Western Carolinian.

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TERMS.

The terms of the Western Carolinian are, $3 per annum—or $2 50, if paid in advance.

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Advertisements will be inserted at fifty cents per square for the first insertion, and twenty-five cents for each subsequent one.

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SUPREME COURT.

The following are the principal cases determined by the Supreme Court, at its last session, with the points of law which they involved, appended; for which we are indebted to the Raleigh Register.

Jesse Person v. *The State Bank*, from Wake. Judgment affirmed.

[Twenty warrants were brought by the Plaintiff on bank notes, in the whole amounting to $104. Judgments were obtained, and appeals taken by the defendants. In the County Court, the cases were ordered to be consolidated into one, and from this order of consolidation, the Plaintiff appealed to the Superior Court, where the order was affirmed. *Held*, that the Court had the power to make the order, and the power being possessed, it was mere matter of discretion whether it should be executed in this case, and upon what terms.]

Doe lessee of Barden, v. *McKinnie and others*, from Wayne. Judgment affirmed.

[A levy on Chattels vests in the Sheriff a special property, and this it is that enables him to sell after the return day of the writ, and without a *vend. exp.* but a levy on Lands gives him neither property nor right of possession—he has only a naked authority to sell, and a sale transfers to the purchaser only the right of property to which the Sheriff cannot add an actual possession, without the consent of the tenant. Therefore, a sale made by the sheriff, of real estate, after the return of a fi. fa. and without a new writ, is a sale without authority, and passes nothing to the purchaser.

It seems, a levy on real estate, shewn only by an endorsement on the writ, and such endorsement made after the return day of the process, is not valid.]

Governor to the use of Holcomb, v. *Martin and others*, from Surry. Judgment affirmed.

[The act of 1818, ch. 980, (N. R.) makes it the *official* duty of a constable, to collect claims put into his hands, with or without suit. Therefore, where a note was delivered to a constable to collect, and he obtained judgment and received the money from the debtor, without execution. *Held* that this was a collection *virtute officii*, and the non-payment, by the constable, a breach of the condition of his bond, to pay over all sums of money "he should collect by virtue of his office."

The holder of a note (though not indorsed to him, who places it in the hands of a constable for collection, is entitled to demand payment from the constable. Therefore, if payment be refused, he is "the person injured," who may bring the action on the office bond, under the act of 1793, ch. 384, (N. Y.)

Hamilton v *Wrights* and *Parish*, from Granville. Judgment reversed, and new trial awarded.

[Action on a Justice's judgment. On the trial the judgment being proved, the Defendant offered the Justice as a witness to shew that the judgment was confessed before him at a place out of his county. The Court below rejected this evidence. But in this Court, *held*, that the evidence should have been received. In the case of *Bain* v. *Hunt* (3 Hawks 572) this Court ruled that *assumpsit* would not lie on a Justice's judgment, because the merits of such judgment are not examinal in an original suit, and in this respect, and in this only, likened it to a record. But that decision has no bearing on the present case. *There*, the existence of a judgment properly rendered was pre-supposed, and the question was as to its effect; *here*, the existence of a proper judgment is the question in issue—and until its existence is established, the enquiry as to its effect does not arise.

The proceedings of Justices are not records, and do not prove themselves. They are public writings, to be proved by parol evidence, and that evidence may been countered by other evidence of the same kind. The conclusive effect of these proceedings when established, is so far from being a reason for rejecting the proof offered here, that sound policy requires the clearest evidence to be adduced of the existence of that which, if it exist, is conclusive in its operation on the rights of the parties.]

Devereux v. *Cape Fear Bank*. In Equity, from Wake. Injunction dissolved, with costs.

Benzien's Ex'rs. v. *Lenoir* and *others*. In Equity, from Iredell.

Griffin's Heirs v. *Griffin's Ex'rs.* and *others*. In Equity, from Johnston.

[In the first of these cases, in the year 1814, (the case then being in the Court of Equity of Iredell) certain points were submitted to the Supreme Court, and a decree was made here, and entered in the Court below for the Plaintiffs. A petition for re-hearing was thereupon filed in the Court below, and a re-hearing having been ordered, the cause was transmitted to this Court for hearing.

In the second of these cases, a decree was directed by the Supreme Court and entered in the Court below, and the decree having been enrolled, a bill of review was exhibited, and a decree thereupon pronounced in the Court below, from which an appeal was taken to this Court.

Here it was objected, that the decrees complained of were decrees of this Court, or at least decrees directed by this Court to be made below, and that neither a petition to re-hear, nor a bill to review, could be entertained by the Court below: But *held*, by two Judges, that the decrees of the Court below, and as such, re-examinable by bill or petition below, whether they were pronounced by the Judge upon his own opinion, or upon conference with the other Judges. One Judge *contra*.

Chairman of Washington County Court v. *Harramond* and *others*. Judgment affirmed.

[A judgment against an administrator is evidence against his securities of a debt due from his intestate; but such judgment is not evidence as against such securities, that the administrator had assets to satisfy the judgment.

The inventory returned by an administrator is *prima facie* evidence of assets against his securities.

Hunter v. *Kirk*. Judgment reversed, and new trial ordered.

Black v. *Black*. In Equity, from Lincoln. Bill dismissed with costs.

Selby, adver v. *Dixon* and *others*. In Equity. The decree below dismissing the bill affirmed, with costs.

Pugh v. *Bauer and others*, in Equity, from Franklin. Injunction dissolved and decree for Defendants.

[An injunction granted upon the payment of the money recovered at law into the office of the master, will not be dissolved merely [illegible] than four months after the rendition of the judgment at law. The object of the act of 1800 forbidding injunctions after four months from the judgment, was to prevent delay and hazard to creditors, but this is effecually accomplished by the terms imposed. To dissolve the injunction, on this ground, therefore; would be to sacrifice the manifest spirit of the act to its literal construction.]

Cannon v. *Jones*, in Equity, from Wake. Bill dismissed.

[The Plaintiff was security for one G. The Defendant, the administrator of the creditor, obtained judments at law against the principal and security in a joint action. Upon which the plaintiff filed this bill to be relieved against the judgment, on the ground that he was discharged in Equity by the laches and forbearance of the creditor. The facts constituting this equitable ground were proved by the deposition of G. the principal debtor, and the sole question was, whether he was a competent, for though he must pay the money recovered either to Cannon, the Plaintiff, or to Jones, the Defendant; yet he is evidently interested to defeat Jones' claim, in which event, he would be liable to the costs of one suit only, whereas if Jones succeeds against Cannon, the latter may recover against G. the costs also of the suit brought by Jones. G. will derive a certain benefit, or receive a certain injury from the decision to be made, and consequently is directly interested in the event of the cause.]

Paschal v. *Williams*, from Warren. Judgment affirmed.

[In an action for an assault and battery, the only question being the amount of damages, the Judge instructed the jury that they were the sole judges of the question, and that by placing themselves in the situation of the Plaintiff and enquiring what compensation they should think adequate and would receive for such an injury, the justice of the case might be attained. A verdict was found for $1000. *Held*, that such instruction was no ground for a new trial.]

Falle and *others* v. *Torrance*, in Equity, from Iredell. Decree for Plaintiffs for negro Elora and her increase.

[A purchase by an administrator enures solely to the benefit of the next of kin, and the slave purchased remains in the hands of the administrator after the sale upon the same trust as before. One marrying an administratrix is trustee of the intestate's property in the same manner as his wife was, especially if he have notice that it was the property of the intestate. The claim of the next of kin to distribution is not affected by the statute of limitations, being the case of a trust to which the statue has no application. In such case time is not a *bar*, but a circumstance from which a presumption may arise that the demand has been settled by payment or otherwise. A great length of time affords a strong presumption, but such presumption may be repelled by facts explanatory of the delay.

And though the Court will not encourage claims brought forward after a great efflux of time, but will presume against them, yet where the delay is satisfactorily explained and the presumption of satisfaction sufficiently removed, the equity of the claimant remains unaffected and the Court will decree for him, notwithstanding the great lapse of time.

In regard to time, equity acts by analogy to statute law or to common law, and time has the same effect as at law in the analogous case. Where the statute applies, *time* is a positive bar, may be pleaded, or is the ground of demurrer, and the right can only be saved by the same exceptions as at law have that effect.

It seems, that equities of redemption and constructive trusts are cases in which equity acts by analogy to the statute, and time should be a bar in itself, according to the recent decisions in England. But when the rule as to time was adopted in this state, in such cases, equity was supposed to act in analogy to the common law. Hence, the time adopted was twenty years, and hence also, it was considered as only affording a presumption of fact, and not as a positive bar. Though this notion was incorrect, and properly seven years is the period and should be a bar, in analogy to our statue of limitations, yet the notion has been so long adopted—is supported by such a train of decisions, and so much property depends upon it, that it is now too late to disturb it.

In cases of direct or pure trusts, time has no influence. The estate of the trustee is that which supports the trust, and without which it could not exist, and his possession operates for the benefit of the *cestui que trust*. The trustee cannot by any act of his, make his estate and possession adverse to the *cestui que trust*. The trust owes its existence to agreement of parties to destroy it. Therefore if the trustee be guilty of wrongful conduct, he does not cease thereby to be a trustee, and of the same kind of trust as before such conduct—but it is at the election of the *cestui que trust* to consider the trust at an end (if he please) and treat the trustee as a wrong doer.]

State v. *Joinner*, from Pitts, Judgment of the Superior Court reversed and new trial awarded.

[Indictment on the 2d section of the act of 1818, ch. 985, (N. R.) against a mother for concealing the death of a bastard child. Upon the constitution of this statute, *held* by a majority of the Court that the *corpus delicti* is the concealment of the death of a being upon whom the crime of murder could have been committed—hence if the child were *born* dead, no concealment of the body would be an offence within the statute. But concealment by the mother suppresses the means of ascertaining whether the child was born alive or not—and raises a presumption of guilt against her—therefore it is not incumbent on the prosecution to shew that the child was born alive, but the burthen of shewing the contrary lies upon the accused. But *held* by one Judge that the act does not by the word "death," men the *act of dying*, the transition from life to death; but concealing the *lifeless body* is a concealing "*the death*" within the statute.

Issue of the body is itself proof irresistible that life accompanied and actuated it up to the stage of maturity in which we beheld it, and whether that life existed or not at its birth is immaterial.]

Barkley v. *Colquhoun and others*. In Orange. Cause remanded to the Court below.

[In the Court below an order of publication as to J. C. an absent defendant—and afterwards an order setting the cause down for hearing and removing it to this Court. It did not appear from any thing in the transcript that the publication had been made or a *pro confesso* taken.

Held, that setting the cause for hearing was irregular. This Court can take cognizance of a cause removed only after it is set for hearing below. An irregular order setting the cause down for hearing is equivalent to no order—Therefore this Court cannot proceed.]

State v. *Patillo*, from Lincoln. Judgment arrrested.

[Indictment for a cheat at common law, by passing certain "promisory notes" as and for bank notes—and no averment that the notes passed, resembled Bank notes.

Held, the indictment cannot be sustained—for at the common law no cheat was the subject of criminal prosecution except one accomplished by some false token of a public nature—and promissory notes of themselves are not public tokens—Bank notes are public tokens, and had it been averred that the notes in question resembled or were in the likeness of bank notes, the indictment would have been sufficient.]

Crom, executor, v. *Herring and Wife and others*. In Equity, from Lenoir.

Account to be taken by the Master of this Court, unless the parties agree on some other person, and report to be made at next term.

[B. V. having several children, to the elder of whom he had made considerable advancements, made his will, and after devising and bequeathing real and personal estate to his wife and to his younger children, and confirming the advancements made to the elder, directed the residue of his estate real and personal to be sold, and the proceeds "to be divided among all his *heirs*, according to the statute of distributing of Intestates' estates."

Held, the word "*heirs*," as here used, means heirs *quo ad* the property, and not "children," "next of kin," or "heirs at law." By is is to be understood those whom the law appoints to succeed beneficially to the property in question. The whole of the property here is personal, for the land being directed to be sold, and the proceeds divided, is regarded in this Court, as personalty. Therefore, the widow of the Testator is entitled under that term—she being by law appointed to succeed to personal property as well as the children, all claiming under the same statute.

The surplus mentioned in this clause, is to be divided among those entitled, without any reference to the advancements, or property bequeathed by other clauses,

Moore v. *Moore*. In Equity, from Hertford. Plaintiff's bill dismissed with costs.

[The right to contribution among cosureties, is founded originally, not in any contract between them, but on the maxim of natural equity, "that equality is equity" among persons standing in the [illegible] This however [illegible] now the established doctrine of Equity, an understanding is inferred among co-sureties, of mutual contribution, for men are presumed to act in reference to the laws governing the transaction; hence Courts of law now give relief, by action of assumpsit to one surety against another.

But this principle of Equity can only apply to those whose situations are equal; for equality among those whose situations are unequal, is not equity. But if one surety stipulate for a separate indemnity, the equality of situation between him and his co-surety, ceases, and the principle does not apply.

This indemnity may indeed be reached in favor of the co-surety, but it is on one of two grounds—either that it was taken in fraud of the co surety, or intended for his benefit.

If taken *secretly*, it is a fraud on the other sureties; for 1st, the transaction inports mutual risk, and united exertions, and 2dly, the indemnity weakens the ability of the principal to indemnify the other. If taken without such secrecy, it is presumed to be designed for the benefit of all.

Hence, if an indemnity be fairly taken by one surety, and exclusively for his own benefit, he may rightfully use it until he is completely indemnified.

But if, in this case, a surplus remain, after thus indemnifying the security who has taken it, the benefit of such surplus must be communicated to the co-sureties: for benevolence dictates such communication among those who are involved in a connexion so intimate, and a common danger, and to obey the dictates of benevolence becomes a duty, when such obedience is not prejudicial to ourselves.

Held, that these principles were decisive against the plaintiff's claim, for he became surety for the principal, without asking or wishing any indemnity; when another name was required, the defendant, before becoming bound, stipulated for a *lien*, as a counter security to himself. The lien, therefore, was not intended for Plaintiff's benefit. The Plaintiff was subscribing witness to the deed creating the lien, and so there was no secrecy, and consequently no fraud.

The equality of situation being thus destroyed, without fraud, and there being no intention to benefit complainant, it follows that he cannot call on the Defendant for contribution to his loss.]

Colquet v. *Bostick and others*, from Rutherford. In Equity. Master's report confirmed and decree for complainant according thereto for the sum of $1,329 63 with interest on $968 59 from the 24th of June, 1826, against the executors of Bostick—and bill retained as to the defendant Rivers.

State v. *Allen and another*, from Person. Judgement of the Superior Court affirmed.

[Indictment against two for an affray in "mutually assaulting and fighting with each other"—Conviction as to one and acquittal as to the other—Judgment cannot be pronounced against the party convicted as for an assault and battery.]

There is an article in the last No. of Silliman's Journal, with the following title: "Proofs that general and powerful currents have swept and worn the surface of the earth."

There are many indications that a powerful current has passed over the continent of America from north to south, and over Asia from south to north; and the author of this article accounts for these appearances by supposing that a change has at some period taken place in the velocity of the earth's motion on her axis. The surface of the earth at the equator revolves at the rate of more than 1000 miles per hour, or 1500 feet per second, which is about equal to the velocity of a cannon ball. We have no idea of circular motion like this. A wheel of wrought iron, of three feet in diameter, will fly in pieces, before it reaches a velocity of 400 feet per second. Supposing the earth should be slightly checked in her daily motion, the Pacific ocean would in a moment rush over the Andes and Alleghanies into the Atlantic; the Atlantic would sweep over Europe, Asia, and Africa; and in a few hours the entire surface of the earth would be covered with rushing torrents, excepting perhaps the vicinity of the poles. "The appearances presented on the surface of the earth," says this writer, "are precisely such as we should expect after such a catastrophe."

CURE for a WEN.

We gave an account in the Register, effect produced by the simple application of salt and water, to a large wen or tumour, on the neck of a citizen of this county, who had tried without success the prescriptions of various physicians. We stated, as was the case, that from the moment this solution was applied, the wen decreased gradually in size, and finally disappeared. We thought this a remarkable cure, and published it. We yesterday received a communication from a respectable gentleman in Sampson county, who states, that being severely afflicted with a large tumour of some kind under his eye, which was pronounced by most persons to be a cancer, he saw in this paper the account above allowed to, and immediately determined to try the saline preparation. He did so; and in six weeks the tumour entirely disappeared, and he adds that he is now perfectly well. This is so simple a remedy, that some may deride it, but we advise persons similarly afflicted to make the experiment.

Raleigh Register.

BITE OF A RATTLESNAKE.

The following is recommended as an effectual remedy against the fatal effects of the bite of a Rattlesnake. Boil the common Poke-root until it becomes quite soft, then mash it up in the water which remains, and apply it as a poultice to the wound. This remedy is said to have been most miraculously tested by the hunters of Missouri, among whom it is now in general use—and that when an immediate application is made, the poison will not manifest itself more strongly than the sting of a bee.

CURE FOR WARTS.

The milky juice of the stalk of spurge, or of the common fig leaf, by persevering application, will, to a certainty, soon remove them.

ON THOMAS KEMP,

Hanged for Sheep-Stealing.

Here lies the body of Thomas Kemp,
Who lived by wool, but died by hemp;
There's nothing would suffice this glutton,
But, with the fleece, to steal the mutton;
Had he but work'd, and liv'd uprighter,
He'd ne'er been hung for a sheep-biter.