validity of the assignment in this collateral inquiry and upon mere *ex parte* affidavits; we interpose only where it is manifest that the fund is mismanaged and in danger of being lost, or where the insolvency of an unfit trustee is present or imminent."

And, again, "The rule is quite as well settled, that, unless in case of threatened irreparable damage or loss of the fund, it will be suffered to remain in the hands of the party who in law is entitled to its custody and care"—citing *Thompson* v. *McNair*, Phil. Eq., 121.

We understand the appeal to be taken from the denial of the motion for a receiver and an injunction, while the judgment in the record is for a dissolution of a preceding restraining order, which was not, in fact, ever granted.

In view of this inconsistency we are constrained to consider the subject-matter of the appellants' complaint to be the failure of the judge to make the orders asked.

There is no error. This will be certified that the case may proceed in the court below.

No error. Affirmed.

ARTHUR COLLINS, Executor, et als. v. HENDERSON FARIBAULT.

Appeal—To What Term Must be Taken—Certiorari.

1. An appeal must be brought to the term of the Supreme Court that comes next after it was taken.
2. If an appeal is not brought to the proper term of the Supreme Court, on good cause shown, a *certiorari* will be granted.

MOTION by the defendant to dismiss an appeal from the Superior Court of CHOWAN county, heard at February Term, 1885, of the Supreme Court.

The facts appear in the opinion.

Messrs. Reade, Busbee & Busbee, for the plaintiffs.
Messrs. Pruden & Vann, for the defendant.

MERRIMON, J. The appellees move to dismiss the appeal in this case upon the ground that it was not brought to the term of this Court that came next after it was taken.

It appears that the appeal was taken at the Spring Term, 1884, of the Superior Court of Chowan county; that it was not brought up to the last October Term of this Court, nor until the 25th day of January of the present year, when it was docketed here.

It is settled that an appeal must be brought to the term of this Court that comes next after it was taken, or if for any cause it does not then come up, some appropriate steps must be taken during that term to bring it up, otherwise the appeal will be lost entirely, unless, for good cause shown, it shall afterwards be brought up by the writ of *certiorari*.

It appears from a memorandum in the record that time was granted by the Court until the first day of the last October Term of this Court, within which to perfect the appeal, and this leave was granted by consent of parties. It is insisted that therefore the appeal stood over and properly came to the present term of this Court. If, by consent, such an arrangement could be made (and this is not conceded), it is very plain that it was contemplated by the Court in granting the leave, that the appeal was to be perfected and brought up to the last October Term, when in the order of procedure, it ought to have been brought up.

The appellee had a right to have the appeal heard and determined at the last term, unless for good cause it had been continued. As it was not then brought up, he now has the right to have the appeal dismissed. Neither the terms nor the spirit of the leave given to perfect the appeal within the time specified, were complied with, nor were the requirements of the law observed.

Indeed, the undertaking upon appeal was not given until the 25th of January of the present year. The motion to dismiss the appeal must, therefore, be allowed.

Appeal dismissed.

R. L. McLURD and others v. JAMES CLARK and others.*

Evidence—Declarations.

When a deed is put in evidence simply as a declaration, it is subject to the same rules that apply to other declarations, one of the most important of which is that when a declaration is offered in evidence by one party, the opposite party has the right to all that was said at the time in the same connection.

This was an ACTION for the recovery of land, tried before *MacRae, Judge*, and a jury, at Spring Term, 1884, of LINCOLN Superior Court.

The plaintiffs claimed title from Nathaniel McLurg and offered in evidence a grant from the State to Nathaniel McLurg, dated May 17, 1789, the boundaries of which are marked X Y Z on the plat and covering the "*locus in quo*," and proved that they were in possession of the land within the letters X L K.

It was admitted that the names McLurg and McLurd were the same. The plaintiffs offered in evidence the will of Nathaniel McLurg devising the land to James McLurg, and proved that they were the heirs of James McLurg.

It was in evidence that Nathaniel McLurg died in 1829.

The defendants offered in evidence a deed from Lawson Henderson to John Cathy, dated in 1825, represented on the plat by the letters L K I D C B A and back to L. Defendants claim under John Cathy and connect themselves with his title, and offered testimony tending to show that John Cathy and those claiming under him cultivated from forty to sixty acres of that part of the Cathy tract below the line F G for sixty years and up to the present time claiming the same adversely under the said title. The defendant testified that he had been in possession of the said tract up to the line L K over thirty years. That the land within the boundaries L K F G (which is the land in dis-

*The reporter considers it unnecessary for an understanding of the opinion to print the plat accompanying the record.

pute) is wood land. That he has been using it for timber of all kinds, rails, firewood, saw logs. That the corner G runs down into the defendant's field which he has had cleared for twelve or fifteen years.

The defendant offered in evidence a deed from J. W. McLurd to one Mullen for one acre of land lying above the line L K which called for the Cathy line. (This deed was offered only as the declaration of McLurd, one of the plaintiffs, as to the location of the Cathy line claimed by the defendants as the line L K).

The defendant offered in evidence a deed from Nathaniel McLurg to Lawson Henderson, dated in 1821, and testimony tending to show that said deed covered the same land as the Cathy deed and extended up to the line L K.

The plaintiff in reply offered evidence tending to show that the deed from McLurg to Henderson only extended to the line F G and not to L K, and so did not cover the *locus in quo*, also that the field above the line F G cleared by the defendant was only about one-half acre, and had been extended over the line F G only about a year before the suit was begun; and plaintiff proposed to ask one Mullen, a witness for the defendant, whether or not J. W. McLurd at the time he had made the deed for the one acre to said Mullen had stated that he did not know where the Cathy line was. Defendant objected. Objection sustained, and plaintiff excepted.

The plaintiff asked the Judge to charge the jury, "That the declaration in the deed of J. W. McLurd calling for the Cathy line does not operate to carry the land to Cathy or his heirs, and does not estop McLurd from afterwards disputing the Cathy line." This was given with the addition, "It is only some evidence which you may consider in reaching your conclusion where the lines are." To this addition plaintiff excepted. The plaintiff asked the following charge: "Adverse possession must be an open notorious possession, such as cultivating the land, clearing and fencing the same, building houses, &c., on the land." This charge was given, "or using it habitually and not simply occa-

sionally for getting timber, fence-wood or fire-wood." To this addition plaintiff excepted. The presiding Judge had already instructed the jury upon this point, "that actual possession, adverse possession, is not simply the occasional cutting of wood for fences, fires or timber, but it must have been the habitual use of the land under visible lines or boundaries in the usual way in which land is used by its owners." The jury returned a verdict in favor of the defendants. Rule for a new trial. Rule discharged. Plaintiffs appeal to Supreme Court.

Messrs. Hoke & Hoke, G. F. Bason and *Batchelor & Devereux* for plaintiffs.

Mr. W. P. Bynum for defendants.

ASHE, J. (after stating the facts). The land in controversy was a small part of a large tract granted to Nathaniel McLurd in 1789, and it was in shape a rectilinear triangle having its base at the south of the tract, running from east to west and culminating in an acute angle at the north.

The plaintiffs claim the land in controversy by descent from James McLurd, who claimed his title by devise from Nathaniel McLurd.

The defendant claimed the land under a deed of conveyance from Nathaniel McLurd, dated in 1821, to Henderson, and a deed from Henderson to Cathy, dated in 1825.

The *locus in quo* lies between two parallel lines running across the tract from east to west, which were represented on the plot by the line L K, lying nearest to the apex of the triangle, and the line F G further south of that.

The plaintiffs had been for many years in possession of the tract lying north of these lines, and the defendant and those under whom he claimed for over forty years, in that part of the triangle lying south of those lines.

The land lying between the lines L K and F G was woodland—upon which there had been no clearing until about one year before the commencement of this action. The contention

between the parties was, whether the defendant's deed covered the *locus in quo*.

The plaintiffs insisted that Nathaniel McLurd's deed to Henderson only went as far as the lower line F G, and he had no right to convey any land lying north of that line. But the defendant contended that the deed to Henderson covered the land lying north of the line F G and up to the line L K, but if that was not so, he and those under whom he claimed had had adverse possession of the lappage up to the line L K, under the Cathy deed, for more than thirty years, by using it for getting timber of all kinds, rails, firewood and saw-logs, and to show that the boundaries of his land embraced the *locus in quo*, offered in evidence a deed executed by J. W. McLurd to one Mullen, conveying the land lying above the line F G, which called for the Cathy line. This deed was offered only as a declaration of McLurd, one of the plaintiffs, as to the location of the Cathy line, claimed by the defendants as the line L K. The defendants, in reply to that evidence, proposed to ask Mullen, a witness for defendant, whether or not J. W. McLurd, at the time he made the deed to him, had not stated that he did not know where the Cathy line was.

To this evidence the defendant objected and the objection was sustained by the Court.

In the refusal to admit this evidence we think there was error.

The deed to Mullen was offered simply as a declaration, and as such is subject to the same rules that apply to other declarations, one of the most important of which is, that when a declaration is offered in evidence by one party, the opposing party has the right to all that was said at the time in that connection.

There were some other points raised in the case, but as we are of opinion that His Honor was in error in excluding this evidence it is useless to consider them.

There is error. The judgment of the Superior Court is reversed and this must be certified to that court that a *venire de novo* may be awarded.

Error. Reversed.

M. MOORE v. S. GRANT.

Consent Judgment—Res Adjudicata.

1. A judgment by consent cannot be set aside by one of the consenting parties when an execution issued thereon has been satisfied.
2. After a motion to recall an execution and set aside a judgment has been once heard and refused upon full evidence, it becomes *res adjudicata.*
3. Where a consent judgment was entered which provided that a writ of possession for certain land was to issue, unless before a specified day referees appointed in the judgment shall ascertain the amount of purchase money due and allot to the defendant the land purchased by him, if the referees fail to act, the remedy is by a motion to modify the judgment by extending the time in which they may act, and not by a motion to set aside the judgment.

This was a motion to recall an execution and set aside a judgment, heard before *Shepherd, Judge,* at Spring Term, 1884, of DUPLIN Superior Court.

His Honor refused the motion, and the defendant appealed.

The facts appear in the opinion.

Messrs. Faircloth & Allen for the plaintiff.

Messrs. H. F. Kornegay and *G. V. Strong* for the defendant.

SMITH, C. J. The subject matter of this controversy was before us, with a reversal of parties, at February Term, 1883, *Grant v. Moore,* 88 N. C., 77, upon the application of the defendant Grant for an injunction to restrain the plaintiff from enforcing his writ of possession then in the sheriff's hands. The order for an injunction was refused, upon the ground that the original action was depending, and the remedy, if any, must be sought by a motion in the cause and not in an independent suit. The cause is now brought up from a refusal of the judge to set aside the judgment and execution, and restore the parties to the condition occupied previous to the rendition of the judgment, or to afford the defendant opportunity to have the reference provided for therein still acted on.

The judgment was entered by consent of parties that it should be such "*as he* (the Judge) *should deem proper*," at a Special Term held in July, 1882, in form as follows:

"It is adjudged that the plaintiff recover against the defendant the possession of the premises in the pleadings described, and against him and his surety the sum of sixty dollars and the costs of this action; the execution upon this judgment to be stayed for ninety days from the adjournment of the court, and subject to these additional orders:

"(1) It is referred to T. B. Pierce and A. G. Mosely and to an umpire of their choice, if they disagree, to ascertain the amount at which the defendant Grant purchased the hundred acres from the plaintiff; calculate the interest from the day of purchase, giving credit for the two hundred dollar bonds purchased by Grant from Parker, and all payments since made by Grant, whether to Moore in principal or interest, in any judgment for rent.

"(2) That they ascertain the value of the rent of the land cultivated by defendant, lying outside the lines of the lands contracted to be bought by him up to the day of reference; that they fix upon a line of said tract, allotting to Grant two-fifths of the tract, including the dwelling-house and curtilage, with two-fifths in value of the cleared land and of the wood-land; that upon the payment in money of the sum so found to be due on the purchase, and the rent outside the land purchased (no rent being due on that), then the plaintiff is to execute to said Grant, or to his assigns, a deed for an absolute estate in the lands set apart; and only the costs in the action are to be collected, and no writ of possession is to issue.

"But if the defendant Grant fails or refuses to pay such award by said referees before the ninety days expire, then a writ of possession and execution shall issue upon the judgment herein first declared."

During this interval the referees failed to act, though both were present in court when the appointments were made and gave their consent.

And thereupon, on December 11th of the same year, the plaintiff sued out his writ of possession. While it was in the sheriff's hands, a temporary restraining order arresting its immediate execution, on the 22d day of the next month, a motion was made before the judge to set aside the writ, on the hearing of which, with affidavits used on both sides, it was refused and no appeal therefrom taken. After this judgment the writ was executed, the defendant removed and the plaintiff put in possession of the premises.

Subsequently, one of the referees went upon the land, the other refusing to co-operate, and undertook to perform the duties imposed upon both, making the survey and allotment, and ascertaining the unpaid residue due from the defendant. This sum was tendered to the plaintiff, and, being refused, was deposited in the clerk's office, where it remained when the application, now under review, was made for setting aside the original judgment and writ of possession. The denial of the motion, for the reasons assigned by the judge, that the judgment was entered by consent and the execution had fulfilled its office, to which may be added, a similar motion as to the execution, after full evidence, had been before refused, and the matter presented in no new aspect affecting the merits had become *res adjudicata*, was proper.

The remedy appropriate to the case has been misconceived. The failure of the referees to proceed in the performance of duties they had voluntarily assumed, is explained in the affidavit of one of them, Thomas B. Pierce, and is in no manner attributable to the defendant. As the judgment was in the nature of a decree for a specific performance, and time was no such essential part of it that it could not be enlarged when sufficient reasons existed for the failure of the referees to act within the period prescribed, we think it was in the power of the court to grant relief in its extension, so that the referees might still go on in the discharge of their assumed duties. Suppose both referees had died, or refused to act, or for any other cause the reference to them became impracticable, and without remissness in the defendant, is it not mani-

fest the judge could and ought to modify the judgment in this particular and not allow a forfeiture of the defendant's rights?

The judgment for the recovery of possession has somewhat the relation of a penalty to the conditions of a bond, and is intended to secure a compliance with the terms annexed, and relief would seem to be open to the defendant, not in default, on the same terms.

But this remedy was not sought at the proper time and hence it is not available and open. We must sustain the action of the court in its present ruling, while the defendant may perhaps upon the facts, if found as suggested, have had an equity for relief. The judgment must be affirmed.

No error. Affirmed.

A. J. SMITH v. B. H. FITE.

Evidence—Locating Land.

1. Where a party introduces a deed in evidence, which he intends to use as color of title, he must prove that its boundaries cover the land in dispute, to give legal efficacy to his possession.
2. It is error to allow a jury on no evidence, or only on hypothetical evidence, to locate the land described in a deed.

This was a CIVIL ACTION for the recovery of land, tried before *Gilmer*, *Judge*, and a jury, at Fall Term, 1883, of GASTON Superior Court.

There was a verdict and judgment for the defendant from which the plaintiff appealed. *

Messrs. G. F. Bason, Batchelor & Devereux and *Hoke & Hoke*, for the plaintiff.

Mr. W. P. Bynum, for the defendant.

*The reporter deems it unnecessary to print the plat which accompanies the record, as the decision of the Court turned upon other points.

SMITH, C. J. The case prepared on the appeal is so obscure in its statement, and the accompanying plat or map of the survey so deficient in explanation upon the evidence, that we may fail to understand the facts and the exceptions to the rulings intended to be reviewed, and in consequence be unable to reach a satisfactory solution of the controversy.

The plaintiff derived title to the territory circumscribed by the lines A, B, C, D, E, F, G, H, I, in the plat, under a deed executed in March, 1856, by one Hoffman to Eliza Smith, his grandmother, and successive descents to his father and to himself, accompanied by an alleged continuous adversary occupation since by the successive owners up to the time of the defendant's entry, made shortly before the bringing the action. The title to a larger tract, of which that described in the deed forms part, had been divested out of the State by a grant issued in the year 1750.

The area in dispute and held by the defendant is represented in the space between the lines 1, 2, 3, 4.

The territory described in the Caldwell deed lies within the boundaries 5, 6, 7, 8, 9, 10, 11, 12, and these do not reach the Hoffman lines (marked A, B, C, D, E, F, G, H, I), while they run a nearly parallel course, and leave an intervening space covered at one point by the disputed part. This deed is made to one Beasley, and bears date in 1842. The defendant also exhibited in evidence a deed from one Gingles, by whose name the land therein conveyed is known, to Jasper Stowe, also of date anterior to that of Hoffman, and under which the defendant claims in connection with a long adversary occupation by preceding owners and himself.

Each party shows an occupancy and cultivation up to a divisional fence by the respective claimants, neither passing beyond that limit.

The proper location of this fence, long since removed, became thus material in ascertaining the extent of their respective possessions under the several deeds, or with them in perfecting title.

The obvious result of this separate occupation of land embraced in the Hoffman and Gingles deeds, and common to both, up to and on either side of the divisional fence, is to vest the title in each to so much as is measured by their respective possessions, and this without regard to seniority in the deeds. It was necessary, therefore, for the defendant, in using the Gingles deed as color of title, to ascertain its boundaries so as to give legal efficacy to his possession for the prescribed period. The lines of this deed are not given, nor so far as appears have they been surveyed and located. On the contrary the surveyor, from whom a hypothetical opinion was obtained resting upon no definite data, and in itself too vague to furnish material aid in the location, testifies that no papers were shown him "by which he could run the Gingles or any other lines," and hence the evidence was absent that the defendant's possession was under color or other than a trespass. It is equally apparent that the disputed territory is within the lines of the Hoffman deed as shown in the plat, and this affords color of title sufficient, with the occupation, to put the estate in the plaintiff. There was, therefore, error in permitting the jury, without evidence, to undertake to locate the land contained in the Gingles deed, and to render a verdict based upon a location wholly conjectural, yet requisite to such finding. It is possible we may misapprehend the facts, but such we understand them to be as they appear in the record.

Without adverting to other exceptions or expressing an opinion as to their legal sufficiency, we are constrained, for the erroneous instruction pointed out, to give the appellant a trial before another jury.

Let this be certified to the end that the verdict be set aside and a *venire de novo* awarded.

Error. Reversed.

GABRIEL MARSHALL v. THE WESTERN NORTH CAROLINA RAILROAD COMPANY.

Corporations—Stockholders.

1. Where the State is a stockholder in a railroad company, it is bound by the provisions of the charter in the same manner as an individual. It has no advantage as a stockholder on account of its sovereignty, for by becoming such, it lays aside its character as sovereign, and places itself on a footing of equality with the individual stockholders.
2. The property of a corporation belongs to it, and not to the stockholders. They only have an interest in such property through their relation to the company, and in this respect the State is like any other stockholder. So, where an Act of the General Assembly provided for a sale of the State's interest in a railroad company in which the State was a stockholder, *it was held* to be only a sale of the stock.
3. Whether such sale would vest in the purchasers of the State's stock all the powers and privileges which the charter of the company had conferred on the State; *quære?*
4. An act of the Legislature which provides that, in a certain contingency, the stockholders of an existing corporation shall re-organize as a new corporation, which changes the amount of the capital stock, and provides for the stockholders in the existing corporation by reserving a certain amount of the stock for them in the corporation to be formed, creates a new corporation, and is not an amendment to the charter of the one already in existence. In such case it is immaterial that the new corporation is called by the same name as the old one.
5. *Quære* whether the Legislature has power to compel the stockholders in the old corporation to re-organize as a new company; but if they do so voluntarily, the new corporation is regularly and legally formed.
6. In such case, the organization of a new corporation at once dissolves the old one.
7. If there are creditors of the dissolved corporation under these circumstances, they may cause the property of the defunct corporation to be applied to their debts by means of a receiver.

(*Young* v. *Rollins*, 85 N. C., 485; *Von Glahn* v. *DeRosset*, 81 N. C., 467; *Railroad Co.* v. *Rollins*, 82 N. C., 523, and *Dobson* v. *Simonton*, 86 N. C., 492, cited and approved).

CIVIL ACTION, heard before *MacRae, Judge*, at Spring Term, 1885, of CATAWBA Superior Court. There was a judgment for the defendant upon the facts agreed to, and the plaintiff appealed.

Mr. R. Z. Linney for the plaintiff.
Mr. D. Schenck for the defendant.

MERRIMON, J. The Western North Carolina Railroad Company was organized under and by virtue of an act of the General Assembly (Acts 1876–7, ch. 106), and did business next thereafter until May, 1880. Its capital stock was $850,000, divided into shares of $100 each. The State owned of such stock, shares equal to three-fourths thereof, and individual stockholders owned the balance of it. It owned a valuable railroad and much valuable property appertaining thereto. It was governed by a Board of Directors, nine of whom were appointed by the Governor of the State with the consent of the Senate, and three of whom were elected by the individual stockholders.

The plaintiff sold and delivered to this company, in the years 1877 and 1878, cross-ties, on account of which it became indebted to him in the sum of $124.30, and this debt has never been paid.

Afterwards, in pursuance of an act of the General Assembly (Acts of the Special Session of 1880, ch. 26), the State sold its stock in, and all its interest in, the franchises and property of every kind of the above-mentioned company, to certain persons mentioned in the second section of that act.

The title and sections of that act, material to a proper understanding of the opinion in this case, are as follows:

"An act to provide for the sale of the State's interest in the Western North Carolina Railroad Company, and for other purposes.

"Section 1. That the Governor, Treasurer, Secretary of State and Attorney General of the State of North Carolina be and they are hereby appointed commissioners on the part of said State to sell, assign, and transfer all the right and interest of the State in and to the railway, stock, property and franchises of the Western North Carolina Railroad Company, in accordance with the provisions of this act.

"Sec. 2. That said commissioners are hereby authorized and directed to execute an instrument purporting to convey, and which, when delivered to the grantees in pursuance of the provisions hereinafter contained, shall be a deed effectual to convey

to William J. Best, William R. Grace, James D. Fish and J. Nelson Tappan, subject to the charter of said company and the amendments thereto which shall be in force at the date of the ratification of this act, all the interest of said State in and to the stock, ways, railways, road-bed, right of way, depot grounds, and other lands belonging to the same; all rails, bridges, viaducts, culverts, fences, depot station-houses, engine houses, car houses, wood houses, freight houses, machine shops, and every other building or structure thereunto belonging, held, owned, or used by said railroad company in conducting the business thereof; also, to all locomotives, tenders, cars and other rolling stock, all equipments, machinery, tools, implements, fuel, supplies, and material for constructing and operating the railroad of said company, or any part thereof; together with all and every right, estate, interest, property, claim and demand whatsoever appertaining or in anywise belonging to said railroad company, and all statutory claims or liens of said State against or upon the property and franchises of said company; which said instrument shall be deposited by said commissioners with the United States Trust Company of New York, as an escrow, to be delivered to the grantees therein named, upon the fulfilment of the terms and conditions hereinafter specified, taking from said Trust Company a receipt, setting forth the purpose and conditions of said deposit."

* * * * * * * *

"Sec. 5. That on or before the depositing of said instrument of conveyance with the said United States Trust Company, said grantees shall deliver to said commissioners a written contract signed by themselves and binding them to said State to pay the interest on said bonds as the same shall accrue, and to finish the railroad of the said Western North Carolina Railroad Company to its Western termini at Paint Rock and the Georgia or Tennessee State line near Ducktown, according to the charter of said company and all acts amendatory thereof, and that said railroad be completed and put in operation to Paint Rock on or before the first day of July, eighteen hundred and eighty-one, and to Mur-

phy, in the county of Cherokee, on or before the first day of January, eighteen hundred and eighty-five, and that the work upon the said road shall be begun within two months from the date of the ratification of this act, and carried on with diligence and energy until completed to Ducktown and Paint Rock."

* * * * * * * *

"Sec. 8. That upon the execution and delivery of said contract by said grantees, they shall re-organize the said company as a new corporation by the name of the Western North Carolina Railroad Company, upon the basis of a capital stock of four millions of dollars, which shall be considered and deemed preferred stock; and there shall be set aside and reserved of said stock, for the benefit of the private stockholders of the Western North Carolina Railroad Company, as the same may exist at the date of the ratification of this act, the sum of two hundred and twelve thousand five hundred dollars ($212,500), which stock shall be divided *pro rata* between said private stockholders, according to the number of shares of the stock of the said last-mentioned company respectively held by them; *Provided*, That said company, by a majority vote of the stockholders in interest, may issue second or common stock to an amount not exceeding fifteen thousand dollars per mile of said road; and said company as reorganized shall be governed by a board of nine directors, who shall be elected by a majority vote of the stockholders in interest.

"SEC. 9. That, after its re-organization, said company may execute and deliver mortgage deeds with power of sale to such trustee or trustees as may be selected by the board of directors, conveying the railroad, property and franchise, including road-bed, superstructure, equipment, and all the real and personal estate of said company, to secure the payment of such bonds and the interest thereon as the same shall become due, as it may issue to aid in the construction, completion and equipment of said railroad, and said mortgage deeds, when duly executed, may be recorded in the register's office in Rowan county, and their registration in that county shall be deemed an effectual and sufficient

registration for all purposes, and it shall not be necessary to register the same in any other county, any law to the contrary notwithstanding: *Provided,* that no sale, under the mortgage deeds herein authorized, shall be made by virtue of any decree of foreclosure, or of any power of sale contained therein, without giving ninety days' notice thereof in three newspapers published in the State of North Carolina."

* * * * * * * *

"SEC. 24. That the floating debt of said company, not to exceed thirty thousand dollars, contracted since the purchase of the road by the State in eighteen hundred and seventy-five, shall be paid by the said grantees in cash, and the amount of mortgage bonds to be delivered to the State as provided in section twelve of this act shall be reduced by the amount so paid."

A new company styled The Western North Carolina Railroad Company was organized, under and in pursuance of the eighth section above set forth of the act last named, on the 27th day of May, 1880, and this company is the defendant in this action. This company, upon its organization, took possession of the railroad and all property appertaining thereto above mentioned, and has had possession thereof, using the road as its own, ever since. This company has paid $30,000 as required by the twenty-fourth section above set forth of the act last above mentioned; but it had not paid the whole of that sum at the time this action began.

The deed from the State deposited as an escrow with the United States Trust Company of New York, mentioned in section two above set forth, was delivered to the assignees of the grantees therein, in September, 1884, and not until that time.

The plaintiff brought this action before a justice of the peace of Catawba county against the defendant, the company *last* above named, on the 4th day of January, 1882, to recover the money due to him on account of the cross-ties, sold by him to the company *first* above mentioned, in 1877 and 1878.

The defendant has made no express promise to pay this debt.

Upon this state of facts, the parties agreed to submit the case to the court below, with the further agreement, that if the court should be of opinion that the defendant is liable to the plaintiff, judgment should be entered in his favor for $124.30 and costs—otherwise judgment should be entered for the defendant, with leave to the party cast to appeal. Upon consideration, the court gave judgment for the defendant, the plaintiff excepted, and appealed to this court.

The plaintiff contended that the company which became indebted to him for cross-ties in 1877 and 1878 still exists, and that the defendant is that company, having since then only enlarged or modified its corporate powers, privileges, duties and obligations, the form of its government, and exchanged the State as chief stockholder with peculiar powers, rights and privileges, for individual stockholders with the same or similar rights and privileges, and that, therefore, the defendant is obliged to pay the money so due to him.

On the contrary, the defendant insists that it is not in any respect the company so indebted to the plaintiff, that it is in all respects a new and different company from that, and is on no account or in any manner liable to the plaintiff.

The State was a stockholder in the railroad company organized under the act of 1876–7, ch. 106, and, as such, bound by the provisions of its charter just as were the individual stockholders. It had peculiar privileges and advantages allowed because of its character and the amount of stock it owned, but these it exercised and claimed only as allowed by the charter. It had no advantage as a stockholder in the company because of its sovereignty—this it put off and laid down when it became a stockholder, and, as such placed itself on a footing with the individual stockholders, except in respect to special advantages that may have been secured to it by the terms and provisions of the act incorporating the company. *Curran v. Arkansas*, 15 Howard, 304, and the cases there cited; 2 *Redfield on Railways*, 55, 169. The State had no interest in the company and its railroad, or any

of its property, except as a stockholder. The property of all kinds belonged to the company, not to the stockholders personally; and, as individuals, their interest in the property was only such as they had through their relation to the company as stockholders, and in this respect, the State was on no other or better footing than the individual stockholders.

When, therefore, a stockholder sold his interest in the company, its franchises, its railroad and other property, he sold his stock—only his stock—his right under the charter to vote and have a voice in the company, to share in the dividends it might declare from time to time, and to share in the assets of the company when it should be dissolved, and its affairs wound up and closed.

It seems that it was not contemplated by the charter of the company that the State should sell or otherwise dispose of its stock. No provision in that respect appears, nor is any method or form of transfer of it prescribed, nor are the rights and privileges of purchasers of it defined.

Passing by any question in this respect, and granting that the Legislature could by statute provide for a sale of the State's stock, having due regard for the rights of individual stockholders, it did not, by that act, (ch. 26 of the Acts of the Special Session of 1880) undertake to sell the property of the company. By the terms and purport of this act, the State sold its *interest* in the stock, franchises, and other property of the company, to the persons named in the second section thereof. The first section designates commissioners "to sell, assign, and transfer all the *rights and interest* of the State in and to the railway, stock, property and franchises" of the company. The second section authorizes the commissioners, by a proper instrument in the way and upon the terms and conditions provided, to convey to the person therein named, "*subject to the charter of said company and the amendments thereto* which shall be in force at the ratification of this act, all the interest of said State in and to the stock, way, railways" and other property of the company. The

title to the act describes it as "an act to provide for the sale of the *State's interest*" in the company, "and for other purposes."

The State could not, nor did it undertake to sell more than its interest in the company. It was a stockholder owning three-fourths of the capital stock; this it sold and no more. The purchasers became the owners of the stock—certainly the equitable owners of it—and interested in the property of the company as stockholders and not otherwise. Whether they became stockholders invested with all the exceptional rights and privileges of the State as a stockholder, or whether they became such on an equal footing in all respects with the other individual stockholders, we need not now discuss or decide; because the stockholders of that company—all of them, we must so take it—availed themselves of the authority and right granted in the last cited act to reorganize as a new company.

The eighth section of that act provides, "That upon the execution and delivery of said contract by said grantees, they *shall reorganize the said company as a new corporation*, by the name of the Western North Carolina Railroad Company, upon the basis of a capital stock of four millions of dollars, which shall be considered and deemed preferred stock, and there shall be set aside and reserved of said stock, for the benefit of the private stockholders of the Western North Carolina Railroad Company, as the same may exist at the date of the ratification of this act, the sum of two hundred and twelve thousand five hundred dollars ($212.500), which stock shall be divided *pro rata* between said private stockholders, according to the number of shares of the stock of the said last mentioned company respectively held by them."

It is not necessary to inquire whether or not the Legislature had power to compel the stockholders of the old existing company to reorganize as a new company; or whether the purchaser of the State's stock could compel the other stockholders to join them in such reorganization, because the reorganization of the company "as a new corporation" under the act last mentioned,

was made and took effect on the 27th day of May, 1880, and, at once, the new corporation took possession of the railroad of the old company and has had possession of it ever since that time. Such reorganization must here be taken as implying that it was made regularly and effectually as the law directed, and that all the stockholders of the retiring company assented to it.

The act of the 29th of March, 1880, cited above, obviously contemplated the reorganization of the old company and the creation of a new and independent corporation, invested with new and different corporate franchises, in no way connected with the old one. This Court in referring incidentally to this statute in *Young* v. *Rollins*, 85 N. C., 485, adopted this view of its effect. The purpose was to enable the purchasers of the State's stock, three-fourths of the whole capital stock, to have a clear, large and unembarrassed opportunity to complete the construction of the great lines of railway mentioned and described in the act. To this end, the company was authorized to have an immense capital stock of different kinds and grades, and empowered to create large mortgage debts, and provide methods for securing and paying them, and, differently from the old company, it was to be governed by a board of nine directors to be elected by a majority vote of the stockholders in interest.

The fundamental powers conferred upon the new company, different in most material respects from those of the old one—the chief purpose of the reorganization being clearly such as we have indicated, and the express declaration in the act that the old company shall be reorganized as a "new corporation"—these things leave no doubt upon our minds that the purpose of the Legislature was to create a new and independent corporation, relieved entirely of the old one, its liabilities and embarrassments, if it had any. This view is strengthened by the provision in the twenty-fourth section of the act that required the purchasers of the State's stock to pay off a certain class of the old company's "floating debt, not exceeding thirty thousand dollars." It is likewise supported by the provision that in case the purchasers of

the State's stock should fail to comply with the terms and conditions of their contract with the State, then and in that case, the State should take possession of the railroad and other property, not under the old charter and company, but under new and different powers and provisions specified and defined in the act. *Bollows v. The Bank*, 2 Mason, C. C., 31; *Angell & Ames on Corp.*, 780; *Morawetz on Private Corp.*, sec. 566.

The mere fact that the new corporation was allowed to retain the name of the old one—however much this might tend to mislead uninformed people—cannot be allowed to disappoint the intention of the Legislature so clearly expressed.

Besides, and in addition to what we have said, the act does not purport in terms or effect to enlarge the powers of the old company, or to amend its charter, except that in section 25 certain clauses of its charter are repealed, and this seems to be cautionary merely. It contains no provision—certainly none in terms—that extends to the new company the powers and privileges conferred by the charter of the old one. Section five requires the purchasers of the State's stock to complete the lines of railway mentioned in it as required by that charter, and the general scope and purpose of the new company requires it to do the same thing, and it may be that some of the rights and powers of the old company are by just and reasonable implication conferred upon the new one. In many respects, and largely, the latter company is governed and affected by general principles of law applicable to corporations.

It was properly conceded on the argument, that if the defendant is a new corporation, such as we have indicated it is, the plaintiff cannot recover in this action. It is sometimes difficult to determine whether or not a corporation is a new and independent one, or an old one with new and superadded powers and privileges; but when it is settled that it is a new one, it follows, in the absence of any provision in the statute creating it to that effect, that it is not liable for the debts of the old one. *Angell & Ames on Corp.*, sec. 780; *Morawetz on Private Corporations*, sec. 566.

The reorganization of the old "company as a new corporation," at once had the effect to disorganize and dissolve the old one. Apart from the legal consequence, it is obvious that the Legislature so intended. And, likewise, a purpose was manifestly implied, that the old company should transfer its railroad and other property to the new one. This appears, not from the express terms of the act, but plainly from its scope and purpose, and particularly from the ninth section, which provides in express terms, that the railroad and other property might be mortgaged to secure the mortgage debts allowed to be created. The Legislature authorized such transfer, and it seems that the stockholders of the old and new companies effectuated the transfer of the property as far as they could. It appears that the new company has had possession of the railroad ever since its organization.

How far the Legislature had power, if any, under that clause of section 1 of Article VIII, of the Constitution in respect to corporations, which provides that "All general laws and special acts passed pursuant to this section, may be altered from time to time, or repealed," to authorize such transfer to the prejudice of the creditors of the old company, we are not now called upon to decide.

The creditors of the old company, however, were not without remedy as to any property of that company liable to be applied to the satisfaction of their debts at the time of its dissolution. Ample remedy in that respect was provided by the statute applicable to such cases. All the property of the dissolved corporation might have been secured in the hands of a trustee or a receiver, and the right of the creditor to follow the property of the old company in the possession of the new one might have been thoroughly tested and settled. *The Code*, §§667, 668; *Von Glahn* v. *DeRosset*, 81 N. C., 467; *Railroad Company* v. *Rollins*, 82 N. C., 523; *Dobson* v. *Simonton*, 86 N. C., 492.

Whether or not the plaintiff and other creditors of the old company, if there be any, can yet have such relief as that sug-

gested, is a question not before us and one that we are not now at liberty to decide. This action began before a justice of the peace, and he had no authority to appoint a receiver or grant any equitable relief in a case like this. And, hence, also, the plaintiff could not, in this action, have his debt, as part of the "floating debt," if it be such, paid out of the fund of $30,000 to be paid by the purchaser of the State's stock as provided in section 24 of the act. How and by whom that fund should have been administered is another interesting question not now before us.

There is no error and the judgment must be affirmed.

No error. Affirmed.

J. C. LOWDERMILK et als v. A. J. CORPENING et als.

Homestead—Execution—Reversionary Interest—Judgment Lien.

1. The homestead law is not void as to debts contracted before its adoption, and is inoperative only when such debts could not otherwise be collected out of the debtor's property.
2. The homestead should be allotted when executions are issued on such debts, and the excess first applied to the payment of the execution, and if sufficient for that purpose the debtor should be allowed to retain his homestead.
3. Where an execution issued on such debt, and the sheriff sold the real property of the debtor subject to the homestead, the purchaser acquired the reversion after the termination of the homestead.
4. The Act of the 25th of March, 1870, which prohibits the sale of the reversionary interest in land charged with the homestead exemption, cannot deprive a creditor of a vested right acquired by docketing his judgment before the act was passed.
5. A judgment has no lien on land in a county in which it has not been docketed.
6. The lien of a judgment cannot be continued by subrogation when the judgment has been satisfied, nor against a party who acquired rights before the action in which the judgment of subrogation was rendered was begun, nor can such subrogation impair the rights of persons not parties to the action.

(*Barrett* v. *Richardson*, 76 N. C., 429; *Wyche* v. *Wyche*, 85 N. C., 96; *Burton* v. *Spiers*, 87 N. C., 87; *Albright* v. *Albright*, 88 N. C., 238; *McDonald* v. *Dixon*, 85 N. C., 248, cited and approved. *Hill* v. *Kessler*, 63 N. C., 437, and *Edwards* v. *Kearsey*, 74 N. C., 241; Ibid., 75 N. C., 409, commented on).

CIVIL ACTION, tried before *Gilmer, Judge,* at Fall Term, 1884, of BURKE Superior Court.

There was a judgment for the plaintiffs and the defendants appealed.

Messrs. J. T. Perkins, Walter Clark and *Batchelor & Devereux* for the plaintiffs.

Messrs. Reade, Busbee & Busbee for the defendants.

SMITH, C. J. The controversy in this case is in respect to the plaintiff's claim of ownership of the land described in his complaint. By consent, a trial by jury was waived and the court allowed to find the facts instead, it being agreed that in the event of the plaintiff's recovering judgment, his damages should be one hundred dollars.

The land formerly belonged to Archibald Kincaid, against whom judgments, on debts contracted previous to the adoption of the Constitution in 1868, were recovered and docketed in the Superior Court of Burke on January 4th, 1870. The land was sold under executions issued thereon, subject to the defendant's right of homestead therein, on April 16th of the same year and conveyed to the plaintiff.

The defendant's title is also derived from the same source and is as follows:

In 1866 the legatees of Robert Kincaid recovered judgment in an action against the said Archibald and John Kincaid, on which issued a writ of *fieri facias* that was levied on their lands, the tract in dispute being included, in August, 1866, and returned with an endorsement of the levy, but without further action.

The sale was arrested by an injunction obtained by the debtor, to secure which they gave an indemnifying bond with the defendant A. J. Corpening as surety. The cause in which the restraining order was granted was removed to the Supreme Court, where it was overruled and judgment also entered against the parties to the injunction bond. Of this judgment, the said Corpening, as surety, paid the sum of two thousand dollars and fifty cents.

At Spring term of 1871 of the Superior Court of Caldwell, Corpening brought his suit against the said Archibald Kincaid and others praying to be substituted to the rights of the judgment creditors, to whom, in consequence of his liability as a surety in the injunction bond, he had paid the sum stated, and this was so adjudged in the said Superior Court in 1873. This judgment was never docketed in the Superior Court of Burke wherein the land lies, but an execution issued to the sheriff of the county last named, under which the premises were sold in the year 1874 to the present defendant. Corpening brought his action, in 1875, against his judgment-debtor to recover possession of the land, and the cause being removed to the Supreme Court by appeal, it was then determined that the plaintiff was entitled to recover and hold said land during the life-time of said Archibald, and the continuance of his homestead right, and it was left undecided as to the person in whom the estate thereafter had vested. This inquiry is to be solved in the present suit between the contending purchasers from the sheriff, the said Archibald having died, leaving no wife or minor children.

Upon the foregoing facts found by the judge, he rendered judgment that the plaintiffs recover possession of the premises and one hundred dollars damages for the defendants' wrongful withholding. The appeal of the defendants is from this ruling.

(1). The plaintiffs, by virtue of their purchase at the sheriff's sale in 1870 and his deed to them, undoubtedly acquired the estate of the debtor, leaving him to occupy and enjoy the same during the period of exemption provided in the constitution. When the sale took place, the rulings in this State from the case of *Hill* v. *Kessler*, 63 N. C., 437, decided the next year after the adoption of the new constitution, had been consistent and uniform, that no distinction could be made between debts contracted before and after that time, and that the homestead right was paramount to both and could be asserted against each. It was so held in *Edwards* v. *Kearsey* decided at the January term, 1876, and again at the term following, and reported in 74 N. C., 241,

and 75 N. C., 409. Such was understood to be the law, and it was acted on as such, until the ruling was reversed in the Supreme Court of the United States on the removal of the cause to that court. 96 U. S., 595.

The sale was, therefore, conducted in recognition of the law as interpreted in this court, without dissent from the debtor, and in a manner that was favorable to him. The estate that was sold and conveyed by the sheriff, and so described in his deed, was in subordination to the homestead or exemption claim, and no other or greater passed to the plaintiff. This is decided in *Barrett* v. *Richardson*, 76 N. C., 429, and again in *Wyche* v. *Wyche*, 85 N. C., 96, in both of which cases the debts antedated the constitution, and the sale was made on similar reservations of the debtor's estate.

What reason can be suggested for denying to a creditor, whether becoming such under an old or new contract, a right to recognize the debtor's exemption, when he might have proceeded in disregard of it? or why should the one be disabled from doing what another may do in the effort to collect his demand against an insolvent debtor? Indeed, the homestead exemption is not void as to either class of debts, and it only becomes so as to such as were contracted before it became a law, when otherwise the latter could not be collected out of other property of the debtor. Such other property ought first to be appropriated, and, if sufficient, the debtor allowed to avail himself of the benefit of the constitutional provision made in his behalf. *Burton v. Spiers*, 87 N. C., 87; *Albright v. Albright*, 88 N. C., 238.

But this sale is impeached as in conflict with the act of March 25th, 1870, which prohibits the sale of the debtor's reversionary interest in land charged with the homestead exemption.

The statute was passed in furtherance of the policy of securing a home to the insolvent and his family, and to leave them undisturbed in their possession during the limited period.

It never looked to the curtailment of his privileges by forbidding the creditor to let him have what the Constitution allows,

and forcing an out and out sale of the premises. This meaning is apparent from the concluding clause of the first section, which suspends the running of the statute of limitations against the debt while the exemption remains in force. *Bat. Rev.*, ch. 55, sec.26; *McDonald v. Dickson*, 85 N. C., 248.

But another answer to this contention is furnished in the fact that the lien of the judgment under which the plaintiffs bought, attached and conferred a right to sell and appropriate the proceeds *before the act was passed*, and this right *could not be divested or impaired* by any of its provisions. This results, and for stronger reasons, from the principle established in *Edwards v. Kearsey, supra.*

The appellant further insists that the lien created by the levy of the execution in 1866 is preserved and continued in force by virtue of the judgments of subrogation rendered in 1873 in Caldwell Superior Court, and that the sale under it supplants that made in 1870 to the plaintiffs. To the maintenance of this proposition the obstacles are insuperable, some of which we will mention.

1. The judgment upon which the *fieri facias* issued, has been paid and satisfied in full.

2. The plaintiff acquired title before the institution of the action in which that judgment of substitution was rendered.

3. It was not docketed in Burke county and could have no operation upon lands therein.

4. The substitution only binds the parties in that action, and cannot be permitted to impair the legal rights acquired by other creditors of the common debtor to pursue his estate and subject it to their demands.

These considerations fully meet and dispose of any claim to priority derived from these proceedings made on behalf of the defendants. There is no error and the judgment must be affirmed, and it is so ordered.

No error. Affirmed.

* ANDREW SYME, Administrator, v. W. W. SMITH, Administrator, et als.

Parol Contract to Convey Land—Statute of Frauds.

1. A parol contract to convey land is not void, but only voidable, if the vendor chooses to plead the statute of frauds.
2. The plaintiff administrator alleged that under a parol contract to purchase certain lands, his intestate had paid a portion of the purchase money, and prayed judgment against the defendants for the amount so paid. The defendants, by their answer, admitted the contract substantially as set out in the complaint; *Held*, that the action must be dismissed.

(*Foust* v. *Shoffner*, Phil. Eq., 242, cited and approved).

CIVIL ACTION, tried before *Avery, Judge*, at February Term, 1884, of WAKE Superior Court.

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

Messrs. S. G. Ryan and *A. M. Lewis & Son*, for the plaintiff.

Messrs. Pace & Holding, D. G. Fowle and *G. H. Snow*, for the defendant.

ASHE, J. The action was brought by the plaintiff as administrator of Freeman F. Green, deceased.

In his complaint, he alleged that his intestate, in 1876, by a parol contract, had purchased a parcel of land lying in the county of Wake, from the defendants A. W. Lawrence and A. H. Winston, now deceased, for which he was to pay them the sum of seven hundred and fifty dollars to be taken in work which was to be done in five years from the date of the agreement.

That his intestate, in fulfilment of his part of the contract had paid the defendant the sum of five hundred and ninety-six dollars, and had entered upon said land and had incurred heavy expenses in building houses and making other improvements on said land.

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

That Lonny Winston, one of the defendants, is the only child and heir-at-law of the said A. H. Winston, and they prayed judgment for the sum paid upon the contract and the value of the improvements upon the land.

The defendants admitted the contract as set out in the complaint, except that they allege that the interest agreed to be paid was eight per cent., which was not stated in the complaint, but this was not denied by the plaintiff. And the defendants further stated in their answer that the purchase money had never been paid, and they are informed and believe that the estate of the said Freeman Green is insolvent, and that they are ready and willing to have the land, by decree of this court, conveyed to the heirs of the plaintiff's intestate upon the payment of the purchase money.

This action cannot be sustained. It is founded upon the presumption that the contract made by the plaintiff's intestate with the defendants for the land described in the complaint is void, and that he therefore has the right to recover the money advanced by his intestate and the value of the improvements put by him on the land. But the contract is not void unless the defendants shall refuse to comply with its terms and rely upon the statute of frauds, which they have not done, so far from that, they admit the contract, and say they are ready and willing to make title whenever the residue of the purchase money shall be paid, and *non constat* but the heirs of Green may wish to have a specific performance of the contract, which they have the right to assert, and if they should see proper to bring an action for that purpose, with a tender of the balance of the purchase money due, and the defendants should file such an answer as they have done in this case, the court would undoubtedly decree a specific performance.

The adjudication in the case of *Foust* v. *Shoffner*, Phillips Eq., 242, is decisive of this case. That was a case similar in every respect to this, except the action was then brought by the person to whom the land was contracted to be conveyed, and not by his

administrator. It was, as here, a verbal contract, and the contractor had been compelled by suit to pay the notes given as the consideration of the contract, and he filed a bill in equity to recover the money upon the ground the contract was *void*, and that therefore he could not ask the court for a specific performance of the contract.

The court dismissed the bill, and Pearson, C. J., speaking for the court, said "The plaintiff, in this case, seeks to avoid the contract for the defendants, instead of waiting to see whether they will take advantage of the statute of frauds; and the defendants, by their answers, aver a willingness to execute title and comply with their verbal undertaking in respect to the law. This fully meets any equity on the part of the plaintiffs." The action cannot be maintained, and is, therefore, dismissed.

Per curiam. Action dismissed.

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*W. A. CHEATHAM v. W. H. ROWLAND, et als.

Trusts and Trustees—Power to charge the trust property—Parties.

1. Certain property was conveyed to trustees to receive the profits and pay them over to the *cestui que trust*, beyond the necessary expenses incident thereto. The trustees contracted a debt for repairs, and the creditor filed a mechanic's lien on the property; *Held*, that the trustees had the power, under the provisions of the deed, to make a contract on the credit of the trust property for necessary repairs.

2. *Held, further*, that it was error in the court below to refuse a judgment to enforce the lien by a sale of the property, until the *cestui que trust* were made parties defendant, and were given an opportunity to be heard.

(*Miller* v. *Bingham*, 1 Ired. Eq., 423; *Freeman* v. *Cook*, 6 Ired. Eq., 373; *Herndon* v. *Pratt*, 6 Jones Eq., 327; *Welborn* v. *Finley*, 7 Jones, 228, cited and approved).

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*MERRIMON, J., did not sit on hearing of this cause, having been of counsel.

CHEATHAM *v.* ROWLAND.

CIVIL ACTION, tried before *Graves, Judge,* and a jury, at July Special Term, 1882, of the Superior Court of VANCE county.

The facts appear in the opinion.

The plaintiff appealed.

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

Mr. D. G. Fowle, for the defendants.

SMITH, C. J. William H. Hughes conveyed a lot or parcel of land, containing about six acres, known as the Henderson Fair Grounds, and lying within the limits of said town, for a valuable consideration, to James M. Bullock, S. S. Royster, Proteus E. A. Jones, Horace H. Rowland and Archibald Davis, and their successors in office, &c., "to have and to hold to the said James M. Bullock, S. S. Royster, Proteus E. A. Jones, Horace H. Rowland and Archibald Davis, trustees as aforesaid, and their successors in office appointed, to secure and pay over the profits in all and any manner whatsoever arising out of said Fair Grounds above and beyond all necessary expenses incident thereto, to John D. Hawkins," and nearly one hundred others mentioned by name, and among them the trustees to whom the deed is made, "stockholders of said Fair Grounds, and to their heirs, and to their only use and behoof."

The trustees, Rowland, Davis and Royster, in 1877, their associates, Jones and Bullock being then dead, in consequence of the dilapidated condition of the premises, and the exposure to waste and deterioration, contracted with the plaintiff, and employed him to make the needed repairs and to furnish the material required for that purpose. The plaintiff performed the work during the year of his own occupancy under a lease for seventy-five dollars, which rent was to be thus discharged, finishing about the 20th day of December, 1877. The charge for the work was three hundred dollars, which, the defendant trustees who made the contract not assenting thereto, was by agreement referred to a skilful mechanic, and was reduced by him to

$257\frac{05}{100}$, and this they promised to pay the plaintiff. Notice of lien was filed on the 7th day of February thereafter in the office of the Superior Court Clerk in accordance with section 1784 of The Code, and in April following, the present action was commenced to enforce it against the three surviving trustees. No answer was put in by them to the complaint, which was filed at the term to which the process was returnable, or afterwards, and no resistance ever offered to the plaintiff's demand for the relief sought. At the same time, three others, S. S. Cooper, W. W. Young and Harril Harris, claiming to be trustees, are, at their own instance, allowed to come in and defend the suit. These defendants filed an answer at Fall Term, 1879, and therein controvert all the material allegations of the plaintiff, except those that relate to the deed of conveyance, and bring forward a counter-claim against the plaintiff for rent due from him for his use and occupation of the lot for the three successive years, 1877, 1878 and 1879, and damages committed during that interval.

The plaintiff's replication re-affirms what is alleged in the complaint, and, denying that the respondents are trustees or have any right to intervene, adds that the contract was entered into by the three only surviving trustees mentioned in the summons, to whom the land was conveyed. At the term held in July, 1882, the issues, not in form, arising out of the controverted averments in the answer, as the record states, were found in favor of the plaintiff, and thereupon the following judgment was entered against the contesting defendants, to whom another had been added in the place of Harril Harris, deceased:

"It appearing that the defendants W. W. Young, S. S. Cooper and J. E. Clark, who insisted on their right to defend in the action, as trustees, are not so entitled to defend, it is therefore adjudged that the plaintiff's action be dismissed as to those, and that the said defendants jointly and severally pay the cost incurred by them by reason of becoming parties to said action."

The plaintiff then moved for judgment against the surviving trustees, Rowland and Harris, for his undisputed demand, with

costs, and for the enforcement of his lien by a sale of the lot to satisfy the same. The motion was allowed for judgment for the debt and costs, but was refused as to the sale of the premises, unless and until the *cestui que trust*, denominated stockholders, or some of them, are made defendants and can be heard. From this refusal the plaintiff appeals.

The legal title under the deed vested in the five-named trustees and their successors in office appointed in trust, "to receive and pay over the profits in all and any manner whatsoever arising out of said fair grounds, above and beyond *all necessary expenses incident thereto.*" All the legal power that could be exercised over the premises in the preservation of the improvements and the prevention of waste and destruction was possessed by them. The case states that the "premises were much out of repair, and by exposure liable to great waste," when the contract for repairs was made, and while there is no suggestion of a want of good faith in the trustees who entered into it, we think they were competent under the provisions of the deed to employ the plaintiff to do the work necessary for the preservation of the property upon its credit under the lien enactment. If they had not this authority the buildings and surrounding fence might have gone to ruin, and there would be no means of providing against these consequences. A majority of the original trustees, and all those living, entered into the agreement with the plaintiff for the work as necessary to preserve the property from further injury—they do not oppose the charge as excessive in amount, or for work that could have been dispensed with, and no reason is shown why the plaintiff should not be paid. But the order of sale is refused because, in the opinion of the Court, some of the *cestui que trust* should first be brought in to defend the common interest for all.

We do not concur in this opinion, for, aside from the fact that the defendants occupy a two-fold relation to the subject matter, being not only trustees but beneficiaries also under the deed, they are the proper persons, as legal owners in charge, to manage and

take care of the common property, not only in its preservation, but in its defence against unjust and unreasonable demands, from whatever source they may come. The authority and duty of doing so are incident to the office and inseparable from it, and to this end the estate is put in trustees. When the trust is abused and they neglect or misappropriate the property, those interested may interpose to prevent the injury and enforce the execution of the trust, or even have the estate taken away and put in other hands. In such case, the loss consequent upon mismanagement and negligence the trustees may also be required to make good. *Miller* v. *Bingham*, 1 Ired. Eq., 423; *Freeman* v. *Cook*, 6 Ired Eq., 373.

So entirely are the interests of *cestui que trust* committed to the trustees for protection, and placed under their control, that it when the bar from the lapse of time operates against the latter operates against the former as against other adversary claimants. *Herndon* v. *Pratt*, 6 Jones Eq., 327, and this even when the *cestui que trust* are infants or married women. *Welborn* v. *Finley*, 7 Jones Law, 228.

We infer from the record that there is an incorporation, from the use of the word stockholders as descriptive of the numerous persons for whose benefit the trust is created, but the fact is not so stated, nor would the fact make any difference in our conclusions. The legal estate is vested in the trustees and its full management entrusted to them. In the performance of their duties they have contracted, as such, with the plaintiff to have the repairs made. The work has been done, and he has judgment against them for his debt. The law gives him the lien and he has a right to have it enforced.

There is error in the ruling, and this will be certified, for further proceedings in the court below.

Error. Reversed.

J. A. SHERRILL v. ADAM HAGAN.

Statute of frauds—Contract—Consideration—Evidence.

1. Where it is agreed between the vendor and purchaser of a tract of land, that the purchaser shall have it surveyed at his expense, and if it shall be found to contain a smaller number of acres than is called for by the deed that the vendor shall refund a *pro rata* part of the purchase money; *Held*, that such contract is founded on a sufficient consideration, and that it is not within the provisions of the statute of frauds.

2. In such case parol evidence is admissible to establish the contract.

(*Findly* v. *Ray*, 5 Jones, 125; *Watkins* v. *James*, *Ibid*, 105; *Brown* v. *Ray*, 10 Ired., 72; *Manning* v. *Jones*, Busb., 368; *Twidy* v. *Saunderson*, 9 Ired., 5; *Daughtry* v. *Boothe*, 4 Jones, 87; *Terry* v. *The Railroad*, 91 N. C., 236, cited and approved).

CIVIL ACTION, tried before *MacRae, Judge*, and a jury, at Spring Term, 1885, of CATAWBA Superior Court.

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

Messrs. Batchelor & Devereux, for the plaintiff.
Messrs. M. L. & George McCorkle, for the defendant.

ASHE, J. This was a civil action for the surrender and cancellation of a note and for money paid.

The plaintiff, in his complaint, alleged that he contracted with the defendant for a tract of land lying in the county of Catawba, known as the "George Hooper place," at the price of two thousand dollars, one thousand of which was paid in cash, and the balance secured by two notes, the one payable on the first day of March, 1883, and the other on the first day of January, 1884, each bearing interest at eight per cent. from the first of March, 1883. That the defendant and his wife executed a deed for the land on the 29th day of December, 1882, and plaintiff paid the first of said notes about the time of its maturity, and about the first of March, 1883, paid the sum of three hundred dollars, which was endorsed on the second note.

That, at and before the date of the said deed, the defendant expressly agreed with the plaintiff that in case said tract of land did not contain as much as three hundred and fifty acres, the defendant would make good the deficiency and refund to the plaintiff the amount of the deficiency, to-wit: $5.71\frac{3}{7}$ per acre for the number of acres between the number stated by defendant, which was three hundred and fifty acres, and the number that said tract actually contained. That he has had the land surveyed since the deed was delivered, and it was ascertained to contain only $298\frac{3}{4}$ acres.

The plaintiff therefore prayed judgment

(1) That the defendant surrender the second note above described to be cancelled;

(2) For judgment for $91.21, the amount so overpaid, with interest thereon from the 1st of March, 1883, until paid;

(3) For costs of action, and for such other relief as he may be entitled to in the premises.

The defendant admitted the contract of sale as alleged by plaintiff, and that he and his wife executed the deed to the plaintiff on the 29th of December, 1883, and that he did say to the plaintiff that the land contained three hundred and fifty acres as he was informed by an old surveyor.

He admitted that some time before the 21st of December he did agree to guarantee the number of acres to be 350 if plaintiff purchased the land, but the plaintiff did not accept the offer, and there was then no trade. He denied that there was any contract made before the 29th of December, 1883, or that he agreed to make up any deficiency on the number of acres less than 350 at the time of the trade. He stated that he had no knowledge or information sufficient to form a belief as to the plaintiff's allegation with regard to the quantity of acres ascertained by the survey, and therefore held plaintiff to strict proof.

The following issues were submitted to the jury:

1. Did the defendant Hagan agree to pay or refund plaintiff $5.71 per acre for the difference between 350 acres and the num-

ber of acres actually contained in the land described in the pleadings, in case said land did not contain as much as 350 acres?

2. How many acres did the land contain?

3. How much does defendant owe plaintiff, if anything?

To all of which issues the defendant excepted.

The plaintiff testified in his own behalf that at the time of making the contract of sale, which was subsequently consummated by the defendant and wife, the defendant stated that the land contained three hundred and fifty acres, but upon the plaintiff expressing a belief that the land did not contain so many acres, told the defendant if he would have the land run out and it held out three hundred and fifty acres he would talk about the trade. Defendant replied, he would never pay a cent for the survey—that there were three hundred and fifty acres by actual survey, and that if he would take the land at the price, and have it run out at his own expense, whatever it lacked he would pay him in proportion, and at the time of executing the deed the defendant admitted that he had told M. O. Sherrill that he had made plaintiff a foolish proposition to make the land good for 350 acres and did not hold the plaintiff bound for the excess if it run out more than 350 acres, and that the defendant admitted after the deed was executed that he did tell the plaintiff if the land did not run out 350 acres he would make it good in proportion.

Plaintiff also offered the testimony of one L. A. Rudisill, that he heard the trade between the plaintiff and defendant throughout, in front of Mc. Sherrill's store, and Hagan told the plaintiff he could have the land for $2,000, and if it did not run out as much as 350 acres he would reduce the price in proportion.

Plaintiff further offered the testimony of the county surveyor, who testified that he had surveyed the land and it contained only two hundred and ninety-eight and a-half acres.

The defendant objected to all of the testimony offered by the plaintiff that it contradicted and added to the written contract as evidenced by the deed, and was, therefore, inadmissible. But the objection was overruled by the court, and the defendant excepted.

The defendant offered himself as a witness in his own behalf and testified that he did not agree to pay or refund, or be responsible to the plaintiff for any deficiency in the land, and that it was the express agreement and understanding between him and plaintiff that he bought the land by the plat which purported to contain 350 acres, and that he was not to be responsible for any deficiency in the number of acres. He also offered the testimony of several witnesses in confirmation of his testimony.

In reply, the plaintiff offered as a witness Miles Sherrill, who testified that defendant told him he had made a foolish trade with the plaintiff in that he agreed to make up the deficiency in a certain number of acres without having plaintiff agree to pay for the excess over the number.

The jury responded to the first issue, "yes."

To the second issue, "298½ acres."

To the third issue, "$294.06."

There was judgment upon the verdict in behalf of the plaintiff, and defendant appealed.

The defendant contended, first, that the action could not be sustained because the complaint does not set forth facts sufficient to constitute a cause of action, and second, because, the contract being such as is required by law to be in writing, it was error in the court to admit parol evidence to establish the contract; and third, because the deed executed by the defendant to the plaintiff contained the contract of the parties, it was error in the court to admit parol evidence to contradict, vary, or add to it.

The first objection of the defendant is without force.

The facts set forth in the complaint are sufficient to constitute a cause of action, if the agreement alleged was such as was not required by law to be put in writing. The defendants contended that it was a contract concerning an interest in land, and not being in writing was void under the statute of frauds.

The contract for the conveyance of the land was put in writing as evidenced by the deed, which passed the title to the land to the defendant, unclogged by any condition or stipulation. But the

undertaking to make good the deficiency in the number of acres was a distinct and independent contract, and did not purport or stipulate to pass any interest in the land, and, therefore, was not such an agreement as falls within the statute of frauds. It was a parol agreement and might be supported by parol evidence. It was in substance an agreement, that if the plaintiff would, at his own expense, have the land surveyed, and it should be ascertained to fall short of three hundred and fifty acres, the defendant would make good the deficiency, by deducting a proportionate amount of the price agreed to be paid for the land. It was a contract no more within the statute of frauds, than if the defendant had agreed with the plaintiff that if he would have the lands of a stranger surveyed at his own expense, so as to ascertain the number of acres it contained he would pay him one hundred dollars. Most clearly such a contract need not be in writing, and there is no doubt the plaintiff could maintain an action to recover the one hundred dollars, for it is a contract founded upon a sufficient consideration. So here, the defendant says to the plaintiff, "do you have the land surveyed at your expense, and if it falls short of three hundred and fifty in the number of acres, I will make good the deficiency in proportion." The plaintiff did have it surveyed and it fell short $51\frac{1}{4}$ acres. The trouble and expense of having the survey made was a sufficient consideration to support the defendant's promise. Trouble, loss or inconvenience is a sufficient consideration to support a promise, and it is not necessary that the person making the promise should receive or expect to receive any benefit. *Findly* v. *Ray*, 5 Jones, 125; *Watkins* v. *James*, *Ibid*, 105; *Brown* v. *Ray*, 10 Ired., 72.

But if there can be any doubt about this position, it was objected that the deed was the only legal evidence of the contract between the parties, and the evidence offered by the plaintiff and admitted by the court to establish the contract set out in the complaint, contradicted, added to, and varied the contract as evidenced by the deed. But the objection is not sustained. For conceding it to be all one contract, the deed is evidence of one part of the

agreement, and the promise to make good the deficiency in the number of acres is another part of the contract left in parol, so that the parol proof offered and admitted did not add to or contradict the deed.

In *Manning* v. *Jones*, Busb., 368, where A made a parol contract to purchase of B a tract of land at an agreed price, and B further agreed that he would put certain repairs on the premises before the 10th of January ensuing; afterwards, and before that day, B delivered to A the deed for the land, renewing the promise to make repairs; the repairs not being made, A brought *assumpsit* to recover damages, and on the trial offered to prove the agreement by a witness, when it was objected that the deed was the only legal evidence of the contract between the parties: It was held that the proof was admissible, the deed being an execution of one part of the agreement, the other having been left in parol; so that the proof offered was not to add to, alter or explain the deed. To the same effect are *Hone* v. *O'Malley*, 1 Min., 387; *Twidy* v. *Saunderson*, 9 Ired., 5; *Daughtry* v. *Boothe*, 4 Jones, 87; *Terry* v. *Railroad*, 91 N. C., 236.

It can make no difference whether the agreement to make good the deficiency constituted a part of the entire contract to convey the land or was an independent contract founded upon a sufficient consideration, it was competent to support it by parol evidence, and we are of the opinion there is no error.

The judgment of the Superior Court is affirmed.

No error. Affirmed.

W. H. DAIL & BRO. et als v. JOHN T. FREEMAN.

Execution Sale—Agricultural Lien—Parol Contract to Purchase Land—Judgment Lien.

1. A purchaser under execution sale takes all that belongs to the debtor and nothing more. A greater estate or interest than the debtor owned cannot be conveyed thereby.
2. A sale by the sheriff relates to the date of the judgment so as to defeat all conveyances and incumbrances upon the land subsequently made, but it has no application to the crops raised on the land after the rendition of the judgment, but before the sale.
3. Where an agricultural lien is made by a vendee who has paid only a portion of the purchase money, of which the vendor has notice but makes no objection, his assent to the lien will be presumed.
4. A parol contract for the purchase of land, is voidable, not void. In such case, a vendee who is in possession is the tenant by sufferance of the vendor.
5. So, where a tenant makes an agricultural lien, and afterwards the land is sold under execution as the property of the landlord; *It is held*, that the owner of the lien has a right to the crop superior to the purchaser at execution sale.
6. A judgment creditor has neither *jus in re* nor *jus ad rem* in the judgment debtor's land, but only the right to make his lien effectual by a sale under execution.

(*Davidson* v. *Frew*, 3 Dev., 3; *Hoke* v. *Henderson*, *Ibid*, 12; *Homesley* v. *Hogue*, 4 Jones, 481; *Wellborn* v. *Simonton*, 88 N. C., 266; *Pearsall* v. *Mayers*, 64 N. C., 549; *Brothers* v. *Hurdle*, 10 Ired., 490, cited and approved).

This was an action of claim and delivery for two bales of cotton, tried before *MacRae*, *Judge*, and a jury, at the July Special Term of GREENE Superior Court.

On the trial the plaintiff offered evidence tending to show that one Charles Hart contracted with Lewis Johnson in 1874 for the land upon which the two bales of cotton in controversy were raised in 1878. Johnson sold the land to Alexander Williams and turned over to him the notes which Hart had given him for the land. He afterwards sold to W. F. Williams. Hart had a bond for title to be made when the notes were paid.

In March, 1878, Hart, who had been in possession of the land since his purchase from Johnson, gave to W. H. Dail & Bro., in

consideration of advances agreed to be made by them, a lien upon all the crops he should make on the land where he then resided, and also a similar lien, of same date, upon like consideration, to McDowell, Pate & Co., two of which firm, W. H. Dail and G. T. Dail, were members of the other firm of W. H. Dail & Co. These liens had not been discharged, but were still in force, when the land was sold by the sheriff in August, 1878, as hereinafter stated.

The defendant offered in evidence several judgments; among others, a judgment in favor of Spivy against Williams, dated 16th day of January, 1874, upon which execution was issued and the land upon which the cotton was raised was sold by the sheriff on the 25th day of August, 1878, and purchased by the defendant J. H. Freeman.

The defendant further offered evidence tending to show that, after the sale, Hart became his tenant and promised to pay him rent, and in the spring after the land was sold, Hart came to John F. Freeman, who was a witness for the defendant, and said to him, "You told me whenever I got that cotton ready to let you know; there are two bales of cotton there, and several persons are after it. If you don't come to-day, some one else will get it." This was in the fall of the year, directly after the cotton was picked, and the fall after the land was sold and bought by Freeman. That Charles Hart was then living on the place, and had never paid Freeman anything, except the two bales of cotton. The plaintiff then introduced Hart as a witness, who testified that he had never rented the land from Freeman nor told him to take the cotton. He further testified that he had cancelled the contract for the sale of the land before the execution sale, and had rented it from Williams ever since.

The bond for title was offered by the plaintiff to show that Hart was in under a contract of purchase of the land, and not under a contract to pay rent. It was objected to by defendant, but admitted by the Court, and the defendant excepted.

The defendant asked the following instructions:

1. If Charles Hart agreed to pay rent to J. T. Freeman as agent of J. H. Freeman, the plaintiff is not entitled to recover, and the plaintiffs are not the owners thereof, and the defendant does not wrongfully withhold possession.

2. If Freeman got possession of the cotton with the consent of Charles Hart, the defendant does not wrongfully withhold possession thereof, nor is the plaintiff the owner thereof.

3. If the defendant, as agent of J. H. Freeman, got possession of the cotton peaceably, the plaintiffs are not the owners thereof.

All of which were declined, and the defendant excepted.

The defendant tendered the following issues:

1. Did Charles Hart rent the land on which the cotton, which is the subject of controversy, was raised, from J. T. Freeman, as agent of J. H. Freeman?

2. Did Charles Hart authorize the defendant to go and get the cotton, which is the subject of action?

His Honor declined to submit these issues to the jury, and the defendant excepted.

Then the following issues were submitted:

1. Are the plaintiffs the owners and entitled to the possession of the two bales of cotton described in the complaint?

2. Does defendant wrongfully withhold possession of the same from plaintiff?

3. What is the present value of the cotton?

The presiding Judge charged the jury, that the plaintiffs hold two mortgages on the crop of Charles Hart for the year 1878. This being so, the plaintiffs would be entitled to recover, unless the defendant can show a better right to hold the cotton which he admits to be in his possession. But the defendant says he holds the cotton as agent of J. H. Freeman, who was the landlord of Charles Hart. If defendant does so hold it, he has the better right to it, as the landlord's lien is paramount. Defendant offers in evidence the sheriff's deed for the thirty acres of land, sold under execution, in the case of Spivey against W. F. Williams, to J. H. Freeman, and testifies that this is the same land that

the cotton was raised on, and that Charles Hart agreed to pay rent and authorized him to get the two bales of cotton. If Hart was in possession of the land under a bond for title, which was defective and void, and it amounted only to a parol contract for the purchase of the land, and had paid part of the purchase money, the ordinary relation of landlord and tenant did not exist between Hart and the owner of the land, and when the land was sold under execution, the same interest which the owner had was conveyed by the sale and the sheriff's deed. If Hart agreed to pay rent to Freeman before he mortgaged the crop to the plaintiff, this would constitute the ordinary relation of landlord and tenant, and Freeman's lien for the rent would be paramount and the plaintiffs would not be entitled to recover. There is some question whether Hart did agree to pay rent to Freeman, and when he did so agree.

The defendant excepted to all the foregoing.

The jury responded in the affirmative to the first and second issues, and on the third issue assessed the plaintiff's damages at $73.80.

There was judgment for the plaintiffs, and the defendant appealed.

No counsel for the plaintiffs.

Mr. W. C. Monroe, for the defendant.

ASHE, J. (after stating the facts). There is no error in the ruling of His Honor in refusing the instruction asked by the plaintiff, nor in rejecting the issue tendered by him, for the reason they were not such as were warranted by the pleadings or the facts of the case. Nor are we able to discover any error in the instruction given by His Honor to the jury, which could have operated to the prejudice of the defendant.

The defendant claimed the land on which the two bales of cotton were raised in 1878, by a sheriff's deed made to him, by virtue of a sale of the land under an execution on the 30th of

August, 1878, issued by leave of the court upon a judgment rendered the 10th of January, 1874. The defendant then acquired the interest, whatever it was, of W. F. Williams, the defendant in the execution, and this would have given him the right to the rent of the land for that year accruing after the sale, or, at least, the right to recover for the use and occupation for that term, unless there was something done by the defendant in the execution previous to the sale which prevented his said rights from attaching.

The purchaser under an execution takes all that belongs to the debtor and nothing more; a greater estate or interest than the debtor owned cannot be conveyed. *Herman on Executions*, sec. 360.

Here, Hart was the vendee of Williams, the defendant in the execution, by a parol contract of purchase—he had paid a part of the purchase money, and was put into possession of the land by Williams, and continued to hold possession by his consent to the time of the sale by the sheriff. He was only the tenant at sufferance of Williams, who had the right to deprive him of the possession at any time upon a reasonable notice. But he did not exercise the right, and until he should see proper to do so, Hart was rightfully in possession, and being so, he executed in March, 1878, the two agricultural liens upon his crops to be raised on the land during the year 1878, which were duly registered, and thus gave notice to everybody.

Williams the vendor, therefore, had notice, and not objecting, his assent to the lien given by Hart must be presumed. Hart then, so far as Williams was concerned, had the right to give the liens, and they conveyed a vested right to the plaintiffs in the crops to be made during the year 1878, as fully and effectually as if they had been given by Williams himself; and if they had been given by him, would the purchaser of the land at the sale under execution divest the rights of the plaintiffs acquired by the agricultural liens? We are of the opinion, it would not. It is true where there is a judgment lien upon land,

a sale under execution issued upon such judgment will pass to the purchaser all the rights and interests of the defendant in the execution, and when he obtains the deed of the sheriff, it will relate to the rendition of the judgment, so as to defeat all conveyances and incumbrances upon the land subsequently made. But this relation has no other effect than to defeat such alienations and incumbrances, made subsequent to the rendition of the judgment, upon the *land itself*. It has no application to the products or profits of the land arising or accruing in the interval between the judgment and the sale. If that were so, the purchaser at an execution sale under a judgment several years old might receive the rents accruing during all that time; but the reason he cannot do so, is because the judgment lien on land constitutes no property or right in the land itself. A judgment creditor has no *jus in re* nor *jus ad rem* in the defendant's land, but a mere right to make his general lien effectual by following up the steps of the law, and consummating his judgment by an execution and sale of the land. *Freeman on Judgments, sec.* 338, and *Herman on Executions, sec.* 335. And the only effect of the relation of a sheriff's deed to the judgment is to preserve and make effectual the lien of the judgment under which the execution sale was made. *Freeman on Executions, sec.* 333. For any other purpose his deed only relates to the day of sale. It vests the title of the land in the purchaser only from the time of the sale. *Davidson* v. *Frew*, 3 Dev., 3; *Hoke* v. *Henderson, Ibid.*, 12. And only such interest as the defendant in the execution has in the property levied upon and sold, whether real or personal, passes by the sheriff's sale. *Homesley* v. *Hogue*, 4 Jones, 481. Hence, although the purchaser, at execution sale, acquires the right to the rents accruing at and after the time of sale, by purchasing the reversion when the land is in possession of a lessee, if the defendant in the execution has no right to them at the time of sale, the purchaser acquires no right. Here, Williams had no right to the rents or crop, nor claim for use and occupation, at the date of the lien or at the time of the sale. He had

no such interest as could be passed by the sale. Hart was his vendee, it is true, only by a parol contract; but it was still a valid contract, unless Williams should see proper to make it void by setting up the statute of frauds. Until that should be done, Hart was in possession lawfully as vendee, and was his tenant at sufferance, and as such was entitled to the rents and profits of the land. *Wellborn* v. *Simonton*, 88 N. C., 266; *Pearsall* v. *Mayers*, 64 N. C., 549. If he was entitled to the rents, he was, of course, entitled to the crops, and consequently had the right to give a lien on them for advances to enable him to make them.

It is held that a purchaser at an execution sale is not, as a general rule, entitled to the crops nor the fixtures on the land if the premises be in possession of a tenant. Such tenant has the right to gather the crops and remove the fixtures, but it is otherwise when the crop is raised by the defendant in the execution—*Herman on Execution*, §347. But even in that case the principle applies only to the crops which have not been severed before the sale; when there has been a severance before the sale, the crops do not pass to the purchaser. This distinction is maintained in several decisions of the Supreme Court of Pennsylvania. In *Stambaugh* v. *Yates*, 2 Rawle, 161, where grain growing had been sold under execution against the debtor, before the sale of the land upon a *ven. ex.* it was decided that severance was implied, and that the grain did not pass with the land; and in *Myers* v. *White*, 1 Rawle, 353, a mortgagor assigned all his property for the benefit of his creditors, it was held that the growing grain passed to the assignees, and not to the purchaser at sheriff's sale of the land sold by virtue of the *levari facias*, because the assignment amounted to a severance. To the same effect are *Porche* v. *Bodin*, 28 La. An., 761; *Brothers* v. *Hurdle*, 10 Ired., 490. Upon the principle decided in these cases, the agricultural liens effected a severance of the crops and they did not pass to the purchaser, and this conclusion is strongly supported by the evident policy of our Legislature to encourage agriculture, man-

ifested by numerous enactments on the subject, notable among which are sections 1749 and 1799 of *The Code*. Under the provisions of these sections, if Hart was the tenant of Williams at the time of the sale, the case presents a somewhat different aspect. It will be noticed that there was a conflict of testimony as to whether Hart ever attorned to Freeman, the purchaser at the execution sale. Freeman offered evidence tending to show that he did, and the plaintiff on the other hand, offered the testimony of Hart, who denied that he ever became the tenant of Freeman, but testified that he surrendered his contract of purchase before the sales and became the tenant of Williams, the defendant in the execution, and the jury have found the issues in favor of the plaintiff; the inference is they found that Hart was the tenant of Williams. If so, then section 1749 applies, which reads: "Where any lease for years of any land for farming, on which a rent is reserved shall determine during a current year of the tenancy, by the happening of any uncertain event determining the estate of the lessor, the tenant, in lieu of emblements, shall continue his occupation to the end of such current year, and shall then give up such possession to the succeeding owner of the land, and shall pay to such succeeding owner a part of the rent accrued since the last payment became due, proportionate to the part of the period of the payment elapsing after the termination of the estate of the lessor to the giving up such possession, and the tenant in such case shall be entitled to a reasonable compensation for the tillage and seed of any crops not gathered at the expiration of any current year, from the person succeeding to the possession." It will be observed that this provision accords with the doctrine laid down in *Herman on Executions, supra*, that the purchaser would not be entitled to the crops but only to a portion of the rent. If Hart, then, at the time of the sale, was the tenant of Williams, he had the right to hold possession to the end of the year, and Freeman would be entitled to the rents accruing only after the sale. But the provisions of this section must be construed in connection with and in subordination to those of section 1799,

where it is provided that, "If any person shall make any advance, either in money or supplies, to any person who is engaged in, or about to engage in the cultivation of the soil, the person so making such advance shall be entitled to a lien on the crops which may be made during the year, upon the land in the cultivation of which the advances so made have been expended, *in preference to all other liens existing or otherwise, to the extent of such advances.*"

This provision would seem to override the purchaser's claim for rent after his purchase, and his right to rent after that time would be subject to the claim of him who held the liens.

After a careful review of the subject, our conclusion is there was no error in the ruling and judgment of the Superior Court, and the judgment of that court is therefore affirmed.

No error. Affirmed.

OLLEY SPARKS v. S. B. SPARKS et als.

Certiorari.

1. A *certiorari*, in lieu of an appeal, will be granted when it appears that the appellant has been guilty of no neglect or delay in prosecuting his appeal. So, where it appeared that the appellant caused a statement of the case to be prepared and served on the appellee, who objected to it, and it was submitted to the Judge who tried the action, but he failed to settle it, whereupon the appellant prepared another case, which was also submitted to the Judge, who again failed to settle the case on appeal; *It was held*, that the appellant was entitled to a *certiorari*.

2. Where a *certiorari* is granted, because no case on appeal has been prepared, the Supreme Court will limit the time within which the case may be prepared and served by the appellant, and in case the parties do not agree, it will be settled as directed by section 550 of *The Code*.

(*Smith* v. *Lyon*, 82 N. C., 2; *Hahn* v. *Guilford*, 87 N. C., 172; *Suiter* v. *Brittle*, 90 N. C., 19; *Mott* v. *Ramsay*, 91 N. C., 249, cited and approved).

PETITION for a *certiorari* filed by the defendant at February Term, 1884, of the Supreme Court.

The facts appear in the opinion.

Messrs. Battle & Mordecai, for the plaintiff.

Messrs. Reade, Busbee & Busbee and *Batchelor & Devereux,* for the defendants.

SMITH, C. J. This action instituted by the plaintiff against the defendant, her husband, to annul and have declared void an agreement entered into between them, and certain deeds also executed in carrying its provisions into effect, terminated at Fall Term, 1883, of the Superior Court of Yancey, in a judgment rendered upon issues found by the jury in favor of the plaintiff. An appeal was then entered, notice whereof was waived, and a justified undertaking given for the sum fixed by the presiding judge. During the following week, under an agreement of counsel, the appellant's counsel prepared a statement of the case for the Supreme Court and submitted it to the counsel for the plaintiff, who refused to accept it, but entered no written exceptions thereto. The statement, with all the papers in the cause, then passed into the possession of the judge, by whom delivered does not appear, and he carried them away, promising himself to make up the statement embodying the appellant's exception for the appellate court. The defendant had no information that this had not been done, and that none of the original papers, necessary in preparing a transcript of the record proper, had been returned to the clerk's office, until the session of the court in the spring following. Thereupon appellant's counsel prepared a second case which was not approved and accepted by the plaintiff's counsel, and it was agreed that it should be handed to the judge for him to revise and settle. This he failed to do, or to return the papers, and they were procured from him upon application of plaintiff's counsel, near the close of the session, without any case or comment or explanation in regard to its absence, and the appellant was thus

enabled to obtain a transcript of the record proper, which he caused to be filed in this court on the 28th day of April, 1884.

These are the facts alleged in the verified petition of the defendant for the writ of *certiorari*, to which there are no opposing statements.

Assuming them to be true, we do not see any indications of neglect or delay on the part of the defendant in prosecuting his appeal to induce us to withhold the remedy he seeks. While awaiting the settlement of the case by the judge to whom it was by common consent committed, he could not at once obtain the transcript without it by reason of the absence of the original papers in the cause, and in fact it was sent up at the term next after the trial in accordance with the rule. *Smith* v. *Lyon*, 82 N. C., 2; *Hahn* v. *Guilford*, 87 N. C., 172; *Suiter* v. *Brittle*, 90 N. C., 19.

It was not the fault of the appellant that his completed transcript was not here when the record proper came up. The retention of the papers obstructed any onward movement in the cause to an early hearing. *Mott* v. *Ramsay*, 91 N. C., 249.

So, too, the opposing counsel agree to submit the defendant's last prepared case to the judge who tried the cause, and to await and abide by what he may do. As the purpose to be attained by the issue of the writ is to supply the defect in the record by having the exceptions prepared and sent up, we shall pursue the course adopted in *Mott* v. *Ramsay, supra,* at the last term, under similar circumstances, by limiting the time in which the defendant may draw up his statement and serve it on the plaintiff or her counsel to the first day of July next, and in case of disagreement the case must be settled under the directions of The Code, sec. 550.

Writ allowed.

DENTON IJAMES v. G. C. McCLAMROCH et als.

Justice's Jurisdiction—Counter-claim—Evidence.

1. The jurisdiction of the Superior Court in appeals from justices of the peace, is entirely derivative, and if the justice had no jurisdiction in the action as it was before him, the Superior Court can derive none by amendment. So where a counter-claim, filed to an action brought before a justice, amounted to more than $200, the want of jurisdiction could not be cured by entering a *remittitur* for the excess in the Superior Court.
2. In an action brought by an administrator on notes given by some of the distributees for articles purchased at the administrator's sale, the declarations of the administrator, at the time when the notes were given, that he would only be obliged to collect a portion of the notes, as the estate owed only a small amount of debt, are inadmissible.

(*Boyett* v. *Vaughan*, 85 N. C., 363, cited and approved).

This was A CIVIL ACTION begun before a justice of the peace and brought by appeal of defendants to the Superior Court, and tried before *MacRae*, *Judge*, at the Fall Term, 1884, of DAVIE Superior Court.

The pleadings before the justice were oral. The plaintiff sued upon a bond, and the defendants pleaded payment and set off. In the Superior Court the pleadings were reduced to writing. The plaintiff complained of the non-payment of a bond executed to him by the defendants, and the defendants pleaded payment of the bond, and a counter-claim, founded upon the alleged indebtedness of the plaintiff to them for a balance due them by the plaintiff, for their distributive shares of the estate of James McClamroch, deceased, of whom plaintiff was administrator, and for a balance due on account of the sale of their land, which they had authorized the plaintiff, by power of atttorney, to effect, for the purpose of paying the debts they owed the plaintiff for property purchased by them at a sale by him as administrator, and to pay off the outstanding debts of the estate. The matter was then referred by the presiding Judge at Fall Term 1881, to the clerk, to take an account of the administra-

tion of the estate of James McClamroch, deceased, by D. Ijames, his administrator, and also to take and state an account of the moneys received and disbursed by said Ijames under the power of attorney referred to above.

The clerk filed his report at Spring Term, 1883, and at said Term a motion was made to the court by the plaintiff's counsel, to strike out the order of reference and set aside the report of the referee, on the ground that the justice of the peace had no jurisdiction of the counter-claims set up in the answer of defendants.

The Court made an order granting the motion, from which the defendants did not appeal. At the same time leave was granted the defendants to amend their answer, in pursuance of which the defendants filed an amended answer, in which they allege that the amount due them from the proceeds of the sale of the land, made by the plaintiff under the aforesaid power of attorney, was $206 and interest, which the defendants pleaded as a counter-claim to the plaintiff's action, and forgave and remitted to the plaintiff so much of the principal of said claim as is in excess of $200, together with the interest on the excess, and asked for judgment against the plaintiff for the same.

The plaintiff replied to the plea of counter-claim that the justice of the peace had no jurisdiction of the same, and that the counter-claim attempted to be set up was passed upon by the court at Spring Term, 1883, and judgment was rendered by the Court in this case to the effect that the justice of the peace had no jurisdiction of the said counter-claim, and the defendants are thereby estopped from setting up said counter-claim again.

The defendants offered to prove, that when the note was given, the plaintiff stated that he, as administrator, would require but little money; that there was a small balance of debts against the estate; that he would, perhaps, call on them for a small amount of money to pay them, and the notes would then be delivered, and settlement made between the heirs to make them equal; that the plaintiff called on them and their brothers from time to time,

claiming that there were debts still due, and they made the payments as endorsed on the notes; that when the last payment of fifty dollars was made by L. N. McClamroch on July 7th, 1884, the plaintiff told defendant he needed some of the money, but very little of it—there would be no more paid to him, and that in about two weeks he would get them all together for a settlement and distribution, and that a part of this money would be left to pay over to the children; that he failed to do this, and that the matter passed along, from time to time the matter being talked over, defendant trying to get a settlement, until this action was commenced. The Court refused to receive this evidence, and the defendant excepted.

The plaintiff alleged that a full settlement of the estate of his intestate, and of the proceeds of the sale of the land, had been made between him and the defendants, and full receipts and acquittances given.

This the defendants denied, and the following issue upon the point was submitted to the jury:

"Was there a full settlement of the estate of James McClamroch made by plaintiff with the defendants?"

To which the jury responded, "No."

When the case came on to be tried, on motion of the plaintiff's counsel, the Judge struck the counter-claim out of defendants' answer, upon the ground that it was over two hundred dollars and the justice had no jurisdiction of it, and only allowed evidence to be submitted to the jury on the issue of payment; to which defendants excepted.

Mr. E. L. Gaither, for the plaintiff.
Messrs. Coke & Williamson, for the defendants.

ASHE, J. (after stating the facts). There were only two exceptions taken in the course of the trial, which are presented by the appeal for our review:

1st. To the ruling of His Honor in excluding the evidence proposed to be introduced by the defendants in reference to the

conversation with the plaintiff in regard to the amount of the money due on the bond, which he would need in settling the debts of his intestate's estate.

There is no possible view in which the evidence could have been admissible. It was no evidence of a payment or release, or in any sense a discharge of the obligation—and if admitted it would have been immaterial and perfectly harmless.

The second exception was to the action of the Court in striking the defence of counter-claim out of the defendants' answer.

There was no error in that ruling. The pleadings before the justice were oral. The defendants in that court pleaded set-off, but what they meant by such a plea, we had no means of forming any knowledge until the case was carried by appeal to the Superior Court, where the pleadings were set out in writing, and by the written pleadings in that court, we are informed what the defendants meant by the plea of set-off before the justice. It seems to have been in the contemplation of the defendants by their plea of set-off, to plead a counter-claim of money due to them by defendant as administrator of Jas. McClamroch, deceased, for balance of distributive shares in said decedent's estate, and also for a balance of two hundred and six dollars due them on account of land belonging to them and some others, sold by him under a power of attorney given him by them for the purpose of raising money to pay the amount of their indebtedness to the estate of his intestate, for articles purchased at the administrator's sale, and for other purposes. The consideration of the note in suit was a part of the land so sold by the plaintiff. We are of opinion that there was no error in the ruling of His Honor in striking out of the defendants' answer the counter-claim set up by them in defence. The jurisdiction of the Superior Court in appeals from justice's courts, is entirely derivative. If the justice in such cases has no jurisdiction of the action, the Superior Court can derive none by the appeal. *Boyett* v. *Vaughan*, 85 N. C., 363.

It was there held: "It is the jurisdiction of the justice of the peace, which, on appeal, gives jurisdiction to the Superior Court; and of course, if the justice had no jurisdiction, the Superior Court could have none, and therefore, by allowing *an amendment in the transcript* which enlarges the cause of action beyond the jurisdiction of the justice, it must necessarily oust itself of jurisdiction."

The principle here decided is, that the Superior Court could not, by amendment, enlarge the cause of action beyond the limited jurisdiction of a justice. That being so, the converse of the proposition must be true, that the Superior Court cannot, by amendment, *lessen* the cause of action so as to give jurisdiction to the justice when the cause of action was originally in excess of his jurisdiction.

From the written pleading in the Superior Court, we must assume that the counter-claim set up by the defendants in the justice's court was two hundred and six dollars, for that was the sum of the demand set up as a counter-claim in the first answer filed by them, and also in their amended answer filed by leave of the court, in which they attempted to escape the objection to the jurisdiction by filing a *remittitur* to all of their demand in excess of two hundred dollars. But, as His Honor very correctly decided, the *remittitur* could not be made in that court so as to give jurisdiction to the Superior Court over a matter of which the justice's court, from which the appeal was taken, had no jurisdiction.

There is no error. The judgment of the Superior Court is therefore affirmed.

No error. Affirmed.

J. C. BOWEN v. SOLOMON WHITAKER.

Issues.

1. The requirements of the statute in regard to submitting distinct issues in writing to the jury is mandatory, and where it does not appear from the record what issues were submitted, but it is stated in general terms that all the issues were found in favor of the plaintiff, a new trial will be granted.
2. Under sec. 395 of *The Code*, if the issues are not prepared by the attorneys, it is the duty of the judge who tries the case to do so.

CIVIL ACTION, tried before *Shipp, Judge*, and a jury, at Fall Term, 1884, of HENDERSON Superior Court.

It appears in the record that no distinct issues were eliminated and submitted to the jury, but only "that the jury find all issues in favor of the plaintiff, and assess his damages at $250."

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

Mr. Armistead Jones, for the plaintiff.
Mr. James D. Osborne, for the defendant.

MERRIMON, J. It must be obvious to every intelligent lawyer that it is of great importance that the issues of fact raised by the pleadings in an action at law shall be thoroughly and accurately tried. It is quite as manifest that this cannot be done unless the issues shall be presented distinctly and with precision. This is especially necessary where the issues are to be tried by a jury. Juries are generally composed of plain, sensible, intelligent men, unaccustomed to draw nice distinctions in the course of the investigation of facts, or to keep in their minds clear and steady perceptions of issues stated to them orally. They need, and it is essential to place before their minds, the issues in such manner and shape as that they can see them clearly and hold them strongly and steadily, while they hear, weigh, and apply the evidence, and until they render their verdict upon them. The

law contemplates that this shall be done, and it is essential to the intelligent administration of public justice. It is often-times a solemn pretence to submit to the ordinary jury issues of fact stated to them orally, sometimes vaguely, by the presiding judge!

The verdict, in such cases, is frequently not an intelligent, satisfactory finding of fact; it is but the merest conjecture as to the true state of the facts. The spirit of the law is, that every authorized facility shall be afforded to reach the truth and justice, through the system of trial by jury.

One of the chief virtues of the common law method of procedure was, that the pleadings necessarily presented the issue of fact clearly, distinctly and within so narrow a compass, as that the plain minds of jurors could lay hold of it at once with firm and intelligent grasp.

This is not so under The Code method of procedure. This is more, though not altogether, like that which prevailed in courts of equity. The constitutive facts are embodied in an orderly method in the complaint or other pleading, often-times presenting a variety of isssues plainly perceivable, if the pleading is good, by the legal mind, but they require to be drawn out by, and put in simple, intelligible language and shape, to be submitted to the jury. When this is not done, the trial by jury must be shorn in a large degree of its usefulness and efficacy, a result not to be tolerated, much less encouraged by the courts, especially in view of the present stringent statutory provisions in this respect, to which reference will presently be made.

The Code of Civil Procedure, as at first adopted in this State, provided for the trial of issues of fact by jury, but it did not specify the particular manner of making them up and submitting them. (*C. C. P.*, §§219 to 240; *Bat. Rev.*, ch. 17, pp. 192 to 198). This gave rise at once to confusion and much dissatisfaction in the practice of the law. This Court recognized the evil, and acting upon its authority to prescribe rules of practice for the Superior Courts, prescribed rules III, IV and V, adopted at June Term, 1871, and reported in 65 N. C., 705. These

rules directed how and at what time issues of fact should be drawn up. They were, however, construed to be only directory, unless strictly insisted upon in apt time. The result was, that in the hurry and carelessness of practice, that too much prevailed, they came to be much neglected, and, as a consequence, verdicts became unsatisfactory, and this Court very often found much difficulty in ascertaining from the records what had or had not been settled by the findings of the jury, especially where several issues of fact had been submitted.

To cure this severely felt evil, it has been provided by *The Code*, §395, that "The issues arising upon the pleadings, material to be tried, *shall* be made up by the attorneys appearing in the action, and reduced to writing, or by the judge presiding, before or during the trial;" and, further, by section 396, that "Issues shall be framed in concise and direct terms; and prolixity and confusion must be avoided by not having too many issues."

It will be observed, that the language of these provisions is strong and mandatory; they require that the issues of fact "shall be made up," and "shall be framed," &c. They are mandatory. The rules of this Court that preceded them were directory, and the consequent evil to which we have adverted prevailed. The purpose of the statute is to cure that evil and establish a better procedure in the respect referred to. There is, therefore, nothing left to construction. The statute must have its full force and effect.

It follows, that the trial by jury of issues of fact in the action, not reduced to writing substantially as required by the statute just cited, is irregular and fatally defective, if the party complaining shall except to it on that account. The issues must be framed and reduced to writing.

Now, applying what we have said to the case before us, we are of opinion that the appellant is entitled to a *venire de novo*. It does not appear from the record what issues were submitted to the jury—it is stated in general terms that all the issues were found by the jury in favor of the plaintiff. They do not appear

to have been framed or given any definite shape, and they were not reduced to writing at all. The requirement of the statute was wholly neglected. The case upon appeal states:

"There were no issues prepared by the counsel on either side, and none offered to the Court. When the counsel for the defendant commenced his address to the jury in reply to one of the plaintiff's counsel, he asked the Court if he (the Court) had prepared the issues? The Court answered in the negative, and remarked that it was supposed to be the duty of counsel to tender issues, and for the Court to settle them in case of disagreement. That such was understood to be the rule of practice."

This cannot be treated as dispensing with a due observance of the statute. It was the duty of the Court to see that the trial proceeded according to its mandatory requirements; having authority, it should have required the counsel to frame the issues and reduce them to writing, or, for any cause, failing to do this, "the Judge presiding," should have done so "before or during the trial." It seems that the learned Judge who presided at the trial, did not note that the statute has superseded the rules of court, under which the practice prevailed as he stated it. That is not the present rule of practice.

It is not sufficient to say that the appellant did not propose proper issues, or that he must be taken to have waived them. It does not appear that he did waive them—it certainly does not appear affirmatively that he did so—indeed it seems that he did not. But it appearing to the Court that the pleadings raised issues of fact that have not been tried according to law, the Court could not give judgment, certainly while the appellant was present objecting. It cannot be seen that a jury was empaneled and made a finding upon the evidence submitted to them; they must have rendered a verdict upon issues properly formed in writing submitted to them. This the statute requires, and this is essential to an intelligent apprehension of the merits of the case in the Superior Court, and as well upon appeal in this court.

The findings of the jury cannot be treated as a special verdict. They were not instructed to find such verdict, nor do they purport to have done so, nor are the facts found; the finding was general, and the record fails to show what was found, with any degree of certainty.

There is error, for which there must be a *venire de novo*. To that end let this opinion be certified to the Superior Court according to law.

Venire de Novo.

J. M. McMINN v. P. F. PATTON.

Bond—Correction of Written Undertaking—Undertaking an Appeal to stay Execution.

1. In order to correct a written contract, it must be alleged and proved, that there was either a mutual mistake in regard to a material fact, or that there was a mistake on the one part, and some fraudulent act on the other, whereby he was misled.
2. In an action on a bond given to stay execution on an appeal from a justice's judgment, it is not necessary to allege that the plaintiff had sustained damage on account of the appeal.
3. Where the condition of the bond to stay such execution was, that if judgment be rendered against the appellant and execution thereon be returned unsatisfied in whole or in part, the sureties will pay the amount unsatisfied, together with all costs and damages; *Held*, sufficient under the statute.
4. Before the Act of 1879, ch. 68, (*The Code*, §884), a civil action, and not a summary proceeding in the cause, was the proper remedy against the sureties to an undertaking to stay execution on an appeal from the judgment of a justice of the peace.

(*Crowder* v. *Langdon*, 3 Ired. Eq., 476; *Capehart* v. *Mhoon*, 5 Jones' Eq., 178; *Wilson* v. *The Land Co.*, 77 N. C., 445; *Walker* v. *Williams*, 88 N. C., 7; *Robeson* v. *Lewis*, 73 N. C., 107; *Brown* v. *Brittain*, 84 N. C., 552, cited and approved. *Burnett* v. *Nicholson*, 86 N. C., 728, distinguished and approved).

CIVIL ACTION begun before a justice of the peace and heard on appeal before *Shipp, Judge*, and a jury, at Fall Term, 1884, of HENDERSON Superior Court.

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

Mr. Armistead Jones, for the plaintiff.
Messrs. Battle & Mordecai, for the defendant.

MERRIMON, J. On the 9th day of April, 1875, the plaintiff obtained a judgment, before a justice of the peace of the county of Henderson, against George W. McMinn for the sum of $200, with interest on that sum from that date. From that judgment, the defendant therein appealed to the Superior Court of that county, and desiring to stay the execution of the judgment, he executed a bond for the sum of $200, dated the 10th day of April, 1875, payable to the plaintiff; the present defendant signing the same as surety thereto. The condition of this bond recited the judgment and the appeal, and provided that if the appellant therein mentioned should "*abide the decision or order of the said court*, and pay all costs and damages that may be sustained in said action, then this obligation to be void, otherwise to remain in full force of law." The justice of the peace endorsed his approval upon this bond.

In the Superior Court, at the Fall Term, 1875, thereof, the plaintiff obtained judgment against the said George W. McMinn for $200, with interest thereon from the 9th day of April, 1875, and for costs. Thereafter, on the 21st day of February, 1876, an execution was duly issued upon this judgment, directed to the sheriff of that county, and the same was returned into court unsatisfied, because the defendant therein had not property out of which to levy the money in it specified.

Afterwards, the plaintiff brought his action, upon the bond to stay the execution above mentioned, against the present defendant, before a justice of the peace of said county, and obtained judg-

ment for the sum of $200, with interest on that sum from the 3d day of June, 1876, and for costs, and the defendant therein appealed to the Superior Court.

On the trial in that court, the defendant offered evidence to show that at the time he signed the bond, he inquired of the justice of the peace who took it, what was its legal purport and effect, and to what extent he would be liable upon it, and that he was informed in reply, that it was only to secure costs, and that he would not, in any event, be bound for more than $20, and that he signed it upon the assurance from the justice of the peace, that he could only be bound for the costs of the appeal; that he signed without reading it, relying upon what was told him, and that the principal in the bond was insolvent at, before and after the time he signed it.

The defendant moved to dismiss the action upon the ground that the complaint did not state a cause of action, in that it failed to aver that the plaintiff sustained damage by reason of the appeal.

He further insisted, that the bond was not an appeal bond within the statute applying in such cases; that it was, at most, but a common law bond and, according to its terms and legal effect, he was only liable for such damages as the plaintiff might be able to show that he had sustained by reason of the appeal.

He further contended, that the action must be dismissed upon the ground that if the plaintiff had any remedy, it must be sought in the action in which the bond was given. The court refused to sustain the several points of objection thus raised by the defendant, and he excepted. The jury rendered a verdict for the plaintiff; there was judgment in his favor, and the defendant appealed to this court.

We think that the court was warranted in overruling all the objections raised by the defendant to the plaintiff's right to recover.

1. It was not alleged that the plaintiff, by any fraudulent means, or, indeed, in any way, induced the defendant to sign the

bond sued upon. Nor was it alleged that it was executed by the mutual mistake of the plaintiff and defendant. If the latter chose to ask and take the advice of the justice of the peace, and was misled by it, and failed to read the bond before he signed it, this was not the fault of the plaintiff, and he ought not to suffer on that account. It was the misfortune of the defendant to be ill-advised. His mistake as to the legal effect of his act, cannot deprive the plaintiff of his right; he is presumed to have known it, and in cases like this, must be bound by it. *Ignorantia juris non excusat.*

This case is not like, but very different from that of *Burnett* v. *Nicholson*, 86 N. C., 728, relied upon by defendant's counsel in the argument. In that case, the plaintiff in this Court moved for judgment against the surety to the undertaking given for the stay of the execution of the judgment pending the appeal. The defendant resisted the motion, "upon the ground that it was the intention of the *parties who signed the undertaking* and *those* who *took it*, only to secure to the plaintiff the costs of the appeal, and the failure thus to limit their liability, in terms, was owing to a mistake or inadvertence of the gentleman who prepared the instrument for the signatures."

Affidavits were offered in that case tending to show the mutual mistake of the parties as to the *purpose* of the undertaking, and that there was a mistake on the part of the draughtsman. It was contended that the plaintiff was a party to the mistake as well as the defendant, and the latter sought, in a summary way, to obtain equitable relief because of mutual mistake.

In this case, as we have said, it was not alleged or hinted that the *plaintiff* misled the defendant, or mistook the nature and purpose of the bond; the defendant was badly advised by some person, whose advice he sought and acted upon, and that was all.

In a case like this, in order to entitle the defendant to equitable relief, he must allege and prove a mistake of material facts on his part, and that of the plaintiff as well, or mistake on his part, and some fraudulent practice or act on the part of the

plaintiff, whereby he was misled. *Crowder* v. *Langdon*, 3 Ired. Eq., 476; *Capehart* v. *Mhoon*, 5 Jones Eq., 178; *Wilson* v. *Land Co.*, 77 N. C., 445.

2. It was not necessary to allege in the complaint, that the plaintiff had sustained damage by reason of the appeal, because the bond required to stay the execution of the judgment was not given or required for the purpose of indemnifying the plaintiff simply against damage resulting from the appeal, but for the purpose of having the surety to the bond pay the judgment and costs that might be recovered in the appellate court against the appellant if he failed to pay the same, or such part as he should fail to pay. The statute in force at the time the bond was given, (*Bat. Rev.*, ch. 63, §63), required, that such bond should be "to the effect that if the judgment be rendered against the appellant, and execution thereon be returned unsatisfied in whole or in part, the sureties will *pay the amount* unsatisfied, together with all costs awarded against the appellant." This statute has been changed, but not in a respect affecting the bond in this case. (*The Code*, §884). It is never necessary, indeed, it is improper, to put immaterial allegations in the complaint.

3. The bond sued upon is substantially such a one as was required by the statute. (*Bat. Rev.*, ch. 63, §§61, 62, 63; *The Code*, §§882, 883, 884). Obviously it was given for the purpose of staying the execution of the payment, and it must be interpreted in the light of such purpose. The body of it is regular and formal. The condition, however, is informal, in that it does not provide in terms, "that if the judgment be rendered against the appellant and execution thereon be returned unsatisfied, in whole or in part, the sureties will pay the amount unsatisfied, together with all costs awarded against the appellant." Upon principle, a literal compliance with this provision would not be necessary—a substantial compliance would be sufficient, but the statute itself provides that the condition shall be to that "effect." The terms of the condition are, that if the appellant shall "*abide the decision or order of said court*, and pay all costs and damages that

may be sustained in said action," &c. How "abide the decision or order of said court?" Plainly, by complying with its requirements of him, the main one being that he should pay the sum of money specified in it to the plaintiff. "To abide by a judgment" implies, not simply to submit passively to it, but as well to comply with its terms and requirements. The meaning of the parties to the bond in question, in view of its purpose, is manifest. *Walker* v. *Williams*, 88 N. C., 7.

4. It was certainly competent to bring an action upon a bond like this at the time this action was brought. Indeed, it seems to have been deemed necessary to do so; it was questioned whether a summary judgment might be granted against the surety to a bond like this, in the action in which it was given. *Robeson* v. *Lewis*, 73 N. C., 107; *Brown* v. *Brittain*, 84 N. C., 552. The statute (Acts 1879, ch. 68; *The Code*, §884) now provides that judgment may be given against the surety in the action in which the bond to stay the execution of the judgment was given, and this has been construed to be an additional remedy.

No error. Affirmed.

COATES BROS. v. JOHN WILKES.

Supplemental proceedings—Jurisdiction of the Supreme Court—Questions of fact—Receivers—Witness—Production of books.

1. Supplemental proceedings are substituted in the present system of procedure for the method of granting relief in equity in the former system, in favor of a judgment-creditor after the remedy at law by execution had been exhausted. They are incidental to the original action, and to accomplish their purpose of reaching the judgment-debtor's property of every kind that cannot for any cause be reached by execution, injunctions may be granted and receivers appointed in them as occasion may require.

2. The appointment of a receiver in these proceedings does not rest solely in the discretion of the judge, and his action in appointing or refusing to appoint is subject to review by the Supreme Court.

3. It is not necessary in order to warrant the appointment of a receiver in such proceedings that it should appear with perfect certainty that the debtor has property which ought to be applied to the payment of the judgment. It is sufficient if there is reasonable ground to believe that he has such property.

4. The general principles of law applicable to receivers apply to those appointed in supplemental proceedings. It is the duty of such receiver to take possession of the property of the debtor at once, and to bring actions to recover any property belonging to him which may be in the hands of third persons.

5. The motion for such receiver may be made before the judge, pending an appeal to him from the ruling of the clerk upon other questions.

6. In applications for receivers and injunctions in supplemental proceedings, the Supreme Court will examine the evidence and pass upon the facts.

7. In actions *purely equitable*, the Supreme Court has jurisdiction to pass on the *questions of fact* as distinguished from the *issues of fact*, where the evidence on which the judge below acted accompanies the record and can be examined by the appellate court.

8. In supplemental proceedings the evidence should all be taken down in writing.

9. Where the judgment-debtor is examined, the creditor does not make him his witness, but may cross-examine and contradict him. The provision in The Code, allowing the examination of parties to actions, takes the place of the bill for discovery in the former system of procedure.

10. Where the examination of the debtor shows that his books of account contain evidence material to the investigation he should be required to produce them.

(*Hasty* v. *Simpson*, 77 N. C., 69; *Rand* v. *Rand*, 78 N. C., 12; *Hinsdale* v. *Sinclair*, 83 N. C., 338; *Gillis* v. *Martin*, 2 Dev. Eq., 470; *Graham* v. *Skinner*, 4 Jones Eq., 94; *Jones* v. *Boyd*, 80 N. C., 258; *Young* v. *Rollins*, 90 N. C., 125; *Worthy* v. *Shields*, *Ibid.*, 192; *Twitty* v. *Logan*, 80 N. C., 69; *Railroad Co.* v. *Wilson*, 81 N. C., 223; *Levenson* v. *Elson*, 88 N. C., 182; *Hanna* v. *Hanna*, 89 N. C., 68; *Justice* v. *The Bank*, 83 N. C., 8; *McLeod* v. *Bullard*, 84 N. C., 515; *Commissioners* v. *Lemly*, 85 N. C., 379, cited and approved).

MOTION for a receiver, in supplemental proceedings, heard before *Graves*, *Judge*, at Chambers in ROWAN county.

His Honor refused the motion, and the plaintiff appealed.

Mr. B. C. Potts, for the plaintiffs.

Mr. J. S. Henderson, for the defendant.

MERRIMON, J. The plaintiff obtained judgment at Spring Term of 1874, of the Superior Court of Rowan county, against

the defendant for the sum of $31,187.17 and costs. The defendant then, and ever since that time, has resided in the county of Mecklenburg. The judgment mentioned was docketed in the Superior Court of the latter county, on the 9th day of September, 1874. Executions against the property of the defendant, repeatedly issued upon this judgment from the Superior Court of Rowan county, directed and delivered to the sheriff of Mecklenburg county, and the last one was so issued and delivered on the 21st day of August, 1880. These executions were each successively returned by the sheriff, wholly unsatisfied.

Afterwards, on the 21st day of April, 1883, the plaintiffs begun their proceeding, supplementary to the execution upon the judgment mentioned, in the Superior Court of Rowan county against the defendant.

On that day, an order was entered by the court (the clerk), requiring the defendant to appear therein and answer concerning his property as required by law, and he was forbidden to transfer or make any other disposition of his property not exempt from execution, until the further order of the court.

Afterwards, on the 8th day of May, 1883, the defendant was examined in pursuance of that order at length before the court, in respect to his property. Upon such examination, the plaintiff moved that the defendant be required to produce the books of account and record of business, that the defendant alleged belonged to Mrs. Jane Wilkes, his wife, to the end the same might be examined and used as evidence in such proceeding. The court (the clerk), refused to grant this motion of the plaintiff. From the order denying the same, the plaintiff appealed to the judge.

Afterwards, on the 21st day of January, 1884, upon notice to the defendant, the plaintiffs moved before the judge in the same proceeding that a receiver be appointed in that behalf; and, at the same time, the judge heard the appeal mentioned above.

The plaintiffs supported their motion for a receiver by the testimony of the defendant taken as stated above, and the depositions

of other persons, all of which are sent up as part of the case settled upon appeal for this court.

The judge found the facts of the matter so before him, denied the motion for a receiver, and affirmed the order of the court (the clerk), denying the plaintiffs' motion that the defendant be required to produce the books mentioned. The plaintiffs excepted, and appealed to this court.

The defendant's counsel raised numerous objections to the application of the plaintiffs for a receiver. Among other things he insisted here, first, that the findings of the facts by the judge below is conclusive, and this court has no authority to review the same, and secondly, that if this is not true, then, such findings are correct and fully warranted by the evidence.

We think it very clear, that these objections cannot be sustained.

The proceedings supplementary to the execution in an action, as allowed and provided for by *The Code*, secs. 488–500, are mainly, if not altogether equitable in their nature. While, perhaps, they go beyond in some respects, they are in large part a substitute for, and take the place of, the methods of granting relief in equity in favor of a judgment creditor as against his judgment debtor, after he had exhausted his remedy at law by the ordinary process of execution, as these prevailed before the present Code System of procedure was adopted. *Hasty* v. *Simpson*, 77 N. C., 69; *Rand* v. *Rand*, 78 N. C., 12; *Hinsdale* v. *Sinclair*, 83 N. C., 338; *High on Rec.*, 401.

In the order of procedure, such supplementary proceedings are incident to the action; they extend and enlarge its scope for the purpose of reaching the judgment debtor's property of every kind subject to the payment of his debts, that cannot, for any cause, be successfully reached by the ordinary process of execution, and subjecting the same, or so much thereof as may be necessary, to the payment of the judgment.

In effectuating this purpose, it very frequently becomes necessary to grant relief by injunction and the appointment of a receiver, as in other cases. Indeed, a receiver is appointed almost

as of course, where it appears that the judgment debtor has, or probably has, property that ought to be so subjected to the satisfaction of the judgment, after the return of the execution unsatisfied. The receivership operates and reaches out in every direction as an equitable execution, and it is the business of the receiver, under the superintendence of the Court, to make it effectual by all proper means.

If it appear that the debtor has funds or property in his own hands, the Court may, by proper order, apply the same to the judgment; but if the title to the property alleged or claimed to be that of the debtor, be in dispute, or it be disposed of by the debtor, in fraud of creditors, in such way as that it cannot be promptly reached by execution or the order of the Court, then a receiver may be appointed at once. And it is not essential to such appointment, that it shall actually appear that the debtor has property; if it appear with reasonable certainty, or that it is probable that he has property that ought to be subjected to the payment of the judgment, a receiver may be appointed. *Bloodgood* v. *Clark*, 4 Paige, 574; *Osborne* v. *Hyer*, 2 Id., 342; 2 *Whit. Pr.*, 697; *High on Rec.*, 400, *et seq.*, and notes.

It is an important part of the duties of the receiver to take possession and get control of the property of the judgment debtor, whether in possession or action, as soon as practicable, and to bring all actions necessary to secure and recover such property as may be in the hands of third parties, however they may hold and claim the same, and particularly to recover property conveyed to third parties fraudulently as to creditors.

The general principles of law applicable to receivers, apply as to them in the case of supplementary proceedings; and *The Code*, §494, specially authorizes their appointment in such cases, and §497 provides that if it appear that a person or corporation alleged to have property of the judgment debtor, or indebted to him, claims an interest in the property or denies the debt, such interest or debt shall be recoverable only in an action against such person or corporation by the receiver, and the Court is

authorized to prevent any transfer or other disposition of such property, until sufficient opportunity shall be afforded the receiver to bring the action and prosecute the same to judgment and execution.

The judgment debtor cannot complain at the appointment of a receiver. If he has property subject to the payment of his debt, it ought to be applied to it; if he has not such property, this fact ought to appear, with reasonable certainty, to the satisfaction of the creditor. The receiver proceeds to do this, not at the peril of the debtor, but at his own peril, as to costs, if he fails in his action. The purpose of the law in such proceedings, is to afford the largest and most thorough means of scrutiny, legal and equitable in their character, in reaching such property as the debtor has, that ought justly to go to the discharge of the debt his creditor has against him.

It thus appears that supplementary proceedings are incident to the action, equitable in their nature, and that an injunction may be granted and a receiver may be appointed as occasion may require.

This Court has no authority to review, change, or modify in any respect, the findings of fact by the Court below, in matters purely legal in their nature. But, while the Legislature has not undertaken to provide how the facts in actions and matters purely equitable in their nature shall be ascertained, otherwise than as in actions where the matter in litigation is purely legal in its nature, it is settled, that in equitable matters wherein the evidence is and must be written in the form of affidavits, or depositions, or is documentary, and the court below finds the facts, this Court has authority, and it is its duty in a proper case, upon appeal, to consider the evidence before that court, review its findings of fact, and sustain, reverse or modify them. It has uniformly done so since the amendment of the Constitution in 1877 (Art. 4, §8) in respect to applications for injunctions, receivers, and like applications wholly equitable in their nature, wherein *questions of fact*, as distinguished from *issues of fact*, have been passed

upon by the Superior Court. In such applications all the evidence before the court must, upon appeal, be sent to this Court, and here considered. In such cases this Court takes cognizance of and reviews the evidence, and finds the facts, just as it did in equity cases before the present Constitution and *The Code* method of procedure were adopted. *Gillis* v. *Martin*, 2 Dev. Eq., 470; *Graham* v. *Skinner*, 4 Jo. Eq., 94; *Jones* v. *Boyd*, 80 N. C., 258; *Young* v. *Rollins*, 90 N. C., 125; *Worthy* v. *Shields*, Id. 192.

But this Court cannot review the evidence and findings of fact in cases purely equitable, where *issues of fact* are tried; because such issues, under existing laws, are tried by a jury, just as in cases at law, and, besides, no method has been devised or provided by the Legislature, under the present Constitution, for taking the evidence in such cases, in such shape as that it could be sent to this Court to be considered, if it were competent for it to do so. It is not essential that *questions of fact* shall be tried by a jury; the evidence submitted to the court upon such questions is generally, and ought to be, in the shape of affidavits, depositions and documentary—such as can, upon appeal, be easily sent to this Court. And it is only in matters purely equitable, where such evidence is received, that this Court can consider the evidence and review the findings of fact by the Court below.

It has been suggested, that *The Code*, §491, provides that "witnesses may be required to appear and testify on any proceedings under this chapter, (that in respect to supplementary proceedings), in the same manner as upon the trial of an issue," and therefore, each witness examined must testify *ore tenus*, just as witnesses do on the trial of an issue of fact by a jury, so that the evidence could not be taken down in writing and sent to this court for review, upon appeal from an order granting or denying a motion for an injunction or a receiver in such proceedings, as in like applications in other proceedings and actions.

This is not a proper interpretation of the section quoted. It has reference to the manner of compelling witness to appear

before the clerk, a referee, or the Judge, and testify, as by *subpœna* or attachment, and not to the manner of taking, applying and preserving the evidence. The witness may be "required," that is, compelled, to appear and testify—his testimony may be received, taken down, as the aspect, or circumstances of the proceedings and the general principles of law applicable may require. In many—most—respects, in such proceedings, the evidence must in the nature of the matter, be taken down in writing, as when it is taken by the clerk or a referee, to the end the Judge may, in contingencies provided for, examine, review and pass upon it. As for example, in the next section after that quoted, it is provided that if the examination of witnesses be taken by a referee, he shall certify it to the court and Judge.

We can see no reason why the application for a receiver, or an injunction in such proceedings, shall not stand upon the same footing as to the power of this Court to review the facts upon appeal, as the like application in other cases. Indeed, in the same chapter, in respect to the same subject, *The Code*, §494, provides that, "The court or Judge having jurisdiction over the appointment of receivers, may also by order, *in like manner and with like authority*, appoint a receiver in proceedings under this chapter, of the property of the judgment debtor, whether subject or not to be sold under execution, except the homestead and personal property exemption." This plainly means, that the application for a receiver shall be made in like manner as in other cases—that is, the motion shall be supported by affidavits and other written or documentary evidence. And it is likewise provided, in the chapter of *The Code* (sec. 379), prescribing the powers of the courts to appoint receivers generally, that the Court may appoint them in cases, "where an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment." This has reference to supplementary proceedings and cases like that now under consideration. It seems to us, therefore, that the appointment of a receiver in such proceedings stands upon the same footing, and is subject to the same appellate jurisdiction as like appointments in other cases.

In this case, the plaintiff applied for a receiver as allowed by *The Code*, §494. The evidence submitted to the Judge in support of the motion consisted of the examination of the defendant, (the questions and answers thereto being necessarily reduced to writing), and the depositions of two other witnesses. The Judge considered the evidence, found the facts and denied the motion. All the facts before him have been sent up with the appeal, and we have them before us just as the Judge below had them before him. The motion before him was equitable, and incidental and collateral in its nature, and raised a question of fact in the supplementary proceedings, just as if the motion had been made in any other stage of the action, before final judgment, in which it might be pertinent to apply for a receiver.

This Court may, therefore, consider the evidence, review the findings of fact by the Judge, and sustain, reverse or modify them.

Upon a careful examination and consideration of the evidence, we cannot concur in the findings of the facts by the Judge. We think there was evidence tending strongly to show a disposition by the defendant of his property, fraudulent as to his creditors.

It was not necessary, indeed, not proper, under the circumstances of this case, for the Court to find *conclusively*, whether or not the defendant had certainly made a disposition of his property, fraudulent as to his creditors. If there was evidence tending strongly to show such a disposition of it, or that he was refusing, covertly or otherwise, to apply his property to the judgment, this was sufficient to warrant the appointment of a receiver, to the end, that he might take such steps, and, if need be, bring such actions as would enable him to secure and recover any property of the defendant so conveyed or withheld by him, to be applied to the judgment of the plaintiff. To warrant the appointment of a receiver, it need not appear, certainly or conclusively, that the defendant has property that he ought to apply to the judgment—if there is evidence tending in a reasonable degree to show that he probably has such property, this is sufficient, or if

it appears probable that he has made a fraudulent conveyance of his property as to his creditors, this is sufficient.

We do not deem it necessary or proper to analyze and comment upon the evidence before us, and indicate specially such parts of it as lead us to a conclusion different from that reached by the Judge in his findings of fact. It is sufficient that we are satisfied that the facts were such as to warrant and require the appointment of a receiver as demanded by the plaintiffs. Any comment upon the evidence might prejudice the defendant, or third parties claiming property alleged to be his, in actions that the receiver may hereafter bring. This we ought not, and certainly have no inclination to do. The receiver, when appointed, will bring such actions as he may be advised he ought to bring, and establish his cause of action, if he shall have any, without regard to the finding of facts upon this application for a receiver. Our views of the evidence in the matter now before us cannot be allowed to prejudice persons not parties to the proceedings.

The counsel for the defendant contended, on the argument, that the plaintiff, having examined the defendant, thus made the latter his witness, and, therefore was bound by his testimony.

This argument has only seeming force. By the general rules of evidence, the party introducing a witness may show that the latter is mistaken, and he is at liberty to show that the facts are otherwise than as stated by such witness; he may not, however, impeach him directly by showing that he is unworthy of credit. But the examination of parties to actions is regulated by statute, and *The Code*, §583, provides that "The examination of a party thus taken may be rebutted by adverse testimony." This is a general provision and applies to and embraces the examination of a party or parties in supplementary proceedings as well as in other cases. The method of such proceeding in the action is peculiar, and it was appropriate to provide specially in that respect and connection for the examination of the judgment debtor; but this does not prevent the operation and application of other general statutory regulations in respect to the examination

of parties, where they are pertinent. We can conceive of no sufficient reason why they should not so apply, and, on the contrary, the general scope and purpose of *The Code*, §583, cited above, shows that it must apply. This general statutory provision, that in cases where a party to the action is examined, such examination may be rebutted by adverse testimony, rests in some measure, perhaps not altogether, upon the ground that the party examined is supposed to be adverse to the party examining him; the latter is therefore allowed by the statute to rebut what he says by adverse testimony, and hence, also, the examining party may cross-examine and put leading questions to the party examined. The latter is, in theory, the witness of the former; but he is, in fact, adverse to him in interest, and the statute is intended to modify the general rules of evidence applicable in cases when parties to the action are examined.

In supplementary proceedings, the judgment-debtor, for the same consideration, and in the same measure, perhaps in greater measure, is in fact adverse to the judgment-creditor. Why, then, shall the judgment-creditor not have the right to rebut the testimony of the judgment-debtor in such proceedings as allowed by the statute mentioned? There are no words of limitation in this statute, it is broad and comprehensive, and embraces the examination of parties to the action in all cases. Such supplementary proceedings are part of the action, as we have seen, and the judgment-debtor is a party to the action. The provisions of the Code of Civil Procedure, in respect to the examination of parties to the action, take the place of and supersede the bill of discovery used in the former courts of equity, and, as we have said, the statute modifies the rules of evidence in such cases.

It was also contended on the argument, that in supplementary proceedings, the appointment of a receiver rests solely in the discretion of the judge and that no appeal lies from his decision. This is a mistaken view of the statute. *The Code*, sec. 494, provides that "The court or judge having jurisdiction over the appointment of receivers may also, by order and in like manner,

and with like authority, appoint a receiver in proceedings under this chapter, of the property of the judgment-debtor, whether subject or not to be sold under execution, except the homestead and personal property exemptions." So that the authority to appoint receivers in such proceedings, is the same as in other cases, and the judgment of the judge is reviewable by this court upon appeal. *Twitty* v. *Logan*, 80 N. C., 69; *Railroad Co.* v. *Wilson*, 81 N. C., 223; *Levenson* v. *Elson*, 88 N. C., 182; *Hanna* v. *Hanna*, 89 N. C., 68.

The objection that the motion for a receiver was made before the judge, pending the appeal to him from the order of the court entered by the clerk, denying the motion to compel the defendant to produce his books, and was, therefore, inopportune, cannot be sustained. The appeal and the motion for the receiver, were in the same case and before the same judge, he had complete jurisdiction of both, and might dispose of the whole matter at once, as he did do. The purpose of the appeal was to obtain the direct action of the judge of the court in respect to the matter involved in it; indeed, the judge was simply called upon to correct a ruling made by the clerk representing him, as allowed by the statute in such cases.

The defendant admitted that he had possession of the books required by the plaintiffs, and his examination shows that they contained accounts and statements that would afford evidence material to the matters under investigation. He declined to produce them upon the general ground that he was not bound to do so, and the judge so held. In this there is error; he ought to have required their production as provided by *The Code*, sec. 578. *Justice* v. *Bank*, 83 N. C., 8; *McLeod* v. *Bullard*, 84 N. C., 515; *Commissioners* v. *Lemley*, 85 N. C., 379.

Let this opinion be certified to the Superior Court of Rowan county, to the end that the motion for a receiver be allowed, and other and further proceedings be had in the action according to law. There is error.

Error. Reversed.

W. L. WHITE v. ANN JONES et als.

Petition to Rehear—Vendor's Lien—Specific Performance.

1. A petition to rehear should point out the ruling which is alleged to be erroneous, but should not, by a course of reasoning, undertake to show that it is erroneous. The argument should be made at the hearing, and not in the petition to rehear.
2. The doctrine of the vendor's lien for unpaid purchase money, has long been repudiated in this State.
3. A court of equity will not decree the specific performance of a contract to convey land, until the full price has been paid; but this does not rest on the doctrine of lien, but upon the rule that a court of equity will refuse relief to one who will not do what, in equity, he ought to do.
4. The rule announced in the former decision of this case affirmed, that where A purchased land, and after paying a part of the purchase money, assigned his interest to B, taking from him a promise to pay the balance due to the vendor and his bond for the part A had paid, and B afterwards assigns his interest to the plaintiff; the plaintiff, upon paying the balance due *the estate*, will be entitled to a deed for the land, unencumbered with any lien in favor of B.

(*Womble* v. *Battle*, 3 Ired. Eq., 182; *Cameron* v. *Mason*, 7 Ired. Eq., 180; *Blevins* v. *Barker*, 75 N. C., 436; *Smith* v. *Brittain*, 3 Ired. Eq., 347; *Lewis* v. *Rountree*, 81 N. C., 20, cited and approved).

PETITION by the defendants to rehear. The case is reported in 88 N. C., 166.

Messrs. R. F. Armfield and *Batchelor & Devereux*, for the plaintiffs.

Messrs. D. M. Furches, D. G. Fowle, Fuller & Snow, E. C. Smith and *J. M. McCorkle*, for the defendants.

SMITH, C. J. The petition of the defendant Jesse Bledsoe, asking us to review and reverse our former decision in the cause, for an assigned error prejudicial to his claims, is not confined to its proper office of pointing out the ruling wherein the error lies, but undertakes, by a course of reasoning, to show the ruling to be erroneous. The proper time to make the argument is at the

hearing, and we notice the departure from the simple and brief forms in use, to avoid the inference that this meets our approval, and that it may not become a precedent.

The brief, filed in support of the application, introduces the doctrine, long since repudiated in this State, which gives to the vendor of real estate, after conveyance to the vendee, a lien for the unpaid purchase money, of which we have only to say it can furnish no aid by analogy or otherwise, in the present case. *Womble* v. *Battle*, 3 Ired. Eq., 182; *Cameron* v. *Mason*, 7 Ired. Eq., 180; *Blevins* v. *Barker*, 75 N. C., 436.

In the former opinion, formed after much consideration of the whole subject matter involved in the appeal, occurs a sentence upon which stress is laid in the argument for the petition, expressed in these words:

"Were Gray, the plaintiff in the action, tendering the balance of the purchase money to the administrator and seeking to have title assured to him, then the court might well, and doubtless would, withhold its aid until he had as well paid the debt to his immediate assignor—and this independently of any contract, and upon the principle that he who would have equity must first do equity." *White* v. *Jones*, 88 N. C., 166 and page 179.

If this language were susceptible of an interpretation that recognizes the creation of a lien upon the equitable estate vesting in Gray, by virtue of the transfer of the bid of Bledsoe and Maxwell to him, which the assignee would be compelled to discharge, as well as to pay the remaining purchase money due to the administrator, before he could entitle himself to a decree for a conveyance of the legal title, it would be difficult to resist the reasoning, and the sustaining authorities cited, that the lien is transmitted, with the successive assignments of the estate to which it adheres, until its termination and vesting in the plaintiff. But the defect in the argument is in the false premises assumed, that such lien was formed at all between the original parties to the transfer of the bid, so as to attach to the estate in Gray, or that the passage quoted was intended to bear, or by any

fair and just interpretation will admit of such meaning. The suggestion is outside of any supposed lien, and rests upon a different principle prevailing in the administration of remedial justice in a court of equity, which, in applications for specific performance, that are not of strict right, guides the action of the court in refusing relief to one who can, and will not do, what in equity he ought to do to another. As Gray owes equally the money advanced by his assignors, as that still due the vendor, and has become incapacitated by subsequent insolvency from paying to them that part of the consideration of the assignment, the intimation is that relief in obtaining title will be granted only when the full consideration of the original contract of purchase has been paid and discharged. This is the extent of the proposition, and whether pertinent to the facts of the present case, it does not countenance the assumption that while such an equity subsisted in favor of the assignors against Gray himself, it ceased upon the assignment of Gray and could not be further pursued.

To a proper understanding of the matter it becomes necessary to recall the material facts. Summarily, they are these:

Jacob Fraley, in the exercise of a power conferred in the will of Rachel Stokes, on January 1st, 1863, made sale of the land known by the name of "The Old Stokes Homestead," on a credit of 12 months, to Bledsoe and Maxwell, the highest bidders, for the sum of $26,180, whereof in twenty days thereafter they paid the administrator, in Confederate money, $15,210, which sum, with interest, was equivalent at the expiration of the credit, to $16,180, then paid. On March 6th Bledsoe and Maxwell endorsed their bid for the land, and some articles of personal property bought at the same sale, at an advance of $2,000 to Gray; at the same time taking from him a bond, that is dated, however, on the day previous, wherein he promises to pay them $16,108, expressed to be "in payment of the Stokes land, the remaining part to be paid to the administrator of the deceased, for all the balance due from us (them) to the estate."

On the 18th day of the next month, Gray offered to take up his bond with Confederate currency of which the assignor consented to accept $10,680 and no more. Thereupon, in the place of the first bond, Gray executed another in the sum of $7,500: maturing in forty-five months, and bearing interest during the first twenty-one months at the rate of two per cent., and at the rate of six per cent. for the remainder of the time. A bond similar in terms and credit and for the same amount, had been before given by Bledsoe and Maxwell to one Edwards for money borrowed of him and used by them in making the early payment to the administrator, and the bond of Gray was put in a form that the one debt could be used in discharging the other. According to the testimony, Gray was to take up the claim held by Edwards and surrender it to the assignor in discharge of his own debt.

We give our unqualified assent to what is said of the nature and effect of these transactions in the former opinion.

"So that it is clear to be seen," remarks the court, "that the intention and expectation of the parties were, that upon his *paying to the estate the unpaid portion of the purchase money, Gray was to receive the title to the land, unencumbered with any liens in favor of his immediate vendors.* Their assignment to him was an absolute and unconditioned one therefore, so far as it depended upon the intention of the parties and their contract; and in the same plight and condition he had a right to assign it and did assign it; and, in that condition, it was acquired by the plaintiff. We know of no principle of equity upon which, under such circumstances, he should be deprived of the full benefit of his acquisition;" same Report, p. 178.

No such lien is contemplated, and no such incumbrance imposed, in the terms of the agreement, nor is either implied in the attending facts. The transfer is simple and direct, placing Gray in the precise position occupied by his assignors in respect to their accepted bid, and as they could, so could he demand a conveyance as soon as the residue of the debt due to the vendor was discharged. This is the only condition underlying the vendor's obligation to make title.

The undertaking of Gray to reimburse to his assignors the moneys previously paid by them upon the purchase, is purely personal, and distinct from the equitable estate passing to him, and this is accepted by them as a sufficient security for the performance of it. As evidence of the complete association of the obligation assumed, the substituted bond of April defers payment for more than three years beyond the period of credit fixed in the administrator's sale, so that when the administrator could demand and enforce payment of what was due him, Gray would be in no default in respect to his contract for which he could be held liable. How, then, can the discharge of a debt that he has yet three years in which to pay, enter into and become a condition precedent to his right to require the title, and how can the obligation, as an incumbrance, be fastened upon and follow the estate when conveyed?

We are unable to distinguish the present case favorably from that of *Smith* v. *Brittain*, 3 Ired. Eq., 347, cited in the former opinion, and discussed in the brief of petitioner's counsel, the facts in which are briefly these:

Brittain bid off the land under a decree of the court of equity in a suit for partition at the price of $5,656, whereof he paid part, and being pressed for the residue, agreed to sell his interest in the land to Smith for $3,800. This sum was paid to Brittain, and with it, and other money of his own, Brittain discharged the debt incurred in the purchase. It was afterwards discovered that the tenants had not and were unable to secure a good title to the property, and the inquiry was, to whom should the purchase money be returned. Brittain claimed all in excess of the sum advanced by Smith, and the latter claimed all, under the assignment. It was decided, that as, if the sale had been consummated, Smith would have taken the land, so, upon a rescission, he was entitled to all the money, as representing the land.

The common principle in all the cases is, that the assignor becomes subrogated to all the rights of the original bidder, and may enforce them against the vendor, as well in coercing a con-

veyance of the land, as in a return of the purchase money representing it, when the other is impracticable, and this without regard to the source from which the purchase money may have been derived. It is true one of the Court dissents, but this does not weaken the clear and conclusive logic of the opinion, nor impair the force of the adjudication as a precedent.

The testimony of the petitioner, that the payment of the last bond of Gray was put in the distant future to meet a bond similar in terms, given by himself and Maxwell, even if the first agreement was, as he says, that Gray was to repay them, as well as pay what was still due the administrator, before getting the legal title, it must be regarded as a superseding arrangement, since it is entirely inconsistent with the other previously made, and to neither was the administrator a party.

Aside then from the difficulty met in the rule of evidence, which does not allow parol addition to the terms of a written contract, and their legal operation, under the statute of frauds, it must be manifest that all such difficulties disappear in the final form which the transaction assumes.

If it were necessary in order to obtain title, to bring Bledsoe and Maxwell before the court and require of them something to be done to complete the assurance, they would not be compelled to act in perfecting the title to an insolvent purchaser, who still owed and could not pay the portion of the purchase money due to them. But this is not necessary; the transfer puts Gray in the same relation to the vendor as his assignors, and separates them from it, so that he is permitted to demand of the vendor the execution of the contract, as soon as full payment is made to him. This is the result of the transfer, by the voluntary action of the parties to it.

Therefore the relation of these parties are only those of creditor and debtor, and no more equity remains in the former than in the case of the vendor, who has conveyed the land and taken only the personal obligation of the debtor for the unpaid purchase money. *Blevins* v. *Barker*, *ante*.

We have carefully reconsidered our former ruling with the purpose of discovering and correcting any error that may have been committed in the former adjudication, yet we cannot forbear recurring to the principle upon which a rehearing is had, as announced in *Lewis* v. *Rountree*, 81 N. C., 20, and numerous cases preceding, within which this case can scarcely be included. No new authorities have been cited and no matter, then overlooked, called to our attention to unsettle our then expressed convictions of the law so as to disturb the conclusions arrived at.

The judgment must be affirmed.

No error. Affirmed.

MARTHA A. HARPER v. W. H. DAIL & BRO.

Evidence, Parol to Explain Receipt—Res Gestæ—Agent—Husband and Wife—Counter-claim—Non-suit.

1. When a receipt is evidence of a contract between the parties, it stands on the same footing as other contracts in writing, and cannot be contradicted or varied by parol; but when it is merely the acknowledgment of the payment of money or the delivery of goods, it may be contradicted by parol.
2. A husband may be the agent of his wife.
3. The declarations of a party, made at the time that she handed a deed to her husband to deliver as her agent to the grantee, are admissible in evidence as a part of the *res gestæ*.
4. Declarations to become a part of the *res gestæ* must be made at the time of the act done, and must be consistent with the obvious character of the act.
5. Where it appears in the record that the plaintiff took a non-suit and appealed before the issues arising on a counter-claim pleaded by the defendant had been disposed of, but no objection was made by the defendant at the time; *Held*, not to be such an exception as can be taken for the first time in this Court.

(*Reid* v. *Reid*, 2 Dev., 247; *Wilson* v. *Derr*, 69 N. C., 137; *State* v. *Jones*, 69 N. C., 16; *Meekins* v. *Tatem*, 79 N. C., 546, cited and approved).

CIVIL ACTION, tried before *MacRae, Judge*, and a jury, at the July Special Term, 1884, of GREENE Superior Court.

The facts fully appear in the opinion.

The plaintiff, in deference to His Honor's opinion, took a non-suit and appealed.

Messrs. Bryan & Burkhead, for the plaintiff.

Messrs. W. C. Monroe and *Nixon & Galloway,* for the defendants.

ASHE, J. The action was brought to recover the balance alleged by plaintiff to be due her upon the purchase money of a tract of land which was the property of the plaintiff, and had been conveyed by her and her husband Blaney Harper to the defendant, with the agreement, as she alleged, that a note made by said Blaney Harper and R. H. T. Harper, as surety, to defendant, for four hundred and fifty dollars should be paid and the balance of the purchase money should be paid over to plaintiff.

She alleged that the balance had not been paid and prayed judgment for the same.

The defendant admitted the purchase of the land and the execution of the deed, but alleged that the purchase money had been paid according to the agreement. That he knew nothing of the conversation between the plaintiff and her husband before the drawing of the deed. That the deed contained a covenant against incumbrances, but the land in question having descended to the plaintiff and others as tenants in common, upon a partition theretofore made, under proceedings regularly instituted, the lot assigned to the plaintiff had been charged with the sum of one hundred and fifty dollars for equality of partition, and that he had been compelled to pay the same on the 15th of January, 188–, when the sum so charged, with interest, amounted to two hundred and thirty-one dollars, and he pleaded the payment of this money as a counter-claim and prayed judgment therefor.

The plaintiff replying alleged that there was nothing due for equality of partition at the time of the purchase by defendant,

that her husband had theretofore paid the same to R. C. Beaman, guardian of the parties in favor of whose lot her lot had been charged.

The plaintiff offered in evidence a receipt, as follows, to-wit:

SNOW HILL, March 10th, 1875.

Received of Blaney Harper one hundred and fifty dollars in part payment for the claim, I hold against him as guardian of the heirs of R. Heath, deceased.

(Signed) R. C. BEAMAN, *Guardian.*

Plaintiff also offered in evidence the deed made by her and her husband to defendants, and introduced Blaney Harper as a witness who testified that the claims held by R. C. Beaman as guardian, against him, were about one hundred and seventy-five dollars for rent of land and one hundred and fifty dollars on the division of the land. Plaintiff then proposed to ask witness, "what claim he settled, when the receipt was given by Beaman, if anything was said about what claim he was paying." Defendant objected to the answer to the question upon the ground that the receipt purported to be for claims held against the witness, and he ought not to be allowed to contradict it, and now say that the money was paid in settlement of the charge upon the land. The court sustained the objection and plaintiff excepted. The witness further testified "that he did not recollect whether the understanding with Dail was that the note was to be paid and the balance of the purchase money of the land to go on witness' account or not, witness may have sworn so before the referee. Witness told Dail, that he, witness, had nothing to do with his wife's land. Witness might have sold it to him with the understanding as above stated."

He stated that he was largely indebted to defendants over the amount of the note, perhaps as much as one thousand dollars.

The plaintiff offered herself as a witness in her own behalf, and her counsel, for the purpose as he stated, of showing the agency of her husband, Blaney Harper, to deliver the deed for her, and the extent of his authority in relation to such delivery, proposed to ask the witness, "At the time you executed the deed and handed it to your husband to be carried and delivered to the defendants, what directions did you give him as to the terms upon which the deed was to be delivered." The answer to the question was objected to by the defendant. The objection was sustained by the Court, and the plaintiff excepted. Thereupon, the plaintiff submitted to a non-suit and appealed.

The only exceptions taken upon the trial worthy of consideration, are those to the ruling of the Court in refusing to hear testimony in explanation of the receipt, and excluding the answer of the plaintiff to the question propounded by her counsel in regard to the directions given her husband with respect to the terms upon which he was to deliver the deed.

In both of the rulings we think the Court was in error. When a receipt is evidence of a contract between parties it stands on the same footing with other contracts in writing, and cannot be contradicted or varied by parol evidence; but when it is an acknowledgment of the payment of money or of the delivery of goods, it is merely *prima facie* evidence of the fact which it recites, and may be contradicted by oral testimony. 1 *Greenleaf on Evidence, sec.* 308; *Reid* v. *Reid*, 2 Dev., 247; *Wilson* v. *Derr*, 69 N. C., 137.

As to the other exceptions, it is laid down in 2 *Greenleaf on Evidence, sec.* 61, that the authority of an agent may be proved by parol evidence, and it is well settled that a wife may empower her husband, as well as any other person, to be her agent, and that he may hold the agency by express written or verbal appointment, 2 *Bishop on the Law of Married Women, sec.* 395; and then the only other question is, are the directions which the plaintiff gave her husband with respect to the terms upon which he, as her agent, was to deliver the deed,

admissible in evidence. We are of the opinion they were. The handing the deed to her husband to be delivered, by the plaintiff, was an act of her's and whatever was said by her in reference to the act, was admissible in evidence as a part of the *res gestæ*. Declarations to become part of *res gestæ*, must be made at the time of the act done, and must be such as are calculated to unfold the nature and quality of the facts they are intended to explain, and so to harmonize with them as obviously to constitute one transaction. In other words they must be contemporaneous with the act and must be consistent with the obvious character of the act. 1 *Greenleaf on Evidence, sec.* 108, note 1.

The evidence, we think, was admissible, but what effect it might have is another question.

The defendants' counsel moved to dismiss the appeal, upon the ground, as appears by the record, that the plaintiff submitted to a non-suit and appealed to this Court before the issue arising on the counter-claim of the defendant was tried, or any judgment rendered thereon. The exception might have been sustained if it had been taken in apt time, but there was no objection made by the defendant in the court below when the non-suit was entered and the appeal taken. It is not one of the exceptions allowed under sub. div. 3, §412 of *The Code*, to be taken for the first time in this Court—and it has been too repeatedly decided that exceptions cannot be taken in this Court which were not taken in the Court below, to admit of a question. *State* v. *Jones*, 69 N. C., 16; *Meekins* v. *Tatem*, 79 N. C., 546.

The only exceptions to the rule are where there is want of jurisdiction, or where, upon the whole case, it is apparent that the plaintiff is not entitled to relief, and in those cases mentioned in sub. div. 3, §412 of *The Code*.

Our conclusion is that there is error, and the judgment of the Superior Court is reversed, and this must be certified to the Superior Court of Greene county, that a *venire de novo* may be awarded.

Error. Reversed.

ELIZA R. DEPRIEST v. J. L. PATTERSON, Executor.

Findings of Fact by the Supreme Court—Scale.

1. *Quære*, whether the Supreme Court can review the findings of fact made by the Judge below, in an action against an executor for an account and settlement of the estate of his testator.
2. Where an executor sold property of his testator in July, 1863, on nine months credit, he is liable for the scaled value of the money for which it sold, at the time of the sale and not at the expiration of the time of credit.

CIVIL ACTION, heard before *Gilmer, Judge*, at August Term, 1884, of IREDELL Superior Court.

Both parties appealed from the judgment of the court below.

Mr. D. M. Furches, for the plaintiff.
Messrs. Robbins & Long, for the defendant.

SMITH, C. J. This action, begun November, 1879, is for an account and settlement of the estate of James Patterson, who died in the year 1858, and left a will appointing the defendant, his son, executor, and to recover the share of the *feme* plaintiff, his daughter, therein.

In pursuance of an order of reference to Richard A. McLaughlin, commissioner, he stated and reported to Spring Term, 1883, of Iredell Superior Court, the administration account, together with the evidence and his findings of facts and law, from which it appears that the executor is chargeable with the sum of one thousand three hundred and ninety-seven dollars and eighty-seven cents, including interest computed to the 12th day of February, 1883. To this report the defendant filed eleven exceptions, of which three were allowed, and from the judgment sustaining those numbered respectively one and eight the plaintiffs appeal to this court.

(1) The first of the sustained exceptions is to the commissioner's refusal to credit the defendant with the sum of $370,

for which he produced and had no voucher, but the *feme* plaintiff, in her deposition, admits to have been received by her from the executor in the year 1860, consisting of $200 in money, a horse worth $125 and a wagon of the value of $45.

The fact that this amount was paid in the manner mentioned and at the time specified is not controverted, and is so found by the commissioner, but, in his opinion, it is absorbed by, and forms part of, a receipt given about the same date by the plaintiffs, who jointly sign for $600, and this opinion he fortifies by a course of reasoning set out in the report. The judge did not concur in this view, and gave the defendant the excluded credit also.

The question is one of fact, whether the admitted payment enters into the larger sum, or is omitted from the account; and if the finding of the court below is not conclusive in this, it is fully warranted by the evidence.

The receipt is in this form:

$600. STATE OF NORTH CAROLINA,
IREDELL COUNTY.

Received of James L. Patterson six hundred dollars in full for an interest in two negroes, Margaret and William, that we have sold to him. October 29th, 1860.

P. R. DEPRIEST,
ELIZA R. DEPRIEST.

The slaves seem, from the report, to have been sold in December, 1859, by the executor, for $2,400, to one-fourth of which sum the *feme* plaintiff was entitled, and her husband could take, by marital right as the law then was, and hence, both united in the acknowledgment. This was an independent transaction of the defendants, and the form of the receipt indicates that it was so treated.

At least no such connection is shown as to authorize the inference that the smaller constitutes a part of the larger payment.

The omission to enter this item in the statement prepared by Mr. Cowles, so much relied on, that the parties agreed not to go outside the claims due the estate therein enumerated to charge the executors with others, as a circumstance militating against this additional credit, is explained in the simple statement that the account was made up on writings placed in his hands, and there being no evidence of this, it was not entered. But this omission cannot prevail against positive proof, which the commissioner finds sufficient to establish the fact that the payment was made, and in the manner mentioned.

The exception numbered eight is in these words:

"For that the commissioner erred in holding the defendant bound to account in good money for the sum received in 1864 in Confederate money, as the proceeds of the second sale of property made by the defendant at the date, July 25, 1863, on nine months' credit, charging the defendant with $289.12 principal and interest on this item, when he should only be charged with the scale of said sum as of date, April 25th, 1864."

The Court ruled that the executor was responsible for the scaled value of the money at the time of the sale, and not at the expiration of the credit, and in this we concur. The property sold in July, 1863, brought $137.10, and as it is not suggested that it did not bring its value in the currency to be used in payment, it would be unjust to the executor to charge him with more in value than he received, when no imputation is made upon his conduct in making this disposition of the goods. He is personally a loser by the difference in the scale applied at the time of sale, and nine months later at the the expiration of the credit.

There is no error in the rulings from which this appeal is taken, and the judgment of the Court upon the exceptions brought up must be affirmed.

No error. Affirmed.

DEPRIEST v. PATTERSON.

Executor—Confederate Money.

1. An executor during the war took certain notes belonging to the estate of his testator, and substituted for them Confederate money of his own. The notes proved to be worthless; *Held*, that he is chargeable with the scale value of the Confederate money at the date of the attempted substitution.
2. Where an executor swears that certain Confederate money was the property of the estate, but is unable to explain by whom it was paid, or how he is able to remember the character of the fund as being a part of the trust estate; *Held*, not sufficient to relieve him from liability.

This is the defendant's appeal, in the foregoing case.

SMITH, C. J. Having examined and disposed of those of the defendant's exceptions which, having been sustained by the court, were brought up for review on the plaintiff's appeal, we are now required, on the defendant's appeal, to consider and dispose of those in the series which were over-ruled. Those are numbered respectively, 2, 5, 6, 7 and 10, and thus set out in the record sent up.

Ex. 2. For that the commissioner erred in not allowing the defendant credit for the sum of three hundred and seventy dollars, as admitted by the plaintiff, in her deposition, to have been paid her in 1860 by defendant, in *full discharge* of her *special* legacy of $300 charged on the land, and in payment to the amount of the $70 overplus, of her claim on her *general* legacy, under the will.

Ex. 5. For that the commissioner erred in not finding *as a fact* that Mary J. King (now Cooper), daughter of plaintiff (sent by plaintiff from Georgia to North Carolina to defendants in 1864 with slaves), was an *agent* of plaintiff, and acted as such agent in *receiving* $500, paid her for plaintiff March 11, 1864, and in *instructing* him (defendant) to keep the residue of what was going to plaintiff in some bank or other safe place till plaintiff called for it or till after the war; when this agency, and acts necessarily implying it, are sworn to by several unimpeached witnesses, and corroborated by the admitted conduct of plaintiff in

receiving said $500 when brought her by said Mary J. King (now Cooper), without complaint or objection, as part payment from defendant to her of her claims from her father's estate.

Ex. 6. For that the commissioner erred in not holding as *matter of law* that the defendant is exonerated from liability for the sum of $800 balance, kept by him on deposit for the plaintiff, separately from his own funds thereafter, the same being in obedience to, and by instructions of plaintiff, through her said agent Mary J. King (now Cooper).

Ex. 7. For that the commissioner erred in charging defendant in *good* money $2,814.46 on the Gray & Baggerly notes, holding him as having collected or as bound to collect these in good money before the war, when they were reported in the *inventory* (filed in 1858) as among the "*bad or doubtful*" debts, and had been placed, by the defendant's testator in his life-time, in the hands of an attorney (Miles Cowles) for collection; when the only evidence of debt on these claims which came to defendant, was the said attorney's receipt for them as being so put in his hands for collection; when defendant never really collected or received, or could collect anything on them; but when defendant has merely agreed, pending this reference, to be bound by the charges of the "*Cowles settlement*," May 10th, 1863, which shows one of said notes $743 principal; interest, $397.50; and the other note $300; interest $138—making, in all, $1,578.50 only chargeable to defendant as of that date, May 10th, 1863, as there is no evidence that he *ever did* or *could* collect it; so that he is only bound to account for what he so admits and as of said date; by the *scale* of Confederate money this amounts to $287, and the interest on the same to February 12th, 1883, is $340.10, making the proper charge on the Gray & Baggerly notes in good money (if anything) $627.10 instead of $2,814.46; the error of the commissioner on this item being $2,187.36 against defendant, one-third of which should come out of plaintiff's claim in this case.

Ex. 10. For that the commissioner erred in not holding the defendant exonerated from liability altogether for the money

deposited with C. A. Carlton, depository of the Confederate States in Statesville, the same being, as the defendant testifies, assets of his testator's estate, kept separate and apart from the defendant's own funds, and the deposit having been made under the counsel of A. C. Cowles, proven to have been a good business man.

It is agreed by counsel of plaintiff and defendant, that defendant, that defendant is chargeable with the claims mentioned in exhibit "D," and is not chargeable with any other claims that may appear on inventory "B." This to be without prejudice to either party, plaintiff or defendant, with regards to the character of the funds and the vouchers recited therein are considered in evidence.

Ex. 2. The matter of this exception, as far as respects the allowance of this credit in the general administration account, has been discussed in the other appeal and decided in the defendant's favor. It is now presented in a particular aspect, and the exception is that it is not specifically appropriated to discharge a legacy due to the plaintiff, and secured by being made a lien on land. In a clause of the testator's will, he devises a tract of land to the defendant, super-adding these words "with the following exceptions, that he pay out of its value to my two daughters, Eliza R. and Nancy, to each of them, three hundred dollars." The defendant claims a right to have so much of this credit as was required, applied to the discharge of this incumbering bequest, and thereby the land relieved of the burden. The court ruled otherwise, and this is the gravamen of complaint. We should have little hesitancy in passing upon the asserted claim if it were pressed to a determination, but we are relieved from the necessity of considering it, by the frank avowal of the defendant's counsel, that intending and expecting to pay the legacy, he is indifferent whether it retains its force as a lien upon the land, or the lien has been discharged. The judgment of the court below in disallowing the exception will remain undisturbed.

Ex. 5 *and* 6. The defendant, on March 11th, 1864, paid to Mary J. King (who by marriage became Cooper), as representing the plaintiff, her mother, the money which was carried and delivered to the latter. The authority to receive the money as a payment on account of the estate is disavowed by both, who then resided in Georgia.

The payment was made on the occasion of a visit of the former to this State with some slaves of the latter to be hired out, when this locality was supposed to be more secure. There was, however, some evidence of such agency in opposition to their testimony, and outside of its exercise by one, and ratification of the other in the acceptance of the fund. At the same time, the defendant having a deposit in bank, of funds which, he says, were of his testator's, but in which he is not sustained by the evidence, amounting to some $1,300, offered to pay three hundred dollars more, which was declined. The parties do not agree as to the reasons for the refusal. The point in the exception is, that this further sum which became wholly worthless by the results of the war, should also be charged to the plaintiff, and the loss fall upon her. The $500 is so charged, mainly because it was received by the plaintiff and put to her own use, independently of a previous authority conferred upon the daughter, and upon testimony, in which the Judge was entirely correct in excluding the additional charge. The ruling upon these exceptions is sustained.

Ex. 7. When the defendant took possession of the personal effects of his testator he found among the papers, a receipt for two notes against Baggerly and Gray, given by Miles Cowles, an attorney, for collection. The notes, one for $743 and the other for $300, had been executed many years before. They are enumerated in the inventory among the bad and doubtful debts. They are charged at their face value against the defendant in an account, stated at his instance, of the administration by A. C. Cowles, known as the "Cowles settlement," with interest down to May 10th, 1863.

The respective counsel agreed that the defendant is to be charged with the claims mentioned in this account and with none others. The commissioner reports that the executor substituted his own Confederate money for these notes, and thus charged himself with them, while he testified that they were never collected by him, but in some unexplained way were replaced with a debt of one Thomas Gaither, who went into bankruptcy, and the claims were lost. The commissioner charges these notes at their nominal value, and in good money. Assuming that the executor undertook to appropriate these notes to his own use, and to substitute Confederate currency instead, which the law did not permit to be done to his advantage, and that the notes remained part of the trust estate, there is no evidence that they were or could be collected, and the defendant swears they were not, nor was the substituted claim against T. Gaither rendered available. So that to pursue the fund, it terminates in an entire loss, and there is no sufficient ground to impute a want of proper care, or negligence, to which the loss can be attributed. Besides supposing him to be the owner of the claims, his personal interest in the result affords some assurance of dilligence in the effort to secure and collect.

The remaining remedy open to the plaintiff is to charge the executor with the value of the Confederate money which he attempts to substitute for the claims, and the executor assents in his said agreement to be so charged. It is reasonable he should be held responsible for the amount with which he is charged in the "Cowles settlement," to-wit: $1,578.50, the amount of principal and interest to May 10th, 1883, and interest on the aggregate principals, $1,043 from that date, reduced by the scale applicable to that month.

Ex. 10. The defendant's own testimony as to the funds deposited with C. A. Carlton in the fall of 1863, and the sources from which derived is very unsatisfactory. He states, and perhaps he alone could tell, that he deposited money of the estate, but he is unable to explain by whom paid or how he is able to remember

the character of the fund as being a part of the trust estate. The testimony is not so clear and positive as to warrant the removal of the loss of the excess over the $500 received from the executor by the plaintiff, and we will not disturb the ruling below.

In order to the corrections in the account, rendered necessary by our adjudications upon the exceptions in both appeals, a reference must be made, so that the result may be ascertained, and final judgment rendered.

The reference will be made to the clerk to reform the account and make report. It is so ordered.

NOTE.—In the foregoing opinions the attention of the court is confined to the exceptions in the form in which they are presented by the respective appellants in the record, and we merely pass upon their legal sufficiency. The only exception which directly involves the applicability of the legislative scale, is that of the defendant to the charge against him of the Baggerly notes at their full face value. This exception is sustained. The others are taken to the refusal of the court to allow certain claimed credits in their entireties, and upon which we have ruled without inquiring or intending to decide whether they were or were not subject to the scale, assuming that the account would be re-adjusted upon a proper basis as to these as well as other items not presented for our consideration, the scaling process being applied in proper cases to both sides of the account. We have only disposed of the exceptions, and have not gone outside of these. The plaintiff will, of course, be entitled to her share only of the Baggerly notes.

R. W. WHARTON, Adm'r, v. E. B. WILKERSON et als.

Jurisdiction of the Clerk and of the Court in term—Contribution.

1. In special proceedings before the clerk, when issues of fact are joined, they must be certified to the court in term for trial. As soon as such issues are tried, it is the province of the clerk, and not of the judge, to make orders in the cause.
2. Where, in such proceedings, the record does not disclose that issues of fact have been transferred to the court in term, any orders made by the judge are extra-judicial.

3. A claim for contribution cannot be set up by one defendant against another in a proceeding to sell land for assets. When the amount exceeds two hundred dollars, the court in term alone has jurisdiction of such cause of action, except in cases of contribution between persons claiming as devisees under a will, or as heirs-at-law of a testator to whom undevised land has descended, which exception is caused by section 1534 of *The Code*.

(*Brittain* v. *Mull*, 91 N. C., 498, and *Battle* v. *Duncan*, 90 N. C., 546, cited and approved).

This was a special proceeding tried before *Graves, Judge*, at Fall Term, 1884, of BEAUFORT Superior Court.

The proceeding was commenced before the Clerk of the Superior Court of Beaufort county by a petition filed in said court by R. W. Wharton, administrator *de bonis non* of James W. Gaylord, deceased, against the defendants to sell certain lands descended from him to his heirs to make assets for the payment of the debts of the deceased.

The petition was filed by the plaintiff against the defendants Eveline Wilkerson, James W. Gaylord, J. F. Latham, W. P. Flynn, Thomas H. Privett, E. P. Brooks and Anthony Tapping, to sell the land, which, in a proceeding for partition by the Superior Court, had been allotted to said Caroline Wilkerson and W. L. Gaylord, two of the heirs-at-law of the intestate Jas. W. Gaylord, and the other defendant, being purchasers from W. S. Gaylord within two years of the grant of the letters of administration on said estate, or with express notice.

The plaintiff alleged that there were two judgments outstanding against the estate of his intestate—one in favor of R. C. Woodly for $1,716.39, and the other in favor of the administrator of E. J. Matthews for $284.20, and no assets had come to his hands wherewith to pay said judgments or any part thereof, and, therefore, he prayed for leave to sell the said land for the payment of said judgments, &c.

Eveline Wilkerson answered the complaint and admitted that she was one of the heirs-at-law of James W. Gaylord, and that he was seized at his death of the land described in the petition, but alleged that she had no knowledge or information with

regard to the other matters alleged in the petition sufficient to form a belief.

The case was then, we suppose, transferred to the issue docket of the Superior Court, and in that court at Spring Term, 1881, the said Eveline Wilkerson, upon motion, obtained an order of the Court to make George D. Olds and Lewis Latham parties defendant to the action, and that they answer to the petition of the plaintiff and to the allegation of said Eveline hereinafter stated, and that they submit to, abide by, and obey such judgment as the Court shall give them.

In support of her said motion, and as ground thereof, she alleged that all the other heirs of James W. Gaylord having been advanced by him in his life-time, his land was divided between her, W. L. Gaylord and M. E., the wife of Augustus Latham, the first administrator of James W. Gaylord; that Augustus Latham and wife Mary E. had conveyed their share in the estate to Augustus Latham, Jr., who, pending this proceeding, had sold the said lot No. 3 to George D. Olds and Lewis Latham, who had notice of the pending of the proceeding and of the rights and claims of said Eveline; that she had bought up the Mayo judgment, and prayed judgment, that said Augustus Latham, and in case of his failure, that said Olds and Lewis Latham shall contribute in the proportion of one-third, that being their share of the estate of said James W. Gaylord, to the payment of the said debt to Arthur Mayo, administrator aforesaid, or his assigns, evidenced by the judgment aforesaid.

The defendants, answering the motion, denied all the allegations of the said Eveline in support thereof.

The respondents, George D. Olds and Lewis Latham, opposing the motion of said defendants, further submit, in addition to what they have filed heretofore:

1. That this is not the proper method of procedure; that defendants should bring an original action for contribution.

2. That said J. W. Gaylord, deceased, was not indebted as alleged in said motion, or in any sum, and that these respondents

have not been parties to any proceedings establishing any such debt by judgment, and the said alleged judgment is not binding on them.

3. That if there was any such debt or judgment, said Eveline B. Wilkerson settled the same by paying only $250.00, and about $60.00 costs, and these respondents, in any event, would be responsible, if at all, only for their proportion of said $250.00, and no more.

4. That they own no land formerly the property of said J. W. Gaylord, deceased, or that if they do, they purchased without notice of this action, and more than two years after death of said J. W. Gaylord and administration on his estate, and that any such land they may have, is not in law subject to contribution for said debt or any part thereof.

The action being called for trial, it was by agreement between all the parties, submitted to His Honor, J. F. Graves, to hear the evidence and find all the questions of fact and law, his finding of facts to be final and his conclusions of law subject to appeal by any party.

The judge finds the following facts:

I. James W. Gaylord, the intestate of plaintiff, died in the Spring of 1865, intestate.

II. In December 4th, 1865, Augustus Latham became his administrator, qualified, gave bond and acted as such.

Said Augustus Latham died in 1876, without having settled the estate.

III. On November 21st, 1877, the plaintiff Wharton duly became administrator *de bonis non* of the intestate. He received no assets of the intestate.

IV. The heirs of James W. Gaylord were, (1) Eveline Wilkerson, (2) William Samuel Gaylord, (3) James Gaylord, (4) Mary, wife of Augustus Latham, Sr., (the person who became administrator as aforesaid).

V. By deed, on December, 1866, the said Mary and Augustus Latham in consideration of love and affection conveyed all their

estates in the lands of the intestate, James W. Gaylord, to their son Augustus Latham, Jr., who is the Augustus Latham named in the motion of Eveline B. Wilkerson in this action.

VI. The said James W. Gaylord, Sr., died seized in fee of the piece of land described in the complaint in this action which descended to his heirs in equal shares.

VII. On 3rd of December, 1872, before the clerk of the court, the said William S. Gaylord brought a special proceeding against said Eveline Wilkerson, James Gaylord and Augustus Latham, Jr., defendants, praying for a division of said lands among himself and said defendants. It appearing to the court that said James Gaylord had been fully advanced by his father, the said intestate James W. Gaylord, in his life-time, the court adjudged that said lands be divided in equal parts to said Eveline, William, Samuel, and Augustus Latham, Jr. Commissioners, to divide, were appointed, who made a division, by which several shares by metes and bounds, were assigned to said Eveline, William, Samuel, and Augustus, Jr. They duly reported, the report was confirmed and registered in said county.

VIII. By deed made and dated on March 5th, 1874, said Augustus Latham, Jr., sold and conveyed in fee his share of said lands to Andrew and Lawson Reddick, and on the same day took from them a mortgage on the same lands to secure $500.00 with interest, with a power of sale in case of default in payment.

The said Reddicks have paid in cash upon their debt $60 cost, and $150 on the mortgage. They failed to pay the debt secured by the mortgage, and by virtue thereof, the said Augustus advertised the mortgaged lands and sold the same on August 8th, 1879, when George D. Olds and Lewis Latham became the purchasers of the said land, which was the tract conveyed by Augustus and Mary Latham, in December, 1866, to said Augustus Latham, Jr.; said Augustus, Jr., by virtue of said power of sale conveyed the tract to said Olds and Latham by deed, August 8th, 1879, who paid cash therefor.

Said Olds and Latham before their purchase under the mortgage sale, had heard that E. J. Matthews' estate had a claim against J. W. Gaylord's estate, for which the lands of W. S. Gaylord and E. B. Wilkerson were bound, and they had heard there was a suit against them to subject their lands. That Olds and Latham did not know that the lands they purchaseed at the mortgage sale had been a part of the J. W. Gaylord estate, and that there was any claim against them. The description contained in complaint does not embrace them.

After the finding of the above facts which are agreed to as correct, His Honor held as a conclusion of law:

That the Superior Court in Term time had no jurisdiction to grant the motion of E. B. Wilkerson against Geo. D. Olds and Lewis Latham made in this cause. That a motion in the cause is not the proper remedy.

From this judgment, the defendant, Eveline Wilkerson, appealed.

Messrs. Rodman & Son, for Wilkerson.
Mr. Geo. H. Brown, Jr., for Olds and Latham.

ASHE, J. (after stating the facts). The only question presented by the appeal in this case, is whether there was error in the conclusion of the law and the judgment as announced by His Honor in the court below, "That the Superior Court in Term time had no jurisdiction to grant the motion of E. B. Wilkerson in regard to George D. Olds and Lewis Latham, made in this cause. That a motion in the cause is not the proper remedy," and the judgment of the Court that "the motion be denied and that said Olds and Latham go, without day, and recover their reasonable costs on said motion to be taxed."

We are of opinion there was no error. The action was a special proceeding by petition, filed before the Clerk of the Superior Court, by the administrator of James W. Gaylord, against the

defendant's heirs-at-law, to sell the land described in the petition to make assets to pay the debts of his intestate. The case was transferred to the Superior Court in Term, but upon what ground the record does not disclose, but we presume it was to try the issues raised by the pleadings, as there was no appeal to the Judge to decide any question of law raised before the Clerk. If we are correct in this, then as soon as the issues were tried, it was the duty of the Clerk, not the Judge, to make parties, and all necessary orders, and proceed with the case to final judgment. *Brittain* v. *Mull*, 91 N. C., 498. But the record does not show that any issues were tried, or transferred to the issue docket, and yet the Judge of the Superior Court in term took jurisdiction of the case and proceeded from time to time to make orders and decrees in the cause, which were clearly extrajudicial. Such was the order made, upon the motion of E. B. Wilkerson, to bring George Olds and Lewis Latham before the Court, to answer the allegations she made in support of her motion to compel them to contribute for money she had advanced in payment of a judgment against the estate of her ancestor, James W. Gaylord. It strikes us as an anomalous proceeding. It was an attempt to foist on a special proceeding, of which the Clerk of the Court alone had jurisdiction, a cause of action of which the Superior Court in Term had exclusive jurisdiction. For an action for contribution, when the sum demanded is over two hundred dollars, the Superior Court in term has exclusive cognizance. The only exception to this is the remedy given by section 1534 of *The Code*, which provides that "The remedy to compel contribution shall be by petition or action in the Superior Court, or before the Judge in term time, against the personal representative, devisees, legatees and heirs also of the decedent, if any part of the real estate be undevised, within two years after probate of the will, and setting forth the facts which entitle the party to relief, and the costs shall be within the discretion of the Court."

The very terms of the section show that it applies only to contributions among persons *claiming as devisees under a will*, and heirs-at-law of the testator to whom undevised land has descended. It clearly has no application to contributions among tenants in common who claim by descent, as in our case. The conclusion and ruling of His Honor in the Court below is sustained by the decision in *Battle* v. *Duncan*, 90 N. C., 546, where it was held that in a petition to sell land for assets to pay debts, a mortgagee of the interest of one of the heirs-at-law, cannot be admitted as a party defendant, and that such a claim cannot be set up in proceeding of that nature.

There is no error. The judgment of the Superior Court is affirmed, and the case remanded that the Clerk of the Superior Court of Beaufort county may proceed with the case according to law.

No error. Affirmed.

GEO. W. WYNNE v. J. M. HECK.

Trustee of an Express Trust—Parties.

The plaintiff having transferred the claim, upon which this action was subsequently brought, to an attorney at law, for collection, and with directions to him to apply the proceeds to demands which he held for collection against the plaintiff due other parties; *Held*,

1. The plaintiff cannot maintain an action in his name to recover the sum alleged to be due upon the claims.

2. That the effect of the transfer was to vest the ownership of the claim in the attorney, as a "Trustee of an Express Trust," and the action should have been brought in his name alone, or, in conjunction with those of the *cestui que trust*. *The Code*, §§177 and 179.

(*Willey* v. *Gatling*, 70 N. C., 410, cited and approved; *Abrams* v. *Cureton*, 74 N. C., 523, cited and distinguished).

WYNNE *v.* HECK.

CIVIL ACTION, tried on the report of the referee, Geo. V. Strong, Esquire, and the exceptions filed thereto, before *Gudger, Judge,* at August Term, 1884, of WAKE Superior Court.

The Court adopted the findings of fact and affirmed the conclusions of law of the referee, overruled the plaintiff's exceptions, and adjudged the action be dismissed.

From this judgment the plaintiff appealed.

The facts sufficiently appear in the opinion.

Messrs. Gray & Stamps and *Armistead Jones,* for plaintiff.

Messrs. Pace & Holding, for defendant.

MERRIMON, J. The plaintiff alleged in his complaint that the defendant was indebted to him on sundry accounts in the sum of $679.48. This, the defendant in his answer, denied, and thus it became necessary for the plaintiff to establish his alleged debt by proper proof.

By consent of the parties, the whole matter in contention was referred, under *the Code of Civil Procedure,* with instructions to the referee to report his findings of law and fact. The referee among other things, reported as follows:

"Prior to the commencement of this action, E. R. Stamps, an attorney at law, had certain claims against the plaintiff in his hands for collection, and presented the same to him for payment, who thereupon transferred to the said Stamps the account on which this action is brought, for collection, it being agreed between them at the time, that said Stamps should collect the same and apply the proceeds to the claims so held by him for collection against the said Wynne.

"The plaintiff cannot maintain this action, but it should have been brought in the name of the said E. R. Stamps as trustee of an express trust."

Upon these findings the court held, and we think properly, that the plaintiff could not recover. It is obvious that the plaintiff sold and transferred his debt against the defendant to E. R.

Stamps, upon the express trust that he should collect the same, and apply the money when collected, to the payment of the debts he, as attorney, held against the plaintiff for collection. The trustee had the ownership of the debt, and he was charged by the trust to collect it, not for the plaintiff, but for certain of his creditors. The plaintiff could not of right reclaim it, nor could he sell or dispose of it to another, except subject to the trust. The debt belonged to Stamps as trustee of an express trust. *The Code*, sec. 177, provides that the action must be brought in the name of the party in interest, unless as otherwise provided, and section 179 provides, that the trustee of an express trust may sue without joining with him the person for whose benefit the action is prosecuted, but he, in such case, must sue alone, or join the beneficiary with him. *Willey* v. *Gatling*, 70 N. C., 410.

The counsel for the plaintiff cited and relied upon *Abrams* v. *Cureton*, 74 N. C., 523. That case is not like, but very different from this. In this case, the plaintiff transferred his debt to the trustee for a valuable consideration, that is, that the trustee would collect the debt, and with the money pay certain debts owed by the plaintiff to certain persons. In that case there was no consideration. Abrams was merely an agent or attorney, who undertook to collect certain notes for the owner of them, who did not part, nor intend to part with the ownership of them.

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

No error. Judgment affirmed.

DEFENDANT'S APPEAL.

MERRIMON, J. This is the defendant's appeal in the case last reported. In the court below, the plaintiff failed to establish his alleged debt against the defendant, and the Court gave judgment for the latter in that respect. The plaintiff appealed to this Court, and we have affirmed the judgment. This put an end to the action, except in respect to the counter-claim pleaded by the defendant.

It might be questioned whether the alleged indebtedness of the plaintiff to the defendant, and pleaded as a counter-claim, was in strictness such, but it is unnecessary to decide any question in that respect, because the referee found the facts, and as matter of law, that the debt was barred by the statute of limitations. There was no exceptions to this finding, and the Court affirmed it.

So that the appeal of the defendant was improvidently taken. It presents no question for our decision, and must therefore, be dismissed.

Appeal dismissed.

SARAH A. DUPREE v. THE VIRGINIA HOME INSURANCE CO.

Continuance — Evidence — Agent — Juror — Challenges — Issues — Insurance — Witness, Examination of — Issues — Judge's Charge.

1. The granting or refusing a continuance is entirely discretionary with the presiding Judge, and cannot be assigned for error on appeal.

2. In an action on a policy of insurance, where the defence is over valuation, it is competent for the plaintiff to prove that insurance was effected the year previous on the same property in another company, through the same general

agents by whom the policy in suit was issued, and that before the former policy was issued an agent examined and valued the property, although such agent was not the agent of the defendant company. Such evidence is admissible, not on the ground of binding the defendant with the knowledge acquired by such agent, but to show what information the general agents were in possession of when they issued the policy in suit.

3. The Court may permit a paper to be read in evidence before its execution has been proved, when the party introducing it undertakes, at a subsequent time, to prove the execution.

4. Where concurrent insurance is effected in different companies, all represented by the same general agent, an examination and valuation made by a subordinate agent of one of the insurers, is admissible in evidence against all who act on his report, and the same rule applies to successive insurance in different companies.

5. The admission of immaterial evidence cannot be assigned as error.

6. A party's reason for peremptorily challenging a juror cannot be inquired into. The law gives to a litigant the right to object to a limited number of jurors without assigning any cause.

7. It is incompetent to prove what a witness swore on a former trial, when the witness can, himself, be put on the stand.

8. Where a witness has been questioned in regard to certain matters in his examination in chief, it is discretionary with the Judge whether he will allow further questions to be asked the witness in regard thereto, after the cross-examination has been completed.

9. Refusal to allow further testimony after the case has been closed, is matter of discretion and not subject to review.

10. Issues which embrace all the substantial matters of defence developed in the pleading and necessary to a determination of the action, are sufficient.

11. When requested to do so in apt time, the Judge must put in writing so much of his charge as embodies principles of law, but he cannot be forced to put the recapitulation of the evidence in writing.

12. It is not error in the Judge to omit to charge the jury upon matters of law which can only arise upon the verdict, and have no bearing on the questions to be considered by the jury.

13. The strict accuracy required in applications for insurance, in order to bind the insurer, is in the statement of facts, and not matters of opinion as to the value of the property, unless intended to obtain some unfair advantage.

(*State* v. *Scott*, 80 N. C., 365; *Capehart* v. *Stewart*, 80 N. C., 101; *Gadsby* v. *Dyer*, 91 N. C., 311; *Wood* v. *Sawyer*, Phil., 251; *Currie* v. *Clark*, 90 N. C. 355; *Bobbitt* v. *The Insurance Company*, 66 N. C., 70, cited and approved).

CIVIL ACTION tried before *Avery, Judge*, and a jury, at February Term, 1884, of WAKE Superior Court.

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

Messrs. Armistead Jones and *A. M. Lewis & Son*, for the plaintiff.

Messrs. D. G. Fowle, J. W. Hinsdale and *Jno. Devereux, Jr.*, for the defendant.

SMITH, C. J. The plaintiff's action is upon a policy of insurance against fire, issued by the defendant company on the 3rd day of October, 1879, and its object the recovery of damages for the loss of a store-house and certain articles of personal property therein, that were burned on the 21st day of the same month. Besides controverting some of the allegations contained in the complaint, the answer sets up as a defence against the demand, false representations alleged to have been made in the plaintiff's application for insurance, as to the value of the property proposed to be insured, and her failure, after the fire, to furnish, under oath, to the adjusting officer of the company sent to make examination, the full and detailed specifications of the building, its cost, and the other particulars required under the terms of the contract. The defendant avers that the house and other articles are knowingly estimated by the plaintiff at double their real value, as grouped in her application, at the time; and these false and fraudulent estimates, as an inducing influence, enter into and vitiate the contract of insurance, and exonerate the company from any liability under it.

The aggregate valuation distributed among the several kinds of property, is put in the application at $1,700, whereof the sum of $1,132, not quite two-thirds, also ratably apportioned, is protected by the policy issued in response. Some discrepancy appears in the enumeration of the several sums covered by the policy, which, added, make $1,066 and not the entire amount of the insurance. But the variance was not adverted to in the argument, nor does it affect the merits of the controversy, and we

notice it only to show that it has not been overlooked in examining the record. The parties accept the first-mentioned sum as that in dispute and this is assumed in the verdict for damages.

From the conflicting allegations made in the pleadings, issues in the form of inquiries are drawn out and were submitted to the jury, which, with the responses to each, in substance are as follows:

1. Did the defendant company issue the policy mentioned in the complaint? Answer—Yes.

2. Was the property covered by it destroyed by fire? Answer—Yes.

3. What was its first cost? Answer—$1,700.

4. What was the value of the house and other insured property at the time of application for insurance, separately estimated? Answer—Value of the house, $800; general merchandise, $600; counter, shelves, &c., in the house, $100; show cases, scales, drawers and furniture, $100.

5. What the value when destroyed by fire? In answer the jury make the same estimates, except that the general merchandise is valued at $750, an excess of $150 over the former.

6. Did the plaintiff know or have reason to believe that the property or any part of it was overvalued in her application? Answer—No.

7. What was the value of the property destroyed by the fire? Answer—$1,750.

8. Did the plaintiff furnish proof of loss in compliance with the conditions of the policy? Answer—Yes.

9. Had a store-house located on the same land, and near the same site, been burned within three years next before the plaintiff's application? Answer—Yes.

10. If so, and it was insured, by what company and for whose benefit was the insurance effected? Answer—By the Virginia Fire and Marine Insurance Company and for the benefit of W. E. Dupree.

In pursuance of these findings, judgment was rendered for the plaintiff, and the defendant appealed.

The exceptions, thirty-six in number, to which is added another in the brief for the appellant, not found in the record, were taken during the various stages of the trial up to the final judgment, to rulings of the judge in the reception of evidence objected to—in the rejection of evidence offered by the appellant—in the framing of issues—in the refusal to give instructions asked—in the giving of such as are shown in the charge, and in other matters appearing in the transcript. These exceptions will be considered *seriatim* in the order of their enumeration.

(1) The defendant's counsel moved for a continuance on account of the absence of a witness, the grounds for which were deemed insufficient by the court, and for this reason, as also in the exercise of a judicial discretion, the motion was denied. If repeated and uniform rulings that the granting or refusing a continuance of a cause is not a subject of appellate review are to have any force, this must be considered as settled. *State* v. *Scott*, 80 N. C., 365.

(2) The second exception is to the admission of proof of an application made by the plaintiff the preceding year, to the Virginia Fire and Marine Insurance Company, through the same general agency of Cameron, Hay & Co., by whom the present insurance was effected, upon the same substantial statement of facts in the application as far as pertinent to the controversy, her notification by these agents of the approaching termination of the time of insurance, and renewal solicited, her being supplied by them with a form of application to the defendant company, filled up, returned and policy issued, and that the first application was filled up, and the responses made out under the supervision of an agent of that company, sent to make a personal examination of the premises, preparatory to the issue of its policy. We do not see any valid objection to the proof of these facts. It was not offered to connect the defendant with the agent, so that from the relation, the knowledge acquired by the latter is in law to be deemed the knowledge of the principal and thus preclude the defendant from impeaching the plaintiff's valuations as false and fraudulent, but to show upon what information, in possession of

Cameron, Hay & Co., the policy involved in this suit was issued and why no further inquiry was considered necessary. An examination which warranted the first, might well be considered, in the absence of any suggested change in the condition or value of the property, sufficient to authorize the issue of the last.

Moreover, the plaintiff sought a re-insurance in the same company, and the substitution of the defendant was the unasked act of the general agency, under an authority conferred and used at the discretion of the agency, and in which the plaintiff, indifferent in the matter, acquiesced. She ought not, therefore, to be placed in a less favorable position than she would be if the same company had re-insured.

The general agents did not, therefore, exclusively rely upon the plaintiff's estimates, but were in possession also of the information supplied by the personal inspection of the agent of the former company, when they chose to transfer the application to the defendant, and both are in harmony with the plaintiff's statement in the present case.

The material and important question then and now is, was there an *intentional* over-valuation, not a mere error in judgment, if the estimates were put too high, and this is solved by a verdict which declares that the property was respectively worth the sums at which it is valued in the application, and that consequently there was no misrepresentation fraudulent or otherwise in the application.

(3 and 4) The production of the notice and the letter with the former and the present policies, finds support in the same consideration. In the notice, Cameron, Hay & Co. call themselves "General Insurance Agents," and in neither do they designate their principals. The objection to the reading of these papers until their authenticity was shown and the admission of them on condition of proof thereafter, was removed by subsequent evidence of their genuineness.

(5) The objection to the testimony that, upon the plaintiff's first application to Cameron, Hay & Co., an agent came out and

saw and valued the property, pursuant to which the former policy issued, and that they had the same information when the defendant, through the same agents, entered into its contract with the insured, is met with the same answer given to a similar preceding one, and is equally untenable.

It is certainly competent to show the source and extent of the information possessed by the general agents, and which prompted their action in the premises, and to repel the imputation of a false and fraudulent representation of value on the part of the plaintiff. It is manifest that if a divided insurance had been obtained in different companies, all represented by the same agency upon an examination and estimate made by a subordinate agent of one of them, he would stand in the same relation to each, and be, to this extent, the common agent of all who act upon his report. Why should not the same rule prevail when successive insurances in different companies are secured? The testimony was properly admitted.

(6 to 11) inclusive, and 16 and 17 exceptions, relate to evidence offered to identify the person of the agent, by proof of his hand-writing in the application, and that while he was in the service of the former, he was not in the employ of the present insuring company, and may be considered together as presenting the same general proposition in varying aspects. While there is no sufficient reason, intrinsic in the evidence itself, for its exclusion from the jury, it is obviously immaterial, so that no error can be assigned in the ruling. It is unimportant that the person that made the examination of the property and concurred in the estimate of its value, was acting at the time for the former company, for the information was communicated to the firm that issued both policies, and had authority from each to do so. From whatever source derived, the general agents had the same knowledge, and it is their possession of the information which in law is imputed to their principals and imposes the obligation.

(12) The inquiry as to the plaintiff's reason for the peremptory challenge of a juror, with a suggestion of its being because the

juror resided in her neighborhood, was rightfully disallowed. The law gives to a litigant the right to object to a limited number of tendered jurors without assigning cause, and its exercise cannot be called in question to his prejudice in the mode here attempted. This, if any authority were needed, is decided in *Capehart* v. *Stewart*, 80 N. C., 101.

(13, 14½, 15) These exceptions having been abandoned we forbear to comment upon them.

(14) The offer to prove that a witness who had not been introduced at the present trial swore, on his former examination, as to the value of the insured property, was promptly and properly denied. The correctness of this ruling is too obvious to require more than a reference to *Gadsby* v. *Dyer*, decided at last term, 91 N. C., 311, and what is said in the opinion filed in that case.

(18, 20) These exceptions involve a question of practice, and the testimony was not received, because not offered in apt time. The defendant proposed to inquire of its witness, J. A. Rhodes, after the conclusion of the cross-examination by the plaintiff, whether his estimate of the cost of such a structure as that burned (which he had put at $350 on his first examination) was based upon his knowledge or was "*mere guess work*," as he had said in his cross-examination by the plaintiff. The answer would have been but a repetition of the testimony in chief, with the explanation given in response to the plaintiff's inquiry into the value of the opinion, as embodied in the estimate, and thus the same subject matter would again come up. It was entirely competent for the Judge, while in his discretion to admit, to arrest the proposed re-examination for the reason which he assigns.

The other exception is to the refusal of the Court, after the witnesses on both sides had been heard and the plaintiff's testimony in reply was closed, to permit the defendant to introduce evidence to contradict the statement of P. C. Dupree, that he had on the other trial contradicted a deceased witness. The statement was elicited upon his examination by the defendant and not in answer to any interrogatory from the plaintiff. The testimony

was disallowed, as reopening the case after it was closed, for no sufficient reasons addressed to the discretion of the Court to warrant a relaxation of the rule. The refusal presents no point for review upon appeal, and the practice is clearly and distinctly marked in the well considered opinion of the Court in *Sawyer* v. *Wood*, Phil. 251, 274, delivered by Mr. Justice Reade.

(19) The testimony of a witness for the defendant, who had been examined at the previous trial and had since died, one J. W. Dodd, was reproduced by one who had heard his former statement, that a conversation occurred between the plaintiff and her brother, the said P. C. Dupree, in which the former said the house had cost her nearly $400, and that some small addition of lumber afterwards had run it up $10 or $15 more.

The said Dupree, for the plaintiff, denied that any such conversation occurred, or that he had ever heard the plaintiff say how much money she had expended on the building.

Upon cross-examination the witness admitted, that as to this, the testimony of the deceased witness was in conflict with his own, and thereupon he was asked, with a view of impeaching him, whether he knew the handwriting in the body of the application and the signature thereto.

We are unable to see in the question, or the answer it may bring out, any tendency to impeach the truthfulness of the witness himself, or to impair the force of his testimony. At least this is not sufficiently pointed out in the record to show its pertinency and bearing in that direction, and the error in not permitting the inquiry to be made. How can the witness's knowledge, or want of knowledge, of the writing disprove what the witness says in regard to the conversation, or what his sister said at any other time in his hearing?

The discrediting interrogations that put the witness in antagonism to the reproduced testimony of Dodd, and which antagonism he admits, seem to be directed, not to the written answers found in the application, but to the plaintiff's verbal declarations, and especially that spoken of by the deceased witness.

The exception must be overruled.

The series of issues, ten in number, while the subject of complaint in the eleventh exception taken by the appellant, in our opinion present the controversy in all its essential aspects to the minds of the jury, whose findings negative all the forms of defence set up to the plaintiff's claim.

These findings determine the separate values of the house and articles therein as grouped in the estimates, at the time of the fire, their original cost as a whole, the absence of knowledge of, or of intended over-valuation in the plaintiff's application, the measure of her loss from the fire, a full compliance with the requirements of the policy in furnishing proof of the loss, and that the plaintiff had no interest in a previous insurance of a house upon the same premises by W. E. Dupree.

Without considering separately the exceptions that relate to the form of the issues framed and passed on by the jury under the sanction of the court, it is sufficient to say that these embrace all the substantial matters of defence developed in the pleadings and necessary in the determination of the action, on which the defendant was entitled to a response from the jury, comprehended in the general terms of an inquiry, while, in some cases, not subdivided and presented in the specific form tendered for the defendant.

We, therefore, overrule these exceptions.

We now proceed to consider the defendant's prayer for instructions and those given by the court.

The defendant's counsel requested that the jury be charged:

1. That the application upon which the policy of insurance was issued forms a part of the contract of insurance and is a warranty by the assured.

2. That the application being in the nature of a condition precedent, the burden of proof is upon the plaintiff to prove the truth of its representations.

3. That a representation as to the value of the property insured is material.

4. That the doctrine of immateriality does not apply in a case where the representation forms a part of the contract, and is made in response to a direct question.

5. That it is sufficient to avoid the policy, that the representations were false, however honestly made.

6. That the burden of proof is upon the plaintiff to satisfy the jury that the property insured was as to each item, worth the value placed upon it.

7. That there is no evidence that any agent of the Virginia Home Insurance Company ever inspected or valued the building or shelves, counters or drawers insured.

8. That there is no evidence that any agent of the Virginia Home Insurance Company ever inspected or valued the stock of goods, show case, scales and bed-room furniture insured.

9. That there is no evidence that any agent of Cameron, Hay & Co., ever inspected or valued the property insured or any part thereof.

10. That there is no evidence that the Virginia Home Insurance Company, or any of its agents, had any personal knowledge of the value of the property insured.

11. That if the jury shall believe that a former agent of Cameron, Hay & Co., acting for the Virginia Fire and Marine Insurance Company, examined and valued the building, shelves, counters and drawers insured, there is no evidence that he communicated his knowledge to Cameron, Hay & Co.; and the Virginia Home Insurance Company are not in any way affected by said knowledge of Cameron, Hay & Co. not communicated to them.

12. That there is no evidence that in any way fixes on the defendant either actual or constructive knowledge of the value of the property insured, outside of the application on which the policy was based.

13. That it is incumbent on the plaintiff to satisfy the jury, by a preponderance of evidence, that the cost price of the property insured to the plaintiff was $1,700.

14. That there is no evidence that the property insured cost her $1,700, and that the jury must find upon the issue upon this subject in favor of the defendant, that is, that the property did not cost $1,700.

15. That if the jury shall believe as testified by the plaintiff, that her son, by her permission, built a house upon her land, which was, a year or two before the date of the policy sued upon, destroyed by fire, that they must find the 9th issue in favor of the defendant.

16. That the burden of proof is upon the plaintiff to show that she has furnished to the company the proof of loss required by the policy, containing a particular account of such loss, signed and sworn to by her.

17. That there is no evidence that she has furnished the defendant with the required proof of loss as to the general merchandise.

18. That there is no evidence that the plaintiff has furnished the defendant with the required proofs of loss for the scales, drawers and bed-room furniture.

19. That there is no evidence that the defendant has waived such proof of loss.

20. That if the jury shall believe that the plaintiff furnished to the defendant the proof of loss which was sworn to before S. D. Williams and procured him to sign the certificate of such loss, without knowing the amount of the loss, the value of the property or other facts set forth in the certificate made by said Williams, or without having examined and read over the same before signing it; that said proof of loss was fraudulent and not such as required by the policy, and the jury must find these issues in favor of the defendant.

21. That the defendant was not bound to make an examination of the value of the property insured, and was in no default for not doing so.

22. That the defendant had a right to rely on the statements of the assured, as contained in her application, and was not bound

to make any further inquiry as to any of the matters contained in said application.

23. That the plaintiff had a right to read Borum's deposition to the jury. The omission of the defendant to read the deposition which might equally have been read by the plaintiff, is no ground for the presumption that the testimony of Borum would be unfavorable to the defendant.

24. That the jury cannot consider any of the evidence relating to the examination of the property insured, by an agent for the purpose of insurance prior to the date of this policy, as such evidence has no bearing in this case, and is withdrawn from the consideration of the jury.

25. That when application is made for insurance, at the same time and in the same application, upon two or more separate pieces of property, as upon the store and the goods therein; and the statements of the insured, contained in the said application, in reference to any one item of property, are false, the contract is regarded as entire, and the whole contract is void.

Counsel for the defendant in addition to the request made in writing, that the charge of the Court should be in writing, asked the Court, when the last of five speeches was being made to the jury, to put in writing also, any recapitulation of the testimony given to the jury, to show the application of the law to the testimony.

His Honor charged the jury, in writing, as follows:

"The plaintiff brings her action to recover upon a contract between the plaintiff and the defendant company, which contract is embodied in the application and policy issued thereon. The contract is mutual.

The answers of the plaintiff contained in the application, amount to a covenant on the part of the plaintiff that such answers (if material), being inducements to the defendant to enter into the contract, were true when the application was made. The defendant covenants to perform the stipulations contained in the policy, subject to the conditions set forth in the policy, but is not answer-

able to plaintiff in damages, unless the plaintiff has shown affirmatively that all the material representations contained in the application, and relied upon as inducements to contract, by defendant, were true when made.

The burden is upon the plaintiff to satisfy the jury by a preponderance of testimony:

1. That the defendant executed and issued to the plaintiff the policy set forth in the complaint. If the jury are so satisfied, their response to the first issue will be "Yes," otherwise, "No."

2. That the plaintiff's property covered by the policy sued on was destroyed by fire. If the jury are so satisfied they will respond to the second issue, "Yes," otherwise, "No."

3. What was the actual or estimated cost of the property insured, and that it was as great as the amount set forth in the application, viz., $1,700. If the actual or estimated cost of the property was less than $1,700, then the plaintiff cannot recover. In response to the third issue, the jury will write in letters or figures what they find from the testimony was the cost of the property insured.

4. That on October 3, 1879, when the application was made and also when the store-house was destroyed by fire, the value of each of the articles or items set forth in the application or policy was as great as the value fixed in the application and policy, viz.: That on the first of said days the store-house was worth $800; the general merchandise was worth $700; the counters, shelves, etc., in store-house were worth $100; the show case, scales, drawers and bed-room furniture in the store-house were worth $100.

In response to both of said issues the jury will write in letters or figures what they find from the testimony was the reasonable market value of articles as classified and set forth in the issues submitted. Upon the question as to the value of the property insured, at the time when the application was made and also when the store-house was destroyed by fire, the plaintiff relies upon her own testimony that the merchandise was worth accord-

ing to inventory, at cash price on September 29, 1879, $600, and that $200 worth of goods were added; that the other insured articles in the store were worth the amounts set forth in the application, viz.: .... and ....; that the store-house was worth $800, and also upon the testimony of P. C. Dupree, who testified that as carpenter he did a portion of the work.

The defendant relies upon the testimony of the witnesses Ashley and Ellington, examined as experts, and a number of other witnesses who estimate the value of the building at $350 to $400, and the shelves, counters and show-case at less than the value set forth in the policy, and upon the testimony of a number of witnesses who estimate the value of the goods much lower than price fixed in the policy.

In determining the value of the property insured on October 3, 1879, the jury may consider and give such weight as they deem proper, to the testimony offered to show that the firm of Cameron, Hay & Co. were, during the years 1878 and 1879, agents both of the defendant company and the Virginia Fire and Marine Insurance Company, that issued the policy offered in evidence in July, 1878, and that an agent acting under the direction of said firm, inspected and estimated the value of the store-house and other articles insured in the policy sued on, at the prices set forth in the policy issued in 1878, and made out the application; that the relations of said firm with said agent were such that the said firm of Cameron, Hay & Co. could issue a policy in the name of either of the corporations without regard to the form of the application, and that the policy sued on was issued upon an application in form for insurance in said Virginia Fire and Marine Insurance Company. The witness may be considered as determining the value of the other articles insured, but not as to the value of the merchandise.

The burden is upon the plaintiff also to show in response to the seventh issue, what was the value of the property actually destroyed by fire.

The plaintiff insists that it was the amount set forth in the policy, less the value of the articles carried out of the store-house and saved. The defendant insists that the aggregate value of the articles was much smaller, and that the value of the articles saved should be deducted from the aggregate value ascertained by the jury.

The response to the sixth and ninth issues will be "yes" or "no," as the jury may find from the testimony.

In response to the tenth issue, if they shall find that the house had been previously insured, the jury will give the name of the person for whose benefit the store-house was insured. The only testimony on this subject was that of the plaintiff, that her son built the store-house on her land and by her permission, and afterwards took out a policy of insurance for his own benefit, and that the name of her son was W. E. Dupree.

In passing upon the eighth issue, if the jury are satisfied by a preponderance of testimony, that the plaintiff furnished to the defendant the proof of loss, which has been offered in evidence, within ninety days after the property insured was destroyed by fire, then the burden would be upon the defendant to show that the defendant demanded other proofs or in different form, and which were requisite to full compliance with the conditions of the policy. If such demands were made by defendant and the plaintiff did everything in her power to comply with the demand, and failed only to furnish some of her bills or her inventory destroyed by fire, the proof of loss offered in evidence would be deemed in law a compliance with the stipulations and conditions of the policy.

The court gave the first three and the twenty-first instructions asked by defendant, and stated that as the jury were called upon to find the facts so fully as to amount almost to a special verdict, much of the instruction asked by the defendant involved questions of law which might arise after the return of the verdict.

In their deliberations as to the sixth issue, the jury may consider the testimony of the witness as to actual value of the prop-

erty insured when the application was made, and also the testimony in reference to the inspection of the property by an agent in 1878, to which attention was called in connection with the fourth issue.

32D EXCEPTION.—The defendant excepted to His Honor's charge as given.

33D EXCEPTION.—The defendant also excepted to the failure and refusal of His Honor to give each of the instructions asked for.

At the conclusion of the evidence and before the argument was entered upon, the defendant's counsel presented a series of instructions, twenty-five in number, which the court was requested to give to the jury, and at the same time demanded that the instructions to be given should be in writing, adding thereto during the progress of the discussion a request that the recapitulation which might be made of the testimony should also be reduced to writing, to show the application of the law to it.

In this connection it may be remarked that the statute, *Code*, §414, only requires to be written and read to the jury, when demanded in apt time, so much of the charge as embodies a proposition or principle of law, which, if erroneous, admits of correction, but not the rehearsal of the testimony. He must "state in a plain and correct manner the evidence given in," and then, if required, "*declare* and explain the law arising thereon" in writing; section 413.

This construction is put upon the statute and declared in *Currie* v. *Clark*, 90 N. C., 355, 359, 360.

The three first enumerated instructions, as also the 21st in the series offered by the defendant, were given, and these are put out of controversy.

The next two, numbered four and five, present questions of law and not of fact, and came within the observation of the Judge as matters to be decided after the findings of the fact to which the principle of law may be applicable; moreover, all the misrepresentations relied on in the answer, as a discharge of the

defendant from the obligations of the contract, consist in an alleged over-valuation of the property, in the denial that the plaintiff had before suffered a loss by fire of a building upon the same premises, and added to this, her failure to furnish the particulars of the loss afterwards, when required. These defences are presented in distinct and independent issues to the jury, with directions to determine the separate value of each kind of insured property, at the time of insurance, and in like manner the actual or estimated cost of the property in the aggregate. This was done, and the verdict also fixed the separate value at the time of the fire. As the findings are adverse to the defendant and sustain the statements in the answer, no question as to their materiality can arise, and no cause of complaint found in the imputed omission to tell the jury that, in order to a recovery, all the answers to the inquiries contained in the application must be true in fact, irrespective of their materiality in inducing the issue of the policy.

The next seven instructions, from six to twelve inclusive, are predicated upon matters already considered, and require no further comment, except that which imposes the burden of showing the separate values upon the plaintiff, and in this the jury were so directed and they have so responded.

The 13th instruction asked, differs from that given and numbered three, only in that the former confines the inquiry to the aggregate *cost* of the property, while the other, following more nearly the words of the application, requires in detail the finding of "*the actual or estimated cost.*" There can be no just complaint of this.

The 14th instruction, follows and is dependent upon that immediately preceding, and the case shows there was evidence to warrant the response to the direction to find, if not the *actual*, the *estimated cost* of the property, and in this alternative form, the answer is given to the inquiry in the application.

The 15th instruction was properly refused, and the verdict removes the defence set up in the answer based upon an alleged insurance for, and a loss sustained by fire by the plaintiff.

The 16th instruction was given upon a broad and comprehensive issue, involving a compliance with all the requirements in respect to the proof of loss, and without a tedious rehearsal of the evidence upon this point, embracing a voluminous correspondence between the plaintiff's counsel and an adjuster of the defendant company, we are clearly of opinion that it warrants the charge of the court in respect to the eighth issue, and not less so the finding of the jury in the affirmative in response thereto.

The instructions, 17 to 20 inclusive, are rightfully refused.

The answer to the 22d instruction is found in the entire charge, which makes the liability of the defendant contingent upon the correctness of the declarations contained in the application, and thus assumes that the defendant might act upon them without further inquiry.

We cannot see the pertinency of the matter of the 23d instruction, nor what use in argument was made of the defendant's failure to read the deposition of its adjusting agent, nor indeed that anything occurred afterwards (for the instruction was asked before argument), which called for any direction of this sort during its progress. It seems not to have been noticed by the court, and we must assume the reasons for this, while not appearing, were sufficient.

The 24th instruction requires no further comment, and the 25th, which involves only matter of law, has become unimportant in consequence of the verdict.

Before dismissing the subject, it is proper to say, that the strict accuracy required in the application, to make the insurance contract binding on a company, is in the statement of facts, known or assumed to be known, and declared as such, not in the opinion formed and expressed as to the worth or value of property, and hence, an honest, though erroneous estimate put upon it, cannot be a vitiating element in the contract. It might be otherwise if intended to deceive and secure some unfair advantage from the company through its misplaced confidence, and, therefore, an issue was framed numbered 6 to present the imputed over-valuation

in this aspect, and the finding relieves the plaintiff of an intentional misrepresentation.

The cases cited in the brief of the defendant's counsel are in accord with this view. *Jeffries* v. *Life Insurance Co.*, 22 Wall., 47; *Ætna Life Ins. Co.* v. *France*, 91 U. S., 510; *Bobbitt* v. *Liv. and Lond. Globe Ins. Co.*, 66 N. C., 70, and a large number of other references in the brief.

After the rendition of the verdict, the same rulings, the exceptions to which have been reviewed, were assigned as grounds in support of a motion to set aside the verdict and award a *venire de novo*, and especially that there had been no evidence offered to sustain the findings upon the 3d, 4th, 5th, 6th, 7th, 8th and 10th issues.

This is but a renewal of previous exceptions, and we will only remark that the seventh must have been intended to refer to an issue of that number in a previous enumeration of the issues, and not to that passed on by the jury bearing the same number. This latter is only an inquiry as to the value of the property burned, about which there was much evidence.

The motion for judgment upon the verdict for the defendant finds no support therein.

The Judge who presided at the trial, and seems to have given a patient hearing to the argument in support of the long array of exceptions, and to have correctly administered the law in disposing of them, in explanation of the voluminous record sent up, says it was in deference to the demands of appellants' counsel, and while his notes do not show that the plaintiff testified, *seriatim*, that the store-house and articles therein covered by the policy were worth, separately, the sums at which they are valued in her application, yet the charge was written when his recollection was fresh, and was predicated upon her testimony as being such. We must, therefore, accept the fact to be correct.

Upon a calm review of the case as presented in the appeal, we find no error which entitles the defendant to a reversal of the judgment, and it must be affirmed.

No error. Affirmed.

STATE, ex. rel. R. A. TORRENCE et als. v. E. C. DAVIDSON et als,

Administrator—Diligence.

1. All that is required of an administrator in the management of his intestate's estate is diligence and fidelity. If coercive measures vigorously pushed against a debtor are likely to result in a loss to the estate, he is not required to adopt them.
2. An administrator is never held responsible because the exercise of a reasonable discretion has turned out unfavorably for the estate.
3. A debtor to an estate being in failing circumstances, the administrator made a further advance of money to him, and took a mortgage to secure the entire amount. It was possible, but not probable, that the debt might have been collected by suit, and the debtor refused to give the mortgage unless the further advance of money was made. The debtor became utterly insolvent and the mortgaged property was insufficient to pay the entire debt; *Held*, that the administrator was not liable to the estate for the loss.
4. The fact that an administrator has a common interest in the estate with the distributees is a circumstance tending to show the exercise of fidelity in the management of the estate.

(*Patterson* v. *Wadsworth*, 89 N. C., 407, cited and approved).

CIVIL ACTION, heard on exceptions to the report of a referee, at August Term, 1884, of MECKLENBURG Superior Court, before *McKoy, Judge.*

His Honor gave judgment for the plaintiff and the defendants appealed.

The facts appear in the opinion.

Mr. George E. Wilson, for the plaintiffs.
Mr. W. P. Bynum, for the defendants.

SMITH, C. J. J. T. Davidson died intestate in March, 1874, and soon after, letters of administration issued to the defendant E. C. Davidson, who, with the other defendants as sureties, gave the bond on which the present action is brought by some of the distributees to recover their share in the estate.

Among the effects which passed into the possession of the administrator, were four promissory notes executed by R. D. Gra-

ham, respectively in the months of June, August, September and November previous, and which matured twelve months after their several dates. They were unsecured, and the administrator, apprehensive of loss from the large indebtedness of the maker, endeavored to effect a settlement, and after repeated efforts obtained from him the promise of a mortgage on a lot in Charlotte. Afterwards, and at the solicitation of the administrator, on his making an additional loan and extending the time of payment, he procured a mortgage from Graham on said lot and several others, in value deemed amply sufficient to secure the debt. The deed bears date September 25th, 1875, and was registered the next month. It authorized a sale by the mortgagee in case of default after the expiration of the year. The property thereafter declined in value, and in the expectation of improvement, the sale was deferred until September, 1877, when suit was brought for a foreclosure, and under a decree of the court, the lots were sold in March, 1878, for $1,810 to the administrator, he being the highest bidder, the report of which sale was made and confirmed. The administrator offers to surrender the property to the distributees on being exonerated from further liability on account of these notes.

The registration of the mortgage was postponed with the mortgagee's consent, until notified by Graham to have it done, on his promise to let the former know when he was threatened with suits by other creditors, and declaring if the administrator attempted to sue, the other creditors would be notified, and the administrator must look to the mortgaged property alone for his debt. Judgments were recovered by other creditors and docketed on May 11th, 1877, amounting to thirty thousand dollars, and Graham has become wholly insolvent.

The administrator is himself a distributee in the estate of the intestate and as such entitled to share therein.

Upon these findings the court was of opinion that the administrator "did not exercise due diligence in the collection of the notes," and ruled that he was chargeable for their full amount.

From this ruling the defendants appeal, and it is the only matter involved in the account rendered by the referee open to examination.

We do not assent to the conclusion of law deduced from the facts, of such inattention and remissness as subjects the administrator and his sureties to the payment of the entire indebtedness, for reasons which may be thus summarily stated:

1. Some assurance of fidelity to the trust assumed with its obligations, is furnished in the fact of his having a common interest with others in securing the fund for the estate.

2. He acted with a prudent caution in not at once resorting to coercive measures, and precipitating an unfavorable result, under the menace that if he did so other creditors would be notified and allowed to appropriate to their demands the other property of the debtor, for this must be the import of his words, that in such case, the administrator would not be allowed to share with them, but must be content with what he had already secured under the mortgage.

3. He pressed his claims in a less direct manner, suggested by information of the heavy indebtedness overhanging the debtor, and his precarious financial condition, and by means of a further loan and longer indulgence, secured the preferential assignment of property considered ample for the amount of the mortgage debt.

4. The delay in closing the mortgage was prompted by the hope of a recovery from the depreciation which had fallen upon the lots, and as soon as it failed, steps were taken and carried out for the sale.

5. To prevent greater loss, the administrator bid off the lots and now offers to surrender them for the benefit of the estate.

Throughout, the administrator has acted with an earnest desire to save the debt and to protect the trust estate from loss, and even now it is not seen wherein he has been derelict in duty or how he could have better managed the fund. He has exercised vigilance and attention in his efforts to promote the interests commit-

ted to his care, some portion of which was personal. If instead of procuring the mortgage, he had proceeded by action, while perhaps the whole might have been saved, the indications rather are that this indebtedness would have shared the fortune of the large amounts in the docketed judgments, and with more reason in such case would a personal accountability have been incurred, had he declined to take the offered mortgage upon the prescribed terms.

The cases cited in the brief of counsel for the appellee, go no further than to demand diligence and fidelity in the discharge of fiduciary obligations, and prompt action when it does not endanger the safety of the fund. But if coercive measures, vigorously pushed, are likely to result in loss, the fiduciary is not required to adopt them, for a prudent regard to the interests committed to his hands is quite as much a duty, as active conduct under other circumstances. In a case where an executor was sought to be held responsible for retaining certain Mexican bonds until their depreciation caused a loss, Sir C. C. Pepys, Master of the Rolls, used this language: "I have found no case, and none has been produced, in which an executor has been called upon to bear the loss that has arisen, because in the *bona fide* exercise of a reasonable discretion, the conclusion he came to has turned out unfortunately." *Buxton* v. *Buxton*, 1 Mylne and Craig, 80.

But we have been referred to a recent case, the report of which is not accessible, the facts of which, as found in 10 Jacobs' Fisher's Digest, 15,820, briefly stated, are very similar to the present.

A testator died in possession of certain notes, which coming into the hands of his executor, were presented to the debtor for payment. This the latter was unable to meet unless by selling certain real estate under mortgage, sufficient, as he believed, to discharge both the mortgage debt and that of the executor. The mortgagees made further advances but no payments were made to the executor. Being again pressed, the debtor filed a liquidation petition that he said he would have resorted to in case he had been pressed at an earlier period. It was sought to charge

the executor with the loss of the debt, and it was held that he was not liable, as no such negligence was shown as to put that burden upon him.

The proper measure of fiduciary liability where loss has been sustained, is laid down with many adjudications in its support, in the recent case of *Patterson* v. *Wadsworth*, 89 N. C., 407, in quoted words, as follows, "executors should not be held responsible as insurers. All that a sound public policy requires, is that they shall act *in good faith and with ordinary care.*"

More cannot be reasonably demanded, nor does the law impose a higher obligation at the peril of individual loss.

Tested by this just and salutary rule, we shall find in the conduct of the administrator in the management of these notes, no other than an earnest desire to save of them all that he could, and the use of such means as seem to assure advantage to the estate. He had, at one time, apparently at least, secured the entire debt, and the delay was a condition upon which the mortgage deed was obtained, and the subsequent forbearance of sale was prompted by an unwillingness to sacrifice the property, and in the hope, though it ended in disappointment, that there would be a reaction from the depreciated market value in real estate.

It does not appear what or whose money was used in the loan by which the conveyance was obtained. Nor is it of any moment to inquire, since, without objection, the whole proceeds of sale are applied to the notes in controversy, and thereby no detriment on this account comes to the estate.

The report of the referee exonerates the administrator from this loss, and the plaintiff's exception thereto was sustained by the court. In this ruling there is error, and the defendant's exception to the reformed account, in this feature, must be upheld. There is error in the ruling by which the defendants are charged with the entire debt and with the costs of the suit of foreclosure, and these will be stricken out. To this end it is referred to the clerk, and when the account is corrected, the plaintiffs are entitled to judgment for what may then be found due to them.

Error. Reversed.

JAMES W. GRANT, Adm'r, *v.* R. O. EDWARDS, Ex'r.

Reference—Interest—Commissions—Legacy, when it takes effect.

1. The court will not set aside a report and order a re-reference on the ground that the referee has failed to pass on certain matters involved in the account, when the report furnishes *data* from which the account can be stated.
2. An administrator cannot be charged with interest at eight per cent., because he is indebted to the estate, and has realized that rate on money of his own.
3. Where an executor attempts to pay his individual debts out of the assets of his testator, he commits a *devastavit*, and his creditor who knowingly accepts such payment is liable to account to the estate therefor, but, in such account, he is entitled to credit for the amount of the executor's interest in the estate.
4. Under the circumstances of this case an allowance of five per cent. commissions to the administrator is not excessive.
5. Where a testator devised two-thirds of his entire estate to a party for life, it means two-thirds of his net estate, and it takes effect, in the absence of any express provisions to the contrary in the will, immediately after the time when the law requires the executor to distribute the estate, unless the estate should be sooner settled.

(*Gulley* v. *Macy*, 89 N. C., 343; *Grant* v. *Bell*, 87 N. C., 34, cited and approved).

CIVIL ACTION, tried at Spring Term, 1880, of NORTHAMPTON Superior Court, before *Gudger, Judge.*

This case is reported in 87 N. C., 34, and also in 90 N. C., 558, and in pursuance of an order of reference therein made, the referee submitted his report to this court, and the cause was heard upon exceptions thereto.

The findings and rulings of the referee, material to explain the opinion, are as follows:

That on the compromise judgment of $12,077.34, on November 25th, 1868, J. J. Bell paid to B. F. Lockhart in money the sum of $4,489.16, and the remainder he paid in B. F. Lockhart's individual bonds.

That during the life-time of said B. F. Lockhart and prior to November 25th, 1868, he paid indebtedness of W. T. Bell's estate, amounting to $1,541.10, and immediately after said date he paid debts of said estate, amounting to $981.16. The aggre-

gate of debts due by said estate, on November 25th, 1868, was $4,113.60. To this was added five per cent. commissions allowed on $7,588.18, the amount of the judgment left unpaid and which will have to be collected by the present administrator, and also five per cent. commissions on $1,115.60, the unpaid indebtedness of the estate.

That B. F. Lockhart's interest in the estate was a life-estate in two-thirds of the net surplus of the estate, and that said Lockhart died on the 7th of February, 1877.

That charging the defendant with six per cent. interest, the value of Lockhart's life-estate is $2,305.17, and if he is charged with eight per cent, the life-estate would be worth $3,073.56.

Reference is also made to the report of this case in the 87th volume at page 34, where the facts fully appear.

Messrs. R. B. Peebles and *Thos. N. Hill*, for the plaintiff.
Messrs. Mullen & Moore and *Day & Zollicoffer*, for defendant.

MERRIMON, J. It was suggested on the argument, and it appears, that the account is not fully stated in the report of the referee filed at the present term, as directed by the order of reference, entered in this case at the February Term, 1884, of this court. The referee omitted to ascertain the interest upon two-thirds of the net value of the estate of the testator of the plaintiff, from the date of his death until the death of B. F. Lockhart, and state the account, giving the defendant credit for that sum of money.

This seems to have been an over-sight, and is not, necessarily, ground for setting the report aside altogether, more particularly, as it furnishes data for so stating the account. The proper correction can be promptly made by the clerk of this court. The report, therefore, need not be set aside. *Gulley* v. *Macy*, 89 N. C., 343.

Both the plaintiff and the defendant have filed exceptions to the report.

These we will dispose of in their order:

1. The plaintiff contended that it sufficiently appeared, that the testator of the defendant had and used the money belonging to the estate of his testator, and realized upon it a profit equal at least to eight *per centum per annum*, and, therefore, interest at that rate should be allowed upon the unpaid balance of the judgment in question. The referee refused to allow that rate of interest, and this is the ground of the first exception of the plaintiff.

This exception cannot be sustained. The testator of the defendant did not have and use the money of the plaintiff's testator, as he insists. This court held, in *Grant* v. *Bell*, 87 N. C., 34, that the testator of the defendant failed to pay so much of the judgment against him for $12,077.34, entered on the 25th of November, 1868, in favor of F. F. Lockhart, executor, as he undertook to discharge with the note and other indebtedness of the executor to him. That part of the judgment has never been paid; the defendant's testator owed it in his life-time, just as if he had never pretended to pay it. There is no more reason why the plaintiff should share in the profits that he realized upon his money invested, than that any other person, to whom he might owe a debt he had not paid, should do so. The misapprehension grows out of the supposition that the executor, Lockhart, paid his own personal debt due to the testator of the defendant, with the assets of his testator. This he did not do. The arrangement by which he sought to pay his own debt, was treated as fraudulent and void—as a nullity.

2. Nor can the plaintiff's second exception be sustained. The referee properly allowed the defendant credit for B. F. Lockhart's interest in the estate of the plaintiff's testator, whatever that might be.

This court expressly decided in *Grant* v. *Bell*, *supra*, that the defendant's testator was entitled to be credited with the whole of that interest when ascertained, and that decision remains undisturbed.

The defendant's counsel in this court, properly abandoned so

much of his first exception as referred to the allowance of compensation to counsel.

We think the allowance of commissions to the plaintiff was, under the circumstances, not unreasonable, and this exception in that respect must be overruled.

It turns out that the defendant's fourth exception is in respect to a matter immaterial, and it must therefore be disregarded.

His second and third exceptions must be sustained, except so much of the latter as suggests the sum of money for which the plaintiff ought to have judgment; in this respect it must be overruled.

The statement of the account by the referee is not made, in several respects, in accordance with the order directing the reference. The referee fails to indicate the considerations that led him to ascertain the net value of the estate of the testator of the plaintiff on the 25th day of November, 1868, as he should have done. Especially, he has failed to ascertain and report an account of the value of the life-estate of B. F. Lockhart in two-thirds of the net estate of the testator of the plaintiff, treating it as beginning immediately after the death of the testator, and ending on the 7th day of February, 1877, the date of Lockhart's death. It is important to have the account stated in this view, with some modification. The report supplies data necessary for that purpose.

The will of the testator of the plaintiff, among other things, provides as follows:

"Thirdly, I devise and bequeath two-thirds of all my estate of every description, whether in possession or in action, to my uncle Benjamin F. Lockhart during the term of his natural life," &c.

This plainly implies, that the testator intended that his uncle named should have a life-estate in two-thirds of his net estate. This could not be known or ascertained immediately after his death. In the order of things, the estate had to be settled, and reasonable time was required for that purpose. In the absence of any express provision in the will as to the time when the life-

estate should begin, the law implies that it should begin immediately after the time within which the executor is required by the statute to distribute the estate, unless it should be sooner settled.

This the statute (*The Code*, §1488) requires to be done at the end of two years next after the qualification of the executor or administrator. It is reasonable to conclude that the testator, there being no express provision in that respect in the will, intended that his bounty should be enjoyed by his uncle within a reasonable period after his death, having regard to the time required to settle his estate. The nature of the bequest implied that the net of the estate should be ascertained. As this was not done sooner, two years next after the qualification of the executor was a reasonable time in which to do so. It is fair to presume that the testator intended the life-estate should then begin, and we hold that it did.

The referee reports that he ascertained the value of the life-estate of Lockhart from the 25th day of November, 1868, to the 7th day of February, 1877. It is obvious that he did not ascertain its true value.

It must therefore be referred to the Clerk of this Court to restate the account heretofore ordered to be taken, and especially to ascertain the value of the life-estate of Benjamin F. Lockhart in two-thirds of the net of the estate of the testator of the plaintiff, treating such life-estate as having begun two years next after the qualification of his executor, and ended on the 7th day of February, 1877. The clerk will use the *data* contained in the report filed, and make his report during the present term.

It is so ordered.

GRANT v. EDWARDS.

Legacy—Life-estate—Interest.

1. Where a testator leaves two-thirds of his estate to a legatee for life, the value of such legacy is the value of a life-estate in two-thirds of the net amount of the estate, two years next after the qualification of the executor under the will.
2. Where a legatee, who is also executor, misapplies any of his testator's estate, it must be deducted from his legacy.
3. Where a testator gives to a legatee an estate for life in two-thirds of his estate, but nothing is paid to him, he is not entitled to interest on the amounts which should have been paid him each year.

After the opinion in the foregoing case was filed, a report was made by the Clerk of this Court, to whom it was referred, to which both parties filed exceptions.

MERRIMON, J. The clerk has restated the account and made his report thereof, as directed by the order of reference entered at the present term in this case, and both the plaintiff and defendant have each filed numerous exceptions thereto, and these exceptions are submitted to the Court without argument.

Upon examination of the account stated, in connection with the exceptions, we find that the clerk in ascertaining the value of the life-estate of B. F. Lockhart, based his calculations, in some respects, upon improper *data*. The report must, therefore, be recommitted for correction, as directed in this opinion.

The clerk first ascertained the net value of the estate of the plaintiff's testator on the 25th day of November, 1868, and adopted two-thirds of that sum as the sum of money in which B. F. Lockhart was entitled to a life-estate. This was erroneous, because, as we have seen heretofore, he was entitled to a life-estate in two-thirds of the net value of the estate mentioned, at the end of two years next after the qualification of the executor of the will of the plaintiff's testator, which it appears was in June, 1865. The net value of the estate at the latter date must be

ascertained, and the value of the life-estate in two-thirds of that sum allowed to the defendant as a credit, unless it shall appear that Lockhart had misapplied the assets of the estate, or moneys belonging to it, or owed it money on any account—in such case, any sum of money due from him to the estate, must be subtracted from the sum of money due on account of his life-estate, and the balance allowed to the defendant as a credit. The purpose of the account is to ascertain what sum of money was due to Lockhart. Hence, in *Grant* v. *Bell*, 90 N. C., 558, we said: "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." This obviously means what sum was due to him, diminished by any sum he owed the estate on any account.

In the same opinion, in directing how the account should be taken, we said: "In ascertaining the amount due 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." This direction, taken in connection with our former opinions and directions in the case, plainly implied that the referee should first ascertain the gross value of the estate of the testator of the plaintiff, and secondly, its net value, by subtracting from the gross value thereof, all debts due from it, all costs of administration, including reasonable compensation to counsel, whether paid or incurred by Lockhart while he was executor, or by the present plaintiff, and by proper commissions to Lockhart for any collections or disbursements made by him as executor, and like commissions to the plaintiff for collections or disbursements made by him.

It seems to be conceded on both sides that the value of Lockhart's life-estate was equal to the interest on the fund in which he had such life-estate from the time it began until it ended. It is fair to allow that the interest was due, and ought to have been paid to him at the end of each year next after his life-estate began, but it was not so paid, nor paid at all, so far appears. The

clerk impressed, no doubt, with this idea, in restating the account allowed interest on the accrued and unpaid interest of each preceding year.

Such allowance of interest, though seemingly just and reasonable, is not so in fact, and cannot be allowed. There is nothing in the will that can be construed as allowing interest upon interest, or that goes to show a purpose to place Lockhart on a more favorable footing than the other objects of the testator's bounty.

If the enjoyment of his life-estate was postponed, so also was the enjoyment of the like estates to others. Why should he have interest upon interest and they not have it? If he should be allowed it, this must be done at the expense of others. The delay was his misfortune, in common with other interested beneficiaries under the will. It appears that the estate made but simple interest. The defendant has less ground of complaint at the adverse delay than others interested, because it is obvious that his testator and Lockhart, one or both, occasioned it.

The exceptions bear upon the points to which we have thus adverted. Those of the plaintiff must be sustained so far only as they suggest error, but, in so far as they suggest how the account should be restated they must be over-ruled.

In respect to the defendant's exceptions, we are unable to ascertain from the report, whether or not the clerk made the allowance mentioned and claimed in his first exception. If he did not, any such disbursement or payment made by Lockhart must be allowed, not with a view to ascertain the net value of his estate, but in ascertaining whether he owed the estate of his testator anything.

And, as to the second exception, we cannot learn from the report whether commissions, as claimed, were allowed or not. But if commissions were not allowed on account of Lockhart as to collections and disbursements made by him as executor, the same must be in restating the account, as we have already indicated.

The third, fourth, fifth and ninth exceptions are really only suggestions as to the manner of stating the account as claimed by the defendant, and must be disregarded.

Let an order be entered in accordance with this opinion, recommitting the report to the clerk. It is so ordered.

B. N. HOWELL et als v. WILLIAM R. POOL.

Usury—Mortgage—Purchase by Mortgagee at his own Sale.

1. A stipulation in a mortgage, that the mortgagee should retain from the proceeds of the sale of the property, "costs and charges, including a commission of five per cent. for making such sale," in addition to the principal and interest then due on the secured debt, is not usurious, in the absence of proof of an usurious intent. It is a provision for the compensation for services performed in the execution of the trust, and not a part of the consideration for the loan.
2. Such stipulations are not approved, and will never be enforced when the mortgagee makes the sale and becomes the purchaser.
3. A sale to a mortgagee by himself, under a power of sale in the mortgage deed, is ineffectual to divest the equity of redemption from the mortgagor, and the relation of the parties is not changed by that act.

(*Kornegay* v. *Spicer*, 76 N. C., 95; *Whitehead* v. *Hellen*, *Ibid*, 99, cited and approved; *McCorkle* v. *Brem*, 76 N. C., 407; *Capehart* v. *Biggs*, 77 N. C., 261; *Purnell* v. *Vaughan*, 77 N. C., 268; *Pritchard* v. *Sanderson*, 84 N. C., 299, cited and distinguished).

This was a CIVIL ACTION, pending in WAKE Superior Court, heard before *Avery, Judge,* on motion to dissolve a restraining order, at chambers on the 26th of May, 1884.

On the 26th day of January, 1881, the plaintiff, B. N. Howell, borrowed of the defendant the sum of twenty-five hundred dollars, and gave his bond therefor, to become due at twelve months, and bearing interest from date at the rate of eight per cent. per annum, payable semi-annually. At the same time

the said B. N. Howell and his wife, the plaintiff Nancy J., executed a mortgage deed to the defendant conveying, with other lands a lot in the city of Raleigh, known as the "Howell House," and vesting in the mortgagee a power of sale in case of any default in meeting the obligation, and the liberty of bidding and buying at such sale. Stipulations were also inserted in the deed to insure the payment of taxes by the mortgagor, for an insurance against fire to the amount of the debt for the benefit of the defendant, and one in the following terms: "And out of the moneys arising from such sale to retain the principal and interest, which shall then be due on the said mortgage, together with all costs and charges, *including a commission of five per cent. for making such sale.*" Some payments were made, but the plaintiff, failing after repeated demands to discharge the residue, which as computed to February 19th, 1883, was in excess of two thousand dollars ($2,155.44 according to defendant's estimate in an account rendered to the mortgagor), he proceeded, under the provisions of the deed, to advertise a sale of the lot, to be made on the 11th day of February, 1884, when the present action was instituted and the proceedings arrested by the issue of a temporary restraining order, under the direction of Shepherd, Judge, to operate until the hearing of an application for an interlocutory injunction before Avery, Judge.

Meanwhile a large volume of evidence, consisting of affidavits of the contesting parties and exhibits, was prepared and submitted, together with an account which had been before sent to the plaintiff's son and agent, R. P. Howell, who, in all these transactions, acted for his father, withdrawing an item objected to as an usurious charge, upon the consideration of which the following judgment was rendered:

"After hearing the complaint and affidavits of the plaintiffs and the affidavits of defendant in the above entitled cause read, and after hearing counsel on both sides,

"It is now considered, adjudged and ordered by the court, that the injunction and restraining order moved for by the plaintiffs in this cause be refused.

"It is further considered, adjudged and ordered, that the temporary restraining order heretofore issued herein by the clerk of the Superior Court of Wake county, on the 11th day of February, 1884, in pursuance of an order herein granted by His Honor, J. E. Shepherd, together with last mentioned order, be vacated and annulled, and that the defendant recover his costs.

"And this cause is restrained for further directions."

From this order the plaintiff appealed.

Mr. Armistead Jones, for the plaintiff.

Messrs. Haywood & Haywood and *Gatling & Whitaker,* for the defendants.

SMITH, C. J. (after stating the facts). Many reasons are suggested in the complaint why the court should interpose in the attempted exercise of the power conferred in the mortgage, such as the mental and physical condition of the mortgagor, and the injurious consequences to him that may ensue, and the unfavorable time for making sale, which cannot enter into our consideration of the right of the creditor to enforce payment of his debt, through the means placed at his disposal by the debtor.

The objection to the insufficient manner of advertising the intended sale, and to other informalities in connection with it, are put out of the way by the interference of the restraining order that prevented a sale. There is no support to the charge of usury found in any provisions of the deed, in the absence of proof of an usurious intent. The compensation to be retained from the proceeds of sale fixed by the parties, is manifestly for his services in executing the trust, and not a part of the consideration for the loan—contingent upon the necessity of exercising the power conferred.

We are not disposed to sanction the provision thus understood, at least when, at such sale, the mortgagee undertakes to become the purchaser.

The act, if legally effectual for any purpose, would operate, not as a transfer of the estate unencumbered, but as the extin-

guishment of the equity of redemption, and there would properly be no moneys from which commissions could be taken. But the sale of the mortgagee to himself, directly or through an intervening agency, would be ineffectual, and the title would remain undisturbed. "Once a mortgage always a mortgage," is a maxim in equity, remarks Pearson, C. J., in *Whitehead* v. *Hellen*, 76 N. C., 99, while considering the subject, and he asks, "how has the defendant (mortgagor) lost his equity of redemption? what price has been paid for it?"

But as the matter has now passed under the jurisdiction of the court, and the sale, if necessary, will be conducted by a commissioner under its supervision, the inquiry as to the effect of this clause of the deed is immaterial, as the court will make such allowance as it deems reasonable and adequate for the service rendered.

The case does not present complicated accounts and unadjusted dealings so as to come within the rulings made in *Kornegay* v. *Spicer*, 76 N. C., 95; *McCorkle* v. *Brem*, 76 N. C., 407; *Capehart* v. *Biggs*, 77 N. C., 261; *Purnell* v. *Vaughan*, 77 N. C., 268; *Pritchard* v. *Sanderson*, 84 N. C., 299, and other cases of the same class.

There are here no complicated relations between the parties, no unadjusted account to be settled. There is a debt of definite amount represented by the plaintiff's bond, enlarged by fire insurance money and taxes paid by the defendant, which ought to have been paid by the plaintiff, with several payments, and no item, except a small charge which is surrendered, about which there is any controversy. The balance due is a simple matter of arithmetical computation. This has been made and embodied in an account rendered the plaintiff, from which the objectionable charge is eliminated. There can be no litigation about the provision for compensation to the mortgagee for making the sale, since it will be made, if at all, under the direction of the Court by one of its own appointees, for whose services allowance may be made by the Court, and so also there can be

no injustice or wrong done to the plaintiff in carrying out his own agreement.

The evidence, much of which is needless repetition, and consists in details that have little bearing on the controversy, furnishes no reason to induce the Court to delay longer the enforcement of the mortgagor's obligation.

Such forms of securities whereby the creditor is invested with full control of the property, instead of committing the execution of the trusts to a disinterested and impartial trustee, are not favored, and are tolerated, in the words of Pearson, C. J., in *Kornegay* v. *Spicer*, *supra*, "after much hesitation, on the ground that in a plain case where 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."

We therefore concur in the refusal of the Judge to grant an injunction to operate until the hearing, and in his vacating the restraining order previously issued.

The Court, being now in possession of the cause, will proceed to a judgment of foreclosure, if so required by the defendant. And to this end, let this be certified to the Superior Court of Wake. The appellant will pay the cost of the appeal.

No error. Affirmed.

S. T. STANCILL and LEWIS D. GAY, Administrators, v. JERE. GAY et als.

Evidence—Irregular Judgments—Jurisdiction of Probate Court—Summons—Acceptance of Service—Notice.

1. In motions to set aside judgments for irregularity, and other motions of kindred nature, the rules of evidence are not so strictly adhered to as in the trial of an issue by a jury. In such cases the Court can hear any evidence which is reasonably calculated to aid it in arriving at a just conclusion.
2. By accepting service of the summons, the parties are brought into court and made parties to the action, and must take notice of the proceedings, and are bound by the judgment of the Court.
3. Litigants are presumed to take notice of all that is done in actions to which they are parties.
4. A judgment rendered without any complaint having been filed is not necessarily void. Such judgment is valid if rendered by consent, or if ratified by subsequent assent to it.
5. An irregular judgment will not be set aside as of course. The moving party must show that the alleged irregularities affect them adversely in a material respect, and that they have exercised due diligence in seeking relief.
6. The former courts of probate had exclusive jurisdiction of proceedings to settle the estates of deceased persons.

(*Mayo* v. *Whitson*, 2 Jones, 231; *Johnson* v. *Futrell*, 86 N. C., 122; *University* v. *Lassiter*, 83 N. C., 38; *Vick* v. *Pope*, 81 N. C., 22; *Hunt* v. *Sneed*, 64 N. C., 176; *Heilig* v. *Foard*, *Ibid.*, 710; *Hendrick* v. *Mayfield*, 74 N. C., 626, cited and approved).

MOTION to set aside a judgment rendered in a special proceeding heard, on appeal from the decision of the clerk, before *Shepherd, Judge*, at Fall Term, 1883, of HALIFAX Superior Court.

His Honor found the following facts:

1. That on the 25th day of March, 1871, S. T. Stancill and L. D. Gay, as administrators *c. t. a.* of Green Stancill, filed their final account of said administration, and on the same day caused a summons to be issued by the clerk against the present defendants. That service of the summons was accepted by all the defendants, except the three infants, Ida A. Stancill, Samuel D. Long and Mattie Long. That no service

was ever made on these infants, except a notice in reference to the appointment of a guardian *ad litem*. That no guardian *ad litem* was ever appointed for the infants during these proceedings.

2. That the summons was returned after the acceptance of service thereof, in due time and before the rendition of the decree, and before the statement of the account.

3. That the parties defendant, during the proceeding, except Mattie D. Long, lived within the county of Northampton, within from two to thirteen miles of the office of the clerk.

4. There was no evidence that a complaint was ever filed in said proceeding, except the recital in said decree, but the Court finds that the account filed by said administrators on the day of the issuing of the summons was used during the conduct of the proceeding and formed the basis thereof.

5. An attorney was employed by Jere. Gay and wife, and represented them in the proceeding. Before the decree was made he examined the account stated by the clerk, and expressed his satisfaction therewith; and that the decree was made in accordance with said account. That the other defendants employed no counsel, but the clerk understood that the same attorney was acting for all the defendants.

6. That the interests of the defendants, as distributees, were identical, except that S. E. Long and Mattie D. Long represented one-half of a share each.

7. That exclusive of the recitals of the decree, there is not sufficient evidence that formal notice was given of the statement of the account, but the court finds that while no formal notice was given, the defendants were fully informed of all the proceedings in said cause, that after the account was stated and before the entering of the decree they were fully advised of the same, and of the shares to which each would be entitled under said account, and that they made no objection thereto; that the decree was made according to the said account, and that the plaintiffs settled with, and took receipts from the defendants served, except Jere. Gay, according to such account and decree, and with full

knowledge of all the proceedings in the cause. The infant defendants were also settled with according to the decree, but it does not appear to the satisfaction of the Court that they were fully informed of the proceedings in said cause. That Jere. Gay and wife were partially settled with by the administrators on the basis of the account and decree.

8. That the record does not show that any attorney appeared for the defendants.

9. That the final decree was approved by Judge Albertson, and that his signature to the approval is genuine.

10. That the account filed at the time of issuing the summons, differed from that stated, and on which the decree was rendered, in no other respect than the omission of the proceeds of certain real estate and interest, which the plaintiffs contend were not proper charges in that account.

11. That the decree was made at the instance of the clerk.

12. That the motion was made on the 16th of September, 1882, and that the decree was rendered in 1874. Upon these facts, His Honor rendered judgment setting aside the judgment as to the infant defendants, and refusing to set it aside as to the adult defendants.

From this judgment all the parties appealed.

Messrs. T. W. Mason, T. N. Hill and *Mullen & Moore* for the plaintiffs.

Messrs. R. B. Peebles and *Battle & Mordecai* for the defendants.

ADULT DEFENDANTS' APPEAL.

MERRIMON, J. The appellants moved to set aside a final judgment in a special proceeding, brought in the court of the clerk of the Superior Court of the county of Northampton, to settle and distribute the estate in the hands of the appellees, administrators. The motion was based upon the grounds of alleged

irregularity in the judgment and the proceedings leading to it. In passing upon its merits, it became necessary to ascertain important facts. The clerk heard the evidence, consisting mainly of numerous affidavits, and having found the facts, refused to set the judgment aside, and gave judgment accordingly. Thereupon the present appellants appealed to the Superior Court. The clerk sent up to that court the record, including the evidence and his findings of fact.

In the Superior Court the judge considered the evidence, modified some of the findings of fact by the clerk, gave judgment affirming the judgment of the clerk, and remanding the case.

The appellants assigned as grounds of error, that the judge heard and considered improper evidence, and upon the whole case affirmed the judgment of the clerk.

We are of opinion that the exceptions in respect to evidence rest upon no substantial ground. Most of the evidence objected to was not of much importance, and could not have had much weight, especially as it was considered by an intelligent judge who considered its relation and proper application. Some parts of it were irrelevant, and these, the judge states, he did not consider. While, perhaps, according to the technical rules of evidence applicable in the trial of actions, some parts of it might not be strictly competent, still it was not improper to hear and consider it upon a motion like that before us.

The motion was heard summarily. It presented *questions* of fact to be tried by the judge upon affidavits and documentary evidence. The object was not to try an action, or the rights of the parties in it, but to ascertain what the court itself had done or omitted to do in a special proceeding, and what the parties to it had done in and about it. Besides, in an important sense, the motion was addressed, as we shall see, to the sound and just discretion of the court.

In such application the rules of evidence are not so strictly adhered to as they are in cases of trial by jury, or when actions

are tried upon their merits. This is especially so, when the discretion of the court is invoked; and generally, in summary proceedings, such as interlocutory applications in chancery, motions in actions to set aside judgments, grant attachments and orders of arrest, to enter satisfaction, and in criminal proceedings, after conviction, to show matters in aggravation by the prosecution or in mitigation by the defendant.

In such cases, the court may hear any evidence, which is reasonably calculated to inform its judgment. It has the right to draw evidence from any pure source. *Mayo* v. *Whitson*, 2 Jones, 231; *Daniel, Ch. Pr.*, 1769; *Tidd's Pr.*, 440, 568; *Chit. Cr. Law*, 697. In *Shortz* v. *Quigley*, 1 Binn., 222, Chief-Justice Tilghman said, "The motion to open the judgment, was an appeal to the court, to execute a summary jurisdiction on principles of equity. In hearing these motions, courts are not tied down to strict rules of evidence which govern them in trials by jury, because it is presumed that their knowledge of the law prevents their being carried away by the weight of testimony not strictly legal."

We do not mean to be understood as intimating that the Court may, arbitrarily, hear and consider any and every statement or suggestion that may be made, but only as saying it may hear such pertinent evidence as is properly produced and reasonably tends to throw light upon the question before it.

The Court properly affirmed the judgment of the clerk denying the motion. The proceeding was disorderly rather than irregular, but if there was some irregularity in the course of the proceeding leading to the judgment in it, it was not such as to render it void, and the conduct of the appellants was such as bound them by it.

The appellants each "accepted service" of the summons. It was not strictly formal, but it plainly gave them notice to appear in court, "in twenty-one days," and answer a complaint that would be filed, and that if they failed to answer the same, the plaintiffs therein would apply to the court for the relief demanded

in it. This was sufficient to bring them into court and make them parties to the proceedings. By such compliance they agreed to take notice of the proceeding and became subject to the jurisdiction of the court in that behalf. *Johnson* v. *Futrell*, 86 N. C., 122.

The court thus having obtained jurisdiction, the parties were bound to take notice of what was done in the course of the proceeding until the final judgment therein. It was their neglect and their folly, if they did not. The law charged them, at their peril, to be watchful of their interest in that respect. *University* v. *Lassiter*, 83 N. C., 38; *Freeman on Judgments, sec.* 142.

No complaint appears in the record, nor is it certain one was filed. The clerk finds as a fact that there was one, and that it was lost. The Judge finds that the only evidence of this was the recitals in the judgment. These recitals were evidence, but not conclusive. But if there was no complaint filed, this fault alone did not render the judgment void. The court having jurisdiction of the subject of the action and the parties to it, the latter might consent to the entry of a judgment by express agreement, or, one having been entered, they might assent to it. There is a presumption in favor of the regularity of the judgment—that the court gave it in the course of procedure, or that the parties consented to it. *Vick* v. *Pope*, 81 N. C., 22; *Freeman on Judgments, secs.* 130, 132, 135, 136.

The appellants were not only in court by virtue of the summons, but it appears from the findings of fact by the clerk and the Judge, that if there was not formal notice of the taking of the account (as was contended), "the defendants (the appellants here) were, nevertheless, fully informed of all the proceedings in said cause; that after the account was stated, and before the entry of the decree, they were fully advised of the same, and the share to which each would be entitled under said account, and they made no objection thereto; that the decree was made according to said account, and the plaintiffs (the appellees here) settled and took receipts of the defendants served, except Jere. Gay,

according to said account and decree, and with full knowledge of all the proceedings in the cause." It also appears that Jere. Gay and his wife received a part of the share due them. They were represented in the proceeding by counsel, who examined the account as settled by the decree, and he expressed his satisfaction therewith. The decree complained of was entered on the 1st of May 1874, and approved by the Judge, and the motion to set it aside was made 16th of September, 1882, more than eight years afterwards.

Now, it is not certain that there was any irregularity in the course of the proceeding, but if it be granted that there was in some respects, the appellants were cognizant of all that was done in it, they were fully informed as to the statement of the account and the final decree in which it was adopted and confirmed, and in pursuance of that decree, they, with one exception, respectively received the money decreed to each, and he received a part of the share decreed to him, and, besides, he was represented by counsel. Such being the facts, they must be deemed to have waived all formal irregularities, and be bound by the decree.

But if there were irregularities in the proceeding, affecting the decree, the appellants would not, as they seem to suppose, be entitled to have it set aside on that account, as of course.

In such case, it would behoove them to show that the alleged irregularities affected them adversely in a material respect, and that they had, within a reasonable period under the circumstances, exercised due diligence in seeking relief. The facts make it manifest that they did not exercise such reasonable diligence. They were familiar with the proceeding from the beginning to the end of it, they received the money under the final decree, and after that, more than eight years elapsed before they made their motion.

It was suggested on the argument by the appellant's counsel, that the late court of probate, the clerk of the Superior Court, had not jurisdiction of the special proceeding in question.

The suggestion is founded on misapprehension. On the contrary, it seems that that court had exclusive original jurisdiction

of such proceedings. Art. IV, sec. 17 of the Const. of 1868; *Hunt* v. *Sneed*, 64 N. C., 176; *Heilig* v. *Foard*, *Id.*, 710; *Hendrick* v. *Mayfield*, 74 N. C., 626. It seems that the statute (Bat. Rev., ch. 45, sec. 134, 147) contemplated that the Superior Court should have like jurisdiction, but this court held otherwise, giving effect, perhaps, to a proper construction of the provision of the constitution cited above. It may be, that there are reported cases in which the Superior Court took original jurisdiction of such proceedings, but be this as it may, the court of probate certainly had jurisdiction of the case in which the motion before us was made.

There is no error. Let this opinion be certified to the Superior Court, to the end that court may take future action according to law.

No error. Affirmed.

PLAINTIFFS' APPEAL.

1. A judgment rendered against infant defendants, who have never been served with process, and who have no general or testamentary guardian nor guardian *ad litem*, is void.
2. The receipt of money under such judgment by the infants, does not give vitality to the judgment. They may be made to account for the amounts received in another action.
3. The Code, sec. 387, making valid judgments against infants and certain other persons, in cases where, being parties defendant, they are not personally served, does not apply to cases where there has never been any service upon the infant, nor upon any person representing him.

(*Armstrong* v. *Harshaw*, 1 Dev., 187; *Stallings* v. *Gulley*, 3 Jones, 344; *Doyle* v. *Brown*, 72 N. C., 393; *Larkins* v. *Bullard*, 88 N. C., 35; *Young* v. *Young*, 91 N. C., 359, cited and approved).

The same counsel appeared as in the previous case, and the facts are the same.

MERRIMON, J. The appellees were infants and had a substantial interest which it was sought to affect by the special pro-

ceeding and the judgment thereon, in respect to which the motion embraced in this appeal was made. It appears that no summons in that proceeding was ever served upon them, nor was a guardian *ad litem* appointed for any one of them, nor did they appear, nor did any counsel appear for them, nor was any defence made by them or in their behalf.

It is manifest that the judgment in that proceeding, in so far as it purports to apply to them, was not only irregular, but absolutely void.

The court did not obtain jurisdiction of the appellees. There was no service of process upon them personally, nor was there constructive service, nor were they brought into the proceeding in any way recognized by law, or indeed, at all. Jurisdiction of the party, obtained by the court in some way allowed by law, is essential to enable the court to give a valid judgment against him. *Armstrong* v. *Harshaw*, 1 Dev., 187; *Stallings* v. *Gulley*, 3 Jones, 344; *Doyle* v. *Brown*, 72 N. C., 393; *Larkins* v. *Bullard*, 88 N. C., 35; *Young* v. *Young*, 91 N. C., 359.

Notice was issued to them by the counsel of the appellants, to procure the appointment of a guardian *ad litem* for themselves. This notice was without authority and had no sanction of law. In the absence of a general or testamentary guardian, it was the duty of the court, upon the motion of any party to the proceeding, to appoint a guardian *ad litem*. The notice mentioned seems to have been served upon but one of them; but this was not material, because it was not process; it did not purport to be, nor was any guardian *ad litem* appointed.

The appellees received the money designated in the judgment, as shares of the fund distributed, due to them respectively, but it appears that they were not fully informed as to the nature of the proceeding and its purpose; it does not appear what were their ages respectively, at the time they received the money, nor is it material to inquire here, because the mere receipt of it could not give life and effectiveness to a void judgment. The only object now is to set aside and quash that judgment. At another time

and in another proceeding, they may have to account for the money received by them.

The statute, (*The Code*, §387,) making valid, judgments against infants and other classes of persons in certain cases, does not apply in a case like this. Its purpose is to make valid "the proceedings, actions, decrees and judgments" against an infant or such others, in cases where they, being parties defendant, were not "*personally served with a summons.*" But it does not purport to render valid judgments and proceedings in actions when there was no service upon an infant defendant therein, and none upon his general or testamentary guardian, or upon a guardian *at litem* properly appointed for him, nor can it be construed to have such effect. The Legislature did not intend that a judgment against an infant in an action or special proceeding wherein he was not made a party defendant, but treated as a defendant, should be rendered effectual against him. A statute with such a purpose would contravene fundamental right and shock the moral sense of just men!

There is no error in the judgment of the Superior Court reversing the judgment of the Clerk of that Court in respect to the infant appellees. Let this opinion be certified to that Court according to law.

No error. Affirmed.

INFANT DEFENDANTS' APPEAL.

MERRIMON, J. This is the appeal of the appellees in the case just decided. They appeal, assigning as error that the Court have heard improper evidence adverse to them in its findings of fact that might, in a possible contingency, prejudice them. But, as the judgment in their favor has been affirmed, the questions they seek to present are immaterial and the appeal was unnecessary; indeed we cannot see that in any case it was necessary. It must therefore be dismissed.

It is so ordered.

JAMES S. WHEDBEE et als. v. KENELLUM LEGGETT.

Arbitration—Submission—Judgment.

In an action for the recovery of land, the defendant denied the allegations of the complaint and pleaded a counter-claim, alleging title to the lands in himself, and asking damages for trespasses done thereon by the plaintiffs. By consent, the case was submitted to arbitrators to decide the matters in issue, *except the question of title*, the award to be a judgment of the Court. The arbitrators awarded damages to the defendant. Upon filing the award, the Court gave judgment against the plaintiffs for the amount found by the arbitrators; *Held*, to be erroneous, as the defendant could have no judgment for damages until the issue as to the title should be determined in his favor.

CIVIL ACTION, tried before His Honor, *Gudger*, *Judge*, at Fall Term, 1884, of HALIFAX Superior Court.

The action was begun on the 11th of October, 1879, returnable to Spring Term, 1880, to recover the possession of a tract of land in Halifax county, and for damages for cutting and carrying off the timber trees thereon.

At Fall Term, 1883, the defendant filed his answer denying plaintiffs' title to the land, and also denying the trespass upon the same. He also pleaded the statute of limitation to their claim both to the possession of the said land and the said trespass thereon, and alleged title in himself. He further alleged in his answer that the plaintiffs had trespassed upon the land by cutting and carrying away therefrom timber trees to the amount of five hundred and fifty dollars, and demanded judgment:

1. That the plaintiff's action be dismissed.
2. For five hundred and fifty dollars damages.
3. For other relief.

The plaintiffs filed their replication to the defendant's said answer, denying that they had trespassed upon the land by cutting and carrying away timber trees therefrom to the amount of five hundred and fifty dollars, and pleaded the statute of limitation to the defendant's claim for damages.

At the same term the following order was made: "By consent of parties this cause is referred to three persons to act as arbitrators, who shall decide all matters in controversy in this cause, except the title to the land, and their award, or a majority of them, shall be final, and shall be a judgment of this court. One of said arbitrators shall be selected by the plaintiffs and one by the defendant, and these two so selected shall select the third. Said arbitrators shall inspect the premises of the defendant, if they so desire, and shall have the power of this court to summon witnesses. The arbitrators shall inquire only as to the damages, if any, to defendant's land. And it is agreed that the plaintiffs shall not plead the statute of limitation to any trespass committed by them or their agents to the defendant's land. And this cause is retained for further directions. And this cause shall be heard by the said arbitrators upon twenty days notice, given by defendant's counsel to plaintiffs' counsel."

On July 29th, 1884, W. Robinson and J. L. Bowers, who had been selected as arbitrators by the parties under said order, filed their report as follows:

"We, Willoughby Robinson and J. L. Bowers, having been selected by the parties to this action as arbitrators in this action according to an order heretofore entered in this cause, selected H. H. Lanier as the third person. After notice duly given as directed by said order, we took up this case in Palmyra in said county, when and where the plaintiffs were represented by Messrs. Mullen & Moore, and the defendant by Messrs. Kitchin and Dunn. After hearing evidence then offered, we continued this cause by agreement of parties to the 25th day of June, 1884, in order that we might inspect and view the premises of defendant. On said day, we went on said land and carefully viewed and inspected it. Pursuant to notice duly given and served, we again met in Palmyra on the 25th day of July, 1884, to take action in this cause. After inspecting said land ourselves, and after hearing all the evidence, there being no disagreement between us, we find that the plaintiffs have damaged the defendant's land, by tres-

passing thereon, to the amount of five hundred and thirty-one dollars, and we assess the defendant's damages at that sum. We ask that we be allowed fifteen dollars each for our services. All of which is respectfully submitted to the court, this July 25th, 1884. This decision shall not be construed to interfere with the title of said land, or statute of limitation."

When the cause was called for argument, the plaintiffs moved for a non-suit as to their cause of action, which was granted by His Honor, and the defendant excepted. The plaintiffs also moved for judgment, notwithstanding the report of the arbitrators, which was refused, and plaintiffs excepted. The defendant thereupon moved for judgment for five hundred and thirty-one dollars on the award, which His Honor granted, and plaintiffs excepted.

The defendant appealed from the judgment of non-suit, and the plaintiffs from the refusal to grant them judgment for costs and also from the judgment in favor of the defendant.

Messrs. Mullen & Moore and *Walter Clark*, for the plaintiffs.
Mr. R. O. Burton, Jr., for the defendant.

PLAINTIFFS' APPEAL.

ASHE, J. The plaintiff moved for judgment in this case, notwithstanding the report of the arbitrators, and upon the refusal of the Court to grant the motion, excepted, and also excepted to the judgment awarded by the Court in favor of the defendant.

These constituted the grounds of error assigned by the plaintiffs, and are the only questions presented for our determination, and we are of the opinion there was no error upon the first ground, but there was upon the second.

The action was brought to recover a tract of land to which the plaintiffs alleged they had title, and also to recover damages for cutting and carrying off the timber trees growing thereon.

The defendant denied that the plaintiffs had title to the land, and also that he had committed any trespass on the same. He also pleaded the statute of limitation to the possession, as well as to the trespass thereon. He also, for a further defence, set up a counter-claim alleging that the title to the land was in him, and that the plaintiffs had trespassed on the land and had damaged him by cutting down and carrying away trees to the amount of five hundred and fifty dollars, for which he asked for judgment against the plaintiffs.

The plaintiffs replied denying the trespass, and pleaded the statute of limitation.

By consent, the case was submitted to arbitrators to decide the matters in controversy except as to the title to the land and the statute of limitation as pleaded by the plaintiffs in their replication, and their award to be final, and to be a judgment of the court. The arbitrators awarded to the defendant five hundred and thirty-one dollars for damages sustained by him by reason of the plaintiffs trespassing on his land.

We are unable even to conjecture upon what ground the plaintiffs asked for judgment notwithstanding the award.

There was no trial. The award, according to the restricted terms of the submission, did not and could not make a final disposition of the action, and there was nothing found by the award in favor of the plaintiffs.

But the plaintiffs' exception to the judgment granted upon the award in favor of the defendant was well taken.

The award "that the plaintiffs have damaged the defendant's land by trespassing thereon to the amount of five hundred and thirty-one dollars," cannot be considered a final determination of the action. The effect of the finding of the arbitrators was nothing more than the assessment of the damages to which the defendant would be entitled in the event of his establishing his title to the land upon the trial. For the issue as to the title made by the pleading, was expressly withheld from the arbitrators in the order of submission, and although in the order, it

is declared that the award shall be final, and shall be a judgment of the court, we must give it a reasonable construction, and as the question of title was reserved, and the defendant's right to damages depended upon his establishing his counter-claim, and that again upon his making proof of title to the land in himself, his counter-claim could be of no avail as a defence, unless he should establish a better title to the land than that shown by the plaintiffs, and as without making good his counter-claim, he would not be entitled to any damages, we must, therefore, take the order of submission to mean that the award shall be *conclusive* between the parties as to the damages which the defendant will be entitled to, in the event upon the trial of the reserved issues he shall succeed in making good his title to the land.

There is error. The judgment of the Superior Court must be reversed, and the case remanded so that it may be proceeded with to the trial of the issues reserved in the order of submission, and to a final determination.

Error. Reversed and remanded.

DEFENDANT'S APPEAL.

Counter-claim—Non-suit.

When the defendant pleads as a counter-claim, a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's cause of action, the plaintiff cannot be permitted to take a non-suit. But when the counter-claim does not arise out of the same transaction as the plaintiff's cause of action, but falls under subdivision 2 of section 244 of the Code, the plaintiff may submit to a non-suit. In such case, the defendant may either withdraw his counter-claim, when the action will be at an end, or he may proceed to try it, at his election.

(*Francis* v. *Edwards*, 77 N. C., 271, and *Purnell* v. *Vaughan*, 80 N. C., 46, cited and approved).

For the facts, see the preceding case.

ASHE, J. In this action both parties appeal to this court.

The defendant alleged error in the court in granting the motion of the plaintiffs to enter a non-suit as to their cause of action. In this there was error. A counter-claim is in effect a cross action, and, when well pleaded, the defendant becomes an actor, and there are two simultaneous actions depending in the same proceeding between the same parties, and each has the right to have all the matters put in issue by the pleadings adjudicated, and neither has the right to go out of court before a complete determination of all the matters in controversy without the consent of the other. This was held to be the rule of practice in the case of *Francis* v. *Edwards*, 77 N. C., 271, and the decision there is decisive of this case. The court then held that when a counter-claim is duly pleaded, neither party has the right to go out of court before a complete determination of all the matters in controversy, without or against the consent of the other, and when the court below permitted the plaintiff to take a non-suit, it was error. *Purnell* v. *Vaughan*, 80 N. C., 46.

There is a distinction in counter-claims set up as a defence under sec. 244 of *The Code*, which has not been taken or adverted to in the decisions upon that subject heretofore made, that, we think, should be observed.

The first subdivision under that section is "a cause of action arising out of the contract or transaction set forth in the complaint, as the foundation of the plaintiffs' claim, or connected with the subject of the action," and second, "In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action."

The distinction is this. When a counter-claim such as is authorized by the first subdivision is set up, then we think the plaintiff should not be permitted to enter a non-suit, without the consent of the defendant, for the reason that as it is a connected transaction and cause of action the whole matter in controversy between the parties should be determined by the one action.

But when the counter-claim is an independent cause of action arising on contract, such as is provided by the second subdivis-

ion, then we can see no reason why the plaintiff may not enter a non-suit if he should choose to do so. But when the plaintiff in such a case does enter a non-suit, the defendant should be permitted at his election, to withdraw his counter-claim, which would terminate the action, or proceed to trial with his counter-claim, if it is traversed, or move for judgment against the plaintiff if its allegations are not denied, as in actions upon contracts by a plaintiff against a defendant.

Our case comes within the first subdivision, and it was not, therefore, necessary in deciding this case to refer to the distinction above made, but holding, as we do, that the distinction is a good one, we have deemed it proper to mention it here, as an intimation of the Court for the guidance of practitioners in the future.

Our conclusion upon the case before us is that there was error, and the judgment of non-suit rendered in the court is reversed, and the case remanded that it may be proceeded with in conformity to this opinion and the law.

Error. Reversed and remanded.

P. B. BARBEE, Adm'r, v. CALVIN J. GREEN.

Reference—Funeral Expenses.

1. A referee is not required to refer to the evidence in his findings of fact. All that is required is, that he should transmit to the court the evidence upon which his findings are based.
2. Where the Supreme Court cannot pass upon the facts, it cannot look into the evidence upon which the referee bases his findings of fact, unless the exception is that he has found facts with no evidence to support them.
3. Where on exceptions to a referee's report, the Judge does not find any facts, but overrules all the exceptions to the report, he is presumed to have adopted the findings of the referee.
4. No wish or direction given by a person as to what should be done after death, unless made in a will, can be legally carried out. So, where a person of small means expressed a wish to be buried in an expensive coffin, and the

defendant, who was indebted to her, furnished one at her death, the cost of which he pleaded as a set-off in an action against him by the administrator; *Held*, that he was only entitled to such sum as would have purchased a coffin suitable to the intestate's pecuniary condition.

(*Green* v. *Castlebury*, 70 N. C., 20, cited and approved).

CIVIL ACTION, heard upon exceptions to the report of a referee before *Gudger*, *Judge*, at August Term, 1884, of WAKE Superior Court.

His Honor overruled the exceptions, confirmed the report, and gave judgment for the plaintiff, and the defendant appealed.

Messrs. A. M. Lewis & Son, for the plaintiff.
Messrs. Battle & Mordecai, for the defendant.

ASHE, J. This action was brought before us by appeal to the February Term, 1882, and the case was then remanded that an inquiry should be made before a referee as to the value of the burial case, with the view, that the defendant might be allowed as a set-off, so much thereof as was suitable to the circumstances of the intestate of the plaintiff.

In pursuance of said decision of the Court at the January Term, 1883, of Wake Superior Court, the case was referred to S. G. Ryan, Esq., to inquire into the value of the burial case, and to allow so much thereof to the defendant as was suitable to the circumstances of the intestate, Mary Herndon, and at August Term, 1883, of said court, the referee made his report accompanied by the evidence taken by him.

The referee, upon the evidence taken before him, made the following finding of facts, viz.:

1. That the estate of the intestate was of very small value, and that the sum of money due from the defendant thereto is very nearly the whole thereof.

2. That the sum of one hundred dollars paid by the defendant for the burial case in which the plaintiff's intestate was buried, was a fair price therefor.

3. That eighteen dollars is a reasonable sum to be allowed defendant as suitable to the circumstances of the said intestate for a burial case.

The defendant excepted to the report, and assigned the following grounds, to-wit:

1. For that said report makes no reference to the testimony taken by referee.

2. For that the value of the estate is not stated in the report, as might have been done from the returns of the former administratrix and other evidence before the referee.

3. For that the referee erred in his conclusion of law; that eighteen dollars is a reasonable sum to be allowed the defendant for a burial case for the intestate, when it appears that he actually paid $100 for such a case, and the evidence before the referee that the intestate owed nothing, left neither husband nor child as her distributees, and that the defendant purchased the burial case at her instance and request, and in good faith.

At February Term, 1884, the referee filed a supplementary report, as follows:

1. That the whole estate of the intestate of the plaintiff consisted of the notes in controversy in this action, and some other personal property not exceeding in value the sum of fifty dollars.

2. That said intestate left neither husband nor children her surviving, and only collateral relations.

3. That said intestate frequently expressed a desire to be buried in a metallic coffin, and that said relations did not object to her being so buried.

4. That the defendant lived in adultery with the plaintiff's intestate for several years prior to her death.

5. That no inventory of the estate of intestate has been filed.

There was no objection to this supplemental report, but the defendant excepted to it as follows:

1. That the first finding of fact is made without sufficient evidence, it appearing from the supplemental report that no inven-

tory of the estate of Mary Herndon has been filed, and there being no specific and proper testimony as to said value.

2. That the said finding is too indefinite.

3. That the fourth finding of fact is impertinent to any issue or matter in the action.

4. That said last mentioned finding is contrary to the weight of evidence.

5. That the referee has failed to find as directed by the court whether the intestate owed any debts.

The court overruled the exceptions taken by the defendant, confirmed the report of the referee, and rendered judgment against the defendant for the sum of three hundred and fifty-five dollars and forty-four cents, that being the amount of the debt, principal and interest, due by the defendant to the plaintiff's intestate, less the sum of thirty dollars and twenty-seven cents, being the amount of eighteen dollars and interest thereon allowed for the coffin, leaving the sum of three hundred and twenty-five dollars and seventeen cents to be paid plaintiff, with interest on one hundred and ninety-two dollars from the 11th of August, 1884, until paid, and for costs of action. From this judgment the defendant appealed.

We are of the opinion there was no error in the ruling of His Honor in overruling the exceptions taken by the defendant. The two reports must be taken as one, and in reviewing the exceptions we think it unnecessary to take them up in the order in which they were filed, or to consider any others than those which we deem material.

The fourth exception, that the report makes no reference to the testimony, cannot be sustained. The law does not require the referee to refer to the testimony in finding the facts, but it does require that he should report the evidence upon which his findings are based, and this was done.

The exception to the first finding of the referee in the supplemental report, is not sustained. His finding was that the whole estate of the intestate of the plaintiff, consisted of the notes in

controversy in this action, and some other personal property, not exceeding in value the sum of fifty dollars. This, it seems to us, was all that was necessary to be found under the order of reference, and was sufficiently specific. The whole scope and object of the inquiry directed by this court, was to ascertain the value of the estate, and then, what in the opinion of the referee, would be a proper allowance for burial expenses, suitable to the circumstances of the intestate, that is, to the value of her estate. The finding of the referee is, that the estate, including the notes sued on, was about five hundred dollars. That the referee did not find that the intestate was indebted, is an omission of which the defendant had no right to complain, for if debts had been found to be due, that would only have had the effect of reducing the value of her estate and would have made against the claim of the defendant—for the smaller the estate, the less should be the burial expenses.

That the deceased should have expressed a wish that she should be buried in a metallic coffin, cannot justify the expense incurred by the defendant. No wish or directions given by a person as to what should be done after death, can be legally carried out by any person, so as to make a charge upon the decedent's estate, unless it is so made in a last will or testament. It would not justify an administrator, much less a stranger.

The defendant's fourth exception to the supplemental report, "that the said last mentioned finding is contrary to the weight of evidence," we suppose refers to the first finding in that report. If so, it is an admission that there was some evidence to support the finding. In that case, it is not for this Court to look into the evidence, to see whether the preponderance was on the one side or the other. This Court never looks into the evidence, in cases like this, upon which a referee bases his findings of fact, except when there is an exception to the finding because there is no evidence to support it.

The referee has substantially complied with all the requirements in making a report, as prescribed in *Green* v. *Castlebury*,

70 N. C., 20. He notified the parties, examined the evidence and wrote it down, found the facts and wrote them down, and declared his conclusion of law, that the defendant should be allowed the sum of eighteen dollars for the coffin as a price suitable to the circumstances of the intestate. His Honor did not find the facts, but as he overruled all the exceptions of the defendant, he is presumed to have adopted the findings of the referee and his conclusion of law. The finding of the facts by the referee must therefore be taken as the finding of His Honor, and his finding is conclusive. His conclusion of law is, however, reviewable, and, concurring in that, we hold there was no error.

The judgment of the Superior Court of Wake is therefore affirmed.

No error. Affirmed.

D. J. FOLEY, BRO. & CO. v. BLANK & LOVICK.

Excusable Neglect—Code, Sec. 274—Filing Pleadings.

1. A pleading placed on the files of the Court after the Judge has left for the term, is not filed in contemplation of law.
2. Where, in setting aside a judgment for excusable negligence, the Judge does not state the ground on which he founded his order, his action will be upheld, if in any aspect of the case it would be proper.
3. The Supreme Court can review on appeal what is mistake, surprise or excusable neglect under section 274 of *The Code*, but it cannot review the discretion exercised by a Judge of the Superior Court under that section.
4. Where the Judge left the Court before the end of the term, but did not adjourn the Court, leaving it to expire by its own limitation, and a judgment by default was entered against a defendant, who filed an answer before the expiration of the term, but after the departure of the Judge; *Held*, excusable negligence.
5. When the Judge presiding leaves a court finally before the term has expired he should have it adjourned and not leave it open to take care of itself. Such practice has no legal sanction, and it gives rise to misapprehension, confusion and wrong.

(*Branch* v. *Walker*, *ante*, 87, cited and approved).

MOTION to set aside a judgment, heard before *Gudger, Judge,* at Chambers in RALEIGH on January 21, 1885.

His Honor granted the motion, and the plaintiffs appealed.

Messrs. H. R. Bryan, G. V. Strong and *E. C. Smith,* for the plaintiffs.

No counsel for the defendants.

MERRIMON, J. The plaintiffs brought this action to the Fall Term, 1884, of the Superior Court of Craven county, and filed their complaint within the three first days of that term, and made a minute on the docket of the Court requiring the answer to be filed during the term. This minute was made in accordance with a practice peculiar to that Court. On Saturday of the second week of the term, the business of the term having been disposed of, the Judge left the county without formally adjourning the Court, but left the term open to expire by its own limitation.

On Friday of the second week of the term, the day before the judge left, a judgment by default final for want of an answer, was entered against the defendants. On the next day, Saturday, the day the judge left, the defendants filed their answer, in which they denied all the material allegations in the complaint. Afterwards, an execution issued upon the judgment.

Upon motion heard by the judge at Chambers, he made an order setting the judgment aside, and directing the clerk to issue a writ of *supersedeas* to the sheriff in respect to the execution. The plaintiffs excepted, and appealed to this court. The judge does not state the ground upon which he founded his order setting aside the judgment in question. So, if in any aspect of the motion before him, his action can be upheld, it must be done.

Upon looking into the record, we find the regularity of the judgment questionable, but we do not find it necessary to decide upon that. The judge left the term open—to expire by its own limitation. The defendants may, therefore, have thought, and

not unreasonably, that they had the right to file their answer at any time during the last day of the term, although the judge was not present. It seems their counsel thought so, and they certainly would have had such right, if the judge had been present. But a pleading placed on the files of the court in the absence of the judge, after he has left for the term, is not filed in contemplation of law, and we repeat, that the judge ought never to leave the term open to take care of itself. Such practice has no legal sanction, and it gives rise to misapprehension, confusion and wrong.

Leaving the term of the court open to expire by its own limitation, may have led the defendants to mistake their right to file their answer at the time they undertook to do so. As they could not properly file it in the absence of the judge, they may have been surprised. Such mistake or suprise would not be unreasonable, and it would be such as would authorize the judge in a proper case, in the execution of his sound discretion, to set a judgment aside. *Branch* v. *Walker, ante,* 87.

This court has authority to determine what constitutes "mistake, inadvertence, surprise or excusable neglect," under *The Code*, sec. 274, but it has no authority to review or interfere with the discretion exercised by the judges of the Superior Court under that section. So, in this case, as in view of the facts there may have been such mistake or suprise, we cannot interfere with the discretion of the judge who set the judgment aside. He certainly had authority to do so, not subject to our review.

There is no error. Let this opinion be certified to the Superior Court according to law.

No error. Affirmed.

NANNIE BUXLY v. J. C. BUXTON, Adm'r.

Bond—Consideration—Judge's Charge—Code, Section 413—Weight of Evidence—Seal.

1. The execution of the bond sued on being denied by the defendant administrator, he introduced evidence of conflicting declarations made by the plaintiff to him when the bond was presented for payment, as to the sources from which she obtained the money which was the consideration of the bond. Plaintiff failed to introduce evidence to corroborate either of these declarations, or to show from what source the money was procured by her; *Held*, that this furnished no presumption in favor of the defendant that his intestate had never executed the bond. It was only a circumstance to be considered by the jury with the other evidence in the case.
2. *Held further*, that it was not error for the Judge to remind the jury—such being the fact—that there was no evidence before them that the parties who might be called as witnesses, to corroborate the declarations of the plaintiff, were alive at the time of the trial.
3. It is not a violation of the Act of 1796, (*The Code, sec.* 413), for the Judge to tell the jury that the evidence that the intestate had seen the bond, and admitted that the had executed it, if believed by the jury to be true, is entitled to more weight than the opinions of experts as to the genuineness of the signature, and that such opinions should be received with caution.
4. A seal imports, or rather dispenses with proof of consideration, except when equitable relief is sought.

(*Pope* v. *Askew*, 1 Ired., 16; *State* v. *Ellington*, 7 Ired., 61; *State* v. *Nash*, 8 Ired., 35; *State* v. *Nat*, 6 Jones, 114; *Wiseman* v. *Cornish*, 8 Jones, 218; *State* v. *Haney*, 2 Dev. & Bat., 390; *State* v. *Hardin*, *Ibid*, 407, cited and approved).

CIVIL ACTION tried before *Gilmer*, *Judge*, and a jury, at Spring Term, 1884, of DAVIDSON Superior Court.

The facts appear in the opinion.

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

No counsel for the plaintiff.

Messrs. Watson & Glenn and *Reade, Busbee & Busbee*, for the defendant.

SMITH, C. J. The action is upon a note under seal, for the payment of money, alleged in the complaint to have been executed by the intestate of the defendant, and denied in the answer of the latter. The pleadings are both verified, and the only issue submitted to the jury was, "Is the bond sued on the act and deed of J. N. Shelton, the defendant's intestate?" To which the response was in the affirmative.

Upon the trial, the plaintiff introduced evidence tending to show the signature to the note to be in the hand-writing of the intestate, in the opinion of the witnesses, while other witnesses testified that the intestate admitted his execution of the instrument, and said that he would pay it. The defendant introduced a large number of witnesses who swore that they were well acquainted with the intestate's signature, and that, in their opinion, that on the note was spurious and not his.

The defendant, examined on his own behalf, testified to two conversations with the plaintiff, one of which took place when the note was presented to him for payment, some eight months after the intestate's death, and the other some two or three months later, when the note was a second time presented and payment demanded. In the first conversation the defendant denied that the signature was that of his intestate, and that the plaintiff in answer to an inquiry where she got the money for which the note was given, said that she made it by sewing for the girls at the Greensboro college. In reply to a similar inquiry at the next presentation of the note, the plaintiff stated that it was sent to her by her uncle from the west, in a registered letter.

The plaintiff was in court and heard this testimony, but was not examined, nor did she offer any evidence to show the source from which she obtained the money constituting the consideration of the note.

There was evidence that the plaintiff had always resided in the county, and both *pro* and *con* as to her needy circumstances.

In the argument of defendant's counsel he insisted that the plaintiff had the power of proving by her uncle's deposition, if

such was the fact, that the money was furnished by him to her, and could have summoned the postmaster to prove his delivery of a registered letter, and that she having failed to make this proof when the answer denied the genuineness of the note, it was to be presumed that the denial was true, and this circumstance was to be weighed by the jury against her.

The Court charged the jury that there was no presumption of law to be argued against the plaintiff's statements of the source from which the money was derived, and that they were false, because she had not produced her uncle or the postmaster; that this was a circumstance, and it did not appear that either was living, or who or where they were. To this instruction the defendant excepted.

Besides other instructions, to which no exception was taken, the Court charged further: "The evidence of the intestate's admission when viewing the instrument, that it was the note he gave to the plaintiff, if accepted by the jury as true, is entitled to greater weight than the expression of opinion by witnesses or experts as to the genuineness or falsity of the handwriting. An opinion as to a man's handwriting ought to be received by the jury with caution." To these directions exceptions were also taken.

The verdict being returned and judgment rendered for the plaintiff, the defendant appealed.

The exceptions appearing in the record are confined to the charge addressed to the jury, and not upon assigned errors in law in the rulings, and a supposed disregard of the act of 1796, which forbids the Judge to express "an opinion whether a fact is fully or sufficiently proven." *The Code*, §413.

(1.) There was no error committed in telling the jury, that the failure to produce the evidence of the postmaster and the plaintiff's uncle, to corroborate her last account of the manner in which she came in possession of the money loaned, raised a presumption against the truth of her statement, was not a correct proposition in law, and that the omission was but a circumstance to be

considered with other proofs offered, in arriving at a conclusion as to the truth or falsehood of her declaration. Nor was it wrong to remind them of the absence of evidence that the witnesses were living, or who, or where they were. There is no such rule of law to be declared to the jury, and the corroborative evidence has but a remote, if any, bearing upon the issue as to the execution of the note by the intestate. Whether the money was obtained from the one or the other source, or whether any money was loaned to form the consideration of the former, has at most but a slight tendency towards proving the fabrication of the instrument sued on. Being under seal, it imports or rather dispenses with proof of a consideration, unless when some equitable relief is sought.

The plaintiff was not herself examined, and hence no discrediting effect upon her evidence is imparted by the alleged false statement. The significance allowed to this omission, in leaving it for the consideration of the jury, furnishes no cause of complaint to the defendant and he could not ask more.

Nor can there be error in saying there was no evidence of a fact, when there was none, that constitutes an important element among those from which the unfavorable presumption is proposed to be deduced.

(2.) The exception to the instruction that an opinion as to one's hand-writing ought to be received with caution, and that direct evidence that the intestate, when he saw the note, admitted its execution and his liability to pay it, if accepted as true, was entitled to greater weight than such opinions when expressed, is equally untenable.

This is not a case of recognition of a person or thing seen and remembered, but of an exemplar or ideal, impressed upon the mind to which the disputed hand-writing is compared, and from its conformity to which as a standard is inferred its genuineness or falsity. The identity of the hand-writing, as proceeding from one and the same source is thus determined in the opinion of the witness, and this opinion becomes evidence to aid the jury in com-

ing to a conclusion as to the controverted fact. It is, therefore, obvious upon general reason and founded upon common experience, that opinions thus formed are more uncertain, and should be more carefully considered and acted upon than positive testimony from a credible witness, who saw and knows the fact of the execution of the note, or which is of equivalent force, the direct admission of the maker or obligor. There could, therefore, be no harm in making the observation in regard to these classes of evidence and their relation to the controversy, in accordance with which the jury ought to act, and, it may be assumed, would act in the absence of the suggestion.

The reference to the treatises of *Taylor* and *Wharton* on the law of evidence only show that the opinions of experts or those who have acquired knowledge of a particular individual's handwriting, and are allowed to testify, as held in *Pope* v. *Askew*, 1 Ired., 16, are primary or original evidence, and as such to be regarded by the jury. But the value of the opinions, as proof of the matter about which they are formed, must be left to the jury to estimate. Their force and effect are not dependent, as is direct and positive testimony, upon the means of knowledge and the credibility of the witnesses alone, but upon the correctness of their deductions from an examination of the writing. In thus being subjected to further contingencies, opinions, however honestly entertained, furnish less reliable basis for reaching a correct result, than direct testimony to the fact, derived from equally credible witnesses who have personal knowledge. An apt illustration is supplied in the present case. Witnesses for the plaintiff express opinions that the signature is genuine, while a large number for the defendant say that it is spurious. These are discrepant conclusions, reached by persons who have examined the writing, and may be honestly entertained without imputing falsehood to either class, and they show the propriety and fitness of the suggestion of caution in accepting it as a proof of the ultimate fact, and its greater uncertainty in comparison with the other form of evidence. There are cases in our reports affording support by analogy to the remark contained in the charge.

In *State* v. *Ellington*, 7 Ired., 61, where the mother and sister testified on behalf of the prisoner, and the charge was "that it was the province of the jury to say whether the witnesses have testified truly, notwithstanding their relation to the prisoner, or had yielded to that human infirmity to which we are all liable, and had testified falsely in favor of their son and brother," Ruffin, C. J., said, "Nor was there error in telling the jury that their (the witnesses) relation to the prisoner *affected their credit.* That is a proposition of law and reason."

So in *State* v. *Nash*, 8 Ired., 35, the charge that "the law regarded with suspicion the testimony of near relations when testifying for each other," was sustained.

The same observation in reference to the testimony of fellow-servants of the accused was upheld as free from objection in *State* v. *Nat*, 6 Jones, 114.

In *Wiseman* v. *Cornish*, 8 Jones, 218, where the refusal to so charge was assigned for error, the late Chief Justice said: "There being no rule of law in regard to the matter, it must be left to the discretion of the Judge."

The same rule is acted on in regard to the credit to which the evidence of an accomplice is entitled.

In *Rex* v. *Jones*, 2 Campbell, 132, Lord Ellenborough remarked: "Judges in their discretion will advise a jury not to believe an accomplice unless he is confirmed, or only so far as he is confirmed, but if he is believed, his testimony is unquestionably sufficient to establish the facts he deposes."

Quoting these words in *State* v. *Haney*, 2 D. & B., 390, Gaston, J., adds: "We are not aware of any judicial decision in our country at variance with the rule brought hither by our ancestors."

In *State* v. *Hardin*, *Ibid.*, 407, Ruffin, C. J., in reference to such evidence uses this language: "It is, however, dangerous to act exclusively on such evidence, and, therefore, the Court *may properly caution the jury* and point out the grounds for requiring evidence confirmatory of some substantial parts of it."

These are sufficient to show that observations of the kind under review, are not obnoxious to the objection that they are unauthorized by law, and may be made in aid of the jury in arriving at their verdict.

The appellant's chief objection to these expressions of the Judge is, that they intimate an opinion upon the facts, and invade the province of the jury.

We look in vain for any proof of the imputed intimation. The opinions of experts come from both parties, and what was said is alike applicable to them all. The suggestion of the want of evidence that certain witnesses were alive and their testimony could have been obtained, was certainly not improper when deductions are to be drawn from a mere omission to produce the testimony. The absence of this proof is a fact in the case which ought not to be over looked in qualifying the general proposition, nor was there error in calling attention to it.

The trial throughout seems to have been conducted with entire impartiality and fairness, with no indication of an opinion whether any part is or is not "fully or sufficiently proven," or of any leaning or bias for or against either party. The jury having rendered their verdict, we see no cause for setting it aside, and the judgment must be affirmed.

No error. Affirmed.

W. L. CHURCHILL v. THE BROOKLYN LIFE INSURANCE CO.

Certiorari—Undertaking on Appeal.

Providing an undertaking on appeal is not a professional duty which an attorney owes to his client, and an assumed agency of counsel to see that this is done, is the same as if the agent was not a professional man, and his neglect is the neglect of the principal, so far as losing the right to appeal is concerned.

(*Churchill* v. *Ins Co.*, 88 N. C., 205; *Winborne* v. *Byrd*, *ante*, 7, cited and approved).

MOTION by the defendant for a *certiorari* as a substitute for an appeal, heard at FEBRUARY TERM, 1885, of the Supreme Court.

The facts appear in the opinion.

Messrs. Battle & Mordecai, for the plaintiff.

Messrs. George V. Strong, Walter Clark and *E. C. Smith*, for the defendant.

SMITH, C. J. In this action the plaintiff, at Fall Term, 1882, of the Superior Court of Greene, recovered judgment against the defendant company by default, for want of an answer, for the full amount of his demand, which judgment was afterwards modified in form and made interlocutory, subject to an inquiry of damages before the jury, which ruling was affirmed on appeal to this court. *Churchill* v. *Ins. Co.*, 88 N. C., 205.

At a subsequent term the damages were assessed, and from the judgment rendered therefor the defendant entered an appeal to this court, the amount of the undertaking was fixed at fifty dollars, and thirty days by consent allowed in which to perfect the same. The term elapsed without this being done, and the appeal being lost, the defendant now applies for a writ of *certiorari*, as a substitute for the appeal, to bring up the record in order that the errors assigned may be heard and decided.

The affidavit, in support of the petition, sets out the following facts:

1. The defendant had in its employment in this State a regular attorney to manage its legal business, with whom it corresponded, who, not practicing in Greene county, committed the company's defence to the action to George V. Strong, Esq., and he undertook its management.

2. The latter ceasing to attend the court of that county, placed the case in the hands of a third attorney who did attend there, and acted under the said Strong, the affiant.

Affiant at the time of the rendition of the judgment and for some time afterwards was absent from his home on account of ill

health, a fact unknown to the attorney who conducted the defence, whose residence was in a distant county and at a place with which mail communications were slow and irregular, in consequence of which, advice of the result only reached affiant after considerable delay, while the regularly employed attorney of the company was also absent from his home in attendance upon his sick wife.

When the latter was informed of the result of the trial, he directed affiant to fill out an undertaking on appeal and transmit to the defendant at Brooklyn in New York, in order that it might obtain some sufficient security in this State, and send it, when properly executed, to the clerk of the Superior Court wherein the judgment was.

This was done by affiant, but before the undertaking was perfected, the limited period for filing it expired. There is a meritorious defence to the action and the appeal is for the correction of error in the ruling.

In a counter-affidavit the plaintiff's attorney, W. C. Munroe, states among other things that, on the 19th day of August next after the rendition of the judgment in July, he received a letter from G. V. Strong, who alone has taken an active part in the cause, asking for an extension of time, and thinking that the ten days remaining was sufficient in which to prepare and file the undertaking or make the deposit in money instead, declined to give his consent to a further delay and so wrote to him.

We do not find in these facts any ground for the interposition of the court, nor any sufficient legal excuse for the failure to give the bond, or make the deposit required. "In a multitude of counselors there is safety," is a proverb which was not found profitable in the present case, for the delay to provide the undertaking is in large measure attributed to a divided and misunderstood responsibility among those employed. But whatever the cause, the time was extended, and that it was permitted to pass, ought not to be allowed to deprive the plaintiff of his legal rights in the premises.

Nor can we recognize the distinction attempted to be drawn between the neglect of defendant and the neglect of counsel in the failure to do what was necessary to perfect the appeal. Providing security is not a professional duty, and an assumed agency of counsel to see that this is done, is the same as if the agent were some other person, and his neglect is the neglect of the principal in its relation to others. So it is held in *Winborne* v. *Byrd*, *ante*, page 7, decided at the present term. The applications for the writ now asked for as a remedy for a lost appeal have been so numerous, and the rule under which the court acts so fully explained in recent adjudications as to require no re-statement of it, and we must refuse the petition at defendant's costs, and this without regard to the merits of the defence sought to be reviewed.

Motion refused.

VIRGINIA HARRISON v. N. A. BRAY.

Injunction—Set-off—Mortgagor and Mortgagee.

1. The plaintiff executed to the defendant a mortgage to secure the amount due upon a note one year thereafter; before the day of payment she purchased two notes on defendant (who was insolvent), past due, and demanded a credit for the sums due thereon upon her note; the defendant refused to allow the credits, alleging that he had sold the note before it became due; that one of the notes against him was barred by the statute of limitations; that he was entitled to the amount of the plaintiff's note as personal property exemption, and advertised the mortgaged premises for sale; *Held*, that the plaintiff was entitled to have the sale enjoined until the issue arising upon the controverted facts were properly tried.

2. Whether an interlocutory injunction should be granted in such cases is a question addressed to the *legal* discretion of the court, to be exercised in accordance with established principles, its purpose being, not to determine the rights involved, but to prevent the perpetration of a wrong, or secure the preservation of the subject of the litigation pending action.

(*Harris* v. *Burwell*, 65 N. C., 584; *Heilig* v. *Stokes*, 63 N. C., 612; *Jarman* v. *Saunders*, 64 N. C., 367; *Dockery* v. *French*, 69 N. C., 308, cited and approved).

CIVIL ACTION pending in CRAVEN Superior Court, and heard before *Philips, Judge*, at Chambers, on 14th January, 1885.

The plaintiff alleges in her affidavit, that she executed to the defendant her promissory note for $400, dated the 1st day of December, 1883, to be due on the 1st day of December, 1884, and to secure the same, executed to him a mortgage with power of sale contained therein, upon her house and lot situated in the city of Newbern; that after she executed the note and before it came due, she purchased for value two single bonds, given by the defendant to third persons, whereby he became indebted to her in the sum of $291.58; that at once, after the notes she gave the defendant came due, under the power of sale contained in the mortgage, he advertised that he would sell the house and lot; that thereupon, she offered to surrender to him the bonds she held against him, they then being past due, in part discharge of her note to him, and to pay the balance due thereon in cash; that he refused to accept this proposition, and that he was insolvent.

She brought this action to compel the defendant to account with her; to have the money due upon the bonds she holds against him set off as a credit on the note she gave him, and to be allowed to pay the balance in cash, and for an injunction restraining him from selling the mortgaged property pending the action.

She moved before Shepherd, Judge, at Chambers for such injunction, and he granted a restraining order, and required the defendant to show cause, before *Philips, Judge*, at a subsequent day, why an injunction should not be granted, upon condition that the plaintiff would pay into court the sum she admitted to be due. Whereupon she paid the sum of $143.42 into court as required.

Upon the hearing of the motion at a subsequent day, under the order to show cause, the defendant admitted the substance of the plaintiff's allegations, except that he contended that he signed one of the bonds which she held against him as surety,

and it was therefore barred by the statute of limitations; but he alleged that he had sold the note, secured by the mortgage, before it matured, to a third party for a valuable consideration. He further contended that he was poor, and was entitled, if, indeed, he had not effectually sold the note before it came due, to have it set apart to him as and for his personal property exemptions.

These allegations the plaintiff denied. Numerous affidavits were produced by both the parties—those on the part of the plaintiff tending to show that the defendant had not sold the note for $400 before it came due, and that the pretended sale was colorable, and intended to defeat her rights, those on the part of the defendant tending to show the contrary.

The Judge denied the motion for an injunction; the plaintiff excepted and appealed to this court.

Messrs. Batchelor & Devereux, for the plaintff.

Messrs. Reade, Busbee & Busbee and *Walter Clark*, for the defendant.

MERRIMON, J. (after stating the facts). We are of opinion that the defendant ought to be restrained by injunction from selling the mortgaged property until the action shall be tried upon its merits. If the allegations of the plaintiff be accepted as true, she had the right in equity as soon as the note secured by mortgage came due, indeed before that time, to surrender to the mortgagee, the defendant, the bonds against him, which she held and owned, and to have the money due upon them credited upon the note he held against her. *Harris* v. *Burwell*, 65 N. C., 584. And such credit would discharge the mortgage debt *pro tanto*.

The defendant, however, alleges that one of the bonds, as to him, is barred by the statute of limitations. This depends it seems, upon whether or not he executed it as principal or surety. It appears from its face that he executed it as principal. He further alleges that he sold the note secured by the mortgage to a

third person before it became due, and that he has no interest in it. He produced affidavits tending to sustain these allegations. The plaintiff, on the other hand, denies that they are true, and alleges that the pretended sale of the note was merely colorable and intended to defeat her rights, and she produced affidavits tending to show that her contention was true.

She is entitled to have the material issues of fact raised and that may be raised by the formal pleadings, tried by a jury, and the issues of law decided finally by the court in the ordinary course of trial. Upon this application for an injunction, they are not so tried. The judge hears the motion summarily upon affidavits and other appropriate evidence, and determines whether or not the case is one in which relief by injunction *may* be granted, and whether it *ought* to be. If it appears that the defendant is doing, or is about to do, or threatens to do, or procures another to do some act, or suffers some act to be done, in violation of the plaintiff's right in respect to the subject of the action, and which may defeat the purpose of, or render ineffectual the judgment when obtained, the court ought to grant an order for an injunction restraining the defendant from doing or suffering to be done such act, until the action shall be tried upon its merits. The object is to preserve the matters in litigation intact as nearly as may be, until the rights of the parties shall be settled and determined according to the ordinary course of procedure. The purpose of an interlocutory injunction, such as that demanded in this case, is not to determine the question of right involved in the action, but merely to prevent the further perpetration of wrong, or the doing of any act by which the right in controversy may be materially injured or endangered.

And so, in this case, the question of the rights of the parties is not determined in the application for an injunction. The substance of the plaintiff's complaint is, that the defendant is about to sell her house and lot, while she is entitled to have the mortgage under which he purports to act, and the debt secured by it, discharged by the application of the money due upon the

two bonds she holds against him. This is the principal relief demanded by the action, and the object of the injunction demanded is, not to try the right in that respect, but to prevent a sale of the property until the action can be tried upon its merits.

The special interlocutory injunction is not granted, *ex debito justitiæ*, or as of course, but the application for it is addressed to the sound discretion of the Court, guided by the facts and circumstances of the case in which such relief is sought. Such discretion is not an arbitrary one, it is a legal one, exercised in accordance with established principles of equity. Hence, it is the duty of the Court, in such applications, to require a full disclosure of the facts affecting them. If the plaintiff's right is clear and the injury apprehended is likely to occur; or if the evidence leaves the question of right in doubt, and the injury may—would—likely occur, the injunction should be granted. This is especially so when no serious harm can result to the defendant. The Court should be satisfied in a reasonable degree that the plaintiff, in good faith, sets forth and insists upon a right that ought to be preserved intact as nearly as may be, until the action shall be tried upon its merits.

Applying the law, we think the plaintiff was clearly entitled to the interlocutory relief she demanded.

The defendant admitted the substance of her material allegations, including that of his insolvency, but alleged matters in avoidance; the latter allegations are in turn denied by the plaintiff.

It appears that she has in good faith alleged a substantial cause of action, and that if she shall, in the end, succeed in obtaining a judgment in her favor, it will be rendered ineffectual if the defendant shall, in the meantime, be permitted to sell the property mentioned. The evidence shows that her right is seriously questioned, but she may succeed in establishing it upon the trial of the action.

We are satisfied that the action is not simply feigned and vexatious, but that it is serious, and there is evidence tending strongly

to support the plaintiff's allegations. In such a case relief by injunction should be granted. *Heilig* v. *Stokes*, 63 N. C., 612; *Jarman* v. *Saunders*, 64 N. C., 367; *Dockery* v. *French*, 69 N. C., 308; *High on Injunction*, §§3, 5, 6, 7, 8.

The allegation of the defendant that he is poor and entitled to the note against the plaintiff as part of his personal property exemption, if he has not sold it, as he alleges, cannot avail him here. It may turn out that he is not so entitled.

The injunction must be allowed.

To that end let this opinion be certified to the Superior Court of Craven county. It is so ordered.

Error. Reversed.

ALEXANDER SAVAGE v. L. D. KNIGHT and E. M. BRYANT, Trustee.

Fraudulent Conveyance—Intent.

1. Where, in a voluntary assignment to secure creditors, a debtor has the intent to hinder and delay one certain creditor, the deed is fraudulent and void, although neither the trustee nor the beneficiaries under the deed participated in or knew of such fraudulent intent.
2. Where the conveyance is absolute and for a valuable consideration, it is not fraudulent and void as to creditors although the grantor had a fraudulent intent in its execution, unless the grantee participated in such intent.
3. Where a deed is fraudulent and void as to one creditor, it is void as to all.
4. Where the validity of a deed alleged to be fraudulent depends upon the intent with which it was made, such intent is a fact to be submitted to the jury.

(*Hafner* v. *Irwin*, 1 Ired., 490; *Lee* v. *Flannagan*, 7 Ired., 471; *Cansler* v. *Cobb*, 77 N. C., 30; *Reiger* v. *Davis*, 67 N. C., 185; *Lassiter* v. *Davis*, 64 N. C., 498, cited and approved; *Brannock* v. *Brannock*, 10 Ired., 428; *Harris* v. *DeGraffenreid*, 11 Ired., 89, and *Morris* v. *Pearson*, 79 N. C., 253, distinguished and commented on).

CIVIL ACTION tried before *Gudger*, *Judge*, at Fall Term, 1884, of EDGECOMBE Superior Court.

The action was for the recovery of the land described in the complaint, originally brought against Knight, and subsequently, Bryant, by leave of Court, was made defendant, and claimed under a deed of trust to him from his co-defendant Knight. The plaintiff put in evidence judgments against Knight rendered by a justice of the peace, and docketed in the Superior Court of Edgecombe county on the 14th day of February, 1883. Execution was issued thereon, and a deed was made to him by the sheriff of that county, after a levy and sale under the same. The plaintiffs claim that the deed of trust was void, for that it was made to hinder, delay and defraud the creditors of the maker Knight; that at the date of the trust Knight was indebted to Jones, Lee & Co., $4,180.00; to Savage, Son & Co., of which firm plaintiff was a member, $2,000.00; to W. J. Lawrence, the sum named in the deed of trust; to S. S. Mark & Co., $350.00, and H. L. Staton $250.00. The maker Knight, the trustee Bryant, and W. J. Lawrence, one of the *cestui que trust*, are residents of Edgecombe county, and Jones, Lee & Co., the other *cestui que trust*, live in Norfolk, Va., and are a mercantile firm in that city.

It was in evidence that the deed was drawn by W. M. Jones, a partner in the firm of Jones, Lee & Co. That the deed was signed by Knight at the residence of Jones, at Norfolk, Va., on the night of Friday, the .... day of February, 1883, only Jones, Knight and Lawrence being present. That Lawrence and Knight went by train to Norfolk on Friday evening, and left next morning. That they went directly from the train to Jones' private residence, and from there directly to the train the next morning. That Bryant had no knowledge of the trust, until after its probate and registration. That he was selected by the parties named at the drawing of the deed; that shortly after the execution of the deed in trust, W. J. Lawrence, one of the *cestui que trust*, said to plaintiff that he, Lawrence, had carried Knight to Norfolk and made him make the deed in trust to defendant Bryant, to defeat and cut out Savage, Son & Co., and they should

never get a cent of what was due them if he could help it. That Knight was present and did not deny it. That he added, "I was carried to Norfolk and to Jones' house, and remained there all night, and they trotted me back next morning just in time to reach the train, telling me that if I let the plaintiff see me he would have me arrested and put in jail."

Jones testified that "Knight came to my house with Lawrence and executed the trust openly, and, as I thought, a *bona fide* business transaction to secure the debt which he owed me. I then knew nothing of his indebtedness to Savage, Son & Co., nor any suggestion that Savage would arrest him. There was no concealment of Knight's presence in my house." His Honor charged the jury that if the deed of trust was made with the intent to hinder, delay and defraud the creditors of Knight, or any one of them, the deed was void, but to have that effect the plaintiff must show that the fraud was participated in by the *cestui que trust* Jones, who drew the deed. Plaintiff excepted. Verdict. Motion for a new trial for misdirection. Motion refused. Judgment for defendant. Appeal by plaintiff.

Messrs. J. L. Bridgers, Jr., and *Haywood & Haywood*, for the plaintiff.

Messrs. Connor & Woodard, for the defendants.

ASHE, J. (after stating the facts). His Honor charged the jury, "that if the deed of trust was made with the intent to hinder, delay and defraud the creditors of Knight or any one of them the deed was void, but to have that effect the plaintiff must show that the fraud was participated in by the *cestui que trust* Jones who drew the deed."

We think the instruction was erroneous, and must have misled the jury, and the error consisted in qualifying the first part of the charge with the addendum "that to have that effect the plaintiff must show that the fraud was participated in by the *cestui que trust* Jones who drew the deed." We have been unable

to meet with any case where the validity of a deed is made to depend upon the participation of the draughtsman in the fraud alleged. According to the evidence, Jones was an innocent *cestui que trust*, and why select him as the person whose participation in the fraud, if there was one, instead of Lawrence, who was also a *cestui que trust*, and who according to the evidence, upon his own testimony, did not only participate in, but instigated the fraud.

If His Honor had instructed the jury, that the participation of Lawrence or any one of the persons who were secured by the deed of trust, was necessary to establish the fraudulent character of the deed, it is most probable that the verdict of the jury would have been different.

We are of the opinion, when the judge charged the jury "that if the deed of trust was made with the intent to hinder, delay or defraud the creditors of Knight or any one of them, the deed was void," he should have stopped there, and not have qualified his charge with the additional remarks, for such we understand to be the law in this State.

We are aware that there is a diversity of adjudications in different States upon this question. In New York for instance, it is held, that in deeds of assignment, the intent of the assignor to hinder, delay and defeat creditors is sufficient to vitiate an assignment, without any participation on the part of the assignee or those for whose benefit the assignment is made. But in some of the other States, it is held that no matter how fraudulent may be the intent of the assignor of a deed of assignment, the deed will be valid against unsecured creditors, unless the fraudulent purpose of the assignor is participated in by the assignees or the *cestui que trust*.

So far as we are able to come to anything like a definite conclusion from the conflicting adjudications on the subject, the decisions in this State rather concur with those of New York. We have substantially re-enacted the statute, 13 Elizabeth, in this State, act of 1815, The Code, sec. 1545, which reads. "For

avoiding and abolishing feigned, covinous and fraudulent gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements, as of goods and chattels, which may be contrived and devised of fraud, to the purpose and intent to delay, hinder and defraud creditors and others of their just and lawful actions and debts, every gift, grant, alienation, bargain and conveyance of lands, tenements and hereditaments, goods and chattels, by writing or otherwise, and every bond, suit, judgment and execution, at any time had or made, to or for any intent or purpose last before declared and expressed, shall be deemed and taken (only as against that person, his heirs, executors, administrators and assigns, whose actions, debts, accounts, damages, penalties, and forfeitures, by such covinous or fraudulent devices and practices aforesaid, are, shall, or might be in anywise disturbed, hindered, delayed or defrauded) to be utterly void, and of no effect."

The provisions of the statute are so plain that "he that runs may read." It is a remedial statute, and should be construed so as to abridge the mischief and enlarge the remedy. We cannot conceive, in the construction of the statute, how the validity of a deed of assignment alleged to be executed with a fraudulent intent, can in any way depend upon the honesty of purpose in the assignee. The assignor makes the assignment and no one else, and the *making intent* is his and no one else.

It is the intent and purpose existing in the mind of the insolvent debtor, at the time of making the assignment, to delay, hinder, defeat and defraud his creditors, that vitiates his assignment and renders it void. This is the construction given to the statute by some of the ablest jurists who have sat upon the bench. In *Hafner* v. *Irwin*, 1 Ired. Law, 490, Judge Gaston uses this language: "every conveyance of property by an insolvent or embarrassed man, to the exclusive satisfaction of the claims of some of his creditors, has necessarily a tendency to defeat or hinder his other creditors in the collection of their demands. But if the sole purpose of such a conveyance be the discharge of an honest

debt, it does not fall under the operation of the statute against fraudulent conveyances. It is not embraced within its words, *which apply only to such as are contrived of malice, fraud, collusion or covin, to the end, purpose and intent to delay, hinder and defraud creditors.*" The decision in this case is cited with approval by Chief-Justice Ruffin in *Lee* v. *Flannagan*, 7 Ired., 471, where the learned Judge says: "The very power of an insolvent debtor to give preferences, implies that the effect may be that some of the creditors may lose their debts. Therefore, the distinction is, that where a deed in favor of one creditor is made *for the purpose* of defeating another creditor, it is fraudulent; but that is not so when the loss of the latter is merely a consequence of the preference given to a just debt." And, again, in *Cansler* v. *Cobb*, 77 N. C., 30, when an old man, much embarrassed, conveyed his land to his daughter in consideration of services rendered, and to be rendered in attending upon him in his old age, with intent to defraud his creditors, although the daughter had no knowledge of the fraudulent intent, it was held, Chief-Justice Pearson speaking for the Court, that the deed was fraudulent.

In this case the invalidity of the conveyance is not made to depend upon a participation of the grantee in the fraud, or a knowledge of the fraudulent purpose of the grantor in conveying his property. In New York, the construction given to a similar statute is, that "in determining upon the validity of an assignment made by a debtor, the intent of the assignor is the material consideration. Honesty of purpose in the assignee is not the test." *Wilson* v. *Forsythe*, 24 Barb., 105. And, again, in *Rathbun* v. *Planter*, 18 Barb., 272, it was decided that "an assignment made by a debtor, of his property, with the fraudulent intent to hinder, delay and defraud his creditors, is void, although the assignees are free from all imputation of participating in his fraudulent doings, and they are themselves *bona fide* creditors of the assignor, and are to take the entire avails of the assigned property to pay their preferred debts."

To the same effect is *The Mohawk Bank* v. *Atwater*, 2 Page, 54.

Lord Mansfield said in *Cadogen* v. *Kennett*, Cowper, 434: "The question in every case is, whether the act done is a *bona fide* transaction, or whether it is a trick and contrivance to defeat creditors." The same principle is maintained in Michigan, 2 *Mich.* (Gibbs), 309, and in several other States.

All the cases here cited were deeds of voluntary assignments in trust to pay debts, except *Cansler* v. *Cobb*, and *Cadogen* v. *Kennett*, and in none of these cases is it held that the participation of the assignee in the fraudulent purpose of the assignor is a necessary element in the transaction to vitiate his deed. In such cases it is the *mala mens*, the fraudulent and covinous *intent* and *purpose* at the time of the concoction of the deed, that makes it void, no matter how innocent the assignee may be.

But there lies a distinction between such voluntary conveyances and absolute conveyances for a valuable consideration. In these latter cases when there is a valuable consideration paid by the grantee, he gets a good title, notwithstanding the intent of the maker to defraud, if he is not a party to such fraud, and buys without any knowledge of the corrupt intent. *Reiger* v. *Davis*, 67 N. C., 185; but when there is collusion between the grantor and grantee to hinder and defraud the creditors of the former, the conveyance will be void, even though the deed be founded upon a valuable consideration.

The distinction is recognized by Gould, Judge, in a note to his opinion in the case of *Wilson* v. *Forsyth*, *supra*, to the effect that in absolute conveyances, differing in that respect from voluntary deeds of assignment, the honesty or *bona fides* of the grantee does operate to make good a conveyance which the grantor intended to aid him to delay and defraud other creditors.

The distinction seems to us be a sound one. A voluntary deed is the result of the operation usually of but one mind, that of the grantor; but a deed purporting to convey the estate absolutely, is a contract, and requires the concurrence of the minds of both the grantor and grantee.

This view of the subject is fully sustained by this court in the case of *Lassiter* v. *Davis*, 64 N. C., 498, where Reade, Judge, speaking for the court, says, "the distinction seems to be this: 1st. A voluntary gift or settlement is void, if it was the intent of the maker to hinder, delay or defraud, whether the party who takes the gift participated in the fraudulent intent or not. 2d. An absolute conveyance for a valuable consideration is good, notwithstanding the intent of the maker to defraud, unless the other party participated." The fraud must enter into and affect the contract.

There is a class of cases which would seem to form an exception to the interpretation here given to the statute by the cases above cited, as when there are several independent debts secured in an assignment, some of which are good and others fictitious and illegal. It has been held that the latter debts may be eliminated from the assignment and the deed will stand as to the good debts. Notably, are the cases of *Brannock* v. *Brannock*, 10 Ired., 428; *Harris* v. *DeGraffenreid*, 11 Ired., 89; *Morris* v. *Pearson*, 79 N. C. 253. It is difficult to reconcile the decisions in these cases with those we have cited above, but it is not necessary that we should undertake to do so, for they have no application to the present case. Here there were no fictitious or illegal debts attempted to be secured in the deed, and the question is squarely presented, whether a deed of assignment made by an insolvent debtor with the *intent* and for the *purpose* of delaying, hindering and defrauding a creditor is void, without any participation of the assignee or the beneficiaries under the deed, and we are of the opinion that it is void, not only against the party defrauded, but to all intents and purposes, so that if it shall be found by the jury in this case, that the deed made by Knight to Bryant was made with the fraudulent intent mentioned in the statute, the deed will be void, and all the trusts secured in it must necessarily fail. It may seem a hard case upon the innocent creditors secured in the deed, but it is equally hard on the party defrauded, who is not less innocent than the others, and

more deserving, because the statute was passed expressly for his protection.

Some deeds are void upon their face, and in such cases it is a question of law for the court, but when the validity of a deed depends, as in this case, upon the *intent* with which it was made, it is peculiarly a question within the province of the jury, and in such cases, when the rights of innocent persons are involved and not unfrequently to large amounts, a jury should require the most satisfactory proof of the fraudulent intent before they return a verdict finding the fraud.

The more critical scrutiny into the intentions and purpose of the debtor is required, because he has the right to prefer one creditor to another, and his right to do so, is only abridged when he exercises it, as said by Judge Gaston, "with contrived malice, fraud, collusion, or covin, to the end, purpose, and intent, to delay, hinder, and defraud creditors."

We are of the opinion, there is error, and it must be certified to the Superior Court of Edgecombe county that a *venire de novo* may be awarded.

Error. Reversed.

GEORGE TURNER, Adm'r, *v.* J. D. QUINN, Adm'r.

Appeal—Certiorari.

Where an appeal has been dismissed for want of a proper justification of the undertaking on appeal, neither haste, ignorance nor inadvertence in the appellant's counsel in preparing the undertaking on appeal, will furnish any ground for issuing a *certiorari* as a substitute for an appeal.

PETITION by the defendant for a *certiorari* as a substitute for an appeal, filed at October Term, 1884, of the SUPREME COURT, and heard at the present term.

The facts appear in the opinion.

Messrs. S. W. Isler, Theo. F. Davidson and *E. C. Smith,* for the plaintiff.

Mr. J. W. Hinsdale, for the defendant.

ASHE, J. The petition is for a *certiorari* to bring up the record from the Superior Court of Jones county in the above entitled case, which was a special proceeding begun by George Turner, administrator of A. Turner, against the petitioner and others to sell land for the payment of the debts of his intestate. There was an appeal from the clerk to the Superior Court in term, and from that court to this, and here at the October Term, 1884, the appeal was dismissed for the reason that the appeal bond of the defendants in the action had not been justified according to the requirements of the statute.

Petitioners state that they were minors when the judgment was rendered against them, and they had no regular guardian or guardian *ad litem,* and no service of process had ever been made upon them.

That their counsel who drew the appeal bond was pressed for time, and in the hurry of the moment omitted to state in the justification that the sureties were worth *double* the amount of the bond, and that the surety is worth twenty times the amount of the bond, and they pray that the judgment and other proceedings connected therewith be removed to this court.

We do not think the excuse rendered for the omission of the justification of the undertaking, as required by the statute, is admissible. In almost every instance where a bond has not been justified according to law, the failure to do so has been the consequence of haste, inadvertence or ignorance. If we should admit any of these causes as sufficient to omit the enforcement of the statutory requirement, we might as well dispense at once with the practice of requiring its observance. Infant defendants are as much bound to give appeal bonds as others.

There having been shown no good reason why the writ should be issued, it is refused.

Certiorari refused.

ROBERT O. BURTON, JR. v. R. P. SPIERS and EDWIN CLARK.

Execution Sale.

1. Where the purchaser at execution sale is a stranger to the judgment, he gets a good title, although the sheriff may have failed to advertise the property and give notice to the judgment-debtor, as prescribed by secs. 456 and 457 of The Code. All that such purchaser is required to ascertain is, that it is an officer who sells, and that he is empowered to do so by an execution issued by a court of competent jurisdiction.
2. But when at such sale, the plaintiff in the execution or his attorney or agent, or any other person affected with notice of such irregularity, purchases, the sale may be set aside at the instance of the defendant in the execution, by a direct proceeding for that purpose.
3. Execution sales cannot be *collaterally* avoided because of irregularities in the manner in which they have been conducted.
4. When there is fraud and collusion between the sheriff and the purchaser at execution sale, the sale is absolutely void, and such defect may be taken advantage of by any one interested in the property sold; but when the fraud results from the conduct of the plaintiff alone, as in suppressing, binding, &c., there being no collusion between the sheriff and the purchaser, the sheriff's sale passes the title, and the execution debtor must seek his relief in equity.
5. The rule of the Supreme Court, adopted at June Term, 1869 (Rule XIX, 63 N. C., 669), in so far as it attempted to deprive a senior judgment-creditor of his lien, interferes with a vested right, and is unconstitutional.

(*Mordecai* v. *Speight*, 3 Dev., 428; *McEntire* v. *Durham*, 7 Ired., 151; *Hill* v. *Whitfield*, 3 Jones, 120; *Harry* v. *Graham*, 1 D. & B., 76; *Oxley* v. *Mizle*, 3 Murph., 250; *Woodley* v. *Gilliam*, 67 N. C., 237, *Dougherty* v. *Logan*, 70 N. C., 558; *Perry* v. *Morris*, 65 N. C., 221, cited and approved).

CIVIL ACTION pending in HALIFAX Superior Court heard, by consent, before *Gudger, Judge*, at Chambers in Jackson, in September, 1884, upon the following case agreed.

On the 21st day of December, 1880, H. & E. Hartman & Co. duly recovered two judgments for $200 each against Richard P. Spiers before a justice of the peace in Halifax county, which were, on the same day, docketed in the Superior Court of said county, and at Spring Term, 1881, of the Superior Court of said county, the said H. & E. Hartman & Co. recovered one other judgment against said Spiers for $736.68. Executions were issued to the

sheriff of Halifax county upon all said judgments, on the 11th day of April, 1881, against the property of said Spiers, returnable to Fall Term, 1881, of said court, under which a homestead was allotted to said Spiers. The sheriff made due advertisement under these executions, and gave to said Spiers the required notice of sale, which said notice and advertisement was as follows, to-wit:

"By virtue of sundry executions in my hands against Richard P. Spiers, from the Superior Court of Halifax county, I shall sell for cash, at the court-house door in Halifax, on the 1st day of August, 1881, all the real estate in the town of Weldon, bought by Richard P. Spiers of J. T. Evans and wife, S. W. Buxton and wife, and W. J. Winfield and wife, with the buildings and improvements thereon. This 24th day of June, 1881."

And, on the 21st day of August, 1881, the sheriff sold the land described in the complaint. There was then standing unsatisfied and unpaid, a judgment for costs amounting to $17.16 on the said judgment docket, in favor of Henry, Adolph and Joseph Locheim, partners trading as Locheim Brothers, against Richard P. Spiers, which judgment was duly rendered in said Superior Court at Fall Term, 1878, and was not dormant.

The plaintiff Burton was the attorney of record and acting for H. & E. Hartman & Co. and Locheim Brothers, and instructed the clerk, on the Saturday before the sale, to issue execution on the said Locheim judgment, and the said Burton himself handed said execution to the sheriff on the morning of the day of sale.

The sheriff sold said land, on the 1st day of August, 1881, under the H. & E. Hartman and under the said Locheim executions, and the plaintiff Burton became the purchaser, at the price of $30, and the sheriff duly conveyed the land to him and his heirs, and made due return of the said execution.

The plaintiff then began this action against said Spiers for the recovery of said land to Fall Term, 1881, of said court.

On the 1st day of November, 1880, the said Spiers and wife duly conveyed to the defendant Edwin Clark, a portion of the

land lying on Washington avenue, and running back seventy-five feet, which deed was registered on the 1st day of March, 1882.

The plaintiff did not know of the claim of said Clark at the execution sale, and said Clark was not present at the sale.

At Spring Term, 1882, the said Clark came in, and was made a party defendant, and filed an answer. A severance was granted by His Honor and this cause tried only as to Clark; said Spiers sets up no claim to the land claimed by Clark, and at the beginning of this action said Clark was in possession of said land claimed by him. If, upon these facts, the court shall deem the plaintiff entitled to recover, the judgment shall be rendered in his favor for the recovery of said land claimed by said Clark, and costs, otherwise in favor of said Clark.

His Honor gave judgment in favor of the plaintiff, and the defendant appealed.

Messrs. Gatling & Whitaker, for the plaintiff.
Messrs. Mullen & Moore and *Day & Zollicoffer*, for defendant.

ASHE, J. (after stating the facts). Every sheriff, before selling property under an execution, is required to advertise the sale for four weeks in a newspaper if there be one in the county, and if not, for thirty days at the court-house door, and three other public places. *The Code*, sec. 456. And besides, he is required to give notice to the defendant in the execution or his agent, &c., for ten days before the sale. *The Code*, sec. 457. But these requirements are held to be only directory.

It is well settled as a general rule, that a purchaser at execution sale is not bound to look further than to see that he is an officer who sells, and that he is empowered to do so by an execution issued from a court of competent jurisdiction, and he is not affected by any irregularities in the conduct of the sheriff. *Mordecai* v. *Speight*, 3 Dev., 428; *McEntire* v. *Durham*, 7 Ired., 151. It follows from this, that a purchaser may get a good title at a sheriff's sale when there has been no advertisement of the sale, but this is subject to qualifications.

As where the purchaser is a stranger, he will get a good title, notwithstanding any irregularities there may have been in the management of the sheriff. *Oxley* v. *Mizle*, 3 Murph., 250. But when the purchaser is the plaintiff in the execution, or his attorney, or any other person affected with notice of the irregularities, the sale may be set aside at the instance of the defendant in the execution by a direct proceeding. If not so corrected, they cannot be made available by a collateral attack on the purchaser's title. Hence, an execution sale cannot be collaterally avoided, because real estate was sold without first levying upon personalty, nor because of irregularities or deficiencies in the advertisements, nor for defects in the levy. *Herman on Executions*, §39; *Oxley* v. *Mizle, supra;* and it was held by Chief-Justice Ruffin in the case of *Harry* v. *Graham*, 1 D. & B., 76, "that an allegation of fraud against a purchaser at execution sale will not be heard from a stranger to the execution." And in the more recent case of *Hill* v. *Whitfield*, 3 Jones, 120, the same doctrine is announced by Chief-Justice Pearson with more fullness and particularity, when he makes a distinction between a fraud practiced by the defendant, and fraud and collusion between the purchaser and the sheriff; and we take the distinction to be, when there is fraud and collusion between the purchaser and the sheriff, the sale is absolutely void in law, and may be taken advantage of by any one interested in the property sold, but when the fraud charged in the sale results from the fraudulent conduct of the plaintiff alone, as in suppressing competition at the sale, &c., *there being no collusion between the sheriff and the purchaser*, the sheriff's deed will pass the title to the purchaser, and the defendant must seek his remedy under the equity jurisdiction of the Court.

Now, to apply the principle here stated to the facts of this case LocheimBrothers had obtained a judgment against Richard Spiers, rendered in 1878. There were judgments against Spiers, in favor of H. & E. Hartman & Co., rendered in 1881, the first of which was docketed on the 21st of December, 1882. Spiers and wife sold the land in controversy in the case to the defendant Clark by deed bearing date 1st November, 1880.

The sheriff advertised the land to be sold on the 1st of August, 1881. At the time of the advertisement he had in his hands only the executions in favor of the Hartmans, but on the morning of the sale, the plaintiff, who was the attorney of both Locheim and the Hartmans, put the execution in favor of the former in his hands. The sheriff sold under both executions, and the plaintiff became the purchaser, without any knowledge of the fact that Spiers had sold the land to Clark, the deed to the latter not having been registered until after the sale.

Fraud is not to be presumed, when the transaction is consistent with *bona fides*. Here the plaintiff was attorney for both parties in the executions, and it is fair to presume, that finding the sheriff was about to sell under the Hartman execution, and knowing that if the Locheim execution, being the older lien, was placed in the hands of the sheriff before the sale, it would be his duty to apply the proceeds of the sale to that execution first, which would render another sale of the land unnecessary, the plaintiff lodged the execution with the sheriff for that purpose. This is often done and there is no impropriety in it.

There is nothing stated in the case agreed, which shows that there was any fraud or collusion between the plaintiff or his attorney and the sheriff.

It does not appear that plaintiff's attorney gave any directions to the sheriff to sell under the Locheim execution, and there was no reason that he should, as it was not known to him at the time that Clark, the defendant, had any claim upon the land. As the case stood at the time of the sale, the plaintiff had reason to believe that he would get a good title to the land by his purchase under the Hartman execution, the Locheim judgment being put out of the way, by its satisfaction out of the proceeds of the sale, whether the land was sold under the execution issued upon it or not.

In the absence of fraud, the irregularities of the sheriff in selling without due advertisement, although it will expose him to an action at the suit of the party injured, would not violate a sale

otherwise good, *Woodley* v. *Gilliam*, 67 N. C., 237, and cases there cited. We are of the opinion that the Locheim judgments having been put in the hands of the sheriff before the sale under the Hartman execution, the sheriff had the right to sell under that execution without any other advertisement than that given. The object in requiring this notice to be given, is for the benefit of the debtor, to protect his rights and to create competition and to obtain the best price for the property. The advertisement in this case which was objectionable in respect of not mentioning the name of the plaintiff, accomplished the objects of the advertisement as much so as if they had been specially named, and a sale, under such circumstances, has met with the direct sanction of this court. At June Term, 1869, the court adopted the following rule: "XIX. If any plaintiff shall have docketed a judgment and failed to sue out execution against the lands of the defendant, any other plaintiff who has docketed a judgment, and shall take out execution, may give notice of his execution to creditors having prior docketed judgments, which shall be served at least twenty days before the day of sale, and any creditor so notified, who shall fail to sue out execution, and put it in the hands of the sheriff before the day of sale, shall lose his lien on the land sold, provided that this rule shall not apply to any creditor who cannot take out execution."

This rule was not only adopted by this court, but was approved by two of the decisions subsequently made. *Dougherty* v. *Logan*, 70 N. C., 558; *Perry* v. *Morris*, 65 N. C., 221.

The rule was adopted to meet the change in the law from the lien of the execution to the lien of the judgment. Under the old practice, when land was sold under a junior execution, it could not be sold a second time under a second execution; but under the new system the judgment alone created the lien on land, and if land should be sold under an execution issued upon a junior judgment, it may be sold again under one issued upon a senior judgment.

The rule above cited has not been acted upon, that we are aware, save in the case of *Dougherty* v. *Logan, supra,* for the reason that it was manifest to the profession, that so far as it deprived the senior judgment creditor of his lien, it was unconstitutional, because it interfered with his vested rights, but it is referred to to show that this court recognized the doctrine, that even under *The Code,* the sheriff might sell under an execution issued upon a senior judgment, put into his hands before a sale under one issued upon a junior judgment duly advertised. Else why require it to be put into his hands after notice of twenty days by the creditor of the junior judgment, if not intended to be sold, so that the purchaser at the sale might get a title under both executions, and that without further advertisement under the senior judgment? For the law requires the advertisement of a sale of land to be thirty days, but under the rule, the senior judgment creditor was required to put his execution into the hands of the sheriff any time after twenty days before the sale, to the end that both liens might be disposed of by one sale and the purchaser get a good title.

We are of the opinion the plaintiff in this case acquired the *legal* title by the sheriff's deed. The action in its nature was *legal* and the defence *legal.* The defendants may have some equities against the plaintiff, but they are not set up in his defence, and we are not called upon to decide them under the pleadings in this action.

Our opinion is there was no error, and the judgment of the Superior Court of Halifax county must be affirmed.

No error. Affirmed.

WILLIAM HOWELL v. LARKIN RAY.

Deed—Probate—Judge's Charge.

1. Where the grantor in a deed is dead, and the subscribing witness has been a non-resident of the State and not heard from for a number of years, and it is impossible to prove his hand-writing, the deed may be proved and registered upon evidence that the signature of the grantor is genuine, without proving the hand-writing of the subscribing witness.
2. Where in such cases, the evidence upon which the Probate Judge acted in ordering the registration is set out in full, and it appears that such evidence was insufficient, the registration is void.

(*Jones* v. *Blount*, 1 Hay., 238; *Blackwelder* v. *Fisher*, 4 D. & B., 204; *McKinder* v. *Littlejohn*, 1 Ired., 66; *Love* v. *Harbin*, 87 N. C., 249; *Starke* v. *Etheridge*, 71 N. C., 240, cited and approved; *Barwick* v. *Wood*, 3 Jones, 306; *Davis* v. *Higgins*, 91 N. C., 382; *Leatherwood* v. *Boyd*, Winst. 123, cited and distinguished; *Carrier* v. *Hampton*, 11 Ired. 307, cited and doubted as to one point).

CIVIL ACTION for the recovery of land, tried before *Shipp, Judge*, and a jury at Spring Term, 1884, of WATAUGA Superior Court.

The facts sufficiently appear in the opinion as to the first exception. The third exception was as follows:

His Honor told the jury that a person might acquire a title to land by a possession up to known and visible boundaries for thirty years without color of title, or by a possession of twenty-one years under color of title. The defendant complains that His Honor did not explain to the jury what known and visible boundaries were in law. There was no question made as to this at the trial. His Honor was not asked to explain it to the jury, nor was there any exception to his charge for this omission, nor indeed for any other charge given or omitted. His Honor asked at the conclusion of his charge if the counsel desired other instructions. The defendant did ask one which was given, and no other was requested, and no exception made.

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

Messrs. G. N. Folk and *L. L. Witherspoon*, for the plaintiff.
Messrs. J. W. Todd and *D. G. Fowle*, for the defendant.

SMITH, C. J. In deducing title to the land claimed in the action, the plaintiff introduces a deed dated some time in 1825, purporting to have been executed therefor by Thomas Calloway to Francis Brown and attested by a single witness, Hubert Brown. The deed had been proved in the county court of Ashe, and registered upon the examination and oath of one George Brown, who swore that he was well acquainted with the hand-writing of the maker, and that the signature was his. The admission of the instrument in evidence was opposed by the defendant upon the sole ground that the hand-writing of the attesting witness had not been proved. Thereupon the plaintiff showed that before the probate, the maker, Calloway, died, having been for some years previous insane; that more than ten years previous to the probate, the attesting witness had removed to Texas or some other distant State, and had never since been heard from, that he was quite young, and little known when he left, and it was difficult if not impossible to identify his hand-writing. The deed was received and read to the jury, to which ruling the defendant excepted.

In *Carrier* v. *Hampton*, 11 Ired., 307, the bill of sale of the slaves had the mark of an attesting witness who could not write, and had been registered on proof of his death and the genuineness of the vendor's signature, but without stating the means by which the witness acquired the knowledge enabling him thus to testify. The statute then in force, in terms admitted to registration deeds conveying land, when they "shall be acknowledged by the vendor or grantor or proved by one or more evidences upon oath," and when so proved and registered "the registry or copy of the record of any deed or conveyance, registered or recorded as by this act prescribed," was admitted in evidence in case the original was lost. Rev. Stat., ch. 37, sec. 1, 2.

And so a written transfer of slaves was required to have and be proved by a subscribing witness, unless he was "dead or removed out of the State," and then the probate and registration could be given in evidence. Sec. 21. Commenting upon the inadequacy of these provisions, Ruffin, C. J., speaking for the court,

says, "There is no hesitation in holding that a deed for land and slaves would not be avoided by the accidental circumstance of the death of the subscribing witness and of the maker, whereby it could not be registered upon proof by the one or acknowledgment by the other. In such a case, we hold that *recourse may be had to the common law mode of proof for the purpose of registration,* as for the purpose of making the deed evidence at common law generally." *Carrier* v. *Hampton, supra.*

This clearly follows from the necessity of registration to give effect to the deed, yet it was only to such as were registered under the directions of the statute, that permission was given in case of loss of the original to use the registry or copy in its place.

This restriction was removed by subsequent legislation which authorizes the use of the copy without reference to the custody of the original of all conveyances by deed, which are "required or *allowed to be registered or recorded.*" Rev. Code, ch. 37, §16, and this is the present law. *Code,* §1251.

Under the former statute, a deed for land not provided for in it, might be registered by the proof admissible at common law, to give it full efficacy, but the copy could not be used in evidence, and it was necessary again to prove it on the trial. By the amendment, if properly put upon the registry, the copy could be used, whether the proof be such as the statute mentions or such as the common law sanctions, according to the opinion in the case cited.

At common law, when the subscribing witness to a deed or bond is dead or his residence unknown, and *his* handwriting cannot be proved, that of the obligor or maker may be. *Jones* v. *Blount,* 1 Hay., 238; *Blackwelder* v. *Fisher,* 4 D. & B., 204; *McKinder* v. *Littlejohn,* 1 Ired., 66; *Love* v. *Harbin,* 87 N. C., 249.

The attesting witness Hubert Brown, had been absent from the State; not heard from for more than ten years when the proof was offered of the execution of the deed in the probate court; his place of residence, if living, unknown, and his handwriting very difficult of recognition by witnesses.

These facts then existed, and if, as we must infer from the admission of the evidence, they were known to the Court, fully warrant the form of probate adopted. Under such conditions it was proper to receive proof of the signature of the grantor to the deed, as the only available means left to put it on the registry, and, as a judicial act, it must be presumed the attending circumstances were shown to the Court to sustain the action in the premises, upon the maxim so often cited *omnia præsumuntur rite esse acta*, and the legal presumption finds support in the evidence adduced at the trial.

In *Starke* v. *Etheridge*, 71 N. C., 240, the only written memorandum of probate, was the word *jurat* opposite the name of a subscribing witness, and the deed was adjudged to have been sufficiently proved by the oath of the clerk that it was properly proved, and that he intended to put the probate in proper form afterwards. In the opinion, Bynum, Judge, defending the admission of this aiding testimony, used this language: "As the validity of the registration may be thus impeached, so it may be supported by the same kind of evidence."

While the parol proof was received to show what transpired at the time before the clerk, and not merely the outside facts then existing, and in this respect differs from the case before us, yet the presumption of the rightfulness of what was done, in the absence of any evidence to the contrary, is strengthened by present proof of them.

The cases in which an attempted probate has been adjudged insufficient to authorize registration, do not furnish an adverse precedent to control this under examination. In them the evidence was set out in full, as given by the witnesses, and the defect was apparent; and as such testimony orally delivered at the trial would be incompetent to prove execution, so when shown as the only evidence on which the probate was adjudged, the Court must see and declare that the execution of the instrument had not been proved and could not be registered.

Thus in *Carrier* v. *Hampton, supra,* the insufficiency consisted in the omission of the witness who testified to the hand-writing, to show his own competency, and how he acquired a knowledge of the hand-writing to enable him thus to testify. This was, however, overruled in *Barwick* v. *Wood,* 3 Jones, 306, and this last case is followed in *Davis* v. *Higgins,* 91 N. C., 382.

Again, in *Leatherwood* v. *Boyd,* Winst. (60 N. C.,) 123, the subscribing witness undertakes to state all that occurred at the time of the execution, and fails to show that his own attestation of the will was in the testator's presence, an essential part of the execution.

The imperfection is in these cases apparent in the form of the probate, and no room is left for the inference that in performing a judicial act competent to be done, whatever ought to have preceded to make it rightful and proper will be accepted as having taken place *ut res magis valeat quam pereat.* This is the aspect of the present entry upon the deed, and it must be assumed that those circumstances existed and were shown, necessary to let in proof identifying the hand-writing of the grantor. There is, therefore, no error in the ruling to which the exception is taken. The second exception is abandoned and the untenableness of the other, not pressed in the argument for the appellant, is so manifest that we dismiss it without comment.

The judgment is affirmed.

No error. Affirmed.

H. WEIL & BRO. v. THOS. W. UZZELL AND WIFE.

Frivolous Answer—Estoppel—Homestead—Mortgage.

1. In an action to foreclose a mortgage, the defendants in their answer admitted the execution of the note and mortgage, and the amount due thereon, but alleged as a defence, 1st. That the land had been sold under judgments docketed prior to the execution of the mortgage, and that they had acquired a life-estate in the land from the purchaser at execution sale. 2d. That the defendants own no other real estate from which they can get a homestead; and, 3d. That when the mortgage was executed, they delivered to the mortgagee other securities as additional security for the debt; *Held*, that the answer raises no material issue, either of law or fact, and is frivolous.
2. *Held further*, that the mortgagors will not be estopped by the decree of foreclosure from setting up the title acquired by them from the purchaser at the execution sale, in an action against them for the possession of the land by a purchaser at a sale by the mortgagee.
3. *It seems* that under some circumstances a mortgagee may be required to sell a part of the mortgaged land sufficient to satisfy his debt, in order that the mortgagor may have a homestead allotted in the residue.

(*Howell* v. *Ferguson*, 87 N. C., 113; *Atkinson* v. *McIntyre*, 90 N. C., 147, cited and approved; *Johnson* v. *Furlow*, 13 Ired., 84; *Eddleman* v. *Carpenter*, 7 Jones, 616; *Frey* v. *Ramsour*, 66 N. C., 466, cited and distinguished).

CIVIL ACTION to foreclose a mortgage, heard before *Avery, Judge*, at Fall Term, 1884, of WAYNE Superior Court.

The plaintiffs alleged in their complaint that the defendant T. W. Uzzell executed his note to them for the sum of seven hundred and eighty-five and $\frac{57}{100}$ dollars, and to secure the payment of the same, the said T. W. Uzzell and Bettie A., his wife, made and executed a mortgage upon certain land, definitely described in the complaint, and that no part of the note has been paid, although overdue.

The answer admitted the allegations in the complaint, and set up the following matters as a defence:

1. That at the time the defendants executed the above mortgage specified in the complaint, there were judgments against Thomas W. Uzzell docketed in the Superior Court of Wayne county, which were prior liens on the tract of land described in

the pleadings, and the said land was the individual property of the defendant Thomas W. Uzzell.

2. That executions issued on said judgments, and the land described in the plaintiffs' mortgage was sold according to law, and John W. Isler became the purchaser.

3. That John W. Isler conveyed the said land specified in the said mortgage to Thomas W. Uzzell and Bettie A. Uzzell his wife, for their lives, remainder to the children of the defendants. A copy of said deed is registered in the register's office of Wayne county, to which reference may be had.

4. That the defendant owns no other real estate from which he can obtain a homestead.

5. That at the time of execution of the said mortgage specified in the complaint, the defendant Thomas W. Uzzell delivered and pledged, as collateral security, a mortgage on sixty acres of land, which was owned by Abraham Uzzell and McRae Uzzell, for about six or seven hundred dollars, also one mule and one horse and other personal property.

1. Wherefore the defendants ask the Court to compel the plaintiffs to obtain satisfaction of the debt specified in the complaint from the collateral securities above mentioned.

2. That the plaintiffs be perpetually enjoined from selling any of the tract of land specified in the mortgage from the defendants to the plaintiffs, described in the third article of the plaintiffs' complaint.

3. That the plaintiffs be perpetually enjoined from selling any interest in the above lands except the estate of Thomas W. Uzzell and wife Bettie A. Uzzell.

The Court adjudged the answer frivolous and ordered the land mortgaged by the defendants to the plaintiffs to be sold, from which judgment the defendants appealed.

Messrs. Fuller & Snow and *E. C. Smith*, for the plaintiffs.
Messrs. S. W. Isler and *G. V. Strong*, for the defendants.

MERRIMON, J. A frivolous answer is one that raises no issue or question of fact or law pertinent and material in the action. *Howell* v. *Ferguson*, 87 N. C., 113; *Atkinson* v. *McIntyre*, 90 N. C., 147.

Applying this rule of law, we concur with the Court below in the opinion that the answer of the defendants was frivolous. It confesses the complaint, and alleges immaterial and irrelevant matters as defences, that in no way modify or affect the plaintiffs' rights to the remedy and the particular relief they seek.

The defendants admit the execution of the note and mortgage and their validity in all respects, and they do not insist that any part of the debt has been paid.

If it be true, as alleged in the answer, that there were docketed judgments that constituted a lien upon the land at the time of and before the execution of the mortgage, still it passed whatever interest the defendants had in the land, subject to the prior liens of the judgments. If the land was sold to satisfy such judgments, and this required all the proceeds of the sale, the plaintiffs would get nothing by the mortgage, and a sale under it would pass nothing. But the defendants cannot be allowed to say they mortgaged nothing. The plaintiffs are entitled to have the benefit of whatever interest the mortgage deed passed to them, whether that be much or little.

No question in respect to the defendants' right to homestead in the land was presented by the answer. The mortgage deed conveyed that to the plaintiffs.

If it turns out that the purchaser at the sheriff's sale got a good title to the land, and that he afterwards conveyed such title to the defendants for life, as they allege, the sale under the mortgage cannot disturb them as to that, because, in that case, their present title would be acquired subsequent to, and without regard or reference to the mortgage. If the purchase at the sheriff's sale was *bona fide*, then the defendants have a new estate, unaffected by the mortgage. The scope and purpose of the action is to foreclose the mortgage and to sell such interest in the land

as passed by the mortgage deed and no more. The decree of foreclosure and sale cannot have a broader scope or effect, nor does it purport to have. If the defendants got a good title from John W. Isler as they allege, the decree in this action would not estop them from asserting it whenever it might become necessary to do so. The mortgage deed passed the title to the land to the mortgagors subject to the liens of the judgments, and the case is therefore different from that class of cases where the mortgage or other deeds pass no title. *Johnson* v. *Farlow*, 13 Ired., 84; *Eddleman* v. *Carpenter*, 7 Jones, 616; *Frey* v. *Ramsour*, 66 N. C., 466.

The defendants ask that the plaintiffs be required to sell certain "collateral" securities which they hold to secure the mortgage debt in addition to the mortgage, to the end that they may have homestead in the land. This is scarcely sincere. They first contend, that in effect the mortgage deed passed nothing substantial to the mortgagees, and yet they ask that the sale be postponed. Wherefore? How can they have homestead in an equity of redemption, when according to their own allegation, the whole of the mortgaged property was sold to discharge prior liens?

But if there were a substantial equity of redemption, and if, possibly, in some cases, the mortgagee might be required to sell a part of the mortgaged land sufficient to pay his debt, to the end the mortgagor might have homestead laid off and allotted to him in other convenient parts of it, the answer of the defendants raises no such question. They do not allege that the whole of the mortgaged property, including the "collateral" securities, will be sufficient to pay the mortgage debt. The answer contains no allegation or suggestion as to the value of the property. In that respect it is silent.

There is no error. Let this opinion be certified to the Superior Court, to the end that that court may take further appropriate steps in the action.

No error. Affirmed.

A. L. ELLETT and others v. CHARLES NEWMAN and others.

Fraudulent Assignment—Injunction—Receiver.

1. Where there is reason to apprehend that the subject of the controversy will be destroyed, or removed, or otherwise disposed of by the defendants, pending the action, so that the plaintiff may lose the fruit of his recovery, the Court will take control of it by the appointment of a receiver, or by the grant of an injunction, or by both, if necessary, until the action shall be tried on its merits.
2. The facts in this case fully justified the appointment of a receiver and the grant of an injunction.

(*Parker* v. *Grammer*, Phillips Eq., 28; *Craycroff* v. *Morehead*, 67 N. C., 422; *Morris* v. *Willard*, 84 N. C., 293, and *Levenson* v. *Elson*, 88 N. C., 182, cited and approved).

This was a CIVIL ACTION pending in the Superior Court of HALIFAX county, and was heard before *Avery, Judge,* upon motion for an injunction and a receiver, at Chambers, on the 5th day of March, 1884.

The plaintiffs, to-wit: Ellett, Drewry & Co., Watkins, Cottrell & Co., Slater, Myers & Co., A. Oppenheimer, George Gibson, Jr., and W. M. Parrish, allege that during the year 1883, they each sold and delivered to the firm of P. Newman & Co., at Enfield in Halifax county, divers goods, wares and merchandise, for none of which has payment been made; that about the year 1878, the defendant Charles Newman was engaged in a general merchandise business at the town of Whitakers, in Edgecombe county, North Carolina, and Littleton, in Halifax county, and about the 27th day of December, 1878, became much embarrassed, failed in business, and was sold out under execution in favor of divers of his clerks, of whom the defendant, Albert Jacobson, was one; that about the — day of February, 1882, Charles Newman opened a general retail store in the town of Enfield, Halifax county, and continued to conduct it until about the 29th day of December, 1883, under the name of P. Newman & Company; that the defendant Pauline Newman is the wife

of Charles Newman, and the said Charles pretended to be acting for his wife in the business, but that this was merely a device to keep off the old creditors of Charles Newman, and that the business, in truth and in fact, belonged to Charles; that, on the — day of December, 1883, the defendant Pauline, wife of said Charles Newman, and Jacob Kirschbam, pretending to constitute the firm of P. Newman & Co., executed and delivered unto the defendant Branch a pretended deed of assignment, whereby they professed to convey unto the defendant Branch a large number of mostly worthless accounts, some of them contracted with Chas. Newman when he did business at Whitakers and Littleton, and all the stock of goods, wares and merchandise in the store occupied by P. Newman & Co., in Enfield, and some other small articles, in trust, after allotting to Pauline Newman and Jacob Kirschbam their personal property exemptions as allowed by the laws of North Carolina, to sell the same at such times and on such notice, and in such manner, publicly or privately, as the said Branch might deem best for the interest of the creditors named in said trust, and out of the proceeds to pay off certain preferred creditors therein mentioned, and the balance, if there was any, was to be applied *pro rata* to the demands of the other creditors; that the defendant Jacob Kirschbam was not a partner in the firm, and had no interest therein, and that he was set up as a partner in said assignment merely to enable Chas. Newman to claim an exemption of $1,000; that the defendant Branch, who was one of the attorneys of P. Newman & Co., and who prepared the assignment, left the defendant Albert Jacobson, who had been staying about the store with Charles Newman, in charge of the goods after the assignment; and after the allotment, the goods assigned as exempt were all put on one side of the store, and the residue on the other, and shortly thereafter the assignee sold, or pretended to sell, the assigned goods to Jacobson for $800, at private sale; the said Jacobson now pretends to be merchandising at the said store, and in the same are the goods allotted to Pauline and Jacob, as well as the goods he pretends to have bought of

the said E. T. Branch; that Charles Newman was still attending to store; that the pretended purchase was a mere trick and device to elude the creditors of P. Newman & Co., and that the said Jacobson was only a clerk in the employ of Newman; that the assignment was made with the intent to hinder, delay and defraud the creditors of P. Newman & Co., whereof the said Branch and Jacobson had notice; that the purchase by Jacobson was made with the money of P. Newman & Co., and that the whole scheme was carefully concocted from the beginning; that for a considerable length of time prior to the assignment, P. Newman & Co. were selling goods so low in the said town of Enfield as to be a subject of common remark, and to seriously interfere with the business of other merchants in said town; that all the defendants, except Branch, are insolvent, and that it is in the power of the defendants to defeat the rights of plaintiffs by disposing of the goods, &c., before judgment could be recovered on their respective claims; and they prayed the court to appoint a receiver and grant an injunction, &c.

The complaint was duly verified.

The defendants, E. T. Branch, Charles Newman, Pauline Newman, Albert Jacobson and Jacob Kirschbam, filed separate answers.

Branch, after admitting the allegations in the complaint as to the date of the execution of the assignment, the allotment of personal property exemptions, and the sale to Jacobson, alleged further that he had no notice of any fraud concocted by the defendants P. Newman & Co., to defeat, delay and defraud their creditors, but in fact and in truth believed that said assignment was *bona fide* made, and that he acted in good faith in the execution of said trust, and insisted that said assignment was not void as to him, and that if any fraud was committed he had no notice thereof; that the moneys arising from said sale to Jacobson had been paid out and disbursed by the trustee, in the manner and in the order directed by the provisions of the trust; and his account with said trust-fund was ready and prepared to be exhibited and

filed when required; and that the sale to Jacobson was in good faith and for the best interests of the creditors, and was made after consulting with them, or some of them.

Charles Newman and his wife Pauline, and Kirschbam and Jacobson, make substantially the same answer, in which they allege that Charles Newman had no interest whatever in the firm of Newman & Co., that it was truly composed of Kirschbam and Pauline Newman, who had been declared a free trader on the 29th of January, 1879; that the assignment to Branch was in good faith, as also the sale by the latter to Jacobson; and they positively denied all charges of fraud or knowledge of fraudulent purpose in the transactions referred to in the pleadings.

The answers were duly verified.

Upon the hearing both parties supported their allegations by affidavits of other persons, exhibits, records, &c., upon consideration whereof the court made the following adjudication:

"The Court being of the opinion that all the defendants, except E. T. Branch, are insolvent, and that there are probable grounds to believe that Jacob Kirschbam was not a partner in the firm of P. Newman & Co., and that the alleged purchase from the assignee by Albert Jacobson, was made with the money of said P. Newman & Co., and the goods purchased of the assignee, the exemptions allotted to Pauline Newman, and that allotted to Jacob Kirschbam being so intermingled that they can only be separated by the inventories,

"It is adjudged and ordered that the injunction heretofore granted, restraining the defendants from selling, disposing of, or in any manner interfering with, any of the goods, wares and merchandise owned by P. Newman & Co. prior to the assignment to the said E. T. Branch, and described in the complaint, except the exemptions allotted to Pauline Newman, be continued to the hearing.

"It is further ordered and adjudged, that Geo. B. Curtis, of Enfield, be and he is hereby appointed receiver to take charge of and sell all said goods, except the exemptions allotted to Pauline

Newman, and hold the proceeds till the determination of this action."

The defendants appealed from this judgment.

Mr. R. O. Burton, Jr., for plaintiffs.
Messrs. Branch & Bell and *Mullen & Moore* for defendants.

MERRIMON, J. We see no reason prompting us to disturb the findings of fact by the Judge at Chambers. They are substantially correct and fully warranted by the evidence.

It appears sufficiently for the decision of the matter before us, that the plaintiffs have a cause of action, that they sue in good faith, their purpose is not merely vexatious, and that there is reasonable ground to apprehend that the goods involved in the action may be disposed of fraudulently before it shall be tried upon its merits, and in such way as to render any judgment that may be obtained against the defendants, or any of them, ineffectual.

It is well settled that when there is reasonable ground to apprehend that pending the litigation, property, the subject of it, will be disposed of fraudulently, or in such way as to deprive the complaining party of the fruit of his recovery when had, a court of equity will secure the property, or in a proper case, have it sold and secure the fund arising from it by the appointment of a receiver, or by injunction, and when need be, by both, until the action shall be tried upon its merits. The authority of the court to preserve property, the subject of litigation, pending the action, until final judgment, and then to apply it, as justice may require, is too manifest to admit of question, and such authority should be exercised when it appears that there is reasonable ground to believe that the plaintiff may recover, and the interference of the court is necessary to protect the property in question pending the controversy. *Parker* v. *Grammer*, Phil. Eq., 28; *Craycroff* v. *Morehead*, 67 N. C., 422; *Morris* v. *Willard*, 84 N. C., 293; *Levenson* v. *Elson*, 88 N. C., 182.

We concur fully with the Court in his findings of fact and the application of the law. There is no error. Let this opinion be certified according to law.

No error. Affirmed.

VAUGHAN & BARNES v. JAMES T. GOOCH AND AARON PRESCOTT.

Consent Judgment—Judicial Sale—Opening Biddings—Motion in the Cause—New Action.

1. An order or judgment entered by consent, cannot be set aside or modified, unless by consent, except for fraud or the mistake of both parties.
2. Where such order or judgment is interlocutory, it may be corrected for such reasons, by a motion in the cause; but if it be a final judgment it must be done by a civil action.
3. Where an interlocutory order, made by consent, directs the judicial sale of land, the parties to the action cannot change the terms of the order by consent, in a manner detrimental to the interest of a purchaser at such sale.
4. A consent order directed a sale of certain lands by a commissioner, that said commissioner execute a deed to the purchaser, and further directed him how to apply the proceeds of the sale, but contained no provision for re-opening the biddings. After the sale, an advance of ten per cent. was offered on the amount bid; *Held*, that the refusal by the Superior Court to open the biddings was proper.
5. Where in such case, the Judge bases his refusal on the ground that he has no power to open the biddings and order a resale, he will be understood as meaning that its exercise under the circumstances would be unwarrantable, and that he has no *legal* power to grant such motion.

(*Mebane* v. *Mebane*, 80 N. C., 34; *Wilcox* v. *Wilcox*, 1 Ired. Eq., 36; *Edney* v. *Edney*, 81 N. C., 1; *Stump* v. *Long*, 84 N. C., 616; *McEachern* v. *Kerchner*, 90 N. C., 177; *Ex parte Yates*, 6 Jones' Eq., 212; *Ashbee* v. *Cowell*, Busb. Eq., 158; *Pritchard* v. *Askew*, 80 N. C., 86, cited and approved).

MOTION to re-open biddings and order a resale of lands, heard before *Gudger*, *Judge*, at Fall Term, 1884, of HALIFAX Superior Court.

His Honor refused the motion, and the defendant Gooch appealed.

Messrs. Day & Zollicoffer, for the plaintiffs.
Messrs. Mullen & Moore, for the defendant.

SMITH, C. J. This action is instituted for foreclosure, by sale of the land mentioned in the complaint, which had been conveyed by mortgage deed from the defendant Prescott to the defendant Gooch, to secure the payment of certain notes under seal executed to the latter, and which Gooch has assigned together with the mortgage, to the plaintiffs, as collateral security for his own indebtedness to them.

The summons was duly issued and served upon both defendants, and at the return term thereof a judgment was entered in these words:

"This cause coming on to be heard, and it being made to appear to the court that proper service of the summons has been made on the defendants, and it further appearing that no answer or demurrer has been filed to the complaint; now, on motion of plaintiffs and by consent of all parties, it is adjudged that the mortgaged premises in the complaint described, and hereinafter set forth, be sold by A. C. Zollicoffer, who is hereby appointed a commissioner for that purpose, to raise the amount both principal and interest that is due to the plaintiffs, the sum of $4,878.00 with interest on $3,646.88 from the 1st day of this term till paid, said sale to be made for cash after thirty days advertisement in the Roanoke *News*, a newspaper published in the town of Weldon—said sale to be made in the town of Weldon, North Carolina; that the plaintiff or any other party to this suit may become the purchaser at such sale; that the commissioner execute to the purchaser a deed of the premises sold; that out of the proceeds of the sale after deducting his fees and expenses on such sale, he pay to the plaintiffs $4,878.70 with eight per centum interest on $3,646.88 from the first day of this term till paid; that he take

the receipt of the plaintiff for the amount so paid him and file the same with his report of sale; and that the purchaser be let into possession of the premises upon the production of the commissioner's deed. That the said commissioner pay the surplus, if any, within ten days, into the office of the clerk of this court, there to be held till the further order of said court, and that he make a report of such sale, and file it with the clerk of this court.

"And it is further adjudged that the defendants and all persons claiming under them or any or either of them after the commencement of this action, be forever barred and foreclosed of all right, title and interest and equity of redemption in said mortgaged premises so sold, or any part thereof."

Pursuant to its requirements the commissioner advertised and offered the land at public sale, when it was bid off by the defendant Gooch, at the price of $2,900. He failed to comply with the conditions of sale, and the land was again put up and bought by R. W. Daniel, he being the last and highest bidder, for the sum of $2,600, to which he had limited his agent who run the bids up to the sum reached at the first sale. The money was paid to the commissioner, who thereupon conveyed title and made report to the next (Spring) Term, 1884, after which no further action in the premises was asked or taken. Indeed, nothing more was required beyond making a disposition of the fund.

At the succeeding term, after verbal notice to all the parties, the defendant Gooch moved the court to re-open the biddings for an alleged insufficiency of price, supporting his motion by an offer from R. R. Anderton to raise the bid by an additional ten per cent., and the deposit of the money in the clerk's office to assure its performance.

At the same time the purchaser, who had gone into possession under his deed, asked for a confirmation of the commissioner's reported sale. No opposition was made by the plaintiffs to the motion for a resale of the land. The Court, reciting in the judgment the previous action in the case, the facts of which we have summarily set out, refused both motions "on the ground

that he had not the power to do so, being concluded by the decree of Fall Term, 1884." From this ruling the defendant Gooch alone appealed.

The simple question before us, is whether the Judge could vacate and set aside what was done in strict accordance with the directions for the sale and in the plain execution of them, upon a mere proposal to enlarge the bid by a ten per cent. advance.

The proper practice in decretal orders of sale made by the court, as recognized and explained in *Mebane* v. *Mebane,* 80 N. C., 34, is to require the commissioner to report the bid for confirmation, until which it is but an unaccepted offer on the part of the bidder. But the parties are free to depart from this rule of practice, and by agreement make other conditions, assimilating the sale to that made by the sheriff, which requires no confirmation. It becomes, in a measure, a contract entered of record and binding on both.

The judgment, or, as it is termed, the decree, is, by consent the act of the parties rather than of the court, and it can only be modified or changed by the same concurring agencies that first gave it form, and whatever has been legitimately and in good faith done in carrying out its provisions must remain undisturbed. The authorities to this effect are simple and decisive among our own adjudications. In *Wilcox* v. *Wilcox,* 1 Ired. Eq., 36, Gaston, J., declares a decree rendered by consent, to be in truth the decree of the parties, and in such a decree, *stat pro ratione, voluntas—their will is a sufficient reason.*

In *Edney* v. *Edney,* 81 N. C., 1, Dillard, J., says that "a decree by consent, as such, must stand and operate as an entirety, or be vacated altogether, unless the parties by a like consent, shall agree upon and incorporate into it an alteration or modification." If a clause be stricken out, he adds, "against the will of a party, then it is no longer a consent decree, nor is it a decree of the court, for the court never made it."

"A consent order may be set aside and declared void," in the words of Ruffin, Judge, in *Stump* v. *Long,* 84 N. C., 616, "if

the consent be procured by fraud, just as any other contract may be, but this, as said by Judge Dillard in *Edney* v. *Edney, supra,* must be done by a civil action on the ground of fraud and imposition, and cannot be done by motion."

The latter part of the remark has reference to a final, as distinguished from an interlocutory order, for in the latter case, upon sufficient ground, such as fraud or circumvention, the correction may be made by petition and motion in the pending action, as stated by Merrimon, Judge, in the recent case of *McEachern* v. *Kerchner,* 90 N. C., 177.

Now it is too manifest to require argument, that to annul what is done in good faith, and in precise conformity to the terms and requirements of the decretal order of sale, (and it embraces as well the making of title to the purchaser as receiving the purchase money), is *pro tanto* an abrogation of the order itself, for otherwise, in the absence of any allegation of collusion, fraud or misconduct in the commissioner, or in others in suppressing bidding and preventing the free action of bidders, the authority and command sanction what has been done.

The relations of a purchaser to the decretal order under which he buys, give him an immediate and direct interest in having it remain undisturbed, for the protection of his acquired right or estate. Between the parties to the action and himself, it is in the nature of a contract, which they, even by consent, ought not to be allowed to modify or change to his prejudice and injury. Their obligation to adhere to the integrity of the order, consummated by a sale and conveyance, is analogous to that of a vendor to his vendee, and the Court will not render its aid in disturbing the acquired estate, merely because some one offers to pay a larger sum for the property. The authority ought not to be revoked to impair rights which have been created by its exercise. The purchaser under a confirmed sale becomes, in a measure, a party to the cause, passes under the control of the Court, and may be made to perform his contract, as in case of a bill to enforce special execution, prosecuted in a court of equity. *Ex-parte Yates,* 6 Jones Eq., 212.

The case is quite as strong for the purchaser as if his offer had been accepted and the sale confirmed under the usual decree. In truth and in legal effect, the confirmation is conveyed in the authority conferred to sell and make title, and the rights thus acquired are not less entitled to protection. Certainly the Court will not lend its aid in impairing those rights, or taking them away, upon the mere pretext that a better bargain can now be made with another.

In *Ashbee* v. *Cowell,* Busb. Eq., 158, when an application very similar was made, it is said by the Chief-Justice, "we can imagine no ground, other than fraud, upon which this Court can assume jurisdiction to set aside a sale and open biddings a year after the sale *has been confirmed,* (the italics are in the opinion), and after the purchaser has been put into possession and has made outlays in repairs and improvements so that he cannot be put *in statu quo.*"

Referring to the mischievous consequences of setting aside sales made under such circumstances, he adds, "Any practical mind will see at once that an attempt to make property bring its full value by opening the biddings after the sale has been confirmed, must defeat its own object; because no man will play at a one-sided game."

So remarks Dillard, J., while conceding to the court the power to set aside sales made under its authority, "but as a matter of policy it is slow to do so, and is careful not to open the biddings unless there be some special circumstances, such as *unfairness in the conduct of the sale,* want of proper notice of time and place of sale, fraud in the purchaser, and palpable inadequacy of price, and similar grounds." *Pritchard* v. *Askew,* 80 N. C., 86, citing *Roper on Judicial Sales,* ch. 10, secs. 394 to 441.

The present motion rests for support upon no such grounds. It is not suggested that the sale was not in all respects fair, and conducted in a manner to elicit the highest bids from those present, or that there was not a full attendance of persons when it was made. Though conducted by the commissioner under an

agency created by the order, the sale was really by the mortgagee mortgagor and assignees, to the purchaser, for the decree itself is but the embodiment of their own agreement, and it would be manifestly wrong to divest interests derived out of its execution. The undoing of a contract executed, must be the concurring work of the persons who made it.

The judge ruled that he had no power to do this at the instance of the mortgagor, and he must, of course, be understood as intending to say that its exercise, upon the case presented, would be in contravention of the established practice controlling the courts, and unwarranted by the rules of judicial procedure—that is, he had not power *legally* to allow the motion, or interfere in the consent proceeding.

There is no error, and the appellant will pay the costs of the appeal. Let this be certified to the Superior Court.

No error. Affirmed.

J. H. GREENLEE, Trustee, v. WILLIAM MCCELVEY.

Undertaking on Appeal—Justification—Waiver.

Where the surety to an undertaking on appeal does not justify, but it appears that the surety was tendered and accepted, and the instrument duly executed in open court without objection; *Held*, to be a waiver of the statutory requirement.

(*Hancock* v. *Bramlett*, 85 N. C., 393; *Jones* v. *Potter*, 89 N. C., 220, cited and approved).

MOTION by plaintiff to dismiss an appeal from McDowell Superior Court, heard at February Term, 1885, of the SUPREME COURT.

Messrs. Walter Clark and *J. W. Hinsdale*, for the plaintiff.

No counsel for the defendant.

SMITH, C. J. The plaintiff's counsel moved to dismiss the appeal upon the ground that the undertaking to perfect the same has not been justified as required by law.

The undertaking bears date on October 2, 1883, which, if the term continued for the full period allowed by law, was on Tuesday of the second week of the session, and it bears the name of the clerk as an attesting witness. A form of justification follows, dated on October 20th, 1884, with the signature of the surety, but without the clerk's name to the certificate that it was sworn.

The preparation of the case, from indulgence of counsel and the delay of the Judge, seems to have been deferred for a year or more, and the record was not docketed in this court until November 14th, 1884, as appears from the clerk's endorsement, of the time of filing the transcript. As no exception is taken to the hearing of the case on account of the delay, we assume it to have been acquiesced in by the counsel for the appellee, whose motion rests solely on the want of verification of the sufficiency of the surety to the undertaking. In examining the record, we find an entry immediately following the final judgment, in reference to the appeal, in these words: "It is allowed to him upon his giving an appeal bond according to law with G. W. Crawford as his surety. Said bond is duly executed and is herewith sent."

In the statement of the case over the signature of the counsel for both parties who tried the cause, is contained this paragraph: "The defendant filed the appeal bond in apt time."

As the surety who signed the undertaking was tendered and accepted and the instrument "duly executed," and this during the sitting of the court without a verification, it must be understood as a waiver in writing, and a dispensing with the oath, and an admission of the sufficiency of the surety without its support. The present case then falls clearly within the ruling in *Hancock* v. *Bramlett*, 85 N. C., 393, and *Jones* v. *Potter*, 89 N. C., 220.

The motion is denied.

JAS. L. WILLIAMS AND WIFE v. JOHN W. JOHNSTON et als.

Agent.

1. Authority delegated by a creditor to an agent to collect and settle a debt, leaves the medium of payment largely at the agent's discretion, but it does not extend to a settlement which the debtor knows will enure entirely to the benefit of the agent.
2. So, where the debtor contracted with an agent who was authorized to collect a debt, that he would deliver timber at the agent's mill, for the agent's individual use, which was to be applied in payment of the debt; *Held*, that the delivery of the timber under this contract does not discharge the debt due the principal.

CIVIL ACTION tried before *Gudger*, *Judge*, and a jury at Fall Term, 1884, of HALIFAX Superior Court.

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

Mr. R. O. Burton, Jr., for the plaintiffs.

Messrs. Mullen & Moore, Day & Zollicoffer and *Walter Clark*, for the defendants.

SMITH, C. J. William W. Brickell, as guardian of the *feme* plaintiff, sued and recovered judgment against John W. Johnston, administrator of William L. Johnston, a prior guardian, at May Term, 1866, of the County Court of Halifax, for the sum of $\$4{,}485\frac{19}{100}$ due the ward, with interest thereon from the first day of January preceding. A portion of the amount was collected, but the estate of the debtor was insufficient to pay all, and on October 24th, 1873, there remained unpaid of principal money $\$908\frac{6}{100}$ and $\$196\frac{40}{100}$ in costs incurred. Alfred W. Simmons, a surety on the bond of the first guardian, died in 1867 possessed of real and personal estate, and leaving a will wherein he appoints the defendant John W. Johnston, executor and devises to the *feme* defendant Susan F. Johnston, the several tracts of land described in the plaintiff's complaint, and

these, the small personalty that passed into the executor's hands being exhausted, constitute the only property of the testator out of which the indebtedness can be satisfied. The present suit is to enforce payment by a sale of the lands, or so much of them, as shall be necessary to discharge the judgment.

The defence set up is that the demand has been paid, and the only issue presented to the jury is whether the debt of $\$1{,}104\frac{46}{100}$, or any portion and what portion of it, has been paid. The response is that the judgment has been paid and satisfied.

A small sum, $150, it was admitted, had been so received and applied by the plaintiff James L. Williams, acting for and on behalf of his wife.

The testimony of John W. Johnston, examined on his own behalf, was, in substance, that the male plaintiff, in 1876, bought a saw-mill and put it on witness's land, with his consent, to be there operated and run for the said plaintiff; that at the same time it was agreed between them that the plaintiff might cut trees on the land for the use of the mill, paying twenty-five cents for each, and that the money due therefor should be in settlement of the judgment.

The plaintiff James L. Williams testified for himself that he purchased and sawed up the trees and was to pay the stipulated price, but "did not bargain that the timber at 25 cents should go on this debt."

It was in evidence that James L. Williams who had received payments on the judgment, rents out his wife's real estate, which is considerable, attends to all her out-door business, and has erected and removed buildings upon her land, she being not competent, physically, to attend to her own affairs.

The plaintiff also stated that he had control of his wife's land, and the management of her business matters, and that since the transaction with the defendant, the agency had been constituted in a writing, which had been spread upon the registry, but he had, since as before, exercised the same general authority.

The other evidence relates to the number of trees cut down and used, and we put it out of view as unimportant in considering the matter brought up on the appeal.

The plaintiff requested the Court to charge the jury:

1. That a general authority to collect a debt does not authorize a settlement of it in timber trees.

2. "That there was no evidence before them to warrant them in finding that James L. Williams was authorized to settle the judgment in trees, or a gin-house."

The court declined to give these instructions, and iustead gave the following:

"That they should first determine whether the plaintiff Williams was the general agent of his wife for the transaction of her business. If they should so find, they should then proceed to determine whether said Williams had made a contract with Johnston to take pay in timber trees; and if they should so find and also that such payment in trees had been made to him, then it would be binding, and they should find the first issue "Yes."" Plaintiff excepted.

To the first issue the jury responded "Yes."

In our opinion the instructions given upon the evidence were misleading and erroneous, in that a general agency does not itself give sanction to what was done. An agency, however comprehensive in its scope, nothing else appearing, contemplates the exercise of the powers conferred for the benefit of the principal. It implies a trust and confidence that the delegated authority will be employed in the honest and faithful discharge of the duties appertaining to the fiduciary relation thus established. A power to collect and settle a debt, conferred without limit, leaves the medium of puyment largely at the agent's discretion, but it does not extend to a misapplication of the fund to his own personal advantage. A third party may make the payment, and he is not responsible for the misuse of the money. It is enough for his protection to know that the authority is possessed, whatever disposition may be afterwards made of the fund by the agent. But

when the contract itself involves a misapplication of the money or other article of value to the agent's own use while it should go to the principal, it will not be enforced to the injury of the latter, unless assent is shown or is implied from past transactions. An agency involves integrity and fidelity in the agent, an exercise of power not for his own, but in the interest and for the intended benefit of him who confers it.

Thus, an agent entrusted with a horse to sell for his principal, cannot dispose of him to his own creditor in payment of his own debt. *Parsons* v. *Webb*, 8 Greenleaf, 38.

An attorney having authority to collect a debt due his principal cannot commute the debt by exchanging it for one due from himself to the debtor. *Kingston* v. *Kincaid*, 1 Wash. C. C., 454.

The very relation between the parties requires good faith, and one who participates, in his own interest, in the conversion of a trust fund to the use of the agent or trustee, is not allowed to take personal advantage therefrom. It is an unwarrantable inference proposed to be drawn from a general agency, a right to appropriate what is received to the agent's own use in the absence of any previous authority or subsequent sanction to such act.

In the present case the defendant contracts with the husband and agent of the *feme* creditor, that timber to be supplied to him for his own known individual use in running his own mill, shall be applied to the extinguishment of her judgment-debt, in disregard of his assumed fiduciary obligation, with no other evidence of her approval of this or other misapplication, beyond that of his general agency to manage her business and collect her debts. Will the court give its sanction to this perversion of authority, concurred in and rendered effectual by the defendant, and thus deprive the *feme* of her property?

In this aspect the charge is misleading. The inquiry should have gone beyond the existence of a general agency, and extended to an assent, actual or implied, to this misuse of her funds. The issue was too narrow and the instruction too restricted. The agent's right to use the property of his principal is not an inci-

dent to its management, and such the jury would naturally understand to be the meaning of the instruction. It must be declared there is error and the plaintiffs entitled to a *venire de novo*.

To this end let this be certified for further proceedings in the court below.

Error. Reversed.

JOHN GATLING v. THE COMMISSIONERS OF CARTERET COUNTY.

Taxation—Set-off—Counter-claim—Municipal Corporation.

1. A tax is not a debt in the ordinary sense of that word. It is an impost levied by the sovereign for the support of the State, and it is not founded on contract. When the statute prescribed no special manner for its collection, it may be collected by an action at law, but when a method is provided by statute, an action for its collection cannot be maintained.
2. A counter-claim or set-off is a defence to an action, and exists only in favor of a defendant. It arises when the demand, both of the plaintiff and the defendant, is a debt, arising out of contract and existing at the commencement of the action.
3. Where a municipal corporation is indebted to a taxpayer, the latter is not entitled either in law or equity to have the amount due him applied as a set-off or counter-claim against the amount he owes for taxes.

(*Hurst* v. *Everett*, 91 N. C., 399; *Battle* v. *Thompson*, 65 N. C., 406: *Cobb* v. *Elizabeth City*, 75 N. C., 1, cited and approved).

MOTION to continue an injunction to the hearing, heard by *Shepherd, Judge*, at Spring Term, 1884, of CARTERET Superior Court.

His Honor refused to continue the restraining order theretofore granted and dismissed the action, and the plaintiff appealed.

Mr. John Gatling, for the plaintiff.

Messrs. Simmons & Manly for the defendants.

ASHE, J. This was a civil action brought by the plaintiff against the defendants as commissioners of Carteret county, to have a debt due to him by the county set off against certain taxes assessed against him by the commissioners for the years 1882 and 1883, and for an injunction against the defendants, to restrain them from collecting said taxes.

The plaintiff in his complaint alleged that the county of Carteret was indebted to him in the sum of eight thousand dollars, evidenced by two judgments against the board of commissioners of said county, each for the sum of four thousand dollars, founded upon bonds issued by the board of commissioners of said county under the provisions of an act of the General Assembly of the State of North Carolina, entitled "An act to incorporate the North Carolina Railroad Company and the North Carolina and Western Railroad Company," ratified the 27th of December, 1852, whereby the said county and its properly constituted authorities became bound to levy annually on the persons, lands, and other property within said county, and collect, such taxes as may be sufficient to pay such bonds and interest. That the judgments are still due and owing, no part thereof having been paid, and that payment has often been demanded; that the plaintiff has property situated at Morehead City in the county of Carteret which has been assessed for taxes for two years, 1882 and 1883, both for State and county purposes, and the tax lists have been placed in the hands of the sheriff of said county for collection; that he has paid all of the taxes due for those years, except the general tax for county purposes, so far as they have come to his knowledge; that he is entitled in equity and good conscience to have the said indebtedness of the county to him declared a set-off or counter-claim *pro tanto* against said residue of taxes, and he prayed for such application and for a restraining order enjoining the defendants from collecting such residue.

The defendants answered the complaint, admitting some of the allegations thereof and denying others.

The plaintiff then moved for a restraining order founded upon an affidavit, varying but little from the allegations in his complaint, and the defendants filed a counter-affidavit similar to their answer.

On the 28th day of March, 1884, His Honor A. C. Avery, at Chambers, granted the restraining order as prayed for, to be heard before His Honor J. E. Shepherd, and it having been agreed between the counsel of both parties that His Honor should try the cause upon the facts found by him, and the complaint and answer, His Honor found the facts substantially as stated in the affidavit of the plaintiff, and adjudged that the plaintiff was not entitled to the relief demanded, and that the action be dismissed and the defendant to recover his costs to be taxed by the clerk.

The sole question presented for our determination is, whether the plaintiff can set up the judgments which he has against the county, as a set-off or counter-claim against the taxes admitted by him to be due to the county for the years 1882 and 1883.

The position taken by the plaintiff in seeking to set off the debt due him from the county of Carteret against the taxes assessed by the county authorities upon his property situated in that county, cannot be sustained upon any principle of law or equity.

It is certainly an action of the first impression. Matter which is purely defensive in its character, and is only allowed as a defence to an action, is sought to be used as the *gravamen* of an action. As a counter-claim it cannot avail the plaintiff, for that is in the nature of a cross action, and must be a cause of action existing in favor of a *defendant* and against a *plaintiff*, between whom a several judgment might be had. *The Code*, §244.

There is no rule of practice or procedure, known even to the loose pleading tolerated by the Code System, which allows a plaintiff to set up a counter-claim against a defendant—such an action is an anomaly in legal proceedings.

The same observations apply with equal appositeness to a set-off, which, like the counter-claim, is a *defence* to the action, and only exists where the demand, as well of the plaintiff as of the defendant, is a *debt*, such a demand as under the old practice could only be recovered by an action of debt or *indebitatus assumpsit*, but enlarged by The Code so as to embrace any cause of action arising on contract existing at the commencement of the action, extrinsic to the plaintiff's cause of action. *The Code*, §244; *Hurst* v. *Everett*, 91 N. C., 399. But still it must be a debt in the broad sense of that term, a demand for money due, founded upon contract.

But a tax is not a debt. "Taxes are not debts in the ordinary sense of that term, and their collection will in general depend on the remedies which are given by the statute for their enforcement. When no remedy is specially provided, a remedy by suit may fairly be implied, but when one is given which does not embrace an action at law, a tax cannot in general be recovered in a common law action as a debt. Taxes are not demands against which a set-off is admissible; their assessment does not constitute a technical judgment; nor are they contracts between party and party, either expressed or implied, but they are the particular acts of the government through its various agents, binding upon the inhabitants, and to the making and enforcement of which their personal consent individually is not required." *Cooley on Taxation*, 15 and 16.

In the *City of Camden* v. *Allen*, 2 Dutcher, 398, the Supreme Court of New Jersey say, "a tax, in its essential characteristics, is not a debt, or in the nature of a debt. A tax is an impost levied by authority of government upon its citizens or subjects, for the support of the State. It is not founded upon contract or agreement, it operates *in invitum*." To the same effect is *Shaw* v. *Pickett*, 26 Vermont, 486.

If then, a tax is not a debt or obligation to pay money founded upon a contract, it cannot be liable under any circumstances to a set-off. In the case of *City of Camden* v. *Allen*, *supra*, the court

said, "Debt is the subject-matter of set-off, and is liable to set-off; a tax is neither. To hold that a tax is liable to set-off would be utterly subversive of the power of government and destructive of the very end of taxation." *S. P. Cooley on Taxation, supra; Finnegan* v. *City of Fernandina*, 15 Florida, 379.

In *Battle, Treasurer*, v. *Thompson*, 65 N. C., 406, it was held by the court that a defendant cannot offer as a set-off or counter-claim against the State, the indebtedness of the State to him arising out of coupons of the State which are overdue, and which the State legally owes; and the decision was put upon the ground that a State cannot be sued by its citizens. But a municipal corporation, as a city or county, may be sued, and in the case of *Cobb* v. *The Corporation of Elizabeth City*, 75 N. C., 1, it was held that "debts owing by the town corporation, in whatever form they may be evidenced, cannot be set off against a demand for town taxes, unless there be a special contract to that effect."

The authorities above cited, lead us to the conclusion that the plaintiff is not entitled *at law* to the relief he seeks by this action, and the question then arises whether he is entitled to the relief he seeks through the aid of the equitable jurisdiction of the court.

We know of no head of equitable jurisdiction under which this case can be brought. The power to levy taxes is a function of government, and is incident to any government, whether State or municipal, essential to its very existence. Without it no government could exist, and to be deprived of it, every government must fall to pieces. Governments are formed to promote the public good, and taxation in some form or other is indispensable to the attainment of that end.

To accord to the courts of chancery the power to interfere with taxation by interposing to set off the indebtedness of the government against the taxes, might greatly embarrass the operation of its machinery, if not clog its very wheels. The courts of chancery are therefore not clothed with any such power.

In the case of *Finnegan* v. *the city of Fernandina, supra*, the Court say, "to enjoin the collection of municipal taxes due upon

property owned by individuals to the extent that there is a debt from the city to such individual, is the exercise of the power of appropriation and interference with public trusts, and the exercise of delegated sovereign power, which has not received the sanction of any court." * * * "If the tax is due, the party should pay it. A court of equity will not aid him in resisting the just and legal demand of the government. It will not step in for such reasons and protect a party in not paying a tax which he admits is due. This is a familiar principle obtaining in all the States."

In *Rees* v. *The city of Waltham*, 19 Wallace, 107, and *Ibid.*, 658, it is held that the failure of the ordinary legal remedy, because it has not been used at law with sufficient success by the plaintiff to secure his debt, does not therefore confer upon the court of chancery any jurisdiction. To same effect is *Burroughs on Taxation*, 456.

There is no error. Judgment of the Superior Court of Carteret county must be affirmed.

No error. Affirmed.

EVA S. POTTER, by her next friend, B. F. SLEDGE v. THE WILMINGTON & WELDON RAILROAD COMPANY.

Negligence—Carriers of Passengers.

1. Railroad companies are held to a high degree of responsibility in providing for the safety of passengers. But from the nature of their business, it is attended with some danger, and when they make it as safe as it practically can be made, they are not liable for an injury which results to a passenger from his own lack of caution.
2. Where a passenger—a child of nine years of age—fell and broke her arm over the iron rail of the track of a railroad company, which was close to the defendant's, at its depot where it was accustomed to receive and discharge passengers, no negligence being shown in the manner in which the rails were arranged, the defendant was not liable.
3. *Quære,* Whether the defendant could be held responsible for defects existing in the track of another railroad.

POTTER *v.* WILMINGTON & WELDON RAILROAD.

CIVIL ACTION tried before *Gudger*, *Judge*, and a jury, at Fall Term, 1884, of HALIFAX Superior Court.

The plaintiff, a girl nine years old, sueing by her next friend, brought this action to recover damages for injuries sustained by her in the breaking of her arm while she was approaching the defendant's passenger train at Weldon to go on the same from that place as a passenger to Halifax, a station on the defendant's road. She alleges that the injury was occasioned by the negligence of the defendant in failing to keep the passage way for persons going on its train in good and safe condition and repair.

The evidence was, that the defendant and two other railroad companies, each had a railroad track, a short section of each road, constructed in the usual manner, upon lines a few feet apart, nearly or quite parallel each with the other, under a large shed common to all the companies at Weldon in this State. Passenger trains on each of these roads stopped regularly under this shed to let off and take on passengers and baggage, and transfer passengers and baggage from one train to another. No platform or elevation of any kind was used for such purpose; passengers got on the train directly from the ground, and getting off it stepped immediately upon the ground.

One of the tracks mentioned lay between the defendant's track and that on which the plaintiff fell and broke her arm.

The plaintiff, going a way frequently used by persons approaching defendant's train, while crossing the track of the Petersburg railroad, hitched her foot, as she testified, under the bottom of the iron-rail and fell. She did not know whether there was any open space under the iron-rail or not, she was looking in front of her towards the hotel, she had crossed one iron (meaning the iron-rail), and struck the next one and fell. She said "If I had been looking where I was walking I could have kept from falling."

A witness who was with the plaintiff at the time of the accident, testified that only two trains meet at Weldon at that time, one train had arrived, the defendant's train was expected in a few minutes, many persons were then passing about, no engine mov-

ing there at the time the accident occurred, two or three minutes before schedule time for arrival of the train. This witness and plaintiff were going direct to the hotel; he said, "I was a step before her; she fell at the rail; I did not see her strike her toe; there was some elevation between this and next track on which she fell; there was a ridge of dirt two or three inches in height; the crossties were filled in between with earth even with the ties, smooth, and the dirt half-way of the rail, she could not have hung her foot under the rail. She is a child of average intelligence, she was nine years old. One looking where he was walking, could get over safely. The rails were of "T" iron. Track has been filled since the accident. More dirt in middle but not more against the rails. Flange of the engine keeps the dirt away from the inside of the rail two or three inches."

Another witness testified, that during the Spring before the accident, the track was raised; track was not filled, end of sills exposed; enough of iron was exposed for the toe to catch under the rail; space of half-inch under the rail to the dirt. This is a common pass-way."

Another witness testified that the "track had been in the same condition it was at the accident sometime before—a year or more. Dirt even with the ties in the middle of the track; flange of the rails covered. She could not get her toe under the bottom of the rail." It is admitted in the case for this court, agreed to by the counsel of the parties, that "plaintiff struck her toe against the inner rail of the Petersburg Railroad track."

The Court instructed the jury that accepting the evidence as true, there was no negligence on the part of the defendant. They rendered a verdict accordingly. There was judgment for the defendant, and the plaintiff appealed to this court.

Messrs. Mullen & Moore and *A. J. Burton*, for the plaintiff.

Messrs. Day & Zollicoffer and *R. O. Burton, Jr.*, for the defendant.

MERRIMON, J. (after stating the facts as above). We think that the Court gave the jury the proper instruction. In any view of the evidence, negligence on the part of the defendant did not appear from it. The injury the plaintiff sustained was the manifest result of her own misadventure and misfortune, and not of the negligence of the defendant. She was passing towards defendant's track, at a point where she intended to go on its train as soon as it should arrive, as a passenger, and while crossing the Petersburg Railroad track she "struck her toe against the inner rail" of that track and fell to the ground, breaking her arm by the fall. It does not appear that the fall was occasioned by any unevenness of the ground, or a hole in it, or obstructions allowed to be temporarily or permanently at and about the place where she fell. It seems that the surface of the ground was nearly level, except that the inner rail of the track was slightly above the surface, and immediately inside of the track on each side there was a small channel or opening in which the flange of the engine-wheel moved. This opening was necessary and unavoidable. It was easily passed over and without danger, if the person crossing it would give even slight attention to his movements. The track, the rail, the channel inside of and along it, the ground about it, were all plainly to be seen, and interposed slight or no obstacle to an ordinary person passing that way. The plaintiff herself testified that if she had been looking where she was walking, she would have kept from falling, and the witness who had charge of her testified, that "one looking where he was walking could get over safely." If she had given slight attention to her steps she would not have encountered the misfortune that befell her.

Railroad companies, as common carriers, are necessarily and justly held to a high measure of care, circumspection and responsibility, especially in respect to the safety of passengers—indeed, of all persons whom they transport—but they are not required to do, or have, or observe such things, as under the circumstances of the matter in question, are unreasonable. In the nature of their

business, some things necessarily attended with more or less danger are essential. Such things they are required to make as safe as practicable, to keep them so, and use them properly and cautiously. When they do so, and a passenger, through his lack of caution or his negligence, suffers injury from such dangerous thing, the company is not responsible for such injury. Passengers on their part are required to observe proper caution, to see and avoid danger when they reasonably can, and if they will not they must suffer the consequences of their rashness, the company being free from fault. What is due caution must depend largely upon the nature of the danger encountered and the circumstances of the person endangered at the time.

The channel or opening just inside of the rail of the track, caused the plaintiff, as she incautiously walked along, to strike her toe against the exposed side of the rail, and she fell to the ground and broke her arm as a consequence. She could easily see the rail and the opening and avoid any danger from it. The defendant was in no default—it was not negligence on the part of the company owning the road, or the defendant, to allow it to be there—it was essential. The company could not, in the nature of its use and purpose, dispense with it and keep it closed, and it was not bound to do so. The plaintiff was bound to take notice of it and avoid danger from it at her peril.

We pass by the question, whether the defendant could, in any view of the matter, be held responsible for defects, if such had existed, on and just about the track of the road of the Petersburg Railroad Company.

No error. Affirmed.

JOHN A. BOYDEN v. JOSEPH WILLIAMS.

Appeal Bond, When Must be Filed.

1. The undertaking on appeal must be filed within ten days after the rendition of the judgment.
2. Where an appeal bond has no date, it will be presumed to have been filed on the day that it is justified.

(*Wade* v. *Newbern*, 72 N. C., 498; *Sever* v. *McLaughlin*, 82 N. C., 332, cited and approved).

MOTION by the defendant to dismis an appeal, heard at February Term, 1885, of the Supreme Court.

Messrs. Armfield & Armfield, for the plaintiff.
Messrs. Haywood & Haywood, for the defendant.

ASHE, J. This was a CIVIL ACTION brought by the plaintiff against the defendant for the settlement of a partnership account.

The case was referred to a referee to take the account between the parties.

After the report of the referee was made and filed, the plaintiff, at Fall Term, 1884, of Catawba Superior Court, before *Gilmer, Judge*, moved for a jury trial. The motion was disallowed, and the plaintiff appealed to this Court.

When the case was called for argument in the Court the defendant appellee moved to dismiss the appeal on two grounds:

1. That the appeal bond was not filed within the time required by law.

2. That the appeal was not taken to the next term of the Supreme Court as required by law.

It is needless to consider the second ground, as the first is sufficient to sustain the motion of the defendant.

The law requires that the appeal bond shall be given within ten days after the rendition of the judgment. *Wade* v. *City of Newbern*, 72 N. C., 498; *Sever* v. *McLaughlin*, 82 N. C., 332.

The judgment was rendered at Fall Term, 1884, of Catawba Superior Court, which was held on the last Monday in August, 1884, and the bond was not filed until the 8th day of December, 1884.

The bond, in fact, has no date, but it was justified on the 8th day of December, and we must take it that it was filed on that day.

The motion of the defendant must be allowed and the appeal dismissed.

Appeal dismissed.

J. H. WILSON AND WIFE et al. v. C. J. LINEBERGER.

Specific Performance.

1. Where a contract contains mutual and dependent covenants, specific performance cannot be decreed, unless the party seeking it alleges either that he has performed or is ready and willing to perform his part of the contract.
2. Where an administrator agreed with his co-administrator, who was also a distributee, that in consideration of the said distributee selling him a certain tract of land, he would pay therefor a certain price, and would also execute a mortgage to secure to the distributee whatever sum might be due to him from the estate of the intestate; *Held*, that specific performance will not be decreed when the complaint fails to state that the distributee has performed all of his covenants contained in said contract.

(*Hardy* v. *McKesson*, 6 Jones, 554; S. C., 7 Jones, 567; *Addington* v. *McDonnell*, 63 N. C., 389; *Wilson* v. *Lineberger*, 88 N. C., 416, cited and approved).

CIVIL ACTION, tried before *McKoy, Judge*, at Fall Term, 1884, of GASTON Superior Court.

His Honor gave judgment for the plaintiffs and the defendant appealed.

Messrs. Geo. E. Wilson and *Batchelor & Devereux*, for the plaintiffs.

Messrs. W. P. Bynum and *R. W. Sandifer*, for the defendant.

MERRIMON, J. The plaintiffs brought this action to compel the defendant to specifically perform the agreement under seal, specified and set forth in the complaint. In that agreement, the plaintiffs stipulated that the *feme* plaintiff would convey in fee to the defendant, by deed of bargain and sale, with covenants of general warranty and seisin, her undivided one-fourth interest in the large tract of land therein mentioned and described, for the several considerations therein specified, when the same should be paid and done as required by the terms of the agreement. No definite time for the execution of the provisions of the agreement is specified, but it seems that it was to be done as soon as practicable.

The defendant, on his part, stipulated that he would pay to the plaintiffs, for the interest in the land so to be conveyed to him, $9,000. Of this sum, he was to pay $6,000 at the time of the execution of the deed, and to execute to the plaintiffs his promissory note for the balance, $3,000, due two years next thereafter, bearing interest from date, payable annually, at the rate of eight *per centum per annum*, and to secure the same by a mortgage of his interest in the land, with power of sale in the plaintiffs, to be exercised in case he should fail to pay the interest as it came due, or the note at its maturity. He further stipulated that an account of the partnership effects of the firm of Lineberger, Rhyne & Co. should be taken immediately, and that one-fourth of the manufactured goods, the raw cotton on hand, and of the rights and credits, should be delivered to the plaintiffs specified in the agreement. It seems that the *feme* plaintiff, the defendant, and Rhyne composed that firm.

He further stipulated, that he, as co-administrator with the *feme* plaintiff of the estate of J. L. Lineberger, deceased (who was her former husband), would state and file immediately with the judge of probate of Gaston county, his account of his administration, and would, at the time of the execution of the deed to be executed by the *feme* plaintiff to the defendant, "turn over to her," his co-administrator," all the assets which may have or

should have come into his hands," as such administrator, and execute to the plaintiff his promissory note for such sum of money as might be found to be due on account of such assets, due two years next after the date of the agreement, bearing interest at the rate of eight *per centum per annum*, and to execute to the plaintiffs a mortgage of the same land to secure it.

The plaintiffs stipulated in this connection that when they received such assets, they would execute to the defendant a bond in the penal sum of $5,000 conditioned to indemnify him against loss or harm on account of anything done or that might be done by the *feme* plaintiff as administratrix.

The plaintiffs, while they allege and set forth in the complaint the whole of the agreement, of which the above is a summary, do not demand a specific performance of all its material provisions and stipulations; they demand only an account of the assets in the hands of the defendant as co-administrator with the *feme* plaintiff of the intestate, and such assets as ought to have come into his hands from sundry sources specified; that he execute his note for the money that may be found to be due for such assets to the plaintiff under the agreement; and that he execute to them a mortgage of the land mentioned to secure it.

This seems to us irregular. We can account for it only upon the supposition that the very intelligent counsel for the plaintiffs construed the agreement as containing two separate and distinct contracts, one in respect to land which the *feme* plaintiff agreed to sell to the defendant, and the other in respect to other matters, including that mentioned in the complaint. Such a view, in our judgment, is a serious misapprehension of the terms, proper scope, and effect of the agreement. It is one whole. It contains one contract, made up of sundry parts, containing mutual and dependent covenants, and it requires that several material things shall be done concurrently by the plaintiff and the defendant.

The agreement upon its face, in terms purports to be "this contract," as a whole, and "the consideration" is spoken of as one

and a whole. The plaintiffs covenant that the *feme* plaintiff will convey her one undivided fourth interest in the land mentioned in the agreement to the defendant for $9,000, to be paid by him as specified; but not for that alone and *when* that is paid, but *when* he shall do "also in compliance with the stipulations *hereinafter set forth*," which stipulations plainly refer, and can only refer, to the taking of the account of the partnership assets of the firm of Lineberger, Rhyne & Co., and the delivery of one-fourth thereof to the plaintiffs "within ninety days after the execution of the deed of conveyance by the said parties of the first part as aforesaid," and also to the ascertainment and payment in the way provided, to the plaintiffs, of the assets in the hands of the defendant, as the *feme* plaintiff's co-administrator. In a note at the end of the agreement, a part of the contract is referred to as "the above contract," thus designating it as a whole.

Besides, if the conveyance of the land by the *feme* plaintiff shall not be treated as the consideration for that part of the contract the plaintiffs seek to have specifically performed, then there would be no consideration appearing to support the latter—certainly no substantial consideration, such as would induce a court of equity to compel its specific performance. No other consideration is mentioned, and it must be taken that the defendant recognized and accepted it. It is scarcely probable that he intended to oblige himself to do things so important without a consideration.

The agreement under consideration is peculiar, and not very clearly and orderly explained in some respects, but we cannot doubt that the substance of it is, that the plaintiffs on their part covenanted to and with the defendant, that the *feme* plaintiff should convey her interest in the land mentioned in it, to the defendant, and would execute to him the penal bond mentioned within a reasonable time, in consideration of, and when the defendant should pay to the plaintiffs, $6,000, and secure to them $3,000 more as provided for, and should do the several other things agreed to be done by the defendant; and the defendant

on his part, covenanted to and with the plaintiffs, that he would, within such reasonable time, pay the sum of money required to be paid, and secure other sums mentioned, ascertained and to be ascertained, and do the other things stipulated to be done by him, in consideration of the interest in the land so to be conveyed to him.

This being the proper construction, the plaintiff could not compel the defendants to specifically perform only a part of the contract particularly advantageous to them. It must be specifically performed as a whole and on both sides, or not at all, because the right is mutual, each is entitled to the benefit of it.

Moreover the covenants are mutual and dependent, and the principal acts to be done are concurrent, and the plaintiffs are not entitled to the relief demanded by them, until they aver and show their ability and readiness to perform the contract specifically on their part. Indeed, generally the plaintiff seeking the specific performance of a contract must aver and prove that he has performed his part of it, or his ability and readiness to do so. *Hardy* v. *McKesson*, 6 Jones Law, 554; the same case, 7 Jones Law, 567; *Addington* v. *McDonnell*, 63 N. C., 389; *Batten on Specific Performance*, 108.

The plaintiffs do not allege that they have performed their part of the contract, nor do they allege their ability and readiness to do so; on the contrary, as we have seen, without such allegation, they seek to have but a part of it specifically performed. This they cannot have, and for the reasons already stated.

They therefore fail to allege facts essential to entitle them to a mortgage of the land mentioned to secure the payment of the assets ascertained to be in the hands of the defendant as co-administrator with the *feme* plaintiff. As it does not appear upon the face of the complaint, or indeed at all, that the plaintiffs are entitled to have a mortgage of the land executed to them by the defendant under the contract, the Court could not in the exercise of its equitable jurisdiction, treat it as a mortgage and give effect to the *lis pendens*, notice of which was given as required

by the statute. It is obvious that the law of *lis pendens* does not apply, and cannot take effect, where the party suing fails to show himself entitled to the property in litigation, or the relief demanded in respect to it.

We think the Court erred in adjudging the judgment for the money ascertained to be due the plaintiffs, and from which there was no appeal, to be a lien by virtue of the *lis pendens*, upon the land described in the pleadings. It did not follow as a necessary consequence of the judgment for the money that the lien upon the land should be declared. The defendant chose to let that stand undisturbed; but he had the right to resist, as he did, that the plaintiffs had not, by the pleadings or otherwise, shown themselves entitled to the mortgage demanded, and to have the land sold by virtue of such right, and the proceeds of the sale applied to the satisfaction of the judgment not appealed from.

These views substantially harmonize with that expressed by us, when this case was before the court at a former term. While it was not then necessary to interpret the contract, the court suggested that the purpose was to have only a part of it specifically performed, and intimated strongly that the plaintiffs were not entitled to have such relief. Indeed, the action was treated as having for its real purpose, the settlement of the estate of the intestate of the defendant and the *feme* plaintiff.

In *Wilson* v. *Lineberger*, 88 N. C., 416, on page 437, the Chief-Justice said, "we have treated this action as intended in its general scope and aim, to effect a settlement of the intestate's estate in the defendant's hands, and wholly administered by him, in order to ascertain their amount, and recover the distributive shares therein accruing to the *feme* plaintiff and her infant child, of whom she is the guardian, and not as one merely to enforce the specific contract entered into between the associated representatives for an account and the payment over of the trust fund by one to the other. The settlement of the administration is an execution of part of the contract and both distributees are interested in the result. The infant distributee ought to be made a party to the

suit, and must be before any final decision is rendered. This is due to the defendant for his protection against another suit at the instance of the infant distributee, protracted, expensive and harassing; and, to the infant to secure his distributive share in the estate. We are not prepared to uphold the contract in this feature, as one entitled to a specific performance, if its validity were now open to question. But it would be manifestly unjust to leave the defendant exposed to a similar suit by the infant, or to deny to him the right to have judgment against the defendant for his portion of the trust estate."

No question was raised as to whether the appeal brought up the whole judgment, or only a part of it, and we do not deem it necessary to express any opinion in that respect.

The judgment, declaring the lien upon the land and directing a specific performance of the contract in respect to the mortgage, or in case of failure to do so, a sale of the property, must be reversed. To this end, let this opinion be certified to the Superior Court.

Error. Reversed.

E. W. GAYLORD v. JAMES T. RESPASS, et al.

Infants—Deed—Evidence—Relevancy of—Tenants in Common—Statute of Limitation.

1. The assent of infants will be presumed to a deed made to them as a gratuity at the instance of their mother for a valuable consideration moving from her, and in order to avoid it, the infants must repudiate it after arriving at full age.
2. Evidence is relevant when it tends to the advantage of either litigant, and bears upon the issue.
3. A deed is evidence of its own existence, and of whatever results from its existence, against all persons; its recitals are evidence only against parties and privies.

4. If one tenant in common occupies the common property for twenty years, claiming it as his own, the entry of his co-tenants is tolled.

5. If a tenant in common is in possession under a title independent of the common title, *it seems* that a possession for seven years will bar his co-tenants.

6. A party by taking a deed from one claimant does not debar himself from setting up a better title derived from some other source.

7. In case of the common possession by two persons, the ownership draws to it the possession, and it is presumed to be in him who has the title. So, where a ward resided with his guardian on a tract of land in which he had an interest as tenant in common, his possession is presumed to be in accordance with his title, and there is no adverse possession as against him.

(*Covington* v. *Stewart*, 77 N. C., 148; *Caldwell* v. *Neely*, 81 N. C., 114; *Bell.* v. *Adams*, *Ibid.*, 118; *Pope* v. *Matthis*, 83 N. C., 169; *Gadsby* v. *Dyer*, 91 N. C., 311; *Claywell* v. *McGimpsey*, 4 Dev. 89, cited and approved).

CIVIL ACTION for the recovery of land, heard before *Gudger*, *Judge*, and a jury, at Spring Term, 1884, of BEAUFORT Superior Court.

The land, the title to a part of which is drawn in question in this suit, in 1809 belonged to John Gaylord, and both parties claim under him. He died soon after, leaving a widow Lucretia, and having made a will, that was admitted to probate the following year, wherein said land is devised to his six children by name, the plaintiff being one of them. Subsequently the plaintiff obtained two other shares. In January, 1811, Lucretia Gaylord, assuming to act in the capacity of executrix of the testator, entered into a written agreement with Richard Respass, the elder of that name, and the paternal grandfather of the defendant James T. Respass, in the operative words of which she undertakes to "acquit to and with the said Respass to take the grist-mill and saw-mill, and he to repair the saw-mill, and to put the dam in such places as he may think proper in the same, and to repair the road and bridges as soon as possible." For this service Respass is to "have the use of said saw-mill and timber on the lands adjoining the mill, until he is satisfied for his services, and for tending the grist-mill he, the said Respass, is to have the one-half of all the toll that she may take in." The other provisions relate to repairs, which

in some events are to be made at the expense of Respass, and in others at the expense of the testator's estate, and when the latter have been paid, the executrix is to "have one-third of all that he may saw at said mill, and Respass to have the refusal of the renting of the mill."

On the 25th day of February, 1813, the sheriff of Hyde made a deed to Richard Respass, Sr., for two-thirds of the mill and lands on Broad Creek, conveyed by John Gray Blount to John Gaylord, in which he recites several executions issued to him on judgments recovered by said Respass, and by others against the said John Gaylord, under and by virtue of which he sold the same to Respass for five hundred and twenty-five pounds.

On April 25th, 1819, an arrangement was made between Lucretia Gaylord and said Respass, in pursuance of which the former, for the recited consideration of a deed being executed to her six children "for one-half of Broad Creek saw and grist-mill, with one-half of the mill land, whereon I, the said Lucretia Gaylord, now live, with the exception of Lucretia Gaylord's life-estate, to enjoy said land and mill during her life," undertakes to convey by deed to him "all my (her) right and title in my dowry land laid off to me," &c., "in the half of mills and half of lands where said Richard Respass now lives, being the half of mills and lands owned by said Respass, that I convey my right of dower of, and no other."

In executing his part of the agreement, Respass, on the same day, for the sum of five hundred dollars, stated as the value of the consideration received, executed his deed to the said six children, designating each by name, for "one-half of the Broad Creek saw and grist-mills, with one-half of the lands purchased with said mills by John Gaylord from John Gray Blount, of the town of Washington, with the exception of the life-estate of Lucretia Gaylord in said mills and lands, the land being the half whereon the said Lucretia now lives, being one hundred and fifty acres more or less."

In 1825, under an order of the County Court of Beaufort, issued upon the application of those of the alleged owners of the lands derived from John Gaylord, partition was made by commissioners appointed for that purpose, and the land divided into six equal shares, one allotted to each of the testator's said children, and report made thereof. The land divided lies wholly south of what is known as the divisional line between the Gaylord and Respass lands, no portion of which is in controversy between the parties in this action.

Richard Respass died in August 1836, leaving a will wherein he devises the lands in dispute to his son Richard Respass, Junior, who died in 1845, and the defendant is his son and heir-at-law.

Lucretia Gaylord died in the latter part of the year 1840.

It was shown by various witnesses, and the fact not contested by the plaintiff, that the defendants and their ancestors had been in possession of the land north of the division line, and they claim none south of it, for sixty or seventy years.

Sophia, a daughter of John Gaylord, married John Adams, by whom she had five children, one of whom, John, married the widow of John Respass, Junior, and had issue, a son John F. Adams, who is still living, and another who died without issue. Upon the death of John Adams his widow married the defendant Jones, who, with her, continued to reside on the land, and with whom John F. Adams lived from infancy up, his stepfather becoming his guardian.

On December 1st, 1871, John F. Adams conveyed his interest in the lands in controversy to the plaintiff. Upon the trial, and under the instructions of the Court, a verdict was rendered in favor of the defendants, from the judgment on which the plaintiff appeals.

Messrs. Rodman & Son, for the plaintiff.

Messrs. G. H. Brown, Jr., and *H. A. Gilliam & Son*, for the defendants.

SMITH, C. J. (after stating the facts as above). The only exception taken, and not abandoned on the hearing in this Court, during the examination of the witnesses, was to the introduction of the deed from Respass, Senior, to the plaintiff and the other children of John Gaylord, made in April, 1819, on the ground of incompetency and irrelevancy, and for the further reason that the plaintiff, if not others, was then an infant.

Any properly registered deed, or certified copy from the registry, is competent, when pertinent to the issue, or inquiry pending, whatever may be its legal effect, and when made to infants, at the instance of their mother and for a valuable consideration coming from her, as is this, a mere gratuity to the grantees, assent will be presumed to have been given, and infants, to avoid this, must repudiate it after arriving at full age. Nothing of this kind appears to have been done.

It is not irrelevant since the plaintiff takes benefit under it, if it, the evidence, bears upon the issue; and if it does not we cannot see what harm comes from reading it. A deed is evidence of its own existence, and of whatever necessarily results from its existence, against all persons, while its recitals are evidence against the parties and others in privity with them. *Claywell* v. *McGimpsey*, 4 Dev., 89.

The effects of the several written instruments, assuming them to be effectual for the purpose intended, may be thus summarily stated:

The agreement entered into between the said Lucretia and the elder Respass in 1811, and under which the latter took possession, had for its object the separation of the mills and their management and operation by him for the common advantage, rather than the relation of a lease. But it was superseded by her deed of 1819, and by virtue of it, he acquired a moiety of her dower estate, and thus they became tenants thereof in equal parts. The contemporary deed of Respass to the children, *nominatim*, of John Gaylord, conveyed to them a moiety of the described lands, subject to the life-estate of their mother, whereby they became ten-

ants in common with him in the remainder, together possessing one undivided equal part. Richard Respass, Sr., died in 1836, leaving a will in which the lands are devised to his son of the same name, who continued in possession until his death in 1845, as has his son, the defendant James T. Respass, since, up to the bringing of this suit in 1877.

In the year 1840 the dower estate in the premises terminated by the death of the said Lucretia. It was not contested that the grandfather, father, and son, successively and continuously for a period back of sixty or more years, had been in possession, claiming the lands without interruption from others, as of right. As more than twenty years elapsed after the expiration of the life-estate before the act suspending the statute of limitations went into operation, during which all the other tenants were of full age, their entry is tolled, and their right of action barred. *Covington* v. *Stewart*, 77 N. C., 148; *Caldwell* v. *Neely*, 81 N. C., 114; *Bell* v. *Adams*, *Ibid.*, 118; *Pope* v. *Matthis*, 83 N. C., 169.

This may not be true as to such as were infants in 1840, and remained under such disability so long that the prescribed period of time had not passed, but the time would avail against the plaintiff who became of age in February, 1829.

But farther than this, the adverse occupation extended over more than seven years after the suspending act ceased to operate and before the issuing of process.

The sheriff's deed, as well as the devise in the will of Respass, Sr., was color of title and operated as such during the hostile occupation. The plaintiff insists, however, that no estate passed to him and others by the deed of Respass to them in 1819, and that their title is superior under their father's will.

It is true a party by taking a deed from one claimant, does not debar himself from setting up a better title derived from some other source, but this would not avail the plaintiff, since the possession under color of title would be equally efficacious, (if not more so,) if there was no tenancy in common, and indeed would bar him in a shorter period.

Nor would the plaintiff's disability in 1819 repel the presumption of his acceptance of the conveyance, from his long acquiescence in the defendants' possession and failure to assert any independent right to the premises. While, when the disability ceased, he could have repudiated the conveyance, it does not appear that he has done so, or done any act inconsistent with its provisions.

The case is different, however, in respect to the occupation of the defendant Jones. James F. Adams, the owner of a small fractional interest, has remained on the land with his step-father and guardian, so that there has been no adverse holding by the latter against him. In case of a common possession by two or more the ownership draws to it the possession, and it is deemed to be in him who has the title.

The inconsiderable interest of Adams, never divested by an adverse holding, passed to the plaintiff in 1871, under his deed of that date. The principle prevailing in such cases, is so clearly stated in the opinion of Baron Rolfe in *Daniel* v. *Woodruff*, 10 M. & W., (Ex.) 607, that we transfer his words: "We are of the opinion that the intention was wholly immaterial, and that the effect of the entry must be ascertained upon legal principles, irrespective of the motives or meaning of the party by whom the entry was made. Where a party having a right of entry, enters, it is not competent to him to repudiate any rights he may possess, and to say he has entered as a trespasser, or by some other than his real title. As soon as he has entered he is possessed, whether he will or not, by virtue of every title which he had in him, and which he could assert by entry." The remark applies with equal force to a possession acquired and continued. Declarations of non-claim, however often and persistently repeated, do not change the relation of the owner to the possession, which, in spite of all attempted disclaimers, is in him under and by virtue of his title. *Gadsby* v. *Dyer*, 91 N. C., 311.

It is needless to examine the instructions which form the subject of appellant's complaint in detail. They may be all resolved in these general propositions.

1. An estoppel rests upon the defendants, and prevents their calling the plaintiff's title in question, arising out of the contract of the executrix by virtue of which possession was acquired.

2. The possession of James F. Adams not only protects his estate, but enures to the common benefit of all his co-tenants and protects them also.

What we have already said disposes of the appellant's exceptions, and disposes with the further and separate examination of them.

There is no error in the rulings so far as they relate to the defendant Respass and his possession, but there is error in them as applied to his co-defendant's possession, as according to our understanding of the record, he occupies a distinct and separate part of the land claimed in the action. There must, therefore, be a new trial of the issues between him and the plaintiff, while the judgment in favor of Respass must be affirmed.

Let this be certified to the end that the verdict be set aside as to the defendant Jones, and a *venire dè novo* awarded for the trial of the issues as to him, and further proceedings be had according to law.

It is so ordered.

MRS. JAMES B. BROADFOOT v. A. A. McKEITHAN, JR., Adm'r.

Appeal—Transcript.

When the transcript does not show that any court was held, or that any Judge was present or gave judgment, it is so defective that the Supreme Court has no jurisdiction to act upon it.

This was a motion made by the plaintiff at February Term, 1885, of the Supreme Court, to re-instate a case on the docket which had been docketed and dismissed by the appellee under the rule.

Mr. W. A. Guthrie for the plaintiff.
Mr. D. G. Fowle for the defendant.

MERRIMON, J. The plaintiff moved at the present term, to re-instate upon the docket a supposed appeal, dismissed at the last October Term of this Court.

We do not deem it necessary or proper to find the facts involved in the motion and decide upon its merits, because what seems to have been intended to be the transcript of an appeal, is not such transcript in any legal sense. It does not appear from it that a Superior Court was held at any time or place, or that a Judge held a term of the court, or gave a judgment from which an appeal was or could be taken. The supposed transcript is so essentially defective, that it cannot give us jurisdiction to act upon it for any purpose. The motion must therefore be dismissed as having been improvidently made.

It is so ordered.

G. W. PITTMAN et als. v. JOHN KIMBERLY et als.

Appeal—Certiorari—Case on Appeal.

1. An appeal must be brought to the next term of this Court held after the appeal is taken.
2. If for any reason the Judge fails to settle the case on appeal upon disagreement of counsel, in time for the appeal to be docketed in the Supreme Court, the appellant must bring up the record in its imperfect state and have it docketed, and then move for the proper orders to get the case on appeal before this court, otherwise the appeal will be dismissed.
3. It is the duty of the appellant and not of the clerk to have the record sent to the Supreme Court. So where the case on appeal was filed in the office of the Clerk of the Superior Court a short time before the Term of the Supreme Court to which it should have been brought expired, but the transcript was not docketed until during the next term, the appeal was dismissed, although the appellant had applied for a *certiorari* at the term at which his appeal should have been docketed.

(*Smith* v. *Lyon*, 82 N. C., 2; *Officers* v. *Bland*, 90 N. C., 6; *Suiter* v. *Brittle*, Ibid 19; *State* v. *O'Kelly*, 88 N. C., 609; *Wiley* v. *Lineberry*, 88 N. C., 68; *Owens* v. *Phelps*, 91 N. C., 253, cited and approved.)

MOTION by the defendants to dismiss an appeal heard at February Term, 1885, of the Supreme Court.

The facts appear in the opinion.

Messrs. Theo. F. Davidson, C. A. Moore and Battle & Mordecai for the plaintiffs.

Mr. J. H. Merrimon for the defendants.

SMITH, C. J. This action for the recovery of land was brought to a trial and determined at Spring Term, 1884, of Buncombe Superior Court in a verdict and judgment for the defendants. The plaintiffs entered their appeal and filed the undertaking on July 7th as prescribed by law. Their counsel at once prepared the case on appeal and caused it to be delivered to the defendants' counsel who filed exceptions, and both papers were forwarded to the judge before whom the trial was had, who

received them while holding a term of the Superior Court of Randolph county. The case was settled after some delay, which he explains, and transmitted to the clerk of the Superior Court of Buncombe and received by him on December 13th, 1884, as was conceded in the argument, for the record shows no note of the date of the filing.

On the day previous the appellants applied for a writ of *certiorari*, stating in their petition besides the facts already mentioned, that their counsel made repeated requests, by letters addressed to the judge, to settle the case, having obtained the consent of counsel for the appellees that it might be done without the presence of or notice to the counsel of the time and place of doing so, and that more recently application was made by telegram, to which he returned answer that he had been in ill health and much pressed for time, but would soon prepare and transmit the case to the clerk. This was accordingly done at the time mentioned. This court remained in session until the 27th day of December, the day of its adjournment. The transcript was sent up and filed with the clerk of this court, as appears from his endorsement thereon, on March 24th of the present term.

The appellees now move that the appeal be dismissed because it was not prosecuted by filing a transcript at the last term, which in numerous decisions we have held to be necessary to its maintainance in this court. *Smith* v. *Lyon*, 82 N. C., 2; *Officers* v. *Bland*, 90 N. C., 6; *Suiter* v. *Brittle*, Ibid, 19; *State* v. *O'Kelly*, 88 N. C., 609.

The motion is met by the suggestion that the cause was in legal effect put upon the docket at the proper time by the filing of the petition for the *certiorari*, the pressing of which was dispensed with by the filing of the full transcript at the present term. And it is further maintained that it was the duty of the clerk, not of the appellants, to send up the record before, if necessary to the perfecting of the appeal, as well as after, the case was received from the Judge.

This is a misconception of the law. The default, if there be such, is that of the appellants, not of the clerk. The statute imposes upon him the duty "on receiving a copy of the case settled" to "make a copy of the judgment roll and of the case," and within twenty days to transmit it properly certified to the clerk of this court. *Code*, sec. 551. This limited time had not ended when the term of this court expired, and while the clerk might have done this during the remaining fourteen days, he was not required to do it.

But it was the duty of the appellants to perfect their appeal by filing a transcript, whether with or without the case stated, during the October sitting of the court. We have heretofore called attention to this, and suggested to appellants and counsel that the record, even in its imperfect form, should be filed so as to constitute the cause in this court during the term next succeeding the appeal.

In *Wiley* v. *Lineberry*, 88 N. C., 68, determined two years since, Ruffin, Judge, in concluding the opinion, uses this language:

"We take occasion to suggest, that in a case like the present, and in all others in which there should be any difficulty in procuring a statement of the case on appeal, it is best that parties should at least forward and cause to be docketed, a transcript of the record proper of the case. In this way they will secure a footing in this court and can always have its aid in perfecting their appeals, and it may be *that the Court will hereafter insist upon this course being taken.*"

The admonition was repeated by Justice Merrimon a year later when he said that "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. *Suiter* v. *Brittle*, 90 N. C., 19.

The same declaration as to the proper practice was reiterated at the last term, when it is said that "ordinarily when an appeal

is taken, it ought to be brought up, *whether the case for this court is settled or not*, and all proper motions to perfect the record for this court can be made in it." *Owens* v. *Phelps*, 91 N. C., 253.

The reason for the requirement of this course is obvious, to show an intention to proceed in the cause in the appellate court and not to abandon the appeal.

There was no occasion for the *certiorari*, for there was no neglect or misconduct imputed to the clerk in failing to send up the record as it then was, and the application of the writ, as directed to the judge, would have been proper after the appeal had obtained a footing in this court. It is not suggested that any request was made of the clerk to prepare and transmit a copy of the record, as it then was, or even after it was completed by the case sent to him by the judge. What excuse is offered for the omission? And why was not the transcript sent up before the end of the term? No satisfactory answer is given to these inquiries, and for this delay no sufficient excuse is offered. It is an imperative duty to enforce the rules of practice prescribed for appeals as long as they exist, and modify them if found harsh or oppressive in their operation, and these rules will be found in the action of the court, and in the opinions delivered, as well as those expressed in formulas. We are constrained therefore to refuse to entertain the appeal and it must be dismissed. Let this be certified.

Appeal dismissed.

W. A. DILLS v. E. R. HAMPTON.

Trespass—Waste—Estoppel—Licenser—Judge's Charge.

1. Where the defendant, as overseer of a road, entered on and took possession of a piece of land belonging to the plaintiff for the purposes of the road, under a license from the tenant of the plaintiff; *Held*, that he was liable in damages in an action by the owner of the fee.

2. In this State, any act which works a permanent or present injury to the freehold, is waste.

3. A license from one who had no right to give it cannot justify an illegal act.

4. A grant from the State will be presumed from thirty years' possession, although no privity can be traced between the successive occupants.

5. A charge which is in part erroneous, but which calls the attention of the jury fairly to the material questions on which they are to pass, is no ground for a new trial.

6. One who enters as a licenser is estopped to deny the title of his licensee, and when the license is given by a tenant, the licenser is estopped to deny the title of his licensee's landlord.

(*Moore* v. *Hobbs*, 77 N. C., 65; *Knight* v. *Houghtalling*, 85 N. C., 17; *Williams* v. *Lanier*, Busb., 30; *Fitzrandolph* v. *Norman*, N. C. Term Rep. (127), 564; *Simpson* v. *Hyatt*, 1 Jones, 517; *Lewis* v. *Sloan*, 68 N. C., 557; *Whitaker* v. *Cawthorne*, 3 Dev., 389, cited and approved).

CIVIL ACTION, tried before *Gudger, Judge*, and a jury, at the Fall Term, 1883, of JACKSON Superior Court.

The action was brought to recover damages for an alleged trespass committed by the defendant upon a certain piece of land for which the plaintiff alleged he had title.

In his complaint the plaintiff alleged that the defendant entered upon the *locus in quo* with force and arms, and with divers persons, and tore down his fence and removed it back upon his land so as to throw out of his inclosure a strip of his cultivated land one hundred yards long and from eighteen to twenty-seven feet wide, thereby turning out and exposing to depredation a great part of his land which was very valuable, together with many large and valuable fruit trees, to-wit: ten apple trees.

The defendant denied the allegation of the plaintiff as set out in the complaint.

The following are the facts disclosed by the case on appeal:

The plaintiff offered a deed for the land in question to him from the executors of one Love. The deed was permitted to be read, under objection by the defendant, His Honor, at the time, stating that the deed would do the defendant no harm unless the plaintiff showed that the makers thereof had the right to make the deed.

The plaintiff obtained the possession of the land in August, 1882, and leased it to one Inman for three years, who assigned the lease to Bumgarner. The lease had not expired when the alleged trespass was committed. One Jones and his father had been in possession and cultivation of the land for forty years or more before the possession of the plaintiff. The fence inclosing the *locus in quo* was taken down by the defendant, and moved back upon the cultivated land for the distance of about one hundred yards in length and to the width of from eighteen to twenty-seven feet, and thereby several apple trees, which the plaintiff had reserved from the lease, were turned out and exposed to depredations.

A public highway ran between the fence, as it originally stood, and a creek. The road had become impassable, and the defendant, who was the overseer, moved the fence of the plaintiff back in order to open a road over the land in question.

The defendant had no authority for changing the road, and was forbidden by the plaintiff to make the change before it was done. Prior to moving the fence the defendant had obtained the consent of Bumgarner to do so.

The defendant requested the following instructions, to-wit:

(1) That the gist of this action is the breaking the close of another, and that in order to maintain the action, the plaintiff must, at the time of the trespass, have the actual possession of the land and not the right merely to enter.

(2) That the right to enter and gather apples merely was not such a possession as would support the action—the plaintiff must have the exclusive interest in the land at the time.

(3) That in order that the plaintiff may recover in this action, he must show title in himself and those under whom he claims, or the actual and rightful possession of the land—that in this case the plaintiff has failed to show such title as the law requires, and if he recover at all, he must recover upon his actual possession. That if from the evidence they should be satisfied he did not have actual possession, then he could not recover.

(4) That if the jury should believe that Bumgarner, the tenant in possession of the close, gave permission to the defendant to go upon the land and move the fence, then the plaintiff cannot recover.

(5) That the damage must be proximate and not remote, and that the loss of a crop of apples is too remote.

(6) That the damages must be for the act of entering and breaking the plaintiff's close, and cannot be for damages resulting after the trespass, such as injury to the subsequent year's crops, or the loss of the subsequent apple crops, being after the plaintiff had knowledge of the moving of this fence.

(7) That the moving the fence by the defendant did not disseize the plaintiff of his freehold, if he had such an interest, and that he or his tenants might have re-entered immediately after the trespass complained of, and fenced up the road so opened.

The Court declined to give the instructions and the defendant excepted.

The court charged the jury as follows, to-wit:

(1) That the deed from James R. Love's executors was not sufficient to show title in the plaintiff, and that they should not consider it as any evidence of title.

(2) That if the plaintiff and those under whom he claimed had been in the actual possession of the land upon which the road is alleged to have been made, for twenty years or more, excluding the time elapsing between the 20th day of May, 1861, and the 1st day of January, 1870, then the law presumed the title to be in the plaintiff.

(3) That if the defendant had been notified by plaintiff not to enter and tear down the fence, and afterwards procured a license from Bumgarner to enter, the defendant could not deny plaintiff's title, for that the title and possession of the tenant is the title and possession of the landlord.

(4) The defendant could not justify his act in entering on the lands mentioned in the pleadings, if he did enter, because he was an overseer of the road.

The defendant excepted to the second, third and fourth instruction as given by the Court:

There was a verdict for plaintiff; judgment accordingly; and defendant appealed.

No counsel for the plaintiff.

Messrs. T. F. Davidson and *Armistead Jones*, for defendant.

ASHE, J. (after stating the facts as above). The instructions asked by the defendant are predicated upon the idea that this is an action in the nature of *trespass quare clausum fregit.* If so, there would be error in the refusal of His Honor to give the instructions prayed for by the defendant. But the defendant has misconceived the plaintiff's cause of action. Upon the facts stated, the nature of the action is *trespass on the case,* and the instructions asked are not applicable to such an action, and we, therefore, hold there was no error in the refusal of His Honor to give them. When the facts of a case are stated in a "plain and concise statement of the cause of action," the plaintiff is entitled to any relief justified by the facts proved, and not inconsistent with the pleadings. *Moore* v. *Hobbs,* 77 N. C., 65; *Knight* v. *Houghtalling,* 85 N. C., 17.

The *gravamen* of the plaintiff's action is a permanent injury to the freehold. When there is such an injury done to land, and at the time there is a lease upon it, the lessee may sustain an action of trespass *quare clausum fregit,* and at the same time the reversioner may have an action against the trespasser for the injury to his reversionary interest in the freehold.

Here the plaintiff claimed title to the land, he had leased it to Inman for three years, who had assigned the lease to Bumgarner, and the lease had not expired when the trespass complained of was committed. Bumgarner might have sustained an action for the trespass, if he had not given his consent to it; and the plaintiff clearly had a right of action for the trespass, if he had the title and the trespass worked a permanent injury to the freehold affecting his reversion. *Williams* v. *Lanier,* Busb., 30.

These are principles too well settled to require the citation of authorities to support them.

If Bumgarner had committed the acts complained of by the plaintiff, he would have been liable to the plaintiff in an action of *trespass on the case* in nature of waste under the former system of pleading.

Waste as defined by *Blackstone*, Book 2, page 281, "is a spoil or destruction in houses, garden-trees, or other corporeal hereditaments to the disherison of him that hath the remainder or reversion in fee simple, or fee tail." The conversion of land from one species to another is waste in England; as to turn arable land into pasture or meadow, or meadow into arable, or arable into woodland, are all of them waste. *Ibid.*, 282. In this State the question of waste depends upon the fact whether the injury to the land works a permanent or present injury to the freehold. Surely then, the turning out arable land, not into woodland, but to the uses of a highway to be trampled upon and cut up by the feet of horses and the wheels of vehicles would be waste much more serious and injurious to the freehold than turning it into woodland or to a different species of husbandry. If Bumgarner would be liable to an action for such an injury as that complained of, he certainly had no right to give permission to another to do the act, and one who commits an illegal act can never justify under a license from one who had no right to give it. The permission then, given by Bumgarner to the defendant could not avail him as a defence to the action.

But the defendant contends that the plaintiff had no title to the land, and insisted there was error in the instructions given by His Honor to the jury in the second, third and fourth instructions.

As to the second instruction, it is held that thirty years possession of land will presume a grant from the State, although no privity can be traced between the successive occupants. *Fitzrandolph* v. *Norman*, N. C. Term Rep., (127) 564; *Simpson* v. *Hyatt*, 1 Jones 517. But even if there was error in the instruction, it could not have misled the jury, for the third instruction

was clearly right, and laid down the principle which governs the case, to-wit, that the defendant, having procured a license from the lessee, Bumgarner, to enter the land, he could not deny the title of the plaintiff, for the title and possession of the tenant is the title and possession of the landlord.

Even if the instruction was erroneous in its application to the facts of the case, it is not ground for a new trial, when the court calls the attention of the jury to the *material question* on which they are to pass. *Lewis* v. *Sloan*, 68 N. C. 557.

There is no principle better settled than that a tenant cannot dispute the title of his landlord, and it is also well settled that the doctrine of estoppel, as applicable to tenants, prevails against one who enters or takes possession under a mere license. *Bigelow on Estoppel*, page 425. In *Johnson* v. *Baytup*, 3 A. & E., 188, it was held that where a "lessor of a plaintiff being, in possession of a house and premises, defendant asked leave to get vegetables in the garden, and having obtained the key for that purpose, fraudulently took possession of the house and set up claim of title; *Held*, that having entered by leave of the party in possession, she could not defend an ejectment, but was bound to deliver up the premises before she proceeded to contest the title—a mere licenser being in this respect on the same footing as a tenant." The same doctrine is maintained in this State in *Whitaker* v. *Cawthorne*, 3 Dev., 389, and to the same effect are *Glynn* v. *Grays*, 20 N. H., 114; *Wilson* v. *Motly*, 59 N. Y., 120; *The Hamilton and Rossville Hydraulic Co.* v. *The Cincinnati, Hamilton and Drayton R. R. Co.*, 29 Ohio State, 341.

The defendant is estopped as licenser of Bumgarner to deny his title, and Bumgarner as tenant of the plaintiff, is estopped to deny his title, *ergo*, the defendant is estopped to deny the title of the plaintiff. So there was no error in the third instruction.

The fourth instruction was so manifestly correct that it is useless to discusss it or take further notice of it.

There is no error. The judgment of the Superior Court is affirmed.

No error. Affirmed.

J. R. TRULL et als, v. POLLY RICE et als.

Partition—Judicial Sale—Re-sale.

1. It is a well settled rule of practice in this State, that in judicial sales, the biddings will be opened and a re-sale ordered, if before the sale is confirmed, an advance of ten per cent. is offered. After confirmation the biddings will not be re-opened, except in case of fraud or unfairness, or some other adequate cause.
2. Where, however, the Judge below, in the exercise of his discretion refuses to open the biddings on an advance of ten per cent. before the sale is confirmed, the Supreme Court will not direct him to do so.
3. In an application to set aside a sale and re-open the biddings, the Supreme Court will not look into conflicting affidavits, but are governed by the facts as found by the Judge.

(*Attorney General* v. *Roanoke Navigation Co*,, 86 N. C., 408; *Pritchard* v. *Askew*, 80 N. C., 86; *Bost, ex-parte*, 3 Jones' Eq., 482; *Blue* v. *Blue*, 79 N. C., 69; *Wood* v. *Parker*, 63 N. C., 379; *Miller* v. *Feezor*, 82 N. C., 192; *Simmons* v. *Foscue*, 81 N. C., 86; *Lovinier* v. *Pearce*, 70 N. C., 167; *University* v. *Lassiter*, 83 N. C., 38, cited and approved).

MOTION to set aside a sale and re-open biddings heard before *Graves, Judge,* on appeal from the clerk, at Spring Term, 1884, of BUNCOMBE Superior Court.

His Honor refused to order a re-sale and affirmed the judgment of the clerk, from which the plaintiff J. R. Trull appealed.

Mr. Chas. A. Moore, for the plaintiffs.
Mr. S. H. Reed, for the defendants.

SMITH, C. J. The petition for partition and sale of the tract of land described therein, in order to an assignment to the co-tenants in severalty of their respective shares, was filed on the 2d day of March, 1877, in the Superior Court of Buncombe, before the clerk, and after amendments introducing other interested parties in the action, was prosecuted to a final judgment for actual partition without a sale, in November, 1880. The land is estimated to contain one hundred and fifty acres, whereof the

petitioners James R. Trull, Emma, Charles M., and Julia McAfee, and the defendant Polly Rice are entitled to one undivided seventh part each, and the other defendants, seven in number, are entitled to the remaining one-seventh, the whole being subject to the dower of Jane McAfee, which has been allotted and assigned to her. Upon an appeal to the Judge, so much of the order as directs an actual division and refuses a sale was reversed, and on an appeal to this court that ruling was sustained. *Trull* v. *Rice*, 85 N. C., 327.

On February 17th, 1882, an order for the sale of the premises was entered by the clerk, and at the sale the plaintiff Trull, purchased at the price of one hundred and fifty dollars.

The sale was set aside upon an offer of one of the defendants' counsel to double the bid. The land was again exposed to sale when Jane McAfee, the tenant in dower, became the purchaser at the price of twenty-five dollars of so much as was covered by the dower, and the defendant J. C. McAfee of the residue, unencumbered, for three hundred and five dollars. Thereupon one B. R. Trull, assuming to act for his brother, the plaintiff J. R. Trull, proposed to increase the bids, the one to forty dollars and the other to three hundred and fifty dollars, and concurrent motions were submitted by defendants' counsel to confirm, and by plaintiffs' counsel to vacate the sale.

The other co-tenants are content and do not desire the sale to be disturbed. The motion to set it aside is made at the sole instance of the plaintiff Trull. The commissioner's report is found in the transcript, and it appears therefrom that he recommends that the sale be confirmed. Several affidavits were read before the clerk, one from the said B. R. Trull, and several from other persons on behalf of the defendants, in reference to the sale of the property, the first representing it to be worth, the reversionary estate, seventy-five dollars, and the residue four hundred dollars, while the others regard the sale to have been made at the full value, some of the witnesses being entirely disinterested. Upon the hearing the sale was confirmed, and on

appeal to the Judge, he affirmed the ruling of the Clerk, declaring, upon an examination of the testimony, that, "it appeared that the offer to increase the bids was made by the plaintiff *for the purpose of obtaining an unfair advantage of the other parties.*"

From this judgment the plaintiff Trull appeals, and asks us to review and reverse the order of confirmation, and direct another sale to be made by the commissioner. This is the only matter presented in the record.

It is a well-settled rule of practice in this State, which has long prevailed, to regard an offer of an advanced bid of not less than ten per cent. on the sum reported upon a sale by a commissioner acting under an order of the Court, as a sufficient reason for refusing to confirm the sale, and directing a re-sale of the property, while after confirmation, the biddings will not be re-opened, except in case of fraud or unfairness or other adequate cause shown for reversing the order. *Attorney General* v. *Roanoke Nav. Co.*, 86 N. C., 408. But we have been referred to no cases in which, upon the mere ground of a proposal to increase the bid, and without regard to surrounding circumstances, this Court has undertaken, in the exercise of an appellate jurisdiction in matters of law, to compel the Judge in the Superior Court to refuse the proposal of the reported bidder and to direct a re-sale of the property.

The court to whose sound discretion the question of affirming is addressed, is reluctant to set aside a sale made under its authority and by its own appointee, and, in the language of Dillard, J., "is careful not to do so, unless there be some special circumstances, such as unfairness in the conduct of the sale, want of proper notice of the time and place of sale, fraud in the purchaser and *palpable inadequacy of price*, and similar grounds." *Pritchard* v. *Askew*, 80 N. C., 86.

This is said in a case where the sale was under a decree in this Court, and where its relations to the cause were the same as those in the courts below. Examining the cases cited, none will be found to contravene the general rule of judicial action mentioned.

In *Bost, ex-parte,* 3 Jones Eq., 482, a cause in the former court of equity, the evidence was examined and the facts deduced. The appeal was from an order setting aside a sale and the ruling was sustained.

In *Blue* v. *Blue,* 79 N. C., 69, the sale was set aside for irregularity and other intrinsic defects, and not for an advanced bid.

In *Pritchard* v. *Askew, supra,* and *Wood* v. *Parker,* 63 N. C., 379, the sales were under judgments in this Court and were under its control.

In *Miller* v. *Feezor,* 82 N. C., 192, the purchaser of a slave, who was emancipated before title made, was released from his obligation to pay the purchase money, and only required to account for the hire received.

In *Attorney General* v. *Roanoke Navigation Co., supra,* the sale was set aside upon the proposal to pay the increased price, and this order was sustained on the appeal.

In *Simmons* v. *Foscue,* 81 N. C., 86, an erroneous ruling in regard to a matter of law, was corrected on appeal, and there being no other exceptions, the report was confirmed.

In this case, as in *Lovinier* v. *Pearce,* 70 N. C., 167, while the necessity of finding the facts in the court below is recognized and declared, this court did look into the affidavits to see what facts are not in controversy and assume them to be intended to be presented, and proceeded to judgment upon them.

In the latter case, Mr. Justice Reade says, "It is true, His Honor does not make out a separate statement of the facts, as usually it is *best,* and as in cases where the facts are complicated or the testimony contradictory, it is *necessary* for him to do, yet the facts do distinctly appear," &c.

In the former it is remarked where the evidence and not the facts was sent up, "ordinarily we should feel constrained to remand the cause for the findings of fact, or affirm the judgment because no error is apparent. * * * But as the statements made on the affidavits do not conflict, except, perhaps, in estimates, we may assume them to contain the admitted facts on

which the rulings in the court below were based," &c. *University* v. *Lassiter*, 83 N. C., 38.

If we were at liberty to look into the affidavits, while the appellants differ in their estimates of the value of the property, all but the plaintiff's brother deeming the sale to have been at a full and fair price, there are no facts stated which impeached in any manner the integrity and fairness of the sale in its conduct by the commissioner, or combination among bidders. The clerk, upon a full hearing, affirmed the sale—his ruling was concurred in by the judge, and if we had the power to correct it, no sufficient reason is assigned for our doing so, in opposition to the wishes of the owners of six-sevenths of the estate, at the instance of a single dissatisfied tenant. But the confirmation or vacation of the sale rests in the sound discretion of the court below, and we recognize no inexorable principle of law which requires a vacation of a sale upon the ground of an offer of a larger price merely, in disregard of all considerations which prompt the acceptance of the bid.

There is no error. This will be certified.

No error. Affirmed.

SPENCE & ROSS v. J. M. TAPSCOTT.

Appeal—Transcript of the Record.

1. In order for the Supreme Court to acquire jurisdiction, it must appear in the transcript of the record that an action was instituted, that proceedings were had and a judgment rendered from which an appeal could be taken, and that an appeal was taken from such judgment.

2. Where the transcript of the record sent to the Supreme Court is imperfect, the appeal will not be dismissed, but the papers will be remanded, in order that a proper transcript may be sent up.

(*Buie* v. *Simmons*, 90 N. C., 9; *Moore* v. *Vanderburg*, *Ibid.*, 10, cited and approved).

SPENCE & ROSS *v.* TAPSCOTT.

MOTION by the defendant to dismiss an appeal, heard at February Term, 1885, of the Supreme Court.

Messrs. Scott & Caldwell and E. C. Smith, for the plaintiffs.
Messrs. Graham & Ruffin, for the defendant.

MERRIMON, J. That which purports to be the transcript of the record of an appeal in this case is so defective, that we cannot treat it as bringing the appeal, which it seems was taken in an action in the Superior Court of the county of Alamance, into this court. The papers sent up are fragmentary and confused. It does not appear, except by vague inference, that a court was held at the time and place prescribed by law, and that the Judge named presided.

Nor does it appear that any action was begun in the court. It seems that an action was begun before a justice of the peace at some time not specified, but it does not appear that he gave any judgment, or that any appeal was taken from any judgment by him to the Superior Court; nor does it appear that the latter court got any jurisdiction of the matter, that seems to have been before it in a very disorderly shape. It is said that there was a trial of issues by a jury in the Superior Court, but no record of such trial appears, nor does it appear in the record proper that any appeal was taken to this court. It appears that a judgment was given, but on what account allowed, or in what connection, we cannot see. A case upon appeal is sent up, but this is not sufficient to give the court jurisdiction.

An appeal must be constituted and brought into this court according to law. It is governed by rules of procedure, and their essential requirements must be observed. Otherwise regular authority cannot prevail. Ordinarily, it must appear in the record, with reasonable certainty, that an action or proceeding was instituted in or brought into court, from which an appeal lay; that proceedings were had, and a judgment or order given, from which an appeal lay, and that an appeal was taken from such judg-

ment or order to this court, in order to give it jurisdiction. This is essential to the establishment of appellate relation between the court from whose judgment the appeal was taken and this court. Procedure is essential to jurisdiction, as well as to the application of principle in courts of justice, and it cannot be dispensed with. It is dangerous to ignore or disregard it. Our daily experience and observation afford ample evidence of an incautious disposition on the parts of courts and gentlemen engaged in the practice of the law, to dispense with essential forms and methods of procedure. In our judgment, this is greatly to be deplored. It is not only discreditable to the administration of public justice, but it leads eventually to confusion and wrong, and leaves the rights and estates of many people in a more or less perilous condition.

A motion is made to dismiss the appeal in the case before us. The appeal is not here, and we cannot entertain the motion. But with a view to the ends of justice, we will remand the papers sent up, so that proper steps may be taken to perfect the record and put the case in a shape to be heard and determined intelligently. *Buie* v. *Simmons*, 90 N. C., 9; *Moore* v. *Vanderburg*, *Ibid.*, 10.

Let an order be drawn remanding the papers on the files of the court.

Remanded.

ASHEVILLE DIVISION No. 15, SONS OF TEMPERANCE, et als. v. ASTON.

Corporation—Forfeiture of Charter—Deed—Ejectment.

1. A deed from an individual to a corporation will be good and pass the title to the land, if it clearly appears from the deed itself what corporation was intended, although a mistake or omission in the corporate name may have occurred, and this rule is not changed by the fact that at the time of executing the deed, the grantor was ignorant that the grantee was a body corporate.

2. If lands are conveyed to a corporation aggregate, it will, from the nature of such corporations, be understood as a fee without any words of limitation.
3. Although the existence of a corporation be limited to a certain number of years, yet it is capable of holding estates in fee.
4. A corporation, chartered for the purpose of promoting temperance, does not forfeit real estate which it has purchased, because it ceases to pursue the objects for which it was incorporated.
5. A corporation cannot endure longer than the time prescribed by its charter, and no judicial proceedings are necessary to declare a forfeiture for such a cause, but for any other cause of forfeiture a direct proceeding must be instituted by the sovereign to enforce the forfeiture, and it cannot be taken advantage of in any collateral proceeding.
6. A receiver, appointed under the act (The Code, sec. 670), to wind up the affairs of corporations, can proceed to collect in the assets, and to prosecute and defend suits, after the corporation has ceased to exist by the expiration of its charter.
7. The second story in a house, when held separately, may be recovered in an action of ejectment.

(*Deaf and Dumb Institute* v. *Norwood*, Busb. Eq., 65; *Ryan* v. *Martin*, 91 N. C., 464; *State* v. *Rives*, 5 Ired., 297; *Elizabeth City Academy* v. *Lindsey*, 6 Ired., 476; *Attorney General* v. *Railroad Company*, Ibid, 456; *Von Glahn* v. *DeRosset*, 81 N. C., 467; *Gilliam* v. *Bird*, 8 Ired., 280, cited and approved.)

CIVIL ACTION, heard before *Shipp*, *Judge*, and a jury, at Fall Term, 1884, of BUNCOMBE Superior Court.

This action, commenced on March 3rd, 1881, is to establish title to and recover possession of the third or upper story of a large brick building, erected by Mont. Patton, on Main street, south of the public square, in the town of Asheville, with the means of access thereto, in the occupation of and claimed by the defendant under a deed from said Patton of later date than that executed by him to the plaintiff.

Only one issue was submitted to the jury, viz:

What was the annual value of the rents and profits of the property sued for, since the defendant has been in possession?

As to the other facts, a jury trial was waived by consent of the parties, and they were tried by the Court, whereupon the Court found the following facts:

About the year 1848 there was a temperance organization in the town of Asheville known as "Asheville Division, No. 15." This organization continued until in January, 1851, when the Legislature of North Carolina passed an act incorporating "Asheville Division, No. 15, of the Sons of Temperance." This act was ratified January 28th, 1851. That the said Asheville Division, No. 15, organized under the act of 1851, and was acting under such charter, when on the 24th day of February, 1854, M. Patton executed and delivered to it his deed of that date for the property sued for. The deed described the vendee as "Asheville Division, No. 15." At the time he executed it, the vendor, while he knew there was a temperance organization in Asheville called "Asheville Division, No. 15," did not know that the organization had been incorporated, and did not know that it had any other name than "Asheville Division, No. 15"; that there was no other "Asheville Division, No. 15," or other temperance organization than the plaintiff corporation in Asheville at that time, and immediately after the execution of the deed the said corporation went into possession of the property and continued to occupy it until the year 1866 or 1867; that on the 21st day of January, 1863, said Patton conveyed to the defendant, E. J. Aston, the lot in the town of Asheville, upon which the building stood, the third story of which is sued for in this action. The deed was in the usual form of bargain and sale in fee, and contained an exception in the following words: "Except the upper story of the Temperance Hall building, which has been conveyed to the Sons of Temperance in the town of Asheville."

On the.....day of..... .. ..., 1882, the interest of Mont. Patton in the premises was sold by the sheriff of Buncombe county under an execution on a judgment against him (rendered long after the date of the conveyance above referred to), and one M. E. Parker became the purchaser and received a sheriff's deed therefore, and was permitted to become a party plaintiff in this action, and filed a complaint claiming title to the same property sued for in this action.

At Fall Term, 1883, of the Superior Court of Buncombe county, in an action instituted by J. M. Israel, one of the original members of said Asheville Division, No. 15, Sons of Temperance, against A. T. Summey and others, some of whom were original members of said corporation, A. T. Summey was duly appointed receiver of the effects of said corporation, with power of prosecuting and defending all suits then pending, or which might become necessary for the preservation of the effects of said corporation, and to wind up its business. By the terms of the decree the power of the receiver was extended for three years from the date thereof.

About the year 1867 the plaintiff corporation ceased to hold its usual meetings, and its regular election of officers, and had no further meeting or election until about a month previous to the commencement of this action, when about eleven of its members (seven constituted a quorum by its by-laws) met and elected officers, but did nothing more.

About the time said corporation ceased to hold its meetings and elect its officers as above found, a new temperance organization under the name of the "Friends of Temperance," was organized in Asheville and continued in existence for some time.

That a Masonic Lodge used the room or hall mentioned, as the tenant of the plaintiff corporation, until about the year 1874.

That shortly before the commencement of this action, one J. M. Israel, one of the original members of the corporation, and claiming to act for it, took possession of the hall and was afterwards ousted by the defendant.

The plaintiff objected to the introduction of all evidence tending to prove that the corporation has forfeited its franchises or corporate rights by non-user or mis-user, but insisted that even if the facts were sufficient to warrant a judgment of dissolution, the existence of the corporation could not be impeached in this proceeding, and could only be inquired into by a proper proceeding instituted by the State for that purpose.

The defendant insisted—

1. That the deed from Patton to "Asheville Division, No. 15," was not a conveyance to the "Asheville Division, No. 15, of the Sons of Temperance."

2. That if it were, that corporation expired on the 28th day of January, 1881, prior to the commencement of this action.

3. That if it did not, its charter rights had been lost by non-user.

4. That the deed from Patton to "Asheville Division, No. 15," conveyed but a life estate, and that upon the dissolution of the corporation for any cause, the property reverted to the defendant Aston, and that even if the said deed conveyed a fee simple, still upon the dissolution of the corporation, without having made a conveyance of the property and leaving no successor, it reverted to Aston.

5. Upon all the testimony of the case, neither of the plaintiffs were entitled to recover anything in this action of the defendant Aston, but that he was the owner in fee of the property and entitled to the possession of the same.

Upon the foregoing statement of facts, His Honor gave judgment for the plaintiffs, the "Asheville Division No. 15, of the Sons of Temperance," and A. T. Summey, receiver, made a party plaintiff at this term of court.

The defendant Aston appealed to the Supreme Court.

Messrs. Theo. F. Davidson and *Batchelor & Devereux*, for the plaintiff corporation.

Mr. Jas. H. Merrimon, for the defendant.

SMITH, C. J. (after stating the facts as above). The appellant's exceptions grow out of the following asserted propositions:

1. The misdescription of the corporate name of the plaintiff in the deed of Patton renders it inoperative as a conveyance of his title.

2. If effectual for any purpose, it passes only an estate for thirty years, the life of the corporate existence, unless meanwhile disposed of.

3. The estate having been acquired and held under the provisions of the charter, for the special and limited use in the promotion of temperance, could not be retained for another and different purpose.

4. The corporation was voluntarily dissolved in 1867, when it failed to hold meetings, and by elections perpetuate the officers incorporated and to exercise the conferred franchises. And if not, then,

5. The corporate life terminated either in 1881, thirty years after the passage of the act, or in 1884, thirty years after organizing under it.

These propositions maintained in the carefully prepared brief of the counsel of the appellant, we propose to successively examine.

(1) The misnomer.

There had been formed in 1848, and existed when the charter was granted, an association in the town, known as "Asheville Division, No. 15," with its proper officers, who were incorporated by the name of "Asheville Division, No. 15, of the Sons of Temperance," the only difference being in the superadded words "of the Sons of Temperance."

It is very manifest that the latter was intended to take under the deed, and is sufficiently identified by name. There is no *false description*, and even this may be sometimes corrected, but an omission only of a part of the corporate name, not producing any uncertainty as to the party meant.

A grant of land from an individual to a body corporate will be good, "if it can be clearly discovered from the terms of it, what corporate body is intended, though an omission or mistake in the corporate name may have been made." *Grant on Corporations*, 51.

"The name of a corporation frequently consists of several words and an omission or alteration of several of them is not material." *Angell & Ames on Corporations, sec.* 99.

A misnomer does not vitiate, provided the identity of the corporation with that intended by the parties is apparent. *Ibid.*,

secs. 185, 234; *Morawetz on Private Corporations,* 181. To the same effect are our own adjudications. *Deaf and Dumb Institute,* v. *Norwood,* Busb. Eq., 65; *Ryan* v. *Martin,* 91 N. C., 464.

In the latter case Merrimon, Judge, speaking for the court, uses this language: "If the name is expressed in the written instrument so that the real name can be ascertained, it is sufficient. * * * A misnomer of a corporation has the same legal effect as the misnomer of an individual."

The result is not affected by the grantor's want of knowledge that the voluntary association had become merged in the corporation, for the deed shows an intent to convey the room to an organic body, and the corporate name meets this requirement, without reference to the information possessed by the grantor. He conveys to "Asheville Disvision, No. 15," then an organized corporate body, and who is meant is demonstrated in the deed itself.

(2) The estate conveyed.

This was clearly an estate of inheritance, if the grantor had such to convey. The absence of the word "successors," following the name of the corporation aggregate, does not in any wise abridge or limit, and was unnecessary. In strictness, while a corporation sole has successors, a corporation aggregate has none, for it continues to exist, one and the same, as the river retains its identity, while the currents of water that form it are continually flowing in and passing out. There is a succession among the constituent members, but none in the corporation itself. *Angell & Ames on Corporations,* sec. 172. The corporation will cease to exist, as such, at the expiration of its prescribed limit of life, and it may sooner by a forfeiture of its privileges enforced by the State, as the life of an individual must terminate in the uncertain future, but each is capable of taking an estate beyond this duration, when the operative words of the conveyance are sufficient to pass it.

"A grant in fee to a corporation created for a term of years," we quote from the same author, "will not be construed to convey

the property for the term of years only." *Angell & Ames on Corporations*, sec. 195; *State* v. *Rives*, 5 Ired., 297–305–309.

(3) The trusts upon which the land is held.

The corporation continued to hold its meetings and elect its officers until 1867, about which time a new temperance association was formed, and thereafter the room was used by a masonic lodge, as tenant of the plaintiff, until the year 1874. Shortly before the institution of this suit, one of the original corporators, acting on its behalf, resumed possession and was afterwards expelled by the defendant. These facts do not sustain the proposition that the trusts had become extinct and the legal estate divested out of the owner. That estate remained in the corporation, and the trusts, if of the nature suggested, capable of being enforced by those interested, or on behalf of the State.

(4 and 5) These may be considered together as involving the question of the time of termination of the corporate life.

It is unquestionably true that a corporation whose term of existence is fixed and limited in the act which creates it, cannot endure beyond the prescribed time, unless prolonged by the same authority, or continued for the purpose of adjusting and closing its business, and no judicial proceedings are required to that end. The expiration of the time ends the life given to the artificial body, as death terminates the life of the natural person.

But an earlier determination of corporate existence, for fraud practiced in procuring the creative act, for an abuse of powers and franchises conferred, for usurpation of others not granted, or for non-use of such as may be possessed, must be enforced, in the name of the State, by proceedings directed by law, as contained in C. C. P., ch. 11, secs. 362 and following, or at the instance of a creditor of an insolvent corporation under sec. 22, ch. 26, *Bat. Rev.*, transferred with some modification to section 694 of *The Code*.

A cause of forfeiture cannot be taken advantage of collaterally or otherwise than by a direct proceeding for that purpose, so that the corporation may be heard in answer.

"The government creating the corporation can alone institute such a proceeding, since it may waive a broken condition of a compact made with it, as well as an individual." *Angell & Ames on Corporations*, sec. 777.

"The sovereign alone," remarks Daniel, Judge, in *Eliz. City Acad.* v. *Lindsey*, 6 Ired., 476, "has a right to complain, for if it is an usurpation, it is upon the rights of the sovereign, and his acquiescence is evidence that all things have been rightfully performed. *Atto. General* v. *Railroad*, Ibid., 456.

We do not advert to other methods by which a corporate body may become extinct, such as the death of its members and its supervening disability to exercise its corporate functions, as not pertinent to any inquiries presented in the appeal.

Nor is it very important to determine whether in counting the lapse of time, you begin at the date of the enactment, or of the birth of the organic body under it, or whether the term of the corporate existence expired in 1881 or in 1884, since one general statute, in force at each of those dates, continues the body corporate for three years longer, "for the purpose of prosecuting and defending suits by or against them," and during this interval receivers may be appointed whose powers may be continued as long as the Judge may find it necessary for the settlement of their affairs. *Rev. Code*, ch. 26, §§5 and 6; *Code*, §§667 and 668.

The act of 1872–'73 provides in express terms, that when such corporation as is therein referred to, shall expire or be dissolved, or its corporate rights and privilege shall have ceased, *all its works and property* and debts due it shall be subject to the payment of debts due by it, and then to be distributed among the members according to their respective interests, and such corporation may sue and be sued as before, for the purpose of, &c. *Bat. Rev.*, ch. 26, §48.

The same recognition of subsisting corporate indebtedness and the same imposed obligation on the receiver to appropriate funds to their payment, and distribute any excess among the stockholders or members of the corporation, are found in *The Code*, §670.

The operation and effect of this legislation in securing a just and proper administration of the effects and estate of a defunct corporation through an agency appointed by the court, and whose functions are analagous to those of an administrator upon the estate of a natural person deceased, have been so fully discussed in *VonGlahn* v. *DeRosset*, 81 N. C., 467, that we forbear to pursue this branch of the subject further.

In aid of the present action, a proceeding was begun in October, 1883, before the thirty years and those added had expired, from whichever time the count may begin, for the appointment of a receiver, and upon its being made in December following, with full powers under the law, the appointee, A. T. Summey, was admitted at Fall Term, 1884, as a co-plaintiff to prosecute the action. Even if the corporation no longer existed, this reciver or trustee, as he is indifferently designated in the statute (*Code*, §668), can maintain and proceed with the suit to recover the property.

The conveyance of the building by Patton to the defendant in January, 1863, is not only some nine years posterior to that made to the corporation, but it expressly excepts from its operation "the upper story of the Temperance Hall Building, *which has been conveyed to the Sons of Temperance* in the town of Asheville." Here the corporation is designated by the descriptive words omitted in the deed, which point out beyond all doubt, the party to whom he then intended to make the conveyance. Moreover, this reservation shows that no title has vested in the defendant to the property claimed in the suit.

That a house, and even a chamber in the house, resting upon the soil but held separately from it may be recovered in an action of ejectment is decided in *Gilliam* v. *Bird*, 8 Ired., 280.

In every aspect of the case then, we concur in the ruling of His Honor, that the defendant has no title to the property, and the plaintiffs, who have, are entitled to recover possession.

We have been much aided by the researches of counsel.

The judgment is affirmed.

No error. Affirmed.

ASHEVILLE DIVISION, NUMBER 15, SONS OF TEMPERANCE et als. v. ASTON.

Parties—Intervention.

A claimant to land in dispute between other parties to a suit, who is not connected with any interest in that controversy, but claims by a title different from that of both claimants in the suit, cannot intervene and become a party. A party may intervene when he has an interest in the controversy, but not when he has an interest in the thing which is the subject of the controversy.

(*Keathly* v. *Branch*, 84 N. C., 202; *Wade* v. *Sanders*, 70 N. C., 277, cited and approved).

This was the interpleaders' appeal in the foregoing action.

Two years after that suit was begun and the pleadings put in, application was made to the Court by H. M. Parker and his wife M. E. Parker, to be allowed to interplead in the cause and set up a superior and independent title to the property in the latter, in opposition to the claims of both parties to the action. This, with the consent of the plaintiff, they were permitted to do, and thereupon they file a complaint against the defendant, alleging the *feme* to be the owner of the *locus in quo*, the wrongful withholding, and they demand possession, with damages for detaining it.

Besides the facts found by the Court, contained in the record of the defendant's appeal, already determined, facts are found explanatory of the claim asserted on behalf of the interpleaders.

The judgment against M. Patton, under which his interest in the Sons of Temperance Hall was sold, was docketed in the Superior Court of Buncombe county in 1874, and executions were regularly issued thereon until 1882, when, under the last, the property was sold, and by the sheriff's deed conveyed to the said M. E. Parker. The defendant did not controvert these facts, but admitted that whatever interest remained in the judgment debtor, after the execution of the deed to him in 1863, in the property, liable to execution, passed to her.

Upon the rendition of judgment in favor of the plaintiff the interpleaders appealed.

Messrs. Theo. F. Davidson and *Batchelor & Devereux*, for the plaintiff corporation.

No counsel for the interpleaders.

Mr. James H. Merrimon, for the defendant.

SMITH, C. J. (after stating the facts). Our ruling in the other appeal, that the title to the room, with facilities of access to it as described in the deed to the "Asheville Division, No. 15, of the Sons of Temperance," was in that corporation, and that the receiver had a right to recover possession for the purpose contemplated in his appointment, disposes adversely of the present appeal, and a further examination of the subject would be superfluous. But we cannot let the occasion pass without some comment upon the manner in which the new controversy between the interpleaders and both the original parties is introduced in the cause. It is warranted neither by the practice nor The Code.

In *Keathly* v. *Branch*, 84 N. C., 202, this language is used in the opinion: "It is very clear that a claimant for land in dispute between other parties to a suit, and *not connected with, nor interested in that controversy, nor injuriously affected by its results,* cannot be allowed to intervene and assert his own independent title. This would be in effect to make a double action, and introduce new issues foreign to the original subject of controversy, and not within the scope of either section 61 or 65 of The Code." *Code,* §189.

"A party may intervene who has an interest in *the controversy*, but not when he "claims an interest *in the thing* which is the subject of controversy." Pearson, C. J., in *Wade* v. *Sanders*, 70 N. C., 277. The inconveniences of such a practice as was here pursued, are numerous and great. Let us suppose a sale when the defendant is in possession and is estopped to deny the title of either claimants—how is the cause to proceed in determining in which of the contesting claimants, or whether in either, the title is vested?

When a person holds a fund to which he has no claim himself but which is claimed by others, and he does not know to whom he should account, he, under the former equity practice, was allowed to file his bill against them to show their respective claims, for his own security and protection in delivering the property in his possession or paying over the funds in his hands. In such case he occupies the place of a stake-holder merely, and asserts no right in himself; and there is a single controversy and that confined to the defendants *inter sese*. *Story Eq. Pl.*, sec. 291.

We refer to this irregular proceeding that it may not be deemed a precedent for the practice.

There is no error and the judgment is affirmed.

No error. Affirmed.

MOORE & FALK v. THE FREEMAN'S NATIONAL BANK et als.

Agent—Process.

1. An attorney for a foreign corporation, who has claims to collect for them in this State, is not a local agent upon whom process can be served.
2. A local agent of a foreign corporation, upon whom process can be served so as to bring the corporation into court, means an agent residing either permanently or temporarily in this State for the purpose of his agency, and does not include a mere transient agent.

(*Cunningham* v. *The Southern Express Company*, 67 N. C., 425, cited and approved.)

CIVIL ACTION, heard before *Shipp, Judge*, at Fall Term, 1884, of BUNCOMBE Superior Court.

The facts fully appear in the opinion.

The defendant Bank appealed.

Mr. J. H. Merrimon for the plaintiffs.

Messrs. Theo. F. Davidson and *McLoud & Moore* for the defendants.

ASHE, J. This was a civil action brought by the plaintiffs against the defendant, a foreign corporation. The summons was returnable to the February Term, 1884, of Buncombe Superior Court, before Shipp, Judge. The defendant Nesbitt answered the complaint, and the counsel of the defendant corporation entered a special appearance to deny that the summons had been legally served upon it. The court after hearing the affidavits hereafter set forth, adjudged that Frank R. Nesbitt, upon whom the process had been served, was such an agent as a service may be made upon, and that the defendant bank might have until the next term to answer.

The affidavits upon which the court founded its adjudications were as follows:

George P. Tenney, being duly sworn, says: "That he is the cashier of the Freeman's National Bank, and was such at the times hereafter referred to. That he knows, of his own knowledge, that Frank G. Nesbitt is not now, nor was he ever at any time, the agent of the said Freeman's National Bank, to receive or collect any moneys for said bank in the State of North Carolina or elsewhere.

"That some time during the month of April, the defendant bank having certain bills of exchange, drawn by one Geo. T. Comins, directed to J. J. Hill & Co., Asheville, N. C., which had been duly accepted by J. J. Hill & Co., some of which had been protested and remained unpaid, the said bank employed the firm of Farensworth & Conant, attorneys and counsellors at law, of which firm the said Frank G. Nesbitt is a member, to sue upon the same. That at the instance of the bank, the said Farensworth & Conant sent the said Frank G. Nesbitt to Asheville, N. C., to assist the firm of McLoud & Moore in the suit against J. J. Hill & Co., and if necessary, and thought best by McLoud & Moore, to make affidavit, upon which to obtain an attachment against the property of J. J. Hill & Co. That the only relations existing between the said bank and the said Frank G. Nesbitt, is that of attorney and client, as above mentioned,

and this was the only relation existing at that time. That so far as the matter of the litigation against J. J. Hill & Co. was concerned, the only duty of the said Nesbitt was to render any legal aid he could to Messrs. McLoud & Moore, and, in case it should be thought advisable, to make the affidavit as aforesaid. That only the firm of McLoud & Moore were to receive the money from J. J. Hill & Co., if collected, and the duties of the said Nesbitt were as above stated only."

Frank G. Nesbitt, being first duly sworn, deposes and says: "That he is a member of the firm of Farensworth & Conant, attorneys and counsellors at law. Some time during the month of March, 1884, the said firm received for collection, by suit, several bills of exchange from the Freeman's National Bank, which amounted in the aggregate to several thousand dollars. The said drafts or bills of exchange were drawn by one Geo. T. Comins, directed to J. J. Hill & Co., Asheville, and made payable to the order of said Freeman's National Bank. The defendant Frank G. Nesbitt, representing his said firm, at the instance of said Freeman's National Bank, came from Boston, Mass., to Asheville, N. C., the place of business of the said J. J. Hill & Co., for the purpose of instituting suit upon said drafts, or those of them which were due, against the said J. J. Hill & Co. That after his arrival at Asheville, N. C., he, in his firm's name of Farensworth & Conant, in conjunction with McLoud & Moore, attorneys and counsellors at law, who had been employed to assist affiant's firm in the prosecution of said suit, brought suit in the Superior Court of Buncombe county, for his client, the Freeman's National Bank, against said J. J. Hill & Co. upon said bills of exchange. And the affiant having been, by said Freeman's National Bank, authorized to make an affidavit in the said case, in the event their attorneys, McLoud & Moore and affiant, should think best, for the purpose of obtaining an attachment against the property of the said J. J. Hill & Co., affiant did make an affidavit in said case for the purpose of getting such attachment. The affiant swears that he is not in any

way connected with said Freeman's National Bank, nor was he at any time during his stay in North Carolina, nor at any other time, except by the relations of attorney and client, the agent to receive or collect any moneys within the State of North Carolina, for or on behalf of the Freeman's National Bank. Affiant further swears that he was not at any time authorized to accept service of any process for or on behalf of said bank, and that his only duties or relations with the same were such as arose out of the employment of his firm as aforesaid."

The affidavit upon which the attachment issued was as follows:

"Frank G. Nesbitt, being first duly sworn, says:

"1. That he is the agent and attorney of the plaintiff, and makes this affidavit in its behalf;

"2. That the defendant is indebted to the plaintiff in the sum of $802.50, as is evidenced by two drafts, both bearing date July 30, 1883, each amounting to $400, and due at five and six months after date. Both of said drafts were drawn by one George T. Comins, in favor of Edward S. Haywood, cashier of plaintiff bank, on J. J. Hill & Co., which firm was alone composed of the defendant, as affiant is informed and believes, and were duly accepted by the defendant as J. J. Hill & Co. One of the said drafts was permitted to go to protest by the defendants, and the plaintiff was required to pay the costs thereof, to-wit, $2.50. Both of said drafts have been duly presented to the defendants and payment thereof demanded of them, but they have neglected, and still neglect and refuse, to pay the same.

"Copies of said drafts, with the endorsements thereon, are in words and figures as follows:

"$400. No. .....

"Geo. T. Comins, manufacturer of bedsteads, Boston, Mass.

"Six months after date, July 30, 1883, pay to the order of Edward S. Haywood, cashier, four hundred dollars.

"(Signed) GEO. T. COMINS.

"To J. J. HILL & Co., Asheville, N. C.

"[Accepted. J. J. Hill & Co.]

"$400. No. .....

"Geo. T. Comins, manufacturer of bedsteads, Boston, Mass.

"Five months after date, July 30, 1883, pay to the order of Edward S. Haywood, cashier, four hundred dollars.

"(Signed) GEO. T. COMINS.

"To J. J. HILL & Co., Asheville, N. C.

"[Accepted. J. J. Hill & Co]."

The foregoing is all of the affidavit of Frank G. Nesbitt, offered in evidence by the plaintiff, which is necessary to be stated in regard to the question presented by the appeal.

The only question presented by the record is, was Frank G. Nesbitt such an agent of the defendant, the Freeman's National Bank, as that process against the defendant might be served on him.

The Code, §217, provides that "The summons shall be served by delivering a copy thereof in the following cases:

"1. If the action be against a corporation, to the President or other head of the corporation, secretary, cashier, treasurer, director, manager or local agent thereof. *Provided*, that any person receiving or collecting moneys within this State for or on behalf of any corporation of this or any other State or government, shall be deemed a local agent for the purpose of this section."

The Court finds as a fact, upon the affidavits produced in evidence by both parties, that Frank G. Nesbitt was such an agent as is contemplated by the statute, upon whom service of the summons might be made. It therefore becomes necessary for us to look into the affidavits, to see if there was any evidence to support His Honor's conclusion.

One Terry, a witness for the defendant, testified that he is and was the cashier of the Freeman's National Bank at the time the transactions mentioned in the pleadings occurred, and that he knows of his own knowledge, that Frank G. Nesbitt was not then, nor was he ever at any time, the agent of the said Freeman's National Bank, to receive or collect any moneys for said bank in the State of North Carolina or elsewhere; that some time

in April, the defendant bank put certain bills of exchange, drawn by George T. Comins and accepted by J. J. Hill & Co., of Asheville, in the hands of Farensworth & Conant, attorneys and counsellors at law, of which firm Frank G. Nesbitt was a member, to sue upon the same. At the instance of the bank, Nesbitt was sent by his firm to Asheville, to aid McLoud & Moore, to render them any legal aid they might require, and, if necessary, to make the necessary affidavit for suing out an attachment, if it should be thought to be advisable; that the only relation existing at the time between the bank and Nesbitt was that of attorney and client. The firm of McLoud & Moore only, were to receive the money from Hill & Co., if collected.

The affidavit of F. G. Nesbitt substantially corroborates that of Terry. He stated that he was not in any way connected with the Freeman's National Bank, nor was he at any time during his stay in North Carolina, nor at any other time, except by the relation of attorney and client, the agent to receive or collect any moneys within the State of North Carolina, for or on behalf of the Freeman's National Bank.

To sum up the evidence offered by the defendant:

The Freeman's National Bank, a foreign corporation, put certain bills of exchange, accepted by a firm in Asheville, in the hands of Farensworth & Conant, of which firm Frank G. Nesbitt was a member.

This claim was sent, at the instance of the bank, by Farensworth & Conant, to Messrs. McLoud & Moore of Asheville for collection. The bank, apprehending some difficulty in the collection of the claim, induced the firm of Farensworth & Conant to send F. G. Nesbitt, one of the firm, to Asheville, in conjunction with Messrs. McLoud & Moore to prosecute their said claims, so that he, being familiar with the facts, might make the necessary affidavits for suing out an attachment or other process that might be thought advisable by Messrs. McLoud & Moore. That McLoud & Moore alone were authorized to *receive* and *collect* the amount of the bills.

To resist this testimony, the plaintiff offered the affidavit of Nesbitt, made by him in behalf of the bank, as a preliminary step for a warrant of attachment against the plaintiff, in which he stated that he was the *agent* and *attorney* of the bank. This we think did not constitute him such an agent as is contemplated by the statute. It was what any attorney who has a claim for collection for his client, who had a knowledge of the facts, might do. We cannot believe it was the intention of the Legislature to make any attorney who has a claim for collection in this State for a bank or other corporation outside the State, an agent for the service of process against such corporation. If so, all that a person having a cause of action against a foreign corporation who had no officer or managing agent in this State, would have to do to institute an action in the courts of this State against the corporation, would be to find some attorney who had a claim to collect for the corporation, and by serving the process upon him, bring the corporation to answer before the court. It is true the statute declares that any person *receiving* or *collecting* moneys within this State, for or on behalf of a corporation, shall be deemed a local agent; but to give the statute the construction contended for by the plaintiff would be "sticking in the bark." The term *local*, pertains to place, and a local agent to receive and collect money, *ex vi termini*, means an agent residing either permanently or temporarily for the purpose of his agency, and was not intended to embrace a mere transient agent.

The mischief chiefly intended to be provided against no doubt, was to give a remedy in our courts against corporations chartered in other States, who make contracts in this State, and appoint special agents or attorneys-in-fact to make collections. For before this statute was amended in The Code, when there was no officer or director of the corporation residing in the State, the process was authorized to be served upon a managing agent, and it was a difficult question often to ascertain whether the person served with process was a *managing agent*, and actions sometimes failed for want of due service of process in that respect.

In this case it was expressly stated in the affidavits produced by the defendant corporation, that McLoud & Moore were alone authorized to *receive the money*, if collected, and this fact was not contradicted by the plaintiffs, nor was he a managing agent. For that purpose the agent must be a general or superintending one. *Cunningham* v. *Southern Express Company*, 67 N. C., 425. But there was no evidence that Nesbitt was such an agent. That being so, there was no evidence before His Honor which warranted his conclusion and judgment, "that the defendant Frank G. Nesbitt was such an agent as was contemplated by the statute, upon whom service of the summons might be made."

There is error. Let this be certified to the Superior Court of Buncombe county that the action may be dismissed.

Error. Reversed.

WILLIAM DUCKER v. MOSES COCHRANE.

Contract.

A party to a contract, cannot maintain an action for its breach without averring and proving a performance of his own antecedent obligations arising on the contract, or some legal excuse for a non-performance thereof, or, if the stipulations are concurrent, his readiness and ability to perform them.

(*Dula* v. *Cowles*, 2 Jones, 454; *Niblett* v. *Herring*, 4 Jones, 262; *Jones* v. *Mial*, 79 N. C., 164; *Ibid.*, 82 N. C., 252, cited and approved).

CIVIL ACTION, tried on appeal from a justice of the peace, before *Graves, Judge*, and a jury, at Spring Term, 1883, of BUNCOMBE Superior Court.

The facts appear in the opinion.

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

Mr. C. A. Moore, for the plaintiff.

No counsel for the defendant.

SMITH, C. J. The plaintiff's action is for the recovery of damages for an assigned breach of contract, commenced before a justice, and removed by appeal to the Superior Court of Buncombe. Under the charge of the Court a verdict was there rendered for the defendant, and the plaintiff's appeal brings up for revision the correctness in law of the instructions given to the jury, and by which they were guided in arriving at their conclusion upon the evidence.

The contract is differently represented by the witnesses examined as to its terms.

The plaintiff's witness, J. A. Lance, testified that he had entered into an agreement with one Westfelt, to furnish him with 3,000 feet of locust lumber, at the price of $35 for each thousand feet, and that in order to its execution he contracted with the plaintiff and defendant, that the first should cut and deliver logs at the defendant's saw-mill, in quantities sufficient to produce 2,000 feet—1,000 feet for each month; and that the defendant should saw the logs at the price of 50 cents per hundred feet, which were then to be conveyed by the witness and delivered to Westfelt, he receiving for the carriage at the rate of two-thirds of a dollar for each hundred feet so delivered. The residue of the money paid by Westfelt, after these deductions, was to be paid to the plaintiff. The cutting, sawing and hauling the remaining 1,000 feet to Westfelt was the subject of a separate and distinct arrangement between the witness and defendant, to which plaintiff was not a party, and in the performance of which he had no interest.

The plaintiff describes the agreement as made between all three, to be carried into effect in the manner described by his own witness, the money paid for which was to be distributed by Lance among the several parties according to their respective shares, as already explained.

The defendant's evidence was that Lance proposed to him to contract for the delivery of the 3,000 feet of sound locust plank, which he declined, saying that if the plaintiff would supply the

logs for the first two months, he would supply the necessary number for the third month, and saw and deliver all at the mill to fulfil the contract entered into with Westfelt.

The plaintiff admits that he did not comply with his engagement, and says:

"I was to furnish logs to make 1,000 feet per month. I do not think I furnished as much as 1,000 feet of logs the first month. * * * * * * In the second month I do not know that I furnished 1,000 feet of logs."

The defendant states that the plaintiff's first delivery of logs at his mill was a month after the contract with Westfelt, and the last on December 3; that he sawed 896 feet; that Lance told him not to take any more lumber; that he had logs brought and was ready to comply; that after his refusal to let Lance have more plank, he told the defendant that Westfelt had cut him out of his contract; and that by reason of Ducker's not putting in his 2,000 feet he lost his contract.

This is a sufficient statement of the testimony as bearing upon the contested matter of the plaintiff's performance of his own stipulation, and we omit what transpired in reference to the defendant's refusal to proceed further under the original agreement, and requiring as a condition of further deliveries, that plank of an inferior quality, made from logs previously sent there, should be received.

1. The plaintiff insisted that time was not of the essence of the contract, and though the jury might find that the logs were not delivered in two months, yet the plaintiff should recover, if the defendant refused to deliver the lumber unless paid for those which were rotten.

2. That upon the whole evidence the plaintiff should recover.

The Court charged the jury that unless they should find that the plaintiff delivered logs sufficient to produce 1,000 feet of sawed lumber each month for two months after the date of the contract, the plaintiff could not recover, and they would find for the defendant; that unless the jury found that the plaintiff fully

and promptly complied with the contract on his part, the plaintiff could not recover from the defendant.

To this instruction the plaintiff excepts, insisting upon his right of recovery in any aspect of the testimony.

We are at a loss to discover any reasonable ground of objection to the proposition of law enunciated in the charge. The action is not to recover compensation for goods sold or services rendered upon a partial performance of an agreement, which has enured to the defendant's benefit, so as to come under the rigid rule, which, when full compliance is wilfully refused, refuses any remuneration therefor. *Dula* v. *Cowles*, 2 Jones, 454; *Niblett* v. *Herring*, 4 Jones, 262.

Its object is to compel the payment of damages for the breach of an executory contract which had been previously violated by the plaintiff himself, and that when the performance by the defendant of his stipulations were dependent upon the performance of those resting on the plaintiff. Unless the logs were delivered, the defendant could not saw them within the limited time, and hence, the requirements of the contract with Westfelt would not be met, and its expected benefit would be lost. Certainly the defendant was not obliged to wait the convenience of the plaintiff, and his dereliction absolved the defendant from his obligations, as it defeated the object of their arrangement. The proposition is too plain to need any reference to authority in its support, that a party to a contract cannot maintain an action against another for its breach, without averring and proving a performance of his own antecedent obligation, or some legal excuse for a non-performance, or if the stipulations are concurrent, his readiness and ability to perform them. *Jones* v. *Mial*, 79 N. C., 164; same case, re-heard, 82 N. C., 252. In the present case, the delivery of the logs at the mill was indispensable to their being sawed into plank, and the delivery of the plank to Westfelt in the quantities and within the time prescribed was necessary in holding him to his contract. It is a novel idea that time is immaterial, when it is made an essential condition in the contract, and as the non-

compliance of Lance with his agreed terms of delivery releases Westfelt from his obligation to accept the lumber, so the plaintiff's neglect to deliver to the defendant, which thus disables him, releases him also from all obligation to the plaintiff.

Assuming the plaintiff's failure to deliver in time, he certainly cannot complain of the defendant's refusal to proceed with his agreement to saw, and the law was correctly laid down in the instructions given to the jury.

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

No error. Affirmed.

S. A. TAYLOR et als. v. A. J. EATMAN, et als.

Deed—Consideration—Husband and Wife—Conveyances Fraudulent as to Creditors and Purchasers—Notice—Registration—Powers.

1. The duty of maintainance which a husband owes to his wife is a sufficient consideration for a voluntary deed of land made by him to her, and a court of equity will sustain such a conveyance, although it is void at law.
2. Where a husband makes a gift of land to his wife, without any valuable consideration, but it is admitted he had no fraudulent intent, and he retains property sufficient to pay all of his debts in existence at the time of the gift, it is not fraudulent as to creditors.
3. To make a deed fraudulent as to subsequent purchasers, such purchaser must have paid *full value* for the land, and must also have purchased without notice of the prior voluntary conveyance.
4. The registration of the prior voluntary deed is notice to the subsequent purchaser.
5. A *feme covert*, who is the donee of a power of appointment, either collateral, appurtenant or in gross, may execute the power without the consent of her husband, and she may even execute it in his favor.
6. Although it is generally necessary in deeds or wills, which are intended to execute powers of appointment, to refer to and recite the power, yet this is not necessary when the act itself shows that the donee had in view the subject of the power at the time, or when such deed or will would be a nullity, unless allowed to operate as the execution of the power.

7. A power simply collateral cannot be conferred upon one who is a stranger to the consideration, except by a deed which operates by transmutation of possession.

8. The rule, that in conferring a power, it is necessary to create a seizin in some one commensurate with the estate, which shall be ready to serve the use when created by the appointment, only applies when the donee of the power has no interest in the land.

9. The owner of an equitable estate may bring an action in the nature of ejectment, under The Code system of procedure.

(*Liles* v. *Flemming*, 1 Dev. Eq., 185; *Elliott* v. *Elliott*, 1 Dev. & Bat. Eq., 57; *Arnett* v. *Wanett*, 6 Ired., 41; *Hiatt* v. *Wade*, 8 Ired., 340; *Smith* v. *Smith*, 1 Jones, 135; *Hogan* v. *Strayhorn*, 65 N. C., 279; *Stroud* v. *Morrow*, 7 Jones, 463; *Condry* v. *Cheshire*, 88 N. C., 375; *Murray* v. *Blackledge*, 71 N. C., 492, cited and approved).

CIVIL ACTION, to recover land, tried before *Shepherd, Judge,* at Spring Term, 1884, of WILSON Superior Court. His Honor gave judgment for the plaintiff upon the facts agreed, and the defendant appealed.

Messrs. Connor & Woodard, for the plaintiff.
Mr. G. V. Strong, for the defendants.

ASHE, J. The parties submit the questions arising on the pleadings upon the following case agreed:

1. For a long time previous to the 5th day of March, 1873, Hayman Eatman was seized of a tract of land in Wilson county containing four hundred and fifty acres more or less.

2. That on the said 5th day of March, 1873, the said Hayman Eatman, for the consideration set out in the deed (the love and affection for his wife Chacey Eatman, and for better sustenance, to live comfortably and be better cared for in her affliction, and the further sum of one hundred dollars in hand paid), executed to his wife Chacey Eatman, without words of inheritance, a deed conveying to her one hundred and fifty-six acres of said land embracing nearly all of the arable lands, and all of the appurtenances thereto belonging, to dispose of at her death as she may think proper, by deed or will, to whomsoever she chooses to make her heirs of her estate.

3. The said Chacey Eatman, on the 26th of April, 1873, made her will, devising said 156 acres to the said Hayman Eatman for life, and then to the plaintiffs.

4. The said Chacey Eatman died in August, 1873, and said Hayman Eatman died June 19th, 1883.

5. That at the time of the execution of the said deed by Hayman Eatman to said Chacey Eatman he had no children by the said Chacey Eatman, but had nine children by a former marriage.

6. At Spring Term, 1867, of the Superior Court of Wilson county, a judgment was rendered in favor of George C. Short against the said Hayman Eatman for the sum of seventy-five dollars, with interest from the 1st of September, 1857, and for costs, $10.75, which was duly docketed in said county on the ..... day of .... 18..., which said judgment was taken up by the defendant Alsey J. Eatman on the 22nd of January, 1879.

7. At the time of the execution of said deed by Hayman Eatman to Chacey Eatman, there was a mortgage on the said tract of 450 acres, executed by said Hayman Eatman to secure the sum of three hundred and fifty dollars, which the said A. J. Eatman took up.

8. On the 30th of January, 1875, the said Hayman Eatman executed a mortgage on the said 450 acres to Rountree, Baker & Co., to secure the payment of $266.62 with interest from said date at 8 per cent. On the 26th of February, 1875, the said Hayman Eatman executed a mortgage to Branch & Co., on the said 450 acres, to secure a note of $262.62, payable to Rountree, Baker & Co., and by them transferred to Branch & Co., being the same debt above set forth, and to secure the further sum of $48.90 due to said Branch & Co., and the sum of $50 due to R. G. Barham, the last two sums carrying interest from said 26th of February, 1875, at 8 per cent., which said mortgages were taken up by the said Alsey J. Eatman.

9. That on the 20th day of November, 1875, the said Hayman Eatman executed to the said Alsey J. Eatman a mortgage on the said 450 acres of land to secure the sum of nine hundred dollars with interest, which constituted all of his indebtedness to A. J. Eatman, from said date at 8 per cent.

10. On the 28th of March, 1879, the said Hayman Eatman conveyed to the defendant Alsey J. Eatman in fee simple the whole of said tract of 450 acres for the consideration of one thousand dollars, being a release of his equity of redemption in said land. That at the time of the execution of the mortgage and the deed of the 28th of March, 1879, the 300 acres reserved by Hayman Eatman was worth more than his indebtedness.

11. That at the time of the aforesaid deed by Hayman Eatman to Chacey Eatman, his wife, the balance of said tract of land not conveyed to said Chacey was worth more than his then indebtedness.

12. That said Hayman Eatman owned no other property than the 450 acres of land aforesaid, except some personal estate of small value.

If the Court shall be of opinion upon the foregoing facts that the plaintiffs are entitled to recover the said land, to-wit: the 156 acres conveyed as aforesaid to Chacey Eatman, judgment shall be rendered for the possession thereof in favor of the plaintiffs, and for costs against the defendant. If the Court shall be of opinion in favor of the defendant, judgment shall be rendered accordingly and for costs.

The defendant A. J. Eatman resisted the plaintiffs' recovery on the following grounds:

1. That the deed of March 5th, 1873, from Hayman Eatman to his wife, was void.

2. That the deed will not be sustained in equity, because there is no valuable consideration to support it, and it is fraudulent as to creditors and purchasers.

3. The will is not a good execution of the power, because it does not refer to it, or profess to be made pursuant to it.

If this was an action purely at law, there can be no doubt the deed made by Hayman Eatman to his wife, Chacey Eatman, would, as contended by the defendant, be void. But the action is in a court of blended law and equity jurisdiction, and although the deed may be void at law it still may be sustained in equity, especially so when it is made upon a meritorious consideration, and such must be regarded as the consideration in the deed from Hayman Eatman to his wife. It declares the consideration to be "for the love and affection, for her better sustenance, to live comfortably and to be cared for in her affliction, and the further sum of one hundred dollars in advance or to me in hand paid." The consideration is not only meritorious, but valuable, and it is such a consideration as a court of equity will sustain.

In *Liles* v. *Fleming*, 1 Dev. Eq., 185, it was held that a post nuptial agreement made upon sufficient consideration between husband and wife, will be enforced in equity, and in the case of *Elliott* v. *Elliott*, 1 D. & B. Eq., 57, Chief Justice Ruffin, speaking for the court, said, "as the contract is void at law, the case in this court must always be that of an application to aid a defective conveyance. The wife cannot have that assistance unless she shows herself to be *meritorious*; and shows further a clear intention, that what was done should have the effect of divesting the interest of the husband, and of creating a separate estate for her, which she should have the immediate power to dispose of as she chose; and the estate thus intended for her, was but a reasonable provision." The very terms in which the consideration in this deed are couched, shows that the husband considered her meritorious, and the fact that he acknowledged the execution of the deed with the view to its registration, shows the *clear intention* of divesting his title and *creating a separate estate in her.*

In Indiana it is held that whenever a contract would be good at law if made by a husband with trustees for his wife, that contract will be sustained in equity when made by the husband and wife without the intervention of trustees. *Sims* v. *Rickets*, 35

Black. Rep., (Ind.) 181. In *Hunt* v. *Johnson*, 44 N. Y., 27, it is held: "The duty of maintainance which the husband owes to his wife, is sufficient consideration for a voluntary deed of land made by him to her, and a court of equity will sustain such a conveyance, though void at law;" and in *Sheppard* v. *Sheppard*, 7 John., ch. 57, where the consideration of the deed was for *natural affection* and *to make sure maintainance* for the wife of the donor, the consideration was held to be *very meritorious*, and the deed on that ground sustained.

These authorities dispose of the question as to the validity of the deed made by Hayman Eatman to his wife, as conveying to her an equitable interest in the land described in the deed—unless it be void against creditors and subsequent purchasers, as contended by the defendants. It is admitted that at the date of that deed, and the deed made by Hayman Eatman to the defendants of date 20th November, 1879, the three hundred acres was worth more than his indebtedness. It was not pretended that the deed to Chacey Eatman was made with a fraudulent intent—and conceding it to have been only a voluntary deed, it is not void as against creditors, if the donor retained at the time property sufficient to pay his then indebtedness, out of which the claims of the creditors might be satisfied. *Arnett* v. *Wanett*, 6 Ired., 41; *The Code*, sec. 1547, Act 1840, ch. 28, secs. 3, 4. And as to the contention that the deed was void against subsequent purchasers, the act of 1840, ch. 28, secs. 1, 2, *The Code*, sec. 1546, under which the defendant undertook to impeach the deed, provided that no person shall be deemed a purchaser within the meaning of the act, unless he purchases the land for the full value thereof, without notice at the time of his purchase, of the conveyance by him alleged to be fraudulent. This is the construction given to the act by the Court in *Hiatt* v. *Wade*, 8 Ired., 340. The deed from Eatman to his wife was duly registered, and the registration affected the defendant with notice, and it being agreed that the 300 acres, exclusive of the 150 acres conveyed by the deed to Chacey Eatman, was worth more than the indebtedness of Hay-

man Eatman at the time of his release to the defendant, he was not a purchaser for full value; so that, not being a purchaser for full value and without notice, the deed was good as to him.

But it is further insisted by the defendants that the will made by Chacey Eatman was not a good execution of the power, because it does not refer to it or profess to be made pursuant to it.

As a general rule, in executing a power, the deed or will should regularly refer to it expressly, and it is usually recited; yet it is not necessary to do this, if the act shows that the donee had in view the subject of the power at the time. 2 *Washburn on Real Property*, (4th Ed.), 658.

A will or deed is held to be a good execution of a power, when there is a reference in the will or deed to the power, or when there is a reference to the property which is the subject on which it is to be executed, and when the provision in the will or instrument executed by the donee of the power, would otherwise be ineffectual or a mere nullity, or would not have operation except as an execution of the power. *Ibid.*, 659. The same doctrine is enunciated by Chancellor Kent, in his *Commentaries*, vol. 4, margin page, 334; and to the same effect are *Amory* v. *Meredith*, 7 Allen, 397; *Blagge* v. *Miles*, 1 Story, 426.

The last of the above rules applies appositely to the case. Chacey Eatman, although a *feme covert*, was competent to execute a power, whether collateral, appurtenant or in gross, without the concurrence of her husband. She may execute it even in his favor. 2 *Washburn on Real Property*, (*4th Ed.*) 653-4. But as a *feme covert* she had no right to make a devise of real property, and especially of the land conveyed to her by her husband's deed—for it only conveyed to her a life estate. Her will, therefore, would have been inoperative except as an execution of the power, and for that purpose will be sustained in equity. The defendants' counsel relied upon the decision in the case of *Smith* v. *Smith*, 1 Jones, 135, as enunciating a principle fatal to the plaintiffs' action, but that case is distinguishable from this, in

that there the power was conferred upon a stranger, and, as explained by Chief Justice Pearson, in *Hogan* v. *Strayhorn*, 65 N. C., 279, it was an attempt on the part of the donor, by deed of bargain and sale, or covenant to stand seized, to create a power of sale to one who was a stranger to the consideration, and that the power could only be created by a conveyance operating by transmutation of possession. The Chief Justice said: "The court was not able to give effect to it as a deed under the statute of 1715, because there were no words of conveyance to the stranger, who was to exercise the power. In our case that difficulty is not presented, for the land is given to Laws to have and to hold to him and his heirs, and the ceremony of livery of seizin being dispensed with, the deed operates to pass the title under the act of 1715, although it cannot take effect as a deed of bargain and sale for the want of a valuable consideration." But in our case there was a valuable consideration, and the deed from Eatman to his wife was drawn in proper form to convey the estate directly to her, and according to that decision and others of a like effect, it was immaterial in this case whether the deed was drawn in form as a bargain and sale, a covenant to stand seized, or a feofment under the act of 1715, for if the court cannot give operation to it in one form it will in another, "*ut res magis valeat quam pereat.*" So it will be seen there is nothing in the case of *Smith* v. *Smith* that militates against the validity of the deed from Eatman to his wife.

The defendants' counsel further contended that at the time of executing the deed from Hayman Eatman to his wife Chacey, the land was subject to a mortgage, and the donor had only an equity of redemption, and his deed passed only an equitable estate to the donee; whereas, it was necessary in conferring a power, to create a seizin in some one which shall be ready to serve the use when created by the appointment, and the seizin must be commensurate with the estate authorized to be created under the power. But this it seems only applies when the donee of the power has no interest in the land conveyed. For it has

been held by this court that one who is only a tenant for life may execute a power of appointment to an estate in fee simple. *Stroud* v. *Morrow*, 7 Jones, 463; *S. P.*, 1 *Sugden on Powers*, 44–45. This case differs entirely from *Smith* v. *Smith*, *supra*.

Here there was a transmutation of possession, and the donee of the power had what in equity is regarded as a freehold estate, and although Hayman Eatman, at the time of his conveyance to his wife, had only an equity of redemption, it is treated in equity as a continuance of his old estate when the mortgagor remains in possession, subject to the mortgagee's pledge for repayment. It remains subject to the ordinary incidents of the estate, it passes in the same course of devolution, it might be devised, settled or conveyed in the same way, and as between the mortgagor and third persons, the mortgagor is to be considered as possessed of the *freehold*. *Adams Eq.*, 113–114, and note 1 and cases there cited. This we think was a sufficient seizin to clothe the donee, Chacey Eatman, with the power of appointment, and the power was properly executed by her will in the plaintiffs, and Hayman, as her appointee for life, had no right to convey to the defendant a greater estate than for his own life.

It was stated in the case agreed, that the defendant took up the judgment and the mortgage that were in force when the deed was made by Hayman Eatman to his wife, and the defendants contend it was by assignment, which substituted him to the rights of the judgment creditor and the mortgagee. But we do not so understand it. We think if he had purchased the judgment and the mortgage debt it would have been so stated in the case agreed, and when it is not so stated, but that he *took them up*, we can only give to the words their meaning in the ordinary acceptation, which is that he *paid them off* and by that means the mortgage was discharged, the defendant became a creditor without security, and the estate of the plaintiffs was relieved from the lien of the mortgage, and this view is strongly supported by the fact that in 1879 the defendant took a mortgage from Hayman

Eatman to secure all the moneys he had advanced for him, which must have been founded upon a settlement up to that date.

How, then, stands the case? The plaintiffs have acquired a pure, disencumbered, equitable estate in the 156 acres of the land. The defendant, by the mortgage and release made to him in 1879 by Hayman Eatman, became the owner in fee of the whole 450 acres, but of the 156 acres subject to the equity of the plaintiffs, for he was not a purchaser for full value, and had notice of the equitable title of the plaintiffs. In such a case the plaintiffs had their election of two remedies, the one to call in equity, upon the defendants to convey the land to them; or to bring, as they have done, an action at law to recover the possession of the land, for it is now held that a party may recover in an action in the nature of ejectment upon an equitable title. *Condry* v. *Cheshire*, 88 N. C., 375; *Murray* v. *Blackledge*, 71 N. C., 492.

Our conclusion is there was no error.

The judgment of the Superior Court must be affirmed.

No error. Affirmed.

JAMES T. GOOCH AND EMILY L. HIS WIFE v. VAUGHAN & BARNES.

Mortgage—Power of Sale—Injunction—Account Stated—Burden of proof.

1. While courts permit the use of powers of sale in mortgages, they regard them with much suspicion and watchfulness, and will enjoin their execution when an attempt is made to use them for the purpose of oppressing or obtaining an unfair advantage over the mortgagor.

2. Where it appears in an application to enjoin a mortgagee from selling the mortgaged property under the power of sale, that there are many and complicated accounts between the mortgagor and mortgagee, and the balance due is uncertain, the Court will restrain the execution of the power of sale until an account can be stated and the amount due ascertained.

3. In such case, the rule which requires a mortgagee, in certain cases, to pay the amount admitted to be due before the injunction will be granted, does not apply, because no definite sum is known to be due.
4. A mortgagee with power of sale, is a trustee, 1st to control the property and apply the proceeds to the debt; 2nd, to account for any surplus to the mortgagor; and he is held to a strict account.
5. Where a statement of account is rendered to a debtor who keeps it for a long time without objection, it becomes an account stated, and cannot be opened except for substantial error, mistake, omission or fraud.
6. In opening the account for any of these causes the burden of proof is on the debtor.

(*Kornegay* v. *Spicer*, 76 N. C., 95; *Mosby* v. *Hodge*, *Ibid.*, 387; *Pritchard* v. *Sanderson*, 84 N. C., 299; *Bridgers* v. *Morris*, 90 N. C., 32, cited and approved).

MOTION for an injunction in a CIVIL ACTION pending in HALIFAX Superior Court, heard before *Gudger*, *Judge*, at Chambers, in Raleigh on August 19, 1884.

It appears from the allegations of the verified complaint and the admissions in the answer, that between the month of April, 1882, and that of September, 1883, the plaintiff James T. Gooch and the defendants had a great number and variety of connected business transactions, involving in the aggregate nearly $70,000.

The defendants from time to time, and frequently, supplied the plaintiff James with very considerable sums of money, and at various times the latter delivered and pledged to them, as collateral security for such supplies of money, divers evidences of debt, consisting of notes, bonds and judgments, with the right to collect and apply them, which was done to a considerable extent.

In the course of such transactions the said James frequently executed to the defendants his promissory notes, and they held three of such notes on the 25th of August, 1883,—two bearing date May 1st, 1883, each for $5,618.68, to be due respectively January 4th, 1884, and November 5th, 1884, and the third for $4,917.28, dated July 17th, 1883, and to be due March 4th, 1884, and all to bear interest from date at the rate of eight *per centum* per annum. They also held his single bond for $2,928, dated the 25th day of August, 1883, to be due twelve months next there-

after, bearing interest from date at the same rate. On the 25th day of August, 1883, as security, in addition to the collateral security above mentioned, for such indebtedness, the said James executed to the defendants a mortgage of all his real estate, with power of sale in them, in case of his failure to pay any part of his said indebtedness as it came due, to sell by auction for cash, after thirty days' notice, so much of the real estate embraced by the mortgage as might be necessary to pay the whole mortgage debt, which, in such case, should be treated as due.

The plaintiffs, among other things, allege that at the time of the execution of said mortgage, said Gooch believed said three promissory notes represented his existing indebtedness, including said bond, but upon examination he finds that they do not, and that they exceeded his true indebtedness several hundred dollars—from six to eight—the errors consisting in the main, of excess of interest charged, one bale of cotton not credited, and other small items; that since the execution of said mortgage the defendants have, from time to time, made large and divers collections upon the aforesaid evidences of debt—set out in the third section of the complaint—the amount collected, of which the plaintiffs have information, being from seven thousand seven hundred to eight thousand dollars; but they believe, and so aver, that other and divers collections have been made, the particular amounts and from whom collected they have not information, and that they are informed and believe that said defendants have in hand uncollected of said evidences of debt, and which are collectable, from eight to ten thousand dollars—upon a good many of which they have instituted suit; that the plaintiff Emily L. Gooch, who is and has been since the 5th day of April, 1884, a free trader, became the purchaser of the equity of redemption in and to the lands, except the homestead interest, at Sheriff's sale—paid the purchase money therefor, and has received the sheriff's deed for the same; that as plaintiffs are informed and believe, defendants were deterred from bidding for and purchasing the property at the sheriff's sale, because it was charged by

Gooch that the sale was instigated by them for the purpose of speculating and taking advantage of their power and opportunity as mortgagees. They are also informed and believe that the defendants received the purchase money arising from the sale, to the full amount of their executions; that plaintiffs are informed and believe that the defendants, failing to carry out their plan to purchase the equity of redemption, have avowed their determination to foreclose their mortgage and thereby sacrifice the property conveyed therein, and the other securities held by them, and deprive the plaintiff Emily L. Gooch, of the benefit of her purchase, and for that purpose, have advertised to sell the lands conveyed by the mortgage, including the plaintiff J. T. Gooch's homestead, under the power therein conferred upon them. The lands situated in Halifax county, they have advertised to sell on the 2nd day of June, 1884, and the land in Northampton county at the court-house in said county on the 3rd day of June, 1884. Said lands are worth from $10,000 to $12,000 exclusive of the homestead, and consist of several lots in the town of Weldon and other tracts in Halifax county, and of one or two tracts in Northampton county; that the plaintiffs believe that upon the defendants' accounting for what they have collected upon the evidences of debt, held by them as securities, and for what they will by ordinary diligence collect thereon, James T. Gooch's indebtedness would not amount to more than $2,000 to $3,000; that the plaintiff Emily L. Gooch is advised and believes, that as owner of the equity of redemption therein, she has an equity to compel them to exhaust all their other securities before resorting to the lands conveyed to them by mortgage, and the plaintiff James T. Gooch is advised and believes that the defendants must exhaust all their securities before subjecting his homestead to the payment of their debt, and he avers that the property held by them as security for their debt, other than his homestead, is more than sufficient to pay the same.

In reply to these allegations the defendants, among other things not necessary to be here set forth, say that they admit the execu-

tion of the notes set forth in section four of the complaint, but it is not true that the notes were made as accommodation paper. On the contrary, they aver, that said notes were made to cover avdancements already made when they were severally executed; that before said notes were each executed, the defendants had furnished James T. Gooch with a statement of account, showing the true balance due by him, with the request, if found correct, that he would execute a note for such balance; that said Gooch, after careful examination of said account, as the defendants believe and allege, executed the notes; that at the time of the delivery of said notes, no complaints were made or errors pointed out except failure to credit one bale of cotton of the value of forty-one dollars and fifty-one cents, and the defendants say, that the object of said Gooch in the institution of this action is merely an effort to postpone the evil day; that they admit there is a credit for one bale of cotton, which was given and the notice of the same was made to Gooch prior to the advertisement of the lands embraced in the mortgage. That the allegation that "they—the bonds—exceed his true indebtedness several hundred dollars, from six to eight hundred dollars," is too vague and indefinite to raise any equity in behalf of the plaintiff; that they have collected from the collaterals mentioned, the sum of $6,565.69, and that they have credited this amount, less attorneys' fees, to-wit: $656.57, on the bonds. That they have in their possession all of the collaterals except those which have been collected, and they file a schedule of all collaterals collected and the amounts. They admit that the plaintiff E. L. Gooch has been a free-trader since the 5th day of April, 1884; but they aver that they believe that the equity of redemption, alleged to have been purchased by E. L. Gooch, was paid for with the money of her husband and co-plaintiff, James T. Gooch, and they submit that the sale of the equity redemption and the sheriff's deed thereunder carry no title.

The defendants further say that all of the lands conveyed to them by James T. Gooch are not worth more than eight thousand dollars in cash, as they are informed and believe.

The plaintiffs brought this action for an account and settlement, and moved before a Judge at Chambers, for an injunction to restrain the defendants from selling the mortgaged property until the action can be tried upon its merits. At the hearing of the motion the complaint and answer were used as affidavits, and numerous other affidavits and much documentary evidence were produced by both sides, that are not necessary to a proper understanding of the opinion of the court. The Judge denied the motion, and the plaintiffs appealed.

Messrs. Mullen & Moore, for the plaintiffs.

Messrs. Day & Zollicoffer and *R. O. Burton Jr.*, for the defendants.

MERRIMON, J. (after stating the facts). The defendants admit that they are mortgagees with power of sale in themselves, and that they are about to execute that power in their own behalf by selling the mortgaged property, which embraces all the real estate owned by the mortgagor at the time the mortgage was executed. Courts regard such powers with suspicion and watchfulness, and never fail to scrutinize the exercise of them, when it appears that there is ground to apprehend that injustice in any respect is done, or about to done to the mortgagor. The mortgagor is, in an important sense, completely in the power of the mortgagee and besides, the latter is a trustee, first to control the property and apply the proceeds of it when sold to the payment of the mortgage debt, and secondly, for the mortgagor, as to any surplus, and he is held to a strict account.

The power thus conferred is intended to be a summary, cheap and expeditious method of foreclosing a mortgage without action, when the debt secured is a plain one, unattended by complicated accounts and confusion incident to it. The courts have yielded to it with reluctance, because of the largely superior advantages and opportunity afforded by it in a variety of ways to the mortgage creditor as against the debtor. Indeed, it is allowed to be

exercised without the supervision and direction of the court, only in plain cases, such as give rise to no controversy as to the sum of money due upon the debt secured, or in other respects. If there is, in good faith, a controversy in respect to the debt, or as to the credits to which it is justly subject, however they may arise, or if the credits are greatly confused and require complicated accounts necessary to show what balance is due, in such and like cases, the court will restrain the exercise of the power until such matters, properly put in issue, can be determined by the court, and the mortgagee required to account in all respects as to the exercise of the power, and how he has applied any funds that may have come into his hands on account of his debt. The court will be prompt to grant relief by injunction, when it appears that there is probable ground in support of the plaintiff's alleged equity. It is but common justice that a creditor thus having his debtor within his power, shall account with him under the just and protective authority and supervision of the court. *Kornegay* v. *Spicer*, 76 N. C., 95; *Mosby* v. *Hodge*, Ibid, 387; *Pritchard* v. *Sanderson*, 84 N. C., 299; *Bridgers* v. *Morris*, 90 N. C., 32.

It is not denied that the plaintiff James T. Gooch and the defendants, in the course of about fourteen months, had a great number of current business transactions, involving much mutual dealing and large sums of money. The defendants, from time to time, supplied Gooch with "advancements," and to secure them, he at sundry times, delivered and pledged to them as collateral security, evidences of debt, consisting of notes, bonds and judgments, in amount about $20,000, which they were to collect and apply to his credit. He alleges, that at the time he executed the mortgage, he believed that the notes and bonds specified in it represented truly his indebtedness to the mortgagees, that, however, in fact they did not, but exceeded it in amount by from $600 to $800, the excess being made up mainly of interest improperly charged, and failure to give him credit for a bale of cotton and other small items of charge.

The defendants, on the other hand, allege that this is not true, that before the notes were executed they delivered to him a detailed statement of his account with them, accompanied with the request that he should examine it and point out any errors; that he did not for many months object to it, further than to insist that he was not credited with a bale of cotton, as he ought to have been; that this credit was afterwards allowed, and that after he had ample opportunity to examine the account he executed the notes, manifesting his satisfaction with the account as stated.

The account rendered, and the long delay in objecting to it on account of suggested errors therein, do not necessarily conclude Gooch. The strong presumption is that he examined and accepted it as correct, and he is bound by it, and it ought not to be disturbed, unless he shall allege and prove some substantial error, mistake, omission, or fraud, vitiating it. This he has the right to do, if he can, and in case of success, to have the just correction made. The burden is on him to prove such allegation.

It is contended that the allegation of error in respect to interest is so vague and indefinite that it ought not to be considered. It certainly would have been better to have made it more definite, and it may yet be made so when the pleadings shall be regularly filed. But for the purpose of the motion before us, we think it sufficient. It points and has reference to the account stated. That account must have been a long and complicated one, embracing many items and different classes of items. The error, if it exists, upon proper scrutiny will appear in it, and thus the allegation may be made certain. There are certain data pointing to it, if indeed it exists.

Another and more important allegation of the plaintiff James T., is, that of the notes, bonds and judgments he delivered to the defendants as collateral security as above mentioned they have collected since the execution of the mortgage, from $7,500 to $8,000, and they still have of those uncollected, but which may be collected, from $8,000 to $10,000, and some of these have been sued upon, and that upon the statement of a fair account between

himself and them, it will appear that he owes them not more than $3,000.

The defendants admit that of such securities they collected, as alleged, $6,565.69, and aver that they have credited that sum, less $656.57, paid to counsel, on the mortgage debts, but they omit to state at what time they entered such credit. They likewise admit that they have the collateral securities not collected. Upon some of these they have brought suit, but for causes assigned, they have not been able to collect the money due upon them. As to the balance of them, they say "that many of said collaterals are worthless, and most of them worth far below par." They do not offer to surrender them, nor do they suggest what they intend to do with them.

Without adverting to the other matters in the record before us, not necessary to be considered here, we think it manifest that the defendants should be restrained from selling the land until the action shall be heard upon its merits. They are mortgagees with power of sale. In addition to, and apart from the mortgaged property, they have, as security for the mortgage debt, many thousands of dollars of the mortgagor's rights and credits; some of them from time to time, they have collected and applied, while they have failed to collect others, and have made no final disposition of them. They insist that there is no error in the mortgage debt, as alleged, and that they have faithfully collected such of the collateral securities as they could, and applied the money. But the mortgagor has been within their power, he has had to accept their statement and representations without free opportunity to scrutinize them. He is not satisfied with what they have done, and the accounts they give, more or less complicated, under the power they have exercised over the mortgaged property and himself, and he assigns reasons, not frivolous, but more or less urgent, why they should account with him under the supervision and control of the court. Under such circumstances, the law allows the mortgagor the relief sought by the present motion.

The defendants' counsel insisted on the argument, that the plaintiffs could not have relief by injunction until they paid the sum of money they admit to be due.

They did not admit that any definite sum was due. But the rule of law involved does not apply in cases like this, because, as was said, by Smith, C. J., in *Pritchard* v. *Sanderson*, *supra*, "the mortgagor ought to know definitely what sum he is required to pay, and have an opportunity to redeem without a sale." It may turn out when the definite sum of money due to the defendants, and for which the land is liable, is ascertained, that the plaintiffs can and will pay it. Cases like this go largely upon the ground that the mortgagor has not had a free and fair opportunity to be informed and help himself—that he has been within the power of the mortgagee, and is therefore entitled to have full and satisfactory information from the trustee, the mortgagee, so that he can act intelligently in respect to the mortgage debt and the property mortgaged to secure it.

We do not pass upon the merits of the controversy, further than to determine that there is probable ground for the plaintiffs' motion before us.

In view of the proofs, we cannot conclude that the plaintiffs' cause of action is frivolous and unfounded. It is serious and fit to be considered, and it may turn out that it has substantial merit.

There is error. The injunction demanded must be allowed. To that end, let this opinion be certified to the Superior Court of Halifax county.

Error. Reversed.

NORFOLK & SOUTHERN RAILROAD COMPANY v. W. Y. WARREN, et als.

Right to condemn land by Railway Companies—Appeal.

1. Under the Act of 1869–'70, ch. 18, to incorporate the Norfolk & Southern Railroad Company, no appeal lies from an interlocutory order in a proceeding in accordance with the provisions of said act to condemn land for the use of the railroad. An appeal can only be taken from the final judgment.
2. The Constitutional provisions that the Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below upon any matter of law or legal inference, is not impaired by an act of the Legislature postponing the right of appeal until the final determination of the cause; and the general law allowing appeals from interlocutory judgments must yield to the provisions of a special act.
3. Under the provisions of the Act of 1869–'70, *supra*, the clerk has no authority to appoint commissioners to assess the damages, but must issue an order to the sheriff to summon proper persons.

(*Telegraph Company* v. *Railroad Company*, 83 N. C., 420, and *N. C. R. R. Co.* v. *C. C. R. R. Co.*, Ibid., 489, cited and approved).

THIS WAS a special proceeding, commenced before the clerk, and heard at Fall Term, 1884, of the Superior Court of CHOWAN county before *Graves, Judge.*

The plaintiff appealed.

The facts are stated in the opinion.

Messrs. Starke & Martin, for the plaintiff.

Messrs. Pruden & Vann, for the defendants.

SMITH, C. J. The Norfolk & Southern Railroad Company, a corporation formed and acting under the concurring legislation of the two States, with a subsequent change in name, has constructed and is operating a line of road between Berkeley in Virginia and Edenton in this State.

Section 6 of the incorporating act, passed in 1870 (Acts 1869–'70, ch. 18), confers upon the president and directors, or their lawfully constituted agents, full power and authority to enter

upon all lands through which they may think it necessary to make said road, and to lay out the same according to their will and pleasure, by paying the owners of the lands a fair compensation for their property, and the mode of proceeding is pointed out, to be pursued in case the parties cannot come to an agreement as to the value of the appropriated lands.

Finding larger accommodations needed for the business of the company at the town of Edenton, application was made to the Superior Court of Chowan, before the clerk, for an order to be issued to the sheriff, directing him to summon commissioners, properly qualified, to view the land proposed to be condemned, and to assess and report the damages sustained by the proprietors.

To this application answer was made denying the company's need of the land and offering to convey the same for a reasonable compensation.

The clerk therefore granted the prayer of the petitioner, and proceeded himself to appoint the five commissioners by name, to condemn and value the land, from which the defendants appealed. In the Superior Court, before the Judge, the following adjudication was made: "It appearing from the pleadings that issues of fact are raised which require the intervention of a jury, the appeal is sustained; the judgment of the said clerk is declared to be erroneous, and the cause remanded to him to the end that he may eliminate and certify the issues of fact to be heard by a jury in this court."

The correctness of this adjudication is brought before us by the plaintiff's appeal.

The concluding clause of the section from which we have quoted, declares the award of damages, made by the commissioners and reported, for compensation, "shall be final, unless one or the other of the parties shall appeal to the Superior Court within ten days, in which case *the issues shall be tried by a jury* of the county in which the land lies."

Language very similar, in reference to an appeal to this Court, is found in the act passed to facilitate the construction of telegraph lines (Acts 1874-'75, ch. 203), section eight of which provides "that the right of appeal to the Superior Court shall be limited to thirty days after the confirmation of the report of the commissioners," and it has been held that an appeal could not be taken at an earlier stage in the proceedings.

The constitutional provision (Art. 4, §8) that the Supreme Court shall have jurisdiction to review, upon appeal, any decision of the courts below, "upon any matter of law or legal inference," is not impaired by postponing the exercise of the right to the final determination of the cause, when all the alleged errors may be reviewed, as in criminal prosecutions.

The section of The Code which allows interlocutory appeals must yield to the special enactment governing the special case. *Telegraph Co.* v. *Railroad Co.*, 83 N. C., 420. To same effect *N. C. R. R. Co.*, v. *C. C. R. R. Co.*, *Ibid.*, 489.

The special methods provided for acquiring lands needed in the prosecution to completion of great works of internal improvement, when title cannot be acquired by negotiation on fair terms, are intended to expedite their construction, and do not, therefore, admit of the interruptions and delays, incident to ordinary proceedings at law, by which their progress might be greatly retarded. While in the first instance the land required is to be designated by the company as best knowing its own necessities, and the cause proceeds, without obstruction by appeal, to the assessment of damages, the dissatisfied owner may then remove the action to a higher tribunal, and there have all the issues material in the controversy submitted to a jury, to be passed on under the guidance of proper instructions from the judge, as well as a re-assessment of the damages. This seems to afford protection against arbitrary and needless exactions of the corporation, while it permits the work to go on, so that the controversy is then settled.

The abuse of the conferred power in the demand of more land than there is any reasonable need for may be thus corrected—

Mills on Eminent Dom., §49—while if fairly exercised within the limits of the discretion, it will not be interfered with. *Ibid.*, §62.

It is thus manifest that the cause was practically withdrawn from the jurisdiction of the clerk, with whom it ought to have remained until the commissioners had acted and made their report ascertaining the value of the lot to be condemned. But the statute directs him to issue the summons to the sheriff to summon the necessary number of the commissioners, and not himself to designate them. Their selection devolved upon the sheriff and not upon the clerk.

The attempted removal of the cause to the Judge of the Superior Court, when made, was unauthorized, and he should have remanded it in order that the proper summons might issue and the commissioners proceed to estimate and report the sum to be paid by the company.

The appeal from the ruling of the Judge must be sustained and his action declared erroneous. This will be certified to the end that the cause proceed in the manner pointed out in this opinion.

Error. Reversed.

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*ENNIS STATON v. JACOB MULLIS.

Deed—Construction of—Color of Title—Adverse Possession—Estoppel—Burden of Proof—Possession—Description and Location.

1. When the habendum and warranty clause of a deed are joined, and the intention to convey a fee is clear, the words of inheritance will be so transposed as to connect them with the conveying terms, so as to secure the intended effect of the deed.

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

2. A deed conveying a life-estate is color of title, and when accompanied by adverse possession for the required time, will ripen into a good title to the life estate so granted.
3. When the plaintiff claims under a deed purporting to convey the land in dispute, and shows an apparently adverse possession, the burden of proof is on the defendant to show that such possession is not adverse; and when he claims a reversionary estate after a life-estate, that such life-estate determined too short a time before the bringing of the action to bar his right.
4. A deed is an estoppel, even as between the parties thereto, only as to the estate conveyed.
5. Where A, having a life-estate, conveys to B in fee, who conveys to C, the reversioner or remainderman does not have a right of action until the death of the life tenant. At his death, the possession becomes adverse, and will ripen into a good title by seven years' possession, the title being out of the State.
6. Possession by a grantee of any part of the land described in his deed, is constructive possession of the entire tract against all persons, except a party having a superior title to the part of which there is only constructive possession.
7. When the beginning corner was located, and there was evidence showing marked trees, corners, natural objects, &c.; *It was held*, some evidence from which a jury might locate the land in controversy.
8. It is not error in a Judge to refuse to charge abstract principles of law which have no application to the case.
9. When a witness swears to his possession, with repeated acts of ownership extending over many years, which evidence is allowed to go unchallenged to jury, it is not improper for the Judge to assume a legal possession to have the been testified to and to so present the case in his charge to the jury.

(*Davis* v. *Higgins*, 91 N. C., 382; *Allen* v. *Bowen*, 74 N. C., 155; *Stell* v. *Barham*, 87 N. C., 62; *Batchelor* v. *Whitaker*, 88 N. C., 350; *Osborn* v. *Anderson* 89 N. C., 261; *Simpson* v. *Blount*, 3 Dev., 34; *Williams* v. *Buchanan*, 1 Ired., 535; *Gudger* v. *Hensley*, 82 N. C., 481; *Logan* v. *Fitzgerald*, 87 N. C. 308, cited and approved).

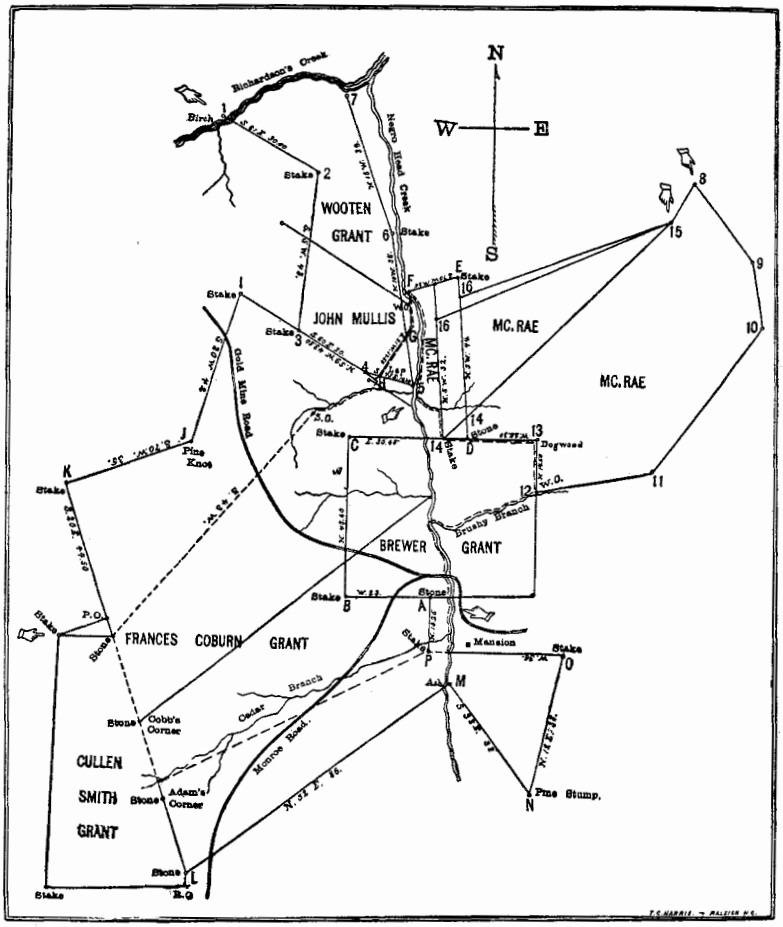
CIVIL ACTION for the possession of land, heard before *MacRae, Judge*, and a jury, at Spring Term, 1884, of UNION Superior Court.

The facts appear fully in the opinion.

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

Messrs. Payne & Vann and *Haywood & Haywood*, for the plaintiff.

Messrs. Covington & Adams and *J. W. Hinsdale*, for the defendant.



SMITH, C. J. In support of his title to the land in dispute, the plaintiff introduced a grant from the State, issued on the 20th day of December, 1799, to Francis Coburn, and successive deeds from him to the plaintiff. The last in the series is a deed made on May 3, 1832, by Frederick Staton to his son, the plaintiff, purporting to convey a tract of five hundred acres, parcel of the original grant. Objection was made to the admission in evidence of the grant and of the two deeds, more especially that

from John Cobb to Vernal Adams for two hundred acres, executed in October, 1814, upon various grounds that have been abandoned as untenable, in the argument before us, under the ruling in the case of *Davis* v. *Higgins*, 91 N. C., 382.

Objection was also taken to the operation of several of the deeds, particularly to that executed in October, 1819, by Vernal Adams to Frederick Staton, and to that by the latter to the plaintiff, as conveying, for want of words of inheritance, a life estate only to the respective grantees. In reference to this construction of the deeds it is only necessary to say, that in form they are quite as favorable to a construction which passes an estate in fee as that before the court in *Allen* v. *Bowen*, 74 N. C., 155, and equally admit the transfer of the concluding words "his heirs and assigns forever," which follow the clause of warranty, to the operative conveying words of the instrument.

In *Allen* v. *Bowen*, *supra*, the intention is declared to be to "sell all the right, title and claim" of the grantor in the premises, and the concluding clause is as follows: "And we, Thomas A. Pritchett and Elizabeth his wife, do, for themselves, their heirs, executors, administrators, and assigns *forever*, the land to the said William Bowen, *his heirs*, executors, administrators, and assigns forever, clear of all incumbrances whatever." While this was an independent sentence, separated by a period from the preceding operative words, it was transposed and annexed to them, to give the deed effect as a conveyance of the inheritance, in carrying out the manifest intent of the parties to it.

The deed now under examination, from Frederick Staton to the plaintiff, and in this feature the others are similar, conveys the described land, with appurtenances belonging, to the grantee in *fee simple*, and without a pause or interruption proceeds, "And I, the said Frederick Staton, for myself, my heirs and assigns doth hereby warrant and forever defend the above bargained land free and clear from myself, my heirs and assigns, and from the lawful claim or claims of any person or persons claiming any lawful claims whatsoever unto the said Ennis Staton, *his heirs*

and assigns forever." The instrument expresses the intent to convey the inheritance, and that intent may be effectuated with equal, if not stronger reasons, by transposing and annexing to the conveying words the concluding part of the sentence. The warranty is spent before reaching that part, and is full and complete without it. There is no division in the sentences to interfere with the transposition of the inheritable words from the place where they are not needed, and their annexation to the conveying terms by which the intended effect of the instrument will be secured.

The cases relied on in the brief of appellant's counsel, as modifying the decision in that case, *Stell* v. *Barham*, 87 N. C., 62, and *Batchelor* v. *Whitaker*, 88 N. C., 350, do not profess to overrule it, but to draw distinctions which render it inapplicable as a precedent. Whether they are consistent is not material in the present inquiry, since the plaintiff, if he only acquires an estate for his own life under his father's deed, was living when the present term began; and though it is suggested that he has since died, such life estate is sufficient to sustain the action, so far as title is concerned. The deed at least constitutes color of title, and accompanied with continuous adverse occupancy since its execution, during the long interval of time that has followed, is sufficient to perfect the life estate.

We do not yield our assent to the contention of counsel, that this possession did not become adverse until after the death of Frederick Staton, the deed to whom, upon a like rule of construction, would pass but an estate for his life, since Vernal Adams, his immediate grantor, and those who preceded him in the claim of title up to Coburn, to whom the grant from the State issued, for a similar supposed defect, had no greater estate in the land than for their several lives.

The previous owners all died before the institution of the suit, but the record does not show when their respective deaths occurred, except that Frederick Staton died about the close of the late civil war. The conveyance from Coburn to Cobb, bears date in 1806,

and if the latter was then of full age and capable of contracting, he would have been about 87 years of age when the summons was sued out, and if he or any other, died any considerable period before the death of Frederick Staton, the estate would have come to an end, and the plaintiff's possession then rendered hostile, continued for the required interval, would have sufficed to perfect his life estate against all claimants.

We cannot infer from the mere admission that these prior life-tenants died previous to the commencement of the suit, the time when their several deaths occurred, and the question arises, upon whom devolves the duty of showing that the plaintiff's possession under his deed, apparently hostile, was not really so for the necessary period of time to bar a reversionary estate retained in another, who is not barred of his entry and right of action. In our opinion the burden of proving that the possession is not adverse to the owner of such reversion for a period sufficient to bar his recovery, and to this end the date of his death, devolved upon the defendant. He is called upon to defeat the plaintiff's apparent title by proof of a superior outstanding title in another, since, in the absence of such evidence, possession under the deed for a sufficient space would confirm the estate proposing to pass under the deed.

Again, the act of accepting the deed from his father, does not operate as an estoppel, even *inter partes* beyond the estate conveyed, upon the plaintiff, nor is he thereby precluded from denying that any reversionary estate remained in Frederick, for the instrument upon its face does not show that all the estate vested in him was not thereby transmitted to the plaintiff. The title being out of the State by reason of the grant, it came to an end at the death of the first life-tenant, Cobb, under his defective deed, and all the estate claimed under deeds with adequate possession of the land, was adverse to the owners of the reversion, and gave effect to those deeds. *Osborne* v. *Anderson*, 89 N. C., 261.

Passing from this aspect of the case, we come to the consideration of the exceptions, which rest upon the alleged inability of the plaintiff to locate the grant or his own deed by the lines therein mentioned, so as to include any of the land in possession of the defendant, and the want of evidence of his possession under his deed. The surveyor, C. W. Watkins, examined by the plaintiff, ran the boundaries of the grant as shown in the accompanying map, and found at various points, according to his testimony, indications from pointers, marked trees, and other natural objects, of corners and lines, corresponding with some variations in distance and slight deviations in course, with the calls contained in the grant.

The beginning point seems to have been fully established. This, with other evidence, is sufficient to warrant the jury in determining its location. In the map, the Mullis land, claimed by the defendant, lies wholly west of Negro Head Creek, with its eastern boundary pursuing a course nearly that of the creek, and touching the creek as the defendant contends, at the southeast corner, so as to include all the territory in dispute within its limits. The plaintiff, however, insists upon its stopping at the corner G, and running thence to H, it being designated in the grant as running from Stewart's corner at G, with his (the Mullis) other line, south 31° west 18 chains to his corner. The line as actually run by the surveyor in that direction, falls short of reaching the point by only 40 links, being 17 chains and 60 links. This location extends the grant over the area in contest. There is, and can be, no lappage, for where the Mullis line is found, there must be the line of the grant which calls for it. We think there was sufficient evidence before the jury to warrant their finding the position of this divisional line, and its bearing upon the controversy becomes material in the fact that if the disputed land lies outside the boundaries of the Mullis tract and within that of the plaintiff's deed, his possession of any part of the land described therein, would be a constructive possession of the whole, and this possession continued for seven years without

interruption from others so as to expose them to his action, would perfect his title, except as against one who has the superior title to the part not in the actual, as distinguished from the constructive, possession of the plaintiff.

The next objection to be examined, is the alleged vagueness of the descriptive words used in designating the land, rendering incapable of identification what the deed undertakes to convey.

Some portions of the description of the corpus or subject matter of the conveyance, are positive and definite. The land is represented to lie on both sides of Negro Head Creek. It is bounded by a portion of the creek above the mouth of Bushy Branch, which empties into it—by the Branch up to its intersection with McRae's line, and thence along that line. Its southwest corner is Adams' corner on Cedar Branch; proceeding west from McRae's line, the boundary crosses the creek, and there meets with the Mullis line, which it follows further westward, until crossing it, it proceeds on by different deflections, until it arrives at Cedar Branch. All the objects called for are laid down on the map, and the only difficulty in closing up the gap on the north, is in ascertaining how the line shall be run between the McRae and Mullis tracts in conformity to the requirements of the plaintiff's deed. If this be done by starting at 14, which, the surveyor says, is the terminus of the McRae land, along whose line that of the plaintiff runs, or from a point just north of 14, and pursuing a course which will become coincident with the dotted line after passing the creek, and this be deemed the true boundary, it will not take in, according to the testimony of the witness, any land of which the defendant is in possession. On the other hand, if the correct location be fixed by continuing the line between three and four, passing H, and proceeding on to the creek, and then by the same route reaching the McRae line; or, if the true position of the line be from four to five or from H to G, by either of such runnings the defendant would be made a trespasser. If the line from G to H be a boundary of the grant, as placed upon the map by the surveyor, it would seem to

be a boundary for the Mullis tract, and inasmuch as the plaintiff's deed also calls for that boundary, his land must come up to, and be bordered on it.

There was much evidence heard before the jury upon the contention as to these matters, and they were charged that if the land described in the plaintiff's deed was part of that embraced in the grant to Coburn, that is to say, if starting at D or 14, and thence running north 5° west to E, or the intermediate point between E and F, and thence to F, and crossing the creek, proceeding on by W and G to H, the lines thus run would include land in the possession of the defendant, (and about this enclosure there seemed to be no controversy), the response to the first issue should be in the affirmative. So, too, the jury were charged that the title being out of the State, the deed to the plaintiff with possession (and that the plaintiff testified to his having been in possession since May 3, 1832), would be sufficient whether it passed an estate in fee or for life.

Some of the instructions asked were, that the Judge should define and explain the character of a possession required to convert a defective into a perfect title under a deed purporting to pass an estate in land, the omission to give which cannot be assigned for error, for the reason that the facts to which such an instruction would be applied do not appear in the evidence.

The plaintiff testifies that his brother had a clearing of eleven acres on the 640-acre track, and was *in possession* for about twelve years before going west, and that he, the witness, has kept it ever since his purchase from his father; that he got timber whenever he wanted it from that corner, to the Martin Ross corner, and to the creek, right on the corner of the 640-acre grant at Copperhead, marked H. The Judge states the plaintiff's testimony to be, as in fact it was, that "he had been in possession of the land described in said (his own) deed since May 3, 1832," the date of its execution.

We cannot undertake to say that a constant cutting of timber up to a defined line during so long a period, as of right, and

without interference or complaint from any one, is not an assertion of ownership, and a possession sufficient to give effect to that, which, in the absence of the exercise of such rights of ownership, would be but color of title.

In *Simpson* v. *Blount*, 3 Dev., 34, Ruffin, J., declares that "exercising that dominion over the thing, and taking that use and profit which it is capable of yielding *in its present state* (the italics are his own), is a possession."

Of similar import is the definition given by Gaston, J., in *Williams* v. *Buchanan*, 1 Ired., 535, when he says that "possession is denoted by the exercise of acts of dominion over it (the property) in making the ordinary use, and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated, as to show that they are done in the character of owner, and not of an occasional trespasser." The subject is considered in *Gudger* v. *Hensley*, 82 N. C., 481.

The court is not required to lay down abstract rules of law not pertinent to any aspect of the proofs, but to declare the law as applicable to the facts that, upon the evidence, the jury may be warranted in finding, and to aid them with this knowledge in their inquiry.

The appellant should have asked an instruction predicated upon the facts proved, or as the jury would have been warranted in finding them upon the testimony, that they do not constitute possession, within the meaning of the rule which attaches such consequences to a deed, in itself conveying no title. If the instruction had been refused, when it ought to have been given, it would be a reviewable error capable of correction. But none such was asked. The witness swore to his possession, to repeated acts of himself extending over many years in assertion of ownership, and this testimony is before the jury unchallenged. It was entirely proper under such circumstances for the court to assume a legal possession to have been testified to, and so to present the case in the charge to the jury.

This view is not in conflict with the ruling in *Logan* v. *Fitzgerald*, 87 N. C., 308, cited in the argument upon the point now considered. There the claim was under an alleged possession, with and without color of title, and the Court below failed to discriminate between the possession required in the two cases.

The error in that case consisted in the neglect of the Court to explain that in the absence of any deed or instrument sufficient to afford color of title, "the occupation *de facto* is the measure of possession," and it cannot be enlarged by construction up to boundaries, as is the rule when there is a supporting color of title. This was calculated to mislead.

In this case there is an accompanying deed, and the possession of any part, is possession of all within the boundaries of it, except when some portion is held under a superior title, to which actual occupation does not extend. The Judge ought not to have told the jury that there was no evidence of possession, for this would neither accord with the testimony reported, nor with the Judge's understanding and statement of it.

The special instructions numbered 12, 13, 14 were given with modifications of the first two of them, which in our opinion were entirely proper. Indeed, it is questionable whether the defendant was entitled to them as modified, for while the description of the beginning in the plaintiff's deed fixes it "on the east side of Negro Head Creek, in McRae's line," its position in the line may be determined, or evidence of it derived from other provisions of the deed. Besides, in assuming the starting point to be at 14, which the surveyor states to be the southwest corner of the McRae tract, you depart at once from his line, while the direction in the deed is, that thence the line of the plaintiff shall run "with said McRae's line, crossing said creek," and then when meeting the Mullis line, to pursue its course to Smith's line, all of which calls are ignored in the requested instructions.

Nor is it very important to ascertain the precise point of the beginning in McRae's line, since wherever it is placed, the final call requires the boundary to run from the ascertained intersec-

tion of Bushy Branch with it, along that line at 12, and to follow it to the beginning, thus completing the enclosure.

Upon a view of the whole case, and after re-arguments, full and exhaustive, upon the exceptions contained in the record, we are brought to the conclusion that none of them are tenable, and that there is no error in the rulings upon them. The appellant's case was fairly and even favorably submitted to the jury, and their verdict is sustained by the evidence. We have considered, and can consider only assigned error, except there be in the charge an erroneous and misleading proposition of law, and none such appear.

The judgment must be affirmed.

No error. Affirmed.

J. B. SUMNER, Adm'r, v. T. J. CANDLER.

Evidence—Transactions and Communications with Deceased Persons.

1. Assignment of error for the exclusion of proposed evidence must distinctly point out its relevancy and materiality.
2. A party to an action is not permitted to testify in his own behalf against the executor, administrator, &c., of a deceased person, unless the executor or administrator, &c., is examined, or the testimony of the deceased person is given in evidence, when the door is opened to the opposing party to testify for himself, but only as to those particular transactions and communications to which the testimony of the deceased person or his representative was pertinent. *The Code*, §590.

(*Knight* v. *Killebrew*, 86 N. C., 400; *Bland* v. *O'Hagan*, 64 N. C., 471, cited and approved).

This was a CIVIL ACTION, tried before *Graves, Judge*, at Spring Term, 1885, of BUNCOMBE Superior Court.

The action was brought to recover from the defendant, the amount of certain claims against the State of North Carolina,

drawn on the Treasury of the State, which the defendant drew from the said treasury, to the use of the plaintiff. The defendant relied upon the plea of accord and satisfaction. On the trial the plaintiff introduced himself as a witness and testified as follows: "I went over to Stephens' mill with my father and passed the mill, going towards Candler's house, and met him on a horse with a turn of grain. Candler said his wife had hunted for the receipts; that he would let my father have the horse, bridle and saddle, and the order for the two hundred dollar claim." On cross-examination he said he had been prosecuting this suit. Jesse Sumner, son of the plaintiff's intestate, was then introduced by the plaintiff, and testified as follows: "I am the son of Jesse Sumner, who died about August 8th, 1878. About 1875 I saw Jesse Sumner and Candler together. They were at the steps of the Roberts building in Asheville. I said to my father, "Let's go home." Candler said, "I will hunt the receipts." Sumner said, he must get the receipts, he did not want the receipts. My father said, he would take the horse, bridle and saddle and suit of clothing for the claim, and Candler was to get up the receipts for the claim; said if he did get the receipts, he could get a proper voucher from the treasurer, and it would be all right. He had been a witness all the time. This was the first time he had been sworn."

The defendant introduced himself as a witness and testified as follows: "I have heard the testimony of John Sumner, the plaintiff. Nothing occurred at the mill; on the 18th day of February, 1875, I met John Sumner and his father. Never was a word mentioned on the subject in the presence of John at that place or any other place."

At this point the defendant offered to assign the reason why nothing was said, and the plaintiff objected. The court said the defendant might testify as to the transaction or communication with deceased, about which the plaintiff, his administrator, had testified, but not as to any other transaction or communication with the deceased. The defendant excepted. The witness then

testified that the witness, the plaintiff, was not at the house of John Hendrix.

The defendant then offered to testify in regard to the matter testified to by Jesse Sumner, son of deceased; objected to, objection sustained, and defendant excepted.

The defendant then offered himself as a witness to testify for all purposes. Plaintiff objected; objection sustained, exception by the defendant. There was a verdict and judgment for the plaintiff, and the defendant appealed.

Messrs. Theo. F. Davidson and *J. H. Merrimon*, for the plaintiff.

Messrs. McLoud & Moore, for the defendant.

ASHE, J. (after stating the facts). The first exception taken by the defendant was to His Honor's refusal to allow the testimony of the defendant, as to the reason why nothing was said when he and the plaintiff's intestate met near the mill. There was no error in the ruling of His Honor in that respect. He told the witness, he might testify as to the transaction or communication with the deceased. The fact that the witness did not proceed to testify, was evidence that what he proposed to say was not about the transaction or communication that was testified to by the plaintiff, and besides it is a well established rule of evidence, that error cannot be assigned in the ruling out of evidence, unless it is distinctly shown "what the evidence was, in order that its relevancy may appear, and that a prejudice has arisen from its rejection," and in this case it does not appear what the rejected evidence was, and we cannot see that it was pertinent or material. *Knight* v. *Killebrew*, 86 N. C., 400; *Bland* v. *O'Hagan*, 64 N. C., 471.

Nor was there any error in the ruling upon the ground of the second exception.

The plaintiff, as the administrator of Jesse Sumner, had introduced a witness who testified to a conversation between his intes-

tate and the defendant. The defendant then offered himself as a witness to explain or contradict the testimony of the plaintiff's witness. As a party to an action, one may be admitted to testify in his own behalf under section 342, C. C. P., section 589 of *The Code*. But by section 343, C. C. P., section 590 of *The Code*, he is excluded from the right of being examined as a witness in his own behalf, against the executor, administrator, &c., of a deceased person. There is, however, an exception to this rule contained in the *proviso*, that when the executor or administrator, &c., is examined as a witness in his own behalf, or the testimony of the deceased person is given in evidence in regard to the same transaction or communication. In such a case it is held the door is opened, and the opposing party may offer himself as a witness and testify in regard to the *same* transaction or communication.

But the plaintiff has not offered himself as a witness in his own behalf as to the conversation between his intestate and defendant, as testified to by Jesse Sumner, nor had he offered in evidence any testimony of his intestate. The testimony, therefore, was clearly excluded by section 590 of *The Code*.

The remaining exception, to the refusal of the Court to admit the defendant to testify for all purposes, was equally untenable. When a party to an action is admitted to testify in his own behalf under the *proviso* or exception in the section 590 of *The Code*, the testimony is restricted to the *same* transaction or communication as testified to by the opposite party. It does not contemplate opening the door so wide as contended for by the defendant.

There is no error. The judgment of the Superior Court of Buncombe county is affirmed.

No error. Affirmed.

*J. M. TURRENTINE v. THE RICHMOND & DANVILLE RAILROAD COMPANY.

Contributory Negligence—Issues.

1. Where issues are framed in such a manner that the material facts of the case as found by the jury are confused and unsatisfactory, the verdict should be set aside and a new trial ordered.
2. In an action against a Railroad Company for an injury to the plaintiff, resulting from its negligence, although the plaintiff shows negligence on the part of the defendant, he cannot recover, if by reasonable care and attention on his part, he could have avoided the injury.
3. Mere negligence or want of ordinary care will not, however, bar the plaintiff's recovery, unless it is such that but for that negligence the misfortune would not have happened; nor if the defendant might by the exercise of care on his part, have avoided the consequence of the plaintiff's negligence.

(*Gunter* v. *Wicker*, 85 N. C., 310; *Owens* v. *The Railroad*, 88 N. C., 502; *Farmer* v. *The Railroad*, *Ibid.*, 564; *Aycock* v. *The Railroad*, 89 N. C., 321; *Bank* v. *Alexander*, 84 N. C., 30; *Mitchell* v. *Brown*, 88 N. C., 156, cited and approved).

CIVIL ACTION, tried before *MacRae, Judge*, and a jury, at Spring Term, 1884, of MECKLENBURG Superior Court.

The complaint charges that the plaintiff, as route agent in the service of the post office department, and in charge of the mails on the defendant's train, in passing between Charlotte and Danville, in the latter part of November and early in December, 1877, in consequence of the insufficient warming of the room in the car assigned him, became violently ill and lost his power of speech, and in this action he claims reparation in damages for the consequences of the negligence and inattention of the company and its employees. The answer denies the imputed neglect, and avers that while the room occupied by the plaintiff for official purposes, was kept warm and comfortable during the severe cold weather that prevailed at the time stated, the injury to the plaintiff's health and physical condition was the result of his own

* MERRIMON, Judge, did not sit on the argument of this cause, having been of counsel.

imprudence in opening the outer door of the room for the delivery and reception of mail-bags in his night excursions along the route on his return to Charlotte, in which currents of cold air would enter, accelerated in volume and force by the rapidly moving train; and the want of proper precaution for his own protection from the effects. The answer also charges that his intemperate habits, and self-exposure in passing from the train, at midnight, on its arrival at Charlotte, to his own house, and other misconduct on his part contributed to bring on the physical condition from which he suffered, and which, with proper care for his own person, might have been avoided. Upon these controverting allegations, issues were drawn and submitted to the jury which, with their responses, are as follows:

I. Did the defendant negligently fail to provide a car properly heated for the accommodation of the plaintiff, as route agent in charge of the United States mails from Charlotte to Danville on the 27th, 29th and 30th of November, and on the 1st of December, 1877, or on either of said days? Answer—Yes.

II. If so, was the plaintiff injured thereby as charged in the complaint? Not as charged.

III. What damage has the plaintiff sustained by reason of the injury resulting from such negligence, if any? Answer—Twenty-five hundred dollars.

IV. Did this negligence produce the injury to the plaintiff, or was it only the partial cause of the injury? Answer—Partial cause.

The plaintiff moved that the verdict be set aside, and a new jury ordered, on the ground that the findings were inconsistent and insensible. This was refused and judgment rendered for the defendant, the court expressing the opinion that as the jury had found that the company was negligent in failing to provide a car properly heated for the plaintiff's use, and that this negligence was only a partial cause of the plaintiff's loss of voice, other causes having been set up in the evidence, it was impossible to apportion the damages resulting therefrom. The plaintiff appealed.

Mr. W. P. Bynum, for the plaintiff.

Messrs. D. Schenck and *Reade, Busbee & Busbee*, for the defendant.

SMITH, C. J. (after stating the facts as above). We have not adverted to the numerous exceptions scattered along the way in the progress of the trial to the admission of evidence the jury were allowed to hear, nor have we given more than a summary statement of the matter in controversy, since the response of the jury to the inquiries they were directed to make, furnish sufficient reason without an examination of the other errors assigned, for reversing the judgment and submitting to another jury, issues put in a form that will elicit the information needed in determining the case upon its merits. The present findings do not enable the court to see whether there was that concurrent negligence of the plaintiff, which, associated with that of the defendant, brought about the injury, and in consequence denies him redress. The proper inquiry was not only as to the defendant's neglect in warming the car used by the plaintiff, but whether the plaintiff himself, by the want of proper care and attention, such as a prudent man would and ought to take for his own safety against the effects of being in an unwarmed room, did not bring the injury on himself or directly, by his own neglect, contribute to it. If he did, he is not entitled to recover, under the established rule, that notwithstanding the previous negligence of the defendant, the plaintiff cannot maintain his action when, in the exercise of reasonable care and attention on his own part, he might have avoided the injury sustained.

To illustrate the proposition of law in its application to the present case. If the plaintiff, entering the car and finding it not warmed, neglected to provide adequate clothing for such an atmosphere, and recklessly and needlessly exposed his insufficiently clothed person to blasts of cold air, and this was the direct and immediate cause of his injury, he could not hold the defendant responsible for consequences that proceed directly from

himself and his own indifference. The question for the jury, in the words of an eminent English Judge, is "whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune, by his own negligence or want of ordinary and common care and caution, that but for such negligence and want of ordinary care and caution on his part, *the misfortune would not have happened.* In the first place the plaintiff would be entitled to recover, in the latter not; as but for his own fault the misfortune would not have happened." And in explanation of the proposition he adds: "Mere negligence or want of ordinary care or caution would not, however, disentitle him to recover, unless it were such that but for that negligence or want of ordinary care and caution, the misfortune would not have happened; nor if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff." Wightman, J., in *Tuft* v. *Warman*, 94 Eng. Com. Law Rep., 573.

The rule is thus so fully and definitely expressed as to require no further comments from us.

The counterpart of this rule is declared in *Gunter* v. *Wicker*, 85 N. C., 310, *Owens* v. *Railroad*, 88 N. C., 502, *Farmer* v. *Railroad*, *Ibid.*, 564, and in *Aycock* v. *Railroad*, 89 N. C., 321, that the defendant will be liable, notwithstanding previous negligence of the plaintiff, if, when the injury was done, it might have been averted by the exercise of reasonable care and prudence on the part of the defendant.

The jury say that the company neglected to provide a suitable room in the coach for the use of the plaintiff, that this negligence was a partial cause of the plaintiff's injury, but the injury was not brought about in the manner charged. How can it be seen how far and how directly the plaintiff contributed to his own injury, and whether this participation was such as to absolve the company from liability for the results? The finding does not point out the efficient and direct cause of the plaintiff's ill health

and suffering so that it can be determined how far his disregard of the dictates of prudence for the preservation of his health was the direct or an active contributory cause of his attack. The issues should have been so framed as to distinctly present the case in the aspect suggested, and especially to show the extent of his contributory agency in producing the result, so that the rule of law could be applied to the facts, and the company's responsibility in the premises decided.

The judgment, while the only one that could be rendered on the findings, rests, nevertheless, upon a confused and unsatisfactory verdict, and ought not to stand, as injustice may be done to the plaintiff. Pursuing the same course as in *Bank* v. *Alexander*, 84 N. C., 30, and *Mitchell* v. *Brown*, 88 N. C., 156, we must reverse the judgment and direct the award of a *venire de novo* to try issues drawn up in proper form, and to this end let this be certified.

Error. Reversed.

J. M. TURRENTINE v. THE RICHMOND AND DANVILLE RAILROAD COMPANY.*

Appeal—Service of Case.

1. Until the term expires, there is no final determination of the cause, so that the case on appeal need only be filed within five days after the end of the term at which judgment is rendered.

2. In calculating the time within which the case on appeal must be filed, the first day is to be excluded.

(*Clifton* v. *Wynne*, 81 N. C., 160; *Moore* v. *Hinnant*, 90 N. C., 163; *Barcroft* v. *Roberts*, *ante*, 249, cited and approved).

This was the defendant's appeal in the preceding case.

The trial of this cause was entered upon during the Spring Term, 1884, of the Superior Court of Mecklenburg county on

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

March 5th, and terminated on the 12th day of the month, when, in open court, the defendant appealed, and was allowed to do so without making a deposit or giving the secured undertaking for costs. The session was concluded and the court adjourned on the 15th day of the month.

The case on appeal was prepared by the counsel of the appellant and served on the defendant's counsel on the 20th, five days thereafter. On the last mentioned day, the plaintiff's counsel also called upon the clerk at his office, and asked him to enter the judgment rendered upon the judgment-docket, and the plaintiff's appeal also. The clerk declined to do this, and thereupon the counsel filed the appellant's exceptions in the office.

Upon the hearing before the judge in order to the settling of the case on appeal, the defendant's counsel objected to the consideration of the statement of the plaintiff's case and the adjustment of the differences in order to its completion, upon the ground that the copy had not been served on him within five days "from the entry of the appeal taken," as prescribed and limited by *The Code*, sec. 550.

The court deemed the objection untenable, and denying the motion, proceeded to make up the case, and the defendant appealed.

Mr. W. P. Bynum, for the plaintiff.

Messrs. D. Schenck and *Reade, Busbee & Busbee*, for the defendant.

SMITH, C. J. (after stating the facts). There is no error in the ruling of the court. The proceedings had during the sitting of the court are *in fieri*, and a judgment rendered is subject to be set aside, modified and changed, should the judge upon a reconsideration deem it erroneous or unsatisfactory in any particular. It is not final and conclusive until the term expires and his authority ceases. This is equally true of an appeal, which is subject to the same conditions, and may be defeated by the action of the court in vacating the judgment or in so modifying it as to remove the objectionable part.

As until the term expires there is no final determination of the cause, the appeal in a legal sense is then taken and becomes absolute. *Clifton* v. *Wynne,* 81 N. C., 160; *Moore* v. *Hinnant,* 90 N. C., 163, and numerous cases referred to in the opinion.

It is manifest then that the judgment is *not rendered,* that is, not made final and complete until the term closes, and so the appeal is only taken when the judgment becomes absolute and fixed. Otherwise in a protracted term, the cause might be taken out of the jurisdiction and placed beyond the control of the judge. Yet the authorities are clear that his jurisdiction retains the cause in court during the entire term, and subject to his authority.

The copy was served within the five days, since in counting time the first day is excluded, as provided in section 596 of *The Code,* and decided in *Barcroft* v. *Roberts, ante,* 249. The entry of the appeal on the 12th was but an inchoate, not a consummated act, awaiting the possible intervention of the judge, but to be proceeded with, when his control over the case ceases, within the time limited for the perfection of the appeal. There is no error, and the judgment is affirmed.

No error. Affirmed.

A. L. LOGAN v. W. W. FITZGERALD, et al.

Entry on Land—Possession.

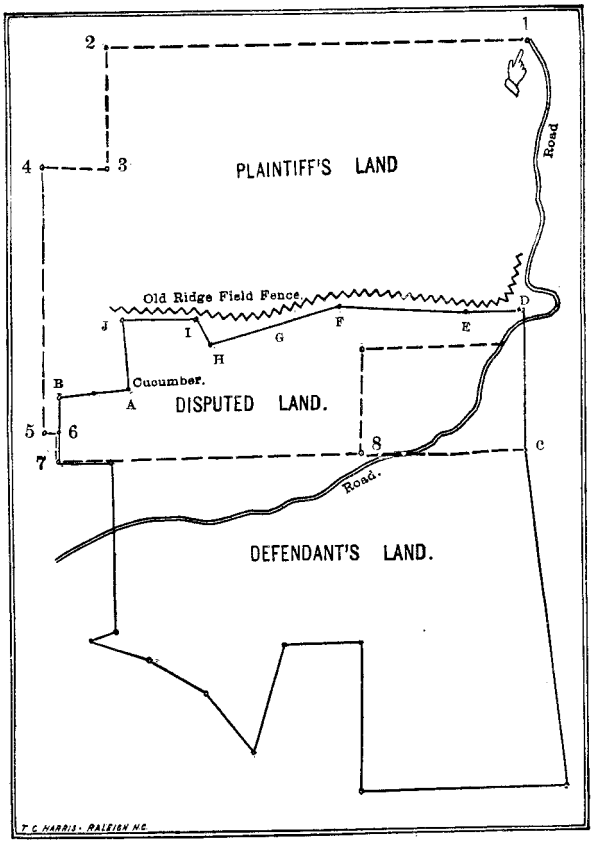
1. If the true owner enters on land, the possession at once follows the title, and both title and possession are then in him. A possession thus acquired by the true owner, although he enters under a mistaken and erroneous claim, nevertheless, is supplied by the legal estate, and the owner, in law, holds by his real, and not by his pretended title.

2. When the true owner enters, as an assertion of his right, it is not necessary to expel the occupant in possession at the time of such entry.

3. Where the defendant was in actual possession of a part of the *locus in quo*, and had constructive possession of the rest, and the true owner, the plaintiff, enters upon the part of which the possession was constructive; *Held*, that such entry at once vests the possession in him, and seven years must elapse from such entry, before the defendant can acquire title by lapse of time.

(*Staton* v. *Mullis*, *ante*, 623; *Howell* v. *McCracken*, 87 N. C., 399; *Gaylord* v. *Respass*, *ante*, 553, cited and approved).

CIVIL ACTION, for the recovery of land, heard before *Graves*, *Judge*, and a jury, at Spring Term, 1884, of BUNCOMBE Superior Court.



It is conceded that the land in controversy belongs to the plaintiff by virtue of the deeds under which he claims, unless the title thereto has been divested and transferred to the defendant Lorena Ramsay, of whom the other defendants are tenants, by virtue of possession accompanied with color of title for the prescribed period of time. To sustain the defence, it was shown that Jacob Ramsay resided on land adjoining that in dispute, just south of the line 7, 8, 6, marked on the plat, until his death in 1844, since which his son William Ramsay continued the possession during his life and at his death devised the same, in 1863, to said Lorena, his surviving wife, designating it in the will as "all that part and parcel of land on which I now live, known and described as the Jacob Ramsay farm."

The defendants also introduced a deed executed in October, 1870, and having the signatures of eleven grantors, of whom five are the wives of five others so signing, in which their respective interests in the land therein described by marks and bounds are conveyed to the said Lorena Ramsay. In 1862 the tract was claimed by William Ramsay, and at his instance was surveyed and the lines run by Blackstock, and the course and distance as ascertained from his field notes are pursued in describing the land in the deed, and include that in dispute, with the other that had been in the occupancy of the Ramsays, father and son. The divisional line is designated in the plat as 6, B, A, J, I, H, G, F, E, D. The deed was proved to have been executed by all whose names are attached, except the five *femes covert*, and upon this probate admitted to registration in March, 1880.

It was in proof that Jacob Ramsay cleared and enclosed several acres north of the line 8, C, on which he built a stable, and these were used and cultivated by both himself and his son during their respective lives, a period of more than forty years. The devisee Lorena, has since her husband's death, continued to cultivate and raise crops on the enclosed territory, enlarging it by clearing other contiguous land, until at the commencement of the suit there were from ten to fifteen acres under fence and in use.

During her residence on the devised tract, she has taken from the disputed part, outside of the enclosure, whatever and whenever required for use on the plantation, without hinderance from any one, timber for wood, rails, boards, and saw logs, and this up to the controverted boundary. If any adverse claimant removed any timber therefrom the fact was not known to her.

On the other hand, there was proof offered by the plaintiff, that a witness now forty-four years of age, when a boy, with others acting under the directions of his father, a mill owner, got material for the repair of the mill, when repairs were needed, from land south of the ridge-field at the asserted divisional line. That a former owner in 1868 got saw stocks on lands south of the ridge-field fence, and that the plaintiff after his contract of purchase in 1876 got wood and timber occasionally thereon, and directed his tenants to continue to get it after they had been notified not to do so. The disputed territory outside of that under fence is woodland, and if cleared, fit for agricultural uses.

The court instructed the jury upon the matter covered by the instructions asked, which are not necessary to be set out, as follows:

"The defendant admits that the plaintiff is the owner of the land in dispute, unless she has shown that she is the owner by color of title and adverse possession. Possession under color of title, to divest the estate of the owner, must be adverse, open and continuous, and without interruption from the owner. If the jury believe, from the evidence, that the plaintiff, and those under whom he claims, did continuously enter upon the woodland of the disputed territory, outside of the defendant's actual possession on said disputed territory, and get and remove the timber therefrom at his pleasure, and that he and those under whom he claims, continuously did these acts *between the date when defendant's actual possession under color of title shown by her began* and the commencement of this action, and that the plaintiff and those under whom he claims did these acts under claim of title, then each was an entry under a claim of title, and

an assertion of ownership, and if the jury shall believe that such acts were done without interference from defendant, they had the effect to break the continuity of the constructive possession of defendant, outside of her actual possession, and to defeat her claim to all the disputed territory of which she did not have the actual possession, if the jury shall believe there was such portion. The repeated exercise of ownership, in using the trees for their own purposes by the plaintiff and those under whom he claims, if the jury shall find from the evidence, that there were such acts of ownership, and the abstaining of defendants from any interference, if the jury shall find that the defendant did abstain from any interference, certainly must have the effect of preserving the plaintiff's title to all of that portion of the disputed territory of which the defendant did not have the actual possession, if there was such portion." Defendant excepted.

The judge, in charging the jury, read over the testimony of the witnesses as he had understood it and written it down, but he told the jury that he had only written it as he understood it, and that they were not bound by his recollection of it, but must be the sole judges themselves as to what the witnesses had sworn to.

The jury, in response to the issues submitted to them, returned their verdict in these words: "We give the defendant all the land she has under fence. We give to the plaintiff all the rest of the disputed land and no damages." And the court rendered judgment accordingly for the plaintiff. From the judgment the defendant appealed.

Mr. J. H. Merrimon, for the plaintiff.
Mr. C. A. Moore, for the defendant.

SMITH, C. J. (after stating the facts). Assuming the acts of ownership exercised upon and over the disputed territory outside of the enclosure and up to her claimed northern boundary, as run and marked by Blackstock, to have been so numerous and

frequent and for so long a period, as to constitute a possession, as defined in the opinion in *Staton* v. *Mullis*, *ante*, 623, it is manifest that such possession to be followed by the legal consequences attributed to it, must not have been interrupted during the prescribed time by the entry of the true owner, as of right, upon the premises, and his exercising similar authority. We have reference to land outside the enclosure, since title to that within seems from the long actual occupation by the defendant and her predecessors in interest, even without any written instrument, to be beyond dispute in the defendant. This does not aid the possession set up to that in controversy, covered by the conflicting claims. If the real owner does enter upon this outside space, the possession at once follows the title, and both title and possession are then in him; so that the continuity of the other possession being broken, when resumed as a new starting point, it must extend over seven years to produce the required result, as if there had been none before. The instruction to the jury was as favorable to the case of the defendant as she could reasonably require; for the entry necessary to interrupt her possession, according to the charge, must have been under a claim of superior title, which admits of an interpretation that more is required than the entry itself and the acts done upon the land, such as an assertion of a right thereto at the time of entering. If this be the meaning, the charge is open to complaint from the plaintiff, for an entry of an owner of land, as of right and not by permission, is itself an assertion of claim and recovery of possession of all that is not in the actual, as distinguished from the constructive, possession of the wrongful occupant.

In the expressive language of the Court, which we have quoted in *Gaylord* v. *Respass*, *ante*, 553, in the opinion delivered in *Daniel* v. *Woodruff*, 10 M. & W., (Ex.) 631, "when a party having right of entry enters, it is not competent for him to repudiate any rights he may possess, and to say he has entered as a trespasser, or by some other than his real title. As soon as he has entered *he is possessed*, whether he will or no, by virtue

of every title which he had in him and could assert by entry." These remarks, of course, have reference to an entry made in the *exercise of a right*, which, however misconceived and not within the declared or unexpressed intent, annexes the recovered possession to the title which is in the party. A possession thus acquired by the owner who may enter upon a mistaken and erroneous claim, nevertheless, is supplied by the legal estate, and the owner, in law, retains by virtue of his real, and not misapprehended right. Such re-entry puts an end to the constructive possession, and defeats its operation as a bar thereto. It is enough that the owner goes upon his own land as an assertion of his right as the owner, and it is not necessary to expel the occupant of the portion which is in his actual possession. *Howell* v. *McCracken*, 87 N. C., 399.

We must understand there was evidence of interrupting entries made upon the land, to have the effect ascribed to them in the charge, in the absence of any exception based upon the absence of evidence, and especially since the instruction asked was that no such *continuous acts* of the plaintiff, showing a claim of ownership, had been proved "to break the continuity of the defendant's constructive possession," not that no successive entries by the plaintiff were in proof.

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

No error. Affirmed.

UNIVERSITY OF NORTH CAROLINA et al. v. THE STATE NATIONAL BANK.

Appeal.

Where part of the issues in an action are decided by a trial, and others, material to the final disposition of the cause, are left open for further adjustment, an appeal is premature, and it will not be entertained.

(*Hines* v. *Hines*, 84 N. C., 122; *Commissioners* v. *Satchwell*, 88 N. C., 1; *Jones* v. *Call*, 89 N. C., 188; *Grant* v. *Reese*, 90 N. C., 3; *Arrington* v. *Arrington*, 91 N. C., 301, cited and approved).

CIVIL ACTION, heard before *Avery, Judge,* and a jury, at February Term, 1884, of WAKE Superior Court.

The parties entered upon the trial of the issues evolved out of the conflicting allegations contained in the pleadings, among which was an inquiry of the damages sustained by the plaintiff from the defendant's conversion of the bonds in his custody by a sale, and his misappropriation of the proceeds to his own use. This issue was by the Judge withdrawn from the jury, in order that, if rendered necessary by the other findings, it might become the subject of further reference and inquiry.

After the rendition of the verdict upon the other matters submitted, judgment was entered requiring the defendant to surrender the bonds, or, if unable to do so, an order of reference was made to a commissioner to ascertain the value of the misapplied bonds, as the measure of the damages to which the plaintiff was entitled, in lieu of such surrender. From this judgment, and without awaiting the results of the reference, the defendant appeals.

Messrs. Fuller & Snow, Reade, Busbee & Busbee, J. W. Hinsdale and *E. C. Smith,* for the plaintiff.

Messrs. D. G. Fowle and *G. V. Strong,* for the defendant.

SMITH, C. J. (after stating the facts). We have repeatedly ruled that under such circumstances, when a part of the issues or mat-

ters in dispute are passed on, and others material to a disposition of the cause, left open, an appeal was premature and would not be entertained. The cases are numerous to this effect and we are content to refer to some of them. *Hines* v. *Hines*, 84 N. C., 122; *Commissioners* v. *Satchwell*, 88 N. C., 1; *Jones* v. *Call*, 89 N. C., 188; *Grant* v. *Reese*, 90 N. C., 3; *Arrington* v. *Arrington*, 91 N. C., 301.

In accordance with these adjudications the appeal must be dismissed, and it is so ordered. Let this be certified to the Superior Court of Wake.

Appeal dismissed.

R. A. COBB, Adm'r, v. J. C. HALYBURTON et als.

Homestead—Statute of Limitations—Reversionary interest—Petition to sell land for assets.

1. The act declaring that the statute of limitations shall not run against any debt owing by the holder of a homestead, which is affected by the act forbidding the sale of the reversion (Bat. Rev., ch. 55, sec. 26), has been repealed.
2. The statute begins to run against such debts from November 1, 1883, when the repealing act went into effect.
3. The allotment of homestead is not *ipso facto* void even against debts contracted prior to the adoption of the constitution. It becomes so only when the debtor has no other property, which can be subjected to the payment of such debts.
4. In 1869, the plaintiff's intestate obtained judgments against the ancestor of the defendants, on debts contracted in 1866, and a homestead was allotted to the defendant, which, at his death, was re-allotted to his infant children, the present defendants. A petition was filed by the debtor's administrator to sell the homestead to make assets to pay the judgments; *Held*, 1st, that by assenting for so long a time to the homestead allotment, and by availing themselves of the provision of the statute, which prevented their judgments from being barred, the creditors were precluded from denying the right of the infants to the homestead; 2d, that the creditors were entitled to have the reversion after the determination of the homestead, not the absolute estate in the land, sold to pay their debts.

(*McDonald* v. *Dickson*, 85 N. C., 248; *Albright* v. *Albright*, 88 N. C., 238; *Markham* v. *Hicks*, 90 N. C., 204, cited and approved).

The executors of Jacob Harshaw, at Fall Term, 1869, of the Superior Court of Burke, recovered two judgments on bonds for the payment of money, executed on September 15th, 1866, to their testator, against Jacob B. Kincaid and others, the co-obligors not being the same on each, and were unable to obtain satisfaction upon executions sued out thereon. In September, 1869, the debtor's homestead and personal property exemptions were laid off to him. He died in 1872, and the homestead exemption was again laid off for the benefit of his infant children, the youngest of whom was born on July 18th, 1867. In April, 1876, his surviving widow also died. Successive writs of execution were issued against the debtor during his life, and against his administrator, the plaintiff in this proceeding, since his death down to the last, which issued on November 23d, 1881, all of which, as appears by the sheriff's returns, were fruitless of result. The plaintiff, having no assets with which to pay the judgments, instituted proceedings in the Superior Court before the clerk, against the heirs-at-law of the intestate, for the sale of his descended land and its conversion into assets for the payment of the aforesaid judgments, and they resist the action, upon the ground that they are barred by the lapse of time, and they claim that this defence is open to them when it is attempted to subject their lands to the payment of the debts.

The present suit was commenced by a summons issued on June 5th, 1882, at the instance of the administrator of Kincaid, to whom letters issued on the 29th day of November, 1875, more than three years after the intestate's death.

The clerk of Burke county having an interest in the testator's estate, the cause was removed and committed to the jurisdiction of the Superior Court of Caldwell, on the hearing before the clerk of which court, it was adjudged that the plaintiff was not entitled to the relief demanded and that the defendants go without day and recover their costs.

Upon the plaintiff's appeal to the judge, he affirmed the ruling and rendered judgment dismissing the petition with costs, and therefrom the plaintiff again appeals to this court.

Messrs. Fuller & Snow and *E. C. Smith,* for the plaintiff.
Mr. John T. Perkins, for the defendants.

SMITH, C. J. (after stating the facts). The only question presented for consideration is, whether the debts reduced to judgments are entitled to be paid from the real estate, and this defence be open to the heirs-at-law.

The act of 1869–'70, found in Bat. Rev., ch. 55, sec. 26, forbids the sale under execution for any debt, of "the reversionary interest in any lands included in a homestead," until after its termination, and meanwhile, "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 in the homestead." This enactment is construed in *McDonald* v. *Dickson,* 85 N. C., 248, as applying to homestead exemptions actually assigned and set apart to the insolvent debtor, and removing the statute of limitations out of the way so far as it obstructs the creditor's access to the assigned land, while it debars him from recourse to other property. The provision suspends the exercise of this reserved right, until by the efflux of time, or otherwise, the exemption ceases, and while recourse may then be had to the homestead for satisfaction of the debt, it was not allowed before.

Of the heirs-at-law of the intestate made defendants in the proceeding, two were under age when it commenced, and the youngest, though married, remains still an infant, so that the limitation has not yet expired, and, under the statute, the action is premature. The statute itself, however, is not brought forward in *The Code,* and ceased to operate on and after the 1st of November, 1883, when the statute of limitations again began to run for the protection of the debtor's estate against the judgments.

The only land left by the intestate so far as the record discloses, is that assigned as exempt in his life-time, and again, unnecessarily, after his death, at the instance of his infant children, assigned to them, and which land it is now sought to subject to the judgment debts. As the judgments were rendered upon contracts entered into in 1866, and can be enforced only against the homestead, the petitioner asks that it be sold and converted into assets for their satisfaction. The homestead allotment is not *ipso facto* void even as against debts made prior to the adoption of the constitution. It becomes so only when the debtor has no other property which can be subjected to their payment, and the appropriation of this becomes necessary. *Albright* v. *Albright*, 88 N. C., 238.

The creditors, by their long delay, have acquiesced in the allotment of the exemption in the land, and as they now are compelled to protect their judgments under the provision for suspending the statute of limitations to prevent a bar, they cannot be allowed to impeach the validity of the exemption on the ground that it is ineffectual against them. If the exemption is repudiated, and the land is thus declared to have been exposed to their demand, then the judgments are barred, for it is only when the creditor is interrupted by the lawful assignment of the land, and cannot proceed against it, that the suspending claim has any force or operation upon the debt. The creditors cannot now occupy any better position than results from regarding the homestead as effectual against them. So that the judgments could only be enforced as others, after the expiration of the exemption, and this period has not arrived. The repeal of the act, which puts in force the statute of limitations, must, however, remit the creditors to their original rights to proceed against this property, and unless they can do so, they may lose their remedy altogether.

It is true, as is said in *Markham* v. *Hicks*, 90 N. C., 204, the prohibition against the sale of the reversionary interest, as it is called, in the homestead, remains in force since the repeal of the act of 1869-'70, but this was said in reference to debts contracted

since the exemption was secured to the debtor, which could not be pressed while the exemption continues, but it does not follow that a prior debt may not be enforced by a sale, not of a "reversionary interest," but of the land itself as free from incumbrance.

We have already said that the creditors having recognized, by their inaction, the assignment of the homestead, and seeking themselves exemption from the statute of limitations under the proviso of the act, could not now claim the benefit and repudiate the burden. But when the statute is revived and becomes active by its repeal, the creditors ought also to be at liberty to proceed and assert their legal rights, otherwise, while not now barred, they may be barred by waiting until the children all arrive at full age. The action, therefore, though prematurely brought, it would seem ought to be allowed now to go on and its legal results reached. In other words the petitioner ought to be allowed to sell the land subject to the homestead, as but for his recognition aforesaid, he could have sold the land free from it.

This conclusion has been arrived at upon a full consideration of what has transpired, and a fair adjustment of the conflicting claims of the parties to the action.

There is no sufficient reason for arresting the proceeding and to compel its institution anew, when no advantage is to accrue to the defendants thereby.

We have not adverted to the irregular manner of this proceeding in passing under the jurisdiction of the Superior Court, for it seems not to have been raised, but we do not wish our silence to be misconstrued into an approval of it.

We therefore declare the ruling in the court below, dismissing the petition, erroneous, and it must be reversed, and the cause proceed in the manner indicated in this opinion. To this end let it be certified.

Error. Reversed.

J. E. MERRILL et als. v. PERRY MERRILL, Administrator.

Appeal—Interlocutory Order—Amendment—Administrator—Parties.

1. An appeal can be taken from an order of the Superior Court either making or refusing to make additional parties, when such order affects a substantial right of the appellant; and *it seems* that the appeal may either be taken at once, or it can be assigned as error on an appeal from the final judgment.
2. An appeal lies at once from an interlocutory order that may in effect put an end to the action, or that may prejudice a substantial right of the party complaining.
3. The Court has no power to convert a pending action that cannot be maintained, into a new one by admitting a new party plaintiff, who is solely interested, and allowing him to assign a new cause of action.
4. Where an administrator dies, no one but an administrator *de bonis non* of his intestate can call his representative to account for the assets of his intestate.
5. So, where a suit was pending by the next of kin against an administrator for the distribution of the estate in his hands, and the defendant died; *It was held*, that the action could not be continued by the next of kin, and the Court had no power to allow an administrator *de bonis non* to be made a party plaintiff in the pending action.

Mr. Chief Justice Smith dissents from the opinion of the Court.

(*Rollins* v. *Rollins*, 76 N. C., 264; *Colgrove* v. *Koonce*, 76 N. C., 363: *Phœbe* v. *Black*, *Id.*, 379; *Stephenson* v. *Peebles*, 77 N. C., 364; *Goodman* v. *Goodman*, 72 N. C., 508; *Lansdell* v. *Winstead*, 76 N. C., 366; *Ham* v. *Kornegay*, 85 N. C., 119; *University* v. *Hughes*, 90 N. C., 537; *Wade* v. *Sanders*, 70 N. C., 277; *McDonald* v. *Morris*, 89 N. C., 99; *Asheville Division* v. *Aston*, *Ante.*, 588, cited and approved. *Hardy* v. *Miles*, 91 N. C., 131, cited and distinguished).

(Cases cited in the dissenting opinion: *Goodman* v. *Goodman*, 72 N. C., 508; *Hardy* v. *Miles*, 91 N. C., 131; *Crawley* v. *Woodfin*, 78 N. C., 4; *Allison* v. *Robinson*, 78 N. C., 222; *Baker* v. *The Railroad*, 91 N. C., 308; *University* v. *Hughes*, 90 N. C., 537).

MOTION to make parties, in a cause pending in TRANSYLVANIA Superior Court, heard before *Shipp, Judge*, at Fall Term, 1884, of said Court.

His Honor granted the motion, and the defendant appealed.

A motion was made to dismiss the appeal in the Supreme Court on the ground that the order did not affect any substantial right and was not appealable.

No counsel for the plaintiff.

Messrs. Battle & Mordecai, for the defendant.

MERRIMON, J. The pleadings, indeed the whole record in this case, are very imperfect and informal. It appears, however, with tolerable certainty, that J. R. Merrill died intestate in the county of Transylvania some time in the year 1866, and John Merrill was duly appointed administrator of his estate. Afterwards, this proceeding was begun by the plaintiffs, who are the next-of-kin of his intestate, against him in the then probate court of that county, on the 19th day of May, 1873, for the purpose of obtaining an account and settlement of the estate, and distribution thereof.

The proceeding was transferred to the Superior Court of that county at the Fall Term, 1873, thereof. In that court, it was repeatedly referred to a referee to take and state the account and make report. Reports were made, and each in its order was set aside.

Some time in the year 1881, John Merrill, the administrator, died intestate in the county named, and the defendant Perry Merrill was duly appointed administrator of his estate. Afterwards, at the Fall Term, 1883, it was by consent of all the parties, plaintiffs and defendants, "ordered that the action be referred to W. W. Jones, Esq., to try and decide all the issues of fact raised by the pleadings, and the law arising upon said facts, and to take and state an account of the administration of the estate of said J. R. Merrill by John Merrill, and to ascertain and report whether or not the estate of said John Merrill, deceased, is liable to the plaintiffs or any of them, and if so, how much, or to what extent. The said referee shall make his report to the next term of this court, and shall report his findings of law and fact separately, and shall also report the testimony."

On the 24th day of August, 1884, Edward Shipman was duly appointed administrator *de bonis non* of the estate of J. R. Merrill, the intestate of John Merrill, administrator.

Upon the coming in of the report of the referee at the Fall Term, 1884, of the court, Edward Shipman, as such administrator, applied to be made a party plaintiff in the proceeding. The defendant opposed this application. The court allowed him to be made a party plaintiff according to his application, and thereupon the defendant excepted and appealed to this court.

It is insisted, that no appeal lay from the order making the administrator *de bonis non* a party plaintiff, upon the grounds that it was within the discretion of the court to make it and not reviewable here; that it was interlocutory, and if reviewable here at all, it could not prejudice the defendant to allow the action to proceed to final judgment upon its merits before taking the appeal.

In our judgment, these grounds of objection are not tenable, because the order appealed from put directly in question the liability of the defendant to answer in this action at all. As we shall presently see, the plaintiffs next-of-kin, could not maintain it against the defendant, nor could the administrator *de bonis non*, without first changing the cause of action, not simply in the form of alleging it, but as well in substance and nature. The defendant contended that the practical effect of the order was to constitute a new action, in one pending that could not be maintained against him, and to introduce a new party plaintiff, solely interested, and a distinct and new cause of action, so that the question was, not whether the court exercised a discretionary power in making proper and necessary additional parties, but whether it had any power to make such order. This question is obviously reviewable in this court.

It is well settled in respect to the time when it may be taken, that an appeal always lies at once from an interlocutory order or judgment that may in effect put an end to the action, or that may prejudice a substantial right of the party complaining, if the appeal should be delayed until after the final judgment upon the merits.

Moreover, the power conferred upon the Superior Court by *The Code*, §§184, 189, to make additional parties to actions, is

not a power to be exercised in all cases in the discretion of the court, not subject to review in this court. Generally, whenever it is so exercised as to affect injuriously a substantial right of the party complaining, such exercise of it is reviewable in this court upon appeal taken, in some cases at once, in others after the final judgment.

This is so upon principle. The statute does not confer the power to make parties to actions generally, as it does to some extent to amend pleadings, but it designates particularly a variety of classified cases in which it may be done, thus clearly indicating a limitation upon the power conferred, and recognizing its importance to the original parties to the action. Who shall and who shall not be made additional parties, are questions in many cases of serious moment, and we can see no reason why the decision of a question of law, arising in the exercise of the power to make them, shall not be reviewed like the decision of any other question of law affecting the merits in the progress of an action. There is nothing in the statute nor in the nature of the power that forbids it, and justice may require it.

Besides, this court has entertained appeals in numerous cases, sometimes taken at once, and sometimes after the final judgment, from the orders of the Superior Court, making or refusing to make additional parties to actions. *Rollins* v. *Rollins*, 76 N. C., 264; *Colgrove* v. *Koonce*, 76 N. C., 363; *Phœbe* v. *Black*, Id., 379; *Stephenson* v. *Peebles*, 77 N. C., 364.

We may add in this connection, that the order appealed from, practically put an end to the action, for the next-of-kin plaintiffs could not maintain it against the present defendant. We are, therefore, of opinion that the defendant had the right to take the appeal, and this Court must decide the question presented by it.

It appears from the record, that the plaintiffs, the next-of-kin of J. R. Merrill, deceased, had a cause of action against the administrator of his estate, John Merrill, but when the latter died, pending the proceeding and before he had completed his

admistration, their cause of action against him did not survive against the administrator of his estate, the present defendant. The defendant, as administrator, held and was charged with any assets in his hands belonging to the estate of J. R. Merrill, not for his next-of-kin, but solely for the administrator *de bonis non* of his estate. It is well settled upon principle and authority, that the law does not vest the title to the property of a person who dies intestate in his next-of-kin, but in his administrator. If the administrator should die before he had completed the administration, the title to such property does not vest in his administrator, but in the administrator *de bonis non* of the first intestate, and so on indefinitely, until the estate in the hands of the first, or some subsequent administrator *de bonis non*, shall be completely settled and distributed according to law. The next-of-kin of the intestate, cannot proceed against the administrator of his deceased administrator for a settlement and their distributive shares; they must go against the administrator *de bonis non* of the intestate whose distributees they are, and plainly, because the title to the assets, in whatever shape to be distributed, is in him. To this effect, without exception, are all the decisions upon this subject in this State, as well those decided before, as those decided after the adoption of The Code method of procedure, blending law and equity.

In *Goodman* v. *Goodman*, 72 N. C., 508, it was held, Justice Bynum delivering the opinion, that after the death of an administrator and before the appointment of an administrator *de bonis non*, the next-of-kin could not maintain an action upon the deceased administrator's bond, and that the estate was in abeyance, and neither the next-of-kin, nor any other person except the administrator *de bonis non*, had the right of action upon the bond of the original administrator. It was further held that the next-of-kin, having brought suit upon the deceased administrator's bond, the Court *had no power to amend the pleadings by striking out the name of the next-of-kin and inserting that of the administrator de bonis non*, subsequently appointed.

In *Lansdell* v. *Winstead*, 76 N. C., 366, the same learned Judge said: "An administration can be effected only by collecting the assets, paying the debts, and making a final distribution 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 is 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."

In *Ham* v. *Kornegay*, 85 N. C., 119, 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 next-of-kin had received their distributive shares from the administrator, and the latter having died, the third distributee brought suit upon the administrator's bond to recover her share. It was 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 his bond, and the next-of-kin must look to him for their distributive shares. In this case, Justice Ashe said: "An administration is never complete so long as there are debts uncollected, or assets remaining in the hands of the administrator for distribution. * * * * If an administrator dies before this is done, his administration is unfinished, and an administrator *de bonis non* must be appointed to finish his administration, and so on *ad infinitum* until a final and complete distribution of the estate."

In the case of *University* v. *Hughes*, 90 N. C., 537, the above mentioned cases were cited with approval. That case was in all material respects like this: "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 balance in the hands of the administrator of $3,990.35 in Confederate money. This report was ordered to be 'certified and recorded.'" The University brought its action against the "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 interest thereon. Pending this 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 (that) action."

The defendant insisted, that his testator having died pending the action, the plaintiff could not recover therein, because the funds 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 could maintain an action for it. This court so held, and in the opinion said: "The plaintiff brought this action to recover a fund in the hands of the testator of the present defendant, and 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 executor, 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."

It seems to us that these cases show clearly that the next-of-kin plaintiffs have no cause of action against the defendant. They had, just as the plaintiff in *University* v. *Hughes*, *supra*, had, a

cause of action at the time the action began against his intestate, who was the administrator under whom they claim as distributees; when he died, their cause of action did not survive against *his* administrator, but against the administrator *de bonis non* of the intestate under whom they claim. This action did not necessarily abate—they might have made the administrator *de bonis non* a party defendant; indeed, they ought to have done so, as he was the only person whom they could then properly sue—the law vested the title to the assets in him, and to him they must look for their distributive shares.

They improperly prosecuted their action for a long while fruitlessly against the present defendant. They had no right to do so; an administrator *de bonis non* ought to have been appointed according to law upon the estate of the intestate whose next-of-kin they are, at once after the death of his administrator, and they ought to have made him defendant in the action, and not the present defendant. They being interested, might have had such administrator appointed. That they did not, was not because of any defect in the law, but because of their neglect, or lack of information as to their proper course of action, which was their misfortune.

The court had no authority to make or allow the administrator *de bonis non* to be made a plaintiff in this proceeding. To do so, was not simply to introduce a new party, but a party having a different, new, and distinct cause of action, arising years after the proceeding began and while it was pending.

The next-of-kin seek a distribution of the estate of the intestate of the administrator *de bonis non*, but the latter seeks to recover the assets belonging to the estate of his intestate, for the purpose of paying, first the costs of administration and debts due from the estate, and secondly for distribution to the next-of-kin according to their respective rights. The defendant is accountable to him, not to the next-of-kin. In due time and in order, he will account to them. Comprehensive as *The Code of Civil Procedure* may be in its terms, spirit, and policy, it does

not contemplate or allow two causes of action, distinct and different in their nature, and between different parties, to be litigated in one and the same action, wherein the plaintiffs, or some one or more of them, have rights more or less adverse to each other. *Wade* v. *Sanders*, 70 N. C., 277, *Colgrove* v. *Koonce*, *supra*, *McDonald* v. *Morris*, 89 N. C., 99, *Asheville Division* v. *Aston*, *ante*, 588.

The court has no authority to convert a pending action that cannot be maintained, into a new one, by admitting a new party plaintiff solely interested, and allowing him to assign a new and different cause of action, if the defendant shall object. The statute allowing necessary additional parties to be made in an action, does not contemplate such an exercise of power. There is neither principle nor statute, nor practice, that allows such a course of procedure; it would certainly lead to endless complications, confusion and injustice. An action separate and distinct from a pending one, must be begun according to the ordinary course of proceedure.

In this case, if the administrator *de bonis non* should be introduced as a party plaintiff, he alone could properly litigate with the defendant—his co-plaintiffs would have no cause of action. He might not wish, upon examination, to be bound by all that had been done in the proceeding—it might be prejudicial to his rights to be so bound. In such case, could or would the court rehear the matter settled, make new orders, and have accounts re-taken? The new plaintiff would have to plead anew and assign a new and different cause of action in himself. All this would generally lead to confusion. Further, after the litigation with the defendant should come to an end, then the administrator plaintiff would need to ascertain what costs and debts he had to pay, what property he had to sell, what debts to collect, and then, at last, he would turn about in the same action and account with his co-plaintiffs, in an adversary relation, and this might lead to litigation with them or some of them. *Reductio ad absurdum!*

There may be possible cases in which it would be convenient, if not very expedient, to have the next of kin and the administrator *de bonis non* join in a proceeding, as is sought to be done in this case, but occasional cases, for mere convenience sake, cannot be allowed to displace and subvert a well settled and wholesome rule of procedure.

This case is different from that of *Hardy* v. *Miles*, 91 N. C., 131. That case is peculiar. While the rule of procedure as here stated is distinctly recognized and upheld, the court decided that under the circumstances of the case, the plaintiff claiming under the will, might make the administrator *de bonis non, cum testamento annexo*, a party defendant, upon the ground, that the latter had failed to seek the relief the plaintiff was seeking by his action.

There is error. The order of the court below making the administrator *de bonis non* a party, must be reversed. To that end, let this opinion be certified to the Superior Court according to law.

Error. Reversed.

SMITH, C. J. (dissenting). As I am unable to concur in the opinion of the other members of the Court in the disposition made of the cause, it is proper and due to them that I should state the reason for my dissent:

1st. The appeal is from an interlocutory order, admitting an amendment in the introduction of the administrator *de bonis non* of J. R. Merrill, as an associated plaintiff in the further prosecution of the action. This works no change in the nature of the claim, and does not subject the defendant to any increased liability or inconvenience. The previous proceedings remain undisturbed, and the new plaintiff takes his place with the others, abiding by all that has already been done. The defendant is no more injuriously affected than he would be in letting in a personal represeutative of a plaintiff, who dies pending the suit, to carry it on afterwards. Instead of being a disadvantage to him,

it would be his protection against a second suit for the same cause, by concluding the only person who could bring it.

2nd. The amendment is within the power of the Judge, and its exercise a discretion which cannot be reviewed or controlled in this Court. The consequences of the introduction of the additional plaintiff, in retaining the cause within the jurisdiction of the Court, are not now presented, and the only inquiry is as to the competency of the Court to permit the attempted perfection of the record, not the effect upon the rights of the parties or the merits of the controversy. The cases are too numerous to require a reference that the power to permit amendments resides with the Judge.

3rd. In my opinion the amendment would preserve the jurisdiction acquired, and enable the cause to proceed to a final adjudication. The numerous cases wherein it has been held that none but an administrator *de bonis non* of the original intestate can sue the personal representative of the first administrator after the death of the latter, or himself and the sureties to his bond, for the recovery of the administered estate, inclusive of damages for waste, that is, or ought to be, in the hands of the deceased, will be found, I believe, upon examination, to be cases in which the action was *wrong from its inception, the plaintiff then having no right to bring it.* The consequent ruling was, that it could not be maintained, nor could this difficulty be removed by the substitution of an administrator *de bonis non,* to whom letters issued during its progress, in the place of those who were wrongfully prosecuting the action as plaintiffs.

This is the principle decided, and its correctness I do not propose to question after its so frequent recognitions, even if otherwise open to criticisms.

But I know of no case wherein a party, in whom a right of action vested at the time of bringing the suit, was not allowed to proceed, because, on the death of a defendant, and in his representative capacity, that right devolved upon the administrator *de bonis non* of the first intestate, whom it was proposed to make a

party also. The case of *Goodman* v. *Goodman*, 72 N. C., 508, is of the specified class.

The institution of the suit in the name of the distributee was after the death of the administrator, when the right of action had vested in an administrator *de bonis non*, and none other but he, when appointed, was competent to maintain the action. Consistently with this ruling, an administrator *de bonis non*, was required to be made a defendant, in order to the maintenance of the action. *Hardy* v. *Miles*, 91 N. C., 131.

But there is an authoritative precedent for the course pursued in the present case, found in *Crawley* v. *Woodfin*, 78 N. C., 4, wherein a creditor of McDowell, the intestate of the defendant Woodfin, brought his action against the latter and the sureties on his official bond, for a breach in the non-payment of his debt. Pending the action Woodfin died, and both his administrator and the administrator *de bonis non* of McDowell were made parties defendant.

The plaintiff was allowed further, to amend his complaint by adding a new cause of action, founded upon the same demand. To this the defendant Pearson demurred, assigning as the ground therefor that "the administrator *de bonis non* of McDowell is the only proper relator in an action on the administration bond of Woodfin, and the *relator Crawley cannot maintain the action.*"

The demurrer was withdrawn, and a motion to dismiss the action made instead. The court refused the motion, and on the appeal the ruling was sustained, because an appeal would not lie from a refusal to dismiss.

There was the same difficulty presented in this case, and yet it was not intimated that the action must terminate in consequence of the death of Woodfin, and could not be prosecuted after the introduction of the two administrators into the cause. But it must be remembered that these adjudications were under a system of practice in which rights strictly legal were alone recognized and enforced in courts of law, which has been materially changed since. Thus it was held in *Allison* v. *Robinson*, 78 N.

C., 222, that the heirs at law only could sue on a guardian bond to recover the moneys received as the proceeds of the deceased infant's real estate, wasted and lost, and not the administrator of the infant, for the reason that the fund belonged to them, and if recovered by the administrator, must be at once paid over to them. And so in *Baker* v. *Railroad*, 91 N. C., 308, the court looked through the legal right of the administrator, and recognized the right of those to whom the recovered fund would belong.

Now suppose the administration had been completed so far that nothing remained to be done except to pay over to the distributees (and such seems to have been the result reached in the report of the referee), why should not the administrator be admitted into the action, so as to conclude him from bringing another, and protect the defendants fully, and thus the distributee be allowed to collect the estate?

Why, when the cause has reached this point, shall it be arrested and the trouble gone over again, for no practical good to any?

If the administration was incomplete, still this would not concern the defendants, or furnish them ground of complaint, because it is immaterial to them who recover, provided they are secure against the claim of any other for the same fund, and there would be no difficulty as among the plaintiffs, since the administrator might take the whole if necessary, and render his administration account after it was finished.

It seems to me needless and unreasonable, as well as unsustained by authority, under such circumstances to put an end to the action at the instance of the defendants, and compel a repetition of all the trouble and expense incurred in thus approaching the final judgment, and I cannot unite with my brethren in holding that the law so requires.

Moreover, the present practice contemplates the continuance of a suit properly begun, and that it shall not terminate or abate by the death of a party or the transfer in any manner of the cause

of action to another. It provides in express terms that "no action shall abate by the death, marriage or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue," that is, does not itself become extinguished thereby, and that the court "may allow the action to be *continued by or against his representative* or successor in interest." In like manner, upon an assignment of the plaintiff's interest he may continue to prosecute the action or the assignee be allowed to take his place. *Code*, §188.

Now, in the case before us, the right to sue was in the distributees when the suit was begun, and to prosecute it afterwards remained with them until the death of John Merrill, and then passed to the administrator *de bonis non* of J. R. Merrill, as soon as he was appointed. When the right to proceed with the action, though meanwhile in abeyance, thus vests in the appointee, it relates back to the death, in the same manner as when one suing in his own right dies, his representative comes in and assumes the place and succeeds to the rights of the deceased plaintiff. This is the result of the blending of the rules in law and equity which aim at an early and prompt as well as full adjustment of a controversy in which all interested are made parties, and bound by what is done.

The course of reasoning pursued in the opinion, to show that the right to continue the action, when properly begun in the name of the distributees and heirs-at-law of the intestate to whom the fund sought to be recovered then belonged, ceased at the death of his administrator and could no longer be maintained by these plaintiffs, rests upon too many adjudications to be open to controversy, and I do not propose to question the correctness of the proposition. It was so held in the last case cited, *University* v. *Hughes*, *supra*, and this must be so, since otherwise the defendant might be exposed to another action for the same fund at the instance of an administrator *de bonis non* from whom the judgment recovered would be no protection. But in that case the parties to the action remained the same, while the right to main-

tain the action was no longer vested in the plaintiffs, and yet the concluding part of the opinion intimates at least a possible different result if the administrator *de bonis non* had been introduced into the cause.

"The plaintiff cannot maintain this action," is the language employed, "against the defendant executor, *certainly not in the absence of the administrator de bonis non of Lee.*"

I repeat that I have discovered no case in which the doctrine has been carried to the extent proposed in this, that the action begun and prosecuted by persons entitled to sue, must terminate at the death of the first administrator, and cannot be further carried on when the administrator *de bonis non* becomes a party so that the judgment will be final and conclusive when rendered.

The underlying error in the reasoning, in my opinion, consists in supposing that if this were permitted, there would be associated two distinct and independent causes of action in one suit, the one vesting in the distributee, the other in the administrator *de bonis non*, and this is not allowable under settled rules of practice. This is a misconception. There is but *one cause of action* against the defendant, and that is founded upon his refusal or failure to account for and pay over the fund to the party entitled, the distributees at first, the administrator *de bonis non* afterwards.

The right to sue passes upon the event mentioned, from the one to the other, but it is, by whichever exercised, for the same default and upon the same liability. The recovery of the fund is the common object of both, and there is no more inconsistency in this than in allowing the personal representative to recover upon a cause of action occurring in the life-time of the deceased. The law transfers the right of action in each case, but it is, nevertheless, one and the same, although prosecuted by another.

It is wholly immaterial so far as the defendant is concerned, for what uses the fund is sought or what disposition is to be made of it when recovered. This furnishes no reason why he should not be compelled to pay what he owes, nor is he injuri-

ously affected by the introduction of a new plaintiff. I am not willing to carry the doctrine beyond the limit of precedents.

Entertaining these views, I cannot give my approval to the rules of practice laid down in the opinion, fruitful as I fear they will be of embarrassments in their enforcement.

N. M. LAWRENCE v. R. T. HODGES, Sheriff, et als.

Ships—Registration—Mortgage.

1. The power conferred upon Congress by the Constitution to regulate commerce with foreign nations and between the States, is paramount and exclusive, and includes the power to regulate navigation by all manner of vessels upon navigable waters flowing from one State into another, or from a State into the sea, and extends to giving to Congress the power to prescribe the methods of sale and transfer of such vessels.
2. Enrolment or registration, under the act of Congress, and not the kind of service in which they are engaged, gives to vessels their national character, and renders them subject to the laws of the United States.
3. Where a vessel which was duly enrolled under the act of Congress, but which was entirely used in North Carolina waters, was mortgaged, which mortgage was recorded in the custom house in accordance with the act of Congress, but was not registered as required by the North Carolina registration acts; *It was held*, that such recording was valid.
4. It is not necessary that a vessel used entirely on the waters of this State should be enrolled as required by the act of Congress, although it may be done, if the owner desires, and if done, the vessel becomes a national vessel.
5. Such mortgage proven before a clerk of the Superior Court, as he is *ex officio* a notary public, is a compliance with the act of Congress.

(*DeCourcy* v. *Barr*, Busb. Eq., 181, cited and approved; *Wiswall* v. *Potts*, 5 Jones' Eq., 184, overruled in part).

CIVIL ACTION, heard before *Graves, Judge*, at Fall Term, 1884, of BEAUFORT Superior Court.

This is an action of claim and delivery, brought on the 31st day of January, 1884, in the Superior Court of the county of

Beaufort, to recover the possession of the steamer "Edgecombe." This steamer is a screw propeller of 52 $\frac{90}{100}$ tons burthen, and enrolled under the laws of the United States in the Pamlico District in North Carolina in the custom house at New Berne. Her owners are native citizens of the United States, residing within that district at the time of such enrolment, and before the execution of the mortgages hereinafter mentioned. She was employed solely in the internal commerce of this State, and used for the purpose of navigation in the waters of the Pamlico River and Sound.

One B. S. Haskins owned this steamer, and on the 12th day of November, 1880, executed a mortgage of the same to N. S. Fulford to secure a debt of $1,500. The execution of this mortgage was acknowledged before the clerk of the Superior Court of Beaufort county, on the 12th day of November, 1880, and thereafter recorded in the custom house at New Berne, and on the 29th day of January, 1884, the mortgagee assigned his mortgage to the plaintiff.

On the 16th day of January, 1882, the said B. S. Haskins executed and delivered to the plaintiff a second mortgage of the steamer mentioned, and acknowledged the execution of the same before the clerk of the Superior Court of said county, and it was likewise recorded in the custom house at New Berne.

The Merchants' and Farmers' Transportation Company was a corporation organized under the laws of this State, and on the 6th day of July, 1884, the said B. S. Haskins undertook, by bill of sale, to convey said steamer to the last named company. The execution of this bill of sale was acknowledged by the maker thereof before J. D. Myers, a notary public, on the same day it was executed and recorded.

At the time the last mentioned bill of sale was executed, the mortgages above named had not been discharged, and the debts secured by them have not been paid. These mortgages were not registered in Beaufort county, nor in any county, except as above stated.

At the time the bill of sale mentioned was executed, the company to which it was made, and the parties interested in the steamer, had full verbal, but no other notice of the said mortgages except the recording of them in the custom house.

The company named, at the time of the execution of the bill of sale mentioned, got possession of the steamer, and remained in possession of her until some time in the month of January, 1884, and on the 18th of that month it passed a resolution declaring that it surrendered the steamer, as far as it could, to the mortgagees.

The defendant R. T. Hodges was the sheriff of the county of Beaufort, and on the 12th day of January, 1884, he had in his hands sundry executions against the said company, and by virtue of them, levied upon and took possession of the steamer. At that time it was in the actual possession of the company. The said sheriff, by virtue of said executions and levies, held possession of the steamer until the 1st day of February, 1884.

On the last named day, the sheriff of Pitt county, by virtue of an order of the Clerk made in this action, seized said steamer and held the same three days, and then delivered her to the plaintiff.

After the sheriff of Pitt county so seized the steamer, the defendant Hodges, as sheriff, had in his hands sundry other executions against said company, and on the said 1st day of February, 1884, "*levied*" them on the steamer, but did not take her from the possession of the said sheriff of Pitt. Before the defendant Hodges, sheriff, levied the executions in his hands upon the steamer, the attorney of the plaintiff notified him of the mortgages named and the sum of money due, secured by them.

The said transportation company was made a party defendant to the action, as was, also, William B. Rodman, Jr., as receiver of that company, he having been appointed such receiver in some appropriate proceeding, and they filed an answer, contesting the validity of the mortgages as against them, upon the ground that the vessel was engaged solely in the internal commerce of this State, and was not subject to the laws of the United States; and,

also, that they had not been properly acknowledged and recorded as required by the laws of the United States, and the further ground, that they were not registered as required by the laws of this State, and were therefore ineffectual as against creditors and subsequent purchasers. The parties agreed upon the facts substantially as above stated, and submitted the case to the Court for judgment.

The Court gave judgment as follows:

"That plaintiff is not entitled to the possession of the steamboat mentioned in the proceedings, and it appearing that said boat has by proceedings in this cause been put in the possession of the plaintiff, it is ordered that plaintiff deliver the said boat to William B. Rodman, Jr., the receiver appointed by this Court to receive the same, or, on his failure to do so, that he pay to said receiver seven thousand dollars, the penalty of the bond given by him in this action, to be discharged upon the payment in default thereof, of the value of said boat and other articles of tackle therein mentioned.

"Provided, however, if plaintiff shall pay to said receiver the amount of the judgment against Merchants' and Farmers' Transportation Company, levied by the sheriff of said county on said boat, and the interest and costs thereon, and the costs of this action, then the judgment for the restoration of said boat and for the penalty of said bond shall be discharged."

The plaintiff excepted and appealed to this Court, as did also the receiver.

Mr. George H. Brown, Jr., for the plaintiff.

Messrs. W. B. Rodman & Son and *C. F. Warren*, for the defendant.

MERRIMON, J. (after stating the facts as above). The record in this case, in different aspects of it, presents several interesting questions that were ably argued by the counsel on both sides. We deem it necessary to decide but two of them, and these are:

1st. Was the steamer "Edgecombe" subject to the laws of the United States regulating domestic commerce? 2nd. If so, were the two mortgages of that vessel, under which the plaintiff claims title to it, proven as required by law?

In our judgment, both these questions must be answered in the affirmative.

The Constitution of the United States, in prescribing and defining the powers of Congress in Article 1, §8, provides among other things, that it shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes."

It is well settled, that the power thus conferred, in the respects specified, is paramount and exclusive. Necessarily incident to that power, is that to regulate navigation, and this includes ships, steamboats, sail and all manner of vessels however propelled, that go upon navigable waters that flow from one State into another, and out of a State into the sea, coastwise, and upon the sea, to and from foreign countries. The power to regulate such commerce, implies necessarily the incidental power to regulate the essential instrumentalities incident to it.

Such power, within its just scope and purpose, is very thorough in in its effectiveness. It is fundamental, and its object is to develope, promote, and protect the commerce of a great people, for the common good. In accomplishing this end, it is not confined, as to vessels that go upon navigable waters, at home or abroad, simply to prescribing methods and rules of navigation, and transportation, but it extends to giving them distinctive national character, wherever and in whatever service they may lawfully be, invested with rights, privileges and obligations, extending to the owners and all persons having an interest in them—to prescribing the methods of sale and transfer of them, or any property interest in them, and to jurisdiction over them for all purposes, germane to such commerce.

It would be a supererogatory service to undertake here to show why this is, and ought be so, because it is so settled by a vast

number of judicial decisions, both Federal and State, and we content ourselves with citing a few of them. *Gibbons* v. *Ogden*, 9 Whea, 1; *Brown* v. *State of Maryland*, 12 Whea, 409; *The License Cases*, 7 How., 283; *South Carolina* v. *Georgia*, 93 U. S., 4; *Hall* v. *DeCuix*, 95 U. S., 485; *Ferry Co.* v. *St. Louis*, 107 U. S., 365; *White's Bank* v. *Smith*, 7 Wall., 646; *Aldrich* v. *Ætna Co.*, 8 Wall., 491; *Mitchell* v. *Steelman*, 8 Cal., 363; *Fontaine* v. *Beers*, 19 Ala., 722; *Shaw* v. *McCandless*, 36 Miss., 296; 6 *Myers Fed. Dec.* §1023, et seq.; *Desty's Shipping and Admiralty*, 1—5.

Congress has exercised the power mentioned in many ways and respects. In respect to vessels of a prescribed tonnage engaged in domestic commerce, it has passed laws providing for their *enrolment* in the Custom House of the collection district in which their respective owners reside, and such enrolment renders them vessels of the United States, and confers upon them national character, rights, privileges and obligations as domestic vessels. *Rev. Stat. U. S.* §4311, *et seq.*

It is the *enrolment* of a vessel that may engage in commerce, and not the character of the particular service it may do, that gives it distinctive national character, and renders it subject to the laws of the United States, and brings it within the jurisdiction of that authority. Such enrolment and a *licenses* confer the right to go from port to port, to engage in trade, and carry passengers and freight between the several States; such national character goes with and is part of the vessel, wherever it may lawfully go, no matter in what service. *Gibbons* v. *Ogden, supra.*

Congress has no power to regulate or interfere with the purely internal commerce of a State, and a vessel engaged solely and exclusively in such commerce, is subject to its laws and control, if the owner chooses to so use it without enrolment under the laws of the United States. But if the owner shall enroll his vessel, as he may do at any time, certainly in the absence of any State statute regulating vessels engaged in such internal commerce, it at once ceases to be a vessel of the State and devoted

exclusively to its internal commerce; it then and thereby takes on the character of a vessel of the United States, with the right to go out of the State and engage in interstate commerce at the will of the owner, if he chooses to obtain a proper license, and by such enrolment it becomes subject to the laws of the United States, no matter where it may be, or in what service it may be employed. An enrolled vessel engaged solely in the internal commerce of a State, does not necessarily thereby put off or destroy its national character, and cease to be a vessel of the United States, certainly while it goes upon navigable waters that flow into other States, or into the sea. It would be most disorderly and confusing and highly injurious to commerce in various ways, and the stability of rights to and in vessels, to allow their owners respectively to impress upon them the character of a vessel of the State, or the United States, at their pleasure. Such character must arise and be established by proper legal authority.

Now, the vessel in question was duly enrolled at the custom-house in New Berne, its home port. By such enrolment, she certainly became a vessel of the United States, and subject to the laws of that government. If before that time, she had been a vessel of this State, engaged exclusively in its internal commerce, and was subject to its laws, by such enrolment it put on the national character, and ceased to be in character and legal contemplation, a vessel of the State, employed exclusively in its internal commerce; it became a vessel of the United States engaged exclusively, according to the facts as they appear, in the internal commerce of this State, with the right to take employment in interstate commerce at the will of her owner. This is not an impossible, but an entirely practicable thing to be done. A vessel solely employed in the internal commerce of a State may be, but it is not necessarily, a vessel of that State. A vessel enrolled in New York, having proper authority, might come into the navigable waters of this State, and engage for years exclusively in its internal commerce, but it would not thereby become a vessel of this State, in contemplation of law, because its character

in such case would be established by law, and not by the fact of the particular service, or its nature. It seems to us, therefore, manifest that the vessel in controversy was, in contemplation of law, a national vessel, and subject to the laws of the United States, applicable in such cases.

It is provided by *Rev. Stat.*, U. S., §4192, that "no bill of sale, mortgage, hypothecation or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation or conveyance is *recorded in the office of* the collector of the customs where such vessel is registered or enrolled."

It is plainly the purpose of this statute to regulate the methods of conveyance and transfer of vessels, and property interests in them, of the United States. The power of Congress to pass such laws, and the effect of them, has been much questioned. The validity of the statute just cited, and its effect as a registration law, have been repeatedly drawn in question, but it has been upheld as consistent with the constitution by many decisions, both State and Federal. The Supreme Court of the United States has repeatedly held that it is valid, and its validity may be treated as settled by the highest judicial authority.

It has likewise been held that recording a mortgage under this statute, supercedes State registration laws as to the place of registration, and gives it priority over a subsequent purchaser, or a subsequent attachment or like lien. *White's Bank* v. *Smith*, 7 Wall., 646; *Aldrich* v. *Ætna Ins. Co.*, 8 Wall., 491; *Shaw* v. *McCandless*, 36 Miss., 296; *Fontaine* v. *Beers*, 19 Ala., 722; *Mitchell* v. *Steelman*, 8 Cal., 363; *Perkins* v. *Emerson*, 59 Me., 319; 1 *Parson's Shipping and Admiralty*, 60, 63; *Desty's Shipping and Admiralty*, §65.

The defendant's counsel relied partly on the case of *Wiswall* v. *Potts*, 5 Jones' Eq., 184. In that case it was held, that a steamboat used exclusively for the purposes of the internal com-

merce of a State, need not be enrolled in the office of the collector of customs, as required by the statute of the United States. This much is true, but it is not true that such a vessel cannot be a vessel of the United States, nor is it true that the mortgage of an enrolled vessel, used exclusively in the internal commerce of a State, need not be recorded in the custom house.

In that case the steamboat had been enrolled. The mortgage of her, however, had not been recorded in the custom house, but had been registered as required by the laws of this State, and the court held such registration sufficient. If this mortgage had been recorded in the custom house, or if a subsequent purchaser, without notice, had interposed his right to the vessel, a different question would have been presented.

We feel called upon, however, to say in this connection, that we cannot concur in the reasoning of the late Chief Justice Pearson in parts of the opinion in that case. For example, he says: "It is the fact that a boat trades to two or more of the States, or to a foreign country, which makes it a vessel of the United States, and the act of registration in the custom house is an *incident* necessary to give it the privileges conferred thereby." This is certainly an inadvertence. The registration or enrolment of the vessel is necessary to give the privileges so conferred, but it is necessary also to give the vessel national character. The statute of the United States, (*Rev. Statutes, U. S.*, §§4131, 4311) expressly provides and declares, that vessels registered and enrolled as therein required and "no others, shall be deemed vessels of the United States." And it is so laid down in plain terms in *Gibbons* v. *Ogden, supra.*

The inadvertence or misapprehension seems to have grown out of the supposition that a vessel engaged exclusively in the internal commerce of a State is necessarily a part of it and subject to the laws of the State. This, as we have seen, is so, only so long as the owner of such vessel chooses not to enroll it under the laws of the United States. This he may do when he will, certainly, in the absence of any law of the State regulating its internal commerce and vessels engaged exclusively in it.

The mortgages in question were acknowledged before the Clerk of the Superior Court of Beaufort county, and recorded in the custom house at New Berne, where the vessel was enrolled. It is objected, that such acknowledgment was not sufficient, because it was not taken by a justice of the peace, a *notary public*, or a commissioner of the Circuit Court of the United States, as required by the *Rev. Stats. U. S.*, §§1778 and 4193, which latter section, after providing how mortgages and other conveyances of vessels or any interest in them shall be recorded, provides, "but no bill of sale, mortgage, hypothecation, conveyance or discharge of mortgage, or other incumbrance of any vessel, shall be recorded unless the same is duly acknowledged before a notary public, or other officer authorized to take acknowledgment of deeds."

We think this objection is not well-founded, because the Clerk of the Superior Court was, by virtue of his office, a notary public, and the taking of the acknowledgment must be referred to the exercise of his notarial authority.

The Code, §3306, provides that "the Clerks of the Superior Courts may act as *notaries public* in their several counties, by virtue of their offices as clerks, and may certify their notarial acts under the seals of their respective courts." This is a public statute of which everybody is presumed to have knowledge, and of which the courts of the United States, as well as the courts of this State, take judicial notice, and whenever it appears that the Clerk has done an official act that the law requires to be done by the exercise of notarial power, it is treated as done in the exercise of such authority. And so, in this case, as soon as it appeared to the Court that the Clerk had taken the acknowledgment of the mortgages of the vessel, to be recorded in the custom house, the Court at once recognized the exercise of notarial authority, because the Clerk had such authority, and he did an act that required its exercise. The nature of the act done, sufficiently indicated by what authority it was done, and all persons are presumed to have knowledge of it. It was said on the argu-

ment that the Clerk did not sign the certificate of acknowledgment as notary public, but as Clerk. It was not necessary, indeed not strictly proper, that he should so sign it, because his notarial authority was incident to his office as Clerk. He took and certified the acknowledgment under his hand as Clerk of the Superior Court, and under the seal of his court, in strict compliance with the statute, and his act was as complete and binding as any similar act he could do.

The case of *DeCourcy* v. *Barr, Busb. Eq.*, 181, relied upon by the defendant's counsel, does not apply here. In that case the notary public in New York, had no authority to take the acknowledgment of deeds executed by *residents of this State*; he was only authorized by the statute to take such acknowledgments of *non-residents.* In this case, the Clerk had authority and exercised it in the way the statute allowed him to do. *Carpenter* v. *Dexter*, 8 Wall., 513; *Shultz* v. *Moore*, 1 McL., 520.

It is unnecessary to inquire whether the Clerk could, as Clerk, have taken the acknowledgment, because he had notarial authority, and, as we have seen, it must be taken that he exercised it.

Upon the "case agreed" and submitted to the Court, the plaintiff is entitled to have the vessel in question as mortgagee.

There is error. The judgment of the Superior Court must be reversed and judgment entered here for the plaintiff.

Error. *Judgment accordingly.*

DEFENDANT'S APPEAL.

MERRIMON, J. This is the appeal of the defendant, *Receiver* in the above action.

The receiver appealed upon the ground that the Court directed that the judgment for the restoration of the vessel and the penalty, should be discharged when and if the plaintiff should pay

the amount, including interests and costs, of the judgments referred to in the judgment from which the appeal was taken.

This is an action at law, and no equitable relief is demanded, nor do the pleadings present a case in which it might be granted. It may turn out that the vessel is worth more money than the mortgagee's debts, but the receiver, if he is entitled to any surplus, can protect himself in another action.

The decision of this court in the plaintiff's appeal in this case is conclusive against the appellant. His appeal was unnecessary and improvidently taken, and must be dismissed.

It is so ordered.

WILLIAMS, BLACK & CO. v. MARY A. WHITING.

Contract—Payment—Agent—Reference.

1. When it was agreed between the vendor and vendee of land that the cotton raised on the land during each of the five years for which credit was given, should be forwarded to the plaintiff and sold and the proceeds applied to the payment of the purchase money, the cotton is in advance appropriated to the debt, and as soon as the money is received, the debt is *pro tanto* satisfied, and can only be revived by the consent of the debtor.
2. This consent may be express or result from implication, and, if the latter, must rest on clear and unequivocal evidence of intent.
3. A power to act for another, however, general its terms or wide its scope, can not be enlarged into a power to pervert funds coming into the agent's hands, without clear approval or ratification by the principal.
4. When the referee fails to report the evidence, the proper course is to move to recommit or to require the referee to produce the evidence.
5. It is the duty of the party excepting to show the error excepted to, and to state such of the evidence as is necessary to enable this court to comprehend and decide the point. When the record does not contain *such* evidence, this court cannot review the decision of the Superior Court, but will affirm it.

(*Williams* v. *Johnston*, *ante*, 532, cited and approved).

CIVIL ACTION, heard upon exceptions to the report of a referee, before *Gudger*, *Judge*, at Fall Term, 1884, of EDGECOMBE Superior Court.

There was judgment for the plaintiffs, and the defendant appealed.

Messrs. Connor & Woodard, for the plaintiffs.

Messrs. Jos. J. Martin, David Bell and *Walter Clark*, for the defendant.

SMITH, C. J. On January 2d, 1878, the plaintiffs constituting the party of the first part, and the defendant, the party of the second part, all residents of the city of New York, entered into an agreement under their several seals, wherein the former, in consideration of thirty-six thousand dollars to be paid, as thereinafter mentioned, covenant to convey to the latter all their right, title, and interest, in a large and valuable plantation in the county of Edgecombe, described by metes and bounds, lying on the side of the track of the Wilmington and Weldon Railroad, and estimated to contain eleven hundred and five and one-half acres, and also certain articles of personal property, and such others as were then on the land.

The defendant covenants on her part, "to pay to the plaintiffs the said sum of thirty-six thousand dollars and interest, as evidenced by certain promissory notes of even date therewith as follows: Four thousand dollars, and interest thereon from date, on the thirty-first day of December, one thousand eight hundred and seventy-eight; four thousand dollars, and interest thereon from date, on the thirty-first day of December, one thousand eight hundred and seventy-nine; four thousand dollars, and interest thereon from date, on the thirty-first day of December, one thousand eight hundred and eighty; four thousand dollars, and interest thereon from date, on the thirty-first day of December, one thousand eight hundred and eighty-one; five thousand dollars, and interest thereon from date, on the thirty-first day of December,

one thousand eight hundred and eighty-two; seven thousand five hundred dollars, and interest thereon from date, on the thirty-first day of December, one thousand eight hundred and eighty-four."

"And the said parties of the first part agree that when the first five of said payments shall have been made and completed, to deliver to said party of the second part, her heirs or assigns, a good and sufficient deed of conveyance of their title to the said property described herein, and free and clear from the mortgage now covering said property for the sum of three thousand dollars, with covenants against the acts of the grantors, upon three days' notice in writing, at such time and place in the city of New York as the said party of the second part may appoint, and to make, execute and deliver such other instruments of release and discharge, as the said party of the second part, her heirs or assigns, or her counsel may request, and upon the delivery of said deed, the said party of the second part shall make, execute and deliver to the parties of the first part, their heirs, executors, administrators and assigns, her certain indenture of mortgage, conveying all the property herein described to secure to them or their heirs or assigns the payment of the balance of said sum, which said mortgage shall provide that upon default being made in the payment of any of the sums thereby secured to be paid, and such default continue for the space of thirty days, that then the whole principal sum shall become due and payable, and the parties of the first part, upon ninety days' notice that they will exercise the power of sale contained in the mortgage, shall be entitled to foreclose said mortgage by advertisement for the space of thirty days, at the court-house door in the town of Tarboro, and three other public places in Edgecombe county, and without the necessity of bringing a regular suit to foreclose the same. It is also agreed between the parties, that the party of the second part, or her assigns, may, subject to the covenants hereinafter set forth, immediately enter upon and take possession of all of the property described therein, as the tenant of the parties of the first part.

And it was understood and agreed between the parties that in case the party of the second part should make default in the payment of either of the said first five instalments as they each became due and payable, then the parties of the first part should be at liberty to annul and make void the contract of sale and treat the party of the second part as tenant for the year immediately preceding; and in that event the parties of the first part should be entitled to seventy bales of good merchantable lint cotton as rent for that year, and as a security for the payment of said rent, the party of the second part agreed that the title of all the crops made on said land should remain and continue in the parties of the first part until the instalment of each of the five years should be fully paid and discharged. It was further covenanted and agreed that the party of the second part should faithfully ship, or cause to be shipped, to the parties of the first part, at the city of New York, all the cotton that should be grown or matured on said plantation during each of the said five years, to be by the parties of the first part sold and the proceeds thereof applied by them in the satisfaction and payment of the notes of the party of the second part falling due in each of those years respectively, and the balance, if any, of such proceeds should be paid over to the party of the second part. And it was covenanted and agreed that should default be made in the payment of any of said first five notes at the maturity thereof, and said default continue for the space of thirty days, that then, that is to say after the expiration of said thirty days, it should be lawful for the parties of the first part, or their appointees, to enter upon and repossess themselves of all of the property described therein, and eject any and all persons from the property without further process, manner or proceeding, it being the meaning and intent of the parties thereto that upon such default being made in the payment of either of said first five mentioned notes, that the parties of the first part should be entitled to the immediate possession of all the said described property without legal proceedings. It was further covenanted and agreed that the par-

ties of the second part, as a part of the consideration, should pay all taxes and assessments of every kind whatsoever, which should be levied or imposed on said property after the date of the agreement, and should deliver immediately to the parties of the first part the bills and receipts showing such payments to have been made. It was further covenanted and agreed that the party of the second part, as a part of the consideration, should keep all of said property insured in good and responsible companies in the sum of twenty-five hundred dollars for the benefit of the parties of the first part, and to deliver said policies of insurance to the parties of the first part. And the said party of the second part further covenants and agrees, that should the said property described, for any cause, revert to the parties of first part, that she will forthwith deliver up and return to them all the personal property in good order and condition, reasonable wear and tear excepted, and where such personal property shall necessarily be used up or consumed, that she will supply the deficiency with other property of the same kind, quantity and value."

"And whereas, there are now pending in the Supreme Court of the State of New York certain actions wherein Brink & Estes are plaintiffs and certain insurance companies are defendants, one-half of the proceeds whereof are by agreement to be paid to the parties of the first part hereto, now it is covenanted and agreed by the parties of the first part that any and all sums by them received from said actions shall be applied for the benefit of the party of the second part in the payment of the third, fourth and fifth of said notes, or so much thereof as may be possible. And it is hereby further covenanted and agreed between the parties hereto, that all the covenants and agreements herein contained shall be obligatory upon and bind the heirs, executors, administrators or assigns of each and all of said parties."

The plaintiffs allege in their complaint that there remains unpaid a large sum due upon the first five notes, stated to be $\$13{,}776\ \frac{99}{100}$, with interest at the stipulated rate of seven per

cent. from January 22d, 1883; while they have on hand seventy-eight bales of cotton of the estimated value of $2,964.00, the proceeds of which, when sold, are to be applied in reduction of the sum stated; and that nothing has been paid on the other notes.

The plaintiffs demand judgment for what is due upon the notes, and a sale of the land for the satisfaction of the indebtedness. The answer does not controvert the allegations of the making the contract and executing the notes contained in the complaint, but avers that many payments have been made; that large dealings have taken place between the parties, amounting to fifty thousand dollars or more, and that one claimed credit is in dispute; that upon a fair and just statement of the account, it will appear, in the defendant's opinion, that her residuary indebtedness does not exceed five or six thousand dollars.

At Fall Term, 1883, an order of reference by consent, was made to two designated commissioners under the provisions of The Code of Civil Procedure, "for the purpose of stating an account of the dealings between the plaintiffs and the defendant," which they were directed to make out and report at the succeeding term.

The referees rendered their report accordingly, accompanied with the proofs taken in the cause, and embodying a series of findings of fact and of law, distinctly and separately enumerated, to such portions of which, contained in the record, as are deemed material to a full understanding of the subject matter of the exceptions brought up for review, we shall direct our attention.

The only testimony contained in the transcript is that of the defendant, of L. G. Estes, her witness, and of James R. Gaskill, examined for the plaintiffs; and the sole exception of the plaintiffs is to their being charged in the account with the proceeds of certain cotton, sent to and sold by them, the facts concerning which, upon the finding of the referees, are as follows:

The cotton was grown upon the plantation, and thence forwarded to the plaintiffs in New York by the said Estes, as agent

of the defendant, in pursuance of the agreement for the appropriation of the proceeds of sale, and was disposed of with full knowledge of the source from which it came. The moneys received upon the sale were not then applied in reduction of the defendant's indebtedness, but were credited to the agency account of Estes. The latter had before and has since, as such agent, drawn upon funds derived from sales of cotton grown upon the farm, in different sums and in excess of the value of shipments, which drafts were paid by the plaintiffs, the defendant understanding that the payments were by reason of such shipment to them.

The testimony of Estes in regard to his relations with the defendant, and his management of the farm and disposition of its products, is substantially this: He bought a good deal of cotton and sent it forward to the plaintiffs in his own name, and not in his capacity as agent. Some of this may have been shipped by him as agent. The plaintiffs furnished him money to buy and send to them such cotton as was thus purchased and paid for.

That which was shipped by him as agent was raised on the plantation. Money was supplied to him, when needed in running the farm, by the defendant. She was at his farm nearly every winter, when matters connected with the business were discussed between them, but no account was ever rendered. The cotton now in controversy and forwarded to the plaintiffs, was the product of the farm. The witness drew drafts on the plaintiffs, based on the shipments, which were honored by them and the moneys diverted from the uses specified in the agreement. The defendant had a claim on the land prior to that of the plaintiffs, and the purpose in entering into the contract with the plaintiffs was to secure what was due her and to aid the witness.

In the account rendered by the referees, the defendant is credited with profits made on contracts for futures, and is charged with losses sustained in others, of less amount.

The agent is admitted to have had the possession and management of the farm, as well as the forwarding of its products in the execution of the defendant's stipulations, to the plaintiffs, for sale and appropriation of the proceeds as provided in the agreement.

The evidence fully sustains the findings of the referees, and the question presented is, whether the funds in dispute and so derived, but misappropriated by the agent afterwards to his own use, constitutes a charge, nevertheless, against the plaintiffs, as a partial payment on the notes. The referees answer the inquiry in the affirmative, but the Judge, in sustaining the plaintiff's exception, rules otherwise, and directs the charge to be stricken from the account. This ruling is presented in the defendant's appeal.

It is to be observed, that under the agreement, "all the cotton that may be grown or matured on said plantation and farm during each of the five years" was to be sent to the plaintiffs to be by them "sold and the proceeds thereof applied by them in the satisfaction and payment of the notes" falling due respectively in that period, and the "balance, if any, of such proceeds," paid to the defendant.

Thus the cotton is in advance, as it is grown, appropriated to a specific debt, the defendant contracting to send it forward, the plaintiffs to sell when received and apply the proceeds to the notes. It is an executed covenant when the moneys arising from the sale come into the plaintiffs' hands. The indebtedness is then *pro tanto* reduced, and the amount so extinguished could only be revived with the consent of the debtor.

Such consent may be express or result from implication, and the latter must rest upon clear and unequivocal evidence of intent. It is sought to be drawn in this case from the general authority conferred upon the agent and exercised by him in conducting the farm, and from the sanction to dealings in futures upon speculative contracts, involved in the credit for profits made, and the charge for losses sustained. But these facts do not warrant an

inference of her assent to the withdrawal and misapplication to the agent's own use, of funds which in the very act of receiving, were appropriated to claims in the plaintiffs' hands.

This legal effect immediately followed the conversion of the cotton into money and the unequivocal consent of the defendant was necessary to prevent it. A power to act for another, however general its terms or wide its scope, presupposes integrity and good faith in its exercise for the benefit of the principal. It cannot be enlarged without a clear approval or ratification by the principal, so as to authorize a perversion of funds coming into the agent's hands, when acting as such, to the use of the agent, when the misapplication is participated in by one, setting up the authority for his own protection. Much less can it extend to a case in which the appropriation has been effected, and it is attempted to undo what has been lawfully done in the interest and for the advantage of the debtor principal. The subject is discussed in *Williams* v. *Johnston*, *ante*, 532.

The evidence, so far as it is accessible to us, is insufficient to excuse the plaintiffs for permitting the agent to use these funds, and attempting to restore so much of the indebtedness as was discharged by them. In this we concur with the referees and reverse the overruling action of the court which sustains the plaintiffs' exception.

Defendant's exceptions are overruled. These exceptions, 9 in number to the findings of fact, and 8 to the conclusions of law, remain to be considered and disposed of. As to the facts, it may be remarked generally that the appellant has brought the cause to a hearing upon a transcript from which is absent the numerous explanatory exhibits referred to in the report, as well as the account itself and other evidence, it may be, to her great disadvantage. Indeed, these are important to our own correct understanding of the force of the exceptions, largely dependent upon them.

Ex. 1. The omission of the referees to report the evidence in reference to the payment of the check for $1,453.

The proper course to be pursued was in a motion to recommit or to require the referees to produce the evidence. This was not asked, and proceeding with the trial without, the appellant has waived the objection.

Ex. 2. The failure of the referees to credit the defendant with the whole insurance, $12,870.43, received and to be so applied, instead of the reduced sum of $8,772.95, parcel thereof. The referees refer to exhibit H, as we suppose to show the items which diminish the amount to the last mentioned sum. Among these items there are an allowance of $1,000, as an attorney's fee for professional services, and of $1,607 for other expenses incurred in collecting, which the referees sustain, and we cannot undertake to pronounce excessive or unreasonable in the absence of all information of the difficulties attending the collection, or the extent, or nature of the claims which enter into the latter sum. Still less can we do so in regard to the unmentioned particulars, which, with these, form the aggregate of the reduction. It is enough to say that there is no evidence impeaching the payments made in securing the result, and this should come from the defendant if we are expected to disturb the conclusions of the referees and of the Judge.

Ex. 3. The general agency of Estes with its limitations has been sufficiently considered.

Ex. 4. The failure to credit the defendant with $1,453, a remittance by the agent to the plaintiffs in a check for that sum.

This sum was sent by Estes with instructions to have it placed as a credit on his individual account, to be applied to defendant's notes when the insurance claims were decided. These instructions were afterwards modified, and the plaintiffs directed to let the entry of credit remain until the defendant and himself should come to an understanding as to what "we (they) are going to do about the plantation." No other directions were given, but before the decision of the insurance or any understanding come to about the farm, Estes used the money by drafts drawn against it. This money, he testifies, was in a check from a bank in Maine,

upon another bank, and was the property of the defendant. He remitted it to the plaintiffs, in response to a letter from them, stating that he owed on the defendant's notes, and the entry of this credit was the first on his account, as agent, with them. The fund was then at the disposal of Estes, and stands upon quite a different footing from a fund arising out of sales of cotton made on the farm and embraced in the covenants.

Exs. 5 *and* 6. These exceptions are to the allowance which reduces the insurance money received and need no further comments.

Ex. 7. This exception is to the referees' finding, that drafts of Estes on cotton produced on the farm, have been paid by the plaintiffs with the defendant's knowledge. To this matter we have already adverted. What disposition was made of the moneys paid on the drafts, whether used in running the farm and obtaining supplies, or put to some other and what use, does not appear. The mere fact that money was thus drawn out, without showing it was improperly used, does not authorize the inference of the defendant's assent to her agent's misappropriation to his own use.

Ex. 8. The sum mentioned, $\$136.\frac{19}{100}$, stood as a credit on the account of L. G. Estes & Co., and by the directions of Estes, was transferred to his agency account. It was not applied, nor was there any request that it should be applied, to the notes. The facts are too meagre to enable us to determine whether the defendant is entitled to charge the plaintiffs with the amount.

Ex. 9. The same difficulty is encountered in passing upon the sufficiency of this exception.

Exceptions to conclusions of law.

Exs. 1, 3 *and* 5. These exceptions relate to the reduction of the insurance money—payments made in securing it, and the $1,453 remittance already considered.

Ex. 2. The objection to the general finding that the defendant is liable for the acts of Estes within the scope of his agency, as a proposition of law is untenable.

Ex. 4. The finding that Estes was in the habit of drawing out moneys arising from sales of cotton sent from the farm, with the defendant's consent, is supported by his evidence, while it is not shown to what use the money was put, and whether, if not used in obtaining supplies for the farm, the defendant knew of it and failed to make objection.

Ex. 6. The claim for loss on cotton (70 bales) directed to be sold by the agent, but who subsequently, knowing that it was not sold, acquiesced in and ratified the holding. The witness Estes testifies to positive instructions to sell without any assent afterwards to the retention, but we have not the testimony upon which the commissioners find the ratification, and cannot undertake to reverse their conclusion in the absence of other evidence.

Exs. 7 *and* 8. These are confined to the general results of the account as stated, and require no further examination. These exceptions were all overruled by the Court, and we sustain the action of the Court in so doing.

The account rendered by the commissioners must therefore stand. There is error in sustaining the plaintiffs' exceptions, but none in overruling the exceptions of the defendant.

As the cause can be more conveniently conducted to its final result in the court below this will be certified to the end that judgment be entered and further proceedings be there had in accordance with this opinion.

The costs of the appeal will be borne equally by the two parties.

Error. Remanded.

THE BANK OF NEW HANOVER v. J. R. BLOSSOM et al.

Serving Process by Publication—Attachment—Amendment.

1. *It seems*, that the affidavit to obtain an order for the publication of a summons, may be made after the order, provided the order remains in abeyance until the affidavit is filed.
2. Where notice of an attachment and summons were published in one notice for five weeks, it was held a sufficient publication of the notice of the attachment, but not of the summons.
3. Where a publication of a summons was only made for five weeks, the court has power to retain the action and order a sufficient publication.
4. Where notice of the attachment is omitted from the order of publication, but in the published notice the defendant is informed that an attachment has been issued against his property, to what court it is returnable, &c., the court has power to amend the order of publication, so as to insert a requirement that notice be given of the attachment.
5. *Quære*, whether such amendment is necessary.

(*Wheeler* v. *Cobb*, 75 N. C., 21; *Benedict* v. *Hall*, 76 N. C., 113; *Price* v. *Cox*, 83 N. C., 261; *Clark* v. *Clark*, 64 N. C., 150; *Ross* v. *Henderson*, 77 N. C., 170; *Allen* v. *Grissom*, 90 N. C., 90, cited and approved).

CIVIL ACTION, heard before *Shepherd, Judge*, at Spring Term, 1884, of NEW HANOVER Superior Court.

The facts appear in the opinion.

The defendants appealed.

Mr. C. M. Stedman, for the plaintiff.

Mr. Geo. Davis, for the defendants.

SMITH, C. J. On the 6th day of March, 1883, the plaintiff, a corporation formed and acting under the laws of this State, sued out of the office of the clerk of the Superior Court of New Hanover, a summons returnable to the next ensuing term, against Joseph R. Blossom and Thomas Evans, partners doing business under the firm name of J. R. Blossom & Evans, upon which the sheriff made endorsement of service upon the latter and that Blossom could not be found in his county. At the same time an affidavit was filed by Isaac Bates, president of the plaintiff bank and acting on its behalf, in which, after averring the corporate

capacity of the bank and his official relation to it, he proceeds to declare "that the defendants are indebted to the plaintiff, in the sum of fourteen thousand five hundred and ninety-nine dollars and ninety cents for money loaned. That the plaintiff is about to commence an action against the said defendants and has issued a summons therein, and that the defendant Joseph R. Blossom is a non-resident of this State, but has property therein, and this court has jurisdiction of the subject-matter of this action."

Thereupon a warrant of attachment issued to the sheriff, and he forthwith levied upon certain lots, as the property of the non-resident defendant, designating them by the number of each and of the block in which they are found in the plan of the city of Wilmington, and made return thereof.

On March 17th, the clerk entered an order for publication, in which, besides reciting the facts contained in the preceding affidavit, he adds after the word "non-resident," "and cannot after due diligence be found in this State." The publication, made pursuant to this order, omitting the designation of the court and the title of the cause, is in this form:

"This is an action brought to recover a debt of fourteen thousand five hundred and ninety-nine dollars and ninety cents ($14,599.90) due by account for money loaned by the plaintiff to the defendants, and a warrant of attachment has issued herein; and it appearing to my satisfaction that the defendant Joseph R. Blossom is a non-resident of this State and cannot, after due diligence, be found therein, and that he has property in this State, and that a cause of action exists against said defendant, and this court has jurisdiction thereof.

"Now, this is to command the said defendant Joseph R. Blossom, to appear at the next term of the Superior Court of New Hanover county, to be held on the 13th Monday after the first Monday in March, A. D. 1883, and answer or demur to the complaint, or judgment will be rendered against him according to law.

S. VAN AMRINGE,
Clerk of the Superior Court."

When the order for this publication was made, no other affidavit than that of March 6th was on file, and that was imperfect in its omission to aver that the non-resident defendant could not, after due diligence, be found in this State, but the order was made in anticipation, and upon the assurance of plaintiff's counsel, that another, without the defect should be put in, as in fact it was put in during the day, to give support to the order for the publication of the summons, as it was sufficient in form to authorize publication of the attachment. This supplemental affidavit has been lost, supposed to have been destroyed by mistake, and been replaced by leave of the court. This second affidavit, of similar general import, and coming from the same officer of the bank, differs from the first, only in substituting the words "has commenced," in place of "is about to commence," and in supplying the omitted averment "that said defendant Joseph R. Blossom cannot, after due diligence, be found in this State."

The order itself recites that it appears from the "affidavit of Isaac Bates, President of the Bank of New Hanover, *which is on file in this cause,* that the defendant Joseph R. Blossom is a non-resident and cannot, after due diligence, be found in this State, and that a cause of action exists against said defendant, and that he has property in this State, and then, omitting any reference to the warrant of attachment, proceeds to direct publication for six weeks in the "*Morning Star,*" commanding said defendant to appear, &c., as in the publication consequent upon the order.

The publication was commenced on the 27th day of March, and continued for five weeks, the last being on the first day of May. The complaint, properly verified, was filed on the 3d day of May.

At the return term of the summons and warrant, the defendant Blossom, by counsel who entered a special appearance for the purpose, moved the court to vacate the attachment and the order directing the issue of the warrant, and also to dismiss the action, while Josiah B. Blossom and James L. Hathaway, claiming the property attached under an assignment made after the levy, pur-

suant to notice given, applied for leave to intervene and assert their title to the lots. At same time the plaintiff asked leave to amend and file another affidavit and for an extension of the time of publication.

The motion of the defendant is based upon an alleged insufficient publication of the summons; that of the assignees rests upon the same ground, and upon the further ground that the lots belonged to an insolvent partnership, and are first to be disposed of in paying the joint debts, while the separate contract of the partners is subordinate, and can only be reached after the joint debts are satisfied. To this end the assignees demand the surrender of the lots to them.

Upon the hearing of their several motions, that of the plaintiff was allowed and ten days were given after the expiration of the term in which to make affidavit and commence a new publication.

The motion to vacate the order of attachment was denied, but the assignees were permitted to inter-plead and set up their own claim to the lots, while they were not allowed to contest the validity of the plaintiff's claim. The question arising out of the alleged insolvency of the debtor firm, and the conflicting rights of the partnership and individual creditors to priority of satisfaction out of the attached estate, was reserved until the hearing. From these adverse rulings the defendant and assignees appealed to this court. The appeal was not considered, but the cause remanded for a more definite finding of facts. *Bank* v. *Blossom*, 89 N. C., 341.

Since that appeal, the cause has proceeded in the Superior Court, a third affidavit filed, similar to that immediately preceding, and publication made under an order so directing, for the required term under the leave obtained of the court. This publication is in the same form as that of March, except that the defendant is notified to appear at the Fall instead of the Spring Term of the Superior Court.

We do not understand the sufficiency of the affidavit first made to authorize the issue of the warrant of attachment, and the publication that followed the order, to be contested by the appellants. While the order separately considered, does not in terms direct notice to be given of the issue of the attachment in the publication to be made of the summons, yet the published order, prepared by the clerk and bearing his official signature, does give notice of the issue of a warrant of attachment, with all the material matters connected with it under the requirements of the statute. It states the names of the parties to the action, and the court in which it is depending, the sum demanded, and how and when due; the time and place, when and where the summons, and so the warrant of attachment which by law is returnable in like manner, is to be returned. The affidavit would have fulfilled all the conditions necessary in a publication of the summons, but for the absence of the single averment to which we have referred, a defect held to be fatal in *Wheeler* v. *Cobb*, 75 N. C., 21, a case following adjudications in other States.

The defect is remedied and the necessary averment found in the affidavit filed on the day of the ordering of the publication, though posterior in time, if it can be made available in sustaining the order. We are not prepared to deny any efficacy to the concurrent and supporting oath, merely for the reason that it followed, when it ought to have preceded by a short space, the entering of the order, when the order remained, and was intended to remain, wholly inactive in the office, in abeyance it may be said, awaiting the promised affidavit. When it was filed, it gave vitality to that which possessed none before, and the clerk may be regarded as *then* exercising his authority, and renewing or in legal effect *making* the order. Such seems to have been the course pursued by the clerk, for he distinctly says that it appears from the affidavit of the president of the bank, "which is on file in this office," that the non-resident "cannot, after due diligence, be found in this State," an averment not in the first,

but in the second affidavit, and indicating clearly his intention that it should operate only when the affidavit was put in and would make the recital true, and not until this was done. In this view the order was *prepared* before, but in a legal sense *made*, after the affidavit, and then became an operative judicial act.

But the determination of the relation between them is not important, since the publication, regular or irregular, was continued for a shorter period than that prescribed by law and directed in the order, so as to be ineffectual in giving notice of the summons, while it may be sufficient as notice of attachment, which requires but four weeks. While the statute directs a single publication when the issue of the summons and the warrant are contemporaneous, and to assure both purposes, must be extended over six weeks, we do not see why, as the separate publication of the attachment is for the shorter period, the common publication may not suffice for this, while it would not answer for the other. *The Code*, sec. 352.

Assuming the publication and the affidavit for the order sufficient to sustain the attachment, the judge extended, if he had the right to do so, the time for publication of the summons. This last affidavit is in the form of that lost and restored, and the order fails as did the other, to direct notice to be inserted of the attachment, while both publications give such notice. Two questions are presented in the appeal whose solution seems to dispose of the entire controversy and these are:

I. Has the court power to allow a new, after an attempted ineffectual publication, and thus retain the cause in court.

II. Is the absence of a requirement in the order that it shall give notice of the attachment, while such notice is in fact given in the order as executed, an incurable and fatal defect?

The current of judicial decision is in the direction of requiring the strictest observance of all the provisions of law authorizing a proceeding by attachment, and we are disposed to uphold the law in its integrity, and dispense with none of its material conditions. But we regard this, and other statutes providing a civil remedy

against a debtor or wrong-doer, in the spirit of the new practice as facilitating the means of access to his property, and to be fairly and reasonably construed in furtherance of the remedy it gives.

Thus an imperfect affidavit upon which an attachment issued, was aided by affidavits introduced upon motion to vacate, and omitted essential parts thus supplied to sustain it, in *Clark* v. *Clark*, 64 N. C., 150. In like manner, was remedied a defective affidavit for an arrest in *Benedict* v. *Hall*, 76 N. C., 113.

In *Price* v. *Cox*, 83 N. C., 261, an exception was taken to the order of publication and to the affidavit on which it was founded, to remove which, the court gave leave to the plaintiff to proceed with a new publication, and upon an appeal, the ruling was upheld as within the power of the Court, and as a proper exercise of judicial discretion.

Why should it not be so? The purpose of publication is to give notice of the proceeding to the absent defendant, and if the plaintiff has made one ineffectual effort to give it, we see no adequate reason why, upon cause shown, the Court, in the exercise of the liberal power of amendment conferred, may not allow a second and correct publication to be made, that shall conform to the law. An alias summons, and others in succession, may be sued out as of right; why may not a substituted publication be permitted on application to the Judge in furtherance of the object of the section?

It is a singular coincidence that the defendants' counsel makes a special appearance, as he may do according to the rules of practice, and comes into court to complain of the disregard of some technical provision necessary to give him *legal notice* of what his presence and motion show he already in fact knows, and then complains that the plaintiff is permitted to proceed and give him that legal notice.

Equally competent, in our opinion, was the Court to allow the amendment of the order of publication, if it was necessary, so as to insert a requirement that notice be given of the attachment. The plaintiff was not in fault in this particular, but the omission

was an oversight of the officer, and it was corrected in the order as published. Indeed, the publication purports to be, and in form is, not the execution of the order as addressed to some one else to perform, but the order itself, judicially authenticated as such. It might be different if the order was to be carried into effect by the sheriff; and yet, in this case, in the language of a recent author, "such *order* may be published as the notice, if it is full enough to convey notice and is addressed to the defendant by the sheriff," and he adds: "when no special form of words is prescribed by the statute, it will be sufficient, if the defendant is addressed through the notice, and told of the suit pending against him, of the attachment of his property, or the order for its attachment, and of the time within which he must appear, the court, the name of the plaintiff, the demand, the grounds," &c. *Waples on Attachment,* 268.

But if the order, as distinct from that published, required the reference to the attachment, and was insufficient without, it was surely in the power of the Court to amend so as to make it conform to what it was understood to mean, as expressed in the publication pursuant to it.

We have not adverted to other objections of the appellant, since they are met and obviated in the last publication, and our ruling that this re-publication may be authorized.

We are not required to express an opinion upon the reserved matter, as it will more appropriately come up on the final hearing. We will, in this connection, simply refer to the cases of *Ross* v. *Henderson,* 77 N. C., 170, and *Allen* v. *Grissom,* 90 N. C., 90, with the remark that the plaintiff is presenting a demand against both partners for a partnership debt, and the adjustment of its and the assignees' claims to the property, may properly be left, as has been done by the Judge, to a future adjudication.

There is no error. Let this be certified, that the action may proceed in the court below.

No error. Affirmed.

S. B. WINSTEAD AND JOHN C. PASS et als, ex-parte.

Partition—Life-estate—Power.

1. Where a sale for partition is made among tenants-in-common, one of whom is entitled to a life-estate only, the tenant for life must have the interest on the value of the share to which he is entitled paid to him for his life, and he is not entitled to have the value of his life-estate ascertained, and a sum in gross paid to him therefor.
2. By section 1909 of *The Code*, in a sale for partition of land subject to dower, where the widow is a party, her life-estate may be valued in money, and the money paid to her in lieu of the interest for life on one-third of the proceeds of sale.

SPECIAL PROCEEDING, begun before the clerk, and heard on appeal before *McKoy, Judge*, at Spring Term, 1884, of PERSON Superior Court.

His Honor rendered judgment for John C. Pass, and the other parties appealed.

The facts fully appear in the opinion.

Messrs. Graham & Ruffin, for Pass.
Mr. J. W. Hinsdale, for the other petitioners.

SMITH, C. J. This is a special proceeding instituted in the Superior Court of Person county, before the clerk, for partition of the lands described in the petition of the co-tenants, and for the assignment of the shares to each in severalty. To this end the lands were sold under an order of the court by a commissioner, his report of the sale made and confirmed, and the fund, except a share, one-sixth part, directed to be distributed among the tenants, holding the other shares according to their respective interest, as set out in the petition. This share belonged to the wife of the petitioner, John C. Pass, who having become, by the birth of issue, tenant by the courtesy, was entitled to a life-estate, while the estate in remainder descended to the owners of the

other shares, as her heirs-at-law. This share was paid into the office of the clerk, when the said Pass moved the court to have the present value of his life-estate, now assuming the character of an annuity, ascertained and the same paid him, in place of the interest for life on the principal money. The motion was opposed by the other tenants, who insisted that the fund remain intact, and be so secured that he may have the annual interest, and they the undiminished principal at his death. The matter was, by consent, transferred to the docket of the Superior Court to be tried before the Judge. He declared that from the statement of counsel and the evidence offered as to the number of persons interested and the sum to be apportioned, it appeared that the interest of all the parties would be best subserved by allowing this to be done, and ruled that the said Pass be permitted to have the value of his life-estate ascertained, withdrawn from the money, and paid over to him in lieu thereof. The value of this annuity, as agreed upon, is $379, estimated at May 15, 1884, and with interest. From this judgment the remainder-men appealed, and present for solution the question of the power of the court to thus apportion the share between them and the owner of the life-estate.

The relation of the owners for life and in remainder, after the conversion of the land into money remained unchanged; the right to the use and profit before, and to the interest after the sale, being in the one and the right to the corpus, or substituted principal which it represented, undiminished, in the others. These are legal rights which cannot be disturbed when adhering to the land, and by what authority can they be by a conversion of the land into money? The life tenant can only claim the use, which the annual interest measures; the remainder-men are entitled to the corpus or principal, unimpaired, after the life-estate terminates. We cannot see upon what ground a power to interfere with these distinct and separate estates, in the manner here attempted, can be asserted and exercised *after*, which could not be *before*, the conversion. It is manifest the land could not

itself be divided in the ratio of the value of the two estates, so that a present right to the respective portions would rest in each, and why shall the substituted money fund be allowed to be thus divided?

Except by consent, the annuity, as interest, belongs to one, the corpus, or principal, in its entirety, belongs to the other, and so must the fund be disposed of as to secure the interest of both.

In a sale for partition of lands subject to dower, when the widow becomes a party, her life-estate may be valued in money, and the money paid over to her in place of the interest for life on one-third of the proceeds of sale; but this is by virtue of a statute—*Code*, sec. 1909—the very existence of which presumes the absence of authority to do so without it; for if the judicial power already existed, the enabling act would be wholly unnecessary. There is no such statute in reference to estates held for life by tenants in common, and as to them the power has not been conferred.

The authorities to which we have been referred, tend in the direction of denying to the court the possession of the disputed power, while no ruling to the contrary has been found.

In *Hubert* v. *Wren*, 7 Cranch, 370, Chief Justice Marshall, in reference to such apportionment without the concurrence of the remaindermen, says: "*They have a right to insist* that instead of a sum in gross, one-third of the purchase money *shall be set apart*, and the interest thereof paid annually to the tenant in dower during life."

The same rule is announced in *Freeman on Co-tenancy*, sec. 476, in these words: "Courts have no authority unless it is expressly conferred by statute, to compel a widow to accept a certain sum of money in lieu of her dower. She cannot be divested of her dower, except by her own act." Nor, but for an enabling statute, we may add, can she elect to have paid her a sum in gross without the assent of those entitled in remainder.

The following are cases of like import, furnished in the argument of appellant's counsel, and we have found none to the contrary. *Wilson* v. *Davidson*, 2 Rob. Va., 384; *Blair* v. *Thompson*, 14 Grat. Va., 441; *King* v. *King*, 15 Ill., 187; *Francisco* v. *Hendricks*, 28 Ill., 64; *Fry* v. *Ins. Co.*, 15 Ala., 810.

There is error in the ruling, and this will be certified that further proceedings be had in accordance with this opinion.

Error. Reversed.

A. SYME, Administrator, et als v. THOMAS BADGER, Administrator, et als.

Executor—Qualification—Retainer—Election—Devastavit.

1. Where an executor proves the will, he cannot elect to take against the will. So where a testator was indebted to the person he appoints his executor and leaves certain property to the executor in payment of the debt, which proved to be of less value than the amount of the debt, the executor, after proving the will, cannot elect to assert his rights as a creditor and retain his debt out of other assets of the estate.
2. It is immaterial that the executor acted under a mistaken idea of the legal consequences of proving the will.
3. An executor is only required to act in good faith and with reasonable care in the management of the estate.
4. Where an executor did not collect a debt, under the impression that it belonged to him personally, he will only be held accountable to the estate for the part of such debt as he actually collects.
5. Where an executor takes a security in his own name for a debt due the estate, it is not, in the absence of fraud and improper purpose, a devastavit.

(*Mendenhall* v. *Mendenhall*, 8 Jones, 287; *Jones* v. *Gerock*, 6 Jones Eq., 190; *Harrington* v. *McLean*, Phil. Eq., 258; *Isler* v. *Isler*, 88 N. C., 581; *Deberry* v. *Ivey*, 2 Jones Eq., 370; *Nelson* v. *Hall*, 5 Jones Eq., 32; *Patterson* v. *Wadsworth*, 89 N. C., 407; *Torrence* v. *Davidson*, *ante*, 437, cited and approved).

CIVIL ACTION, heard on exceptions to the report of a referee, before *Avery, Judge*, at February Term, 1884, of WAKE Superior Court.

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

Messrs. J. W. Hinsdale, Battle & Mordecai and *John Devereux, Jr.,* for the plaintiffs.

Messrs. Gatling & Whitaker, for the defendants.

SMITH, C. J. George E. Badger died in the year 1866, having, in October, 1859, made his will duly attested and in form to pass his real and personal estate, to which, in December, 1860, he annexed a codicil similarly executed, which his surviving widow, Delia Badger, nominated sole executrix, caused to be proved in the proper court and letters testamentary to issue to her.

The provisions of the will, so far as they are pertinent to the inquiries which the appeal requires us to make, and contained in the first and second clauses thereof, are as follows:

In the first place—"In the marriage settlement between my wife and myself, made just before our marriage, mention is made of bonds amounting to the sum of $15,119, but on ascertaining the state of accounts between her and the late Alfred Alston, who was executor of General Williams, and had acted as her agent, this sum was found subject to a deduction of $1,419, due him, so that the net amount receivable thereon was but $13,660. To this are to be added a sum received of hers from the Clerk of the Supreme Court in a suit in equity, and other sums amounting to about $1,500, making the sum for which I am accountable to her, $15,160.

"Out of this I have purchased for her, and at her request, negro woman Catharine, at the price of $650; also, I have purchased the part of lot No. two hundred and ten (210), on which my office stands, of Thomas D. Hogg and George W. Mordecai for the price of $800, the residue of the said lot having belonged to her before our marriage and being embraced in our marriage settlement, leaving the sum of $13,710 to be otherwise accounted

for. I have made investments in the stock of the Bank of the State and the Bank of Cape Fear, sometimes at some advance on the nominal value of the shares, and also in bonds. Of the stock, forty shares in the Bank of Cape Fear were subscribed and now stand in the name of my wife, and will, of course, be hers without any bequest from me.

"Now, therefore, in payment and discharge of what I do owe to my wife, I devise and bequeath to her, her heirs, executors and administrators, sixty shares of stock standing in my name in the Bank of Cape Fear, besides and in addition to the said forty shares, the portion of the said lot No. 210, in the city of Raleigh, purchased by me of the said Hogg and Mordecai, and three thousand seven hundred dollars in cash or bonds."

Secondly:—"Under a deed made by my late wife Mary and myself to Thomas P. Devereux, and a deed from him to me, made in the latter part of the year 1834, or beginning of 1835, her share in certain lands descended from or devised by her father, Col. William Polk, were conveyed to me in trust for myself for life, remainder to my children of whom she was the mother, with a full power to me to sell any or all of the said lands, making such other investments as I might deem best, to be to the same uses, as will appear by reference to the said deeds now recorded or registered in Tennessee where the lands were situated. These lands being at a distance from me, constantly liable to depredations as well as to loss of title by adverse possession, I deemed it best to sell, and by the return of John H. Rill, the agent who made the sales, it appears that they brought in the whole a little less than $15,000. I have from time to time invested these proceeds in bank stock purchased at a large premium, and in bonds. The Bank of the State being about to wind up, in which these investments were chiefly made, in settlement of this fund I do give and bequeath to my dear daughters, Catharine, wife of Wm. H. Haigh, Esq., and Sallie, wife of Montford McGehee, Esq., only children of my said late wife Mary, each fifty shares in the capital stock of the Bank of North

Carolina, subscribed by me and in my name, the said stock to be paid for out of my estate, and to each of my said daughters I also bequeath three thousand dollars in cash or bonds."

Upon the coming in of the answer, an order of reference with consent of parties was entered at January Term, 1880, and the appointed referee directed to "take and state an account of the assets and effects of the said George E. Badger, deceased, that came or ought to have come into the hands of the executrix," &c., and what disposition has been made of them by her or her administrator, and to inquire and report to whom shall be paid such as have come or may come into the hands of the plaintiff, the administrator *de bonis non*, &c.

The referee proceeded to take evidence on the subject-matters of the reference, and has reported the same with his findings of fact and law, embodied in a series of accounts submitted with the report. The plaintiff filed several exceptions, most of which were sustained, and, upon a recommittal of the report, the account was reformed in accordance with the rulings of the court. The defendant's exceptions were overruled, and judgment being rendered, the defendant Thomas Badger, as administrator, appealed to this court.

The first two conclusions of law submitted by the referee and so numbered are in these words:

1. That Delia Badger, the executrix of George E. Badger, deceased, and intestate of Thomas Badger, administrator, having qualified under the will of her testator, containing a legacy stated to be in satisfaction and discharge of the debt due to her by him, thereby in law accepted and became bound by its provisions, and that she thereby waived the right to retain the amount of her debt out of the assets except as directed by the will.

2. That the plaintiffs McGehee and Haigh having never mentioned to the executrix, the matter of the legacies left to them, or made any demand on her for them, and knowing that she was applying the estate to her support, and being willing that she should do so, ought to be taken as assenting to the delay in col-

lecting the McIlhenny and Taylor debt (originally due from one Miller), and to the consequent risk, and that the executrix ought not to be charged with the excess of the debt above the amount actually received thereon.

The defendants' exception to the referee's first conclusion was overruled. The plaintiffs excepted to the second and were sustained, whereby the estate of the intestate of the appellant is made responsible for the full nominal value of the Miller debt.

These rulings constitute the case on appeal, and in order to their being properly understood and determined, require an examination of the facts applicable to each, and as found by the referee they are contained in the sixth clause of his series of findings of fact. Upon an examination of the evidence reported, we think it fully sustains the findings of the referee, which are as follows:

"6. That the assets which came to the possession of the executrix were as follows: (1) A note of John and Thomas P. Devereux, who were subsequently declared bankrupts. The debt was duly proven against the estate of the debtors and small dividends were at various times received therefrom as charged in the account, No. 1, hereto annexed. (2) A note for $..... against Thomas Miller and sureties. This debt being considered unsafe, Miller was required to execute a new note, with other sureties (Thomas McIlhenny and John D. Taylor). On said new note suit was brought by Mrs. Delia Badger, and judgment obtained thereon, with the understanding that a note secured by mortgage on the lands of McIlhenny and Taylor, in Brunswick county, N. C., should be substituted for the judgment, the lands being ample security at that time, for the debt. This was done, and in 1871 the lien of the mortgage upon the land conveyed therein by McIlhenny was released, with assent of Taylor and wife, and a new mortgage taken upon other lands of McIlhenny of greater value than those released, the transfer being made only after careful investigation as to its propriety and as to the value of the lands, by a skilled and careful attorney. The mortgages were made to Mrs. Delia Badger. The note secured by them was for

$6,650, bearing 8 per cent. interest, payable semi-annually and dated January 1, 1870. Suit for the foreclosure of the mortgage was instituted by the defendant Thomas Badger, administrator, after the death of Mrs. Badger, in 1876, and judgment obtained thereon at Fall Term, 1878. The lands were sold on December 6th, 1880, for two thousand dollars ($2,000). On said note, previous to the sale of the lands, there had been paid the said Delia the amounts set forth in the debit side of account No. 1. The judgment taken in 1867 was substituted by the mortgage, for the reason that the principal and interest of the debt became thereby a principal sum, bearing interest at a greater rate, to-wit: 8 per cent. (instead of 6 per cent.), and payable semi-annually. The mortgage was not foreclosed before 1876, for the reason that the lands were regarded as ample security, the interest was paid with reasonable promptness by the debtors, and Mrs. Badger did not want the principal sum, and no demand for the payment of the legacies was ever made by the plaintiffs, McGehee and Haigh, and she, Mrs. Badger, considered herself entitled to the whole debt and its proceeds. After the foreclosure suit the lands were not sold earlier than 1880, for the reason that on account of the depreciation of real estate values near Wilmington, where the lands were situated, there was a well grounded fear that the lands decreed to be sold would not sell for enough to pay the debt, and the administrator of Mrs. Badger was not able to bid in the property, and for the further reason that the administrator of Mrs. Delia desired the administrator *de bonis non* of George E. to take control of the judgment and sale, he having been advised that the judgment belonged to the estate of George E. (3) Parts of lots 237 and 253 in the plan of the city of Raleigh, N. C., which were sold to Mrs. S. G. Ryan by Mrs. Delia Badger, in 1871, for $2,500, a fair price, on which there were payments of interest as set out in the debit side of the account No. 1. In 1876 the lots were sold under mortgage to, or the debt assumed by, D. M. Carter. (4) Part of the lot 210 plan of the city of Raleigh, N. C., mentioned in the second clause of

George E. Badger's will, and devised therein to said Delia his wife and executrix."

The bank stock bequeathed by the testator, whatever may have been its value at the time of the making of the will, and, in the absence of any suggestion to the contrary, as well as from the testator's own evident estimate, we infer it to have been at least of par value, became by subsequent events wholly worthless at the death of the testator and when the executrix assumed her office.

The residuary clause, following some minor bequests of a slave and books, gives what remained of the estate to his wife in absolute property.

Under this clause she has made sale of certain lots, numbered 237 and 253, or rather parts of them, to the wife of S. G. Ryan for $2,500, on credit, the money due from which came afterwards into the hands of said D. M. Carter as administrator *de bonis non*, and has been accounted for by him. With these explanations we proceed to consider the exceptions brought up.

1. The effect of the acceptance of the trusts of the will by the executrix and her proceeding to execute them.

In *Mendenhall* v. *Mendenhall*, 8 Jones, 287, the qualification of the testator's wife as executrix, notwithstanding the subsequent entry of her dissent, was held to debar her right of dower in his lands, and the Chief-Justice, in giving expression to the general principle, uses this language: "The act of qualifying as executrix, and undertaking upon oath to carry into effect the provisions of the will, is irrevocable. She cannot now renounce and discharge herself from the duties thereby assumed. This is settled law."

The correctness of this ruling was re-affirmed at the next term by the same Judge in *Jones* v. *Gerock*, 6 Jones Eq., 190, wherein he says: "If the plaintiff had not entered her dissent in the State of Alabama, *but had taken under the will* the lands devised to her in that State, and had then come here and entered her dissent and claimed dower, we are inclined to the opinion that she

would not have been entitled to it, because, having taken under the will, she would not be allowed to take against the will here, according to the doctrine established in *Mendenhall* v. *Mendenhall.*"

In the subsequent case of *Harrington* v. *McLean,* Phil. Eq., 258, a marriage contract had been made wherein certain slaves were secured to the wife for life and remainder to her children, and in disregard of it, the surviving husband bequeathed them to his children, the offspring of a previous marriage, and appointed two executors who qualified, one of whom was the husband of the only child of the second wife, and who, when he accepted the trust, was ignorant of the existence of the contract. It was insisted against a bill filed for a specific performance of the antenuptial agreement, that the executor husband had precluded himself from disturbing the provisions of the will by accepting the office. In answer to this argument, the same eminent judge distinguishes the cases, and confining the former to claims for some interest derivable from the testator, such as dower and distributive shares, says, "For such claims being under the husband, were inconsistent with the act of qualifying as his executrix. But Harrington is not seeking to set up a claim *under* his testator, but is seeking to set up a claim for his wife *against* the testator, of which claim he had no notice until after he had qualified," &c. The principle deducible from the decisions, is that the undertaking assumed by an executor is to carry out all the provisions of the will, as far as lies in his power, but this does not obstruct the enforcement of a liability incurred by the deceased in his life-time, unknown when the trust was accepted, and, therefore, not constituting a case of election. But when beyond this, any gift of the testator is accepted or benefit voluntarily received under the will, it involves a surrender of all claim to property disposed of in the instrument; in other words one cannot take under a will and in opposition to it.

The rule is thus stated by the Lord Chancellor in *Thellusson* v. *Woodford,* 13 Ves., 219, and referred to with approval by this

court in *Isler* v. *Isler*, 88 N. C., 581: "If a testator intending to dispose of his property, and making all his arrangements under the impression that he has the power to dispose of all that is the subject of his will, mixes in his disposition property that belongs to another person, or property as to which another person has a right to defeat his disposition, giving to that person an interest by his will, that person *shall not be permitted to defeat the disposition where it is in his favor, and not take under the will.*"

A gift intended to be in satisfaction of a debt due the legatee, will put the legatee to an election. *Theobald on Wills*, 82. And it is equally clear that a mode of payment prescribed in the will, when a gift to the creditor is also contained in it which is accepted, involves an assent to the directed means of paying the debt.

In *Worthington* v. *Wigenton*, 20 Beav. 67, a case in its features very similar to the present, Sir Samuel Romilly, Master of the Rolls, employs this language: "Two things are essential to constitute a settled and concluded election by any person who takes an interest under a will which disposes of property belonging to that person. * * * In this case I think that the widow was aware of what her rights were; she was fully aware of the contents of her husband's will; she was the sole executrix named in it, and had proved it, and she made use of her character as executrix to enforce payment of money due to her late husband and to arrange with the landlord for the surrender of the five lease-holds." Now apply the rule to the facts of the present case. The will itself provides a specific fund for the payment of the admitted debt due the executrix, and this to be in discharge. There is also a money or bond legacy given of $3,700; and also the residue of the testator's estate. With the information thus furnished, she proceeds to prove the will and to execute its trusts. She has sold some devised real estate, and assumed generally to manage the estate under the authority thus derived. Is not this a manifest election to take under the will? An error as to the legal consequence of the act of election is not a material

element in its validity. It is enough that she chose to accept the provisions made in her behalf.

Her mistaken supposition that she could do this and at the same time subvert some of the terms of the instrument in asserting a right as creditor, does not in any respect change the act as an election, with its consequences, and by it she must abide. There is no error in the conclusion of the referee, and the sustaining ruling of the court, that the executrix having voluntrily accepted the provisions of the will and undertaken to give them full effect, is bound by her election.

11. The second exception to the ruling of the court, which charges the executrix with the full nominal amount of the Miller debt, instead of what she was able to collect from it, must be sustained. The rules of fiduciary duty have been so distinctly announced in past adjudications, some of them very recent, that it is not necessary to prolong the discussion on this point. The requirement is that such fiduciary act "in good faith and reasonable care" in the management of the trust fund. *Deberry* v. *Ivey*, 2 Jones Eq., 370; *Nelson* v. *Hall*, 5 Jones Eq., 32; *Patterson* v. *Wadsworth*, 89 N. C., 407; *Torrence* v. *Davidson*, *ante*, 437, and other cases.

We shall not recall the efforts made and set out in the report to secure this fund to the estate in its entirety, nor the causes of the loss of a part of it, in none of which is there shown any want of care or dereliction in fiduciary duty. The only ground we can find for the decision of the court, reversing that of the referee, is furnished in the taking of the renewed obligation in the name of the executrix without declaring the attaching trusts, this being deemed a conversion and appropriation of the debt to her personal use. There are authorities that so declare the rule to be at law, and in the absence of explanations, it may be correct. But to call an exchange of an inferior into a superior and better security, preserved for the estate, a devastavit in itself, involves a perversion of the meaning of the term.

The literal rendering of the word is, "he has wasted," and implies, "a wasting of the assets," that is, that there has been a mismanagement of the estate and effects of the deceased, in squandering and misapplying the assets, contrary to the duty imposed, as explained in 2 *Williams' Ex'rs*, 1629, and in other works on the same subject. The rule has undergone qualifications, and is no longer enforced in its former rigor. "The English authorities," in the words of a recent writer, "establish that at the old law, if the legal representative releases a debt due the decedent, or delivers up, or cancels a bond, in which the deceased was named obligee, or *takes a new obligation expressed to himself* personally, or settles a suit upon consideration, he shall be, *prima facie* at least, chargeable as for a devastavit for the full consideration, on the theory that unless he could produce such consideration in full, he must have wasted it to the disadvantage of the estate." *Schuler on Ex'rs and Adm'rs*, sec. 388.

And so Mr. Iredell declares that where the executor delivered up a bond due to his testator, and took a new bond with surety to himself for the debt, it was held that this, *though a conversion in law*, was none in equity. *Iredell on Executors*, 613. This is so declared in *Armitage* v. *Metcalf*, 1 Ch., Cas. 74. The identity of the debt remains and may be pursued and held as part of the estate of the deceased, one only of the badges of ownership being removed, and that with no fraudulent or improper purpose, but under an honest impression produced by legal advice, that the fund was at her disposal.

To hold her, under such circumstances, responsible for more than she was able to obtain, after efforts put forth to secure the whole debt, would be the application of a harsh and oppressive rule of trust duty, to which we cannot consent. She is liable for all received, and this is, in our opinion, the full measure of her official obligation. We, therefore, find error in the ruling of the Court upon this exception, and re-instate the conclusion arrived at by the referee. The will, in a marked manner, indicates the purpose of the testator to deal justly and fairly with his wife

and children in the distribution of his estate among them, and is in keeping with the rule that controlled his conduct in life. But the disastrous results of the war, upon which the country was about to embark when he committed his testamentary intentions to writing, has disappointed them and left but a part to go to his survivors, and hence the embarrassments encountered in carrying out his purpose.

There is error in the ruling last considered, and the account, in this particular, must be returned to the condition in which it was originally reported. Let this be certified for further proceedings in the Court below.

It is so ordered.

J. W. WILSON, et al. v. J. G. BYNUM, Administrator, et als.

Administrators—Petition to Sell Land for Assets—Jurisdiction—Issues.

1. Before the Act of 1846, the lands of a decedent could not be sold to pay a debt upon which a judgment *quando* had been rendered against the administrator; but since the passage of this act, which makes the proceeds of land, when sold, assets in the hands of the personal representative for the payment of debts, a judgment *quando* may be satisfied from the proceeds of the sale of the decedent's lands.
2. Land is not assets until it is sold and the proceeds received by the personal representative.
3. *Quære*—Whether an administrator can be sued on his bond when he has been negligent in not obtaining an order to sell his intestate's land for assets.
4. Where it is necessary, and the administrator fails to take the proper steps to sell his intestate's real estate for assets, he may be compelled by the clerk to do so, or a creditor may file a creditor's bill in the Superior Court against the administrator or executor, and the heirs-at-law or devisees, for the sale of the land.
5. The Code has not taken away from the Superior Court any jurisdiction heretofore exercised by courts of equity, except, perhaps, in cases exclusively within the jurisdiction of a justice of the peace.

6. Where the complaint alleged that the plaintiff had a judgment against the estate of a decedent; that the assets of the estate were exhausted; that certain lands devised by the decedent were in the possession of his devisees, and that the personal representative had refused to apply for an order directing the sale of said land to make assets; *It was held*, that the complaint set out a cause of action.

7. Where issues of fact are raised by the pleadings, it is error for the Judge to decide the action without submitting these issues to a jury, unless both sides consent that he shall decide the whole case, both on the law and the facts.

(*Walton* v. *Pearson*, 85 N. C., 34; *Martin* v. *Harding*, 3 Ired. Eq., 603; *Vaughan* v. *Deloatch*, 65 N. C., 378; *Hawkins* v. *Carpenter*, 88 N. C., 403; *Fike* v. *Green*, 64 N. C., 665; *Wadsworth* v. *Davis*, 63 N. C., 251; *Allison* v. *Davidson*, 1 D. & B. Eq., 46; *Simmons* v. *Whitaker*, 2 Ired. Eq., 129; *Finger* v. *Finger*, 64 N. C., 183, cited and approved).

This was a CIVIL ACTION, tried before *Graves, Judge*, at the Fall Term, 1883, of BURKE Superior Court.

The action was instituted by the plaintiffs as assignees of W. M. Walton, in behalf of themselves and all other creditors of Charles McDowell, deceased, against the defendants, John Gray Bynum, administrator, *d. b. n.* of Charles McDowell, deceased, and C. M. McLoud, administrator of N. W. Woodfin, deceased, Richmond Pearson, executor of R. M. Pearson, deceased, Samuel McDowell, T. W. Walton and wife Annie, Cora McDowell and Manly McDowell, devisees of Charles McDowell, deceased.

The plaintiffs alleged that they were the owners of the following sealed note and the judgment rendered thereon, which had been assigned to them by the obligee W. M. Walton, for value received, to-wit: "One day after date we, W. F. McKesson, as principal, and Charles McDowell and James McKesson as sureties, promise to pay W. M. Walton or order, twenty-two hundred dollars for value received. Given under our hands and seals, this 25th day of November, 1855.

(Signed), W. F. MCKESSON, (Seal).
CHARLES MCDOWELL, (Seal).
JAMES MCKESSON, (Seal).

That no part of the note has been paid. That W. M. Walton, assignee of plaintiffs, brought suit on said bond on the 15th

of March, 1866, and at the Fall Term, 1869, obtained judgment thereon, as appears by the records of Superior Court of Burke county. That Charles McDowell died in the year 1859, leaving a last will and testament, which was duly admitted to probate in the county of Burke, in which among other things, there was a clause as follows, to-wit: "I will, give and devise to my executor, all the lands which I own, for the sole and separate use of Julia McDowell, wife of my son James C. S. McDowell, during the life-time of him, the said James, and at his death to his children, but if he dies childless, then to my grand-children, per capita." That Tod. R. Caldwell was appointed executor in this will, but renounced the executorship, and Nicholas W. Woodfin was appointed and qualified as administrator *cum testamento annexo*, of the estate of the said Charles McDowell, and gave an administration bond with John W. Woodfin, W. F. McKesson and Richmond M. Pearson as sureties. That N. W. Woodfin died insolvent, and C. M. McLoud was appointed his administrator, and John W. Woodfin and W. F. McKesson and James McKesson all died insolvent. That R. M. Pearson died leaving a large estate, and also a last will and testament, in which Richmond Pearson was appointed executor.

That upon the death of N. W. Woodfin in the year 1876, John G. Bynum was appointed administrator *de bonis non* of the estate of Charles McDowell, deceased. That James C. S. McDowell is dead, leaving the following children, viz.: Samuel McDowell, Annie, wife of Thomas Walton, Cora McDowell and Manly McDowell. The plaintiffs allege that Charles McDowell died possessed of a large personal estate which has been exhausted by the payment of debts and emancipation of slaves and other casualties of the late war, and there are no personal assets known to the plaintiffs out of which they can obtain payment of their debt, and none have come to the hands of John G. Bynum, the administrator *de bonis non*, as they are informed; but that Charles McDowell died seized of a large and valuable tract of land lying in Burke county, containing about 1,400 acres, which

he devised to his executor in trust for Julia McDowell for life, and after her death, to the children of the said James C. S. McDowell as above named, who are in the possession of the said land, and who deny that the assets of Charles McDowell were exhausted by his administrator, N. W. Woodfin, and say that he was guilty of a devastavit. They allege that they have called upon the said John G. Bynum and requested him to file a petition for the sale of the said land, which he has declined to do, and therefore they demand judgment that the land be sold to make assets for the payment of the testator's debts; and, by amendment, in as much as the said defendant's devisees, as aforesaid, deny that the assets of the estate of Charles McDowell, deceased, have been exhausted or legally applied, and allege that Woodfin, former administrator, was guilty of a devastavit, they demand that an account may be taken of the estate of Chas. McDowell, deceased, to ascertain whether the assets have been exhausted or have been legally applied, and how much, if any, assets are still in or ought to be in the hands of N. W. Woodfin, and if it appears that he is guilty of a devastavit, that plaintiffs may have judgment against his administrator and the security on his bond, to-wit: Richmond Pearson, executor of R. M. Pearson, deceased, and for such other and further relief in the collection of plaintiff's debt or claim as may be consistent with the facts found in this case."

Richmond Pearson, as executor of R. M. Pearson, filed a demurrer and alleged as grounds therefor: 1st, that no relief is prayed against him in said complaint; and, 2d, that said complaint admits that there has been no devastavit of the principal of his testator, viz.: N. W. Woodfin, administrator *cum testamento annexo* of Charles McDowell, and consequently there is no breach of the administration bond of the said Woodfin.

The other defendants, devisees, in answer to the complaint, allege that sufficient assets came to the hands of N. W. Woodfin, administrator of Charles McDowell, to pay all of the debts of his testator, but that the said Woodfin wasted and misapplied the

same, and was guilty of a *devastavit.* They denied that there are any debts existing against the estate of Charles McDowell, deceased, for which they were liable, or for which their real estate can in any way be charged or sold, to the amount of eight thousand dollars, or to any amount whatever; that the plaintiffs suffered a judgment *quando* to be entered against the administrator, instead of a judgment absolute, whereby the sureties on the administration bond were released from liability, to an amount more than sufficient to pay the debts of the testator.

John G. Bynum adopted, as part of his answer, that of the other defendants, and further alleged:

1st. That more than ten years have elapsed since the execution, if at all, of the bond sued on by the testator, and it is presumed to be paid by presumption of law;

2nd. That no cause of action has accrued to plaintiffs on said bond within ten years next preceding the beginning of this suit;

3rd. That said bond is paid or discharged by being merged in a judgment now on file in the office of Clerk of the Superior Court of Burke county;

4th. That at the time the action was commenced there was an action which is still pending between the same parties, asking the same relief in the Superior Court of Burke county.

His Honor gave judgment for the defendants, and the plaintiffs appealed.

Mr. D. Schenck, for the plaintiffs.

Messrs. Reade, Busbee & Busbee, G. N. Folk and *D. G. Fowle,* for the defendants.

ASHE, J. (after stating the facts as above). This case savors very much of a "fishing bill." It purports to be an action in nature of a creditor's bill, instituted to sell the lands devised by Charles McDowell, deceased, to the defendants, his grand-children, for the payment of his debts. The record transmitted to this Court by the appeal, interspersed as it is with amendments,

"at random strung," is obscure, inconsistent, and voluminous. There are no exceptions taken in the case. The complaint alleges that the assets of the estate of Charles McDowell had been exhausted by the payment of debts, and the casualties of the war—in other words that the administrator had fully and legally administered the assets; and yet in their prayer for relief, they demand that inasmuch as the defendants insist that the administrator did have assets sufficient to pay the debts of the testator Charles McDowell, and had committed a *devastavit*, that, if that fact should be so found on a reference, a judgment should be rendered in their behalf against Richmond Pearson, executor of R. M. Pearson, who was surety on the administration bond of N. W. Woodfin, and this without any allegation in the complaint of a breach of the bond; thus attempting to use the answer of the defendants to supply the deficiencies of the complaint; and, without a single exception pointing to any error, we are called upon to grope our weary way through a large mass of pleadings and record evidence, constituting a moderate sized volume, in search of errors supposed to exist. And when we come to the judgment of the Court, hoping to derive some light from that source, we are confronted with the laconic announcement "That the plaintiffs are not entitled to recover," so that it is impossible for this Court to ascertain upon what ground the judgment of the Court below was rendered; whether because the action was barred by the statute of limitations; or because the bond was merged in the judgment; or because there was another action depending between the same parties asking for the same relief; or because of any of the other defences set up by the defendants. In the absence of any light upon the subject, we are left to conjecture, and it is possible the judgment was rendered upon the ground that the complaint did not state facts sufficient to constitute a cause of action. Assuming, then, that to be the ground of the judgment, we proceed to inquire if it can be sustained.

The administrator *de bonis non* of Charles McDowell, having declined to file a petition for leave to sell his real estate to make assets for the payment of his debts, this action, in the nature of a creditor's bill, is brought against the said administrator and the devisees, to sell the land devised, to make assets for the payment of the debts of the testator, and among them the debt of the plaintiffs, which was reduced to judgment in 1869.

The judgment was *quando*, and so considered by the parties after the amendment of the record in the case by Judge Cloud, and it was so held to be by this court in the case of *Walton* v. *Pearson*, 85 N. C., 34.

Before the act of 1846, the lands of a decedent could not be sold for the payment of his debts after such a judgment, because when an administrator who was then sued, pleaded fully administered, and the plea was established by proof or admitted, the creditor was put to his election, to take a judgment *quando acciderint*, or sign judgment for the amount of his debt, and proceed by *scire facias* against the heirs or devisees to subject the land descended or devised to the satisfaction of his judgment. If, however, he made the election to take a judgment *quando*, he could not proceed against the heirs or devisees, for he had taken his chance to realize his debt from assets that might thereafter come to the hands of the administrator. As the law then stood, the administrator had no concern with, or control over, the lands of his intestate. *Martin* v. *Harding*, 3 Ired. Eq., 603.

But the act of 1846 changed the law in this respect, and empowered the executor or administrator, when there was an insufficiency of assets to pay the debts of the deceased, to sell the lands descended or devised, after obtaining a license therefor from the Superior or County Court; and the act further provided that the proceeds of the sale should be deemed legal assets for the payment of debts. But lands are held not to be assets until they are sold and the proceeds received by the administrator— *Vaughan* v. *Deloatch*, 65 N. C., 378; *Hawkins* v. *Carpenter*, 88 N. C., 403, and *Fike* v. *Green*, 64 N. C., 665—and it is

still an open question whether an administrator can be sued on his bond, when he has been guilty of negligence in not applying for and obtaining an order to sell the real estate of his intestate. But when there is a deficiency of assets, it is nevertheless the duty of the administrator to take the necessary steps prescribed by law to sell the real estate of his intestate for the payment of his debts, and when he refuses so to do, he may be compelled by the clerk of the Superior Court to perform the duty, or the creditor, as in this case, may bring an action in the nature of a creditor's bill against him and the heirs-at-law or devisees, as the case may be, for sale of the land under the equity jurisdiction of the court. That jurisdiction still exists. *The Code* has not taken away from the Superior Courts any jurisdiction heretofore exercised by Courts of Equity, except, perhaps, in cases exclusively within the jurisdiction of justices of the peace—*Wadsworth* v. *Davis*, 63 N. C., 251—and the Courts of Equity have always entertained jurisdiction of creditor's bills, upon this subject—*Allison* v. *Davidson*, 1 Dev. & Bat. Eq., 46; *Simmons* v. *Whitaker*, 2 Ired. Eq., 129, and *Martin* v. *Harding*, 3 Ired. Eq., 603—and especially in cases like this, "when the deficiency in personal assets resulted from accident, after they had come into the hands of the administrator, as here alleged by emancipation, &c., the courts of law (formerly) were not competent to order a sale of lands to pay debts, but that application must be made to a Court of Equity." *Finger* v. *Finger*, 64 N. C., 183. So that in whichever way the assets derived from the sale of the lands are realized, after judgment *quando*, they are applicable to its satisfaction.

Here the plaintiffs allege they have a judgment against the estate of Charles McDowell and the administrator declines to file a petition for the sale of the land; that the assets of the estate have been exhausted by the payment of debts and the emancipation of the slaves and other casualties of the war; and that the defendant's devisees, have lands in their possession devised by Charles McDowell, the testator. This, we think, is a statement of facts sufficient to constitute a cause of action, and if His Honor

rendered judgment upon that ground, there is error. But if we are mistaken in our conjecture as to this being the ground upon which the judgment was rendered, there is still error in the judgment of the court below.

There are several issues of fact squarely raised by the pleadings. The plaintiffs allege that the assets have been exhausted by the payment of debts, &c. This, the defendants deny, and aver that there came to the hands of N. W. Woodfin, assets sufficient to pay all the debts of the testator, which were wasted by the said Woodfin, and they further insisted that the plaintiffs' action was barred by the statute of limitations. These are issues of fact, which His Honor had no right to decide, unless upon an agreement of counsel that His Honor might decide the whole case upon the law and facts. But the record does not show that there was any such agreement. It was, therefore, error in not submitting these issues to the jury.

It is with some reluctance we grant a new trial in this case, and only do so in consideration of the large interest involved. And should the case again come before this court, as it is probable it will, it is to be hoped the record will be presented in a more orderly and intelligible form.

The judgment of the Superior Court is reversed, and this must be certified to that court that a new trial be had.

Error. Reversed.

A. G. DAVIS v. J. T. COUNCIL et als.

Evidence—Declarations—Fraud—Judge's Charge—Assignment of Error.

1. In order to prove fraud the conversations of those who are charged as the perpetrators thereof, which accompany and explain the fraudulent acts, are admissible in evidence.

2. A witness who admits that he participated in the perpetration of a fraud, is impeached, and it is competent to corroborate his testimony by evidence of similar statements before made by him.

3. A purchaser from a fraudulent donee, in order to get a good title, must purchase without notice of the fraudulent character of his vendor's title.

4. An omission to give an instruction, which might have been proper had it been asked, cannot be assigned as error.

5. An instruction asked after the rendition of the verdict is not in apt time, and may be diregarded.

6. The only assignments of error, which do not appear in the case on appeal, which the Supreme Court will consider, are want of jurisdiction, and that the complaint does not allege a cause of action.

(*State* v. *Twitty*, 2 Hawks, 449; *Jones* v. *Jones*, 80 N. C., 246; *Young* v. *Lathrop*, 67 N. C., 63; *Worthy* v. *Caddell*, 76 N. C., 82; *Williams* v. *Kivett*, 82 N. C., 110; *Codner* v. *Bizzell*, *Ibid.*, 390; *Drake* v. *Drake*, *Ibid.*, 443; *State* v. *Hinson*, *Ibid.*, 597; *State* v. *Keath*, 83 N. C., 626; *Meekins* v. *Tatem*, 79 N. C., 546; *Williamson* v. *The Canal Co.*, 78 N. C., 156; *Bank* v. *Graham*, 82 N. C., 489, cited and approved).

CIVIL ACTION, for the recovery of land, tried before *Shepherd*, *Judge*, and a jury, at Fall Term, 1884, of the Superior Court of COLUMBUS county.

The land in controversy belonged to the defendant C. T. Davis, under whom the contestants in the action claim. The plaintiff claims his title from sales made by the assignee in bankruptcy of said C. T. Davis, and the assignee's deed therefor, made in February, 1882, and also by the assignee in bankruptcy of the defendant J. T. Council, to whom the said Davis had previously undertaken to convey, and the assignee's deed therefor, also executed in February, 1882.

The defendants, J. T. Council and Mary J. Council, his wife, claim the estate by virtue of a deed executed by the said Davis to the former in February, 1867, and subsequent deeds transmitting title to the latter, on whose behalf the plaintiff's right of recovery is resisted.

The case settled by the presiding judge, as upon disagreement and by consent of counsel, is thus stated:

The following issues were settled and agreed upon by counsel and submitted to the jury:

1. Is the deed from C. T. Davis to J. T. Council fraudulent?

Answer—Yes.

2. Have the defendants and those under whom they claim been in the continuous, open and exclusive adverse possession of the lands described in the complaint for seven years next preceding the commencement of this action under known and visible boundaries and color of title?

Answer—No.

3. What was the annual value of said land?

Answer—$150.

There was no answer on the part of C. T. Davis, who was in possession of a part of the land under his mother-in-law, Larmia Young, to whom J. T. Council had executed a deed on tke 10th of July, 1867, in trust, for the wife of Davis. Judgment by default, was rendered against him. It was conceded that at the time of the execution of the deed by C. T. Davis to J. T. Council, that said Davis was insolvent, and that J. T. Council knew of his insolvency at that time, also that the deed conveyed all the land of C. T. Davis, and that on the same date, Davis had executed a bill of sale for his entire personal property to said Council, the possession of which has never been changed.

C. T. Davis was introduced by the plaintiff, who, among other things, testified that one John Foy had obtained a judgment against him and one D. B. Melvin, his security, in the Superior Court of Bladen county, in April, 1867, for the sum of four hundred and sixty-five dollars and interest; that for the purpose of defeating the collection of this judgment and other indebtedness, he applied to J. T. Council for advice; that before this he had spoken to D. B. Melvin about this purpose, and that it was agreed between them that Davis should talk to Council about the matter for them both; that he stated his and Melvin's situation to Council, and that Council advised that both witness and Melvin should convey their property to him absolutely, for the purpose of defrauding the judgment; that he (witness) agreed to the proposition, and executed deeds conveying all his real and personal

property to said Council for that purpose; that before executing these deeds he communicated to Melvin all that had occurred between witness and Council, and that Council had said he would take care of both of them; that Melvin a few days thereafter executed conveyances of all his property to Council for the same purpose; and that the conveyances were antedated.

After this witness was cross-examined by the defendant, the plaintiff, for the purpose of corroborating C. T. Davis, introduced D. B. Melvin, and proposed to prove that he had the conversation with Davis as deposed to by him, and that in consequence of the same he applied to Council a few days afterwards; that Council advised him to execute conveyances of all his property to him, as Davis had done, for the purpose of defeating the judgment; that Council told him of a similar arrangement he had made for Davis, and of Davis's application to him; that, therefore, witness executed a deed conveying all of his property to Council for the purpose of defeating the Foy judgment; and that the conveyances executed by him to Council were antedated.

This was objected to by defendant, but the Court admitted the testimony for the purpose of corroborating Davis, and the witness testified to the above mentioned state of facts. The defendant excepted.

The defendant introduced a deed dated August 24, 1872, from Mary J. Council, wife of J. T. Council, to Matthew Burney, conveying the land in controversy, and also a deed from J. T. Council, administrator of Matthew Burney, to Mary J. Council, dated August 26, 1874.

These deeds were introduced to show color of title, and there was evidence tending to show that Mary J. Council, through her tenants, entered under her deed and continued in adverse possession for seven years before the commencement of this action. J. T. Council acted as the agent of his wife, Mary J. Council, in all of their transactions. There were no instructions prayed for, and the Court charged the jury as to what constituted color of title, and what kind of possession was sufficient to constitute adverse possession.

There were no exceptions to the charge on these points, but after verdict the defendant excepted, because under the second issue, the Court failed to charge the jury that the title of a *bona fide* purchaser from a fraudulent grantee, who obtains his title from such fraudulent grantee prior to the title which a creditor of the fraudulent grantee had, ought to be preferred to the creditor of such fraudulent grantor, notwithstanding the fraud.

There was no evidence of the payment of any purchase money.

The jury found this issue in favor of the plaintiff.

The defendant moved for a new trial for the failure to charge the jury as stated in the exceptions, and for the admission of the testimony of witness Wilson.

The motion was overruled. There was judgment for the plaintiff, and the defendant Council appealed.

Mr. W. A. Guthrie, for the plaintiff.

Messrs. Reade, Busbee & Busbee, for the defendants.

SMITH, C. J. (after stating the facts). 1. The first exception presented in the record is to the ruling by which the witness Melvin, in order to corroborate the witness Davis, was permitted to testify to a conversation which passed between himself and Davis, and which had been given in evidence by the latter, as also to a conversation, consequent upon it, with the defendant, J. T. Council, showing the fraudulent arrangement planned and carried out to defeat the creditors of Davis.

The declarations proceed from parties to the action—those through whose agency the *feme* defendant acquires the title set up to defeat it. They are moreover facts that show the common intent, which shared in by both, enters into and vitiates the conveyance from one to the other. Fraud consists in acts done with an unlawful intent, and can usually be proved in no other way than by showing the accompanying conversation between those by whom it is perpetrated.

But the declarations are competent upon the ground in which they were admitted by the Court, to sustain the credit of the witness Davis. He was self-impeached, in the attitude in which upon his own testimony he stood before the Court, precisely as an accomplice in crime is, who confesses his own participation in it. The witness admits his purpose in making the deed was fraudulent, and the land was left out of his schedule when he went into the bankrupt Court to escape from his debts. His credit is thus impaired as effectually as if he were impeached by proof of contradictory statements, or by the manner of cross-examination, or otherwise, and it was clearly competent to sustain his impaired credit in any authorized and proper way allowed by law, and assure confidence in his present testimony in reference to the execution of the deed and its object.

It comes therefore clearly within the settled rule, which, when a witness's credit is impeached, permits proof of similar and consistent statements before made by him, to be introduced in support of his credit. This principle in the law of evidence has been too long and too often asserted by this court to admit of being called in question because of different adjudications elsewhere. From the case of *State* v. *Twitty*, 2 Hawks, 449, in which the opinion is delivered by the first Chief Justice of this court, through the numerous cases since decided, down to that of *Jones* v. *Jones*, 80 N. C., 246, the rule has been uniformly recognized and enforced in this court. It ought to be, and must now be, deemed the law in this State, until the General Assembly shall alter it.

2. There is no exception to the instructions given, none to the refusal to give any proposed. After the jury had passed upon the issues, exception was taken to the omission to charge that the title acquired by a *bona fide* purchaser from a fraudulent grantee, under a deed executed prior to the title obtained by a creditor of such fraudulent grantee, must prevail over the latter.

The answer to this objection is obvious.

1. It was not asked until after the rendition of the verdict, and, therefore, not in apt time to be given.

2. It is not pertinent to any of the issues before the jury.

3. It was not warranted upon any aspect of the evidence, since no consideration was shown, and for aught that appears, outside the recitals of the deed, it was voluntary.

4. The proposition itself is an imperfect statement of the principle of law, as it omits the material qualification, that such purchaser should not have had notice of the fraudulent character of the title of the party from whom he derives his. *Code*, §1548; *Young* v. *Lathrop*, 67 N. C., 63; *Worthy* v. *Caddell*, 76 N. C., 82.

The refusal to grant an instruction asked may be assigned for error—not an omission to give one which might have been proper if requested. *Code*, §412, par. 3.

The stress of the argument of the appellant's counsel was upon the plaintiff's want of title under the assignees' deed, because the sale was in disregard of the requirements of the bankrupt law, as shown in the case made before the Superior Court, and numerous cases were cited and commented on to show her deed to be a nullity.

But no such point is presented in the case, and its consideration cannot be entertained. We have repeatedly held that cases on appeal, in the nature of bills of exception, are understood to present only such errors as are assigned, and we cannot allow defects to be searched for and made grounds of complaint not contemplated in the appeal. As we have too often said to need repetition, the only other objections that can be considered, are to the jurisdiction of the court and that no cause of action is *contained in the complaint*, and to the complaint alone and its averments must this objection be directed. No such defect appears in the present complaint. We refer to a few of the authorities which are conclusive. *Williams* v. *Kivett*, 82 N. C., 110; *Codner* v. *Bizzell*, *Ibid.*, 390; *Drake* v. *Drake*, *Ibid.*, 443; *State* v. *Hinson*, *Ibid*, 597; *State* v. *Keath*, 83 N. C., 626.

Upon the matter of the last suggestion, we refer only to *Meekins* v. *Tatem*, 79 N. C., 546; *Williamson* v. *The Canal Co.*, 78 N. C., 156; *Bank* v. *Graham*, 82 N. C., 489.

We dismiss this part of the argument with the single remark that the practice ought to be understood, and it must be observed, as essential to the just and fair administration of the law in cases brought up for review. There is no error in the record, and the judgment must be affirmed.

No error. Affirmed.

STATE v. W. A. ANDERSON.

Evidence—Declarations—Conspiracy—Res Gestæ—Removal—Record.

1. While it is a general rule of evidence, that the acts and declarations of a person in the absence of the prisoner, are not admissible in evidence against him, yet there are exceptions, one of which is in case of a conspiracy to do an unlawful act, when the acts and declarations of conspirators, in furtherance of the common purpose, are competent, although made in the absence of the others.
2. The least degree of consent or collusion between parties to an illegal transaction, makes the act of one the act of the others.
3. Where, in order to admit the acts and declarations of a third person as evidence against the prisoner, the State alleges that there was a conspiracy, the regular method of proceeding is for the State, in the first place, to establish the fact of a conspiracy by proof, but the Judge, in his discretion, may allow the acts and declarations to be given in evidence, the solicitor undertaking to prove the conspiracy at a later stage of the trial.
4. The acts of the different parties alleged to be conspirators may be given in evidence to prove the conspiracy.
5. The rejection of evidence by the Court, which if admitted, would have been prejudicial to the prisoner, cannot be assigned as error.
6. The declaration of a conspirator, at the very time of the homicide, who was in close proximity to, but not within sight of the prisoner, upon hearing a pistol shot, that the prisoner had killed some one, is admissible in evidence.

7. To constitute *res gestæ* there must be *an act* which may be explained by contemporaneous declarations. So where it was alleged that there was a conspiracy between a person and the prisoner to take possession of a certain mine, in doing which the homicide took place, the declarations of such person when setting out to take possession of the mine, as to his motives in doing so, are not competent evidence for the prisoner.

8. A Judge is not required to give instructions in the very words in which they are asked, and when the charge to the jury substantially embraces the prayer for instructions, it is no ground for a new trial.

9. It is not error to refuse a prayer for instructions which is not founded on any evidence in the case, and is purely hypothetical.

10. Where an affidavit for the removal of a case, stated that the State could not get justice in either Mitchell or Yancey counties, and this was recited in the order, and the cause removed to Caldwell county; *Held*, to be no ground for an arrest of judgment.

11. It is no ground to arrest the judgment, because on such removal two transcripts are sent to the county to which it is removed, although the first is defective, and the second is transmitted without a writ of *certiorari*.

12. Where the clerk sends a defective transcript on the removal of a cause, it is not a compliance with the order, and he may, of his own motion, send another.

13. Upon the removal of a trial for murder, the record showed that the prisoner was arraigned, and then the order of removal immediately follows, before any order remanding the prisoner; *Held*, that it appears by necessary implication that the prisoner was in court when such order was made.

(*State* v. *Jackson*, 82 N. C., 565; *State* v. *Shepherd*, 8 Ired., 195; *State* v. *Collins*, 3 Dev., 117; *State* v. *Craton*, 6 Ired., 164; *State* v. *Chavis*, 80 N. C., 353, cited and approved).

This was an INDICTMENT for murder, heard before *Avery, Judge*, and a jury, at January Special Term, 1885, of CALDWELL Superior Court.

James Hoskins, a witness for the State, testified as follows: The homicide occurred on Sunday. On that Sunday I rode with prisoner and Ed. Ray a part of the way from Bakersville in the direction of the mica mines. They were on horseback. This was before the homicide occurred. Before I left the prisoner that day, he told me that if he should stay out at the mine that week, he wanted me to come out to see him, and take a deer-hunt, and he wished me to tell Mr. Abernathy (a merchant in Bakersville), to send him (prisoner) some No. 22 cartridges to fit his gun. The prisoner did not have a gun at the time.

John Buchanan was introduced for the State, and testified as follows: In the afternoon of the Sunday in which the deceased was killed, I saw the prisoner and Ed. Ray about three miles from the mine where the homicide occurred, riding on horseback in the direction of the mine. They rode up to Polly Sparks' house together, from the direction of Bakersville, about 4 o'clock. They stopped together and rode off together.

Isaac Stewart was examined for the State, and testified as follows: I was at the mica mine near Flat Rock where the homicide occurred, on Sunday evening. While I was there, the prisoner and Ed. Ray rode up and got off their horses. I left in five or ten minutes after they arrived and went to my house, which was between a quarter and a-half mile from the mine. I rode there and put my horse in the stable, and had just gotten into the house, and was pulling off my spur, when I heard a shot. I started out immediately, and as I got into the yard I heard two more shots. I ran to the stable, caught a horse and rode over to the mine. I met the prisoner and Ed. Ray about two hundred yards from the mine, walking in the direction of Bakersville. They had sent their horses off on their arrival, before I left the mine for my house. The deceased, Ed. Horton, was alive and well when I left the mine to go home. I found him on my return, lying dead in a path about the edge of one of the dumps thrown out of the mine, with his head down the hill. His right leg was doubled under him. His left hand was under his head, and he was shot through his right hand. I did not examine his body at that time, but saw that he was shot in the head, in the edge of his forehead. I felt his clothes and satisfied myself that there was no weapon on or about his person. It had rained the night before, and that evening it was drizzling. I did not examine the ground carefully that night, but I saw no sign of a scuffle. I did examine the ground the next day, and saw no signs of a conflict, but people had meantime been walking about there a good deal. There was two shafts sunk at the mine. The two shafts were about fifty-five feet apart; but the dumps had

been formed by the earth thrown out of each shaft, and the edges of the dumps were near together, about 20 or 25 feet apart. I left the deceased, Ed. Horton, Cebe Miller, Stephen Burlison, Bob Penland and Mitt Buchanan at the mine, when I went home on the arrival of the prisoner and Ray. Deceased and Miller were then on the outside of the mine. I think that the other two named were then inside of the lower shaft. The prisoner and Ray were at the upper shaft outside.

The solicitor proposed to show by the witness that he found the body of the deceased near the mouth of the lower shaft, and that he went down into the mine at the lower shaft, and what he found to be the condition of the other persons he had left at the mine, inside and outside of the shaft. The solicitor proposed to show that he found two of them dead or dying and a third wounded, as tending to show the nature and cause of the difficulty, and, in connection with other testimony, to explain the motive of the prisoner, and to show a conspiracy between the prisoner and Ray to take possession of the mine by force. Objection by the prisoner overruled and prisoner *excepted.*

The witness testified further, as follows, viz.: I went to the mouth of the lower shaft. I heard groaning and sent for a rope and a light. I then went into the lower shaft. I found Cebe Miller lying on his back, not able to speak. Stephen Burlison was also lying down in the shaft and had been wounded, apparently by a shot. I saw Bill Burlison also. He appeared to have been shot. Bob Penland was also in the shaft, but was not hurt. I saw Reuben Sparks standing at the upper shaft when I first went to the mine on Sunday afternoon. When the prisoner and Ed Ray dismounted, Reuben Sparks took their horses off.

The Solicitor then proposed to ask witness who was in the actual possession of the mine and working it immediately before the killing. The Solicitor proposed to prove by the witness that Cebe Miller, Mitt Buchanan, deceased, and others were in actual possession of the lower shaft from the time they began to open it about two months before, continuously up to the time of the

homicide, and that they opened the upper shaft also, some time before, and had remained in possession of it until Saturday night immediately preceding the homicide, when Ed Ray claimed to have taken possession of it, and had left Reuben Sparks at the mouth of it and had gone off.

This testimony was offered to be taken in connection with testimony of Hoskins, that Anderson had spoken to him of remaining at the mica mine, and other testimony, thereafter to be offered, that prisoner and Ray both came armed, and had difficulties in and near the lower shaft, as tending to show an unlawful purpose on the part of the prisoner to commit a trespass, and that he did commit a trespass.

Objection for the prisoner overruled, and prisoner excepted.

The witness then testified that Cebe Miller and Mitt Buchanan were in possession just before and at the time of the homicide.

Mitt Buchanan was introduced for the State, and testified as follows, viz.: Cebe Miller and I were in possession of the mine, both the upper and lower shafts, on Saturday, the day before Horton was killed. I left the mine about 10 o'clock, Saturday morning, but left the hands working, and up to that hour had never seen prisoner or Ed Ray at the mine. I had never seen either of them there till the Sunday that the homicide occurred. I had been working at the mine for six or seven weeks, continuously, before the difficulty. I returned between 2 and 3 o'clock on Sunday evening, and found Reuben Sparks and Hardy Sparks at the upper shaft, and Cebe Miller and Palmer Ellis in the lower shaft. I went down into the lower shaft, and was there when Miller and Burlison were killed. The Solicitor proposed to show, at this point, by the witness, what occurred inside of the lower shaft, about the time he heard firing on the outside, but the Court, on objection, refused to allow the witness to state then what was done in the shaft.

Witness testified further, as follows:

While Ray was in the lower pit, I heard a pistol fire outside. I soon heard a second shot outside, and very quick I heard a

third shot. I went out of the mine in about three or four minutes after I heard these shots. As I went out I saw a man walking off of the dump. I went home then without seeing Horton.

Arthur Buchanan was next introduced as a witness for the State, and testified as follows: I went to the mine about one or two o'clock Sunday afternoon. Hardy Sparks and Reuben Sparks were there, at the upper shaft. They were right close to the mouth of the upper shaft. I went down to the lower shaft.

The prisoner's counsel had asked the witness Stewart, if Reuben Sparks and Hardy Sparks had not been in possession of the upper shaft before Ray and Anderson came, and if Ray, prisoner, and Reuben Sparks were not in possession of the upper shaft when he, Stewart, left to go home, just before the homicide. This was asked with the view, as expressed at the time, of showing that Reuben Sparks, Ray and prisoner jointly held possession of the upper shaft, and the witness Stewart had testified on cross-examination, that Reuben Sparks was at the mouth of the upper shaft when Ray and Anderson came up; that they dismounted and gave their horses to Reuben Sparks, who took them away, while Ray and Anderson remained, and he left them standing near the mouth of the upper shaft.

The Solicitor proposed to show by the witness, what Reuben Sparks said, if anything, about his possession, when he left Reuben and Hardy Sparks at the fire at the upper shaft and started down to the lower shaft, after he came on Sunday.

The Court held that after the prisoner had brought out the fact that Reuben and Hardy Sparks were at the upper shaft, to show possession in the prisoner and Ray, it was competent to prove the declaration of Sparks in reference to to the possession.

The prisoner excepted. The Court overruled the exception, and the witness then testified as follows: Either Reuben Sparks or Hardy said to me that they had possession, and were going to hold it.

William Burlison was next introduced for the State, and testified as follows: I went to the mine about 2 or 3 o'clock on Sun-

day evening. I found the two Sparks boys, Reuben and Hardy, sitting on the upper dump. I stood there and talked to them for some time. I went down then to the lower shaft, and went down into the mine. I came out and went to my father's house to get some tools. I met Ed. Ray and the prisoner three-quarters of a mile from the mine, coming from the direction of Bakersville. On my return I saw the prisoner standing on the upper dump. I went on down to the lower shaft, and threw my tools into the pit or shaft. Ed Ray and Cebe Miller were then talking on the edge of the lower pit. Ed tried to catch the tools and missed them. He then drew back a gun that he had across his lap to strike me. Cebe Miller said, "don't do that Ed, Bill don't know it." I looked towards Anderson, and then looked at the other two, and saw Ray knock Miller into the pit. Ray looked up at me, and I knocked him into the pit and lost my balance in doing so, and went in after him. I struck Ray with my fist. The pit was only ten or twelve feet deep. While I was in the pit, I heard some person say, "you leave here, Ed. Horton, or I'll kill you." I took it to be the prisoner's voice. I then heard Ed. Horton say, "I will, I will, I will." I knew Ed. Horton well and I knew his voice. I did not see him just before I fell into the pit or shaft. Immediately after Horton said "I will," I heard two or three shots, or it may be more. I am not certain as to the number.

E. A. Putnam was examined as a witness for the State, and testified as follows: I went to the mine from Isaac Stewart's. I saw Anderson and Ed. Ray at the mine. Ray stepped in front of Cebe Miller and Ed. Horton and forbade them to go any further down towards the lower shaft. Miller stepped around Ray and went into the lower pit. Ray followed and Horton went down behind Ray. I was standing at the upper pit with Anderson and John Butler, while Miller and Ray were talking. Bill Burlison went down and threw some tools into the lower pit. Ray said, "what did you do that for," and cocked his gun. Anderson said to me and John Butler, "come on, boys, and let's

go down." Butler and I did not go down. When Anderson got to the lower pit, Ray, Miller and Bill Burlison had gone into the pit. When Ray cocked his gun, Anderson put his hand to his hip-pocket. Anderson *started down before the fight began.* After Ray, Miller and Burlison went into the pit, Anderson and Horton were left outside. I heard Anderson say to Horton, "Dam you, I'll give you five minutes to leave." I then saw Horton start off from him. About the time Horton was starting off, I heard the prisoner say, "damn you, I want to kill you anyhow." When Anderson told Horton to leave, he said "I will," and started. I saw Horton start, and he had gone about six steps, when I heard Anderson shoot. Anderson shot three or four times. I am certain that he shot three times. After that the firing began in the lower pit, everything became still, and I left and went down to Hensley's about 100 yards. I came back to the mine with Isaac Stewart in three or four minutes after the shooting. It was not more than a-half a minute after they fell into the pit, till Anderson told Horton to leave. It was not a-half minute later, when Anderson fired at Horton. I was looking towards the lower pit; from the time Anderson went down, till Horton started away, I saw no scuffle. I think I could have seen it if Horton had done anything to Anderson. I had been hired by Miller that evening to go up and commence work after mid-night Sunday night. Butler and I were standing at the middle of the upper pit. Horton was on the west of the lower pit. Anderson passed down between Horton and the lower pit. I saw Horton and Anderson, when Horton said "I will." I did not see Horton when Anderson first fired; Horton had passed behind some bushes and I did not see him again alive.

On cross-examination, prisoner proposed to show by the witness Putnam, that when Ray started down to the lower pit, Anderson said, "If Bayley shows title, I will have nothing more to do with it."

The solicitor objected to proving the declaration of the prisoner. Objection sustained, and prisoner excepted. The solicitor had not offered to prove his declarations at that time.

Robert Penland was next examined as a witness for the State.

The solicitor had offered to prove by Buchanan what occurred in the lower pit after Ray and Miller went into it, but, on objection from the prisoner, the Court had refused to allow him to do so. It being now in evidence that the prisoner and Ray left Bakersville together; that Ray had a gun; that prisoner had ordered cartridges to be sent out for a gun if he should remain all the next week; that Ray and prisoner had come to the mine and had their horses put up by Sparks, and had claimed possession of the mine; that Miller and Buchanan had previously been working at the mine, and had actual possession of the lower shaft, and were then in the shaft; that Ray had knocked Miller into the mine, after cocking his gun, in about fifty feet and in sight and hearing of the prisoner; that when Ray cocked his gun, and before he fell into the pit, the prisoner started from the upper shaft and came to a point within five or six feet of the lower pit; that the lower pit was only ten or twelve feet deep, and that persons inside of the pit could hear what was said by the prisoner and deceased to each other; the solicitor now insisted that it was competent to show what occurred inside of the pit as part of the *res gestæ*, the prisoner being near enough to hear what was said and done inside, and as tending to show the motive of the deceased to aid Ray in committing a trespass, by preventing Horton from going into the shaft to assist his comrades.

The solicitor insisted also that there was testimony tending to show a conspiracy between the prisoner and Ray to commit an unlawful act, in taking forcible possession of the mine, and it was therefore competent to prove the acts and declarations of Ray in furtherance of the common purpose.

The prisoner objected to proving what occurred inside of the lower shaft, and especially to proof of any declaration made by Ray, as incompetent and irrelevant. It was insisted for the State, also, that persons inside of the pit testified that he was fifteen

steps from the mouth of the pit, while the prisoner was five or six. The objection was overruled, and the prisoner excepted.

Witness then testified as follows: When they all fell in, Miller caught on his hands and sprang up and said, "pull him off." Miller then caught Ray and hit him two licks. Ray said, "let me up; don't kill me; let me up, and I'll go out." Burlison was also on Ray then, and Ray's gun was under him. Ray, Miller and Burlison were at the bottom of the lower shaft. Just then I heard what sounded to me in the tunnel like hitting a log with an axe. It was a dull noise. It did not sound to me under ground in the tunnel like the report of a gun or pistol. I heard but one report, when Ray immediately spoke, witness not having heard another sound. Ray said, "Let me up, Waits has killed some one." Anderson was called "Waits." They let him up and he began to shoot. He first shot Miller; then he shot the two Burlisons, William and Stephen.

John Butler, a witness for the State, testified as follows: I went to the mine on Sunday night with Cebe Miller, Ed. Putnam and Ed. Horton. When we got to the upper shaft we found Anderson there, and Ray about the lower shaft. Miller went to the lower shaft and Ray followed him to go in. Miller then forbade Ray to go in. Ray said that the mine was his. Miller said, "Mr. Ray, if you've got any deed to it fetch it up, and if you've got more right than I have, you can have it." Putnam, Anderson and myself were then at the upper shaft. Just before Ray pushed Miller into the shaft, Anderson, who was then at the upper dump, said, "boys, let's go down and part them before they get into it." I said, "I won't have any part in it, and I'm not going." Just as Anderson got down to the lower shaft, they fell into it fighting. Horton was then down on the lower dump. Anderson stood on the lower dump about a minute. Horton was on the west side of the dump. Anderson said, "Ed. Horton, God damn you, I'll give you five minutes to get away from here, and if you don't, I"ll shoot you." Horton started, and said, "I will, I will, I will, don't shoot me." Hor-

ton started, and when he got about six steps he passed behind a chinquepin or ivy bush and a laurel bush. When he passed behind these bushes, I could not see him. Just as he got behind the bushes the pistol fired. I saw Anderson, and saw his pistol when he fired. He was standing on the edge of the dump, with his face towards Horton. After the first shot, I turned to the right, and saw only the first shot fired, but I heard the other shots. There were two paths. Horton came the straight path towards me till he was behind the bushes. It was about a minute after he passed behind the bush that Anderson first fired. When Anderson told Horton to leave, he turned right off and walked as fast as he could, till he got behind the bushes, about six steps from Anderson. I went off and came back in about fifteen minutes and found Horton dead on the dump. Anderson was in four steps north of the lower pit, and was about thirty feet from me when he fired.

On cross-examination, the witness stated: I was living with Isaac Stewart about 300 yards from the mine. When I went to the mine it was getting dusky dark. Ed. Horton was standing on the west of the shaft when they all tumbled in. Anderson was standing close to the shaft, looking into it; after they fell in Anderson stood there about a minute before he spoke. Neither Anderson nor Horton moved until Anderson spoke to Horton.

This witness was contradicted by several witnesses, but in what particular the case on appeal does not state.

There was some testimony offered by the State showing a threat, on the part of the prisoner, against the deceased, and a fight between them, in which the deceased had been severely beaten by the prisoner, about two years before the homicide, for which Anderson was indicted and was heard to say, "this thing has cost me fifty dollars, and if I get into it again I intend to kill." This was said in the spring before the homicide.

The prisoner was examined in his own behalf, and counsel proposed to ask him what Ed Ray said to him before leaving Bakersville, that induced him to go to the mine, and, on objection

for the State, the Court held that the prisoner would be allowed to testify as to his motive or purpose in going to the mine, in order to rebut proof offered by the State to show motive, an unlawful purpose, but that the prisoner would not be allowed for that purpose, to state the declarations of Ray. The prisoner excepted to the refusal of the Court to allow him to state what Ray said.

He then testified as follows: Ray went with me to the mine. I had no reason to believe, and did not believe, that there would be a difficulty about the mine. I did not know where the deceased was, and did not think that I would meet him at the mine. I saw Hoskins in Bakersville. I told Hoskins that if I stayed at the mine the next week, he must go to Abernathy and get some No. 22 cartridges for my gun. Ray took my gun along. I did not take any cartridges for it. He took the gun, now exhibited, and it then belonged to me. The gun was taken to hunt and pass off the time. I reached the mine after sundown, and found Reuben Sparks at the upper shaft, and Isaac Stewart, Ed. Horton and others (don't remember who), at the lower shaft. When Ray and myself reached there, Reuben Sparks took our horses off to feed them and put them up. Very soon Cebe Miller and Ed. Horton went off together, and shortly after Isaac Stewart left. The prisoner further testified, at considerable length, to a state of facts which, if believed by the jury, showed that the killing was done in self-defence. It is not deemed material to set out the evidence in full.

A large number of witnesses were introduced for the prisoner, and testified that his character was good—some, on cross-examination, said that his reputation was that of a dangerous man. Hardy Sparks, a witness for the prisoner, corroborated the prisoner in regard to some portions of his testimony.

On cross-examination this witness testified that he went to the mine with Ed. Ray on Saturday evening, the day before Horton was killed, and that he found Miller and Sherman Buchanon at the mine. Prisoner's counsel had, in cross-examination of two of the witnesses for the State, attempted to show that Ray had

possession of the lower shaft, and afterwards that Miller and Buchanan had abandoned the mine, or gone out, leaving no person in it. Prisoner's counsel had also attempted to show an agreement between Miller and Ray that the question of possession and title were to be settled the next day, and that Miller should put no tools into the mine, as bearing upon the question whether the lower shaft was in the actual possession of Miller and Buchanan. The prisoner had also testified to a conversation between Ray and Miller, and that after the conversation, Miller said to the man with him, "throw down your tools."

Counsel for the State proposed to show that on Saturday night (the night before Horton was killed), Ray attempted to smoke Cebe Miller and Buchanan, or those working under them, out of the lower shaft, and failed to get them out and left them in the shaft. This is offered as tending to show actual possession in Miller and Buchanon, and that the prisoner was assisting Ray in committing a trespass, when he killed Horton. The solicitor also insisted that it was competent as tending to contradict the testimony of the prisoner, that Ray told him that he had peaceable possession of the mine, and the court having held that there was evidence tending to show a conspiracy or common purpose on the part of Ray, Anderson and Sparks, to take possession of the mine, the solicitor insisted that it was competent to show the acts of a conspirator, after Anderson went to Ray's house and came with him to Madison county and then to the mine. The objection was overruled and the prisoner excepted.

The witness then testified as follows: Cebe Miller, Jim Miller and Sherman Buchanan were in the shaft Saturday night, the night before the difficulty. Ray built up a fire in a tunnel that communicated with the lower shaft, and fanned the fire to make the smoke go into the shaft and run them out; he was carrying wood to the fire, when my brother and myself went there on Saturday night. He took his hat and fanned the fire to smoke them out. Ray said he believed that he could smoke them out. He came out of the tunnel after that, and called Miller and told him to

come out. Miller refused to do so. Ray then said to me, "let us throw in a little dirt and try to scare them out." I helped him throw in the dirt till my brother Hardy Sparks told Ray to quit.

Cebe Miller and Milton Buchanan had done all the digging that had been done in the mine. I left the mine about nine o'clock, Saturday night, and went to Bakersville. I returned to the mine Monday morning, about eight o'clock. I saw Ray and Anderson Sunday evening on their way to the mine. Either Ray or Anderson had a gun Sunday evening. I am not certain which had it. Ray left in the morning, about nine o'clock Sunday morning, and went towards Bakersville; he stopped at my house about four o'clock P. M. of the same day, coming with the prisoner back to the mine. There was no one working either in the upper or lower shaft when Ray got to the mine on Saturday. Ray and myself took possession of the upper shaft; my brother and myself remained there, when Ray left Monday morning, till three o'clock Monday afternoon.

On Saturday, Jim Miller was standing on the dump of the lower shaft, and said, "come up gentlemen, you need not be scared." He then said, "come down in the shaft." Miller went down first, and Ray, Buchanan and myself followed. Ray told Miller to come out, that he had a deed to the mine. Miller told Ray "that he was there to hold possession, and he was going to hold it unless he should be killed and taken out." Ray said, "that he did not come there for a difficulty," and handed them a deed and told them to read it. They both said they could not read. Ray and I came out of the mine.

Prisoner introduced a number of witnesses, who testified that the deceased had threatened to kill the prisoner on several occasions, and that these threats had been communicated to the prisoner.

The Solicitor introduced a number of witnesses who testified that the general character of the prisoner was that of a violent and dangerous man—some of them testified that his character

for truth and honesty was good. The prisoner offered other testimony to show that his own character was good, and to show that the deceased was a violent and dangerous man. It is not deemed material to give the testimony in full.

The jury returned a verdict of guilty of murder. The prisoner's counsel moved in arrest of judgment, and assigned the following grounds:

1. For that the affidavit upon which the order was made for the removal of the cause from Mitchell to Caldwell county, and the order itself, states not only that the State cannot have a fair and impartial trial in Mitchell county, but includes Yancey county also.

2. That there are two papers purporting to be transcripts, and no writ of *certiorari*, and the two are essentially different. That the first is not properly certified, and the second is not a return in obedience to any writ.

3. For that it does not appear that the prisoner was in court when the order for removal was made.

The motion in arrest of judgment was overruled. There was a rule for a new trial—the rule was discharged, and the judgment of the court was pronounced against the prisoner, from which he appealed to the Supreme Court.

The Attorney General and *Batchelor & Devereux*, for the State.
Messrs. G. N. Folk and *R. F. Armfield*, for the defendant.

ASHE, J. (after stating the facts). There were a number of exceptions taken by the prisoner to the rulings of the court in admitting and rejecting evidence, and to the charge of the court to the jury, and the refusal to give the instructions asked by the prisoner.

The first exception: Stewart, a witness for the State, had testified that he was at the mine on Sunday evening when the prisoner and Ray arrived. Soon after their arrival, he went home, leaving Horton alive at the mine, but, within a few minutes after

getting home, he heard the report of fire-arms in the direction of the mine and hurried back and found Ed. Horton lying dead in a path, at about the edge of one of the dumps, shot through his right hand and in his head near the edge of his forehead. Witness saw no signs of a scuffle that night and none the next day, though there had been a good many people passing about.

The solicitor then proposed to show by the witness, the condition in which he found the persons he had left at the mine, on his return, both inside and outside of the mine. The solicitor proposed to show by the witness that he found in the lower shaft, two of them dead or dying, a third wounded, and Horton lying dead on the outside, as tending to show the motive and cause of the difficulty, and in connection with other witnesses to be offered, to explain the motive of the prisoner, and to show a conspiracy between the prisoner and Ray to take possession of the mine. The counsel for the prisoner resisted the admission of the evidence and contended that the proposed evidence was incompetent; that the prisoner was charged with the killing of Ed. Horton, and his guilt in killing him cannot be established by the proof of another crime; that the evidence must be confined strictly to the point at issue. This, as a general rule, is unquestionably true. But there are exceptions, one of which is, where two or more persons enter into a conspiracy to do an unlawful act, whatever is done by either of them is evidence against the other, if done in furtherance of the common object of the conspiracy—*Roscoe Cr. Ev.*, 387—and the least degree of consent or collusion between the parties to an illegal transaction makes the act of one of them, the act of the other. 2 *Wharton's Law of Evidence*, §1205.

The same principle applies to declarations made by one conspirator in furtherance of the common design, so long as the conspiracy continues, though made in the absence of one of them. *Ibid, supra.* The State alleged that there was in this case a conspiracy between the prisoner and Ray to illegally dispossess Miller and Buchanan of the mine. In such case, the regular mode of proceeding is to establish the conspiracy in the first place, by

proof, and then offer the acts and declarations of any one of the conspirators against the others. But this rule is often departed from, though it is an inversion of the order, for the sake of convenience, and the prosecution allowed either to prove the conspiracy, which makes the acts of the conspirators admissible in evidence against each other when done in furtherance of the common object, or he may prove the acts of different persons, and thus prove the conspiracy. *Roscoe Cr. Ev.*, 385. Mr. Greenleaf, Vol. 1, page 127, maintains the same rule in the following passage: "Sometimes for the sake of convenience, the acts or declarations of one are admitted in evidence before sufficient proof is given of the conspiracy, the prosecution undertaking to furnish such proof in a subsequent stage of the cause. But this rests in the discretion of the judge, and is not permitted, except under particular and urgent circumstances, lest the jury should be misled to infer the fact itself of the conspiracy from the declarations of strangers; and here also care must be taken, that the acts and declarations thus admitted be those only which were made and done during the pendency of the criminal enterprise and in furtherance of the objects." And see also *State* v. *Jackson*, 82 N. C., 565. This was the course pursued in this case. The solicitor announced that he offered the evidence in connection with other testimony to be adduced, to show a conspiracy between the prisoner and Ray to take illegal possession of the mine, and the Judge, in exercise of his discretion, allowed it.

Ex. 2. The solicitor proposed to ask the witness Stewart, who was in the actual possession of the mine and working it just before the killing. He proposed to prove that Cebe Miller and Milton Buchanan, deceased, and others were in the actual possession of the lower shaft at the time of the homicide; and of the upper shaft also, until the Saturday night previous, and continuously up to that time, when Ray claimed to have taken possession.

This testimony was offered to be taken in connection with the testimony of the witness Hoskins, theretofore examined, who had

testified that the prisoner on Sunday evening, while in Bakersville, told him that, if he should remain at the mine that week, he wanted him to come out to see him and take a hunt, and other testimony to be thereafter offered, that prisoner and Ray both came armed, and had a difficulty near the lower shaft, as tending to show an unlawful purpose on the part of the prisoner to commit a trespass, and that he did commit a trespass.

We can see no objection to the admission of this testimony for the purpose for which it was offered.

Ex. 3. The prisoner's counsel had asked the witness Stewart if Reuben and Hardy Sparks were not in possession of the upper shaft before Ray and prisoner arrived at the mine on Sunday evening, and if Ray, prisoner, and Reuben Sparks, were not in the possession of the upper shaft when the witness left to go home, just before the homicide. This was asked with the view, as expressed at the time, of showing that Ray, prisoner and Reuben Sparks were in the joint possession of the upper shaft at the time the witness left. The Court held that after the prisoner had brought out the fact that Reuben and Hardy Sparks were at the upper shaft, to show possession in the prisoner and Ray, it was competent to prove the declarations of Sparks in reference to the possession of Ray.

The witness Arthur Buchanan, who was then under examination, testified that either Reuben or Hardy Sparks said to him that they "had possession and were going to hold it."

The declaration of Sparks was clearly admissible upon the ground taken at the time by the solicitor, that testimony had been offered to show a conspiracy to take possession of the mine, between the prisoner, Ray, Hardy and Reuben Sparks, and that the declaration of either was competent, and whatever defect there may have been in the testimony offered up to that period of the trial upon the point of conspiracy, it was fully supplied by the subsequent testimony.

Ex. 4. On the cross-examination of the witness Putnam, the prisoner proposed to show that when he started down to the

lower pit, while Ray and Miller were sitting there, he said, "If Bailey shows title, I will have nothing more to do with it." The Court, upon objection by the solicitor, refused to admit the declaration. We cannot see how the rejection of this evidence could have worked any possible prejudice to the prisoner. Conceding it was admissible as part of the *res gestæ*, its reception would have operated to his prejudice instead of his benefit, for it could have had no other effect than an acknowledgment that he did have *something* "to do with it," evidently referring to the taking the possession of the mine, and there is no inference to be drawn from the declaration that it was his intention to have *nothing more* to do with it then and after that time, but after Bailey should show that he had title, and Bailey was not expected to make any exhibition of his title until the next day. It did not indicate any intention of abandoning the illegal possession which he had acquired as trespasser. So far from that, in less than five minutes after his claimed declaration of peace, he shoots to the death, one of those who were in the rightful possession of the mine.

The error complained of not being prejudicial to the prisoner, it is no ground for a *venire de novo*. *State* v. *Frank*, 5 Jones, 384.

Ex. 5. The solicitor proposed to prove by the witness Buchanan, what occurred in the lower shaft, insisting that it had been proved that Ray and the prisoner had left Bakersville together; that Ray had a gun; that prisoner had ordered cartridges should be sent out for a gun if he should remain during the week; that they claimed possession of the mine; that Miller and Buchanan had been previously working at the mine, and had actual possession of the lower shaft, and were then in the shaft; that Ray had knocked Miller into the shaft, after cocking his gun, and this in about fifty feet and in sight and hearing of the prisoner; that when Ray cocked his gun, and before he fell into the pit, the prisoner started from the upper shaft and came within five or six feet of the lower pit; that the lower pit was only ten or

twelve feet deep, and that the persons inside the pit could hear what the prisoner and deceased said to each other. He insisted that it was competent to show what was said and done inside the pit, not only as part of the *res gestæ*, but as evidence of a conspiracy between Ray and the prisoner to commit an unlawful act, in taking forcible possession of the mine, and the motive the prisoner had to aid Ray, by preventing Horton from going into the shaft to the assistance of his comrades. The Court sustained the view taken by the solicitor, and over-ruled the exceptions of the prisoner and admitted the testimony. The witness then proceeded to testify to what was said and done inside the pit.

In this ruling of the Court there was no error. The conspiracy had been established by the proof, and it was perfectly competent for the Court to hear testimony of what was said and done by Ray in the pit, in furtherance of the common purpose, or what any of those engaged with him in the pit in his presence said or did, as a part of the *res gestæ*. But the prisoner's counsel contended that the exclamation of Ray while in the pit, and held down by Miller and Burlison, "there, Waits (meaning the prisoner) has killed some one," was not competent. To make it so, "two things must concur, first, there must be a common purpose between the declarant and the person against whom the declaration is used, and further, the declaration must be in furtherance of such common purpose." That is true.

And here there was the common purpose of taking and holding illegal possession of the mine, and it was evidently said in furtherance of that purpose, by drawing the attention of those who held him, that they might release their hold on him, so that he might use his pistol, which he proceeded to do with fatal effect, as soon as their hold upon him was relaxed. The exclamation was also confirmatory evidence of the fact of the conspiracy, and was consequently prompted by the expectation on the part of Ray, that, if he should get into a difficulty, the prisoner, by reason of their relations to each other in the common enterprise, would stand by him. He could have no other reason for supposing it was the prisoner who had killed some one.

Ex. 6. Prisoner's counsel proposed to ask the prisoner while under examination in his own behalf, what Ray said to him before leaving Bakersville that induced him to go to the mine. Upon objection by the solicitor the court held that the prisoner would be allowed to testify as to his motive or purpose in going to the mine, in order to rebut proof offered by the State to show his motive or an unlawful purpose, but that the prisoner would not be allowed for that purpose to state the declarations of Ray. There can be no valid objection to this ruling. There is no principle of evidence upon which it was admissible. The only ground upon which such a declaration could be admitted, would be where it formed a part of the *res gestæ*. But to constitute *res gestæ* there must be a *thing done—some act* which may be explained by declarations made while the thing or act is being done or transacted. But there was nothing of that sort here. The declaration proposed to be proved was made before the parties had started on their unfortunate enterprise.

Ex. 7. The solicitor offered to prove that on Saturday night immediately preceding the Sunday on which the homicide was committed, Ray attempted to "smoke" out of the mine, Miller and others, who were in the lower shaft, by building a fire near the mouth of a tunnel leading into the pit, and forcing the smoke into it. He threw dirt into the pit, with the view, he said, of scaring them. The evidence was offered to show that Miller and Ray were in the actual possession of the lower shaft at that time, and to contradict what the prisoner said Ray had told him about having peaceable possession of the mine. The prisoner's counsel insisted that this evidence was incompetent, that it could only be admitted upon the ground that it was an act in furtherance of a common design between the prisoner and Ray to take possession of the mine at any hazard, and there was no sufficient evidence to connect the prisoner up to that time with any such design. But we think the prisoner's testimony was fully sufficient to show a common purpose between him and Ray to take possession of the

mine, even if no other evidence had been offered on that point. He stated that he had heard that the mine was valuable; had heard four or five times before that Miller and Buchanan were working the mine; had talked to a party about taking possession of it before he went to see Ray; did not persuade Ray to come to the mine; his wife did not want him to go. He told Ray that Reuben Sparks said he had a good title to the mine, and Bayley had none; that he had business in Madison county, and was at Ray's house on Monday or Tuesday before the homicide. Ray came over from Madison county with him to his house, on Thursday. He thinks he sent a message, perhaps wrote a note, to Sparks on Friday. Ray left his house on Friday, and returned to Bakersville on Saturday, where he met him. Can it be doubted by any one after hearing this statement by the prisoner, that he and Ray had formed the purpose of taking the possession of the mine on Saturday before the homicide? But if that were not so, there is ample proof of the conspiracy after the occurrence of Saturday night, and acts of Ray on that night were competent evidence against the prisoner, for it makes no difference at what time the party accused entered into the conspiracy or combination, because any one who agrees with others to effect a common illegal purpose, is generally considered in law as a party to every act which either had been done or may afterwards be done by the conspirators, in furtherance of the common design. *Taylor's Ev.*, §529.

After a careful perusal of the instructions asked, and those given by the Court, we do not think the prisoner has any cause for complaint. The instructions given to the jury were a substantial compliance with those asked by the prisoner, in fact, were in some instances, more favorable to him than was warranted by the facts. But the prisoner contended that there was error in the refusal to charge the jury, "that if the first shot was fired under a reasonable apprehension of great bodily harm, the subsequent shots would not make the prisoner guilty, if fired under like apprehension." The request was substantially complied

with in the fourth instruction given by His Honor to the jury, which was as follows: "If the prisoner went down to the lower shaft for the purpose of separating persons there engaged in a breach of the peace, and did not enter into the fight willingly, he was without fault in bringing on the fight; and if he went down for that purpose and did not fight willingly, but acted only on a well grounded apprehension of great bodily harm in shooting deceased, then the prisoner would not be guilty."

The prisoner's counsel further insisted there was error in refusing to give the sixth prayer for instruction, namely, "If the prisoner entered upon the premises in a peaceable manner, and the deceased, acting on an old grudge, made an assault upon him of a deadly character, the slaying would be justifiable."

The prisoner's counsel contended that the prisoner had the right to enter into the mine, and cited authorities to the effect, that if the party who enters is the owner, he gains both seizin and possession, although the claimant of the adverse interest is at the time actually upon the premises. But, unfortunately for the prisoner, the principle has no application to his case. He was not the owner, neither he, nor Ray, nor Sparks. Neither had any pretence of a title as appears from the record. It is true Ray showed a paper to Miller while in the mine, and said he had a deed for the mine, but it was evidently a sham, for if he had had such a deed, the prisoner would certainly have produced it or a copy on the trial, as he had a right to do, if there was such an instrument. *State* v. *Shepherd*, 8 Ired., 195.

But the prisoner and his confederates, Ray and the two Sparks, so far from being owners or having any title to the property, as appears by the record were mere *tort feasors*, and Miller and Buchanan had the right not only to defend their possession, but to use the necessary means for their expulsion from the premises.

The grounds assigned by the prisoner's counsel for the arrest of the judgment are quite as untenable as the exceptions taken to the charge of the court. There were no exceptions in the

grounds assigned for the arrest of the judgment to the form of the affidavit for removal, but only that Yancey county was embraced in the affidavit and order of removal. If the affidavit for the removal from the county of Mitchell was sufficient, the exclusion of Yancey in the affidavit and order could not vitiate the order of removal. It need not have been stated in the affidavit. The sole object of the removal is to secure a fair and impartial trial, and if it should be made to appear to the court, that Yancey county was obnoxious to the same objection as Mitchell, the court ought not to have moved the case to that county, no matter from what source it obtains the information, whether by affidavit or otherwise. The county to which the cause is removed, always lies in the discretion of the court, provided it be an adjacent county.

It is no ground for arresting the judgment that there were two transcripts of the case sent from Mitchell to Caldwell, although the first was defective and the second transmitted without a writ of *certiorari*. The writ of *certiorari* is only issued when there is a defect in the record, which is discovered by the court, or brought to its notice. When the clerk sends a defective record, it is not a compliance with the order, and he may send another. If the transcripts are contradictory, the contradiction may be reconciled by an inspection of the original record by the court to which it is removed, but when they are not contradictory they form but one copy and both may be used by the court. *State* v. *Collins*, 3 Dev., 117.

The last ground of arrest taken by the prisoner's counsel cannot be sustained. The record shows that the prisoner was arraigned, and then following immediately thereafter before any order remanding prisoner to jail, the affidavit was offered and the order for removal made—it sufficiently appears by a necessary implication, that he was present when the order was made. *State* v. *Craton*, 6 Ired., 164; *State* v. *Chavis*, 80 N. C., 353, and cases there cited.

Our conclusion, after a careful examination of the record in the case, in view of the very grave importance of our decision to the prisoner, is that there is no error.

This opinion must be certified to the Superior Court of Caldwell county that the case may be proceeded with in conformity to this opinion and the law of the land.

No error. Affirmed.

STATE v. THOMAS GEE.

Indictment—Murder—Evidence—Judge's Charge.

1. On a trial of an indictment the acts and declarations of another party tending to show that he committed the offence are inadmissible.
2. When the crime is shown to have been committed by a single person and the question is one of identification, it would be competent to prove that another than the accused did the act; but this must be done by proof direct to the fact and not by admissions or conduct seemingly in recognition of it.
3. It is incompetent to prove by a witness who does not know the general reputation of the accused, who was once a slave, what his former master said of him.
4. The court having charged the jury that every material circumstance must be proved beyond a reasonable doubt and that they must all point to the guilt of the prisoner and exclude every reasonable theory of his innocence, and produce moral certainty of his guilt, it is not *error* to refuse to tell the jury that the circumstances must satisfy them as fully as if direct proof of the act had been produced.
5. When a witness was not sworn, and the fact was not discovered until after the jury had retired; *It was held*, not to entitle the accused to a new trial as a matter of law. The correction of such omissions is left to the discretion of the Judge to set aside the verdict and grant a new trial.
6. Exceptions to evidence, except to such as is made incompetent by statute on grounds of public policy, if not made in apt time, are deemed to be waived, and cannot be afterwards assigned as error.

(*State* v. *May*, 4 Dev., 328; *State* v. *Duncan*, 6 Ired., 236; *State* v. *Jones*, 80 N. C., 415; *State* v. *Boon*, Ibid., 461; *State* v. *White*, 68 N. C., 158; *State* v. *Perkins*, 66 N. C., 126; *Luther* v. *Skeen*, 8 Jones, 356; *State* v. *Speight*, 69 N. C., 72; *State* v. *Swink*, 2 D. & B., 9; *State* v. *Frank*, 5 Jones, 384; *State* v. *Rash*, 12 Ired., 382; *State* v. *Matthews*, 66 N. C., 106; *State* v. *Bowman*, 80 N. C., 432; *State* v. *Parker*, Phil., 473; *State* v. *Ward*, 2 Hawks, 443; *State* v. *Bullard*, 79 N. C., 627, cited and approved.)

STATE *v.* GEE.

INDICTMENT FOR MURDER, tried before *Shepherd, Judge*, and a jury, at Fall Term, 1884, of CUMBERLAND Superior Court.

The prisoner was charged with the murder of Mary Hughes, committed at her house on Monday night, September 29th, 1884. The deceased lived alone in the suburbs of Fayetteville, some two miles distant from the house of the prisoner, with whom she had kept criminal relations for four years preceding, he spending much of his time at night with her. The deceased had been on that day with Martha Campbell, a neighbor, engaged in picking out cotton in the field, and about dark the two returned to the house of the deceased, at which they parted. After dark, about the hour of 7, the prisoner was seen about 25 yards from the house, going in that direction. He stated to a witness that he left the place a quarter of an hour before sunset on that day. He was also observed to cross the Campbellton Bridge on his way towards his home between the hours of 8 and 9.

Allen Jones, a witness for the State, passed the house or cabin occupied by deceased, about 8 o'clock that night, saw a light in it, and heard her talking. At a later hour, about 11, he again passed it and it was dark.

At 8 o'clock the next morning, Tuesday, the deceased was found by Martha Campbell on the floor, dead, with her skull fractured, as it appeared, by an axe, which with a kettle and two dresses belonging to her, were missing. The same morning the prisoner was discovered burning up the removed dresses, and on being asked what he was about, replied that he was burning nails.

About three weeks before the homicide the prisoner had been heard to say that he understood a man was trying to get between him and her, and that he intended to see that thing out. The case states that there were other circumstances pointing to the prisoner's guilt.

Evidence was offered in defence in regard to the movements of Henry Campbell, husband of Martha, about that time, with the apparent purpose of fixing the homicide upon him; and of his going to the house of the deceased, after his wife on the Wednes-

day next preceding, where the latter had gone to spend the night; and of his violent conduct there as he forced his wife to return. He was met when coming from the house, by a witness who represents him as being mad, and with a knife in his hand which he repeatedly opened and shut. His wife followed on behind.

The prisoner proposed to show that the said Henry Campbell uttered threats, saying on the same Wednesday night that he had a mind to go back, turn over the cabin and kill both women, and he intended to break up his wife's visiting there, and witness would hear "of hell being played out there some time."

These declarations, on objection from the State, were excluded, and the prisoner excepted.

The prisoner introduced a witness by whom to prove his own good character, who, after full explanation of this form of evidence, as constituting general reputation, to render the proposed inquiry intelligible, persisted in saying he did not know what it was.

He was then asked what the old master of the prisoner, while he was a slave, said about him. This testimony was also refused.

When the evidence and the arguments were concluded, prisoner's counsel submitted two instructions, which the court was requested to give to the jury.

1. The jury should be as fully convinced of the guilt of the prisoner from the consideration of the circumstances, as if direct proof had been brought.

2. In this case the burden of proof is on the State throughout, and every material circumstance must be fully proved to the satisfaction of the jury beyond a reasonable doubt.

The last instruction was given, the first refused, and instead the jury were charged that every material circumstance must be established beyond a reasonable doubt; that these circumstances must all point to the guilt of the prisoner, and exclude every reasonable theory of his innocence; and produce moral certainty of his guilt in the minds of the jury before they could convict.

The prisoner excepted to the denial of his first instruction.

After conviction, a motion for a new trial was made for the alleged erroneous rulings and for the further reason, shown on affidavit, that one Tony Williams, a witness for the State, had been examined and testified without having been sworn, the facts of which are found by the judge to be these:

Through an inadvertence, the oath had not been administered, but the witness had been examined and cross-examined without the attention of any one engaged in the trial being called to the omission. The prisoner was represented by two counsel, one of whom had no intimation of the neglect, until after the verdict was rendered. The other, after the case had gone to the jury and an hour before their agreement, was advised of the fact that one of the witnesses had not been sworn; but his informant refused to tell who the witness was. This attorney was not present when the verdict was returned, though he had opportunities to communicate to the court the information he had before the verdict was rendered.

The court acquits the attorney of any improper motive in failing at once to make known what he had heard.

After a verdict of guilty, the prisoner moved in arrest of judgment, because the bill of indictment did not charge that the deceased was in the peace of God, as well as in the peace of the State.

The court refused to arrest the judgment, and pronounced judgment on the verdict, from which the prisoner appealed.

Attorney-General, for the State.
Mr. R. S. Huske, for the defendant.

SMITH, C. J. (after stating the facts). The exceptions shown in the record are four in number, and these are now to be examined.

1. The rejection of the proof of threats and other declarations of Henry Campbell, offered to fasten the criminal act upon him and in exoneration of the accused.

The inquiry before the jury is as to the guilt of the accused, did *he* commit the homicide; and full and satisfactory evidence of this was required before there could be a conviction.

The fact that another co-operated and is also guilty, does not disprove the charge against the prisoner, nor absolve him from responsibility.

When the crime is shown to have been committed by a single person, and the question is solely one of identification, it would be competent to prove that another than the accused did the act, because this would directly disprove the charge against the latter. But even in this case the proof must be direct to the fact, and cannot come from admissions, or conduct seemingly in recognition of it. These are but "*res inter alios actæ*," and not under the sanction of an oath.

The adjudications which exclude such testimony are positive, and satisfactory grounds assigned in the opinions for the ruling. *State* v. *May*, 4 Dev., 328; *State* v. *Duncan*, 6 Ired., 236; *State* v. *Jones*, 80 N. C., 415; *State* v. *Boon*, *Ibid.*, 461; *State* v. *White*, 68 N. C., 158.

2. The testimony as to what the former owner of the prisoner said of him.

The witness, after being told what was meant by general character, when he was interrogated as to his knowledge of the prisoner's reputation, said he did not know what it was. This disqualified him to answer the question, and he should, at once, have been made to stand aside, as is ruled to be the proper practice in *State* v. *Perkins*, 66 N. C., 126.

The rejected inquiry sought to elicit the opinion of a single person, while the jury could only hear testimony from one who knew and could communicate the estimate formed in the public mind, that is, what is his general repute among those who know, and this would seem to be among his associates. *Luther* v. *Skeen*, 8 Jones, 356; *State* v. *Speight*, 69 N. C., 72.

3. The refused instructions and those given. The exception seems to be confined to the refusal of the Court to charge that

the series of circumstances must as fully satisfy the jury, as if direct proof of the act had been produced.

It is true that language somewhat similar was employed in the charge in *State* v. *Swink*, 2 D. & B., 9, the Court adding, after telling the jury that the testimony must be such as to satisfy them beyond a reasonable doubt of the prisoner's guilt, "that the circumstances must be as clear and strong as the testimony of one credible and respectable witness." This charge was sustained as being free from objection on the part of the accused. But no special significance is attached to these concluding words. In a later case, in the argument of the defendant's counsel, it was insisted on, as a rule of law, that, "before the jury can convict on circumstantial evidence, they must be as well satisfied of the guilt of the accused, as if one credible eye-witness had testified to the fact."

The court declined so to charge and said to the jury, "such was not a rule of law, but only an illustration; all that was intended by the comparison, was to enjoin the jury that they must be fully satisfied beyond a reasonable doubt of the guilt of the accused." Upon the appeal, the Chief-Justice, who delivered the opinion, says: "We do not see in the charge, or in the manner of submitting the case to the jury, *any error of which the defendant has a right to complain.*"

This was upon a charge of larceny, but the same rules prevail in the trial of felonies of a higher grade.

The general charge, relieved of this objection, is sustained by numerous cases, and is as full and favorable to the prisoner as he could ask. We refer to some of them. *State* v. *Rash*, 12 Ired., 382; *State* v. *Frank*, 5 Jones, 384; *State* v. *Matthews*, 66 N. C., 106; *State* v. *Bowman*, 80 N. C., 432; *State* v. *Parker*, Phil., 473.

4. The testimony of the unsworn witness. Neither the researches of counsel, nor our own, have led to the discovery of any case, in which the effect of the examination of a witness to whom the oath, through inadvertence, had not been administered before

the verdict, has been considered. If such cases have occurred, the correction seems to have been found in the discretionary power of the court to set aside the verdict and grant a new trial. The court in the present case declined to exercise the power, and the exception involves the question of the legal right of the accused, under such circumstances, to have another jury to pass upon the issue.

As a general rule of practice, objections to the competency of a witness, as of a juror, must be taken in apt time, that is, when he is offered; as it must be to any testimony when he is about to deliver it. If the proper moment passes without the objection being made, it is waived, though it remains in the power of the court afterwards to strike out the testimony, or the objectionable part of it, and direct the jury to disregard it. *State* v. *Ward*, 2 Hawks, 443.

The rule may, however, be subject to a qualification, as to evidence, the introduction or use of which is forbidden by statute made in furtherance of public policy. Such as the confessions of the parties in divorce suits, and the like in criminal actions for illicit cohabitation of unmarried persons. *State* v. *Bullard*, 79 N. C., 627.

The general rule remains, that exception to testimony which if objected to, ought not to be heard, must be made when it is offered, so that, if practicable, the objection may be removed, or other not incompetent, may be used instead. Thus, if the objection be to the irregular and unlawful mode of administering the oath, or to the failure to swear the witness at all, it could be met and obviated by a new and proper manner of administering it. It is as much the duty of counsel to see that no unsworn testimony is received against the client, as it is that testimony incompetent for any other reason should be excluded; and, for neglect to give this watchful oversight to the case as it progresses, the counsel is responsible to the client, but it does not enter as a vitiating element in the verdict to the rendering of which it may have contributed.

Again, one of the counsel was advised of the omission in time to bring it to the notice of the Court, when the jury might have been called back and directed to ignore the testimony of the witness, or the witness, being sworn, might have been allowed to deliver his testimony again, under the sanction of the oath. This was not done, and it would be detrimental to public justice to allow a prisoner to remain silent, awaiting the chances of an acquittal, and, if disappointed in the result, to fall back upon a reserved exception, the substance of which is kept from the knowledge of the Court, when, if known, it could have been provided against.

But the testimony related to the movements of another party, against whom suspicion was sought to be directed, and in opposition to evidence which had been introduced for the defendant.

For reasons already stated, the whole of this evidence, as tending to divert the minds of the jury from the real issue they were to try, as a collateral inquiry, ought to have been rejected for irrelevancy.

It is not seen how any harm would come to the prisoner, from the admission of the witness's testimony as to the suspicious conduct of one with whom he is not shown to have had any connection.

The prisoner's testimony, offered to show criminality in some one else, was wholly foreign to the issue of his own guilt, and equally so was that offered in opposition. All ought to have been discarded, and all received could have no injurious effect upon the prisoner's defence.

5. Of the motion in arrest of judgment, it is only necessary to say it has no support in law.

Upon a calm and careful review of the record and of the exceptions contained in it, we find no error and the prisoner must meet the consequences of the crime of which the jury find him guilty.

Let this be certified to the court below that it may proceed to judgment upon the verdict.

No Error. Affirmed.

STATE v. JOHN DAVIS.

Slander of Women—Witness—Character—Comment of Counsel.

1. When there is a direct conflict between the testimony of a witness and of the defendant, who offers himself as a witness, and evidence is introduced to show the good character of the witness, it is legitimate ground of comment by the solicitor, that no witness was offered to show the good character of the defendant.
2. Where a defendant offers himself as a witness, he occupies the same position as any other witness. He is entitled to the same protection and privileges, and is equally liable to be impeached and discredited.
3. The offence of slandering an innocent woman (*Code*, §1113) consists in the attempt to destroy the reputation of an innocent woman by a charge of incontinency.
4. By an "innocent woman" is meant one who never had actual illicit intercourse with a man.
5. *Quære*—Whether the slander of a woman who had once lapsed from virtue, but who had reformed and led an exemplary life, would be a crime under this statute.

(*State* v. *McDaniel*, 84 N. C., 803; *State* v. *Efler*, 85 N. C., 585, cited and approved).

This was an INDICTMENT under section 1113 of *The Code*, tried before *Graves, Judge*, at the Fall Term, 1884, of CHOWAN Superior Court.

The indictment charged the defendant with slandering one Florence Paxton, an innocent woman, by saying he had had sexual intercourse with her.

On the trial, the said Florence Paxton was examined as a witness for the State, and testified that "she had never had intercourse with the defendant Davis, or any other man, and that her life had been pure."

The defendant Davis, was then introduced as a witness in his own behalf, and swore that he had on several occasions had criminal intercourse with the said Florence.

A number of witnesses were introduced to prove the character of said Florence, and stated it was very good. No witness was introduced as to Davis's character.

The Solicitor commented on the fact, that the defendant had introduced himself as a witness, and had failed to introduce witnesses to sustain his character, and said the witness Florence comes into court with her character sustained—the defendant without a character.

The defendant objected to these comments; but the Court refused to stop the Solicitor, stating they were proper, after the defendant had made himself a witness, and there was a conflict between him and Florence. To which the defendant excepted.

The court charged the jury that, by innocent woman, the statute meant "one who had never had actual illicit intercourse with a man. That mere lasciviousness, and the permission of liberties by men with her, although we might consider them improper, were not contemplated by the statute;" and the court further stated to the jury, "that the defendant was before them in a two-fold capacity, as witness and defendant, and that the comments of the solicitor should be considered only as affecting his character as witness." The defendant excepted to the charge.

There was a verdict of guilty—judgment against defendant, from which he appealed.

Attorney-General and *J. G. Martin*, for the State.
Messrs. Pruden & Bunch, for the defendant.

ASHE, J. (after stating the facts). The statute under which the defendant was indicted, reads: "If any person shall attempt, in a wanton and malicious manner, to destroy the reputation of an innocent woman, by words written or spoken, which amount to a charge of incontinency, every person so offending shall be guilty of a misdemeanor, and fined or imprisoned in the discretion of the court." *The Code*, sec. 1113.

In *State* v. *McDaniel*, 84 N. C., 803, the construction given to the statute is, that the "offence defined consists, not in the slander of a woman by falsely charging her with incontinency, but in the *attempt to destroy the reputation* of an innocent woman

by such means; and by 'innocent woman' is meant a pure woman—one whose *character*, to use the language of the statute, is '*unsullied*'—that is, undefiled, not stained with moral turpitude—and what is meant by a *pure* woman, is a *chaste* woman, and Webster defines *chaste* to be 'pure from all unlawful commerce of sexes.'"

When, then, His Honor in his charge defined an innocent woman to be "one who had never had actual intercourse with a man," he has strictly followed the interpretation heretofore given to the statute by this Court; and what His Honor has stated in his charge as to *lasciviousness*, and the *permission of liberties*, though uncalled for by the facts of this case, is not inconsistent with the construction which has been given to the statute.

The construction of the statute, as given by this Court, and followed by His Honor, is, in our opinion, very strict, and would seem to exclude from the protection of the law, every woman who had at some time of her life, made a *slip in her virtue;* and every man, in the course of his life, must have had instances brought to his knowledge, of unfortunate females who have at some period in their lives, been led from the *path of virtue* by the wiles of a seducer, who had afterwards reformed, and by a course of exemplary conduct established for themselves a character for chastity above all reproach. Shall it be said that these unfortunates are not to be allowed a "*locus penitentiæ*," and are to be subject forever to the vile tongue of the maligner and slanderer? How this may be, we are not called upon to decide, nor do we express an opinion; but, however it may be, the charge of His Honor is as favorable to the defendant as he could expect or desire. It has certainly done him no harm, and he has no cause to complain.

As to the other exception taken by the defendant, to His Honor's refusal to stop the solicitor's comments upon the testimony of the defendant *as a witness*, we are of opinion it cannot be sustained.

The prosecutrix and defendant were both examined as witnesses in the cause, and there was a direct conflict in their testimony.

The female witness's character was sustained by a number of witnesses, who testified it was *very good*. *If very good*, it must have been good for chastity and truth; but the defendant offered no evidence to sustain his character. This made a strong contrast between the testimony of the witnesses, and we think it was a legitimate ground of comment. When the solicitor, after commenting upon the testimony of the female witness, how it had been sustained, said the defendant *was without character*, it manifestly meant he had not supported his character by witnesses, and was said in reference to the contrast between the testimony of the two witnesses, as they stood before the jury. It was said *arguendo*, and under the circumstances was entirely legitimate.

The defendant, as His Honor said in his charge to the jury, stood in the double capacity of defendant and witness. If he had not put himself upon the witness stand, the comments of the solicitor would have been undoubtedly objectionable, but when he introduced himself as a witness, he occupied the same position with any other witness. He was under the same obligations to tell the truth, entitled to the same privileges, received the same protection, and was equally liable to be impeached or discredited. *State* v. *Efler*, 85 N. C., 585.

There is no error. Let this be certified to the Superior Court of Chowan county that the case may be proceeded with in conformity to this opinion and according to law.

No error. Affirmed.

STATE v. A. E. SHAW.

Indictment—Forgery—Evidence—Corporation.

1. Where the prisoner was indicted for forging an order for the payment of money, with intent to defraud the Randleman Manufacturing Company, but the indictment failed to allege that the Randleman Manufacturing Company was a corporation; *Held*, immaterial.
2. The corporate existence may be proved, although not alleged in the bill of indictment.
3. Where the forged instrument is set out in the indictment *in totidem verbis*, it shows its own nature, and corrects any error in miscalling it in the indictment.

(*State* v. *Ward*, 2 Hawks, 443; *Buncombe Turnpike Co.* v. *McCarson*, 1 Dev. & Bat., 306; *Elizabeth City Academy* v. *Lindsey*, 6 Ired. 476; *Stanly* v. *R. R. Co.*, 89 N. C., 331, cited and approved).

INDICTMENT for forgery, tried at Fall Term, 1884, of RANDOLPH Superior Court, before *Philips, Judge.*

The facts appear fully in the opinion.

Attorney General, for the State.

Mr. J. T. Morehead, for the defendant.

SMITH, C. J. The indictment upon which the defendant was put on trial and found guilty, charges, with proper averments of time and place, that he did, of his own head and imagination, "wittingly and falsely make, forge and counterfeit, and did then and there willingly assent to the falsely making, forging and counterfeiting, a certain order and writing obligatory for the payment of money and for the delivery of goods, which said forged writing is in the words and figures as follows, that is to say:

Fifty cents.

50

payable in merchandise at the store of the Randleman Manf'g Co. (meaning the Randleman Manufacturing Company).

J. H. FERREE,

Treasurer.

with intent to defraud the said Randleman Manufacturing Company, contrary to the form, &c."

At the trial evidence was introduced to show that the defendant was in possession of many checks or certificates in all respects similar to that described and set out in the indictment, one of which he passed for clothing purchased of one Fishblate, and that the signature of J. H. Ferree to the latter, and to many of the others, had been forged.

The State then proposed to prove the corporate existence of the Randleman Manufacturing Company, to which objection was made for the reason that the indictment did not so charge; objection overruled.

Thereupon the State produced the certificate of the plan and purpose of the proposed incorporation, in conformity with the provisions of the general act authorizing the formation of such companies, with the acknowledgment made before the clerk of the Superior Court of Randolph county, and so certified by him on December 21st, 1869, under said act—Acts, 1868-'9, ch. 280. The State further proposed to show by the book-keeper of the company, that it had out, about the time of the alleged forgery, a large number of checks or certificates, of the size, color and denomination of that passed by the defendant. This was also opposed, on the ground of the insufficiency of the proof of its corporate organization and existence. The evidence was admitted.

The remaining testimony tending to establish the charge, it is not necessary to repeat in order to an examination of the defendant's exceptions.

The counsel for defendant asked for these instructions:

1. That the State must satisfy the jury that the paper alleged to be forged was "an order for the payment of money and the delivery of goods," and there is no evidence to sustain the charge.

2. That the Randleman Manufacturing Company is an incorporated body, and this has not been proved.

Declining to give the instructions, the court proceeded to charge the jury, so much of which as is pertinent to any exception is as follows:

"The forging and counterfeiting must have been done to defraud the Randleman Manufacturing Company. The very essence of the offence is the intent to defraud. It is not necessary that any person should in fact be defrauded. * * * If the jury find, from the evidence, beyond a reasonable doubt, that the defendant forged and counterfeited one or more checks of the denomination of 50 cents, as described in the indictment, or assented to the forging, making and counterfeiting of the same for the delivery of merchandise, with intent to defraud the Randleman Manufacturing Company, then they will convict. * * * * The possession of such a check by the defendant, if forged, it not being drawn in his favor or to the order of any particular person, does not raise the presumption that he forged it. Before the jury can convict, they must be satisfied from the evidence that the defendant forged it, or that, having it in possession, and with knowledge that it was forged, he passed it as genuine, with intent to defraud the Randleman Manufacturing Company, and the intent may be inferred from the facts and attending circumstances."

Besides the exceptions noted, the defendant, after verdict, moved in arrest of judgment, because of the absence of any averment in the indictment that the Randleman Manufacturing Company was a corporation, or association, or had any being whatever.

The motion being overruled and judgment rendered on the verdict, the defendant appealed to this court.

1. The forged instrument makes the sum expressed upon its face, payable at *store of the Randleman Manufacturing Company*, and this implies an association, bearing that name, and engaged in business at a designated place—*their "store."*

In *State* v. *Ward*, 2 Hawks, 443, the forgery was charged to have been of a "bank note of one hundred dollars, on the Bank

of the State of South Carolina," and this was held to be a sufficient averment of the existence of such a bank. The present description of the subject of the criminal act is quite as explicit in designating the company as a manufacturing association.

2. The proof offered before the jury was sufficient to warrant their finding that the company was incorporated and doing business under its corporate name. The articles of incorporation under the general law were produced, and, besides the other proofs, the book-keeper of the company testified to its issue in its business of large numbers of similar checks or certificates. *Buncombe Turnpike Co.*, v. *McCarson*, 1 D. & B. 306; *Elizabeth City Academy* v. *Lindsey*, 6 Ired., 476; *Stanly* v. *R. & D. R. R.*, 89 N. C., 331; *People* v. *Stevens*, 23 Wend., 409.

3. The defendant's first instruction asked, in regard to the misnomer of the forged instrument, in calling it "an order for the payment of money and the delivery of goods," was properly refused.

The writing, in very words, being set out in the indictment, shows its own nature and corrects any error in giving it a name. There is no variance between the allegations and the proofs; the writing described is the writing proved.

The other instructions asked proceed upon grounds which, as we have seen, are wholly untenable, and the intent is properly charged. 2 *Whar. Cr. Law*, §§1453 a, 1444 m.

There is no error and this will be certified, that the Court may proceed to render judgment upon the verdict.

No Error. Affirmed.

STATE v. JOSEPH HOWARD.

Murder—Confessions—Indictment—Evidence.

1. The declarations or confessions of a prisoner, either at the time when he is arrested or when he is charged with the crime, are admissible either for or against him when they are voluntarily made, and it is only necessary that the prisoner should be cautioned that he is at liberty to refuse to answer, and that such refusal will not prejudice him, when the confession is made upon an examination before a magistrate.
2. Where it appeared that the officer making the arrest was accompanied by two other men, and that they were all large, strong men, but were not armed, and the prisoner was a small, weakly man, but that no threats or violence were used and no inducements held out; *Held*, that confessions could not be excluded on the ground that the defendant was put in fear by force and numbers.
3. Where it was in evidence that the prisoner and the deceased had gone into a barn together, a witness who passed the barn about a-half an hour afterwards can testify to a conversation he overheard between persons in the barn, although he does not know the prisoner's voice, and can only identify the voice of the deceased.
4. It is unnecessary to aver, in an indictment, any matter which need not be proved. So where an indictment for murder did not set out that "the prisoner, not having the fear of God before his eyes, but being moved and seduced by the devil," and also did not set out that the "deceased was in the peace of God and the State;" *It was held*, no ground to arrest the judgment.
5. Where an indictment for murder sets out the infliction of a mortal wound, and that the deceased "then and there instantly died," it is a sufficient averment that the deceased died within a year and a day from the time of the infliction of the wound.

(*State* v. *Matthews*, 66 N. C., 106; *State* v. *Jefferson*, 6 Ired., 305; *State* v. *Houston*, 76 N. C., 256; *State* v. *McDonald*, 73 N. C., 346, and *State* v. *Morgan*, 85 N. C., 581, cited and approved).

This was an INDICTMENT for murder, tried before *Shepherd, Judge,* and a jury, at Fall Term, 1884, of the Superior Court of CUMBERLAND county.

There was a verdict of guilty, and the prisoner appealed from the judgment pronounced.

The facts are fully stated in the opinion of the Court.

Attorney General and *T. H. Sutton,* for the State.

Mr. R. S. Huske, for the defendant.

ASHE, J. The prisoner was indicted for the murder of one C. L. Blackman. The evidence on the part of the State disclosed the following facts: On Wednesday, the 29th day of October, 1884, the day of the homicide, the prisoner and defendant had been together, during the morning, on the premises of the deceased, where a fire had broken out, and the prisoner assisted the deceased in controlling it. That the deceased was indebted to the prisoner in the sum of fifteen dollars, and, after leaving the fire and returning to the house of the prisoner, which was about two and a half miles distance, the deceased paid fifteen dollars to the wife of the prisoner, and it was then agreed that the interest should be forgiven, in consideration of the deceased giving the prisoner as much wine as he could drink. That the deceased made wine for sale. That they went to the house of the deceased about two hours before dark. That the prisoner remained there until after supper. That after supper the prisoner told the deceased that he wanted some wine, and they went to the barn to get wine, the barn being about one hundred feet from the house, and about twenty-one feet from the public road, and the lot around the barn was inclosed on the side of the road by a plank fence, leaving a space between the road and the barn.

About dusk, one L. S. Sessom stopped at the fence near the barn and drank wine with them. That deceased told Sessom that he had settled the fifteen dollar land note, and that he was going to give the prisoner as much wine as he could drink for the interest. That Sessom went home, leaving prisoner and deceased at the barn-door, engaged in a friendly conversation. That the wife of the deceased went out and sat with them a short time, and then returned to the house. That in half an hour or more, having attended to all her domestic affairs, she again went to the barn and found her husband, lying near the barn-door on the ground, dead, with his throat cut, and the prisoner gone. That there was much blood on the clothing of the deceased and on the ground.

The wife of deceased testified, when she last saw the deceased and prisoner together they were in friendly conversation.

It was also in evidence, that on the running board-fence at the corner near the barn, there was a spot of blood, like a thumb or finger print, on the under *inside* part of the top board, which was about five and a half inches wide; and that on one of the lower boards, under this spot of blood, there was the sign of a foot, as of some one getting over the fence. That from the barn-door to the spot of blood, was in the direction of prisoner's house; and the place where the spot of blood was, could not be seen from the gate of the inclosure or the house. It was a dark and cloudy night and rained early in the night. That a crowd gathered from all directions, and there was much passing to and fro, and a number of persons were engaged in turning over and straightening out the body covered with bloody clothes. That there was no evidence of a struggle, nor any disarrangement of the clothing.

The prisoner did not reach home until about 2 o'clock the next morning, and the front of his clothes were wet as if they had been washed. On the inside of one of his pants pockets there was a little blood on the lint and the fibre of the cloth.

It was in evidence that the prisoner was a small and sickly man.

The State introduced as a witness, one Faircloth, a constable, who testified he got the pants, coat and drawers of the prisoner, which were exhibited in evidence, from the prisoner's wife, between the jail and market house, after the prisoner had been put in jail. They were the same pants and coat the prisoner wore on the day of the homicide.. That on the Wednesday night of the homicide witness got a warrant for the prisoner and went to his house next morning about five o'clock, and found him in bed, with nothing on but his shirt.

Witness stated, "when I arrested him I told him I had a warrant against him for a high 'depredation' of the law; that he was charged with killing Cullen Blackman. He answered, 'Amanda, (prisoner's wife) told me one McCaskill said so. I did not do it. I know nothing about it. When I left him he was all right. I submit; if I had wanted to (pointing to his

gun overhead), I could have got another one.'" The witness further said, "this was all that was said by either of us before he made the declaration, 'I had no gun, made no threats, nor held out any inducements, nor did any one do so."

The witness was accompanied by two others, and they were all large men: no one of them was a justice of the peace, and none of them had guns, and there was no violence offered. The declaration was made while the witness was getting his spectacles to read the warrant. He did not caution the prisoner then, but did afterwards.

The prisoner objected to the declaration, on the ground that he was not cautioned, and was put in fear by the excessive force and numbers. There was evidence that on the same night other parties went to the prisoner's house, found no gun, and the prisoner was absent.

The State then introduced one Morris Hall, who testified, "I saw the "bulk" of two men at Blackman's barn door, awhile after dark on the night of the homicide. I did not recognize either of them at sight. I was going along the road, on my way to Sessom's, when I heard a voice I thought was Blackman's, say, 'I don't want to cheat you out of a cent.' My best impression is, that it was deceased's voice. I had seen him several times before. I was a stranger in the community, and I heard a strange voice say, 'God damn you, you can't cheat me out of a shilling." From the tone of the voice, I did not think there would be a fight, and as I passed on, the same strange voice said, 'damn you, shut your door,' which was repeated. This was the same voice that used the expression about the shilling. It was some time after dark, and the voice came from the barn door.

The prisoner objected to the admission of anything said by the person with the strange voice, which the witness said he did not recognize, on the ground that the prisoner was not connected with it; and the admission of the evidence, upon objection, was made the ground of an exception by the defendant.

The jury returned a verdict of guilty. There was a motion for a new trial, which was overruled, and thereupon the defendant moved in arrest of judgment, upon the following grounds:

1. For that the indictment does not contain an averment that the prisoner "not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil," &c.

2. For that it is not alleged in the indictment that the deceased C. L. Blackman was in the peace of God and the State.

3. For it does not appear from the indictment that the deceased C. L. Blackman died within a year and a day from the time of the infliction of the said mortal wound.

4. For that the bill of indictment upon the whole is insufficient.

The motion in arrest was overruled and sentence pronounced against the defendant, from which he appealed.

The first exception taken by the defendant to the ruling of the court below, upon the admission of evidence, was to the admission of the declaration of the prisoner at his house, when arrested by the constable, and the ground of the exception is, that the prisoner was not cautioned by the constable, and was put in fear by excessive force and numbers.

The confessions or declarations of a prisoner at the time of his arrest, or when he is charged with a crime, are always competent either for or against him, when they are voluntarily made.

In this case, what he said to the constable was said without any undue influence whatever. There were no threats, no promises, no questions asked, nor any inducements of any kind held out to him to call forth the declaration. It was free and voluntary. But the defendant's counsel says he was not cautioned. But that is only necessary upon the examination of the prisoner before a magistrate, and is made so by the act of 1868-'9, ch. 178, *The Code*, sec. 1146, which provides, that "at the commencement of the examination, the prisoner shall be informed by the magistrate that he is at liberty to refuse to answer any question that may be put to him, and that his refusal to answer shall not be

used to his prejudice in any stage of the proceedings." *State* v. *Matthews*, 66 N. C., 106.

When made freely and voluntarily to any other person, or on any other occasion, it is admissible against him, and even when made by one in custody, it being his own unbiassed act, it may be proved. *State* v. *Jefferson*, 6 Ired., 305.

The defendant's counsel insisted, that if this ground of the exception failed, it would hold good upon the ground that the defendant was put in fear by force and numbers. But it is untenable upon that ground. In *State* v. *Houston*, 76 N. C., 256, it was held, that "when the defendant, a negro, was arrested by the sheriff and three other white men, and other men afterwards joined the party, and while on their way to the magistrate's, the defendant made certain confessions, no threats or promises or violence being used, such confessions are admissible;" and to the same effect is *State* v. *McDonald*, 73 N. C., 346.

Neither can the other exception taken to the admission of the evidence in regard to the strange voice be sustained.

In inquiring whose voice it was, all the circumstances point to the prisoner. He and the deceased went to the barn together about dark, to get the wine which the prisoner was to drink, in satisfaction of the interest on his fifteen dollar debt. Who but the prisoner could have committed the act? They were alone together at the barn, when the wife of the deceased left them for the short interval of half an hour, and it was in this interval that a witness passed by and drank with them at the barn. There was no one then present there but the prisoner and deceased, and when the witness who testified to the strange voice passed by, he saw the "bulk" of two men at the barn door. Can there be any doubt but these were the prisoner and deceased?

There was no evidence that any one else was there but those two, and the circumstances point unerringly to the fact that the strange voice was that of the prisoner.

The jury might have been well warranted in drawing the conclusion from the evidence, that after the prisoner had drunk freely

of the wine, he became intoxicated, and after he had exhausted the quantity of wine the deceased thought he ought to have in satisfaction of his interest, he refused to let the prisoner have another drink, and, upon the prisoner insisting he was entitled to more wine, a dispute arose between them about the *settlement.* Hence the remark of the deceased, "I would not cheat you out of a cent"; and the reply of the prisoner, "Damn you, you can't cheat me out of a shilling." That meant, probably, the balance claimed by the prisoner, and upon the deceased insisting on his refusal, the answer, "You *shut the barn door*"; and then, being in a rage, excited by his disappointment, with his brain unbalanced by his frequent potations, he drew his knife and cut the throat of the deceased.

The evidence objected to, we think, was clearly admissible.

And as to the grounds of arresting the judgment, we would not consider them, but for the respect the Court entertains for the counsel who has presented them for our determination. The indictment is well drawn, and in the usual form, except it omits the statement, that the "prisoner, not having the fear of God before his eyes, but being moved and seduced by the instigations of the devil," and the further omission of an averment that the "deceased was in the peace of God and the State." It was urged here that these were fatal defects. But these averments are never required to be proved, and what is not necessary to be proved in an indictment, need not be stated—*The Code*, §1189, which declares that "No judgment upon any indictment for felony or misdemeanor, whether after verdict or by confession, or otherwise, shall be stayed or reversed for the want of any matter unnecessary to be proved."

The defendant's counsel has also insisted that the judgment should be arrested, because it is not made to appear that the deceased died within a year and a day from the time of the infliction of the mortal wound, and cited in support of his position *State* v. *Morgan*, 85 N. C., 581. But the counsel has misapprehended the decision in that case. The point there was that

the indictment failed to charge a *mortal wound*, but in this indictment the infliction of a mortal wound is averred, and that the deceased *then* and *there* instantly died. The motion in arrest was without grounds, and was properly overruled.

There is no error. Let this opinion be certified to the Superior Court of Cumberland, to the end that the case may be proceeded with according to law.

No error. Affirmed.

STATE v. JAMES GREEN.

Burning Gin-house—Evidence—Indictment.

1. It is never never necessary to show a motive for the commission of a crime in order for a conviction. But when the prosecution relies upon circumstantial evidence, it is always competent to introduce evidence tending to prove a motive.
2. So, in an indictment for burning a mill, after evidence has been introduced tending to convict the prisoner, the prosecution may offer evidence tending to show that the prisoner was to be paid for committing the crime, and his declarations shortly before the fire, that he had no money, but expected to have some soon, and the fact that shortly after the fire he did have money, are competent.
3. The indictment in this case, set out in full in the opinion, sufficiently charges the crime of burning a gin-house, created by section 985, sub-division 2 of *The Code*.

(*State* v. *Thorn*, 81 N. C., 555; *State* v. *Watts*, 82 N. C., 656, and *State* v. *Upchurch*, 9 Ired., 454, cited and approved).

INDICTMENT for burning a gin-house, tried before *Shepherd, Judge*, and a jury, at Fall Term, 1884, of CUMBERLAND Superior Court.

There was a verdict of guilty, and the defendant appealed from the judgment thereon.

The facts are fully set out in the opinion.

Attorney General and *T. H. Sutton*, for the State.

Messrs. Z. B. Newton and *W. A. Guthrie*, for the defendant.

ASHE, J. The defendant was charged with burning a gin-house, the property of C. A. Martin and another.

The indictment is as follows, to-wit: "The jurors for the State upon their oath present, that James Green and Hardy Williams, late of the county of Cumberland, on the 10th day of October, A. D. 1883, with force and arms, at and in said county, unlawfully, wilfully, maliciously and feloniously, did set fire to, and burn, a certain gin-house then and there in the possession and the property of Cyrus A. Martin and James F. Martin, with intent to destroy the same, and with intent to injure and defraud the said Cyrus A. Martin and James F. Martin, contrary to the form of the statute," &c.

The gin-house in question was burned on a Wednesday night, about the middle of October, 1883, and was the work of an incendiary, and kerosene oil and spirits of turpentine were used by him.

The defendant was charged with the offence, arrested, indicted and tried. The evidence against him was entirely circumstantial. It was in evidence among other things that J. D. Warrel and Louis Warrel owned a steam gin about one-half of a mile from the scene of the fire, and they were not on friendly terms with the Martins, who owned the gin that was burned. They both ginned cotton for toll. That Austin McArthur and the defendant were in the employment of the Warrels in operating their gin, and the defendant had so been for some years. That, at the time of the fire, the defendant, with his wife, occupied the same house with McArthur and Roxana, his wife, which was about a half or three-quarters of a mile from the scene of the fire, and about the same distance from Warrel's gin. Louis Warrel lived about a mile and a half from Martin's gin, and from J. D. Warrel.

That, on the Wednesday evening of the fire, McArthur and the defendant, about sun-down, accompanied by one Brooks, were returning home from their work at Warrel's gin, the defendant carrying a jug of turpentine, and he was heard to whisper to McArthur something about the jug, when McArthur asked him what he was going to do with it, and defendant replied, "never

mind, you will hear of the d—est racket you ever heard of to-night." He said he got the turpentine from J. D. Warrel's turpentine still. That, when they reached home, the defendant sat on the front steps, seemed frightened, declined to eat supper, went off, and, after staying half an hour, returned and resumed his seat on the steps; and on being asked by McArthur's wife, what was the matter with him, he said, "never mind, you will know to-night by the sky being illuminated."

Upon the discovery of the fire in the night, McArthur first went to the fire, and was soon followed by the defendant. On their return from the fire there was some conversation about a certain track near the fire which defendant said, was one of the Warrels. Before reaching the house they met their wives and McArthur and his wife discovered the smell of turpentine.

The next day, as McArthur and defendant were on the way to their work, defendant said, "I know who burnt the gin; I have got no money now, but in a few days I will give you some to keep your d—— mouth shut." Similar remarks were made by defendant to McArthur at the fire. This evidence was received without objection.

The State then offered to prove by Roxana McArthur, that on the morning after the fire, she heard the defendant ask his wife to lend him some money, and upon her refusal, he said, "never mind, I have no money now, but I will be d—— if I don't have some soon, and if Arthur (meaning McArthur, who was present) would keep his d—— mouth shut, he would let him have some."

This testimony was objected to by the defendant, but admitted by the court, and the defendant excepted. The State proposed to prove that after the defendant was arrested and was on his way to jail, no violence having been used, nor threats made, nor inducements held out to him, upon his being informed of the charge against him, he said, "I don't care what you do, Jem and Lem Warrel have got a plenty of money, and I don't care what the h—l you do, money will keep me right." This evidence

was admitted by the Court after objection by the defendant, and he excepted.

There was then a good deal of other evidence offered by the State, tending to establish the guilt of the defendant, and among other the testimony of one Goddin, who testified that the defendant owed him some money, and about a week after the fire the defendant met him in the road and pulled out of his pocket a handful of silver, which looked like as much as five dollars, and paid him. The defendant objected to this testimony, and upon its admission by the Court, excepted.

Another witness was introduced by the State, who testified that about a week after the fire defendant gave him a five-dollar bill to have changed. The admission of this testimony was also made a ground of exception by the defendant.

The jury having found the defendant guilty, he moved in arrest of judgment, on the ground that there is but one count in the indictment, and that two distinct statutory offences are blended in one count. The motion was overruled by the Court, and judgment was pronounced against the defendant, from which he appealed.

All the evidence to which the defendant has taken exception bears upon the same point, and was offered by the State, for the purpose of showing a motive on the part of defendant to commit the crime with which he was charged. It is never indispensable to a conviction that a motive for the commission of the crime should appear. But when the State, as in this case, has to rely upon circumstantial evidence to establish the guilt of the defendant, it is not only competent, but often very important, in strengthening the evidence for the prosecution, to show a motive for committing the crime. That was the purpose of the State in offering the evidence excepted to. It was the theory of the State that the motive of the defendant was the hope of reward, and that he had been promised remuneration in money by some one, for setting fire to the gin. The evidence offered upon that point was certainly pertinent to that inquiry. It tends to show by the

defendant's own declarations that he had no money before the burning, but that he expected to have money shortly after the burning; and that he did have money very soon thereafter, some of which he would give to McArthur if he would keep his mouth shut.

It was evidence rightfully admitted and properly submitted to the jury to be considered by them in ascertaining the motive which prompted the defendant to commit the crime. For "where it is shown that a crime has been committed, and the circumstances point to the accused as the perpetrator, facts tending to show a motive, although remote, are admissible in evidence. The jury, however, cannot be too cautious with respect to the importance they attach to this species of evidence." *Roscoe Crim. Ev.*, 88, note 1, and cases there cited. Our conclusion is that none of the defendant's exceptions can be sustained.

The defendant's ground for his motion in arrest of judgment is quite as untenable as his exceptions. His counsel are altogether mistaken in supposing that two offences, the one created by sub-div. 2, and the other by sub-div. 6 of section 985 of *The Code*, are blended into one. The indictment is for a violation of the provisions of sub-div. 2 of that section, and even if it was the intention of the draftsman to draw the bill under sub-div. 6, it can be sustained under sub-div. 2.

It certainly cannot under sub-div. 6, for a gin is not one of the buildings it is made unlawful to burn by that sub-section.

Sub-div. 2 is the act of April 10th, 1869, and makes the wilful burning of any gin-house, &c., an indictable offence; and sub-div. 6 is the act of March 22, 1875, which makes it indictable to burn certain enumerated houses, but a gin-house is not one of them.

The case of *State* v. *Thorn*, 81 N. C. 555, is decisive of this case. That was an indictment for unlawfully, *maliciously* and feloniously burning a gin-house. The Court was asked to charge the jury that the defendant could not be convicted under the act of 1869, because the burning was not charged to have been *wil-*

fully done. The Court held that the word *maliciously* was more comprehensive and included wilfully, and that although the indictment could not be sustained under the act of 1875, because in that act gin-houses are not embraced, it could be under that of 1869. For, say the Court, "while the indictment makes the allegation not required by the act, it embodies every charge essential to the constitution of the crime, and the unnecessary averments may be treated as harmless surplusage. They do not vitiate a verdict which finds them all to be true, nor afford ground for arrest of judgment;" and to the same effect is the decision in *State* v. *Watts*, 82 N. C., 656, where it is held, upon the authority of *State* v. *Upchurch*, 9 Ired., 454, that "where a person is indicted for an offence, as for a *felony*, when in fact it is no *felony*, but only a misdemeanor, he may be convicted of the latter offence. The use of the word *felony* in the indictment does not raise the grade of the offence, and make that *felony* which is no *felony*."

There is no error. Let this be certified to the Superior Court of Cumberland county, that the case may be proceeded with according to law.

No error. Affirmed.

STATE v. ELIAS BUTTS.

Cruelty to Animals—Indictment—Evidence.

1. Where, in an indictment, a word, not used in the statute, is substituted for one so used, the indictment will be sustained, if the substituted word is of equivalent or more extensive signification. Evidence that defendant shot a cow to prevent her from injuring his crops, and that she entered his field at a part of a dividing fence, which the owner of the cow ought to keep in repair, properly rejected.

2. Under the statute—*The Code*, sec. 2482—it is a misdemeanor to wound or injure stock even when trespassing on defendant's crops.

(*State* v. *Stanton*, 1 Ired., 424, cited and approved).

This was an INDICTMENT, tried before *Philips, Judge*, at Fall Term, 1884, of GREENE Superior Court.

The indictment charged that the defendant Elias Butts, wilfully and unlawfully, did cruelly beat and shoot, and needlessly mutilate, torment and torture, a certain useful animal, to-wit: one cow, the property of Joseph Dixon, contrary to the form of the statute, &c. It was in proof on the trial, that the cow was shot three times, in an inclosure of the defendant not surrounded by a lawful fence, in the county of Greene, and it was admitted that Greene county was a no-fence section, and was made so by an act of the Legislature passed on the 7th day of February, 1883.

The defendant proposed to show that he shot the cow to prevent her from destroying his crops. This was objected to by the solicitor. The objection was sustained and the defendant excepted. The defendant then proposed to show that the place where the cow came into his field when she was shot, was a part of a cross fence between the defendant and Joseph Dixon, the owner of the cow, and that part of the cross fence it was the duty of the said Dixon to keep up.

This evidence was objected to by the solicitor. The objection was sustained by the court, and the defendant excepted.

The defendant introduced himself as a witness and testified that he complained to Dixon, the owner of the cow, about his cow's injuring his crops, and Dixon told him that if he would put yokes on his cows, that they could not trouble him any more. That he did put good substantial yokes on the cows, that the yokes were taken off, and the cows troubled him again, and he showed by another witness that these yokes were sawed off and that he had seen them lying in the yard of Dixon.

The defendant contended that the statute against injuring stock in an inclosure not surrounded by a lawful fence having been repealed by the 18th section of the act of 1883, placing Greene county in a "no-fence" section, that he had the right to shoot the cow to prevent her from destroying his crops; and the law against cruelty to animals under which the indictment was drawn,

and under which the defendant was tried, was not intended to apply to cases where persons injured stock to prevent their injuring crops, but was intended only to apply to wanton and useless cruelty to animals.

The Judge charged the jury that if they were satisfied that the defendant shot and wounded a cow, the property of Joseph Dixon, at the time and place mentioned by the witnesses, the defendant was guilty, but if they were not fully satisfied of these facts they would find not guilty.

To this charge the defendant excepted.

The jury found the defendant guilty, and there was judgment from which the defendant appealed.

Attorney-General, for the State.
Mr. W. C. Monroe, for the defendant.

ASHE, J. (after stating the facts). The section of *The Code* under which the indictment was drawn is as follows:

"If any person shall wilfully overdrive, overload, wound, injure, torture, torment, deprive of necessary sustenance, or cruelly beat, or needlessly mutilate, or kill, or cause or procure to be overridden, overloaded, wounded, injured, tortured, tormented, or deprived of necessary sustenance, or to be cruelly beaten, needlessly mutilated, or killed, as aforesaid, any useful beast, fowl or animal, every such offender shall, for every such offence, be guilty of a misdemeanor." *The Code*, §2482.

At the first blush we were doubtful whether the indictment in this case could be sustained, because it does not follow the words of the statute—but, upon consideration, we are of the opinion it is sufficient. The indictment charges the defendant with *shooting* the cow. Shooting is not mentioned in the statute, but the wounding of animals is forbidden, and the shooting necessarily includes wounding. In the *State* v. *Lonon*, 22 Miss., 449, it is said: "In criminal cases the definition of *wound* is an injury to the person by which the skin is broken."

We cannot well imagine a case of injury by shooting where the *skin* is not broken, and Archbold, in his work on Criminal Pleadings, lays down the doctrine to be: "When a word not in the statute is substituted in the indictment for one that is, and the word thus substituted is equivalent to the word used in the statute, or is of more extensive signification than it, the indictment will be sufficient." See also *State* v. *Stanton*, 1 Ired., 424.

The defendant contended in the court below and in this Court, that the statute against injuring stock in an inclosure not surrounded by a lawful fence having been repealed by the 18th section of act of 1883, placing Greene county in a "no-fence" section, that he had a right to shoot the cow to prevent her from destroying his crops, and the law against cruelty to animals, under which the indictment was drawn, and under which the defendant was tried, was not intended to apply to cases where persons injured stock to prevent their injuring crops, and was intended to apply only to wanton and useless cruelty to animals.

The defendant's counsel is mistaken in his construction of the statute. As most of the injuries to animals occur in cases just like this, where they are shot, wounded or injured by persons upon whose crops they are found trespassing, it is fair to presume that this was one of the mischiefs intended to be prevented by the Legislature. It never was the law that a man might shoot and kill his neighbor's horses and cows for a trespass upon his crops. The temptation to do so was guarded against by the law which required every man to keep up, around his cultivated grounds, a fence five feet high, which was supposed by the Legislature to be sufficient to keep out marauding stock; and when the Legislature, as in Greene county, abolished the requirement of a lawful fence, or, in other words, established the "no-fence law," it made provisions for guarding against the trespasses of stock, as in the Act of 1883, chap. 70, it declared that it shall not be lawful for any live stock to run at large in the counties of Lenoir and Greene. The second section of the act made it a misdemeanor for any one within the boundaries defined in the act, wilfully to per-

mit his stock to run at large—and then by the fifth section of the act, it is made lawful for any person to take up any live stock running at large in the territory embraced in this act, and to impound the same in the township where the stock is taken up, and then the act proceeds to prescribe the proceedings to be had after the stock is impounded.

These are the remedies prescribed by the Legislature for preventing stock from trespassing upon and destroying crops.

The owner of stock may be indicted every time he wilfully permits his stock to run at large, and when they are found running at large they may be impounded, whether wilfully or negligently permitted.

At common law no man had the right to be his own avenger by shooting any cattle that he might find destroying his crops or treading down his grass. If one found the beasts of a stranger wandering in his grounds *damage feasant*, that is, doing him hurt or damage by treading down his grass or the like, the law provided that he might distrain them till satisfaction was made for the injury he had sustained; in other words, that he might impound them, as is provided in the act of 1883. *The Code*, §2482.

There is no error. Let this be certified to the Superior Court of Greene county, to the end that the case may be proceeded with according to law.

No error. Affirmed.

STATE v. FRANCIS M. DEATON AND HENRY T. DEATON.

Indictment—Drunkenness.

The warrant in this case charged the two defendants with violation of town ordinance by being drunk in a public place in the town; *Held*, that the warrant was fatally defective for joining two defendants charged with an offence which could not be jointly committed.

STATE *v.* DEATON.

This was a CRIMINAL ACTION, tried before *Shepherd, Judge*, at Fall Term, 1884, of RICHMOND Superior Court.

The action was commenced by warrant in a mayor's court against the defendants, F. M. Deaton and H. T. Deaton, for a violation of an ordinance of the town of Laurinburg, and carried by appeal to the Superior Court.

The warrant is in the following words, to-wit: "Whereas, W. B. Hatton hath complained on oath before the undersigned, mayor of the town of Laurinburg in said county, that F. M. Deaton and Henry Deaton, in the said town, on the 1st day of September, 1883, unlawfully were drunk in a public place within the corporate limits of said town, and used profane and indecent language and otherwise disturbed the peace of said town in and at said place, against the peace and dignity of the State, and contrary to the town ordinance in such case made and provided; which said ordinance reads as follows: "Any person who shall be found drunk or using profane and indecent language, or acting in a disorderly manner, or exposing their person, or in any way disturbing the peace and quiet of the town, shall be fined not less than two dollars nor more than twenty-five dollars. You are therefore commanded forthwith to arrest the said Francis Deaton and Henry Deaton and have them before me according to law."

On the trial in the Superior Court, the defendants were found guilty by the jury. Thereupon, they moved in arrest of judgment, which was overruled by the court, and judgment rendered against them, from which they appeal to this court.

Attorney General, for the State.
Mr. J. W. Hinsdale, for the defendants.

ASHE, J. (after stating the facts). There was error in the refusal of the judge in the court below to arrest the judgment. The offences charged in the warrant are of such a character that they cannot be jointly committed. Drinking is a personal vice

which attaches to the individual. It is a physical as well as moral infirmity, brought on by one's voluntary act, and no two persons can participate in the same identical physical condition. The same in regard to using improper language. The words spoken by two persons though they may be literally similar, yet they are the words of each, distinct from the words of the other.

Thus it has been held that two persons cannot be jointly indicted for perjury, or for seditious, obscene and blasphemous words, because such offences are in their nature distinct— *Wharton's Criminal Law*, 430—and it is laid down in 2 *Hawk.*, ch. 25–89, that "even when several commit a joint act, which act, however, is not of itself illegal, but becomes so merely by reason of some circumstance applicable to each individual severally and not jointly, they must be indicted separately."

Some of the authorities, we are aware, maintain that offenders may be included in the same indictment, when they are charged with offences distinct in their character, but must be charged "*separaliter.*" That, however, even if law, was not done in this case, and we are of opinion the warrant was fatally defective for joining offences that were distinct and could not be jointly committed.

The judgment of the Superior Court must, therefore, be overruled. Let this be certified.

Error. Reversed.

STATE v. JORDAN LEMON.

Larceny — Trial — Introduction of Evidence — Declaration of Agent.

1. The regular mode of trial of indictments is for the State to introduce evidence to sustain the charge; the accused then introduces evidence to make good his defence. Then the State has only the right to introduce rebutting evidence, and evidence strictly to strengthen and support that offered at first. After this, further introduction of evidence is matter of discretion with the Judge, and not reviewable, unless perhaps in case of a clear abuse of power.

2. When defendant swore that he sent his wife to a person to borrow money with which he paid for the property alleged to have been stolen, having thus made her his agent, it is competent for the State to prove what the wife said to this person when she got the money as to the purpose it was intended to serve.

INDICTMENT for larceny, tried at February Term, 1885, of the Criminal Court of NEW HANOVER county, before *Meares, Judge.*

The defendant was examined on the trial as a witness in his own behalf, and testified, among other things, that he had paid about $30 for the hogs alleged to have been stolen by him, to the party from whom he said he bought them, at different times, and that on one occasion he had sent his wife to James Macumber and had borrowed five dollars from him to pay in part for them.

After the defendant had closed his testimony, the State, for the purpose of contradicting him, recalled the witness, James Macumber, and asked him "if he had ever loaned the defendant any money to pay for hogs," and he answered "no." On cross-examination he was asked if he had let the defendant's wife have any money at all, and he answered "yes." On the redirect examination, he was asked to give the conversation and explain what occurred between him and defendant's wife at the time she procured the money from him.

The defendant objected to this question; the objection was overruled by the Court, and the defendant excepted.

The witness then stated that the wife of the defendant came to his store and represented to him that the defendant's father had just died in his house, and they did not have a dollar to enable them to bury him, and that she wanted to borrow five dollars from the witness to enable them to bury him, and that he did lend her five dollars for that purpose, and that on a former occasion she had borrowed from him two dollars and fifty cents.

Thereupon the defendant offered to introduce his wife as a witness, for the purpose of contradicting the State's witness named above, in respect to the purpose for which he had loaned five dol-

lars to her, and as to other loans of money to her. The Solicitor for the State objected, the Court sustained the objection, and the defendant excepted.

Verdict guilty. Judgment. Appeal by defendant.

Attorney-General, for the State.
Mr. J. D. Bellamy, for the defendant.

MERRIMON, J. (after stating the facts). On the trial, after the State had closed its evidence in chief, it was the right of the defendant, and his duty to himself, to introduce such evidence as he could to make good and complete his defence. He ought to have introduced not simply a part of the evidence he could produce, but enough, if he could, to meet conclusively every material aspect of the prosecution. Then was his opportunity of right, in the orderly course of the trial, to make his defence secure.

When the defendant closed the introduction of evidence on his part, then the State had only the right to introduce rebutting evidence, and evidence strictly to strengthen and support that offered at first to prove the allegations in the indictment. The evidence offered to contradict the defendant as to what he swore in respect to getting money from the witness Macumber, was simply in reply.

After this, no further evidence could be introduced on either side of the action, except in the discretion of the Court. In case any injustice was likely to result from any inadvertence, mistake or misapprehension on either side, the Court might, in some cases ought, to allow further evidence to be introduced, being very careful to give neither side undue advantage over the other.

That indicated above is the orderly course of trial. Any other would protract it indefinitely and lead to interminable confusion. If, however, the Court should allow a material departure from the rule on either side, the opposing party would have the right to introduce further pertinent evidence in corresponding degree.

It may be that it was the misfortune of the defendant that he failed to introduce his wife as a witness at the stage of the trial in which he had a right to do so. It was obvious then, that he needed to show that he came honestly by the hogs in question, and, under the circumstances, as tending to prove this, to show that he paid for them, and where he got the money with which to do so.

His wife was a competent witness for such purpose; he had the right to introduce her, (*The Code*, §1353,) and it is plain that he ought then to have done so, if she would prove where he got the money, and as he stated he did get it. At the stage of the trial when he offered to introduce her, it was in the discretion of the presiding Judge to allow her to be examined—perhaps he ought to have done so, but he saw and understood the course and developments of the trial, and was the better judge of the propriety of doing so, and the discretion was his, not reviewable here, unless, perhaps, in case of a clear abuse of power. 1 *Whar. on Ev.*, 571.

It was competent for the State to prove by the witness Macumber that he did not let the defendant's wife have money to pay for the hogs. The defendant himself said that he had sent his wife to the witness to get five dollars. He thus made her his agent, and what she said when she got it from the witness, as to the purpose it was intended to serve, was competent though not conclusive. 1 *Gr. on Ev.*, §§113, 170, 233, 234; *United States* v. *Gooding*, 12 Wheat., 460.

There is no error. Let this opinion be certified according to law.

No Error. Affirmed.

STATE v. JOHN A. McINTOSH.

Indictment—Slander of Innocent Female.

After conviction the defendant moved in arrest of judgment, because the indictment did not state "the circumstances under which the words were spoken by which the *attempt* is charged to have been made; *Held*, that this was not required; and that in indictments which charge statutory offences it is not only sufficient to use the words of the statute, but it was necessary to do so, or at least to use words of equivalent import. *Held further*, that the offence defined in the statute—*The Code*, §1113—is the attempt to destroy the reputation of an innocent woman, and when the indictment is for attempting to commit an offence, an exactness as great as in one which charges the offence itself is not essential.

(*State* v. *McDaniel*, 87 N. C., 803; *State* v. *Liles*, 78 N. C., 496; *State* v. *Aldridge*, 86 N. C., 680, cited and approved).

INDICTMENT tried at Fall Term, 1884, of the Superior Court of MOORE county, before *Shepherd, Judge.*

The case is sufficiently stated in the opinion of the court.

After conviction the defendant moved in arrest of judgment. Motion overruled. Judgment. Appeal by defendant.

Attorney-General, for the State.

Mr. J. W. Hinsdale, for the defendant.

ASHE, J. This was an indictment tried before *Shepherd, Judge*, at the Fall Term, 1884, of Moore Superior Court.

The defendant was indicted under the statute—*The Code*, §1113—for attempt to destroy the reputation of one V. F. Fry, an innocent woman, by charging her with incontinency. The indictment upon which defendant was tried is as follows, to-wit: "The jurors upon their oath present, that John A. McIntosh, late of said county of Moore, on the 1st day of January, 1884, with force and arms, at and in the county of Moore, unlawfully, maliciously and wantonly contriving, attempting and intending, to vilify and defame and to destroy the reputation of one V. F.

Fry, an innocent woman, and to injure her, the said V. F. Fry, did falsely, maliciously and wantonly say that he, the said John A. McIntosh, had had sexual intercourse with the said V. F. Fry, to the great damage of the said V. F. Fry, and against the form of the statute, &c."

The jury found the defendant guilty. The defendant moved in arrest of judgment, which was overruled by the court and judgment pronounced, from which the defendant appealed.

The ground assigned by the defendant's counsel for the arrest of judgment, is that the bill of indictment is defective in not stating the circumstances under which the words were spoken, by which the attempt is charged to have been made to destroy the reputation of the woman.

We do not concur with the view of the indictment taken by the defendant's counsel. We are of the opinion that there is no ground for arresting the judgment. The crime charged in the indictment is a statutory offence. The statute reads, "if any person shall attempt in a wanton and malicious manner, to destroy the reputation of an innocent woman, by words written or spoken, which amount to a charge of incontinency, every person so offending shall be guilty of a misdemeanor and fined or imprisoned at the discretion of the court."

The offence defined by the statute consists, not in the slander of a woman by falsely charging her with incontinency, but in the attempt to destroy the reputation of an innocent woman. *State* v. *McDaniel*, 84 N. C., 803.

The indictment follows the words of the statute, and it is well established as a general rule, that in indictments for offences created by statute, it is not only sufficient to follow the words of the statute, but it is necessary to do so, or at least to use words of equivalent import, otherwise the indictment will be defective. Bishop, in volume 1 of his work on Criminal Procedure, thus lays down the rule: "When the offence is purely statutory, having no relation to the common law—when, in other words, the statute specifically sets out what acts shall constitute the offence,

it is, as a general rule, sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion of the matter." And, in *State* v. *Liles*, 78 N. C., 496, it is stated, at the end of the opinion, that it is a well settled general rule, that in an indictment for an offence created by statute, it is sufficient to describe the offence in the words of the statute. To the same effect is *Pogue* v. *The State*, 8 Ohio State, 229; *Howell* v. *Commonwealth*, 5 Grat., 664; *State* v. *Casador*, 1 Nott & McC., 91; *State* v. *Gove*, 34 N. H., 510.

In *Rex* v *Erle*, 2 Lewin, 133, which was an indictment under the English Statute providing certain punishment for any one who should "stab, cut or wound any person with intent to maim," &c., it was held by Coleridge, Judge, not to be necessary in an indictment under that statute to set forth with what instrument the wound was inflicted. It was said that the indictment followed the words of the statute, and that was sufficient, and whether the instrument used was such as was calculated to produce the injury complained of was matter of evidence.

And in *State* v. *Ladd*, 2 Swan (Tenn.), 226, which was an indictment for "unlawfully and maliciously shooting a person," under a statute of the State of Tennessee, it was held that it was not necessary to describe the weapon, the wound that was inflicted or the circumstances attending the act; but it was sufficient for the indictment to charge that the accused "did unlawfully and maliciously shoot," &c.

If the Legislature had made it an indictable offence simply to slander a woman, there might possibly be some force in the position taken by the defendant's counsel, but it must be borne in mind that the offence enacted by the statute is the *attempt* to destroy the reputation of an innocent woman, by the means mentioned in the statute, to-wit—by *charging her with incontinency*, and there is a marked distinction, recognized by the authorities, between charging a crime, and charging the attempt to commit a crime. *Wharton* lays it down that in indictments for attempt to

commit crimes in themselves indictable, it is not necessary to observe the same particularity as is required in indictments for the commission of the crime itself. *Whar. Cr. Law*, 292 and 1282.

In *Rex* v. *Higgins*, 2 East, 5, it was held that in an indictment for attempting to commit an offence, it is not necessary to maintain an exactness as great as that which is essential in an indictment for the offence itself. And, in *People* v. *Bush*, 4 Hill, 133, the general principle was laid down, "that in cases of indictments for attempts, it was not necessary to point out the specific means by which the attempt was consummated." That refers to those cases where the means are not mentioned in the statute, but if they are, as in this case, of course those means must be pointed out by following the words of the statute, as has been done in this indictment. In the case of *State* v. *McDaniel*, *supra*, and *State* v. *Aldridge*, 86 N. C., 680, the indictments were similar in form to that under consideration, and were sustained by the Court.

We are of opinion that it was sufficient for the indictment to follow the words of the statute. That by so doing it expressed the charge against the defendant in a *plain, intelligible* and *explicit manner,* and sufficient matter appears to enable the Court to proceed to judgment, and when that is so, the judgment must not be arrested.

There is no error. Let this be certified to the Superior Court of Moore county, that the case may be proceeded with according to law.

No error. Affirmed.

STATE v. R. C. WHITENER.

Indictment for Injury to a Dwelling House.

The Code, sec. 1062, which makes an injury to a house indictable, does not embrace the case of injury to a building by a lessee during the continuance of his term.

(*State* v. *Mason*, 13 Ired., 341, cited and approved).

This was an INDICTMENT, tried before *Avery, Judge*, at Spring Term, 1885, of BURKE Superior Court.

The defendant was charged with an injury to a house under section 1062 of *The Code*.

It was in evidence for the State, and admitted by the defendant, that he had been a tenant from year to year of Mrs. M. R. Caldwell, for four years prior to the first day of January, 1885, and that he removed the sash from the windows of the house occupied by him on the premises leased to him by her in December 1884. That the sash were fastened into the windows by a strip like that ordinarily used in fastening the sash into a window. That said strips were held by shingle nails, driven about half way into the wood, and that defendant forced out the nails, took off the strips and removed the sash from the premises in December, 1884, without the consent of Mrs. Caldwell. The defendant proposed to prove that he borrowed the sash from his brother about two years before he removed them. That he took the sash out when he left the premises, and hauled them away in a wagon with his household and kitchen furniture, and subsequently returned them to his brother, who had loaned them to him, and that there were no sash in the windows when he took possession of the premises.

The solicitor objected to the evidence, upon the ground that it was not material, was incompetent, and would not, if true, make out a sufficient defence for the defendant.

The Court sustained the objection, and the defendant excepted. There was a verdict of guilty, and judgment against the defendant, from which he appealed.

Attorney-General, for the State.
Mr. S. J. Erwin, for the defendant.

ASHE, J. (after stating the facts). There is error. The case of *State* v. *Mason,* 13 Ired., 341, is decisive of this case. It was there held that in an indictment, that under the statute of 1846-'7, ch. 70, for injury to a dwelling house, of which a lessee, his time yet unexpired, has the actual possession, the indictment, if it can lie at all, must state the property to be in the lessee. But the act does not embrace the case of destruction or damage to buildings, &c., by the owner himself, and in law the lessee is the owner, during the continuance of his term. The act of 1846-'7, ch. 70, is substantially and almost literally the same with the section 1062 of *The Code,* under which the defendant is indicted. He was the lessee of Mrs. Caldwell, and his lease at the time of the removal of the sash was unexpired. The case falls directly within the decision of *State* v. *Mason.*

There was error. Let this be certified to the Superior Court of Burke that a *venire de novo* may be awarded the defendant.

Error. Reversed.

STATE v. LOT DEBERRY.

Evidence—Joining Issue.

1. Where the prisoner, being in jail on a criminal charge, told a party to see the prosecutor and find out if he would consent that the defendant receive 39 lashes and be discharged; *Held*, that such message is relevant and admissible in evidence.
2. There is no necessity in a prosecution, for the record to show a joinder of issue by the State to prisoner's plea of not guilty.

(*State* v. *Lamon*, 3 Hawks, 175, and *State* v. *Christmas*, 4 Dev. & Bat., 410, cited and approved).

INDICTMENT for larceny, tried before *Philips*, *Judge*, and a jury, at Spring Term, 1884, of ANSON Superior Court.

There was a verdict of guilty, and from the judgment pronounced thereon the prisoner appealed.

Attorney-General, for the State.
Messrs. Little & Parsons, for the defendant.

SMITH, C. J. The defendant was tried and convicted upon a charge of stealing money from one Henry Mensing, in whose service he was employed.

The prosecutor testified that returning from his stable, where he had gone to feed his horse, on Sunday morning, to the front door of his store, he saw, through a broken pane of glass, the defendant, then standing at the money-drawer behind the counter, take from it a tin-cup, wherein he had left $7.50, empty the contents in his left hand and put the money in his pocket. Witness called out to him to leave it there and he returned to the cup all but $1.50 of the money. Both the front and rear doors had been locked, but witness found the last open through which the prisoner had entered, and the lock broken.

The jailor was introduced for the defendant and said that he had searched the defendant and found no money on his person.

He was then interrogated as to any message sent by the defendant, while in confinement, to the prosecutor; objection was made and overruled, and thereupon the witness answered that the defendant "asked me to see Mensing and find out if he would allow the defendant to take 39 lashes and turn him loose, adding that he had rather do this than stay in jail."

The defendant was examined on his own behalf, and denied taking the money or that he was in the store for any unlawful purpose.

The State thereupon, upon inquiry, elicited the same evidence of the message, as before testified to, which was also received after objection. The exceptions to the admission of this evidence, nearly one and the same, are alone brought up for consideration and review.

No ground is assigned in the record for the rejection of this proof, and it is not suggested that the message was not entirely free and voluntary.

The argument here is directed to its alleged irrelevancy and tendency to mislead and prejudice the jury in passing upon the guilt of the accused.

The declaration may be but an expression of impatience at confinement in the prison, and of a preference for corporal chastisement, if followed by enlargement. But it seems to indicate more than this, a desire to suffer present punishment for the offence in the proposed form, if by so doing the defendant can escape that which he fears to be in store for him; and underneath lies the consciousness of guilt. It was proper for the jury to hear the declaration and give it such weight as it was fairly entitled to, in connection with the other proof against him.

Its value was for the jury to determine; its competency can admit of no serious doubt. In examining the record, it does not show the joining of issue or, as it is called, the entry of a *similiter* by the State; but this is immaterial, as ruled in *State* v.

Lamon, 3 Hawks, 175, and *State* v. *Christmas*, 4 D. & B., 410.

There is no error, and this will be certified that the court may proceed to judgment.

No error. Affirmed.

STATE v. JOSEPH R. DEAL.

Injuring Stock—The Code, Section 1003.

1. In an indictment for injuring stock under section 1003 of *The Code*, if the State fails to prove that the injury was inflicted in an enclosure not surrounded by a lawful fence, the defendant must be acquitted.
2. An indictment for such offence must charge that the cattle abused or killed were the property of some one; the abusing or killing must be charged to have been wilfully and unlawfully done, and while the animal was in an enclosure not surrounded by a lawful fence.
3. Where the words of a statute are descriptive of an offence, an indictment under the statute must follow the words of the statute.

(*State* v. *Lisle*, 78 N. C., 496, cited and approved).

This was an INDICTMENT against the defendant, tried at Spring Term, 1885, of BURKE Superior Court, before *Avery, Judge.*

The defendant was charged with injuring, abusing and killing a cow, the property of Dulena Moody, in an enclosure not surrounded by a lawful fence, in violation of section 1003 of *The Code.*

The prosecutrix testified that her cow was shot on the side and shoulder and badly injured on the 6th day of January, 1884; that the cow did not give any milk for a month afterwards, and that she had given two gallons a day previous to that time.

One James Moody, a witness for the State, testified that defendant told him on the evening of January 6th, 1884, that he had shot the prosecutrix's cow in his field because she got in

his wheat. But on cross-examination the witness said, in reply to a question by defendant's counsel, that the defendant did not say where he shot the cow.

Both witnesses testified that the fence around the field referred to by the defendant was not five feet high.

The defendant's counsel, among other instructions asked, requested the Court to charge the jury that they could not find the defendant guilty upon the testimony.

The instruction was refused, and the defendant excepted.

The jury found the defendant guilty, and the Court pronounced judgment against him, from which he appealed.

Attorney General, for the State.
Mr. S. J. Erwin, for the defendant.

ASHE, J. (after stating the facts). We are of the opinion the instruction asked by the defendant should have been given to the jury, and it was error in the Court to refuse it.

The defendant is indicted under section 1003 of *The Code*, which reads as follows: "If any person shall wilfully and unlawfully kill or abuse any horse, mule, hog, sheep or other cattle, the property of another, in any enclosure not surrounded by a lawful fence, such person shall be guilty of a misdemeanor and fined and imprisoned at the discretion of the Court."

In an indictment under a statute, where the words of the statute are *descriptive of the offence*, the indictment should follow its language and expressly charge the described offence so as to bring it within all the material words of the statute. *State* v. *Liles*, 78 N. C., 469. And "every affirmative allegation of an indictment material to the constitution of the offence, must be made good by the prosecutor"—1 *Whar. Cr. Law*, 592—and if the offence be well laid, but there be a material variance between the offence as laid, and the evidence to support it, the defendant must be acquitted. *Archbold Cr. Plead.*, 170.

In the view we take of the case, it can make no material difference whether the indictment is good or bad. If bad, the judgment should be arrested, and if good, the defendant is entitled to a new trial.

The descriptive elements of the section under which the indictment is preferred, all of which are necessary to constitute the criminal offence intended to be created by the Legislature, are that the cattle abused or killed must be alleged to be the property of some one, the abusing or killing must be charged to be done wilfully and unlawfully, and while the animal is in an enclosure not surrounded by a lawful fence; these are all essential averments in the indictment, and must be proved as laid. If either of them should be omitted in the indictment, it will be bad, and the judgment should be arrested; and if stated, and the proof offered by the State fails to support each and all of them by evidence, the prosecution must fail, and the defendant be entitled to an acquittal.

In this case there was no evidence that the cow was shot in the field of the defendant, which was necessary to establish the guilt of the defendant under the statute. The State failed to establish by proof, one of the essential constituents of the offence, and upon that ground the defendant is entitled to a new trial, conceding that the indictment was not defective.

There was error. Let this be certified to the Superior Court of Burke county, to the end that a *venire de novo* may be awarded the defendant.

Error. Reversed.

STATE v. TUCKER HORNE.

No Evidence—Assault.

1. Where the Judge below is requested to charge that there is no evidence of a fact in issue, the evidence most favorable to the adverse party must be considered alone, and if it is any evidence at all to establish the fact, the charge must be refused.
2. Where a person is obstructed in the exercise of a legal right, or prevented from doing what he proposed to do, and may lawfully do, by a display of physical force, as in brandishing a deadly weapon with violent threats of using it, and this in such proximity as admits of an effectual execution of the menace, in consequence of which such person desists, an assault is consummated.

(*State* v. *Myerfield*, Phil. 108; *State* v. *Davis*, 1 Ired., 125; *State* v. *Morgan*, 3 Ired., 186; *State* v. *Hampton*, 63 N. C., 13; *State* v. *Church*, *Ibid.*, 15, cited and approved).

This was an INDICTMENT for assault, tried before *Philips*, *Judge*, and a jury, at Spring Term, 1884, of RICHMOND Superior Court.

There was a verdict of guilty, and from the judgment thereon, the defendant appealed.

The facts appear in the opinion.

Attorney General, for the State.

Messrs. C. W. Tillett and *W. A. Guthrie*, for the defendant.

SMITH, C. J. The defendant is charged with an assault upon the person of W. F. Shaukle, and found guilty on his trial before the jury.

The testimony of the prosecutor was in substance as follows:

Witness had some time before bought a cow from the defendant, and the cow was brought by two persons, whom he had sent after her, to his store, and with a rope over her horns, tied to a post on the side of the road opposite to the plaintiff's store. The witness went out of his store towards the place where the cow had been secured, and found that the defendant had disengaged the rope, and, backing himself, was by kicks driving the cow off.

Defendant then went to his crib, got his gun and with one barrel cocked and his finger on the trigger and the gun held in his arms, but not pointed towards the witness, said if any one laid hands on the cow, he would blow his brains out. Witness asked, "what do you mean?" and was answered, "I mean to die and go to hell in a few minutes." Witness made no attempt, and desisted in consequence of this action and these threats, and re-entered his store. The defendant, while driving the cow, was face to face with the witness, and seemed to think that witness in going after the rope left on the post, intended to take and tie the cow, but witness had no such intention after these demonstrations.

The court refused to charge, as requested, that upon the evidence the defendant was not guilty and gave these instructions:

1. If the defendant was in possession of the cow, and made the threats testified to, but made no offer or attempt to use the gun, though he had it in his possession, he would not be guilty.

2. If the defendant used insulting language to Shankle after he had unfastened the cow, with the gun on his arm, but did not present it or offer to use it, and did not put the prosecutor in fear by his action and threats and cause him to change his course, he would not be guilty.

3. If Shankle went out, after defendant had released the cow, to a place where he had a right to be, and the defendant stood face to face with him and used the threatening and insulting language, having his gun loaded, with one barrel cocked and the finger on the trigger, and the defendant, by his threats and actions put Shankle in fear and caused him to leave sooner than he would otherwise have done, he would be guilty of an assault, though he did not level the gun at the prosecutor.

There was other testimony which we have not reproduced because the exception pressed before us is, that in no aspect of the evidence was an assault committed, and this requires the presentation of the case upon the testimony most favorable to the State. If, upon any state of the facts, the jury were warranted in finding an assault, there was no error in finding the first instruction affirmatively.

Do the facts, as represented in the testimony of the prosecutor, constitute a criminal assault?

"It is difficult in practice," says Pearson, C. J., in *State* v. *Myerfield*, Phil., 108, reiterating the language of Gaston, J., in *State* v. *Davis*, 1 Ired., 125, "to draw the precise lines which separate violence menaced, from violence begun to be executed, for not until these lines are passed can there be an assault."

In this case the defendant was with a pistol in his hand, sometimes bearing upon the prosecutor and sometimes not, and swearing that if the latter came in he would shoot him. Meanwhile the prosecutor was walking to and fro in the street opposite the defendant's grocery, threatening to whip the defendant if he came out. The Court held that the use of the deadly weapon in brandishing it about, and occasionally presenting it at the defendant, although qualified with a condition which he had not the right to impose, was not by the explanatory words divested of its character as a criminal offence and "that an offer to strike with a deadly weapon cannot be thus explained."

In *State* v. *Morgan*, 3 Ired., 186, one Cantwell, a constable, had, under an execution, seized a gun of the defendant's, and had it in possession in his yard when the latter came up with an uplifted axe in his hands and, within striking distance, demanded its return or he would strike. The gun was not delivered up, but a parley ensued and an arrangement was made. This was declared to be an attack begun, and it was not the less so because not carried into complete execution, the principle being, that such a use of a deadly weapon to enforce performance of some required act, when the act is done, is itself an assault.

In *State* v. *Hampton*, 63 N. C., 13, the prosecutor was passing down the steps of the court-house, when he encountered the defendant, who, turning himself about within reach and with his right hand clenched, his right arm bent at his side, but not drawn back, said, "I have a great mind to hit you." He had previously threatened to cow-hide the prisoner if the crowd would go with him. In consequence, the prosecutor turned away and passed out

by another doorway. This violent obstruction offered to the prosecutor's passing out, compelling him to seek other means of egress from the building, was held to be an assault.

In *State* v. *Church, Ibid.*, 15, the facts were these: The defendant and some others, on a day of public worship, were sitting outside the church some 6 or 7 steps distant, when the prosecutor appeared. The defendant spoke to him thus: "We have no use for you in this company—go back, you shall not come here." The prosecutor stopped, when defendant rose to his feet and said, addressing the prosecutor, "I have a pistol," at the same time placing his hand on it, where belted around his body. The prosecutor retired slowly, followed by the defendant, not over ten steps apart, who urged him to go or he would shoot him, and drew the pistol from its scabbard, but did not cock it nor present it towards the prosecutor.

The Court below held this to be no assault, but this ruling was reversed on the appeal, and Reade, J., for the Court, says: "An offer of violence is an assault, even if it be accompanied with a declaration that violence will be forborne upon a condition, which the actor had no right to impose."

The rule deducible from these adjudications seems to be, that where a person is obstructed in the exercise of a legal right, or prevented from doing what he proposed to do, and may lawfully do, by a display of over-awing physical force, as in the brandishing of deadly weapons with violent threats of using them, and this in such proximity as admits of an effectual execution of the menace, in consequence of which such person is intimidated and desists, these acts constitute an assault.

The case before us may not possess all the constituent elements found in those referred to, yet we think it may be fairly brought within the scope of the general principle which they establish. The prosecutor, if we accept his version of the matter, was the owner and in lawful possession of the cow, she being secured near the store where he was present. The defendant removed the fastening, and was, while backing himself, driving the cow

away, while, with his face to the prosecutor, the gun in his hand cocked and one finger upon the trigger, he declared to the prosecutor his intent to blow out the brains of any one, who interfered and laid hands upon the cow. In answer to an inquiry as to what he meant, he says to the prosecutor in words of equal violence and indicating a murderous intent upon himself in carrying out his purpose, "I mean to die and go to hell in a few minutes." In consequence of these demonstrations of menaced violence if interrupted, the prosecutor forbore to pursue and take his cow, returning into his store. The cow was then carried away.

This, we think, is more than violence threatened, it is *violence begun,* and made successful by the over-awing effect produced on the mind of the prosecutor. The gun, though not pointed, was held in a position admitting of instant use, and the purpose to use it, even to the death, manifested by both language and conduct, and thereby the prosecutor was prevented from asserting his right and regaining his possession.

As the jury may have taken this view of the testimony, it would have been erroneous to tell them if they believed the evidence, that is, the testimony of any of the witnesses, the defendant was not guilty.

We see no error in the direction as to what facts, if found by the jury, would constitute the offence charged.

There is no error, and this will be certified to the end that the court below proceed to judgment.

No error. Affirmed.

STATE v. NATHAN RAY.

Removal of Crop— Variance Between Allegations and Proof.

1. Indictment charged defendant with the removal of part of a crop made on the land under a lease executed on 1st November, 1883, and running one year. The proof was that defendant removed part of the crop made in 1883, under a lease made in March, 1883; *Held*, that the offence proved is different from that charged in the indictment.
2. It is not sufficient to prove an offence of like kind, and treat that as the offence charged; when the facts essential to constitute the offence are numerous, they must be alleged with particularity, and proved as alleged.
3. The purpose of the indictment is to inform the accused with certainty and in an intelligent manner of the offence charged against him.

INDICTMENT for larceny, tried at January Term, 1885, of the Superior Court for CUMBERLAND county, before *MacRae, Judge.*

The bill of indictment charged the defendant, as tenant, with the removal of part of crop produced on the land in 1884, under a lease made November 1st, 1883, for one year.

The jury rendered a special verdict, in which they found that the crop removed was produced on the land under a lease made in March, 1883, for that year.

His Honor being of opinion upon the facts found that defendant was not guilty, so adjudged. From this judgment the solicitor on behalf of the State, appealed.

Attorney General, for the State.
Mr. W. A. Guthrie, for the defendant.

MERRIMON, J. It is very clear that the Court held properly that the proof did not support the charge contained in the indictment.

It appeared by the special verdict, that some cotton produced on the land under a lease made in March, 1883, for the crop season of that year, was removed by the tenant, the defendant,

without notice to the land-owner, and before his rents had all been paid and all liens upon the crop in his favor had been discharged.

The charge in the indictment is, that the defendant, as tenant, so removed cotton produced on the land in the year 1884, under a lease made on the first day of November, 1883, and continuing for a year next thereafter. So that the offence proved is a different one, of the same kind, from that charged. The *probata* fails to support the *allegata*. The well settled rule is that the proof, in order to convict, must, in all material respects support and go to prove the allegation in the indictment.

It is not sufficient in indictments for offences like that charged, to prove an offence of like kind, and treat that as proof of the one charged, as is sometimes done in cases of very simple misdemeanors, that in pleading are alleged in very general terms. In the case before us, and like cases, the very offence alleged must be proven, because the facts essential to constitute it are numerous, and must be alleged with particularity, and the defendant is called upon to defend himself against that charge and not another. It would be unfair to require him to defend himself against a charge that he may hear of for the first time in the progress of the trial, made up of a variety of alleged facts that he ought to have reasonable opportunity to refute. The very purpose of the indictment is to inform the accused with certainty and in an intelligent manner, of the offence charged against him. The justice of the law not only requires that he shall be thus informed, but it requires as well, that he shall have reasonable opportunity to prepare to defend himself against the charge.

The judgment must be affirmed, and to that end let this opinion be certified to the Superior Court according to law.

No error. Affirmed.

STATE v. THOMAS MCNEILL.

Indictment—Murder—Cooling Time—Character of Deceased.

1. The doctrine of cooling time only applies when there has been legal provocation.
2. No words, however insulting, and no actions or gestures expressive of contempt, unaccompanied by indignity to the person, by a battery, or at least an assault, amount to a legal provocation so as to mitigate a slaying from murder to manslaughter.
3. Where a violent altercation in words had taken place between the prisoner and the deceased, and, after being separated for between five and ten minutes, they again came together, and, after angry and insulting words passed between them, prisoner shot the deceased, the killing is murder and not manslaughter.
4. The court is not bound to give an instruction in the words or in the order in which it is asked; it is sufficient if it is given in substance and in a proper connection in the charge.
5. The *general* rule is that evidence of the general reputation of the deceased as a violent and dangerous man is not admissible; to this rule there is a well defined exception that such evidence is admissible, when there is evidence tending to show that the killing may have been done in self-defence, or when the evidence is wholly circumstantial and the character of the transaction is in doubt. Wherefore there was no error in allowing the jury to consider the evidence in determining whether the prisoner acted in self-defence, but not on the question of manslaughter.
6. There was evidence tending to show that the prisoner was guilty of murder, and it was not error in the court to submit the case to the jury in that aspect.

(*State* v. *Merrill*, 2 Dev., 269; *State* v. *Barfield*, 8 Ired., 344; *State* v. *Carter*, 76 N. C., 20; *State* v. *Turpin*, 77 N. C., 473; *State* v. *Hogue*, 6 Jones, 381; *State* v. *Floyd*, 6 Jones, 392, cited and approved).

INDICTMENT for murder, tried at January Term, 1885, of the Superior Court of CUMBERLAND county, before *MacRae, Judge.*

The facts were as follows: The prisoner and deceased, who were half-brothers, were at a church festival at the house of Anthony Faulk on the 14th August, 1884. The house was situated in a field of 7 or 8 acres, with two lanes leading from it in different directions. The deceased came down inside one lane:

the prisoner and several others were standing on the outside. Deceased got on the fence, when the prisoner said, "where are you going, you G—d d—d son of a b—h?" Deceased got off the fence and said, "Tom, don't cuss me for that; I'm your brother." Prisoner repeated it. Deceased got off the fence and said, "If it wasn't for that, I've got a small little stick, I'd burst your head open." Deceased pulled up a little stake in the ground (they were then on same side of fence), and stepped back and said, "If you cuss me for that I'll burst you open." Geo. McFadyen got over the fence and told them to have no fuss. Prisoner said, "I'll shoot you," and pulled his pistol not quite out of his pocket. George McFadyen got between them, and pacified them, and they said they were done and walked off. The prisoner went into the house. Between five and ten minutes after the above occurrence, the deceased came out of the house with other persons and stopped in the lane between 25 and 40 yards from the house; he had a pocket-knife in his hand, picking his teeth, and was speaking of the fuss with the prisoner, and said he would have cut the prisoner, or would have whipped the prisoner, if he had not been his brother. Just then the prisoner came up and asked in an angry way what the deceased said. Deceased said, "I told you to stand off of me, Tom," and shoved prisoner back. One witness swore that the prisoner then said, "I'll shoot you, God damn you," and instantly fired. The deceased fell and died instantly. Other witnesses testified as to the shooting, but did not see the pushing or hear the words.

It was in evidence that the deceased was an older and stouter man than the prisoner and a better man in a fight, and that his reputation was that of a violent man. The killing occurred about three hours before day. Next morning, about 8 o'clock, the body was lying where deceased had fallen, and under the elbow of deceased his pocket-knife was found, open.

The prisoner's counsel asked the court to instruct the jury as follows:

1. "If the jury believe from the evidence that it was only five or ten minutes before the killing that there was an altercation between the prisoner and the deceased, in which angry words were used, and there was a demonstration of weapons, the deceased having picked up a stick, and the prisoner having attempted to draw his pistol, and both threatening to use their respective weapons on each other; then there was not sufficient cooling time to make the killing murder, but it would at most be only manslaughter.

2. If the deceased, at the time he shoved the prisoner, immediately before the killing, knew the prisoner was armed, and himself held an open knife in his hand, and was a more powerful man physically than the prisoner, then there was not such a disparity between them as would make the killing murder, but only manslaughter."

These instructions were refused by the Court.

3. "If at the time the prisoner shot the deceased he had reasonable cause to apprehend that the deceased was about to use his knife upon him, or shoved him in a manner which might reasonably have caused him to believe that he was about to receive some great bodily harm, then he would have had the right to shoot in self defence."

The Court, after instructing the jury as to some general legal principles as to which there is no exception, gave the third instruction as asked, and proceeded as follows:

"And it is in this view of the case that you may consider the testimony which has been offered you in regard to the relative size and strength of the prisoner and the deceased, as also the character for violence or otherwise of the deceased. If prisoner and deceased had had a previous difficulty and had made peace, and the prisoner soon afterwards, being armed with a pistol, sought the deceased for the purpose of getting into another difficulty with him, or of attacking him, and used words to him calculated and intended to bring on a blow, and upon being shoved by deceased immediately fired upon him and killed him, there

would be no circumstance of excuse or mitigation, and your verdict should be guilty of murder.

"There can be no manslaughter except upon legal provocation, and no words, however abusive or insulting, can amount to a legal provocation; it must be a blow, or at least an attempt or offer to strike, and the fatal blow must have been stricken upon this legal provocation, before cooling time has enabled the one to regain possession of his faculties of self-control. I feel bound to tell you that there is, according to the evidence, no such connection between the first difficulty and the subsequent killing as would of itself reduce the crime from murder to manslaughter, for if there had been legal provocation in the first difficulty, there had been a sufficient time to enable the prisoner to cool. If, however, the prisoner and deceased met, not by the seeking of the prisoner, and the prisoner heard the deceased talking about their former difficulty and cursed him, and thereupon the deceased, with a knife in his hand, seen by the prisoner, violently shoved the prisoner back, and the prisoner immediately drew his pistol, fired upon and killed deceased, this would not be murder, but the law would have respect to the passions of the prisoner and mitigate the crime from murder to manslaughter."

The jury returned their verdict, guilty of murder.

The prisoner excepted to the charge of the Court and moved for a new trial on grounds which are sufficiently stated and noticed in the opinion of the Court.

Rule for new trial discharged and judgment pronounced by the Court according to law.

Appeal by the prisoner.

Attorney General, for the State.

Messrs. Z. B. Newton and *W. A. Guthrie*, for the defendant.

MERRIMON, J. The Court very properly declined to give the jury the first special instruction prayed for by the prisoner. It was founded upon the groundless supposition that the deceased

had given him legal provocation in the first altercation between them. This he did not do, and hence, no question as to the cooling time was properly presented on the trial.

It appears from the testimony of Andrew Jones, one of the prisoner's own witnesses, and the one who testified most strongly for him, "that he was present at the commencement of the fray; deceased came down inside the lane; witness and several others and the prisoner were standing outside; deceased got on the fence; prisoner said, "where are you going, you G—d d——d son of a b——h;" deceased got off the fence and said, "Tom don't curse me for that; I'm your brother;" prisoner repeated it; deceased got down off the fence and said, "if it wasn't for that I've got a small little stick, I'd burst your heard open;" deceased pulled up a little stake in the ground, (they were now on the same side of the fence), and sorter stepped back and said, "if you curse me for that I'll burst you open." George McFadyen got over the fence and told them to have no fuss; prisoner said, "I'll shoot you," and pulled his pistol not quite out of his pocket; George carried deceased off; prisoner followed them, and returned to where they were standing."

If this evidence be accepted as true, it proves that the prisoner, without provocation, so far as appears, cursed the deceased in the most violent and insulting manner. The latter, at first, remonstrated with him in mild terms, reminding him of their close relationship, but heedless of this, he repeated the words of insult. The deceased then got a small stick and threatened to use it, if he cursed him. He did not strike, nor offer to strike the prisoner; his threat was accompanied with a condition, which, taken in connection with what he had just before said, plainly showed that he did not intend to strike the prisoner, unless he should further provoke him. The language of the prisoner was much the more insulting, and offered without any apparent cause; that of the deceased was likewise offensive, but he did not attempt or offer to strike the prisoner, and therefore gave him no legal provocation. Words of reproach and insult,

however grievous, do not make legal provocation, nor do indecent or provoking actions or gestures, expressive of contempt and reproach, unless accompanied with indignity to the person, as by a battery, or an assault at least. *State* v. *Merrill,* 2 Dev., 269; *State* v. *Barfield,* 8 Ired., 344; *State* v. *Carter,* 76 N. C., 20; *Foster's Criminal Law,* 290.

In this and like cases, the prisoner cannot successfully insist that he slew the deceased in the heat of blood, engendered in an altercation between them so recently before the slaying as that cooling-time had not intervened, unless it appear in such altercation that the parties fought, or that the deceased had at least given the prisoner legal provocation in some way. In the absence of such provocation, there is, in the eye of the law, no adequate cause for such furious state of mind of the prisoner and excessive heat of blood, as will mitigate the crime from murder to manslaughter. In such a case, there is no occasion for cooling time. When two persons quarrel, and each offers the other words of insult only, and they separate, and one shortly afterwards follows and slays the other with a deadly weapon, as a pistol, the slayer cannot be allowed to mitigate his offence by saying that he slew the deceased in the fury of passion and the heat of blood, occasioned by the words of insult so spoken to him.

The court is not bound to give a special instruction prayed for, the substance of which the prisoner may be entitled to have, in the very terms in which it is expressed, nor at the time, nor in the order it may be prayed for. If the substance of it shall be given in the course of the charge to the jury this will be sufficient. Indeed, in some cases, such instructions should not be given specifically. To do so, might give, or tend to give, undue prominence and weight to particular views of the evidence, or to particular facts, in the minds of the jury. The object of the court should be, in all cases, to direct the attention of the jury to every material aspect of the case, giving undue prominence to none, and to state clearly the law bearing upon each. Great injus-

tice might be done by giving a special prominence to particular facts, or views of the evidence.

It may be questioned, whether, in view of all the evidence and the bloody purpose manifested by him, the prisoner was entitled to have the benefit of the substance of the second special instruction he prayed for; but, if it be granted that he was, we think the court gave him the full benefit of it. In presenting the case to the jury in the aspect of manslaughter, the court said, "If, however, the prisoner and deceased met, not by the seeking of the prisoner, and the prisoner heard deceased talking about their former difficulty, and cursed him, and thereupon the deceased, with a knife in his hand, seen by the prisoner, violently shoved the prisoner back, and prisoner immediately drew his pistol, fired upon and killed deceased, this would not be murder, but the law would have respect to the passions of the prisoner, and mitigate the crime from murder to manslaughter," &c.

The view thus presented to the jury embraced every material fact that tended to mitigate the offence from murder to manslaughter; the court told the jury, in effect, that if they should find the facts to be as supposed, then the offence was but manslaughter, although the prisoner slew the deceased with a pistol, thus putting out of view any disparity between the slayer and the slain. The purpose of the instruction was to relieve the prisoner from the weight of the fact that he was armed with and used a very deadly weapon, a pistol. This the court did in full measure.

The exception based upon the ground that the Court instructed the jury that they might consider the relative size of the prisoner and the deceased each to the other, and the character of the latter in respect of violence, in determining whether or not the prisoner acted in self-defence, but did not extend this instruction so as to embrace the aspect of manslaughter, cannot be sustained. The size and character of the deceased, in the respect of violence, might tend to prove that the prisoner fought in self-defence; but this consideration could not tend to show that he slew the

deceased in a tempest of passion, or the heat of blood. Manslaughter, in cases like this, is where the killing is sudden and in the heat of blood and furious passion, that suspends the reason. The prisoner has no time to think of the size of his adversary, or his character in respect of violence. Manslaughter excludes deliberation, preparation and orderly purpose. In *State* v. *Turpin*, 77 N. C., 473, the prisoner offered to prove the general character of the deceased as a violent and dangerous fighting man, and the question considered was, whether or not this evidence, for this purpose, was admissible on the trial? In that case Justice Bynum said, "The *general* rule prevailing in most of the American States is, that such evidence is not admissible, and in this State such a general rule is well established." He cites several cases and adds: "But these cases, which are cited as establishing a general rule excluding such evidence, admit that there may be exceptions to it, depending upon the peculiar circumstances of each case. And these exceptions themselves are now so well defined and established by the current of the more recent decisions, that they have assumed a *formula*, and have become a general rule subordinate to the principal rule. It is this: Evidence of the general character of the deceased as a violent and dangerous man is admissible *when there is evidence tending to show that the killing may have been done from a principle of self-preservation*, and also when the evidence is wholly circumstantial and the character of the transaction is in doubt." To the like effect is *State* v. *Hogue*, 6 Jones, 381. In *State* v. *Floyd*, 6 Jones, 392, the late Chief-Justice Pearson intimates that there may be a possible case in which the prisoner, insisting that he was guilty of manslaughter only, might show the character of the deceased in respect of violence, with a view to explain how he came to be armed with and used such a dangerous weapon as a pistol or a bowie knife, but if in any possible class of cases such evidence could be admissible, this is not one of them.

The last exception in respect to that part of the charge presenting the case to the jury in the aspect of murder, upon the

ground that there was no evidence to support it, and therefore it misled the jury, is groundless. There was evidence, and strong evidence, if the jury believed it, going to show that the prisoner, still armed with a pistol, after the first altercation followed the deceased for the wicked purpose of renewing the quarrel and killing him if he should resist. If the facts were as the jury found them to be, the prisoner is guilty of murder, done under circumstances of savage ferocity. We look in vain for a fact that mitigates a crime so unnatural and so unusual.

The prisoner has no tenable grounds of complaint of the charge of the Court to the jury; it was intelligent and just and merciful to him. We have carefully examined and find no error in the record.

Let this opinion be certified to the Superior Court of Cumberland county, with instructions to proceed further in the action according to law.

No error. Affirmed.

STATE v. REUBEN BARBEE.

Intent—Evidence of—Prayers for Instructions.

1. The law presumes that every one intends to produce the consequences that result from his acts, but this presumption is not conclusive, but only *prima facie* evidence of the intent.
2. Where the defendant was indicted under section 1100 of *The Code*, for shooting at a train, with intent to injure it, and there was evidence tending to show that he was helplessly drunk at the time, the Court properly left the question of intent to the jury, and it was for them to say whether the presumption had been rebutted.
3. The defendant only has the right to ask for special instructions before the case is given to the jury, but if after the jury have retired, the Court should recall them and instruct them further, the defendant can except if the charge is incorrect.

(*State* v. *Phifer*, 90 N. C., 721, cited and approved).

STATE *v.* BARBEE.

This was an INDICTMENT for shooting at a railroad train, tried before *Shepherd, Judge,* and a jury, at Spring Term, 1885, of DURHAM Superior Court.

There was evidence tending to show that the defendant shot at the passenger train on the North Carolina Railroad, as charged in the indictment. That shortly before the shooting his pistol was taken away from him, when he demanded it, drew his knife, and threatened to cut the person who had gotten his pistol from him. That when his pistol was restored to him he fired three times at the train, while within range of his pistol, but there was no evidence that the train was actually struck. The defendant introduced evidence tending to show that at the time he was helplessly drunk.

The defendant asked the Court to charge the jury: 1st. That there was no evidence of any intent on the part of the defendant to injure the cars, or any one on them. 2d. That in the absence of such intent, it was the duty of the jury to acquit, the intent being an ingredient of the offence. His Honor refused the first instruction, and gave the last, and charged the jury as set out in the opinion of the Court.

After the jury had retired to consider of their verdict, the defendant presented certain prayers for instruction, and requested the Court to give them to the jury, if they should ask further instructions from the Court. The jury did ask for further instructions in regard to the presumption as to the intent. The Court charged them, as set out in the opinion, but did not give the special charges asked by the defendant.

There was a verdict of guilty, and from the judgment pronounced thereon, the defendant appealed.

Attorney-General and *Batchelor & Devereux,* for the State.
Mr. E. C. Smith, for the defendant.

MERRIMON, J. The defendant is indicted for shooting "a missil, pellet, shot, and bullet at, against, and into, a certain rail-

road car, locomotive and train * * * * * with intent to injure the said car and locomotive," in violation of the statute (*The Code*, sec. 1100).

The Court refused to instruct the jury, as the defendant requested it to do, that there was no evidence of his *intent* to injure the car as charged, and he excepted.

There is not the slightest foundation for this exception. The case states that there was evidence tending to show, that "he (the defendant) was helplessly drunk," but it appears also, that after his pistol had been taken from him, he drew his knife and threatened to cut the person who had it, got possession of it again, and discharged it three times at the train, first toward the locomotive as it approached, then at the train as it passed him, then, turning, just after it passed him. A man, who could thus deport himself, certainly had capacity to have a purpose, and his act of itself indicated a design to injure the train.

Whatever evidence there may have been before the court and jury in respect to his state of intoxication, it is obvious there was evidence—some evidence—tending to show the intent charged in the indictment, and evidence that properly went to the jury with other evidence, to be weighed and passed upon by them.

The Court submitted the whole evidence to the jury, with the instruction that if "the defendant was so drunk that he did not know what he was doing, the *prima facie* case would be rebutted," and he would not be guilty. He could not reasonably ask, and the court was not authorized to say more, in view of the evidence.

Upon the question of intent, at the request of the defendant, the Court charged, "that in the absence of such intent, it is the duty of the jury to acquit, the intent being an ingredient of the offence," but the Court added, that if the defendant wilfully and intentionally discharged his pistol at the train, as it was moving within range of his pistol, and such shooting, under the circumstances, would naturally and necessarily result in injury to the train, then, "the law presumes that he intended such injury, and

it devolved upon him to rebut the *prima facie* case as to the intent."

This instruction was substantially correct. The law presumes that every man intends to produce the consequences that voluntarily result from his acts and conduct. This presumption, however, is not conclusive, it is evidence only so far as to prove a *prima facie* case in respect to the intent, and cast the burden of disproving it upon the defendant. If nothing further appeared than the shooting as described, then the jury ought to have convicted; but if there was rebutting and opposing evidence, then it was for the jury to determine whether or not the presumption was disproved. The Court thought there was evidence tending to rebut the presumption, and hence he gave the instruction as he did. He did not tell the jury that the presumption was conclusive; he told them just the contrary, and properly, that the burden was on the defendant to show that he did not have the intention attributed to and charged against him. The natural consequence of his shooting at the train within range of his pistol was to injure it in the sense of the statute, and the presumption was that he so intended, and, nothing else appearing, the jury ought to have convicted; but he offered evidence tending to rebut the presumption, and then it was the duty of the jury to determine whether or not he did successfully rebut it; they found by the verdict of guilty that he did not. *State* v. *Phifer*, 90 N. C., 721.

The defendant asked the Court to give two special instructions to the jury. One of them it gave, the other it declined to give.

After the Court gave the issue to the jury and they had retired to consider of their verdict, and had been absent some considerable time, the defendant requested the Court to give the jury, if they should ask for further instructions, several special instructions as to the intoxication of the defendant and reasonable doubt, in respect to two or three aspects of the evidence. The jury returned some time afterwards, and requested the Court to instruct them further as to the presumption of intent. The Court did

not give the special instructions prayed for by the defendant, nor make any reference to them in the presence of the jury; but in reply to their inquiry, instructed them "that if the defendant knew what he was doing, and shot at the train under such circumstances as would naturally and necessarily result in injury to the train, or some passenger, the law presumes he intended such injury." This was strictly in reply to the inquiry of the jury and was substantially correct. The Court might—perhaps ought—then, again to have told them, as it did in the charge at first given, that the presumption was not conclusive, that the defendant had the right to rebut it, and they could consider whether or not he had done so successfully; but in view of the explicit instructions it had already given, it was not bound to do so.

And, indeed, the instructions plainly indicated the right to rebut the presumption, and the effort of the defendant to do so, for the Court said, "if the defendant knew what he was doing," &c., having reference to the exculpatory evidence. It did not necessarily mislead the jury. We cannot see, and it does not appear, that it probably did. The just and circumspect Judge before whom the case was tried did not think so; if he had so believed, we are sure he would have promptly granted the motion made before him for a new trial.

The Court was not bound to give the special instructions prayed for after the issue had been given to the jury. In the order of procedure in the trial, the defendant had the right, and the reasonable opportunity, to ask the Court to give such instructions before the issue was given to the jury; after that, the Court might, in its discretion, give or decline to give them. If this were not so, a party might vexatiously prolong the trial, confuse the jury, and perhaps disappoint the ends of justice. The defendant must ask for special instructions, as of right, in apt time in the progress of the trial, else the Court may decline to give them. But if the Court shall recall the jury and instruct them further, giving special or any instructions, it must give them correctly, else a party may except for error.

There is no error. The judgment must be affirmed, and to that end let this opinion be certified to the Superior Court according to law.

No error. Affirmed.

STATE v. DRURY WARREN.

Indictment—Judgment—Power to Vacate and Re-sentence.

1. The Court has the power during the term, to correct, modify or recall an unexecuted judgment in either civil or criminal cases.
2. But where the Court adjudges that the defendant be fined and imprisoned, and the fine is paid and part of the imprisonment undergone, the Court cannot, even at the same term, recall and suspend the judgment, and at a subsequent term sentence him again for the same offence.
3. No person can be twice punished for the same offence, and the second judgment under such circumstances is void.
4. *It seems*, that with the consent of the convict, the Court may sub-divide the term of imprisonment, so that a portion of it may be suffered at one time and the residue at another.

INDICTMENT for an assault with a deadly weapon, tried before *McKoy, Judge*, and a jury, at Spring Term, 1884, of CASWELL Superior Court.

There was a verdict of guilty and His Honor, Judge McKoy, pronounced judgment, as appears in the opinion of this court.

At Fall Term, 1884, of the same court, the defendant was brought before Philips, Judge, under the circumstances as set out in the opinion of this court, and the judgment was given from which the defendant appealed.

Attorney-General, for the State.

Messrs. Graham & Ruffin, for the defendant.

SMITH, C. J. The defendant is charged in the indictment with an assault committed upon the body of W. P. Oliver, with

a deadly weapon, and upon the trial of his plea of not guilty, was convicted by the jury at Spring Term, 1884, of Caswell Superior Court. Thereupon he was sentenced to confinement for twelve months in the county jail and at once committed.

There were other indictments against the defendant, tried at the same term, in which he was acquitted, and two sent before the grand jury, one of which was found a true bill and not tried, and the other ignored. The day following the commitment, the defendant was brought into court, when the following judgment was entered in the cause.

"Upon the promise of the defendant that he will keep from getting drunk, and upon his entering into a recognizance to be of good behavior for two years, and to keep sober, the court has agreed to remit the twelve months' imprisonment.

"Therefore, it is ordered that the defendant, upon payment of the costs in the case where he is convicted, and the payment of such costs as the county would be liable for in the other indictments where he was tried, and those not disposed of, and entering into recognizance in the sum of one thousand dollars, to be a peaceable, orderly citizen and to keep the peace, and particularly to keep sober, or upon the deposite of seven hundred dollars with the clerk of the court and his individual recognizance for three hundred dollars, conditioned as above, then the judgment for twelve months' imprisonment be stricken out and judgment suspended, with directions to the clerk to issue a capias whenever he shall misbehave or get drunk. If he is made to pay the three hundred dollar bond, he is now under to keep the peace, then, three hundred dollars of the one thousand dollars recognizance is to be remitted."

The defendant then paid the costs in the several indictments, entered into the recognizance in the required amount, and deposited seven hundred dollars in money with the clerk.

During the time the clerk was directed to retain the money paid into the office, the defendant executed a deed of mortgage conveying a tract of land with condition to secure the same

ends, and the mortgage having been given, proved and registered, the money, less the clerk's commission, was repaid to the defendant.

In October, the defendant, while drunk, tore the back of the coat of a colored man, and was thereupon arrested under a capias issued by the clerk and put in jail. In a week thereafter he was released on depositing with the sheriff one thousand dollars to secure his appearance at the next ensuing term of the court.

The defendant appeared at this term and the presiding judge, construing the former action in the premises as a vacation of the sentence, and its suspension to await the defendant's observance of the conditions imposed, pronounced judgment for the re-imprisonment of the defendant for the same period of twelve months in the county jail. From this judgment the defendant appeals, and its lawfulness, under the circumstances, is presented for our determination.

Without adverting to the unusual exercise of judicial power, employed, not to repress crime, but to reform the moral habits of the convicted party; and without questioning the right of the Court, during a term, to correct, modify or recall an unexecuted judgment in a criminal, as well as in a civil case, it is manifest the defendant has undergone a portion, though an inconsiderable part, of his sentence, and has paid, as costs, a sum for which he was not liable, and the payment of which must be deemed a pecuniary fine, thus measured and ascertained. When punishment has thus been imposed and suffered, in whole or in part, can it be treated as a nullity so as to expose the offender to be again sentenced as if he had not been before, by vacating the judgment under which it was inflicted?

There must be restraint upon judical authority over judgments rendered during the term, in such cases, or the fundamental maxim *nemo debet bis puniri pro uno delicto* would be violated. Let us suppose a judgment for corporal punishment, such as formerly might here be rendered, and its prompt and full execution during a term, can the sentence be set aside and all

done under it annulled? The stripes upon the person, or the painful pressure of the stocks or pillory, with their attending humiliation, could not be effaced; nor could the officers that carry the sentence into effect be thus exposed to an action for assault and false imprisonment, at the instance of those who suffer, by an order vacating the judgment.

These results might be obviated and the *status ante quem* of the criminal restored, in case of a pecuniary fine alone imposed, by a return of the money; but they could not be, where imprisonment or other form of corporal punishment has been undergone. The subject is considered in *Ex-parte Lange*, 18 Wall., 163, cited in the argument of the appellant's counsel, wherein Mr. Justice Miller thus asks and answers the inquiry:

"If the judgment of the Court is that the convict be imprisoned four months, and he enters immediately upon the period of punishment, can the Court, after it has been fully completed, because it is still in session of the same term, vacate that judgment and render another for three or six months imprisonment, or for a fine? Not only the gross injusticce of such a proceeding, but the inexpediency of placing such a power in the hands of any tribunal, is manifest."

It is not necessary in the decision of this appeal for us to withhold from the Court the authority to sub-divide the term of imprisonment, at least with the assent of the convict, so that a portion of it may be suffered at one time and the rest of it at another, when in execution of a single judgment. But this is not the case before us. A second and new sentence is pronounced, in disregard of the first, and upon the supposition that in law it had been annulled and did not exist.

The legal effect of the record, according to our interpretation, is a *remission* of the rest of the imprisonment upon the terms and conditions which were accepted and carried into effect by the defendant; and hence the only redress open to the State, is in the enforcement of the securities taken, so far as they can be made available, and of this it is not now necessary, nor do we under-

take to express an opinion. At least it is error to proceed as in case of a suspended judgment. Let this be certified.

Error. Reversed.

STATE v. JOHN MCNEELY.

Imprisonment for Costs.

There were three indictments against a prisoner, to one of which he pleaded guilty, and judgment was suspended on the payment of costs. He was found guilty on the other two, on one of which he was sentenced to imprisonment for ten days. After remaining in jail for the term of his imprisonment and twenty days additional, the prisoner took the oath prescribed for insolvent debtors and persons imprisoned for the costs and fine in a criminal prosecution, and applied for his discharge; *Held*, that he was entitled to his discharge in all three cases.

MOTION to discharge the prisoner from custody for the non-payment of costs, heard before *Avery, Judge*, at Spring Term, 1885, of BURKE Superior Court.

His Honor refused the motion, and the prisoner appealed.

Attorney-General, for the State.

Mr. S. J. Ervin, for the defendant.

SMITH, C. J. The defendant came into court and pleaded guilty to the charge contained in the indictment, of carrying a deadly weapon concealed about his person, under section 1005 of *The Code*. Thereupon an order was entered "that judgment be suspended on payment of the costs."

There were two other indictments against him for similar offences, tried at the same term, and terminating in the same way, in one of which he was sentenced to imprisonment for ten days, in consideration, as the Judge stated at the time, that there were three convictions upon the same charge.

The defendant served out his term of imprisonment and remained in jail for the space of twenty days additional, at the

end of which, he applied for and was allowed to take the oath prescribed for insolvent debtors and persons committed for the fine and costs of a criminal prosecution—*Code*, §2967 and sections following—and was discharged. Afterwards a capias issued, under which he was arrested and gave bond for his appearance at the next term, when he moved the court for his discharge from custody, upon the ground that his imprisonment was for the costs in all the cases and his discharge applied to all.

The motion was refused and the defendant recommitted to the custody of the sheriff for the costs of the prosecution, from the judgment in which the defendant appeals.

The record does not show a judgment committing the defendant for the costs of this proceeding, unless it be inferred from the concluding words of the entry which suspends, that is, forbears to proceed to pass sentence for the criminal act "*on payment of the costs.*" The brief of defendant's counsel assumes a judgment committing for costs in each of the cases, and if this be a fair construction of the record, the conclusion would be manifestly correct that the discharge operates upon all the costs, and exempts the convict from further personal confinement on account of them. Taking the entries in the several cases together, they seem to sustain this view of the counsel. There is a single sentence pronounced in one connection and, for the reason given, an omission to proceed to judgment in the others "on payment of the costs," the meaning of which seems to be that the ten days' confinement shall be full punishment for all the offences, but the costs incurred in all must be paid. The accused was, therefore, in custody after the expiration of the ten days, for the non-payment of all the costs, under an implied, if not positive and direct order of committal, and this, so far as we can see, applies as well to others as to that indictment under which he has received punishment.

The oath and discharge, then, must have the effect of exempting the accused from further liability to imprisonment for the costs, and he was entitled to his discharge. There was error in refusing it. Let this be certified.

Error Reversed.

STATE v. THOMAS WHITFIELD.

Jurors—Talesmen— Witness—Corroboration of—Evidence.

1. A juror summoned on a special *venire* is not rendered incompetent because he has served on the jury in the same court within two years. Only tales-jurors come within the *proviso* of sec. 1733 of *The Code*, and in order that they may be disqualified, it must appear that they have not only been summoned, but have acted as jurors within that time.
2. Where a witness has been impeached, in order to corroborate him, he may be allowed to testify to statements made by him about the same matter shortly after it occurred, corroborating his evidence given on the trial.
3. A witness may be discredited by the nature of his evidence, by the circumstances surrounding him, or by imputations directed against him on cross-examination, as well as by direct evidence introduced to show the untruthfulness of his testimony.

(*State* v. *Thorne*, 81 N. C., 555; *State* v. *Brittain*, 89 N. C., 481; *State* v. *Twitty*, 2 Hawks, 449; *State* v. *George*, 8 Ired., 324; *State* v. *Dove*, 10 Ired., 469; *March* v. *Harrell*, 1 Jones, 329; *Jones* v. *Jones*, 80 N. C., 246; *State* v. *Mitchell*, 89 N. C., 521, cited and approved).

INDICTMENT for larceny, tried before *Meares, Judge*, and a jury, at February Term, 1885, of NEW HANOVER Criminal Court.

The defendant was indicted and charged with the larceny of some salted bacon sides, the property of J. M. Hardwick.

In selecting the jury, after exhausting all of his peremptory challenges, the defendant offered to challenge two jurors upon the ground that they had served on the jury in this court within the past two years. These jurors had been drawn on the special *venire* on the day previous to serve as jurors on the day of this trial, in pursuance of Ch. 300, §1, of the Laws of 1883. The Court overruled the challenges, and the defendant excepted.

The State offered evidence to prove that the store of J. M. Hardwick, situated in the city of Wilmington, was broken open and robbed of two salted bacon sides, weighing over forty pounds, and some other articles

H. Terry, a witness for the State, testified that he was a policeman, and at about 4 o'clock on the morning of December 12, 1884, he entered the lot whereon Hardwick's store was located, for the purpose of waking another policeman, who slept there, and discovered that there was a lamp burning in the store, and that the back door was open, and that a man was in the store; that he had a good view of the man's features and dress, except his pants, and that he was of a "gingerbread" color, with square shoulders, side whiskers from one-half to three-quarters of an inch in length, chin clean shaved, wore a black coat, checked shirt, and that he supposed he would weigh about one hundred and forty pounds; that he had often seen him before but did not know his name, and was certain that the prisoner was the man; that he pursued this man, but could not catch him, and that he returned and awakened Hardwick, the owner of the goods in the store. The solicitor then asked the witness, if at this time, he gave the same description of the man whom he had seen in the store to Hardwick, which he had just given on the stand? The prisoner objected, but His Honor permitted the question to be put, and the prisoner excepted. The witness answered that he had.

This witness further testified that the next morning he accompanied Hardwick down the street to attempt to find the person whom he had seen in the store the night before, and that after going some distance he saw the defendant, and at once pointed him out to Hardwick and told him that he was the man they were looking for; that he arrested the defendant, and that his personal appearance and clothing were precisely similar to the description he had before given to Hardwick, and the same as he had sworn to at the trial.

The defendant objected to that portion of this evidence which related to the description and appearance being the same.

J. M. Hardwick was then introduced for the State and corroborated the witness Terry. After objection, the witness was allowed to testify that at the hearing before the committing magistrate,

the prisoner requested that one ——— Hall, a woman, should be summoned as witness for him.

The State introduced evidence that the witness Terry was a man of good character.

The defendant introduced evidence tending to prove an *alibi.*

There was a verdict of guilty, judgment, and appeal by the defendant.

Attorney General and *Mr. E. C. Smith,* for the State.
Mr. J. D. Bellamy, for the defendant.

MERRIMON, J. The defendant having challenged peremptorily as many jurors as the statute applicable in such cases allowed him to do, challenged two other jurors for cause, and assigned as ground of challenge that each of them "had served on the jury *in that court* within the past two years," and were disqualified under the *proviso* of *The Code,* §1733, which provides "that it shall be a disqualification and ground of challenge to any *tales juror* that such juror has *acted* in the same court as grand, petit or tales juror within two years next preceding such term of the court."

We are of opinion that the Court properly disallowed the ground of challenge assigned. The two jurors had been drawn upon the *special venire* the day before they were so challenged, as required by the statute (acts 1883, ch. 300, sec. 1,) applicable to the Criminal Court of the city of Wilmington. They were not *tales jurors,* but of a *special venire,* drawn and summoned before they were required to serve. They were different in their type from talesmen, and the statute cited makes a distinction between the two classes. They did not come within the terms of the *proviso* quoted above, nor within the mischief to be remedied by it. But if they had been talesmen, this objection was not good, because it did not appear that they had acted as jurors within two years. To render them disqualified they must have *acted* within that time. *State* v. *Thorne,* 81 N. C., 555; *State* v. *Brittain,* 89 N. C., 481.

The witness Terry, a policeman, had sworn very positively to facts and circumstances that went strongly to prove the guilt of the defendant. The defendant, and two other witnesses in his behalf, swore to facts tending to prove that what Terry had sworn was not true, and the obvious purpose and effect of this testimony, if believed, was to contradict and discredit him. The purpose was to impeach his testimony. It was, therefore, competent for the State to corroborate the prosecuting witness by showing that he had given the person whose goods were stolen the same description of the defendant before he arrested him, as that testified to by him on the trial; and, for the like purpose, it was competent to show that this witness, as he testified he had done, had pointed out the defendant on the sidewalk to the same person to whom he had given the description, as the person whom he had seen in the store, and that he then arrested him.

That a witness impeached may be thus corroborated is settled in this State, and such corroborating evidence is not confined to cases where the adverse party produces evidence of statements made by the witness *inconsistent* with what he testified to on the trial. In *State* v. *Twitty*, 2 Hawks, 449, Chief Justice Taylor having reference to this subject said: "It seems to me not to be a just construction of the case of *Luttrell* v. *Reynell*, 1 Mod. Rep., 284, to consider the confirmatory evidence as offered in chief; for suspicion may be thrown on the evidence of a witness, from the nature of his evidence, from the situation of the witness, or from imputations directed against him in the cross-examination, which may be not less effectual in discrediting him than direct evidence brought to impeach his testimony, and equally call upon the party introducing him for confirmatory evidence." This authority was afterwards recognized and approved in *State* v. *George*, 8 Ired., 324; *State* v. *Dove*, 10 Ired., 469; *March* v. *Harrell*, 1 Jones, 329; *Jones* v. *Jones*, 80 N. C., 246; *State* v. *Mitchell*, 89 N. C., 521.

The purpose of such evidence is not to prove the principal facts to be established, it is intended to prop and strengthen a witness, testifying in respect to such facts, in some way impeached, by showing his consistency in the statements he makes, or the

account he gives of the matter about which he testifies, when, and when not under oath. It tends to help his credibility, just as does evidence of his good character, or other evidence competent for such purpose.

The witness impeached, as well as others, is competent to testify as to such consistency. He, like other witnesses, may testify as to any pertinent, competent facts within his knowledge. We cannot see why he may not. In such case he might have promptings to prove his consistency, that others might not have, and thus be more inclined not to testify truly, but this goes to the weight of his testimony and not to its competency. The question whether the impeached witness was competent to testify as to his consistent statements previously made in respect to the matter about which he testified on the trial, was decided in the affirmative in *State* v. *George, supra.* In that case, Battle, Judge, said: "The subordinate question is, whether such confirmatory testimony can be given by the impeached witness himself; that is, can he testify to his former declaration, consistent with his testimony given on the trial. The majority of us, —Nash, Judge, *dissentiente*—hold that he can, and we so hold because we are unable to discover any principle by which the testimony can be excluded. We have all just agreed that the question is a proper one to be asked of *some* witness, and why may it not be answered by *any* witness who is not forbidden to answer it on any one or more of the grounds of objection to the competency of witnesses." Such exidence is not of a high type, but, such as it is, it is received or rejected like other evidence.

The testimony of the witness Hardwick, the admission of which was made the ground of an exception, was not material, and was of slight or no importance, but any objection to it was obviated when the defendant undertook, on the trial, to establish the defence suggested before the committing magistrate. It does not appear that it prejudiced him in any respect.

As the credibility of the prosecuting witness was put in question, it is manifest that the evidence as to his good character was competent and properly admitted.

There is no error in the judgment of the Criminal Court. Let this opinion be certified to that Court to the end that it may take further action according to law. It is so ordered.

No Error. Affirmed.

MOORE v. DUNN.

After the opinion in the above entitled cause was printed (see page 63, *ante*,) the following note was added:

SMITH, C. J. The opinion in this case was prepared under an impression produced by the argument, that the indebtedness secured in the mortgage deed made December 1st, 1874, had been satisfied out of the debtor's estate; and as the homestead exemption would prevail against the earlier mortgage of September 26th, 1873, to the annuitant, inasmuch as the wife of the mortgagor Miles E. Carver was not a party to it, its value must come out of the proceeds of sale under the latter deed.

This was so said in illustration of the principle involved in the exception presented in the appeal, rather than as a ruling of the Court. As it is represented, upon a re-argument since, on one side that the indebtedness secured in the deed first mentioned and posterior in date, wherein the same land is conveyed, has, and on the other hand that it has not been paid, and we are not called on to determine the disputed fact, we recall the suggestion as to the deduction of the value of this exemption, content to reiterate the rule that the indebtedness due the annuitant must be reduced by whatever sum she is entitled to receive from the proceeds of the sale under the mortgage to her, and that the residue thus ascertained, is the sum which will share with other creditors of the same class in the distribution of the personal estate of the intestate mortgagor. The rulings are affirmed.

The costs incurred in the appeal will be paid by the appellants.

RULES OF PRACTICE

IN THE

Supreme Court of North Carolina,

REVISED AND AMENDED

AT FEBRUARY TERM, 1885.

RULE I.—Applicants for License.

1. Applicants for license to practice law will be examined on Monday and Tuesday of the first week of each term of the court. Each applicant must have attained the age of twenty-one years, and is expected to have read,

The Constitutions of this State and the United States;

Blackstone's Commentaries, (the second book with care);

Coke, Cruise, Washburn or Williams on Real Property;

Stephen and Chitty on Pleading;

Adams on Equity;

Greenleaf on Evidence (1st vol.);

Williams on Executors;

Smith on Contracts;

Addison or Bigelow on Torts;

The Code of North Carolina, especially *the Code of Civil Procedure.*

It is not intended to confine the student to the special treatises above mentioned other than Blackstone, but any standard author on the same subjects may be used in their place.

2. Each applicant shall deposit with the clerk a sum of money sufficient to pay the license fee, before he shall be examined; and if upon his examination, he shall fail to entitle himself to receive a license, the money shall be returned to him.

RULE 2.—Appeals.

1. Docketing.

Each appeal shall be docketed for the judicial district to which it properly belongs, and in the order in which the papers are filed with the clerk.

2. When Heard.

The transcript of the record on appeal from a court in a county in which the court shall be held during a term of this court, may be filed at the next succeeding term; but if filed before the perusal of the docket of the district to which it belongs, it shall be heard in its order; otherwise, it shall stand continued; but appeals in criminal actions shall each be heard at the term to which it is brought, unless for cause or by consent it shall be continued.

3. Call of each Judicial District.

(1) Causes from the first district will be called on Wednesday of the first week of each term of the court; from the second district on Monday of the second week; from the third district on Monday of the third week; from the fourth district on Monday of the fourth week; from the fifth district on Monday of the fifth week; from the sixth district on Monday of the sixth week; from the seventh district on Monday of the seventh week; from the eighth district on Monday of the eighth week; from the ninth district on Monday of the ninth week; from the tenth, eleventh and twelfth districts, causes will be called, each in its order, during the tenth and eleventh weeks, allotting to each district, in the order named, four days in succession.

(2.) The call of causes not reached and disposed of during the period allotted to each district, or put to the foot of the docket, shall begin on Monday of the twelfth week, and each cause, in its order, tried or continued.

(3.) At the term of the court held next preceding the end of the year, no cause will be called and tried after the expiration of the eleven weeks designated, unless by consent of parties and the assent of the court.

(4.) Each appeal shall be called in its proper order; if any party shall not be ready, the cause may be put to the foot of the district by common consent, or by the consent of counsel appearing, or for cause shown, and be again called when reached, if the docket shall be called a second time; otherwise, the first call shall be peremptory; or at the first term of the court in the year, it may by consent of the court be put to the foot of the docket; or it may be continued by common consent, or for cause; and if no counsel appear for either party at the first call, it will be put to the end of the district, and if none appear at the second call, it will be continued unless the court shall otherwise direct.

5. Dismissed, if not Prosecuted.

THE CODE, sec. 967, provides that, "suits and appeals pending in the Supreme Court may be dismissed on failure to prosecute the same, after a rule obtained for that purpose and served on the plaintiff or appellant, his agent or attorney, at least thirty days before the term next ensuing that of entering the rule; when, if the party shall fail to prosecute his suit or appeal, the court shall, at the election of the adverse party, dismiss the suit or appeal at the cost of the plaintiff or appellant, or proceed to hear and determine it."

But the cases not prosecuted for two terms shall, when reached in order after the second term, be dismissed at the costs of the appellant, unless the same for sufficient cause shall be continued, and when so dismissed, the appellant may at any time thereafter, not later than during the week allotted to the district to which it belongs at the next succeeding term, move to have the same reinstated on notice to the appellee and showing sufficient cause.

Brantly *v.* Jordan, 92 N. C., 291.

6. *Motion to Dismiss.*

A motion to dismiss an appeal for non-compliance with the requirements of the statute in perfecting an appeal, must be made at or before entering upon the trial of the appeal upon its merits,

and such motion will be allowed, unless such compliance be shown in the record, or a waiver thereof appear therein, or such compliance is dispensed with by a writing signed by the appellee or his counsel, to that effect.

7. Time of Filing.

The transcript of the record on appeal from a judgment rendered before the commencement of a term of this court, must be filed within the first eight days of the term, or before entering on the call of cases from the judicial district to which the case belongs; otherwise, it will be continued. But this shall not apply to motions to docket and dismiss appeals.

Barbee *v.* Green, 91 N. C., 158.

8. Dismissed by Appellee.

If the appellant in a civil action shall fail to bring up and file a transcript of the record before the call of causes from the district from which it comes is concluded during the week appropriated to the district, at a term of this court in which such transcript is required to be filed, the appellee, on exhibiting the certificate of the clerk of the court from which the appeal comes, or a certified transcript of the record, showing the names of the parties thereto, the time when the judgment was taken, the name of the appellant, and the date of the settling of the case on appeal, if any has been filed, and filing said certificate with the court, may move to have the appeal docketed and dismissed at appellant's cost, with leave to the appellant during the term and after notice to the appellee, to apply for the re-docketing of the cause.

Barbee *v.* Green, 91 N. C., 158.

9. When Appeal is Dismissed.

When an appeal is dismissed by reason of the failure of the appellant to bring up a transcript of the record, and the same, or a certificate for the purpose as allowed by paragraph 8 of this rule, is procured by the appellee, and the case dismissed, no order shall be made setting aside the dismissal, or allowing the appeal to be reinstated, even though the appellant may be otherwise

entitled to such order, until the appellant shall have paid or offered to pay the costs of the appellee in procuring the transcript of the record, or proper certificate, and in causing the same to be docketed.

10. Of Unnecessary Records.

The costs of copies of unnecessary and irrelevant testimony, or of irrelevant matter about the appeal not needed to explain the exceptions or errors assigned, and not constituting a part of the record of the action of the court taken during the progress of the cause, shall in all cases be charged to the appellant, unless it appears that they were sent up by the appellee, in which case the cost shall be taxed against him.

11. Transcript of the Record.

(1.) OF THE RECORD.—In every record of an action brought to this court, the proceedings shall be set forth in the order of time in which they occurred, and the several processes, or orders, &c., shall be arranged to follow each other in the order the same took place, when practicable.

(2.) PAGES NUMBERED.—The pages of the record shall be numbered, and there shall be written on the margin of each a brief statement of the subject matter contained therein.

(3.) INDEX.—On some paper attached to the record, there shall be an index thereto, in the following or some equivalent form:

Summons—date, - - -	page 1.
Complaint—first cause of action, - -	" 2.
" second cause of action, -	" 3.
Affidavit for attachment, &c., - -	" 4.

(4.) CONSEQUENCES OF NON-COMPLIANCE.—If any cause shall be brought on for argument, and the above regulations shall not have been complied with, the case shall be put to the foot of the district, or the foot of the docket, or continued as may be proper; and it shall be referred to the clerk or some other person, to put the record in the prescribed shape, for which

an allowance of five dollars will be made to him to be paid in each case by the appellant, and execution therefor may immediately issue.

(5.) MARGINAL REFERENCES.—A case will not be heard until there shall be put in the margin of the record as required in the next preceding paragraph, brief references to such parts of the text as are necessary to be considered in a decision of the case.

(6.) PRINTING THE RECORD.—At and after October term, 1884, of the court, fifteen copies of so much and such parts of the record as may be necessary to a proper understanding of the exceptions and grounds of error assigned as appear in the record in each civil action, shall be printed.

(7.) The counsel for the appellant shall designate such parts of the record as are required to be printed, and have the same copied for the printer; if he shall fail to do so, the clerk of this court shall cause the same to be done at the appellant's cost; and such printed matter shall consist of the statement of the case on appeal, and of the exceptions appearing in the record to be reviewed by the court; or, in case of a demurrer, of such demurrer and the pleadings to which it is entered. This will not preclude the parties in the argument, from referring to the manuscript parts of the record whenever they may deem it needful to the argument—nor from reading the record in full when necessary to the proper understanding of the case.

If the record in an appeal shall not be printed as required by this and the next preceding paragraph at the time it shall be called in its order for argument, the appeal shall, on motion of the appellee, be dismissed; but the court may, after five days notice at the same term, for good cause shown, reinstate the appeal upon the docket, to be heard at the next succeeding term like other appeals; *Provided, nevertheless,* that this and the next preceding paragraph shall not apply to appeals in criminal actions or appeals *in forma pauperis.*

(8). Costs for printing the record shall be allowed to the successful party in the case, at the rate of 60 cents per page of the

size of the page in the North Carolina Reports for each page of one copy of the record printed, not exceeding 20 pages, unless otherwise specially allowed by the court, to be taxed in the bill of costs; and if the clerk of this court shall prepare the manuscript copy of the parts of the record to be printed in any appeal, he shall be allowed ten cents per copy sheet for such service, such allowance to be taxed and paid as other fees and charges allowed to the clerk by law.

RULE 3.—Certiorari and Supersedeas.

1. When Applied for.

Generally, the writ of *Certiorari*, as a substitute for an appeal, must be applied for at the term of this court to which the appeal ought to have been taken; or if no appeal lay, then before or to the term of this court next after the judgment complained of was entered in the superior court. If the writ shall be applied for after that term, sufficient cause for the delay must be shown.

2. How Applied for.

The writs of *Certiorari* and *Supersedeas* shall be granted only upon petition specifying the grounds of application therefor, except when a diminution of the record shall be suggested and it appears upon the face of the record that it is manifestly defective, in which case, the writ of *Certiorari* may be allowed upon motion in writing. In all other cases, the adverse party may answer the petition. The petition and answer must be verified, and the application shall be heard upon the petition, answer, affidavit and such other evidence as may be pertinent.

3. Notice of.

No such petition, or motion in the application, shall be heard, unless the petitioner shall have given the adverse party ten days' notice in writing of the same; but the court may, for just cause shown, shorten the time of such notice.

RULE 4.—Counsel.

1. Agreement of Counsel.

The court will not recognize any agreement of counsel in any case, unless the same shall appear in the record, or in writing filed in the cause in this court.

2. Argument of Counsel.

(1.) The counsel for the appellant shall be entitled to open and conclude the argument.

(2.) The counsel for the appellant may be heard for one hour and a half, including the opening argument and reply.

(3.) The counsel for the appellee may be heard one hour and a half.

(4.) The time occupied in reading the record before the argument begins shall not be counted as part of the time allowed for the argument; but this shall not embrace such parts of the record as may be read pending the argument.

(5.) The time for argument may be extended by the court in a case requiring such extension; but application for such extension must be made before the argument begins. The court, however, may direct the argument of such points as it may see fit, outside of the time limited.

(6.) Any number of counsel may be heard on either side within the limit of the time above specified; but if several counsel shall be heard, each must confine himself to a part or parts of the subject matter involved in the exceptions, not discussed by his associate counsel, unless directed otherwise by the court, so as to avoid tedious and useless repetition.

7. Briefs.

The appellant shall file with the clerk a printed brief, if any, in which shall be set forth a brief statement of the case, embracing so much and such parts of the record as may be necessary to understand the case; the several grounds of exception and assignments of error relied upon by the appellant; the authorities

relied upon, and if statutes are material, the same shall be cited by the book, chapter and section; but this shall not be understood to prevent the citation of other authorities in the argument.

8. Copies of Brief to be Furnished.

(1.) Fifteen copies shall be delivered to the clerk of the court, one of which shall be filed with the transcript of the record, one handed to each of the justices at the time the argument shall begin, and one to the reporter, and one to the opposing counsel, when he shall call for the same.

(2.) OF APPELLEE.—The appellee shall file the same number of like briefs, except that he may omit the statement of the case, which shall be distributed in like manner, except that one copy shall be delivered to the appellant when he shall call for the same.

(3.) COSTS OF.—The actual cost of printing his brief, not exceeding sixty cents per page of the size of the pages in the North Carolina Reports, and not exceeding ten pages, shall be allowed to the successful party, to be taxed in the bill of costs.

(4.) An attorney shall not be recognized as appearing in any case, unless he shall first sign a printed or written request by him, in his own proper handwriting, addressed to the clerk of the court, that he be entered as counsel of record in the case mentioned therein, and such request shall be attached to and filed with the transcript of the record in such case. And upon filing such request, the clerk shall enter the name of such attorney, or he may enter it himself, thereby making him counsel of record for the party he may designate therein. Such appearance of counsel shall be deemed to be general in the case, unless a different appearance be indicated. Counsel of record are not permitted to withdraw from a case, except by leave of the court.

Walton *v.* Sugg, Phil. Law, 98.

RULE 5.—Books.

A book belonging to the Supreme Court library shall not be taken from the chamber of the Supreme Court, except into the

office of the clerk of the court, unless by the justices of the court, the governor, the attorney general, or the head of some department of the executive branch of the state government, without the special permission of the marshal of the court, and then, only upon the application in writing of a judge of a Superior Court holding court or hearing some matter in the city of Raleigh, the president of the senate, the speaker of the house of Representatives, or the chairmen of the several committees of the general assembly; and in such case, the marshal shall enter in a book kept for the purpose, the name of the officer requiring the same, the name and number of the volume taken, when taken, and when returned.

RULE 6.—Clerks and Commissioners.

1. Report in hands of.

The clerk and every commissioner of this court, who, by virtue or color of any order, judgment or decree of the Supreme Court in any action or matter pending therein, has received, or shall receive any money or security for money, to be kept or invested for the benefit of any party to such action or matter, or of any other person, shall, at the term of said court held next after the first day of January in each year, report to the court a statement of said fund, setting forth the title and number of the action, or matter, the term of the court at which the order, or orders, under which the clerk or such commissioner professes to act, was made; the amount and character of the investment, and the security for the same, and his opinion as to the sufficiency of such security. In every subsequent report, he shall state the condition of the fund, and any change made in the amount or character of the investment, and every payment made to any person entitled thereto.

2. Report Recorded.

The reports required by the preceding paragraph shall be examined by the court, or some member thereof, and with their or

his approval endorsed, shall be recorded in a well bound book kept for the purpose in the office of the clerk of the Supreme Court, entitled *Record of Funds*, and the cost of recording the same shall be allowed by the court and paid out of the fund. The report shall be filed among the papers of the action or matter to which the fund belongs.

RULE 7.—Exceptions.

Every appellant, at the time of settling the case upon appeal, or if there be no case settled, then within ten days next after the end of the term at which the judgment is rendered from which an appeal shall be taken, or in case of a ruling of the court at chambers and not in term time, within ten days after notice thereof, shall file in the clerk's office his exceptions to the proceedings, rulings, or judgment of the court, briefly and clearly stated and numbered. And, in civil actions, no other exceptions than those so filed and made part of the record, shall be considered by this court, except exceptions to the jurisdiction, or because the complaint does not state a cause of action, and such as may be authorized under THE CODE, sec. 412, par. 3.

RULE 8.—Pleadings.

1. Memoranda of.

Memoranda of pleadings will not be received or recognized in the Supreme Court as pleadings, even by consent of counsel, but the same will be treated as frivolous and impertinent.

2. Assigning two or more Causes of Action.

Every pleading containing two or more causes of action shall, in each, set out all the facts upon which it rests, and shall not, by reference to others, incorporate in itself any of the allegations in them, except that exhibits, by marks or numbers, may be referred to without reciting their contents, when attached thereto.

3. When Scandalous.

Pleadings containing scandalous or impertinent matter will, in a plain case, be ordered by the court to be stricken from the record, or reformed, and for this purpose, the court may refer it to the clerk, or some member of the bar to examine and report the character of the same.

RULE 9. — Issues.

If, pending the consideration of an appeal, the Supreme Court shall consider the trial of one or more issues of fact necessary to a proper decision of the case upon its merits, such issues shall be made up under the direction of the court, and certified to the superior court for trial, and the case will be retained for that purpose.

RULE 10.—The Judgment Docket.

The judgment docket of this court shall contain an alphabetical index of the names of the parties in favor of whom and against whom each judgment was entered. On this docket the clerk of the court will enter a brief memorandum of every final judgment affecting the right to real property, and of every judgment requiring in whole or in part the payment of money, stating the names of the parties, the term at which such judgment was entered, its number on the docket of the court; and when it shall appear from the return on an execution, or from an order for an entry of satisfaction by this court, that the judgment has been satisfied in whole or in part, the clerk, at the request of any one interested in such entry, and on payment of the lawful fee, shall make a memorandum of such satisfaction, whether in whole or in part, and refer briefly to the evidence of it.

RULE 11.—Executions.

1. Teste of.

When an appeal shall be taken after the commencement of a term of this court, the judgment and teste of the execution shall have effect from the time of the filing of the appeal.

2. Issuing and Return of.

Executions issuing from this court may be directed to the proper officers of any county in the State. At the request of a party in whose favor execution is to be issued, it may be made returnable on any specified day after the commencement of the term of this court next ensuing its teste. In the absence of such request, the clerk shall, within thirty days after the expiration of the term, issue such execution to the county from which the cause came, making it returnable on the first day of the next ensuing term. The execution may, when the party in whose favor judgment is rendered shall so direct, be made returnable to the term of the said superior court held next after the date of its issue, and thereafter successive executions will only be issued from said superior court, and, when satisfied, the fact shall be certified to this court, to the end that an entry to this effect may be made here.

RULE 12—Petition to Re-Hear.

1. The Code, sec. 966.

"A petition to re-hear may be filed during the vacation succeeding the term of the court at which the judgment was rendered, or within twenty days after the commencement of the succeeding term, and upon the filing of such petition the Chief Justice or either of the Associate Justices may, upon such terms as he sees fit, make an order restraining the issuing of an execution, or the collection and payment of the same, until the next term of said court, or until the petition to re-hear shall have been determined."

2. What Contain.

The petition must distinctly specify and assign the alleged error complained of, or the material matter overlooked; and only alleged errors in law will be reviewed upon such re-hearing, or a re-hearing may be had for newly discovered evidence, and it must appear that the judgment complained of has been performed or sufficiently secured, and it must be accompanied with the certificate of at least two members of the bar who did not

appear in the cause at the first hearing and who have no interest in the same, that they have carefully examined the case and the law relating thereto, and the authorities cited in the opinion, and that in their opinion the judgment is erroneous, and in what respect it is erroneous, but no petition to re-hear shall be docketed until one of the justices of the supreme court shall have endorsed thereon that in his opinion the case is a proper one to be re-heard.

Wilson *v.* Lineberger, 90 N. C., 180; Grant *v.* Bell, 90 N. C., 502; Strickland *v.* Draughan, 91 N. C., 103; White *v.* Jones, 92 N. C., 388.

3. Notice of.

Before applying for an order to restrain the issuing of an execution or the collection and payment of the same, written notice must be given the adverse party of the intended motion, as prescribed by law, and also of the proposed application for a re-hearing of the cause, with a copy of the petition therefor; the court may, however, grant a temporary restraining order without notice.

RULE 13.—Motions.

All motions made to the court, shall be reduced to writing, and shall contain a brief statement of the facts on which they are founded and the purpose of the same. Such motion, not leading to debate, nor followed by voluminous evidence, may be made at the opening of the sessions of the court.

RULE 14.—Cases Heard out of their Order.

In cases wherein the State is concerned, involving or affecting some matter of general public interest, the court may, upon motion of the attorney general, assign an earlier place in the calendar, or fix a day for the argument thereof, which shall take precedence of other business.

RULE 15.—Cases Heard Together.

Two or more cases involving the same question may, by leave of the court, be heard together, but they must be argued as one case, the court directing, when the counsel disagree, the course of the argument.

RULES OF PRACTICE

IN THE

SUPERIOR COURTS OF NORTH CAROLINA,

REVISED AND AMENDED BY THE

JUSTICES OF THE SUPREME COURT,

AT FEBRUARY TERM, 1884, BY VIRTUE OF THE CODE, §961.

RULES.

1. No entry shall be made on the records of the superior courts (the summons docket excepted,) by any other person than the clerk, his regular deputy, or some person so directed by the presiding judge, or by the judge himself.

2. No person who is bail in any action or proceeding, either civil or criminal, or who is security for the prosecution of any suit, or upon appeal from a justice of the peace, or is security in any undertaking to be affected by the result of the trial of the action, shall appear as counsel or attorney in the same cause. And it shall be the duty of the clerks of the several superior courts to state, in the docket for the court, the names of the bail, if any, and security for the prosecution, in each case, or upon appeal from a justice of the peace.

3. That in all cases civil and criminal, when no evidence is introduced by the defendant, the right of reply and conclusion shall belong to his counsel.

4. When several counsel are employed on the same side, the examination, or cross-examination, of each witness shall be conducted by one counsel; but the counsel may change with each

successive witness, or with leave of the court, in a prolonged examination of a single witness. When a witness is sworn and offered, or when testimony is proposed to be elicited, to which objection is made by counsel of the opposing party, the counsel so offering shall state for what purpose the witness, or the evidence to be elicited, is offered, whereupon, the counsel objecting shall state his objections and be heard in support thereof, and the counsel so offering shall be heard in support of the competency of the witness and of the proposed evidence in conclusion—and the argument shall proceed no further unless by special leave of the court.

5. When a party in a civil suit moves for a continuance on account of absent testimony, such party shall state in a written affidavit, the nature of such testimony, and what he expects to prove by it; and the motion shall be decided without debate, unless permitted by the court.

(*The above rules substantially, prescribed by the supreme court at January Term*, 1815.)

6. That in any case where a question shall arise as to whether the counsel for the plaintiff or the counsel for the defendant shall have the reply and the conclusion of the argument, except in the cases mentioned in rule three, the court shall decide who is so entitled, and its decision shall be final and not reviewable.

Brooks *v.* Brooks, 90 N. C., 142; Cheek *v.* Watson, 90 N. C., 307; Austin *v.* Secrest, 91 N. C., 214.

7. Issues shall be made up as provided and directed in THE CODE, secs. 395 and 396.

8. Judgments shall be docketed as provided and directed in THE CODE, sec. 433.

9. Clerks of the superior courts shall not make out transcripts of the original judgment docket to be docketed in another county, until after the expiration of the term of the court at which such judgments were rendered.

10. Judgments rendered by a justice of the peace upon a summons issued and returnable on the same day, as the cases are successively reached and passed on without continuance as to any, shall stand upon the same footing, and transcripts for docketing in the superior court shall be furnished to applicants at the same time after such rendition of judgment, and if delivered to the clerk of such court on the same day, shall create liens on real estate and have no priority or precedence the one over the other, if all are or shall be entered within ten days after such delivery to said clerk.

11. In every case af appeal to the supreme court, or in which a case is taken to the supreme court by means of the writ of *certiorari* as a substitute for an appeal, it shall be the duty of the clerk of the superior court, in preparing the transcript of the record for the supreme court, to set forth the proceedings in the action in the order of time in which they occurred, and the several processes, or orders, and shall be arranged to follow each other in order as nearly as practicable.

The pages of the transcript shall be plainly numbered, and there shall be written on the margin of each, a brief statement of the subject matter, opposite to the same.

On some paper attached to the transcript of the record, there shall be an index to the record in the following or some equivalent form:

Summons—date, - - - - - page 1,
Complaint—first cause of action, - - - " 2,
Complaint—second cause of action, - - " 3,
Affidavit for attachment, - - - - " 4,
and so on to the end.

12. Every clerk of superior court and every commissioner appointed by such court, who, by virtue or color of any order, judgment or decree of the court in any action or proceedings pending in it, has received, or shall receive any money or security for money, to be kept or invested for the benefit of any party

to such action, or of any other person, shall, at the term of such court, held on or next after the first day of January in each year, report to the judge a statement of said fund, setting forth the title and number of the action, and the term of the court at which the order, or orders, under which the officer professes to act, were made, the amount and character of the investment and the security for the same and his opinion as to the sufficiency of the security. In every report after the first he shall set forth any change made in the amount or character of the investment since the last report, and every payment made to any person entitled thereto.

The reports required by the next preceding paragraph shall be made to the judge of the superior court holding the first term of the court in each and every year, who shall examine, or cause the same to be examined, and if found correct and so certified by him, shall be entered by the clerk upon his book of accounts of guardians and other fiduciaries.

13. The superior court shall grant the writ of *recordari* only upon the petition of the party applying for it, specifying particularly the grounds of the application for the same. The petition shall be verified and the writ may be granted with or without notice; if with notice, the petition shall be heard upon answer thereto duly verified and upon affidavits and other evidence offered by the parties, and the decision thereupon shall be final, subject to appeal as in other cases; if granted without notice, the petitioner shall first give the undertaking for costs, and for the writ of *supersedeas*, if prayed for as required by THE CODE, sec. 545. In such case, the writ shall be made returnable to the term of the superior court of the county in which the judgment or proceeding complained of was granted or had, and ten days' notice in writing of the filing of the petition shall shall be given to the adverse party before the term of the court to which the writ shall be made returnable. The defendant in the petition, at the term of the superior court to which the said writ is returnable, may move to dismiss, or answer the same, and the answer shall be verified.

The court shall hear the application at the return term thereof—unless for good cause shown the hearing shall be continued—upon the petition, answer, affidavits and such evidence as the court may deem pertinent, and dismiss the same, or order the case to be placed on the trial docket according to law.

In proper cases, the court may grant the writ of *certiorari* in like manner, except that in case of the suggestion of a diminution of the record it shall manifestly appear that the record is imperfect, the court may grant the writ upon motion in the cause.

14. In no case shall the court make or sign any order, decree or judgment directing the payment of any money or securities for money belonging to any infant or to any person, until it shall first appear that such person is entitled to receive the same and has given the bonds required by law in that respect, and such payment shall be directed, only when such bonds as required by law shall have been given and accepted by competent authority.

15. In all cases where it is proposed that infants shall sue by their next friend, the court shall appoint such next friend upon the written application of a reputable disinterested person closely connected with such infant; but if such person will not apply, then upon the like application of some reputable citizen, and the court shall make such appointment only after due inquiry as to the fitness of the person to be appointed.

Young *v.* Young, 91 N. C., 359.

All motions for a guardian *ad litem*, shall be made in writing, and the court shall appoint such guardian only after due inquiry as to the fitness of the person to be appointed, and such guardian must file an answer in every case.

RULES OF PRACTICE

ADOPTED BY THE

JUDGES OF SUPERIOR COURTS OF NORTH CAROLINA,

JANUARY 4, 1884, AT GREENSBORO.

I. All civil actions that have been at issue for two years, and that may be continued by consent at any term, will be placed at the end of the docket for the next term in their relative order upon the docket; when the continuance shall be ordered, and when a civil action shall be continued on motion of one of the parties, court may, in its discretion, order that such action be placed at the end of the docket, as if continued by consent; but this rule will not be enforced when the opinion of the supreme court has been certified to the court below since the last term; in such case a continuance will be ordered without prejudice, unless tried by consent.

II. When a calendar of civil actions shall be made under the supervision of the court, or by a committee of attorneys under the order of the court, or by consent of the court, unless cause be shown to the contrary, all actions continued by consent and numbered on the docket between the first and last numbers placed upon the calendar, will be placed at the end of the docket for the next term as if continued by consent, if such actions have been at issue for two years.

III. Neither civil nor criminal actions will be set for trial on a day certain, or not be called for trial before a day certain, unless by order of the court, and if the other business of the term shall have been disposed of before the day for which a civil action is

set, the court will not be kept open for the trial of such action, except for some special reason apparent to the judge; but this rule will not apply when a calendar has been adopted by the court.

IV. The court will reserve the right to determine whether it is necessary to make a calendar, and also, for the dispatch of business, to make orders as to the disposition of causes placed upon the calendar and not reached on the day for which they may be set.

V. When a calendar shall be made, all actions that do not require the intervention of a jury, together with motions for interlocutory orders will be placed on the motion docket, and the judges will claim the right to call the motion docket at any time after the calendar shall be taken up.

VI. Appeals from justices of the peace in civil actions will not be called for trial unless the returns of such appeals have been docketed ten days previous to the term, but appeals docketed less than ten days before the term may be tried by consent of parties.

VII. When civil actions shall be continued by consent of parties, the court will, upon suggestion that the charges of witnesses and fees of officers have not been paid, adjudge that the parties to the action pay respectively their own costs, subject to the right of the prevailing party to have such costs taxed in the final judgment.

VIII. When time to file pleadings is allowed it shall be computed from the expiration of the term as fixed by law.

IX. Except for some unusual reason, connected with the business of the court, attorneys will not be sent for, when their cases are called in their regular order.

X. Clerks of the courts will be required, upon the criminal dockets prepared for the court and solicitor, to state and number the criminal business of the court in the following order:

First—All criminal causes at issue. Second—All warrants upon which parties have been held to answer at the term. Third—All presentments made at preceding terms, undisposed of. Fourth—All cases wherein judgments *nisi* have been entered at the preceding term against defendants and their sureties, and against defaulting jurors or witnesses in behalf of the State.

XI. Clerks will also be required, upon both civil and criminal dockets, to bring forward and enter in different columns of sufficient space, in each case:

First—The names of the parties. Second—The nature of the action. Third—A summary history of the case, including the date of issuance of process, pleadings filed, and a brief note of all proceedings and orders therein. Fourth—A blank space for the entries of the term.

INDEX.

COLOR OF TITLE:

1. An unregistered deed is color of title, and may be read in evidence without registration, upon due proof of its execution. *Hunter* v. *Kelly*, 285.
2. Where a party introduces a deed in evidence, which he intends to use as color of title, he must prove that its boundaries cover the land in dispute, to give legal efficacy to his possession. *Smith* v. *Fite*, 319.
3. It is error to allow a jury on no evidence, or only on hypothetical evidence, to locate the land described in a deed. *Ibid.*
4. A deed conveying a life-estate is color of title, and when accompanied with adverse possession for the required time, will ripen into a good title to the life-estate so granted. *Staton* v. *Mullis*, 623.

EXECUTOR:

3. Where the reversion is acquired by purchase, one claiming the estate by descent must make himself heir to the first purchaser of the reversion at the time when it comes into possession. *Ibid.*

4. Where A, having a life-estate, conveys to B in fee who conveys to C, the reversioner does not have a right of action until the death of the life tenant. At his death the possession becomes adverse, and will ripen into a good title by seven years' possession. *Staton* v. *Mallis*, 623.

ROADS:

Where an overseer of a road entered and took possession of a piece of land for the purposes of the road, under a license from the tenant of the plaintiff, he is liable in damages in an action by the owner of the fee. *Dills* v. *Hampton*, 565.

RULES OF THE SUPREME COURT:

STATUTE OF FRAUDS:

1. Both legal and equitable rights may now be administered in one and the same action. Therefore, if an action is brought for the specific performance of a parol contract to convey land, to which the vendor pleads the statute of frauds, and it appears that a portion of the purchase money has been paid, the Court will give judgment against the vendor for the amount which he has received. *Pendleton* v. *Dalton*, 185.

2. A parol contract to convey land is not void, but only voidable, if the vendor chooses to plead the statute of frauds. *Syme* v. *Smith*, 338.

3. The plaintiff administrator alleged that under a parol contract to purchase certain lands, his intestate had paid a portion of the purchase money, and prayed judgment against the defendants for the amount so paid. The defendants, by their answer, admitted the contract substantially as set out in the complaint; *Held*, that the action must be dismissed. *Ibid.*

4. Where it is agreed between the vendor and purchaser of a tract of land, that the purchaser shall have it surveyed at his expense, and if it shall be found to contain a smaller number of acres than is called for by the deed that the vendor shall refund a *pro rata* part of the purchase money; *Held*, that such contract is not within the provisions of the statute of frauds. *Sherrill* v. *Hagan*, 345.

5. A parol contract for the purchase of land, is voidable, not void. In such case, a vendee who is in possession is the tenant by sufferance of the vendor. *Dail* v. *Freeman*, 351.

STATUTE OF LIMITATIONS:

1. Where a creditor's claim, which has been reduced to judgment, is resisted by another creditor, on the ground that the cause of action on which the judgment was rendered was barred by the statute, the judgment having been rendered by a court of competent jurisdiction, the judgment is conclusive. *Moore* v. *Edwards*, 43.

2. An ouster of one tenant in common by another will not be presumed from an exclusive use of the common property and the appropriation of its profits to himself for a less period than twenty years; and the result is not changed when one enters to whom a tenant in common has, by deed, attempted to convey the entire tract. This rule extends to purchaser of the interest of a tenant in common at execution sale, and to his vendees. *Ward* v. *Farmer*, 93.

3. If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives after the expiration of that time, and within one year from his death. *Dunlap* v. *Hendley*, 115.

4. It is settled in this State that demand must be made of an attorney or collecting agent, who has collected money for a client or principal, before an action will lie or the statute of limitations begin to run. But, when the reception of the money was unauthorized and wrongful, the plaintiff can waive the *tort*, and sue for money had and received to his use, without demand; and in this case the statute begins to run when the money is received, and bars the action in three years. *Bryant* v. *Peebles*, 176.