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ANNOTATIONS INCLUDE VOL. 210

NORTH CAROLINA REPORTS

VOL. 1

CASES ADJUDGED

IN THE

SUPERIOR COURTS

OF LAW AND EQUITY

AND IN THE

COURT OF CONFERENCE

OF NORTH CAROLINA

FROM NOV. TERM, 1778, TO DEC. TERM, 1804

EMBRACING 1 AND 2 MARTIN, TAYLOR, AND CONFERENCE REPORTS,
RETAINING NOTES OF W. H. BATTLE.
LATCH'S ENGLISH CASES AND BATTLE'S HISTORY OF SUPREME COURT IN APPENDIX.

REPORTED BY
FRANCOIS XAVIER MARTIN (1 and 2 Martin),
JOHN LOUIS TAYLOR (Taylor's Report),
DUNCAN CAMERON, WILLIAM NORWOOD, (Conference Reports).

ANNOTATED BY
WALTER CLARK, 1901.
(FURTHER ANNOTATIONS ADDED, 1937)

RALEIGH
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1937

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Rule 62 of the Supreme Court is as follows:

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PREFACE

Reports of Court decisions in volume one of the North Carolina Supreme Court Reports were originally published in three volumes, the first being reports of decisions in the Superior Courts of North Carolina and in the Circuit Court of the United States for North Carolina District, compiled and published by Francois-Xavier Martin at New Bern in 1797; the second being Reports of Cases determined in the Superior Court of Law and Equity by John Louis Taylor, later Chief Justice of the Supreme Court, published at New Bern in 1802; and the third being Reports of the Court of Conference by Duncan Cameron and William Norwood, of Hillsborough, which were published at Raleigh in 1805. Reports were also published by John Haywood and A. D. Murphey at a later date. Necessarily duplications of Reports of Cases occurred. When William H. Battle published the first reprint of these Reports, made necessary by the scarcity of some of them, he combined into one volume the Reports of Martin and Taylor and of Cameron and Norwood, and this volume of the North Carolina Reports was subsequently made volume one. He avoided duplications as far as possible, omitting from his volume duplicate Reports of cases contained in volumes published by Haywood, Murphey, and others, which have been retained in the reprints of those later reports. He added head-notes to the reprinted cases and also annexed notes bearing on subsequent legislative enactments or judicial decisions, which have been retained in this volume. In reprinting the present volume, the arrangement of cases by the late Chief Justice Clark was necessarily followed, as it was made from Judge Battle's volume one, which was the first reprint, and also with reference to subsequent reprints, but the requirement of the statute that reprints of the Supreme Court Reports shall be made without alteration from the original edition has been observed by carefully following the Reports of cases in the original editions. In the appendix is a translation of Latch's English Cases, which was made by Martin and printed by him in the first volume of North Carolina reports. It is believed that the reprint of this volume complies fully with the legislative intent that these Reports be preserved in their original form. No effort has been spared to make this volume as complete as the exigencies of having to fit it into a general scheme would permit.

JUDGES OF THE SUPERIOR COURTS

1789 TO 1804

SAMUEL ASHE,
JAMES IREDELL,
*JOHN SITGREAVES,
†JOHN HAYWOOD,
¶ALFRED MOORE,
SAMUEL JOHNSTON,
FRANCIS LOCKE,
SAMUEL SPENCER,
§JOHN WILLIAMS,
**SPRUCE MACAY,
‡DAVID STONE,
††JOHN LOUIS TAYLOR,
JOHN HALL.

*Elected additional Judge; appointed U. S. District Judge.
**Elected, *vice* Sitgreaves, 1790.
†Elected 1794, *vice* Spencer deceased.
‡Elected 1795, *vice* Ashe chosen Governor.
§Elected 1779, *vice* Iredell resigned.
¶Elected 1798, *vice* Stone resigned.
††Elected 1799, *vice* Moore appointed U. S. Supreme Court.
Johnston and Hall elected additional Judges 1800.
Locke appointed 1803, *vice* Johnston resigned.

ATTORNEYS-GENERAL:

WAIGHTSTILL AVERY	1777-1779
JAMES IREDELL	1779-1782
ALFRED MOORE	1782-1790
JOHN HAYWOOD	1791-1794
BLAKE BAKER	Elected 1794, *vice* Haywood app'd Judge
HENRY SEAWELL	Elected 1803

NOTE.—Three Judges were elected in 1778. In 1790, the Judges (previously three in number) were increased to four. The Districts were increased to eight, and divided into Eastern and Western Ridings, a Court in each District was held by two Judges. These Superior Courts were held at Halifax, Edenton, New Bern, and Wilmington for Eastern Riding, and at Morganton, Salisbury, Hillsboro, and Fayetteville for Western Riding. Court of Conference authorized 1800. 103 N. C., 474-477.

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CASES ADJUDGED

IN THE

SUPERIOR COURTS

(1 MARTIN.)

November Term, 1778.

THE STATE v. SMITH.—1 Mart., 53.

A person convicted of manslaughter may be bailed, when the execution of the sentence is suspended.

The defendant, at November Term, 1778, was indicted for murder: He pleaded not guilty, and the jury found him guilty of *manslaughter*.

On being asked what he had to say, etc., he prayed the benefit of clergy—which being granted,

The Court gave judgment that he be burnt on the brawn of his left thumb, and discharged:

But on cause shown, the Court, ASHE, J., and SPENCER, J., suspended the execution of this sentence until next term.

He was bailed and entered into recognizance, himself in the sum of £3,000, and his two securities in that of £1,000 each.

At May Term last, the Court (SPENCER, J., *alone*) met; but the smallpox raging then in New Bern, no business was done, and the Court was adjourned to the first day of the Court in course.

And at this term he was brought to the bar, and pleaded a pardon from the Governor, which being read and inspected by the Court, ASHE, J., and SPENCER, J., was allowed, and the prisoner discharged.

*** The same indulgence has since been shown to the defendants, at Wilmington, in the case of *The State v. Snead,* and at New Bern, in that of *The State v. Hyson.*

NOTE.—See *State v. Ward,* 9 N. C., 443.

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(2)

NEW BERN, *November Term, 1778.*

WRENFORD v. GORDON.—1 Mart., 54.

Where a writ of replevin was sued out against the defendant, who had been in quiet possession of the slave for many years, merely to try the right of the parties to the slave, it was quashed as being irregular, wrongful, and oppressive.

GORHAM *v.* ———.

Replevin. *Nash,* for the defendant, moved that the writ be quashed; it having [been] irregularly issued.

It appeared by affidavits filed, that the defendant and her late husband had been in quiet possession of the slave, who had been taken in pursuance of this writ, for several years. And that it was merely in order to try the right of the parties to him that the writ had been sued out.

By the Court, SPENCER, J., alone. The taking out of this writ for this purpose is irregular, wrongful, and oppressive. Let it be quashed.

Nash afterwards moved for and obtained a writ *de returno habendo.* Upon which the slave was restored to the defendant, *ut audivi.*

NOTE.—Replevin cannot be supported unless a *taking* is proved. *Cummings v. MacGill,* 4 N. C., 535; *S. c.,* 6 N. C., 357. See the Act of 1828 (1 Rev. Stat., ch. 101), which provides for bringing the action of replevin for slaves in certain cases.

(3)

NEW BERN, *November Term, 1780.*

GORHAM AND WIFE v. ———.—1 Mart., 52.

Where a testator bequeathed as follows: "I give and bequeath all the rest of my negroes and their increase to be equally divided among my children, the survivor or survivors of them, and their heirs forever," and died, leaving a wife and three children, two of whom died infants, *it was held* that on the death of the first child, the mother was entitled to an equal share of its part of the said legacy with the two surviving children, and on the death of the second, she was entitled to share its estate with the survivor.

Petition. The following case was reserved for the opinion of the Court, viz.:

"John Speir, of Pitt County, in his last will and testament, among other things, bequeathed as follows, to wit:

"'*Item,* I give and bequeath all the rest of my negroes and their increase, to be equally divided among my children, the survivor or survivors of them, and their heirs forever.'

"The testator died, leaving his wife and three children, two of the children, viz.: William and Elizabeth, died infants and under age.

"The question is, whether the mother (Penelope, now wife of James Gorham), upon the death of the said two children, was entitled to any, and if any, what part of the said children's share of the legacy above mentioned?

"We agree to submit the above question to the decision of the Court, and that they may thereupon make such decree upon the above petition, as to them shall seem just.

JAMES IREDELL, for the plaintiff.
WILLIAM HOOPER, for the defendant.

"New Bern, November 22, 1780."

Whereupon the Court, ASHE, J., SPENCER, J., and WILLIAMS, J., did determine, that upon the death of the first child, the mother was entitled to an equal share of the said estate of such child, with the two surviving children: and that upon the death of the other child who is deceased, she was entitled to an equal share of said estate of such deceased child, with the surviving one; and that a division of said estate be made accordingly.

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(4)

HALIFAX, *October Term, 1787.*

TULLOCH'S EX'RS v. NICHOLS AND FARMER.—1 Mart., 27.

Where a subscribing witness to a bond is a nonresident of the State, his handwriting can be proved.

Motion by *Penn* to prove the bond, by examining evidences of the handwriting of the subscribing witness, who was resident of another state. All the bar, except *Johnston,* joined in the argument of this question, being one they wished settled. And the Court determined in favor of the motion.

NOTE.—See *Irving v. Irving,* 3 N. C., 27; *Ingram v. Hall, post,* 69; *S. c.,* 2 N. C., 193. Note to *Clements v. Eason,* 2 N. C., 18, and *McKinder v. Littlejohn,* 23 N. C., 66.

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(5)

NEW BERN, *November Term, 1787.*

DEN ON THE DEM. OF BAYARD AND WIFE v. SINGLETON.—1 Mart., 48.

1. By the Constitution every citizen has a right to a decision in regard to his property by a trial by jury. The act of Assembly, therefore, of 1785, requiring the Court to dismiss on motion the suits brought by persons whose property had been confiscated against the purchasers, on affidavit of the defendants that they were purchasers from the commissioners of confiscated property, is unconstitutional and void.

2. Aliens cannot hold land, and if they purchase, the land is forfeited to the sovereign.

3. An act of Assembly, passed during a war and confiscating the property of an alien enemy *by name*, is at least as effectual in vesting the property in the State, as any *office found* according to the practice in England.

Ejectment. This action was brought for the recovery of a valuable house and lot, with a wharf and other appurtenances, situate in the town of New Bern.

The defendant pleaded *not guilty*, under the common rule.

He held under a title derived from the State, by a deed from a Superintendent Commissioner of confiscated estates.

At May Term, 1786, *Nash* for the defendant, moved that the suit be dismissed, according to an act of the last session, entitled an act to secure and quiet in their possession all such persons, their heirs and assigns, who have purchased or may hereafter purchase lands and tenements, goods and chattels, which have been sold or may hereafter be sold by commissioners of forfeited estates, legally appointed for that purpose, 1785, 7, 553.

The act requires the Courts, in all cases where the defendant makes affidavit that he holds the disputed property under a sale from a commissioner of forfeited estates, to dismiss the suit on motion.

The defendant had filed an affidavit, setting forth that the property in dispute had been confiscated and sold by the Commissioner of the district.

This brought on long arguments from the counsel on each side, on constitutional points.

The Court made a few observations on our Constitution and system of government.

(6) ASHE, J., observed that at the time of our separation from Great Britain, we were thrown into a similar situation with a set of people shipwrecked and cast on a marooned island—without laws, without magistrates, without government, or any legal authority—that being thus circumstanced, the people of this country, with a general union of sentiment, by their delegates, met in Congress, and formed that system of those fundamental principles comprised in the Constitution, dividing the powers of government into separate and distinct branches, to wit: The legislative, the judicial, and executive, and assigning to each several and distinct powers, and prescribing their several limits and boundaries; this he said without disclosing a single sentiment upon the cause of the proceeding, or the law introduced in support of it.

Curia advisare vult.

At May Term, 1787, *Nash's* motion was resumed, and produced a very lengthy debate from the bar.

Whereupon the Court recommended to the parties to consent to a fair decision of the property in question, by a jury according to the common law of the land, and pointed out to the defendant the uncertainty that would always attend his title if this cause should be dismissed without a trial; as upon a repeal of the present act (which would probably happen sooner or later), suit might be again commenced against him for the same property, at the time when evidences, which at present were easy to be had, might be wanting. But this recommendation was without effect.

Another mode was proposed for putting the matter in controversy on a more constitutional footing for a decision than that of the motion under the aforesaid act. The Court then, after every reasonable endeavor had been used in vain for avoiding a disagreeable difference between the Legislature and the Judicial powers of the State, at length, with much apparent reluctance but with great deliberation and firmness, gave their opinion separately but unanimously for overruling the aforementioned motion for the dismission of the said suits.

In the course of which the Judges observed that the obligation of their oaths and the duty of their office required them, in that situation, to give their opinion on that important and momentous subject; and that notwithstanding the great reluctance they might feel against involving themselves in a dispute with the Legislature of the State, yet (7) no object of concern or respect could come in competition or authorize them to dispense with the duty they owed the public, in consequence of the trust they were invested with under the solemnity of their oaths.

That they therefore were bound to declare that they considered that whatever disabilities the persons under whom the plaintiffs were said to derive their titles might justly have incurred against their maintaining or prosecuting any suits in the Courts of this State; yet that such disabilities, in their nature, were merely personal, and not by any means capable of being transferred to the present plaintiffs, either by descent or purchase; and that these plaintiffs being citizens of one of the United States, or citizens of this State, by the confederation of all the States; which is to be taken as a part of the law of the land, unrepealable by any act of the General Assembly.

That by the Constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury. For that if the Legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury, and that he should stand condemned to die, without the formality of any trial at all: that if the

members of the General Assembly could do this, they might with equal authority, not only render themselves the Legislators of the State for life, without any further election of the people, from thence transmit the dignity and authority of legislation down to their heirs male forever.

But that it was clear that no act they could pass could by any means repeal or alter the Constitution, because if they could do this, they would at the same instant of time destroy their own existence as a Legislature, and dissolve the government thereby established. Consequently, the Constitution (which the judicial power was bound to take notice of as much as of any other law whatever), standing in full force as the fundamental law of the land, notwithstanding the act on which the present motion was grounded, the same act must of course, in that instance, stand as abrogated and without any effect.

Nash's motion was overruled.

And at this term the cause was tried.

(8) Both the plaintiffs and the defendant admitted the title of the premises to have been in Samuel Cornell, Esq., at and before the time when the independence of this State commenced.

The case appeared to be this: Mr. Cornell, once an inhabitant of New Bern, leaving his family, together with the premises in question, and a variety of property in this town, took shipping on the 19th of August, 1775, and went to Great Britain, where he continued till some time in the latter part of the year 1777, when he came to New York, then occupied by a British garrison; and as a British subject came from thence and arrived in New Bern on the 11th of December, 1777, and under the protection of a British flag.

His principal design, in coming to this State at that time, was to take his wife and family with him, to reside under the British Government, if he did not find our new government agreeable to his wishes. Not being pleased with the appearance of things here, and thereupon preparing to leave the State, and to carry with him his wife and family, he executed, on board the vessel he came in, a deed to his daughter, one of the plaintiffs (under which they claim), for the premises in question, on the 19th of December, 1777.

This deed for the purpose of execution had been handed to him without a date, and being asked what date he chose it should bear, he hesitated and said he would look at the copy of a bill which was then in his possession, which bill he understood to be on its passage in the Legislature, for confiscating the property of all persons of his description, who should not within a limited time come into this State, and be made citizens thereof, which bill afterwards in the same session passed into a law. After looking at the aforesaid copy of that bill, he chose that the

deed should bear date on the 11th of the same month, being the day he arrived in the harbor of New Bern; which deed was accordingly dated that day. After which Mr. Cornell returned with his family from this State, and from thenceforth lived and died a British subject, under the British Government.

The Court, ASHE, J., SPENCER, J., and WILLIAMS, J., gave their opinion *seriatim,* but unanimously.

They observed that the cause turned chiefly on the point of *alienage* in Mr. Cornell. For this gentleman, having from his birth to the time of his death been always a British subject, and having always lived under the British Government, he owed allegiance to the King of Great Britain, and consequently was never a citizen of this or any (9) other of the United States, nor owed allegiance thereto. For when here, at the time of the transaction aforementioned, he was under the protection of a British flag. That he was therefore, in contemplation of law, as much an *alien,* and at the time of executing the deed, and, from the time of our independence as much an *alien* ENEMY, as if we had been a separate and independent nation, for any number of years or ages before the commencement of the war which was then carried on.

That it is the policy of all nations and states that the lands within their government should not be held by foreigners. And therefore it is a general maxim that the allegiance of a person who holds land ought to be as permanent to the government who holds it as the tenure of the soil itself.—That, therefore, by the civil as well as by the common law of England, *aliens* are incapacitated to hold lands. For that purpose the civil law has made the contracts with *aliens* void. The law of England, which we have adopted, allows them to purchase, but subjects them to forfeiture immediately; and does not allow an *alien* ENEMY any political rights at all.

That the premises in question, upon these invariable principles of law, could not from the time our government commenced have been held by Mr. Cornell; because that, in consequence of his owing no allegiance to the State, he had no capacity to hold them, and according to the letter of the law of the land, they must have consequently been forfeited to the sovereignty of the State. That the act of confiscation, in which Mr. Cornell was expressly named, and more particularly the act which especially directed the sale of the very premises in question, must have been at least as effectual in vesting them in the State, as any *office found,* according to the practice in England can be, for vesting any forfeited property in the King.

That the circumstances and limited privileges of persons who were sent out of this State under a particular act of our General Assembly,

are not applicable to this case. That the case in Vattel, of the majority of the inhabitants of any country deliberately dissolving their old government, and setting up a new one, is neither in reason, nor in the most essential circumstances, anyways similar to this case. That *Cal-*
(10) *vin's case,* reported in Coke, does by no means reach the leading and characteristic circumstances of this case.

The jury found a verdict for the defendant.

Iredell, Johnston, and Davie for the plaintiffs.
Moore and Nash for the defendant.

*** On the decision of this cause, twenty-seven others depending in the same Court, and subsisting upon similar or less substantial grounds, were all swept off the docket, by nonsuits voluntarily suffered.

Ex relatione SPENCER, J.

NOTE.—As to an alien holding land in this State, see *University v. Miller,* 14 N. C., 188. On the last point see *Faris v. Simpson, post,* 381.

Cited: Benzein v. Lenoir, 16 N. C., 265; *S. v. Glen,* 52 N. C., 323; *Carr v. Coke,* 116 N. C., 254; *Wilson v. Jordan,* 124 N. C., 715; *White v. Ayer,* 126 N. C., 593; *S. v. Shuford,* 128 N. C., 593; *Daniels v. Homer,* 139 N. C., 240; *R. R. v. Cherokee County,* 177 N. C., 88; *Hinton v. Lacy,* 193 N. C., 499; *Hill v. Comrs. of Greene,* 209 N. C., 6; *Glenn v. Board of Education,* 210 N. C., 530.

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(11)

November Term, 1784.

GOODRIGHT ON THE DEM. OF McILWEAN v. SHINE.—1 Mart., 54.

Where a judgment in ejectment is set aside after the writ of possession has been executed, the Court will issue a writ of restitution of defendant to the possession.

Ejectment. At the last term, judgment was taken by default against the casual ejector, and a writ of *habere facias possessionem* awarded and executed, and now the judgment was set aside on payment of full costs; Shine making himself a defendant, and agreeing not to delay the trial.

And on motion of ——— his counsel,

The Court directed a writ to issue to the sheriff, to reinstate Shine in the possession of the premises.

NOTE.—See *Beaner v. Pilley,* 4 N. C., 329; *Bledsoe v. Wilson,* 13 N. C., 314.

(12)

HILLSBOROUGH, ——— *Term, 178–.*

TIMS v. POTTER.—1 Mart., 22.

The increase of slaves belongs to the reversioner or remainderman, not to the tenant for life of the mother.

This case was that of a gift of one Glover to his daughter, of a negro woman, reserving the use of that negro during his life. Judgment was obtained against Glover, and an execution levied on the negro. Potter became the purchaser; Tims intermarried with the daughter of Glover, and after Glover's death brought suit for the wench and her children. On a verdict for the plaintiff, the question, as to the children born during the life estate, was reserved.

The following cases were relied upon for the defendant: Tissin on *Tisser,* 1 P. W., 500; *Nichols v. Osborn,* 2 P. W., 419; *Taylor v. Johnston, ibid.,* 506; *Choworth v. Hooper,* 82, Brown's Reports det., 1780, 2 Black., 390; Puffendorff, lib. 2, ch. 4, p. 11; 2 P. W., 42; 1 P. W., 572.

The counsel for the plaintiff combatted these authorities by showing that the principles upon which they were determined would not apply to the present case. That the devise over in the case of *Tisser* depended on a contingency, etc. In some of the other cases it depended upon a condition. That in the case of money, interest was the sole produce or profit; the principal not impaired thereby; otherwise of a negro: where a use is reserved or devised, the property certainly passed and vested in the donee, as remainderman; the intermediate estate is satisfied by the labor, etc., etc., the doctrine of Puffendorff related to the rights of war, etc., etc.,

Moore and Davie for plaintiff.
Iredell and Hooper for defendant.

ASHE, J., and SPENCER, J., present, at the last argument.
WILLIAMS, J., absent, said to disagree.

SPENCER, J. This case has been twice ably argued. My mind is fully satisfied, and I am sure without bias. When this case was first stirred, I inclined to be of opinion for the defendant; but when the authorities and reasons were examined, on the second argument, they were evidently inapplicable to the present case. We have (13) taken great consideration of this cause, and are now clearly of opinion that the remainder carries with it the increase. The intermedi-

ate estate is satisfied fully by the *labor* of the negro.—*Labor is a use* that may be commanded by the person who has the estate; *breeding* is the order of nature, not of the master. This use must be such a use as the owner may command. The life estate might exhaust the whole estate, the remainderman would take an encumbrance instead of a benefit. As to the children being an encumbrance on the life estate, the donee or legatee is a volunteer, and people are generally of a different opinion as to thinking a breeding wench a loss.

ASHE, J. This is a question of great importance; much property depends upon it, and it is in some measure moved for this reason. We have had it twice solemnly, and I say with pleasure, ably argued—I perfectly coincide in opinion with my brother SPENCER, upon the gift, the *jus proprietatis* passed to the donee a mere temporary use, limited by the life of the donor, and *jus possessionis* alone remained. This case has been likened to a devise; there would be no difference, the remainderman is always the principal object of the testator's bounty; and the intermediate estate is well satisfied by the labor—Judge SPENCER says something was held out to the daughter: this was to be a beneficial estate, carrying with it every possible certainty this case would admit; thus, the increase compensated the loss of value by age, labor, and breeding. It would be in vain to look for cases in point in the English reporters; they never possessed property exactly similar; their villains were not in all respects in the same condition with our slaves. If a person were to hire out a negro for a year, or a number of years, or devise her for a number of years, or for a time uncertain as a life, and this happens every day, would any man say that, in the first case stated, the hirer was to have the issue? Yet the counsel for the defendant could not distinguish this case from the present; although it was repeatedly pressed upon them by the counsel for the plaintiff.

Reason, equity, and the general opinion, which I suppose rested on professionals, or judicial opinions formerly given, are all strongly in favor of the plaintiff. Men must be permitted to provide for the various conditions of their families, out of this kind of property. In this country, it makes a large part of our estates. It is a common thing to
(14) leave some negroes to the wife for life, and to children afterwards; the construction has been uniform ever since the settlement of this country: That the *issue* went to the remainderman; the labor has been all that was intended or understood for *the use or intermediate* estate. As I said in the case of hire, the increase revert to the person who has the property; so, the increase go to the person who has the *jus proprietatis,* not inconsistent with, but conformable to, the rule.

This construction is founded in justice and policy, as it accommodates this property to the provision of families, and I think it is agreeable to the principles of law. Construction, having obtained for a great length of time, and universal practice ought to be satisfactory evidence of their adoption under legal authority. Therefore, enter judgment for the plaintiff.

SPENCER, J. The person who has the remainder surely has the *jus proprietatis;* the person who has the absolute property must have the increase; if the special proprietor could claim it, it must occasion infinite disputes.

The increase cannot be separated from the absolute property. It is a case peculiar to this country. We must have recourse to general principles of justice and policy; and the authority of generally received opinions ought to have great weight, supported by long adoption in cases of property.

NOTE.—The question decided in this case, that the increase of slaves limited to one for life with remainder over will go to the remainderman and not belong to the tenant for life, is fully sustained by the cases of *Glasgow v. Flowers*, 2 N. C., 233, where this case is referred to and shortly reported in a note, and *Erwin v. Kilpatrick*, 10 N. C., 456, and has long been the settled law of the State. But if the facts of the case are properly stated, it was improperly determined upon another point which the facts presented, but which seems not to have been noticed by the Court. It was a gift of a chattel either by deed or parol after the reservation of a life estate therein to the donor; and this, according to several adjudged cases, conveyed no interest to the donee in remainder. *Graham v. Graham*, 9 N. C., 322; *Sutton v. Hollowell*, 13 N. C., 185; *Morrow v. Williams*, 14 N. C., 263; *Hunt v. Davis*, 20 N. C., 36. Such limitations of slaves are now allowed by act of Assembly. 1 Rev. Stat., ch. 37, sec. 22.

Cited: Glasgow v. Flowers, 2 N. C., 233; *Erwin v. Kilpatrick*, 10 N. C., 458; *Covington v. McEntire*, 37 N. C., 318; *Patterson v. High*, 43 N. C., 55.

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(15)

NEW BERN, *May Term, 1787.*

DOE ON THE DEMISE OF CLEARY v. WRENFORD.—1 Mart., 57.

Ejectment. The jury found the following special verdict, viz.:

"The jury find that the premises in question were vested in Timothy Clear, late of New Bern, deceased, in fee; that the said Timothy died intestate, without issue, on or about the month of September, 1775; and that Simon Cleary, his heir at law, the lessor of the plaintiff, was then an inhabitant of the kingdom of Ireland; that about the month of

December, 1777, an act of the General Assembly of this State was passed, entitled, *'An Act for confiscating the property of all such persons as are inimical to the United States, and of such persons as shall not, within a certain time, therein mentioned, appear and submit to the State whether they shall be received as citizens thereof, and of such persons as shall so appear and shall not be admitted as citizens, and for other purposes therein mentioned.'* 2, 1777, 17, 341.

"I. Whereas divers persons who have heretofore owned and possessed lands, tenements, and hereditaments, and also movable property in this State, have withdrawn themselves from the same, and attached themselves to the enemies of the United States of America; and also divers persons who have withdrawn to places beyond the bounds of any of the United States, in order to avoid bearing their proper and equal part in defense of the freedom and independence of the same; and also divers persons who having been beyond the bounds of the United States at the beginning of the present war, have failed to return and unite their efforts for the common defense of American liberty; and it is expedient and just that every person for whom property is protected in any state should be and appear within the same, or join in defense thereof whenever the same is threatened or invaded; and it is also just that a reasonable time be given for such as have it in their power to allege favorable or mitigating circumstances to induce this State, ever attentive to the rights of natural justice, and ever ready and willing to receive to grace and favor all who are sincerely attached to liberty, to receive them as citizens, and restore them to the possessions which once belonged to them.

"II. *Be it therefore enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the same,* That all the lands, tenements, hereditaments, and movable property within this State, and all and every right, title, and interest therein, of which any person was seized or possessed, or to which any person had title on the fourth day of July in the year one thousand seven hundred and seventy-six, who on the said day was absent from this State, and every part of the United States, and who is still absent from the same, or who hath at any time during the present war attached himself to, or aided or abetted the enemies of the United States, or who has withdrawn himself from this or any of the United States after the day aforesaid, and still resides beyond the limits of the United States, shall and are hereby declared to be confiscated to the use of this State; unless such person shall, at the next General Assembly which shall be held after the first day of October, in the year one thousand seven hundred and seventy-eight, appear, and be by the said Assembly admitted to the privilege of

a citizen of this State, and restored to the possessions and property which to him once belonged within the same.

"III. *Provided,* That this act shall not extend to such persons as are, or have been actually employed in the service of the United States, or any of them, and have not deserted to the enemy, or traitorously violated their trust, as are imprisoned, of unsound mind, or under the age of twenty-one years.

"IV. *And provided also,* That nothing herein contained shall be construed to give permission to such persons as have removed themselves, or have been removed under the compulsive authority of any law of this State, or who have removed themselves to avoid taking the oath of allegiance to this State, to return thereto, or to avoid any sales of lands, tenements, hereditaments, or movable property, by such persons *bona fide* made before their departure, pursuant to an act of Assembly, passed at the last session of this Assembly, entitled, *'An act for declaring what crimes and practices against the State shall be treason, and what shall be misprision of treason, and providing punishment adequate to crimes of both classes, and for preventing the danger which may arise from persons disaffected to the State.'* 1, 1777, 3, 284.

"And the aforesaid jury also find that in the month of November, 1784, the following act, entitled, *'An act to remove all disabilities from Simon Cleary, and others therein named,'* was made and passed in the words following, viz.: 1, 1784, 34, 145.

"Whereas Timothy Cleary (otherwise Clear), late of the town of New Bern, deceased, departed this life on or about the month of September, in the year of our Lord one thousand seven hundred and seventy-five, without issue, possessed of a considerable real and personal estate, the real estate descending to his eldest brother and heir at law, Simon Cleary, and the personal estate, after deducting the distributive share of the widow to the said Simon Cleary, Patrick Cleary, Esther Beetle, widow, otherwise Cleary, Thomas Connor and Margaret his wife, otherwise Cleary, and Mary Cleary, single woman, brothers and sisters of the said Timothy; and whereas the said brothers and sisters of the deceased were inhabitants of the kingdom of Ireland and other parts without the limits of the United States, by reason of which the commissioners of confiscated estates for the county of Craven have seized and sold the greatest part of the said estate which formerly belonged to the said Simon Cleary, Patrick Cleary, Esther Beetle, Thomas Connor and Margaret his wife, and Mary Cleary; the said Simon, Patrick, Esther, Margaret, and Mary, nor any of them, not appearing at the first General Assembly which was held after the first day of October, one thousand seven hundred and seventy-eight, agreeable to an act commonly called

the Confiscation Act, passed in December, one thousand seven hundred and seventy-seven; and whereas the said Patrick Cleary hath applied to this present General Assembly and offered testimonials to induce a belief that he hath made several attempts to come to this State during the war, properly empowered by his brothers and sisters; the first of which attempts appears to be on or about the latter end of the year one thousand seven hundred and seventy-six, but was each and every time unfortunately taken by privateers; and whereas the General Assembly have resolved that the several claimants of the estate of the said Timothy are entitled to relief, and have voted that they shall receive out of the public treasury the amount of the sales of the said estate, and it is necessary that they should be further relieved by enabling them or some of them to commence an action or actions for the recovery of such part of the estate as hath not been sold, and the rents, issues, and profits thereof, and of such things in action, if any, as may be in the hands of individuals.

" 'II. *Be it therefore enacted, by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the same,* that it shall and may be lawful for the said Patrick Cleary to sue for and obtain letters of administration on the personal estate of his deceased brother, unadministered by James Coor, John Hawks, and David Barron, and the survivors of them, and as administrator to commence and prosecute such suit and suits as may be necessary and in the name of the said Simon Cleary, other the heir or heirs at law of the said Timothy, to commence and prosecute to final judgment any suit or suits either in law or equity which may be necessary for the recovery of any of the real estate which was of said Timothy Clear, any law to the contrary notwithstanding.'

" 'And the aforenamed jury do further find that the premises in question were not sold by any commissioner of confiscated property, before the passing of the last recited act.'

"And upon the whole, if the law is for the plaintiff, they find the defendant guilty of the trespass and ejectment, as laid in the plaintiff's declaration, and assess six-pence costs; if for the defendant, they find the defendant not guilty."

Whereupon the Court, ASHE, J., WILLIAMS, J., and SPENCER, J., after having considered the special verdict, directed judgment to be entered for the defendant.

Maclaine for the plaintiff.
——— *for the defendant.*

HILLSBOROUGH, *April Term, 1790.*

HALL v. COX.—1 Mart., 24.

The affidavit of one who has been convicted of a felony will be heard to excuse a default upon his recognizance.

Cox was bound in a recognizance to appear at October Term, 1789, but did not appear, his recognizance was defaulted. Cox had been convicted at Fayetteville Superior Court of Law of horse stealing, and suffered the punishment. He appeared this term, and an affidavit was offered, sworn to by himself, to induce the Court to remit his recognizance, and was permitted to be read.

All the Judges present.

NOTE.—See the next case.

Cited: Ritter v. Stutts, 43 N. C., 241.

(16)

SALISBURY, *March Term, 1790.*

——— v. KIMBOROUGH.—1 Mart., 25.

After a party to a civil action has been convicted of a felony, his affidavit is still competent in support of a motion for a continuance.

Kimborough, at the last term, had got a *dedimus protestatem* to take the testimony of some persons. He had failed in getting the deposition, and the cause came on to trial; when his counsel filed an affidavit of his, to continue the cause.—It was objected that Kimborough had been convicted of passing counterfeited money, and had suffered punishment; this was admitted: but they argued that he ought to be admitted to make oath, on account of the necessity of the case. Granted by the Court.

SPENCER, J., and WILLIAMS, J., present.

NOTE. See the preceding case of *Hall v. Cox, ante,* 15.

Cited: Ritter v. Stutts, 43 N. C., 241.

(17)

PERSON v. ROUNDTREE.—1 Mart., 18.

Ejectment. Roundtree entered a tract of land, lying in Granville County, on Shocko Creek, and ran the said tract out in the following manner: *Beginning at a tree on the bank of Shocko Creek, running south ——— poles to a corner, thence east ——— poles to a corner, thence north ——— poles to a corner on the creek, thence up the creek to the beginning,* etc. By a mistake, either in the surveyor or in the secretary who filled up the grant, the courses were reversed, *beginning on said creek at a corner, running north ——— poles to a corner, thence east,* etc., placing the lands on the opposite side of the creek from that on which it was really surveyed; so that the grant did not cover one foot of the land surveyed. Roundtree settled on the lands surveyed, which were afterwards entered by Person, who had obtained a deed from Earl Granville for the same, and brought an ejectment against Roundtree for the premises.

On the trial, Roundtree proved the lines of the survey, and his being in possession some time; and claiming the same under his *grant.*

This case was several times argued by counsel on both sides, when it was finally determined, by the *unanimous* opinion of the Court, that the mistake of the surveyor or secretary who filled up the grant should not prejudice the defendant; and that the defendant was well enitled to the lands intended to be granted, which had been surveyed—and therefore there was judgment for the defendant.

Ex relatione WILLIAMS, J.

Cited: Cherry v. Slade, 7 N. C., 87; *Reed v. Shenck,* 13 N. C., 419; *Hauser v. Belton,* 32 N. C., 360; *Ernull v. Whitford,* 48 N. C., 477; *Higdon v. Rice,* 119 N. C., 637; *McKenzie v. Houston,* 130 N. C., 572; *Ipock v. Gaskins,* 161 N. C., 678.

HALIFAX, *April Term, 1789.*

MERRITT'S EX'RS v. MERRITT.—1 Mart., 18.

In detinue for a slave, the plaintiff may proceed for damages and costs though the slave be restored after issue joined.

Detinue. This was a case agreed, viz.: the plaintiff had brought a suit in detinue for a negro in the possession of the defendant, and after issue

joined, the defendant restored the negro to the plaintiff; if the Court were of opinion that the plaintiff could proceed for damages and costs, or costs alone, then there should be judgment for costs: if otherwise, a nonsuit should be entered.

Davie for plaintiff.
Iredell for defendant.

PER CURIAM, after this case had been twice argued.—The plaintiff may proceed for her damages and costs, notwithstanding the negro has been restored to her—and judgment for costs.

NOTE.—*Morgan v. Cone*, 18 N. C., 234, expressly overrules this case, and decides that if, after action brought and issue joined, the plaintiff gets possession of the thing sued for, that fact may be pleaded *puis darrein continuance*, in abatement of the suit, but *it seems* that it would not be a good plea in bar. See, also, *Merritt v. Warmouth*, 2 N. C., 12; *Flowers v. Glasgow, ibid.*, 122; and *Sheppard v. Edwards*, 3 N. C., 186.

Cited: Morgan v. Cone, 18 N. C., 237.

BARROW'S EX'RS v. BAKER.—1 Mart., 19.

The proviso in the Act of 1785 (Rev., ch. 233, sec. 1), requiring the attorney of the appellant to certify the reasons for the appeal, does not relate to actions of debt.

Appeal, on a rule to show cause why an appeal from the Halifax County Court should not be dismissed; the reasons for the appeal being signed by the defendant himself, and not by his attorney, in action of debt.

Iredell for the rule. (18)
Davie, contra.

It was determined by the Court that the proviso in the Act of 1785, 2, 548, relates only to the cases mentioned in that act, and operates as an exception to that act only; therefore, as from actions of debt, an appeal lay by 2, 1777, 2, 82, 348, it was not in the purview of this act.

NOTE.—This proviso was afterwards repealed, 1 Rev. Stat., ch. 1, sec. 2, and ch. 4.

HALIFAX, *April Term, 1789.*

MAYFIELD v. HAWKINS.—1 Mart., 27.

A bill of injunction may be granted, after a former bill for the same cause has been dismissed for not having been served on the defendant in time; but there should be an affidavit of some particular hardship, and no omission on the part of the complainant.

This was a bill of injunction, granted, after a former bill of injunction for the same cause had been dismissed, for not having been served on the defendant in time; for which cause there was a plea in abatement, and on argument the Court ordered the plea to be overruled.

ASHE, J., and WILLIAMS, J., said that in future they would not allow such a bill to stand, without affidavit of some particular hardship, and that there is no omission on the part of the complainant.

But SPENCER, J., was clear that a second injunction might be granted, without any such circumstance of hardship.

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(19)

EDENTON, *May Term, 1789.*

MORRIS WILLING & SWANWICK v. STOKES.—1 Mart., 20.

This was a default and inquiry. The Court ruled that evidence might be given of the difference of exchange between this country and Philadelphia, and in the charge (as bills had not been usually drawn in Edenton, and no one knew the exchange), the Court said to the jury that they might discover the exchange by attending to the value of hard money in this country, and knowing what dollars passed at in Philadelphia.

SPENCER, J., and WILLIAMS, J., present.

NOTE.—See *Emsley v. Lee, post,* 29.

EDENTON, *May Term, 1789.*

SAVAGE'S EX'RS v. RICE.—1 Mart., 20.

In taking depositions where a party lives out of the State, notice may be given to such absent party or to his attorney in Court.

The Court, after argument, said that they had considered the case, and were of opinion, and so laid down the rule, that where a party lives out of the State, the adverse party may give notice to such absent party, or his attorney in court, as he may choose.

This opinion was delivered by WILLIAMS, J., who said it was the Court's opinion: the other two judges being present, and assenting tacitly.

In every instance, except where a witness is about to remove (in which case ten days notice is to be given by Act of Assembly 2, 1777, 2, 41, 306), the Court will fix the time to be given on such notice.

NOTE.—See *Maxwell v. Holland*, 2 N. C., 302, and also 1 Rev., Stat., ch. 31, sec. 68 and 69.

(20)

EDENTON, *May Term, 1789.*

ANDERSON'S ADM'RS v. ANDERSON.—1 Mart., 19.

Where no declaration was filed by the plaintiff, nor any plea by the defendant at the first term of the county court, and at the second term the defendant moved to dismiss the suit for want of a declaration, the court refused the motion, saying it was a matter of discretion under the Act of 1786 (1 Rev. St., ch. 31, sec. 62), and permitted the declaration to be then filed.

In this case, the defendant in the county court did not plead the first term; no judgment was taken. The second term the defendant, by his attorney in fact, moved to dismiss the cause for want of a declaration. Whilst the court was considering the case, the attorney for the plaintiff entered judgment by default; the court ordered a nonsuit, and the plaintiff appealed, and this term cause was shown against striking out the default, and after much argument:

WILLIAMS, J., said he would consider the words in the act of the assembly (1786, 14, 5, 585), "SHALL *dismiss,*" as if they had said "MAY

dismiss"—and they were not obliged to dismiss it, and if the plaintiff was ready with his declaration they would not dismiss the cause at the second term.

SPENCER, J., concurred.

ASHE, J., said he thought the defendant might take the same advantage the second term that he could do the first. That he thought it hard the defendant should be a sufferer by the direction of the Court, to be obliged to enter a *nonsuit* instead of dismissing the cause, and they all agreed that the default should be struck off, and the nonsuit likewise; and the cause sent down in that condition to the county court.

All the Judges present.

NOTE.—See *Dalzell v. Stanly, post,* 50.

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(21)

NEW BERN, *May Term, 1789.*

SURVIVING PARTNER OF STANLY & GREEN v. CUMMINS.—1 Mart., 20.

A note for the payment of £60, specie, in tobacco at the specie price, is a note simply for the payment of so much money; and in ascertaining the damages in a suit on such note the jury may consider the difference in the value of money.

In this case there was a default, and at this May Term, 1789, at New Bern, on executing the inquiry, the note produced, appeared to be for the payment of £60, specie, in tobacco at the specie price, if not paid within two months; but if within two months, then at 40s. per hundred for tobacco. The note was made in December, 1783.

WILLIAMS, J., said it was simply a demand for so much money.

The Attorney-General, who appeared for the plaintiff, attempted to show that a damage might arise to the plaintiff, who was in trade, by not receiving the tobacco which was an exportable article; but the Court did not give into it, and pressed the attorney to say in what manner he would direct the jury himself; who said, if he had the power, he would direct the jury to consider the depreciation of money in order to do justice.

WILLIAMS, J., said the jury were sworn to ascertain the damages sustained, and they might consider the difference in the value of money.

The other Judges assented, but without charging the jury.
All the Judges present.

NOTE.—Such a note would not be negotiable. See *Hodges v. Clinton, post,* 53, and the cases there referred to in the note.

(22)

SALISBURY, *September Term,* 1789.

WILLIS v. SMITH.—1 Mart., 21.

The purchaser of the lands of H. E. McC., under a sale by the commissioners of confiscated property, was allowed to show as good evidence of a title in fee simple, the long possession of H. E. McC., under a deed which he had carried off, the records of the register's office having been destroyed.

This was an ejectment, brought on a deed from the State for lands sold by the commissioners of confiscated property, formerly belonging to H. E. McCulloch. The counsel for the plaintiff set up their deed from the date, and then relied on the possession of McCulloch as evidence of the fee; the original deed to McCulloch, being carried by him beyond sea, and the records in the register's office destroyed. They also showed a plot, and an abstract taken in a list of McCulloch's deeds, and proved the execution of a deed to McCulloch, with possession for several years; the abstract was sworn to, and the plot also. This evidence was objected to by the defendant's counsel, requiring the original deed to be produced.

The counsel for the plaintiff relied upon Buller, 228, 254; Salk., 288; 1 Mod., 117; Douglass, 572; Viner Evid., 231, 2, 3, 4. As to what possession evidence of a fee, they produced and relied on the case of Cowper, 595; Buller, 103; Salk., 421.

Moore and Davie for the plaintiff.
Martin, McCay, and Stokes for the defendant.

PER CURIAM. The evidence is perfectly admissible under the circumstances of this case—and the possession is good evidence of a fee till the contrary appear.

(23)

EDENTON, *November Term, 1789.*

WATSON v. WRIGHT.—1 Mart., 21.

Where a party prays an appeal from the county court, but does not file the papers, and afterwards moves for a writ of error and files a transcript of the record, the court refused, upon the motion of the other party, to dismiss the appeal, saying that they had nothing before them, and that there was no remedy in such case but to sue on the appeal bond.

Appeal. On a writ of error and an appeal on the same cause by Watson, it appeared that Wright had recovered *versus* Watson in the county court, and Watson appealed to May Term, 1789, but did not file the papers. He afterwards gave notice that he intended to move for a writ of error at November Term, in the same case; and at November Term, *Iredell* moved for a writ of error, assigned errors, and filed a transcript of the records which had been taken in the appeal. *Alfred Moore,* Attorney-General, moved to dismiss the appeal, and to have the 12½ per cent, urging that the cause was not before the county court: being removed by the appeal; therefore a writ of error could not regularly go.

The Court refused to dismiss the appeal: saying they had nothing before them, and that there was no remedy in case the appeal was not brought up but to sue the appeal bond.

NOTE.—As to the manner in which appeals from the county to the Superior Court were afterwards carried up, and the remedy provided for the appellee in case the appellant did not carry up his appeal within the time prescribed by law, see 1, Rev. Stat., ch. 4, secs. 3, 4, 5, and 6.

(24)

WILMINGTON, *December Term, 1789.*

JOHN COLHARDIE v. AUGUSTIN STANTON.—1 Mart., 22.

An action on the case lies on a sealed instrument unattested, and not having the words "witness my hand and seal."

This was the case of a promissory note, under seal of wafer and paper. The note was given to one Halfey, who endorsed it some other person, etc., etc., to the plaintiff. As this was an action on the case, *Williams,*

for defendant, objected to the instrument being offered in evidence to the jury. It was permitted to go [to] the jury, and the question reserved—and afterwards, on argument (the note had not the expression "witness my hand *and seal*"), *Williams* said the instrument was before the Court, etc., and relied on *Wood,* 246. *M'Lain* insisted that delivery was necessary and not proved, and cited Gilb, E., 101.

WILLIAMS, J., was clear that it was proper evidence, because the seal is not mentioned in the writing "as witness *my seal.*"

SPENCER, J., concurred.

ASHE, J., differed; said it was a deed; it could not be given in evidence. Judgment for plaintiff.

NOTE.—This case is overruled by *Ingram v. Hall, post,* 69; *S. c.,* 2 N. C., 193.

(25)

HALIFAX, *October Term, 1790.*

FERREL v. PERRY.—1 Mart., 27.

Interest in the event of the question, but not of the cause, will not render a witness incompetent.

Detinue for a negro, formerly the property of John Ferrel, the plaintiff's grandfather, who claims him under a gift which was clearly proved.

The defendant claims under a presumptive gift from John Ferrel to William Ferrel, his son-in-law, previous to the gift to the grandson, and on the trial Norwood (who claimed a negro who was given in the same manner and exactly under the same circumstances, though there was no suit against him), was offered as a witness for the defendant.

Objected by *Davie* for the plaintiff, and to show that he ought not to be a witness read the case of *Abrams qui tam,* before *Lord Parker,* reported by *Lucas,* which says that where there is a bias, though not an immediate interest, it is a good objection, and also in Morgan's Law Essays, a late case before *Lord Mansfield* and *Justice Butler.*

But *Moore* condemned the authority of *Lucas,* and contended that the old rule of being immediately interested was the only sure guide, for since the Courts have departed from that there has been no landmark, etc.

Of which opinion was the Court, for they said that the present verdict cannot be given in evidence in an action against the witness, etc.

WILLIAMS, J., and SPENCER, J., present.

NOTE.—See *Farrell v. Perry*, 2 N. C., 2 (which seems to be the same case), and the note thereto. See, also, *Rowland v. Rowland*, 24 N. C., 61.

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(26)

NEW BERN, *March Term, 1791.*

STANLY'S EX'R v. HAWKINS.—1 Mart., 55.

A person who contracts as agent for the State is not personally responsible.

At May Term, 1790, the jury found in this case the following special verdict, to wit:

"The jury find that the defendant as commercial agent for the State of North Carolina, did purchase of John W. Stanly & Co., on the 3d day of June, 1780,

One Hhd. rum, 110 galls., at £50	£5,500	00	00
On the 27th, 112 lbs. coffee, at £10 8	1,164	16	00
2¾ lbs. of Castile soap, £8	22	00	00
Amounting in the whole to	£6,686	16	00
Equal as per scale of depreciation, to	£89	3	00
And, on July 8th of the same year, 7 hhds. rum, containing 800 galls., at £48,000, equal as per scale of depreciation to	£533	6	8
The debit amounting in the whole to	£622	9	8

"They also find that the said Benjamin Hawkins hath paid to the plaintiff, on the 6th day of July, 1780, a warrant for £20,200, equal per scale to £224 8 10, and 580 dollars in specie, leaving a balance due to the plaintiff of one hundred and sixty-six pounds and ten pence.

"Whether the law be for the plaintiff or defendant, upon the facts aforesaid, the jury pray the advice of the Court. If the law be for the plaintiff, they find the defendant did assume and assess the plaintiff's damage to one hundred and sixty-six pounds and ten pence; if for the defendant, they find the defendant did not assume."

And at this term the Court, ASHE, J., and WILLIAMS, J., gave judgment for the defendant.

NOTE.—See *Hite v. Goodman*, 21 N. C., 364; *State v. Justices of Moore*, 24 N. C., 435.

(27)

FAYETTEVILLE, *April Term, 1791.*

SKIPPER v. HARGROVE.—1 Mart., 74.

In detinue, the plaintiff shall have judgment, though the slave for which the action was brought has died since the demand.

Detinue. *Non detinet* and statute of limitations pleaded. The jury brought the following special verdict:

"The jury sworn, find the defendant doth detain the negroes as set forth in the plaintiff's declaration, to wit, Patience, of the price of two hundred pounds, Ally, of the price of £100, and Violet, of the price of £100. They further find that the negro Bet, also set forth in the plaintiff's declaration, was at the time demanded, in possession of the defendant, and the property of the plaintiff; that she was demanded of the defendant, who refused to deliver her up, and that she is since dead. If the law is in favor of the plaintiff, they find the defendant doth detain the said negro Bet of the price of £50, and if the law is in favor of the defendant, then that she doth not detain the said negro Bet, and assess the plaintiff's damage, to 6 and 6d. costs."

The Court, SPENCER, J., and M'COY, J., gave judgment for the plaintiff.

Overruled: *Bethea v. McLennon*, 23 N. C., 533.

Cited: Bethea v. McLennon, 23 N. C., 533; *Clark v. Whitehurst*, 171 N. C., 2; *Randolph v. McGowans*, 174 N. C., 206.

(28)

FAYETTEVILLE, *April Term, 1791.*

WINDSOR v. WALKER.—1 Mart., 74.

One who takes up a boat adrift on a river is entitled to salvage.

Trover. The jury brought in the following special verdict, viz.:

"The jury sworn, find the defendant guilty, and assess the plaintiff's damage to £4 and 6d. costs: subject to the opinion of the Court, on the following case. The plaintiff owned a boat, which drifted down the

river, and was taken up by the defendant, who claimed salvage, and accordingly refused to restore it until that was paid."

The Court, SPENCER, J., and M'COY, J., gave judgment for the defendant.

NOTE.—See *Winslow v. Walker*, 2 N. C., 192, which decides that the right to salvage in such cases is only to be enforced by detention of the property, and cannot be transferred to a purchaser of the property.

(29)

EDENTON, ——— *Term, 1791.*

ARMISTEAD v. ABBALSON.—1 Mart., 25.

In an action for breach of covenant to deliver specific articles, plaintiff must prove demand and refusal.

The plaintiff declared on a covenant to deliver tar and other articles to a certain amount; the defendant pleaded that he was always ready: the plaintiff could not prove a demand and refusal or neglect, and was nonsuited.

NOTE.—See *England v. Witherspoon*, 2 N. C., 361, and the notes thereto.

EDENTON, ——— *Term, 1791.*

EMSLEY v. LEE.—1 Mart., 25.

This was a suit on a promissory note to pay £100 sterling, according *to the course of exchange.* The Court said this case is not different from bonds for Virginia money, or Whitmill Hill's case and others, and charged the jury to find the exchange at 77 7-9.

N. B. The jury found, however, the real exchange.

EDENTON, ——— *Term, 17—.*

MITCHELL v. CLARKE.—1 Mart., 25.

Plaintiff may, under the book debt law (1 Rev. Stat., ch. 15), prove work and labor done by his slaves, and also goods sold and delivered for the use of the defendant by sundry persons and paid for by the plaintiff.

Motion by *Iredell* for plaintiff to prove work and labor done, not by the plaintiff himself, but by negroes which he employed: and goods, etc., sold and delivered for the use of the defendant, by sundry persons and paid for by the plaintiff, under the book debt act.* (30)

Objected by *Mr. Attorney-General Moore,* that this is neither within the spirit nor letter of the act, because the work was not done by the plaintiff himself, etc.

But, on a long time taken up in discussing the subject, the Court overruled the objection, and admitted the plaintiff to swear.

EDENTON, ——— *Term, 17—.*

CHARLTON'S EX'RS v. LAWRY'S EX'RS.—1 Mart., 26.

In *assumpsit* for fees due a deceased attorney at law, plaintiff was permitted to prove the account under the book debt law (Rev. Stat., ch. 15) by the testator's books.

Assumpsit, on an account for fees as an attorney. *Iredell,* for plaintiff, moved to prove the account by testator's books under the book debt act;* to which the Court objected, as the record of the business done would be better evidence; but on hearing *Iredell, contra,* who argued on the hardship of the case and a reason suggested by *Johnston,* that the record would not always be the best evidence in such case, because the attorney might enter his appearance without being employed, the Court allowed the books to be given in evidence, the sum being under £30.

*1756, 6, 171.

EDENTON, ——— *Term, 17—.*

SMITH v. SMITH'S EX'RS.—1 Mart., 26.

Acts of Assembly take effect from the beginning of the session in which they are passed.

It was admitted on both sides that the testator died during the session, and before the ratification of the act, so that the question was when the act should begin to operate.

(31) *Iredell,* for the petition, insisted, on the authority of many cases he produced, to show that all the acts of the British Parliament take effect as laws from the first day of the session, and therefore *sic hic.*

Johnston, for the defendant, in answer, relied on the words and spirit of the Constitution,* that the signing of the Speakers is necessary to give the act the sanction of a law.

WILLIAMS, J., and SPENCER, J., who delivered their opinions first, concluding with saying that they would not alter the law which had been so long established, and therefore there was judgment for the petitioner.

But ASHE, J., concurred in the opinion of *Johnston.*

NOTE.—See, accordingly, *Sumner v. Barksdale, post,* 328, but it is now provided, since the Act of 1799 (1 Rev. Stat., ch. 52, sec. 36), that the acts of the General Assembly shall be in force only from and after thirty days after the termination of the session in which they are passed, and not before, unless otherwise expressly directed in the acts themselves.

*Sec. XI.

Cited: Hamlet v. Taylor, 50 N. C., 38.

(32)

NEW BERN, *September Term, 1791.*

SIMPSON v. CRAWFORD.—1 Mart., 55.

A writ improperly issued by the clerk in *case* may be altered to *debt,* after it is returned executed.

Jones, for the plaintiff, moved for leave to alter the *capias,* which had been returned *"executed."* He observed that it had been issued by the clerk: that the instrument on which the suit was brought was a *deed,* and the *capias* had been filled up in *case:* while it ought to have been in *covenant.*

The defendant was not in Court, and none of the gentlemen of the bar present, was employed for him.

The Court, ASHE, J., SPENCER, J., and WILLIAMS, J., made no observation, but permitted the *capias* to be altered.

NOTE.—See, *contra, Anonymous,* 2 N. C., 401. But see note to *Cowper v. Edwards,* 2 N. C., 19, and the cases there referred to; and also the cases of *Johnston v. McGinn,* 15 N. C., 277; *Grist v. Hodges,* 14 N. C., 198; *Alston v. Hamlin,* 19 N. C., 115; *Green v. Deberry,* 24 N. C., 344. All amendments, made either by consent or by leave of the Court, ought to appear on the record. *Shearin v. Neville,* 18 N. C., 3.

(33)

FAYETTEVILLE, *October Term, 1791.*

DEN ON THE DEM. OF MABLY v. STAINBACK & TURNER—1 Mart., 75

Where a testator, after bequests of negroes and other personal property to several of his children, concluded thus: "Item, the rest of my estate, negroes, stock and house furniture, to be equally divided between my wife M. H., my son H. H., and my daughter R. H.": *It was held* by WILLIAMS, J., ASHE, J., doubting, that the word "estate" comprehended all the testator could dispose of, real as well as personal.

Ejectment. The jury brought in the following special verdict:

"The jury sworn, find that John Hardiway died seized in fee of the premises in question, that he executed his will in due form of law, in these words: 'In the name of God, I, John Hardiway, of the county of Brunswick, being in perfect sense and sound memory, do make this my last will and testament, revoking all others. My soul I commit to Christ, who redeemed it, my body to be decently buried, and for my estate that God has blessed me with, I give as follows, to wit, I give to my daughter Frances Caudel the following negroes: Little Tom, David, Burnett, Harry, Sue, Sterling, to her and her heirs forever. Item, I give to my son Marcus Hardiway the following negroes: Great Tom, Isabel, Sam, Little Hannah, Bob, Frank, to him and his heirs forever. Item, I give to my daughter Sarah Hardiway the following negroes: Nat, Lucy, Lydia, Jane, Sall, Senos, to her and her heirs forever. Item,

I give to daughter Nancy Hardiway the following negroes: Patty, Claris, Let, Little Peg, Old Hannah, Old Lewis. Item, I do also give to my son Marcus Hardiway, one horse, known by the name Dick, and one feather bed, and to my daughter Frances Caudel, the filly known by the name of Mark Anthony. Item, the rest of estate, negroes, stock, and house furniture to be equally divided between my wife, Mary Hardiway, and my son Hartnell Hardiway, and daughter Rebecca Hardiway. I likewise do appoint my son Marcus Hardiway and William Caudel my executors, whereunto I have set my hand and fixed my seal, this 9th day of December, in the fourth year of our Commonwealth.

JOHN HARDIWAY. [L. S.]

Test: WILLIAM HARRISON.
ROSE (her X mark) STEWART.
JAMES OWEN.

That he died in the year 1779, leaving Marcus Hardiway, his
(34) eldest son and heir at law, and one of his executors. That Marcus Hardiway died, having entered on the premises, that the plaintiff is lessor of the coheirs of said Marcus; they further find that the defendants are lessees of the widow, Mary Hardiway, since Mary Clark and her children, Hartnell Hardiway and Rebecca, in said will mentioned.

Taylor for the defendant. The question is whether, under the word of the will, the widow, Mary Hardiway, Hartnell Hardiway, and Rebecca Hardiway, under whom the defendants claim, take any, and what part of the real estate. The testator's intention to dispose of all his property, is manifested by the introductory as well as residuary clause. Estate is a technical expression, to which a plain and definite meaning is affixed. It comprehends the right a man has to real as well as to personal property, and even by grant of a man's estate, all shall pass what he can grant, *a fortiori* by devise. Woods inst., 117, 129. The words "all a man's estate," have been held to carry a fee, without any words of limitation or perpetuity. 1 Wils., 333. It is now clearly settled that the words "all his estate" will pass everything a man has, unless accompanied with a local description. Further, if the word "estate" does not, in the present case, it will be wholly inoperative, since whatever else the testator had is specifically bequeathed, or covered by negroes, stock, and house furniture.

The introduction is material: nor that, independently of other circumstances, it is sufficient to change the construction of a devise, but as it assists to show the intention of the testator. Cowper, 299. The case of *Turner v. Moore* is so nearly alike in its circumstances, that it ought to govern the decision of the present; and with regard to the authority of

that case, there can be no doubt, as it was decided by *Lord King,* whose decree was affirmed by *Lord Talbot. Cases temp. Talbot,* 284. He also relied upon 2 Term Rep., 411; 6 Mod., 106; Salk., 236; 3 Mod., 45; 2 Vest., 564; 2 Peere Williams, 525; 2 Equ. C. A., 329; H. Bl. Rep., 223.

Moore for the lessors of the plaintiff, argued that the heir at law could not be disinherited without express words; that the generality of the word "estate" was limited by the subsequent word, which shows what the testator meant by using it. That residue must be of something which went before, but lands are nowhere mentioned in the will; he cited and relied upon 2 *Eq. Cas. abridg.,* 328; 2 *Sla. Ray.,* 1324.

WILLIAMS, J., was decidedly of opinion that the word "estate" comprehended all a man could dispose of, real as well as personal.

ASHE, J., doubted.

Curia advisare vult.

The suit was afterwards taken out of Court.

NOTE.—See acc. *Sutton v. Wood, post,* 399; *Foster v. Craige,* 22 N. C., 209. See, also, *Tolar v. Tolar,* 10 N. C., 74; *Clark v. Hyman,* 12 N. C., 383.

(35)

HILLSBOROUGH, *October Term, 1791.*

STRUDWICK v. SHAW.—1 Mart., 34.

Right of possession lost by lapse of time.

The land in dispute was granted to A. in 1728, who sold to B. in 1730, and B. some time afterwards went to England. B. sold to C., who came to Carolina, where he remained till 1787, when he brought suit. One D. settled on the land in 1751, lived upon it thirteen years, and died in possession, leaving a son. The son assigned to some person, who assigned to the defendant, who had lately procured a grant. Under these circumstances *it was held* that the plaintiff's *jus possessionis* was lost.

NOTE.—See this case reported in 2 N. C., 5. Also see *Blair v. Miller,* 13 N. C., 407; *Green v. Harman,* 15 N. C., 158; *Burton v. Carruth,* 18 N. C., 2; *Carson v. Burnett, ibid.,* 546; *Pickett v. Pickett,* 14 N. C., 6; *Hoke v. Henderson, ibid.,* 12; *Rogers v. Mabe,* 15 N. C., 180; *Dobson v. Murphy,* 18 N. C., 586; *Dobson v. Erwin,* 20 N. C., 201; *Murray v. Shanklin, ibid.,* 289; *Ross v. Durham, ibid.,* 54; *Tredwell v. Reddick,* 23 N. C., 56; *Flanniken v. Lee, ibid.,* 293; *Williams v. Buchanan, ibid.,* 535.

(36)

NEW BERN, *March Term, 1792.*

HENRY v. SMITH.—1 Mart., 56.

An infant who has been arrested in a civil suit will be discharged from custody on motion, upon the fact of infancy being made to appear to the Court by inspection or the examination of witnesses.

Henry had sued Smith in the county court of Craven. Smith neglected giving bail, and was committed.

Woods, for the defendant, moved to have him brought into Court, suggesting that he was a minor, and that the property for which he was sued had not been delivered to him. Which,

The Court, SPENCER, J., and M'COY, J., granted.

Whereupon he appeared—and the Court, not being satisfied by inspection that he was a minor, a witness was sworn, and deposed that the defendant was a minor of about the age of seventeen.

And he was, on *Woods'* motion, discharged.

NEW BERN, *March Term, 1792.*

THE STATE v. HIGGINS.—1 Mart., 62.

Where a clerk to a merchant, whose store he attended, had sent goods from the store to a person at a distance with directions to sell them, and he had not communicated this transaction to his principal or any of his other clerks, nor made any entry of it in the books, on an indictment under the Stat. 21st Hen., 8, ch. 7 (see 1 Rev. Stat., ch. 34, sec. 19), the judges differed on the question whether he could be convicted under the statute, but agreed that he might be convicted of felony at the common law. Upon the conviction at common law, judgment was arrested, but upon what ground does not appear.

Indictment on the 21 Hen. 8, 7, 188. It appeared in evidence that the prisoner was a clerk to the prosecutor (a merchant), whose store he attended; that he had sent a parcel of goods from the store to a person who resided at a distance, with directions to sell them; that he
(37) had not communicated this transaction to the prosecutor, or any of his other clerks, and had made no entry of it in the books.

Harris and *Martin,* for the prisoner, contended that he could not be found guilty on this indictment.

1. Because he stood not to the prosecutor in the relation of a *servant,* which the statute requires, and the indictment describes.

2. Because the goods embezzled came *not* to his hands by a delivery of the nature of that described in the statute and the indictment.

I. They said that the words of a statute are to be taken in their ordinary and most known signification, not so much regarding the propriety of grammar as their general and popular use; and cited 1 Comm., 59.

Now, the statute requires that the offender be a *servant.* Perhaps this word, in its most extended grammatical sense, may include *every* person laboring for another, and receiving hire or payment. In its ordinary and popular signification, it reaches no further than family domestics and personal attendants. The painter who draws my picture, the surgeon who pulls out my tooth, the tailor who makes my clothes, the clerk who writes in my office, or attends to my store, are in the first sense my servants; they all labor and are employed by me, and receive payment. Yet, were I to describe them by the appellation of my servants, I would not be understood to mean them; or, if I was, I should be censured for giving them an appellation which in the general and popular acceptation of it is confined to persons of an inferior rank.

A celebrated crown law writer, after speaking of the statute upon which the prisoner is indicted, and the 3 and 4 Will. and Mar., 9, says "to the foregoing larcenies, by breach of trust, by MŒNIAL *servants,* and lodgers, the Legislature has added two others," etc. 1 Hawk., 139, sec. 17. He certainly understood that the *servants* to which the statute relates are only such as are *mœnial,* who live *intra mœnia* within the walls; in other words, DOMESTIC *servants.*

The author of the commentaries, after mentioning *mœnial servants,* apprentices, and laborers, says "there is a fourth species of servants, *if they may be so called:* stewards, FACTORS and bailiffs." 1 Comm., 427, which shows that, in his apprehension, the epithet of *servants,* in ordinary and popular use, is not applicable to stewards, factors, etc.

The same writer, in the next page, says, "A master may by law correct his apprentice or *servant.*" Does he mean that a gentleman could *flog* his steward, or a merchant his factor? Certainly, no.

If the rule of construction, which we have laid down from the commentaries, be a true one; and if the word servant, in its common and popular use, does not comprehend that description of persons employed in the capacity in which the prisoner attended the affairs of the prosecutor, it follows that he did not stand to him in the relation contemplated by the statute.

This construction would be the true one in ordinary acts, but this is a penal statute—one penal in the highest degree. Penal statutes must be construed *strictly*. 1 Comm., 88. Consequently should the word *servant* be restrained to its ordinary signification.

II. The statute confines the things which may be subject of the offense to such as caskets, jewels, money, goods, and chattels, as are delivered to servants *safely* TO BE KEPT *to the use of their masters or mistresses.*

The evidence here is of goods *delivered* TO BE SOLD.

Badger, for the State. Whatever else may be said, it surely cannot reasonably be denied that the present case is strictly within the mischief for which the act intended to provide a remedy; that is to say, the stealing of goods by persons entrusted to manage them for the owner, an offense not sufficiently punishable at the common law. A merchant's clerk, as the prisoner was, has greater opportunities to embezzle property than a *servant* of any other description; having, by the nature of his business, the custody of more goods and more money. It seems peculiarly necessary, therefore, that such persons should be included in this act, for otherwise we are guarded against the smaller evil, and exposed without defense to the greater.

And I contend that this case is also within the *words* of the act. The words *master* and *servant,* according to their popular use, imply a certain relationship, and wherever that relationship is found there is properly a master and servant. This relationship consists of the right of superiority and command on one side, and the duty of service and obedience on the other, and this certainly exists between a merchant and his clerk. The nature of the service is an immaterial circumstance;

(39) for whether a man assume the care of a stable or store, the business of a groom or clerk, he is still a servant; if he has taken upon himself the duty of obedience, and given the rights of authority to another. The right to command, the obligation to obey, is equal in both cases. The time and service in both instances equally belong to the hirer. The contract which produces the relationship is the same, and therefore the relationship itself is the same. The politeness of modern times, it is true, has not often applied this term to merchants' clerks, some of whom are of good families, and would resent the appellation; but this by no means proves that they are not, as clerks, substantially servants, and therefore strictly within the meaning of this act.

The term *servants,* in common language, is very seldom applied to *apprentices,* to merchants, and to several kinds of artificers; yet it never has been denied, I believe, that they are properly servants, and but for the express exception, would, as such, be within the act.

The very expression, "MŒNIAL *servant,*" which is very common, implies that there are servants of a different kind, and otherwise the epithet *mœnial* would be insignificant and useless.

The word servant is used in the act without any epithet to qualify or limit its meaning, and yet it is contended that this general term, which applies equally to all kinds of servants, shall be confined to one kind only, to wit, *mœnial* servants. Had such been the intention of the Legislature, that common expression must have occurred to them, and would certainly have been adopted. I admit that the mechanic to whom we send a job is not our servant, nor do the principles for which I contend imply that he is. There is no authority on one side, no subjection on the other. The mechanic is *employed,* not *directed.* His time is his own, not ours. He may postpone our work to make room for another's. The relationship between him and us supposes no superiority on our side, and therefore it is not the relation which exists between master and servant.

As to the second point.

The goods, it is true, were entrusted to the prisoner to be sold, but they were also in his custody to be *kept* till the sale, and at the time of embezzlement they were in his *keeping,* not having then been sold. His authority to keep had not then expired; he therefore held them under that authority, and therefore his case is within the act.

Until a fair purchaser offered, his authority was merely to *keep.* (40)

Neither of these objections is entitled to much favor. The first admits that persons standing substantially in the same situation with the prisoner, only performing different services, and furnished by the nature of their employments with less power to do mischief, would for the same act be punishable as felons. The second admits that the prisoner, who attempted to ruin his employer by embezzling his property, was entrusted to sell it for his benefit, was under engagements, and had received wages for that purpose.

Admitting, however, that the prisoner is not to be considered as a servant, and that the goods were not delivered him to *keep,* admitting that he is not within the reach of the statute, then he is guilty of larceny by the common law.

It is true that a *taking* is essential to a larceny; and it is said that this offense cannot be committed where there is a delivery of goods from the owner to the offender upon trust. And the instances mentioned are the loan of a horse, and the sending of goods by a carrier. These instances, however, it is to be observed, differ widely from the present case, the owner in these instances parting entirely with the possession, which, for the time belongs exclusively to the carrier and borrower, each of

whom has a special property in the thing delivered. In the present case the offender had not the exclusive possession. The owner had not parted with *his* possession. The goods were in his store, subject to his control and direction, which he occasionally exercised. Had a trespass been committed on these goods, the clerk could not have maintained an action in his own name, but the suit must have been brought in the name of the owner. During every moment of time whilst the prisoner was in the owner's store, the owner might have done whatever he pleased with the goods. The store in which the goods were kept was in *his* possession, nay the prisoner himself was in *his* possession (if I may so speak), having engaged to serve him for hire. As the owner had not *parted* with the possession of the goods, of course the prisoner could not *have* the possession of them. If he had anything, therefore, it was only a care and oversight, and the embezzlement of goods in such a case was felony at the common law. The distinction is clearly expressed in 4 Blackstone, 231. If he had not the possession, but only the care
(41) and oversight of the goods, the embezzling of them is felony at the common law. Here the goods were under the prisoner's care, not in his possession.

It remains, therefore, only to show that though the indictment be founded on the statute, the prisoner may be found guilty of the offense at common law, and to this the 2 Hawk P. C., 251, is in point.

Whereupon *Harris* and *Martin* prayed to be and were heard on the latter part of the argument of the counsel for the State. They said—

The charge against the prisoner presenting itself under another point of view, it behooves us to consider whether the facts charged in the indictment constitute an offense at common law.

Unless it was an offense at common law at the time that statute was passed, it is certainly none at this day. Of this the statute furnishes us a negative proof. In the preamble it is said, after stating such a fact as the one in the indictment, which misbehavior so done, was *doubtful* at the common law, whether it was felony or not.

The preamble of a statute is deemed true, and a good argument may be drawn from it. 2 Inst., 11.

Hence, it must be deemed true that it was doubtful. If it was *doubtful* THEN, it cannot be *certain* NOW. With this negative evidence in our hands, we ought not to fear an adverse verdict; we may claim a favorable one. For in *dubiis semper in favorem vilæ.*

Yet, in taking a retrospective view of the principal and most important decisions of Courts before the reign of Henry VIII, we will, perhaps, incline more strongly to believe that when the statute was

passed the offense under our consideration was deemed a *private injury* only, and no criminal offense.

We do not mean to say that the time never was when such a misbehavior was considered as a criminal offense, nay as felony. In England, as in every other country, during the early age of civil society, no difference was made between moral and civil offenses. Many facts were considered as larcenies, which have since been looked upon only as *private* injuries; thus bailiffs, receivers, and administrators were said to *steal* goods, if they did not give in their accounts; false weights and measures, tricks in trade, and other deceits and impositions are described in the Mirror as instances of larceny. 2 Reeves, 351. (42)

Towards the year 1470, under the reign of Ed. IV, it was held that where a person entrusted goods to the care of a servant, the servant could not take them feloniously, because they were in his possession. 10 Ed. IV, 14.

About three years after the following case happened:

One had bargained with a man to carry certain parcels of goods to Southampton. The man took the parcels, carried them to another place, broke them open, took out the goods, and converted them to his own use. Whether this was in law a larceny was debated with much difference of opinion. It was argued that a possession of the goods was given by the bailment of the owner; and neither felony nor trespass could be committed of them by the bailee; for he could not be said to take them *vi et armis* and *contra pacem*. On the other side it was said that a man's act becomes felony or trespass according to the intent. If a man abuses a distress, he is a trespasser; and so here all confidence implied in the bailment was superseded by the taking, which discovered his intent to have been bad from the beginning. It was also said that this was different from a bailment, for it was only a *bargain to carry;* and what followed shows that this was only a pretense to gain an opportunity for stealing. At length, one of the justices had recourse to a refinement which admitted some of the above reasoning, but exempted this case from the conclusion following upon it. He admitted that a man who has the possession of goods by bailment, cannot commit felony of them; but here, he said, the *goods* within the parcels were *not* bailed to the carrier, but the *parcels themselves;* and therefore taking *them* was not felony; but when he broke them open and took out the *goods,* he did what he had no warrant for, and appeared in a very different light in the eyes of the law. Thus, for instance, if you deliver a tun of wine to a carrier and he sells it, this is neither felony nor trespass; but if he takes any out of the tun and sells it, that is felony. In like manner, if I leave the key of my chamber with any one, and he takes anything out

of it, this is felony. The reason to support these cases was that the things not specifically and expressly delivered were not in truth bailed, and therefore the party, in *taking* them, intermeddled where he had no trust.

(43) These were the arguments used before the council; the case was afterwards adjourned into the exchequer Chamber, and the opinion of all the Judges was taken. There it was agreed by *all* the Judges except one, that generally where goods were bailed to another, he could *not* take them feloniously. They held, also, that when a possession so obtained had once determined, then the bailee might commit felony in taking them; as, if I bail goods to a man to carry them to my house, which he performs, and afterwards takes them, it is felony; because his possession under the bailment ceased when he delivered them at the house. They argued some points upon the nature of possession. If a guest in an inn takes a cup, he is a felon, because he had not properly a possession, but only the use of it while there. The same of a cook or butler; they are only ministers as to the things within their care, but have no possession, which, in these cases, is always construed by law to be in the master. But it would be different, perhaps, says the book, if goods were *bailed* to a servant; for as they then would be in the actual possession of such servant, he could *not* commit felony of them.

After all, as to the principal case, whether it was agreed that the bailment ceased upon breaking the parcels open, and the carrier thereby forfeit the legal privileges annexed to him as bailee, and in so taking the goods he was considered a common person; or whether it was upon the whole thought that this was not a bailment but merely a bargain to carry; it is not stated in the report upon which of these grounds they determined, but it was certified to the Chancellor by the major part of the Justices, that this man was guilty of felony. 3 Reeves, 410.

Towards the year 1485, some questions of larceny similar to the one above cited were debated.

It was propounded by HASSEY, who was then Chief Justice, whether, if a shepherd took the sheep, or a butler the plate, under his care, it could be called felony; he himself thought it was, and related the case of a butler who was hanged under such circumstances; to which a similar case was added by *Haugh,* of a goldsmith who had taken some things that were entrusted to his charge. In answer to these, *Brian* argued that it could not be felony, because neither of these persons could be said to take the things *vi et armis,* while he had them under his care; and of this opinion were the justices. This was giving a blow

(44) to the determination in the time of Edward IV, and expressly

contradicted some cases that were there taken for settled law, and argued upon as such; especially that of the butler. However, we find this case of the butler was understood otherwise some years after and a distinction was taken between the possession a butler has while *in* the master's house, and the possession of a servant entrusted *out* of the house. It was propounded by *Sergeant Pigot,* in the Court of King's Bench, to *Sergeant Cutler,* in this way: If I bail a bag of silver to my servant to keep, and he goes away with it, can this be felony? *Cutler* says yes; for as long as he is in my house, or with me, that which I have delivered to him is adjudged in my possession; thus if my butler, who has my plate in his custody, runs away with it, this is felony; the same if a person having the care of my horse goes off with it, because in both these cases the thing remained all along in my possession. But if I deliver a horse to my servant to ride to market, and if he rides away with it, this is no felony, because he came to lawful possession of the horse by the delivery out of my custody. The same if I give him a bag to carry to London, or to pay away to some one, or to purchase something; if he goes away with these it would not be felony, because they were out of my possession, and he had lawful possession of them himself. To this *Pigot* assented, adding that it might, in all these cases, have an action of detinue or account, which idea of *possession* is consonant to one of the principles laid down in the case so often alluded to. 4 Reeves, 178.

In the time of Henry VIII, says Mr. Reeves, a breach of trust and embezzlement of effects confined to the custody of a person, were thought not to be a *felonious taking and carrying away.* This kind of fraud had of late grown common, from the impunity it enjoyed; and many now thought that, as it carried in it much of the mischief, it deserved the punishment annexed to felony.

The statute upon which this man is indicted was accordingly passed. It is mentioned in the preamble of this act, as a doubt whether this kind of taking was larceny; a doubt raised, perhaps, by the case determined in 13 Ed. IV, which we have before mentioned and which is thought, and not improbably, to have given some occasion for making this statute.

Though the instance of bailment there before the Court was, (45) or might be thought, something like a breach of trust reposed in servants, and was determined to be felony, yet the principles there laid down and agreed to almost unanimously, led to an opposite conclusion; and there needed all the helps of distinctions and technical nicety to take even that case out of the general rule there laid down. Besides, there is at the bottom of that report an opinion, which qualifies any

inference which otherwise might be possibly drawn from it as to this; for admitting that a cook and butler would be guilty of felony if they converted the goods within their respective departments to their own use, it is there said that if the same things were bailed to a servant, *perhaps,* as they would be in his possession, he could not commit felony of them. About three years before, it was said by one of the Judges: "If one commits the care of his goods to his servant, the servant cannot take them feloniously, because they were in his possession." These were direct authorities upon the point, and, joined with the reasoning upon *bailment* and *possession,* sufficiently show what were the opinions of lawyers in those times respecting this question. 4 Reeves, 284.

The case of the carrier, the butler, the guest, fall short from the present. Their possession and power over the things in their hands were temporary. They could not transfer the property; the master was, at all events, to have it back again. In no case was it to be otherwise. In this, the clerk might when he pleased, lawfully dispose of the property, that it should never return to the merchant. His possession was quite of a different nature. Theirs to *keep;* his to *sell.*

So strictly have courts adhered to the notion of possession and its consequences, that in 3 Hen. VII, the Judge went so far as to agree with *Brian* (who, it may be observed, was one of the Judges that dissented from the opinion of felony in 13 Ed. IV, in the exchequer Chamber), that neither a shepherd nor a butler could commit larceny of their sheep or plate, because it could not be done *vi et armis;* so much were the opinions changed from what they had been in the reign of Ed. IV, when these cases were stated for felony, and allowed without debate. This doctrine, we have seen, was again discussed in the last reign; and it seemed, in the instance there stated, to be agreed upon so de-
(46) cidedly *against* the felony, as to call for a formal declaration of the law by statute. Thus stood the law upon this subject towards the end of Henry VII's reign, and so we may suppose it was understood at the time this statute was made. After all these authorities, concludes Mr. Reeves, we may be excused in differing from those who think that the point of law which is the subject of this statute was so well settled before, that the doubt about it mentioned in the preamble is one of those which have much enervated the principles of common law, and could not be the doubt of any lawyer. 4 Reeves, 285.

Lord Hale considers the offense charged on the indictment, as created by the statute. For, he says: Before the statute of 21 Hen., chap. 8, 7, if a man had delivered goods to his servant to keep or carry for him, and he carried them away *animo furandi,* this had *not* been felony, but *by that statute* it is made felony if of the value of forty shillings; but

the offender shall at this day have his clergy; but yet if an apprentice doth this, or if a man delivers a bond to his servant to receive money, or delivers him goods to sell, and he accordingly sells and receives the money and carries it away *animo furandi,* this is neither felony at common law nor by this statute. 2 H. H. P. C., 505.

The same doctrine is laid down, Co. P. C., p. 105, 26 H., 8 Dy. 5, a. b.

Having, we trust, satisfactorily shown, first, that the prisoner is not within the reach of the statute, and secondly, that the facts charged do not constitute the offense of larceny, we proceed to show that even if the prisoner was guilty of larceny, he cannot be convicted of it upon the indictment which the grand jury have found against him.

It is not contended by the counsel for the State, that if he be guilty of any offense at common law, he may be guilty of anything else but larceny.

Hawkins has been read, in order to establish the position that, though an indictment be founded on a statute, the prisoner may be found guilty of an offense at common law.

Although the truth of this position, in a certain degree, is not to be denied now, it is safe to say that it is not generally much less universally true. The origin of it may be traced to *Page's case.* The court, in that case, decided that if persons be indicted, especially on the statute of stabbing, 1 Jac., 16, 6, 351, and the evidence be not sufficient (47) to bring them within the statute, they may be found guilty of general manslaughter, at common law, and the words *contra formam statuti* rejected as senseless.

If the present indictment did not include *contra formam statuti,* it would be insufficient, and no judgment could be given upon it, because the offense charged is only prohibited by statute and not by the common law. See 2 Hawkins, 251.

If an indictment on the statute of stabbing, above cited, did not conclude *contra formam statuti,* still it would be sufficient and good; judgment could be given upon it, as in the case of general manslaughter, or manslaughter at common law, because the facts charged in such indictment are offenses both at common law and under the statute.

The same verdict and judgment may be given upon such an indictment, concluding *contra formam statuti,* in case the evidence does not bring the prisoner within the statute.

Thus if one be indicted, on the 3 El., 9, 304, for perjury, and it be not stated that he *willfully and corruptly* committed perjury, but either that he *falsely and voluntarily,* Savil, 43, or *falsely and corruptly,* Hetl., 12, or *falsely and deceptively,* 2 Leo., 3 Leo., 230; Shower, 190. In all these cases the indictment is bad for an offense on the statute, but is good at common law.

Yet, if the fact proved amounted to the crime of larceny, still the prisoner at the bar could not be found guilty of that offense, because it is not charged in it.

It is not sufficient that the offense charged be prohibited both at the common law and by the statute, in order to support a verdict, by rejecting the words *contra formam statuti;* it is still necessary that the technical words, requisite in the description of the offense at common law, be inserted in the indictment.

An indictment ought to have proper terms of law. 4 Comyns, 398.

The word *cepit* is necessary and requisite in an indictment for larceny. 2 H. P. C., c. 25, §55, p. 224; no other will answer.

It is not in the indictment.

The position established in the latter part of the argument for the State is neither *universally* or *generally* true. It is true only in the case of indictment respecting facts prohibited, both at the com-
(48) mon law and by statute; neither is it true in all such cases, for it will fail, if the indictment does not contain a technical description of a common law offense.

I. The prisoner, therefore, cannot be found guilty under the statute.

1. Because he does not stand in that *relation* which the statute requires, and the indictment describes.

2. Because the goods did not come to his hands by the *delivery, which alone can* bring his offense within the statute.

II. He cannot be found guilty at the common law.

1. Because the facts charged are made criminal by the statute *only.*

2. Because the offense of larceny is not *charged* in the indictment.

WILLIAMS, J., told the jury he thought the prisoner might be found guilty *either* at common law, or upon the statute.

ASHE, J., thought he might be found guilty at common law, but could *not* be convicted on the statute.

The jury withdrew, and found the prisoner *not* guilty of the felony upon the statute, but *guilty* of the felony at common law.

On the next day, the prisoner was brought to the bar, and being asked what he had to say, etc.

Harris and *Martin* moved an arrest of the judgment, and filed reasons.

The counsel for the State, not being ready to enter upon an argument on this motion, the consideration of it was postponed till next court; and

On motion of the prisoner's counsel, it was ordered that the prisoner be discharged from confinement, on his giving bail, before some of the justices of the county of Craven, residing in the town of New Bern.

In September, 1792, there was no Court.

And at March Term, 1793, the consideration of the motion in arrest of judgment was taken up, and without any argument.

JUDGMENT ARRESTED.

*** The prisoner had remained in jail, not being able to procure bail upwards of a twelve months and *Mr. Solicitor-General Jones* (partly out of compassion to him, and partly on account of the late hour at which the Court came to the cause, on the last day of the term) did not oppose the motion in arrest.

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(49)

NEW BERN, ——— *Term, 179—.*

SALMON v. SMOOT & BOND.—1 Mart., 72.

When the sheriff has returned that a garnishee is not to be found, and he comes into Court about other business, he shall be compelled to answer to his garnishment.

Original attachment. The plaintiff had directed Richardson to be summoned as a garnishee, and the sheriff had returned, on the back of the attachment, that he was not to be found.

Richardson came into the courthouse about other business, and *Davie* for the plaintiff, moved that he might answer to his garnishment.

This was objected to by *Martin* for the garnishee, who said that Richardson could not be compelled to answer before due service. A garnishee may be considered as a witness, or as a party to the suit.

A witness is not compellable to give evidence if he has not been legally summoned.

It is no contempt of the Court for a bystander to refuse to be examined. *Bowles v. Johnston,* 1 Blackst. Rep., 26.

The case is much stronger if he be considered as a party. He must then be regularly brought in, and the law gives him two terms to determine on one of the alternatives which it holds out to him, either to give bail, suffer judgment to go against him for the whole debt, or submit to an examination.

The Court, ASHE, J., and WILLIAMS, J., overruled these objections, saying this matter had been lately debated at Wilmington, and determined against the garnishee.

(50)

NEW BERN, *September Term, 1792.*

DALZELL'S ADM'R v. STANLY'S EX'R.—1 Mart., 46.

1. A plea in abatement should be filed at the first term, and is waived by a plea in chief.

2. After a plea in chief, the Court will not dismiss a suit for want of a declaration under the Act of 1786 (1 Rev. Stat., ch. 31, sec. 62), the motion being in the nature of a plea in abatement.

This was an action upon the case, on a promissory note of the testator.

At the appearance term, *Moore,* who had been for many years employed by Stanly in all his suits, and also, after his death by the executor, entered his appearance and pleaded the general issue, although no declaration had been filed.

At the March Term last, Turner, the executor, came into Court, in person, with an affidavit stating that no declaration had been filed, and moved to have the suit dismissed, according to the act of Assembly. 1786, 14, 5, 585.

M'COY, J., who was alone on the bench, refused to determine the motion, on account of its being a point of *argument,* which requires the presence of *two* Judges. 2, 1777, 2, 2, 297.

His Honor directed the affidavit to be filed, and the motion to stand over for argument at the next term.

And now, at this term, *Wood,* for the defendant, argued that the cause ought to be dismissed for want of a declaration, notwithstanding the plea in chief, which, there being no declaration for it to answer, must be considered as a nullity. But,

It was answered by *Davie,* and,

Resolved by the Court, WILLIAMS, J., and M'COY, J., that the motion is in the nature of a plea in abatement, and can not be more favored:

That if this were a plea in abatement, it must not only have been put in at the first term, if at all; but it would be waived by the plea in chief.

That as it is a summary motion, it is entitled to no better treatment.

It was said to have been so resolved by the Judges in some other cause.

*** There was another suit between those parties, where the (51) same motion was also made, and in which it had the like fate.

NOTE.—See *Anderson v. Anderson, ante,* 20, and 1 Rev. Stat., ch. 31, sec. 62.

STATE v. SHEPPARD.—1 Mart., 47.

In an indictment for an assault and battery, the Court will not continue a cause for the absence of a witness who can prove great provocation only, on the part of the prosecutor, but after verdict will suspend the judgment.

Indictment for an assault and battery. At the trial the defendant prayed a continuance, on account of the absence of a material witness.

He was asked what that witness would prove, and on his answering that he intended to prove by the testimony of that witness that the prosecutor had given him very great provocation.

By the Court, ASHE, J., and WILLIAMS, J., this will only go in mitigation of the fine. Let the cause be tried, and if there be a verdict against you, we will postpone giving judgment until next term, in order that you may have the benefit of the testimony of your witness.

The cause was tried, and there being a verdict against the defendant, he was bound over to the next Court.

Ex relatione Arnett.

(52)

HALIFAX, *October Term, 1792.*

MEREDITH v. KENT'S EX'RS.—1 Mart., 28.

The deposition of a witness residing in another state may be read, though he be in the State at the time of trial, and has been summoned in the cause while in the State.

In the course of this trial it was moved by *Stone,* for the defendant, to read the deposition of a witness who resided in Georgia when it was taken, though he was in Bertie County at the time, and had been attending this Court as a witness in the cause, but he was not now present.

Objected by *Lowther,* for the plaintiff, who opposed the introduction of the testimony *totis viribus,* upon the ground that this was not the best evidence; as the witness might have been and was actually summoned in the cause, whilst in the State.

But M'COY, J., declared it to be the settled practice to admit the deposition absolutely; as by the residence of the witness in another State, there could be no forfeiture for nonattendance, though summoned.

Cited: Kinzey v. King, 28 N. C., 78; *Stern v. Herren,* 101 N. C., 519; *State v. Means,* 175 N. C., 823.

(53)

FAYETTEVILLE, *October Term, 1792.*

HODGES v. CLINTON.—1 Mart., 76.

A note for £100 payable in tobacco is not negotiable.

Case. The jury found the following special verdict:

"The jury sworn, find that the defendant did assume; find no set-off, find the defendant did not take the benefit of the act of insolvency, and assess the plaintiff's damage to £73 16s. and 6d. costs: subject to the opinion of the Court, whether the note on which the plaintiff's action is grounded, is a negotiable note within the statute; if it is, they find for plaintiff; if not, for defendant."

The note was for £100 currency, payable in tobacco.

Taylor, for the defendant, argued that no decision upon the 3d & 4th Anne, 9, to which our act of 1762 was in analogy, was to be found, that gave negotiability to notes, except they were for the payment of money alone. Besides the many cases establishing the doctrine, that even notes payable in money are not negotiable, if they are contingent, the case of the East India bond is in point with the present. *Moore v. Venlute.* And if anything else is promised besides the payment of money, the note is not negotiable. 1 Sharp., 629. The design of the act, which was to give to notes a circulation equally beneficial to commerce with bills of exchange, would be frustrated by a contrary decision.

Judgment for the defendant.

NOTE.—See *Jamieson v. Farr*, 2 N. C., 182, and the cases referred to in the note, and also the case of *Alexander v. Oakes*, 2 Dev. & Bat. Rep., 513.

(54)

NEW BERN, *March Term, 1793.*

WILLIAMS v. CABARRUS.—1 Mart., 29.

1. In running a race, one rider may use every fair means to get the track of the other, but neither has a right to strike the other's horse, run on his heels, or do anything of the kind; if one horse get the track of the other, he is not obliged to leave it to save the other's being poled, and if he be jostled, or the like, so as to lose the track, the one that gave the jostle will be distanced, though he did it to save being poled himself.

2. The opinion of the judges of a race is not conclusive: the matter may be afterwards examined by a jury upon testimony produced before term.

3. Where there is a stakeholder, the action lies against him, and not against the losing party, by the party that wins the race.

This was an action upon the case, for money had and received, by the defendant to and for the use of the plaintiff, upon the following case. The plaintiff and Lee Dekeyser made a race to be run the four-mile heats, between the Hyder Ali and the Centinel for £500: which was staked by each party in the hands of the defendant, to hold the same, till the event of the race was determined.

The horses were started fairly. The Centinel had the track, but the Hyder bore down upon him, and at the distance of about 150 yards from the start, the Centinel bearing in and having before *roughed* it on the inner side of the track, was running within the poles which stood at that distance; but his rider checked him short at the pole and drew his head on the outside of it, knocked it down by the inner side of his neck, and *jostled* against the Hyder, who by this stumble, having before outran him, entirely took the track and cleared himself of the Centinel. An article in the race articles said that, whoever rode otherwise than fair, according to the rules of racing, should be considered as distanced, and lose the race.

All the witnesses, except Col. Brown and Mr. Edward Jones, said they thought the horses never touched each other before the Centinel struck the pole. Those two gentlemen were rather of opinion that they did touch before, and Col. Brown said he thought the Centinel was borne out of the track by the superior weight and strength of the Hyder. They all agree, however, that no direct foul play was apparently used.

The question was, whether the Hyder was distanced, as having run unfairly. (55)

Davie for the plaintiff.
And *Taylor* for the defendant.

WILLIAMS, J., recited the testimony, and then said that in running a race, one rider may use every fair means to get the track of the other; but neither has a right to *jostle* the other, to strike *his horse, to run on his heels, or anything of the kind.* If one horse gets the track of the other, he is not obliged to leave it, to save the other's being poled, and if he is *jostled* or the like so as to lose the track, the one that gave the *jostle* will be distanced, though he did it to save being poled himself. The opinion of the judges of the race is not conclusive. The matter may be afterwards examined by a jury upon testimony produced before

them. His Honor here said that he remembered the case of one Pucket in Halifax Superior Court, ten or twelve years ago: where the judges of the race at the start differed in opinion, one saying that there was half a neck difference, and the other that they were even, and at the other end the judges agreed that there was half a neck difference, but they all agreed together that it should be a draw race. Pucket, however, who started the horse that came through first, recovered before a jury, by dividing the difference between the opinions of the two judges at the start, so as to win the race only by the distance of the quarter of the length of the horse's neck.

ASHE, J. Hyder got the track, and the other left it. Here is the point, whether the track was obtained fairly or not. Col. Brown says he thinks Hyder forced the Centinel out of the track by his weight. If this was the case it was not fair, but whether agreeable to the rules of racing or not, I cannot tell. It is true the plaintiff's witnesses are generally sportsmen, and of course their curiosity was engaged, and the probability is that they observed nicely, but they only speak negatively, etc.

It was clearly held by both the judges that an action will lay against the stakeholder, by the party that won the race; and none would lie against the losing party, because he had complied with that article of the agreement, which obliged him to pay, by staking his money with the defendant.

(56) A verdict was found, under these charges, for the plaintiff. ASHE, J., and WILLIAMS, J., present.

NOTE.—That the opinion of the judges of a horse race is not conclusive was also held in *Moore v. Simpson*, 5 N. C., 33. The Act of 1810 (1 Rev. Stat., ch. 51) makes void all bets, contracts, etc., respecting horse racing; and it has been determined under that act that if money bet on a horse race be deposited with a stakeholder, to be by him delivered to the winner, and the stakeholder pay over the money to the winner, after notice from the loser not to do so, the latter may recover the money from the stakeholder. *Wood v. Wood*, 7 N. C., 172. See, also, *Forrest v. Hart, ibid.*, 458.

NEW BERN, *March Term, 1793.*

THE STATE v. ADAMS.—1 Mart., 30.

In an indictment for murder, the offense must be charged in the body of the bill to have been committed within the district over which the Court has jurisdiction; it is not sufficient that the caption names the district;

therefore, where the offense (in the district court) was laid to have been committed in Beaufort County, without adding in the district of New Bern, judgment was arrested.

The defendant had been convicted at the preceding term, of murder, upon the following indictment, to wit:

"State of North Carolina,
New Bern District.
March Term, 1792.

"The Jurors for the State, upon their oath present, that David Adams, late of Beaufort County, planter, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the second day of October, in the year of our Lord, one thousand seven hundred and ninety-one, and in the sixteenth year of American Independence, with force and arms, in the county of Beaufort aforesaid, in and upon one Anthony Mills, in the peace of God and the State, then and there being, feloniously, willfully and of his malice aforethought, did make an assault, and that the said David Adams, with both his hands and feet, he the said Anthony Mills to and against the ground, then and there feloniously, willfully, and of his malice aforethought, did cast, throw, and pull down: and the same Anthony Mills so upon the ground lying, he the said David Adams, with both the hands (57) and feet of him the said David Adams, the said Anthony Mills in and upon the head, breast, back, stomach, and sides of the said Anthony Mills, then and there feloniously, willfully, and of his malice aforethought, did strike, beat, and kick: giving to the said Anthony Mills, as well by the casting, throwing, and pulling down of him the said Anthony Mills, with both the hands and feet of him the said David Adams, in manner aforesaid, several mortal bruises, of which several mortal bruises the said Anthony Mills languished, from the said second day of October till the morning of the third day, being the day following, in the year aforesaid, in the county of Beaufort aforesaid; and languishing did live: on which said third day of October, in the said sixteenth year of American Independence as aforesaid, in the same year, being the day following, the said Anthony Mills in the said county of Beaufort, of the said several mortal bruises aforesaid, died; and so the Jurors aforesaid, upon their oath aforesaid, do say that the said David Adams, the said Anthony Mills, in manner and form aforesaid, feloniously, willfully, and of his malice aforethought, did kill and murder, against the peace and dignity of the State."

He was brought to the bar, and it being demanded of him whether he had anything to say, wherefore judgment of death should not be passed upon him, pursuant to the said conviction.

Davie moved in arrest of judgment for the following reasons, filed at the term the conviction was had, to wit:

I. That the words *with force and arms* are omitted or left out in the said indictment, where those words are material and necessary.

II. That the *district* in which the murder should have been charged to have been done, is not mentioned or inserted.

III. That the said indictment is too vague and uncertain, for the Court to give judgment upon; for in charging the manner by which the said David Adams committed the murder aforesaid, it is set forth, *that as well by the casting, throwing, and pulling down of him the said Anthony, etc.,* without any relative whatever; so that the said Anthony might have come by his death by other means in a manner different from that charged in the bill of indictment.

(58) IV. That the indictment is otherwise informal, defective, and insufficient.

Mr. Solicitor-General Jones for the State.

And the reasons coming on now to be argued, *Davie,* for the prisoner, did not rely principally upon the objection founded on the want of repeating the words *with force and arms* in the indictment, because of the construction of 37 Henry VIII, 8, 256, but he read the Crown Circuit Companion, to show that it was necessary generally. But as to the objection of the omission of the district, he contended that the proper *venue* must be laid in the indictment. The true *venue* here, he said, is the district. The manner of getting a jury here is superior to that of any other country; they are appointed by indifferent persons in the several county courts. To say in the county of *Beaufort* is not of itself sufficient. If the indictment had said, *in the district aforesaid,* though the district was not otherwise mentioned, perhaps it might have done; to show the principle he produced 4 Bl. Comm., 301. The grand jury must be of the proper county and of the vicinage, etc., and 349, the excellence of trial by jury, upon which *Davie* here commented, and also upon the necessity of a strict adherence to rigid rules in criminal cases. It must appear, he contended, from the face of the proceedings that the Court and jury have jurisdiction, etc., 2 Hawk, 303, and as to the necessity of inserting the *venue,* he cited 2 Hale, 180, the ville must be regularly named, etc. The ville and county in England, he contended, answered to the county and district here. So if the indictment had said, at the county in the district aforesaid, but that would be uncertain

if two counties had been before named in the indictment, and of course not good, because in that case the prisoner might have a jury from an improper county imposed on him. Crown Circuit, 101.

As to the third objection, there is not a proper connection; and this causes a want of certainty, which is sufficient to vitiate any indictment. It does not appear whether he received his death by the kicking, etc., or by the throwing, etc., or by either, for want of the word *as*. Wherever uncertainty like this appears, 'twill not warrant the judgment of the Court. 2 Hawk, 259. The particular spot on the man's body on which the wound was given must be shown: and if so, how much more is it necessary for certainty in the manner of giving the mortal wound, in the manner the law requires. It wants certainty, p. 320, 355, 57. The words *"felonice cepit, murdravit,"* etc., being words of art cannot be supplied by any paraphrase or circumlocution. 2 Hale, 185. The offense, says *Lord Hale,* must be alleged particularly. 4, Co., 40. *Circiter pectus* is not good, p. 44, *Vause's case.* As to the manner, it must be certain and not require argument to make it certain enough for judgment, etc.

Mr. Solicitor-General Jones. The first objection is abandoned.

As to the 2d. The only necessity for a *venue* is to show that the Court has jurisdiction of the matter. This is shown, because the law has fixed the county of Beaufort in the jurisdiction of this Court, being a part of the district and the district is mentioned in the margin. The offense is charged in Beaufort County, and it bursts upon the imagination that Beaufort is in the jurisdiction of this Court. In support of this, he cited 4 Bl., 301, which he said was a modern authority of a respectable crown law writer, and more to be relied on than the more ancient books.

As to the 3d reason: surely it is enough that he came by his death by *one* of the modes charged; and he read the Crown Circuit to show that a mistake of the place is not material, etc., etc.

WILLIAMS, J. It is not to be doubted, but that by the common law, sufficient certainty must appear. The first reason is waived by reason of the statute of Henry the VIII. As to the second, the counsel for the prisoner says that the district is the true *venue* here. It is certainly true, and the niceties spoken of by *Justice Blackstone,* as condemned by Hale, are not such as these; the proper *ville* is not mentioned. As to the knowledge that Beaufort County is in New Bern district, that doesn't appear from the indictment. If it had said the district aforesaid, it might do, perhaps, but suppose there had been another county, in another state, of the same name, that would not be in the jurisdiction.

This, therefore, is uncertain, and might be more certain. And as to the third objection, there seems to be some weight in it; but the second is so clear that there is no doubt; and his Honor was therefore clearly of opinion that the indictment was insufficient.

ASHE, J. The niceties required in ancient times in law proceedings became a grievance and the statutes of *Jeofails* remedied the abuse in civil cases, but not in criminal. As to the first objection, the statute of Henry the VIII does it away. As to the second, in making observations of this kind, he should only go over those of Judge WILLIAMS. It is true the district is mentioned, not indeed in the margin, but in the caption; it must certainly also be in the body of the indictment. There is no law or authority that excludes that idea, because it will then appear that the jury has come from the proper *venue*. It is contended that it is very well known that Beaufort County is in the district of New Bern; but we are not to take our knowledge from anything but the record. If it had said district aforesaid, it would do, but there might be another county of that name, etc. And as to the third reason, here are two distinct charges in the indictment: it doesn't charge that he came to his death by both modes; therefore there ought to be a relative. To make this proper, there ought to be a double relative, etc. He read the precedent in the Crown Circuit, and the indictment pursued it; but his Honor observed notwithstanding that it certainly was improperly charged.

And, therefore, judgment was arrested.

Per totam curiam.

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(59)

HALIFAX, *April Term, 1793.*

DEN ON DEM. OF WARD v. WARD.—1 Mart., 28.

When a deed conveyed the whole estate absolutely to the bargainee, but in the premises, though not in the *habendum*, there was *an exception of the grantor's lifetime in any part or parcel of the land, it was held* that the fee passed immediately to the grantee, and the reservation was void.

Ejectment. In the trial of this cause, a question arose upon a deed of bargain and sale, made to the lessor of the plaintiff, by his father, in the year 1771, of the premises in question, which conveyed the whole estate absolutely to the bargainee; but in the premises of the deed there is *an exception of the grantor's lifetime in any part or parcel of the land;* though this exception is not in the *habendum*. Whether the lessor

of the plaintiff took a fee by this conveyance, as a life estate, was reserved to the grantor.

Davie, for the defendant, laid it down as an established rule of law that a *fee* cannot be created by deed to take effect or arise *in futurio;* and here he said, the grantee was not to take till after the grantor's death.

Mr. Attorney-General Haywood entered into a discussion of the doctrine of uses, to show that the use might be limited to take effect in this manner by the statute of uses*; although it would not have been good at the common law.

But the Court, ASHE, J., and WILLIAMS, J., stopped the Attorney-General, saying they differed with him in opinion, with respect to the operation of the statute of uses; but they were clearly of opinion without hearing *Haywood* further, that here the fee immediately passed to the grantee, and the reservation was void.

NOTE.—See the cases of *Sasser v. Blyth,* 2 N. C., 259, and *Smith v. Grady,* 13 N. C., 395, which seem to overrule this case.

*27 H. VIII, 10, 208.

Cited: Savage v. Lee, 90 N. C., 323.

(60)

NEW BERN, *March Term, 1794.*

KAIGHN & ATTMORE v. KENNEDY.—1 Mart., 37.

1. It is the practice to admit depositions which come up with the transcript of the record from the county to the Superior Court, to be read, and to presume that notice has been duly served, and the depositions duly taken, upon proof that they were read below.
2. Declarations of the counsel of the adverse party cannot be given in evidence.
3. After a jury is impaneled in the Superior Court, if it appear that one of the jury has tried the cause in the county court, the juror will be withdrawn, and the cause continued, though one of the parties insists on having another juror sworn.
4. In an action for goods sold and delivered, interest should be allowed according to the custom of the place where the goods were sold.

Certiorari. At the trial *Davie,* for the plaintiffs, offered to read a deposition taken in Philadelphia.

Moore, for the defendant, objected, unless notice could be proved to have been given to the defendant of the time and place at which the deposition was taken.

ASHE, J., inclined to think the deposition ought not to be read, unless notice was proved. But

M'COY, J., said it had been the constant practice of the Superior Courts, when a cause from the county courts was tried anew, and a deposition come up with the transcript of the record, to admit it to be read; and to presume due service of the notice and that the deposition had been duly taken, on proof that it had been read below.

Whereupon, by the Court. Let proof be made of the reading of this deposition below, and it may be read.

Davie offered to read a certificate, which the plaintiff had obtained from the District Judge of the United States, *Sitgreaves,* who, while at the bar, was of counsel for the defendant in this case; stating that the deposition was taken by consent of him and *Caswell,* counsel for the plaintiffs, and that notice was waived.

But *Moore* and *Martin* opposed that evidence, as it was not given on oath.

Davie contended that evidence might be given of an adverse party's declaration—that *Sitgreaves* being the defendant's counsel, his declaration might be given in evidence, with as much propriety as that of the principal. That if it may, evidence of it in writing ought to be received.

(61) But the Court, ASHE, J., and M'COY, J., unanimously rejected it.

While the plaintiffs' counsel was looking around to discover some person who could prove what was required of him, one of the jurors, looking at the deposition, recognized on the back of it some figures which he had made in casting up the interest, at the trial in the county court; having been a juror there.

Moore objected then to that gentleman trying the cause now; as he had already done so once.

On this, the cause was continued; although *Davie* insisted, very strenuously, that another juror might be sworn.

At September Term following, the plaintiffs had a verdict: but

Martin, for the defendant, moved for a rule to show cause why a new trial should not be had. Urging 1st, that improper evidence had been suffered to go to the jury; 2d, that excessive damages had been given.

The rule was granted.

And on the last day of the term, *Graham,* for the plaintiffs, moved to have the rule discharged; on the ground that the defendant, on the argument day, ought to have moved for the rule being made either absolute or enlarged; that having neglected to do so, he ought to be considered as having abandoned his motion.

But *Martin* and *Badger* contended that this being the last day of the term, no business on the law docket could be taken up; the law having exclusively set apart the three last days of every term for the dispatch of equity business, 1792, 8, 46.

Graham replied that the rule must be looked upon as having expired: and

Martin and *Badger* held that the defendant, having obtained the rule and served a copy of it, nothing remained to be done by him until the plaintiffs showed cause.

That it was the plaintiffs' and not the defendant's duty to move the Court: and cited a number of cases out of *Burrows*.

Of this opinion was the Court [M'COY, J., *alone*], who said, that although it was certainly the duty of the plaintiffs to have applied sooner, and on their having neglected to do so, the rule might be made absolute: yet, as this cause had long been depending (it having been commenced nine years ago), he would enlarge the rule until next term.

At March Term, 1795. The rule for a new trial was taken up, and the reasons assigned by *Martin* were: (62)

1. That the declaration contained but the two common counts, for goods, etc., sold and delivered at a stated price, and on a *quantum valebant:* yet an agreement signed by the defendant, that interest should be paid after six months from the delivery of the goods, was read to the jury, from the deposition taken in Philadelphia; although that agreement was not declared upon—and it was therefore improperly introduced.

2. That excessive damages had been given: interest having been computed from the delivery of the goods.

The Court, ASHE, J., and WILLIAMS, J., thought that interest being customarily allowed in Philadelphia in similar cases, it was proper that it should be given in this; even if there had been no agreement to that effect.

They deemed the second objection a proper one.

The plaintiff remitted the interest, during the first six months; and had judgment.

NOTE.—Upon the first point, see *Rutherford v. Nelson*, 2 N. C., 105, and *Collier v. Jeffries*, 3 N. C., 400. Upon the fourth point see, see *Anonymous*, 3 N. C., 5.

NEW BERN, *March Term, 1794.*

THE STATE v. GEORGE, A FREE NEGRO.—1 Mart., 40.

Whether a slave could testify as a witness against a free negro, *quære.*

Mr. Solicitor-General Jones had drawn a bill of indictment for burglary against the defendant: and at the moment it was about to be sent to the grand jury, and the book was handed to the witnesses:

Martin called the attention of the Court to the table: observing that one of the witnesses about to be sworn, was a negro slave; that although the defendant was a negro, yet, he being a free man, it was perhaps improper that a slave should testify against him.

M'COY, J. [ASHE, J., *tacente*]. If there be anything in the objection, the Court will attend to it at the trial.

The slave was sworn, and the bill was found. The prisoner being arraigned, pleaded not guilty; but made his escape before the day assigned for his trial.

See *Cox v. Dove, post,* 72.

(63)

NEW BERN, *September Term, 1794.*

STATE v. GROVE.—1 Mart., 43.

1. An examination of a prisoner made before a magistrate must be recorded within two days, under the Acts of 1715 (1 Rev. Stat., ch. 35, sec. 1) and 2 and 3 Phil. & Mary, ch. 10; and parol evidence of it cannot be received.

2. Where there are two statutes *in pari materia,* as the Stat. 2 and 3, P. & Mary, ch. 10, and the Act of 1715 (Rev. Code, ch. 1), and the latter contains no words of repeal, they are to be taken as one law.

Indictment for arson. *Mr. Solicitor-General Jones,* praying that a witness might be sworn.

Davie, who was of counsel for the prisoner, asked what use was expected to be made of his testimony. Whereupon the Solicitor-General informed the Court that the gentleman at the table was the magistrate who had committed the prisoner; and he was introduced to give evidence of the prisoner's confession or admission, previous to his commitment.

The magistrate was asked whether he had committed the examination of the prisoner to writing, and answered in the negative.

Davie for the prisoner. *Parol* evidence of the prisoner's examination is admissible. It is required by 1715, 16, 11, that the examination of the party be *recorded.*

Of which opinion was the Court.

Whereupon Mr. Solicitor-General wished the magistrate to sit down at the table and make a record of the examination, that it might be read, but

Davie held it was now too late. The examination ought to be committed to writing within *two days* after the taking of it. It is so required by 2 and 3 P. & M., 10, 284.

Mr. Solicitor-General. The statute is not *now* in force; the Act of Assembly, already quoted, has repealed it.

The Court, M'COY, J., *alone.* There being no words of repeal in the act, and the statute being *in pari materia,* they ought to be taken as one law.

The magistrate not being admitted to be sworn.

Mr. Solicitor-General entered a *nol. pros.,* and the prisoner was discharged.

NOTE.—Upon the first point, see 1 Rev. Stat., ch. 35, sec. 1, and the case of *State v. Irwin,* 2 N. C., 112, and the note thereto.

On the second point, see *Ogden v. Witherspoon,* 3 N. C., 227.

(64)

NEW BERN, *September Term, 1794.*

THOMEGUEX v. BELL.—1 Mart., 44.

Defendants, though not named in the book debt law of 1756 (Rev. Co., ch. 57), have always been admitted to its benefit, and, therefore, may prove a set-off under it.

The defendant offered to prove a set-off, under the book debt act, 1756, 4, 171.

The plaintiff's counsel opposed it, on the ground that this act being in direct contradiction of one of the most wholesome maxims of the common law, ought to be strictly construed. That *plaintiffs* alone were mentioned in it: and it ought not to be extended to *defendants* by implication.

He cited a saying of *Lord Coke,* in *Slade's case,* 4 Rep., 95. *Jurare in propria causa est sœpenumero hoc seculo, precipitium diaboli, ad detrudendas miserorum animas ad infernum.*

By the Court, M'COY, J., *alone*. *Defendants* have been uniformly admitted to the benefit of this act. The objection has never been made before: the practice of the Court has been the other way. Let the defendant be sworn.

He proved his set-off, which consisted of a tavern bill, partly by the testimony of a witness, and partly, a sum under £30, by his own oath.

To the set-off there was a replication of the act respecting ordinaries, 3, 179, 10, 15, 392: which was insisted on by the plaintiff.

The Court, M'COY, J., *alone,* in the charge, told the jury it was doubtful whether the act contemplated a case like this, viz.: that of a person *constantly* residing in a town, and *occasionally* calling at a tavern. His Honor said the act was perhaps intended only to operate in case of seafaring men and *transient* persons. The jury would do well to consider of this.

They allowed the set-off.

Martin for the plaintiff.
Slade for the defendant.

*** At the succeeding term, the first question was incidentally mentioned from the bench, in another cause.

(65) ASHE, J., inclined to think the book debt act did not admit of so liberal a construction, as to admit *defendants* to the benefit of it.

WILLIAMS, J., seemed clearly of the contrary opinion.

See 1 Rev. Stat., ch. 15, sec. 6.

Cited: Webber v. Webber, 79 N. C., 575.

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(66)

NEW BERN, *March Term, 1795.*

HARVEY v. JONES & BARFIELD.—1 Mart., 41.

Where a subscribing witness resides in the State, but is temporarily absent at the trial, whether proof of his handwriting should be admitted, *quære.*

Case on a promissory note. The plaintiff proved that the subscribing witness was not in the State, and offered to give evidence as to his handwriting.

But it appearing that the witness resided in the State, and was occasionally absent:

The Court, ASHE, J., and WILLIAMS, J., doubted of the propriety of admitting proof of the handwriting: saying that the testimony of that witness might be obtained at another term; that a commission might be taken and his deposition procured while he was in the State, and read, if he happened to be abroad at the time of trial.

They recommended it to the counsel of both parties to consent to a juror being drawn.

And on their agreeing thereto, it was accordingly done.

Martin for the plaintiff.
Badger for the defendants.

NOTE.—See *Gordon v. Payne, post,* 82; *Selby v. Clark,* 11 N. C., 265, from which it appears that such testimony is inadmissible.

NEW BERN, *March Term, 1795.*

STANLY'S EXECUTOR v. GREEN.—1 Mart., 60.

1. In an action of debt on a sealed note, if the plaintiff of record is merely nominal, and the real interest in the note is in another, a set-off against the latter may be admitted in evidence.

2. Where a set-off is pleaded, if the plaintiff wish to avoid it on the ground of its being out of date, he must reply the statute of limitations.

This was an action of debt on a sealed note, to which the defendant pleaded on the docket among other pleas *"set-off";* but (67) no plea was drawn out at large and filed.

On the trial the defendant's counsel produced as evidence of a set-off, a letter from one Hooper in South Carolina, to the defendant, dated about the year 1785, in which he acknowledged that he had received gold for the benefit of the defendant, a number of certificates, and in the same letter stated the proceeds of the sale. The defendant's counsel offered at the same time to prove that the real interest of the note was in Hooper, and that Stanly's executor was merely a nominal plaintiff.

To this evidence two objections were taken by the plaintiff's counsel. 1st. That as Stanly's executor appeared in the record to be the real plaintiff and only person entrusted in the note, no evidence could be

received to contradict the record, nor prove the property of the note to be in any other person, and consequently no debt, except one due from Stanly, could be set against it. 2d. That the demand set up by Hooper was barred by the statute of limitations, and was not such an existing debt as would support a suit, and therefore would not be set off.

But these objections were both overruled by the Court, ASHE, J., and WILLIAMS, J., who said that if the interest of the note was in Hooper, then demands of the defendant against him might be set up against it, for the debts were in fact mutual—that as the defendant had pleaded his set-off, the plaintiff ought to have replied the statute of limitations; and that a plaintiff can no more oppose this statute to a defendant's pleas without replying it, than a defendant can to the plaintiff's declaration without pleading it.

The defendant's counsel was proceeding to prove that the interest of the note was in Hooper, when the fact was admitted by the plaintiff's counsel and the set-off allowed.

Woods for the plaintiff.
Badger for the defendant.

Quœre of the propriety of this decision. 1. Because by no construction of any part of the record, could it be inferred that Hooper was concerned in interest. The fact ought to have been set forth in the plea, and although it is not the general practice of the bar in this State to draw out the pleadings at full length; yet every material fact which can not be intended in the ordinary form of the plea, ought at
(68) least to be suggested on the docket. 2. Because it is reported that the Superior Court sitting at Edenton had before determined that the words *"set-off,"* written on the docket should be considered as a notice of set-off only, and that all objections to the demand set up, might be taken at the trial.

Ex relatione Woods.

NOTE.—Upon the first point, see *Hogg v. Ashe*, 2 N. C., 471 (*S. c., post*, 233), and the cases referred to in the note thereto, and also the cases of *State Bank v. Armstrong*, 15 N. C., 519; *Haywood v. McNair*, 14 N. C., 231; *S. c.*, 19 N. C., 283; *Haughton v. Leary*, 20 N. C., 14; *Bunting v. Ricks*, 22 N. C., 130.

As to the second part, see *McDowell v. Tate*, 12 N. C., 249; *Worth v. Fentress, ibid.*, 419.

NEW BERN, *March Term, 1795.*

REGULA GENERALIS.—1 Mart., 61.

By consent of the bar, and with the assent of the Court, it is ordered that commissions to take testimony *de bene esse,* where witnesses reside within the State: and *absolute* when without the State, may issue in all cases.

Reasonable notice to be given the adverse party.

(69)

FAYETTEVILLE, *April Term, 1795.*

JOHN INGRAM, ASSIGNEE, ETC., v. JOHN HALL.—1 Mart., 1.

NOTE.—See this case reported at length in 2 N. C., 193, and see, also, the note thereto. As to the proof of attested deeds and other sealed instruments, see the note to *Clements v. Eason,* 2 N. C., 18, and the cases of *McKinder v. Littlejohn,* 23 N. C., 66, and *Blume v. Bowman,* 24 N. C., 338.

PERSON v. ROUNDTREE.—1 Mart., 18.

NOTE.—See this case reported in 2 N. C., 378, in a note to ——— *v. Beatty.* See, also, the note to *Bradford v. Hill,* 2 N. C., 22; *Ingram v. Colson,* 14 N. C., 520; *Lynch v. Allen,* 20 N. C., 190; *Ring v. King, ibid.,* 301; *Hough v. Horne, ibid.,* 369; and *Becton v. Chesnut, ibid.,* 479; *Stapleford v. Brinson,* 24 N. C., 311; *Massey v. Belisle, ibid.,* 170.

(70)

NEW BERN, *September Term, 1795.*

WILLIS v. BROWN'S EXECUTORS.—1 Mart., 52.

Deposition *de bene esse.*

Davie, for the plaintiff, moved that a commission *de bene esse* might be read upon the plaintiff's affidavit, that the deponent was sick and unable to attend.

The defendant objected to this: and

By the Court, WILLIAMS, J., and HAYWOOD, J. A party cannot entitle himself, by his own affidavit, to introduce this weaker kind of evidence. The disability of the deponent to attend the Court must be proved by indifferent testimony.

And the deposition was set aside.

NOTE.—See ——— *v. Brown*, 2 N. C., 227 (which is probably the same case with this), and *Anonymous*, 3 N. C., 74.

NEW BERN, *September Term, 1795.*

MOORING v. STANTON.—1 Mart., 52.

Money paid at request of another for his gambling debt is recoverable.

Case on a promissory note, the consideration of which appeared to be money paid by the plaintiff to a third person, for money lost at gaming by the defendant.

On a plea of the statute of gaming. 1788, 5, 633.

HAYWOOD, J. Money lent to play with, or to pay, at the time of loss, is not recoverable. But it is otherwise of a gaming debt paid by a third person, at the request of the loser.

NOTE.—See Act of 1788 (1 Rev. Stat., ch. 51), and the cases upon the construction of it, *Anonymous*, 3 N. C., 231; *Stowell v. Guthrie, ibid.*, 297; *Hodges v. Pitman*, 4 N. C., 276; *Turner v. Peacock*, 13 N. C., 303; *Hudspeth v. Wilson, ibid.*, 372; *Dunn v. Holloway*, 16 N. C., 322.

(71)

IN EQUITY, NEW BERN, *September Term, 1795.*

BIZZELL v. BURKE.—1 Mart., 61.

Practice on dissolution of injunction, if original bill is continued.

In this suit it was ruled by the Court, M'COY, J., and STONE, J., that upon the injunction dissolved, and the bill continued as an original, if

the complainant neglects to take out depositions or subpœna witnesses, the suit is discontinued, at the second term after the injunction dissolved. *Ex relatione* STANLY, *Magistri.*

NOTE.—See *Anonymous*, 2 N. C., 162, and the cases referred to in the note.

NEW BERN, *September Term, 1795.*

ELLIS' ADM'R v. HETFIELD.—1 Mart., 41.

In covenant by an administrator, *non est factum* pleaded, the handwriting of the plaintiff, who was the only subscribing witness, was permitted to be proved, but the Court also required proof of the signature of the defendant.

Covenant and *non est factum* pleaded. *Martin,* for the plaintiff, offered to give evidence of the handwriting of the plaintiff, who was the only subscribing witness to the specialty; and cited *Godfrey v. Norris,* 1 Strange, 34.

This was objected to by *Slade,* for the defendant: but

Admitted by the Court, WILLIAMS, J., and HAYWOOD, J.

And proof having given of the subscribing witness' handwriting:

WILLIAMS, J., required that the signature of the defendant should also be proved.

HAYWOOD, J., *tacente.*

It was accordingly done, and the plaintiff had a verdict.

NOTE.—See the note to *Hamilton v. Williams,* 2 N. C., 139, and the cases there referred to, and also the case of *Saunders v. Ferrill,* 23 N. C., 97.

Cited: Ballard v. Ballard, 75 N. C., 192.

(72)

NEW BERN, *March Term, 1796.*

GOODRIGHT ON THE DEM. OF SHEPPARD v. TAYLOR.—1 Mart., 46.

Allowance to surveyors and special jurors.

On a question for the opinion of the Court, respecting the taxation of costs, it was determined.

By the Court, HAYWOOD, J., and STONE, J. That the surveyors are entitled to receive 20s. per day, while on the premises, making the plots,

etc., but while attending the Court, where their attendance is necessary, the common allowance of witnesses.

The special jurors are to be allowed, while on the premises, 8s. per day: and while at Court, in the Superior Court, the same allowance. But, in the county court, nothing. 1786, 13, 583.

NOTE.—See 1 Rev. Stat., ch. 31, sec. 124, and ch. 105, sec. 32.

NEW BERN, *March Term, 1796.*

COX v. DOVE, A FREE NEGRO.—1 Mart., 43.

1. A slave cannot be a witness against a free negro.
2. In trespass *quare clausum fregit*, the defendant, under the general issue, may give in evidence a license.

Trespass *quare clausum fregit* and *non culpabilis* pleaded.

To prove the entry, a negro slave was called and offered to be sworn.

But the Court (WILLIAMS, J., saying he never heard such a thing, asked: HAYWOOD, J., *tacente*), refused to admit the witness, although the defendant was stated to be a negro. 2, 1777, 2, 42, 307.

The case of *State v. George, ante,* p. 62, was cited: but much argument was not offered by the plaintiff's counsel; there being other witnesses attending to prove the fact intended to have been proved by the slave. He having been offered only to come at the opinion of the judges.

Slade, for the defendant, offered to read in evidence, a letter
(73) from the plaintiff to the defendant, authorizing him to tend turpentine trees on the premises.

Martin, for the plaintiff, objected to this, on the ground that if the defendant meant to avail himself of the plaintiff's license, he ought not to have denied the entry, which he had done by pleading *non culpabilis;* at all events he ought to have pleaded *justification.* He cited Co. Litt., 282.

The Court, HAYWOOD, J., and STONE, J., nevertheless permitted the letter to be read, on the authority of a case cited out of Buller's Nisi Prius, 90. Hatton & Neale, per Jones, C. J., 1683.

The plaintiff proved a trespass committed by cutting timber, and had a verdict.

NOTE.—Upon the first point, see *State v. George, ante,* 62, and 1 Rev. Stat., ch. 31, sec. 81. The law was later clearly settled that a slave is a competent witness against a free negro.

IN EQUITY, NEW BERN, *March Term, 1796.*

PATTERSON v. SAVAGE'S EX'RS.—1 Mart., 61.

Abatement of action.

The Court, HAYWOOD, J., and STONE, J., held that, if the death of a party is suggested, the suit goes off at the second term after the suggestion.

Witherspoon for the complainant.
Baker for the defendant.

NOTE.—See *Collier v. Bank*, 21 N. C., 328.

(74)

IN EQUITY, NEW BERN, ——— *Term, 179—.*

REGULA GENERALIS.—1 Mart., 62.

Upon completing depositions, the party taking the same may give notice to the opposite party to attend before the Master, for the purpose of being present or proving the notice given of the taking of such deposition, and the Master, upon the return of the notice served, is to examine the evidence offered, respecting service of notices and also hear and consider any objection made against the same. If the Master shall be of opinion that the notice was duly served, or the deposition properly taken, he shall indorse his judgment respecting the same upon the deposition, and make a memorandum thereof upon the docket.

Provided, that notice to attend before the Master in vacation, shall be served on the opposite party, at least ten days before such attendance required, and when the notice shall be served on the party in term time and the party shall be at the time of service in the town of New Bern, then one day's notice.

If either party be dissatisfied with the determination of the Master, he may except thereto when the case shall be reported by the Master, and determined by the Court.

(75)

IN EQUITY, HALIFAX, *April Term, 1796.*

JONES' EX'RS v. STOKES.—1 Mart., 36.

Plea of no service in ten days before Court *held* bad when there had been no service at all.

The defendant pleaded in this case that the process, etc., had not been served on him *ten days* before Court, as the Act of Assembly directs; but it appearing that it had never been served upon him at any time: 1782, 11, 432.

The Court, HAYWOOD, J., and STONE, J., ordered the plea to be overruled: because the act only gives the advantage to the defendant for an *illegal* service, but not when there is *no* service at all.

NOTE.—See an anonymous case in 2 N. C., 286, which is probably the same case with this, and *Worthington v. Colhane*, 4 N. C., 166, which fully sustains it.

(76)

NEW BERN, *September Term, 1796.*

BETTNER v. ———.1 Mart., 36.

In an action on a foreign bill of exchange protested for nonacceptance, the defendant, by suffering a default, admits the declaration to the amount of the bill, but the plaintiff, to entitle himself to extraordinary interest and damages under the Act of 1741 (see 1 Rev. Stat., ch. 13, sec. 8), must prove notice to the defendant of the dishonor of the bill.

Case on a foreign bill of exchange, protested for nonacceptance. The defendant suffered a default: on executing the writ of inquiry, a question arose, whether the plaintiff was bound to give notice to the defendant, that his bill had been dishonored before he could bring suit; *and by the Court,* the defendant, by suffering a default, has admitted the declaration to the amount of the bill.

Whereupon it was urged in behalf of the plaintiff, that he should recover 15 per cent damages for costs of protest, etc., and 10 per cent annual interest, until the time of recovery. 1741, 16, 79.

Graham for the plaintiff.
Taylor for the defendant.

M'COY, J., and STONE, J., present.

After great deliberation, the Court was of opinion that the plaintiff ought to prove notice to entitle himself to extraordinary interest and damages, and having failed so to do, was only entitled to 6 per cent, and the jury found a verdict accordingly.

NEW BERN, *September Term, 1796.*

GREGORY v. BRAY.—1 Mart., 39.

Under the Act of 1777 (Rev., ch. 115, sec. 77), directing the time within which the transcript shall be filed in the Superior Court, in appeals from the county court, if the appellant fail to file the transcript until after the time prescribed, the Court has no discretion to permit the cause to be placed on the trial docket, but the judgment must be affirmed.

Appeal. The transcript of the record was carried up *thirteen* (77) days before the Superior Court, 2, 1777, 2, 84, 314.

The judgment was affirmed, on the second day of the term; unless cause be shown to the contrary, on the argument day.

On which day the defendant's affidavit was read, stating that the judgment had been obtained at the last session of Jones county court; that there were but thirty-three days between the last day of that session and the first of this term; that the defendant was sick abed on the day on which the transcript was to be carried up; that he came down in a boat, being unable to ride; that he arrived time enough to file the transcript, but discovered on his landing that his pocketbook which contained it had been accidentally left behind; that he returned immediately home and came back on the next day with the transcript, but was informed it could not be received, it being then *one* day too late; that he came back on the next day to advise with counsel and was directed to file the transcript, which he did. Whereupon he prayed that the cause might be placed on the trial docket.

STONE, J. If the Court had any discretion to exercise, this would be a proper case to use it; but the act is positive.

M'COY, J. The Act of Assembly leaves the party in this case without a remedy. It is not within the power of the Court to create one for him. It has often been adjudged so.

The judgment was affirmed absolutely.

Harris and Badger for the plaintiff.
Martin for the defendant.

NOTE.—See *Robertson v. Stone*, 2 N. C., 401; *Hood v. Orr*, 4 N. C., 584. The law regulating the mode in which appeals shall be carried up from the county to the Superior Court has been altered by the Acts of 1816, ch. 903, sec. 3, and 1821, ch. 1117, sec. 1 and 5 (1 Rev. Stat., ch. 4, sec. 3, 4, and 5).

(78)

NEW BERN, *September Term, 1796.*

SHEPPARD v. SALTER.—1 Mart., 40.

A new trial granted on payment of full costs, after a nonsuit voluntarily suffered, an affidavit that a witness, by whom the plaintiff expected to repel the plea of the statute of limitations, had voluntarily withdrawn himself just before the trial.

Case *sur assumpsit*. The plaintiff went to trial, proved his debt, but could not give evidence to repeal the plea of the statute of limitations; and suffered a nonsuit.

He afterwards offered an affidavit that one of his witnesses, by whose testimony he would have been able to prove a reassumption within three years, was at his counsel's elbow a little before the cause came on, but was out of the courthouse at the time he was called. Whereupon he prayed that the nonsuit be set aside.

The Court said he ought to have prayed a continuance.

But on his observing that he had thought that by going to trial and satisfying the Court, by the testimony of a witness who attended, that he had a good cause of action, and that he failed only on the proof of a reassumption: the justice of the case being on his side, he would appear entitled to the favor he prayed.

STONE, J. Let the nonsuit be set aside, on payment of full costs.

M'COY, J., *tacente.*

Davie for the plaintiff.
Arnett for the defendant.

NOTE.—See *Williams v. Harper*, 4 N. C., 284; *Reynolds v. Boyd*, 23 N. C., 106.

NEW BERN, *September Term, 1796.*

BORDEN v. NASH'S ADM'R.—1 Mart., 42.

Where an administrator omits to plead *plene administravit,* and there is judgment against him, on *nulla bona* being returned to an execution *de bonis testatoris,* the plaintiff may take out his execution *de bonis propriis,* without waiting for the return of a *devastavit.*

The defendant omitted to plead *plene administravit,* judgment (79) being obtained, the plaintiff took out an execution *de bonis testatoris.* On *nulla bona* being returned, he took out an execution *de bonis propriis.*

The defendant prayed and obtained a writ of *supersedeas quia erronice emanavit* to the last execution. And

At this term *Slade* and *Graham,* for the plaintiff, moved to have the *supersedeas* set aside.

Martin, for the defendant, contended that the execution had irregularly issued *de bonis propriis,* before a *devastavit* had been returned, and cited 1 Morgan's Vade Mecum, 210, 211.

STONE, J. The practice is generally so laid down in the books, and the authorities are all that way; but the Courts in this country have taken a shorter road, and whenever the defendant does not plead *plene administravit,* they have always permitted the plaintiff on *nulla bona* being returned on the execution *de bonis testatoris,* to levy the debt *de bonis propriis,* without waiting for the return of a *devastavit.*

M'COY, J., concurring.

The *supersedeas* was set aside.

NOTE.—See *Parker v. Stephens,* 2 N. C., 218, and cases cited in the note thereto.

NEW BERN, *September Term, 1796.*

DANIEL v. COBB'S EX'R.—1 Mart., 42.

An action of detinue can be revived against the personal representative.

Scire facias to receive an action of detinue: *Davie,* for the defendant, pleaded in abatement, that this action could not be revived against representatives.

By the Court, M'COY, J., and STONE, J., overruled the plea: they said it had been often adjudged that this action could be revived.

A case was cited in which the same principle was held, respecting the action of *Trover,* at Wilmington Superior Court.

Harris for the plaintiff.
Davie for the defendant.

NOTE.—See same case, *post,* 84.

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(80)

NEW BERN, *September Term, 1796.*

EAVES & EAVES v. EX'R OF STARKEY, EX'R OF EAVES.—1 Mart., 45.

An action of account will not lie against an executor as the bailiff or receiver of a legatee.

Account. The jury found the following special verdict, viz.:

"That Edward Starkey was executor of Edward Starkey, who was executor of Richard Eaves. That Edward Starkey, the first testator, came to the possession of sundry negroes as executor of Richard Eaves, hired them out, and received the hire.

"That the defendant is the receiver of the plaintiff.

"Subject to the opinion of the Court, on the following questions:

"1. Whether an action of account lies against the executor of an executor?

"2. Whether it can be sustained to charge an executor as bailiff, or receiver of legatees?"

Slade for the plaintiff.
Graham for the defendant.

The Court, WILLIAMS, J., and HAYWOOD, J., gave judgment for the defendant, on the *second* question.

They gave no opinion on the first question, it being unnecessary in this case. See 4 Ann., 16, 37, 394.

NOTE.—See *Anonymous,* 2 N. C., 226.

IN EQUITY, NEW BERN, *September Term, 1796.*

CORR'S EX'RS v. PAGE.—1 Mart., 56.

Taxation of Solicitor's fee.

It was resolved by the Court, M'COY, J., and STONE, J., that in bills to perpetuate testimony, if the defendant makes no defense, either by plea, demurrer, or answer, he is not entitled to have a Solici- (81) tor's fee taxed in the bill of costs.

Baker for the complainant.
Taylor for the defendant.

IN EQUITY, NEW BERN, *September Term, 1796.*

SHEPPARD v. COLLINS ET AL.—1 Mart., 56.

The Court, in its discretion, may allow an answer to be filed after the appointed time.

At March Term last, the complainant obtained a rule that the defendant answer within four months.

The answer not having been filed within that period, *Baker,* for the defendant, at this term prayed that it might now be received.

This was strenuously opposed by *Woods,* for the complainant, who insisted that the defendant should at least pay costs.

But the Court, M'COY, J., and STONE, J., ordered the answer to be received.

NEW BERN, *September Term, 1796.*

MOORE v. ISLAR.—1 Mart., 78.

Sheriff's fees and witness tickets.

The Court, WILLIAMS, J., and M'COY, J., held in this case:

1. That sheriffs in no instance are entitled to costs for services, other than what shall appear of record, by the return of precepts, to them directed.

2. That witnesses who do not attend to the direction of the law, in procuring and filing tickets of their attendance, shall not afterwards be permitted to draw up accounts, and prove them out of Court and thereby entitle themselves to have them taxed in the bill of costs.

NOTE.—Upon the second point see 1 Rev. Stat., ch. 31, sec. 76. *Anonymous*, 3 N. C., 138; *Stanly v. Hodges*, *post*, 203, 500; *Thompson v. Hodges*, 10 N. C., 318.

(82)

EDENTON, *October Term, 1796.*

GORDON v. PAYNE & MARE.—1 Mart., 72.

Where the subscribing witness to a bond temporarily absent from the State is too ill to return, his handwriting cannot be proven.

Debt on a bond. *Non est factum* pleaded. Robert Egan, the subscribing witness to the bond, having been summoned by the plaintiff, went off sometime before Court to New York on his private business. It was admitted that he was dangerously ill there, and that the last that was heard from him was that he was given over by his physician. Upon this, the plaintiff's counsel offered to prove the handwriting of the witness, as evidence of the execution of the bond; but

M'COY, J., refused to admit the testimony, and he was nonsuited.

*** Egan was actually dead at the time.

NOTE.—See *Harvey v. Jones*, *ante*, 66; *Selby v. Clark*, 11 N. C., 265.

(83)

NEW BERN, *March Term, 1797.*

STARKEY'S ADM'RS v. McCLURE.—1 Mart., 73.

Where the plaintiff claimed under a division of slaves made by consent of all the joint tenants, one of the joint tenants, who held slaves under the same division, but was no party to the suit, was excluded from giving evidence on the ground of interest.

Trover for several slaves. The plaintiffs claimed them under a division (by consent of all parties) of slaves held in joint tenancy under a

will, by their intestate, the person under whom the defendant held, and others.

One of those persons, who had taken a lot of slaves under this division but who was no party to this suit, was introduced on the part of the plaintiffs, to show that such a division by consent had been made.

The defendant's counsel objected to that person being sworn, on the ground of interest, and on argument,

Taylor and Graham for the plaintiffs.
Badger and Harris for the defendant.

The Court, WILLIAMS, J., and M'COY, J., allowed the objection.

NOTE.—See *Ferrel v. Perry, ante,* 25, and the cases referred to in *Farrell v. Perry,* 2 N. C., 2; and also *Kaywood v. Barnett,* 20 N. C., 88.

IN EQUITY, NEW BERN, *March Term, 1797.*

HUNT v. McKINLAY & WILLIAMS.—1 Mart., 73.

When a complainant after the commencement of a term obtained an injunction on a bill returnable to the next term and the defendant moved that the bill and answer might be there read upon an affidavit of the sheriff that he had informed the complainant of his having an execution in his hands against him in time for the bill to have been filed returnable to that term, the Court hesitated to grant the motion, though it was not opposed, but afterwards allowed it.

The complainant, since the beginning of this term, had obtained an injunction against the defendants, on a bill returnable to September Court: and on the first of the equity days.

Taylor and *Badger,* for the defendants, read an affidavit of the (84) deputy sheriff, stating that he had informed the complainant, forty days before the term, that he had the execution in his hands, requesting him to point out property on which it might be levied. They said the complainant might have obtained an injunction on a bill returnable to this term, by going to one of the Judges, as soon as he knew the execution was out: that his waiting until the beginning of the term showed an inclination to put off the defendant, etc., and moved the bill and answer might be read.

Martin, for the complainant, did not oppose the motion.

The Court, WILLIAMS, J., and M'COY, J., seemed averse to granting the motion.

Curia advisari vult.

On the next day they directed the bill and answer to be read; but, as they deemed the equity of the bill not sworn away in the answer, the defendants took nothing by their motion.

NEW BERN, *March Term, 1797.*

DANIEL v. COBB'S EX'R.—1 Mart., 77.

The action of detinue survives against the representatives of a deceased person.

At this term, this cause was by consent of the counsel of both parties, reconsidered; and after a very lengthy argument:

WILLIAMS, J., thought the action of detinue did not survive to the representatives of a deceased person.

M'COY, J., did not think proper to alter the opinion he had delivered at the last term, and the cause was left open.

*** During the argument of this cause, it appeared to be conceded by the counsel for the plaintiff, *Mr. Harris,* and his Honor, Judge WILLIAMS, that the *wager of law,* having never been recognized in this State, that part of the common law, which authorizes the admission of that species of evidence, is not in force here. *Gen. Davie,* and his Honor, Judge M'COY, did not intimate an opinion on that point. *Quœre de hoc.*

NOTE.—There can be no doubt now that the doctrine of the common law in relation to *wager of law,* is not in force in this State.

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(85)

NEW BERN DISTRICT, *September Term, 1798.*

BLOUNT v. MITCHELL ET AL.—Tayl., 131.

No man can be allowed to assert a right to property by violence; hence if the owner of a slave, by force, takes him from the possession of one who holds him, he is liable to an action for trespass.

BLOUNT *v.* MITCHELL.

A purchaser at a sheriff's 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 execution; he is not affected by the irregular conduct of the sheriff. When a sheriff levies on personal property, he should take it into actual possession, and have it present and shown to the bidders at the time of sale.

JOHN HAYWOOD, Judge.

Trespass for entry upon his close, and taking or carrying away a negro man called Robin, the property of the plaintiff. Plea, general issue.

The facts were that Stanly obtained judgment against Blount for £444. A *fieri facias* issued thereupon, and the sheriff returned levied upon negroes, naming them, one of whom was the negro in question. Blount then obtained an injunction, upon the terms of paying £296 into the office of clerk and master; then the injunction was dissolved, and a *venditioni exponas* issued for the balance. The sheriff, without making any new seizure, and without taking into his possession the negroes named in the return, upon the *fieri facias,* advertised them for sale, and on the day of sale Blount tendered all the money mentioned in the *venditioni exponas;* which the sheriff would not receive, claiming commissions on the £296, paid into the office, on the ground that he had been at the trouble of levying upon the negroes for that sum also.

The sheriff sold the negroes on the day mentioned in the advertisement, but they were not present, nor in his actual possession at the time, but in the possession of Blount.

Mitchell purchased the negro named in the declaration, and afterwards, in company with three other defendants, went armed in the nighttime to Blount's plantation, and carried away the negro; Blount never regained the possession of him since. (86)

By the Court. Going upon the plantation of the plaintiff with force and taking away the negro by violence is a trespass, and will subject the defendant to such damages as a jury may think proper to assess, even if the property vested in Mitchell by the sale; no man can be allowed to assert his right by violence. If the property did not vest in Mitchell by the sale, the jury should assess damages to the value of the slave. It is immaterial what passed between the sheriff and Blount; for, if the sheriff refused the money when he ought to have received it, and sold notwithstanding, the vendee's title may be good. He is to look no further than that he is an officer who sells, and that he is empowered to do so by an execution. But then, the sheriff should have taken the property into his actual possession, and had it present at the time of the sale. (I) Because personal property passes by delivery; (II) Because

he cannot sell a chose in action; (III) For the benefit of the defendant, and to prevent fraud, lest by keeping the property out of view he might cause it to sell for less than the value, as the purchaser would not be likely to give the full value for an article he had not an opportunity of seeing.

As the defendant's counsel is unprepared, having not expected the objection, I would recommend a verdict assessing the damages, upon the supposition that the property did not pass to the vendee, and also upon the supposition that it did, leaving it to the Court to determine on which judgment shall be entered.

This proposition being agreed to by *Taylor* and *F. X. Martin,* for the plaintiff, and *Davie* and *Badger,* for the defendant, the jury found a verdict for £120 in the first case, and £20 in the second.

On the argument day, the Court said that things sold by the sheriff ought to be actually seized and shown to the bidders at the time of the sale, and to be delivered to the purchaser; that this point had been so decided in a late case in Wilmington District, *Bunting v. Smith;*
(87) which was a case similar to this in all points except this additional circumstance, that a third person who claimed the negro had obtained possession of him and held him at the time of the sale by the sheriff.

Judgment for £120.

NOTE.—Upon the second point, see *Brodie v. Seagraves, post,* 96; *Jones v. Fulgham,* 6 N. C., 364; *Mordecai v. Speight,* 14 N. C., 428.

On the last point, see *Ainsworth v. Greenlee,* 7 N. C., 470.

Cited: Smith v. Tritt, 18 N. C., 243; *Woodley v. Gilliam,* 67 N. C., 239; *Alston v. Morphew,* 113 N. C., 461; *Barbee v. Scoggins,* 121 N. C., 143; *Nance v. King,* 178 N. C., 576.

(88)

GENERAL RULE.—Tayl., 134.

If a plaintiff die during the pendency of a suit, and his executors do not apply to carry it on within two terms after his death, computing from the day of his death, and not from the suggestion entered by the defendant, the cause will abate, and the defendant be discharged from further attendance.

But if, after this, the executors apply to be made party by a *sci. fa.,* or notice served on the defendant and they do not oppose it, and the

plaintiffs are made parties by order of the Court, it will be too late, afterwards, to move for an abatement; but the cause is to be tried.

NOTE.—See *Anonymous*, 3 N. C., 66.

Cited: Hobbs v. Bush, 19 N. C., 511; *McLaughlin v. Neill,* 25 N. C., 295.

(89)

WITHERINGTON, EX'R OF FERGUSON, v. ANN WILLIAMS.—Tayl., 134.

A widow and two children were joint tenants of a slave; upon the marriage of the widow, the joint tenancy is severed between her and the children, and between the children by the Act of 1784 (1 Rev. Stat., ch. 43, sec. 2), and in trover by one of the children for the slave, he shall recover but one-third of the value.

Trover for a negro, not guilty pleaded. The defendant was the widow of one Ferguson, who was killed at the battle of the Allemance, leaving two children.

The Legislature, in order to make some provision for his family, directed that one hundred pounds should be deposited in the hands of Richard Caswell, to purchase negroes for the widow and children. Two negroes were purchased, one of whom died; the other was given by the defendant, after her marriage with Williams, to her son, the plaintiff's testator.

Taylor for the plaintiff.
Davie for the defendant.

HAYWOOD, J. Mr. Caswell was trustee for the widow and children, to make the purchase; but having done so, the trust was at an end, and the property vested in them as joint tenants. The joint tenancy was severed as to the widow, by her intermarriage with Williams; as to the children, by the Act of 1784, and each held a third in severalty. The gift by the defendant to the plaintiff's testator transferred no property, because her third belonged to Williams, upon the intermarriage; and at the time of the gift to his representatives.

The plaintiff, therefore, is entitled to recover but one-third.

Judgment accordingly.

(90)

EDENTON DISTRICT, *October Term, 1798.*

HARRAMOND v. McGLAUGHON.—Tayl., 136.

If there is a variance between the natural boundaries and the courses and distances called for in a deed or grant, the former shall be preferred.

Ejectment. The plaintiff's grant, which was issued by the State in 1787, described a tract bounded by the river on one side, and thence from the river, so as to include tract supposed to have been left out of the patent hereafter mentioned.

The defendant claimed under a patent issued fifty years ago: Beginning at a hickory, standing not far from the river; thence down the river a certain course and distance. The course ran obliquely from the river, leaving between it and the river the triangular piece of land now sued for.

By the Court. When a deed, patent, or grant describes a boundary from a certain point down a river, creek, or the like, mentioning also course and distance, should the latter be found not to agree with the course of the river creek, etc., it ought to be disregarded, and the river considered the true boundary.

Verdict for the defendant.

NOTE.—See the cases referred to in the note, *Bradford v. Hill*, 2 N. C., 22, and the note to *Person v. Roundtree, ante*, 69.

Cited: Cherry v. Slade, 7 N. C., 86.

(91)

SAWYER v. SEXTON'S ADM'R.—Tayl., 137.

NOTE.—See same case reported in 3 N. C., 67.

GRIER & CO. v. COMB'S ADM'RS.—Tayl., 138.

Judgment obtained against an administrator in other suits, shall not be pleaded after the pleadings are once made up.

Motion for leave to plead several judgments recovered against the administrator, since the pleadings in the action were first made up. The

pleas originally entered were payment *plene administravit,* no assets, no assets *ultra,* etc., judgments.

By the Court: When an executor or administrator has pleaded in chief to an action, having assets, both where the suit is commenced and the plea is pleaded, he cannot afterwards voluntarily pay them away; nor ought he to suffer other creditors to obtain judgments that will deprive him of them.

He can prefer one creditor to another, only before an action is commenced by either; or, when actions are commenced, by giving a judgment to one, before he pleads to the other's suit. After that period, he has no discretion, because the law prefers that creditor who first obtains a plea, provided he afterwards recovers judgment.

The allowance of this motion would be, in effect, to establish a contrary doctrine: namely, that though an executor had assets at the commencement of the action, and also when he pleaded, yet at any distance of time afterwards he might prefer other creditors, by giving them judgments, though possibly their debts were not due when he pleaded to the first action.

Motion denied.

NOTE.—See *Woolford v. Simpson,* 3 N. C., 132, and the cases referred to in the note.

Cited: Bryan v. Miller, 32 N. C., 130.

(92)

HARRELL v. ELLIOTT.—Tayl., 139.

The private examination of a *feme covert,* as to the execution of a deed, cannot be proved by parol.

Ejectment. The land in question had been devised to the plaintiff, then a *feme sole,* by her father; she afterwards married, and together with her husband, executed a deed, under which the defendant claims; the husband soon afterwards died. There was no endorsement on the deed purporting that the wife had been privately examined with respect to her consent; nor could any record to that effect be found.

The defendant offered one of the Justices of the Court to prove that he had received the examination of the *feme;* but,

By the Court: What is done in Court can only be proved by the records of the Court; and though the act does not expressly require the

woman's acknowledgment to be put into writing, or to be recorded, yet it is required that it should be made in Court, and received by a member of the Court. The evidence, therefore, cannot be received.

Verdict for the plaintiff.

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(93)

WYNN'S EX'RS v. BUCKETT.—Tayl., 140.

A bond to keep the prison bounds need not be proved by the subscribing witness, for it must, under the act authorizing it, be deemed a record, so far as concerns proof of its execution.

The defendant had executed a bond pursuant to the Act of 1759, chap. 14, conditioned for keeping the prison bounds. Debt being brought thereon, the question was whether it was incumbent on the plaintiff to prove the execution by the subscribing witness. The material words of the act are that the bond "shall be returned to the office of the clerk of the court whence the execution issued; and shall have the force of a judgment; and if any person who shall obtain the rules of any prison, upon giving bond and security as aforesaid, shall escape out of the same, before he shall have paid the debt or damages and costs, according to the condition of such bond, it shall be lawful, and full power and authority is hereby given to the Court where such bond is lodged, upon motion of the party for whom such execution issued, to award execution against such person, etc."

By the Court: The meaning of the act is, that such bonds shall be considered as judgments, so far only as concerns the evidence necessary to prove them. It does therefore dispense with the proof of execution by the subscribing witness. They may be taken at a place so far distant from that where they were returnable, as to render it inconvenient to procure the attendance of witnesses. To avoid this difficulty, the bonds are to be returned by a sworn officer, and like recognizances may be carried to execution, without proving the obligor's acknowledgment. Further than this, the act does not invest these bonds with the qualities of a record; for notice must be given to the party, and the fact of breaking the prison bounds made out in evidence, before an execution can issue.

NOTE.—An action cannot be maintained upon a bond to keep the prison bounds, for by the act it has the force of a judgment, and the creditor may have execution thereon, upon motion in court. *Brown v. Frazier*, 5 N. C., 421.

Cited: S. v. Pearson, 100 N. C., 417.

(94)

HALIFAX DISTRICT, *October Term, 1798.*

STATE v. DEW.—Tayl., 142.

A man indicted for murder cannot be bailed upon affidavits taken *ex parte* by persons not authorized to take them.

The prisoner having been indicted at the last term for murder, now appeared at the bar, and, upon motion of the Attorney-General, was ordered into the sheriff's custody. It was moved by his counsel that he might be admitted to bail, on the ground of having voluntarily appeared, and upon some affidavits taken before justices of the peace, tending to show that he was not guilty of the crime.

By the Court: It would be entirely irregular to bail a man indicted for murder, upon affidavits taken *ex parte,* by persons unauthorized to take them.

When a man is found guilty by a coroner's inquest, the Court may look into the depositions returned; and if it appear that the jury have drawn wrong inferences, may admit the prisoner to bail; but the secrecy which accompanies the evidence delivered to the grand jury precludes the Court from knowing its amount.

Bail refused.

Cited: S. v. Herndon, 107 N. C., 943.

(95)

KILLINGSWORTH v. ZOLLICOFFER.—Tayl., 143.

Slaves sent to the husband by the wife's father soon after marriage are presumed to be given.

Detinue for negroes. Killingsworth married the daughter of the defendant, and, in about ten days afterwards, the negroes in question, which before the marriage were Zollicoffer's, were in the possession of the plaintiff and so continued till after the wife's death, which took place about a year after the marriage, and afterwards the negroes continued in his possession a year or two, when they were again in the possession of Zollicoffer, who detains them; but whilst in the possession of the plaintiff, he, the plaintiff, expressed doubts about his title, saying he did not know whether or not he could lawfully sell them.

Daniel, for the plaintiff, cited and relied on the case of *Carter v. Rutland,* 2 N. C., 97.

Baker, for the defendant, agreed that the case of *Carter's Ex.* and *Rutland* went upon a presumption that the negroes were intended as a gift by the father, which presumption can only stand until the contrary appears; and in this case, there are circumstances strong enough to overturn the presumption; the doubts expressed on two several occasions by the plaintiff with respect to the validity of his title; and another circumstance, that one of the negroes in question was at the time of this pretended gift in controversy between a third person and the now defendant; which proves that he could not have intended a gift.

By the Court: The case cited for the plaintiff is now the established law, and it governs the present suit.

Verdict for the plaintiff.

NOTE.—See *Farrell v. Perry,* 2 N. C., 2, and the note thereto.

Cited: Torrence v. Graham, 18 N. C., 288.

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(96)

BRODIE v. SEAGRAVES.—Tayl., 144.

1. If by consent a large quantity of effects are put up together, sold at one bid and purchased by the plaintiff, who colludes with the defendant to defeat the claims of the other creditors, the sale is void.
2. A purchaser at an execution sale is not affected by the irregular conduct of the officer.

Brodie had obtained a judgment against Finch, taken out execution and carried it to be levied on his effects; on the day appointed for the sale, they conversed privately together, and the goods seized were sold by the constable, all together at one bid, namely, the standing corn, household furniture, and the tobacco; and Brodie became the purchaser. It was understood at the time by those present that Brodie intended to get satisfaction out of part of the goods, and to release the residue; and in consequence of this understanding, one of the witnesses forebore to bid. All the goods purchased were, after the sale, left by Brodie in Finch's possession, who prepared the tobacco for market, and was carrying it to Virginia when another creditor, one Lees, obtained judgment against him. The execution was levied by the defendant, Seagraves, a

constable, who seized the tobacco and sold it; having first offered Brodie to pay the amount of his judgment, costs, etc., out of the tobacco, which Brodie refused.

HAYWOOD, J. Supposing the constable to have sold in the manner here stated, of his own accord, though the sale was irregular, still the property vested in the vendee; but if he sold pursuant to an agreement between Brodie and Finch, then the unusual manner of the sale, and the setting up of all the goods at once to be disposed of, at one bid (especially in this underhand way, to make the goods sell at a great undervalue and consequently to disappoint some creditor who afterwards might have claimed satisfaction of his debt also), was an evidence of fraud which is to be collected from circumstances, and will vitiate the sale *in toto*.

Verdict and judgment for the defendant.

NOTE.—On the first point, see *Jones v. Fulgham*, 6 N. C., 364. On the other point, see *Blount v. Mitchell, ante*, 85, and the note thereto.

Cited: Woodley v. Gilliam, 67 N. C., 237; *Davis v. Keen*, 142 N. C., 504; *Weir v. Weir*, 196 N. C., 270.

(97)

WILMINGTON DISTRICT, *November Term, 1798.*

ANONYMOUS.—Tayl., 146.

The Superior Courts cannot reverse one of their judgments given at a former term for error in a matter of law; but if it be absolutely void, or taken irregularly against the known rules of the Court, they will set it aside at any time on motion.

The plaintiff had taken a *capias*, which was returned *non est inventus;* then an attachment, upon which the sheriff returned "levied on two negroes, but not taken into custody because there was no jail of the county to keep them in"; upon this return, the plaintiff took a judgment by default and afterwards executed a writ of inquiry and had judgment final, and now,

Hill, for the defendant, moved to set it aside for irregularity, and he produced an affidavit of the defendant stating that he had not any notice of these proceedings.

Jocelyn, for the plaintiff. The judgment was obtained a term or two ago, and now cannot now be set set aside unless by a writ of error.

ANONYMOUS.

HAYWOOD, J. When this Court passes a judgment, and the term expires, it cannot, in general, be set aside but by a writ of error; and then only in a case where the error is in a matter of fact, to be tried by a jury. If the error be in a matter of law, this Court cannot reverse its own judgment for any such error; for then proceedings would be endless; but if the judgment be absolutely void, being given against a person who was not served with process; or if it be taken irregularly against the known rules of the Court, it may be set aside at any time on motion.

Here the property was not taken into the actual custody of the officer; had it been so, the law supposes notice would have come to the defendant; and without such actual taking of the property levied on, into the officer's custody, the attachment is not well executed, and does not bring the defendant into Court; consequently this judgment was ir-
(98) regular, having been taken against one not in Court, and must therefore be set aside.

Judgment set aside.

NOTE.—See *Devany v.* ———, 3 N. C., 239, and the note thereto.

Cited: Bryan v. Brown, 6 N. C., 344.

CASES ADJUDGED

IN THE

SUPERIOR COURT

(TAYLOR.)

MORGAN DISTRICT, *March Term, 1799.*

SPRUCE MACAY and JOHN LOUIS TAYLOR, Judges.

IRWIN v. SHERRIL.—Tayl., 1.

An action lies against one not a party to the contract for deceitfully asserting that an unsound mare is sound, and fraudulently encouraging the plaintiff to buy her.

Action of deceit; plea, general issue. The declaration charged that the defendant, intending to deceive and defraud the plaintiff, did wrongfully and deceitfully encourage and persuade him to purchase from one John Irwin a certain mare; and did for that purpose then and there falsely and deceitfully assert and affirm to the plaintiff that the said mare was free and clear of and from all disease, and was sound; and the plaintiff, confiding in the said affirmation, did purchase the said mare; whereas, at the time, she was unsound and subject to a disease called the yellow water, and that the defendant well knew the same, etc.

The substance of the proof was that the plaintiff, being about to purchase the mare from John Irwin, inquired of him whether she was sound. Irwin made no direct answer to the question, but, having purchased the mare from the defendant, referred the plaintiff to him for the desired information.

The plaintiff accordingly applied to the defendant, and received from him a positive assurance that the mare was sound, upon which he immediately completed the bargain with John Irwin; and shortly afterwards the mare died under the ordinary and well known symptoms of the yellow water. During the time the mare had been in the defendant's possession, she wasted away, although the same care (100) was taken of her as of his other beasts, which under the same treatment had thrived; this he accounted for to his neighbors, who inquired whether she had not the yellow water, by telling them it proceeded from hard usage, and from her having lost a colt. Except this evidence, there was no proof against the defendant of his knowledge of the unsoundness of the mare.

It was argued for the defendant that, admitting the plaintiff's case to be as the declaration charged it, no action would lie for want of privity between the parties. That the defendant, having no interest in the bargain and receiving no consideration from the plaintiff, is not responsible to him for the loss he may have sustained, which was *damnum absque injuria.*

For the plaintiff, it was answered that an action would lie whether there was fraud and deceit in the defendant, and an injury thence resulting to the plaintiff, and the case of *Passey v. Freeman,* 3 Term Rep., was cited, as in point.

The Court, after summing up the evidence to the jury, stated to them that in order to understand its force and application, it became necessary to distinguish this action from one with which it had been confounded, and to which it bore but a remote resemblance. That it was not founded upon a warranty, in which case a privity of contract must exist between the plaintiff and defendant; in this case no privity of contract was necessary, for the cause of action is completely made out, when the defendant practices a fraud, with the view of deceiving the plaintiff, who, in consequence thereof, sustains a loss.

The defendant's intent was essential, and it could only be collected from his knowledge of the real situation of the mare; in which respect, also, this action differs from the one founded on a warrant. That extends to all defects, whether the seller knew them or not; this can only be sustained against a person who knew that the affirmation he made was a false one, and who uttered it with a fraudulent intention.

(101) Thus, according to the case cited, if a man about to contract with another, but ignorant of his circumstances, applies to a third person for information, who assures him that he may safely be trusted; in such case, the affirmant is not liable, unless it be shown that at the time he gave the information, he well knew the man might not safely be trusted. For if, when he asserted it, he really believed it, though it were not true, it is a loss without an injury, and therefore is not the subject of an action. So it is for telling a bare, naked lie, the truth or falsehood of which were alike unknown to the defendant; no action is maintainable; but where it is uttered by a person who, at the time knew its falsehood, and a loss afterwards ensues to the plaintiff in consequence of it, an action will lie.

It is attested by some of the witnesses that the defendant had before owned the mare, and had sold her to John Irwin, who possessed her but a short time before the sale to the plaintiff; it may, therefore, possibly be inferred that whether she were sound or otherwise, was a fact more peculiarly within his knowledge than any other person's; for there were

no constant external symptoms from which a person unskilled in horses could have drawn the conclusion, nor was it a subject upon which the bystanders could exercise their judgment, or the plaintiff safely trust his own.

It is true that the defendant was under no obligation to satisfy the plaintiff's inquiry; but if he thought proper to answer, he was bound not to make a fraudulent representation; no man can claim the right of deceiving another. If, therefore, the jury believe that the plaintiff's case, as comprised in the declaration, is established in point of fact, he is entitled to their verdict. If the proof upon any of the points stated is not satisfactory to them, the verdict should be for the defendant.

NOTE.—See *Erwin v. Greenlee*, 18 N. C., 39, where it was held that if the defendant in an execution fraudulently induces the sheriff to sell unsound property of his, and at the sale fraudulently represents it to be sound, an action for a deceit lies against him by the purchaser.

Cited: Thomas v. Wright, 98 N. C., 274.

(102)

TREASURER OF THE STATE v. NALL.—Tayl., 5.

A collector of arrearages, whose commissions depend upon the amount of the recovery in the suit is not a competent witness to prove a fraud against a defendant charged with fraudulently buying a sheriff's property.

This was a proceeding by *scire facias* against the defendant, who, it was suggested, had fraudulently purchased the property of a sheriff, upon an execution issued against him, upon a judgment recovered by the State.

To prove the fraud, the Solicitor-General offered as a witness for the plaintiff a collector of arrearages, appointed under the Act of 1793, to collect moneys due from the delinquents to the State, and who is thereby allowed 8 per cent upon the amount of cash and certificates by him paid into the treasury.

The case of *Dixon et al. v. Cooper*, in support of the admissibility of the witness, was cited from 3 Wilson, where it is determined that a factor who sold for the plaintiff and was entitled to one shilling in the pound, was a competent witness to prove the contract of sale.

Henderson, for the defendant, contended that the witness was incompetent.

By the Court: The rule of law is that, unless the witness be interested in the event of the suit, he shall be admitted; except in those cases

which, upon their own circumstances, have been differently established by solemn decisions.

This witness is directly interested in the event of the suit, since his commissions must be measured by the amount of the recovery against the defendant, which, therefore, he is concerned to enhance. The case cited from Wilson is an exception to the general rule arising from necessity and the usage of trade; the factor is concerned both for the vendor and vendee, and his testimony may be resorted to by both parties, in case of any dispute. He is an agent by whom alone the sale can be proved; but the collector is not necessarily acquainted with the
(103) fraud, much less is he exclusively so, since other witnesses have already spoken to it.

NOTE.—But it is no objection to the competency of a witness that he is attorney for the plaintiff, and intends, if the debt sued for be recovered, to charge a commission for receiving and remitting the money. *Slocumb v. Newby*, 5 N. C., 423. See, also, *Norwood v. Marrow*, 20 N. C., 578.

ANONYMOUS.—Tayl., 6.

A master in equity cannot act as a solicitor in his own court, and a bill filed by him will be dismissed.

In equity. Motion to dismiss an original bill in equity which had been drawn by the master of the Court and signed by him as solicitor.

Henderson, in support of the motion, urged among other reasons, that such a practice, if tolerated, would have a most fatal effect upon the administration of justice, whose very sources it had a tendency to corrupt; that it was in truth, to constitute the master solicitor and Judge in the very same cause, thereby holding out a temptation to iniquitous judgment, irresistible to many men, and certainly dangerous to all. Independent of the evil consequences that would result to the public, from thus giving to the master the means of multiplying the business of his office, it would be absurd in the highest degree that the person who filed a bill should report upon any matter arising out of it; that the counsel who filed exceptions to an answer should determine upon its sufficiency, and so on, through the many deviations from the first principles of justice, which every step must produce.

He asked what confidence suitors could have in the decisions of a tribunal, where the advocates of one party, clothed with the power by his official station, was no less concerned in interest, to spread an unfavorable coloring over the adversary's case. That it was the policy of

the law, in cases of such moment to the citizens, to regard the principle as inflexible, whatever might be the personal character of the individual; and that, as this was the first attempt of the kind he (104) knew of, he trusted the Court would check it, so that, having no precedent, it might not furnish an example.

Holland, for the complainant, argued against the dismission of the bill, that it was not anywhere declared illegal for a master in equity to practice as a solicitor, the authority for which is derived under a license from the Judges, and is not revoked by the subsequent appointment of the master. That it could not be expected that the master would act as referee in any case where he was solicitor; the smallest share of delicacy would be sufficient to restrain any person from becoming such; and then the evil effects adverted to would not arise. That even if it were improper, the Court might sustain the bill, and their opinion as to the general rule would regulate the practice in future.

MACAY, J. I am clearly of opinion that the practice of a master, acting as a solicitor in the same court, is improper, in whatever light it is viewed. If the proposed remedy be adopted, namely, that the master shall not act in his own cases, then he may be disqualified as to every case in court; consequently the office would not exist to any one purpose of public utility. I think, therefore, the bill ought to be dismissed.

TAYLOR, J. I entertain no doubt on the general question, but incline to the opinion that it would be the more regular way to take it up upon demurrer, so that the reasons of the order may appear upon the record.

The bill was afterwards withdrawn.

DEN ON DEM. OF BEATTY'S HEIRS v. ———.—Tayl., 9.

The husband of the widow of the lessor of the plaintiff's ancestor may be a witness for the plaintiff.

The question in this cause was, whether a man who had married the widow of the lessor of the plaintiff's ancestor, was a competent witness in favor of the plaintiff.

By the Court: The witness is free from any objection on the (105) ground of interest, since a verdict for the plaintiff would not advance him a single step towards obtaining possession of the dower, which his wife claims.

Whether the petition for the dower be filed against the heir or a stranger, the petition must be equally full in the proof of the marriage and dying seized; and a verdict in the present case merely determines the right of possession, without concluding the parties as to the right itself. By the event of this suit, therefore, the witness cannot gain or lose anything.

SALISBURY DISTRICT, *March Term, 1799.*

DEN ON DEM. OF FARRAR v. HAMILTON.—Tayl., 10.

1. A sale of land by the sheriff is valid, though he does not return the execution.
2. Where the notice is to take depositions between certain hours of the day, such depositions shall not be read, unless it appears that they were taken within the time specified.
3. Where a witness is called by one party and examined to a particular fact, and is afterwards cross-examined by the other party as to other facts, the party first calling him cannot object to his testimony on the ground of interest.
4. A mere right of entry cannot be sold or conveyed to another.

This was an action of ejectment, brought to recover possession of a tract of land in Rockingham County, to which the plaintiff claimed title as follows:

A writ was sued out, from the county court of Rockingham by one Gains against Nicholas Larrimore, returnable to August Term, 1791, and continued from thence until February Term, 1794, when judgment was rendered for the plaintiff.

A writ of *fieri facias* then issued against the chattels and lands of the said Nicholas, upon which writ the sheriff made a return in these words, "levied on lands, and sold for ten pounds."

(106) The plaintiff then produced a deed from the sheriff to William Lacey, dated 3d February, 1795, and another from the said Lacey to the plaintiff.

The title set up by the defendant was as follows: That on the 13th September, 1792, Nicholas Larrimore, for valuable consideration, conveyed the land in dispute to his son, Hance Larrimore, who, on the 30th May, 1794, conveyed the same to John Hamilton, the defendant.

Though the deed from Nicholas to his son purported to be made for valuable consideration, no proof was made of the payment of any money;

on the contrary, it appeared that the son's circumstances had been uniformly low, and that he possessed no means of gaining a livelihood, distinct from those furnished by the father.

It was proved that the nominal price of the land, paid by the son according to the deed, was double its real worth, and that the father had been under great anxiety and alarm, by reason of the suit brought against him by Gains; moreover, the father remained in uninterrupted possession of the land until December, 1797, long after the sale by the sheriff, etc.

The material question for the determination of the jury was, whether this deed from the father to the son, under all its circumstances, was fraudulent or not.

It was contended for the plaintiff that the transaction was attended with all those marks and badges by which fraud is distinguished. (1) The possession not accompanying and following the deed, which was absolute; (2) The near relationship of the parties; (3) The want of a consideration; (4) The suit pending against the father, at the date of the execution of the deed, concerning the event of which he had expressed so much anxiety; and lastly, that all the rest of the property of Nicholas was claimed by his other children; so that this was, in truth, a conveyance of all his property. For the plaintiff were cited the following authorities: Stat. of Eliz., 2 Bac., 604; *Twine's case,* 2 Rep., 81; 2 Bulstrode, 218; Cowper, 432.

In the progress of the cause several points of law arose upon which the Court delivered their opinion. The first question was, whether the execution upon which the land was sold should have (107) been returned to complete its validity.

By the Court: The writs of execution, by which lands are made liable to the payment of debts in England, must be returned, because they cannot be executed by the authority of the sheriff alone; in an *elegit* for instance, he must take an inquest according to the statute; therefore, a return is necessary, in order to show that he has acted properly.

But the Stat. of 5 Geo., 2, cap. 7, though it renders land liable to the same process with chattels for the satisfaction of debts, does not place the writ of *fieri facias* upon the same footing, in this respect, with the *elegit.* It merely enlarges its object, by giving it an extent it had not before, but does not thereby create any necessity for returning it. If lands are to be sold under it, in the same manner as chattels, there is more necessity for returning it in the one case than in the other. That it is not necessary in the latter, Hoe's case, in 5 Rep., is a decisive authority. The neglect of making a return will subject the sheriff to an amercement, but the execution, nevertheless, retains its validity; the

same principle extends to all judicial writs, duly executed, where the sheriff is alone competent to complete them.

There is nothing in the Act of 1777, sec. 29, which in the remotest degree, warrants a contrary conclusion. The words are, "that all process that heretofore issued against goods, chattels, lands, and tenements shall for the future issue in the same manner; and such as issued only against goods and chattels shall hereafter issue against lands and tenements as well as goods and chattels." The writ of *elegit* answers the description of the former part of the clause; consequently it may continue to issue; but the superior efficacy of the *fieri facias* has superseded it in practice.

II. That where a notice is given to take depositions, between the hours of ten in the morning and five in the afternoon, depositions taken under such notice ought not to be read, unless it appears that they (108) were taken within the time specified; otherwise the adverse party might be deprived of the benefit of cross-examination, by the depositions being taken before or after the time; at neither of which periods is he bound to attend. This point was mentioned at the bar to have been so ruled on the last Circuit by STONE, J.

III. Where a witness is called upon by one party, and examined to a particular fact, as the execution of a note, and is afterwards cross-examined by the other party as to other facts, the party first calling him cannot object to his testimony on the ground of interest. A party ought not to invalidate his own witness; and it is unreasonable that he should produce a witness, with the means in his power of destroying his credit if he testified against him.

IV. That the plaintiff's title was essentially defective, inasmuch as Lacey had conveyed the lands without having had possession, and at a time when there was an actual adverse possession against him by Nicholas Larrimore, leaving in Lacey, only the right of possession which cannot be conveyed. Co. Litt., 214.

Henderson for the plaintiff.
Duffy for the defendant.

The jury found a verdict for the plaintiff, subject to the opinion of the Court upon the latter point, which, at the instance of the counsel, was reserved; and at the following term MACAY and MOORE, Judges, gave judgment against the plaintiff upon this ground.

NOTE.—Upon the second point, see *Harris v. Yarborough*, 15 N. C., 166. Upon the last point, see *Slade v. Smith*, 2 N. C., 248, and the cases referred to in the note.

(109)

STREET v. CLARK.—Tayl., 15.

A certiorari is not grantable to remove a cause from the county court before trial, especially where the party has the right of appeal, and the county court has original exclusive jurisdiction.

At the last term a rule was made on the defendant to show cause why a *certiorari* should not issue to bring up a cause pending in the county court of Rockingham.

The affidavit upon which the rule was founded stated, in substance, that Street had been arrested in Rockingham County, at the suit of Clark, in an action of slander; that a combination to ruin and destroy him prevailed in that county, in which Clark was most active; that he had been greatly harassed by him and others, whereby such unfavorable sentiments were excited against him in the public mind that he verily believed he could not have a fair trial in that county.

Duffy for the plaintiff.
Williams for the defendant.

By the Court. A *certiorari* ought not to issue where the party has another remedy; in this case another and a more effectual one is provided by law against the injustice which he may receive, or even imagine, by the determination of the county court.

Should they refuse an appeal, this Court might properly interpose its authority; but it would be transgressing the bounds of its own jurisdiction to deprive the county court of theirs, and this, too, without a sufficient ground; for it is certainly presuming too much, upon the belief of a party concerned, that a court of justice can so far forget the solemn sanctions under which it acts, and the high responsibility of its duties, as to be influenced in its decisions by bad men combined to oppress an individual.

Of this action the county court has exclusively, original jurisdiction under the act of Assembly; and this ought first to be exercised before the power of this Court commences; but in any case a *certiorari* is improper before a trial where there is a right of appeal, unless, (110) perhaps, in a case where the county court assume a jurisdiction which does not belong to them. Rule discharged.

NOTE.—For the nature, object, and effect of a *certiorari* in this State, see *Dougan v. Arnold*, 15 N. C., 99; *Swaim v. Fentress, ibid.*, 601; *Betts v. Franklin*, 20 N. C., 602.

Cited: S. v. Sluder, 30 N. C., 491.

CRITES v. LANIER.—Tayl., 16.

If a party and his witness are absent, the Court will require that the absence of the party be accounted for, before they continue the cause.

A continuance of the cause was moved for on behalf of the plaintiff, who was absent, but from what cause did not appear; his witness had been summoned, as appeared by the return of the *subpœna*, but was also absent.

Alexander for the plaintiff.
Henderson for the defendant.

The Court were of opinion that it was first necessary to account, in some satisfactory way, for the absence of the party himself; and then proof might be received as to the materiality of the witness, as far as it could be made by a third person. That it would be extremely mischievous to continue causes upon the naked ground of the party and his witness being absent; for he might absent himself and keep back his witness for the very purpose of delaying the trial, and thereby harass his adversary at pleasure.

NOTE.—See *Wheaton v. Cross*, 3 N. C., 154; *Sheppard v. Cook, ibid.*, 241.

(111)

TORRIS v. LONG.—Tayl., 17.

A full price paid for an article always implies a warranty of its soundness: and in an action on the implied warranty, the plaintiff need not prove the return of the thing bought.

The plaintiff's counsel stated this to be an action founded, first, on an express warranty; second, on an implied warranty; third, on deceit in a sale.

The material parts of the evidence were that the plaintiff purchased from the defendant a horse for the price of forty pounds, after he had sent an agent to examine whether the color and size would serve to match a horse he had; the bargain was completed, upon the agent's reporting to the plaintiff favorably of the horse's appearance.

He did, however, examine and approve the horse himself. At each examination the horse, being taken out of the plough, had on a blind bridle. The witnesses generally thought that forty pounds were the

full value of the horse, had he been sound; though one witness for the defendant deemed him worth fifty or sixty.

It did not appear distinctly from the evidence whether forty pounds was the separate price of the horse, or whether they were paid on account of the horse and a negro, jointly sold for two hundred pounds.

Very soon after the delivery, the plaintiff discovered that the horse was totally blind in one eye and that the sight of the other was considerably impaired; being about to leave the country himself, he directed his agent to return the horse and demand the money, which was accordingly attempted, but the defendant refused to receive the horse unless the negro was likewise returned. About five months before the sale, a film had been cut off the horse's eye, since which it was testified that the animal appeared altogether free from any defect in that organ.

Henderson, for the plaintiff. A sound price uniformly implies a warranty of the soundness of the goods sold. Whether the defect was known to the defendants or not, since it existed at the time of sale, he is under a moral obligation to pay the plaintiff the difference; and courts of justice will endeavor to enforce duties of perfect obliga- (112) tion where no positive rule of society interposes to prevent it The progress of sound sense and the prevalence of moral justice over technical subtlety, are strongly marked in the case of *Pasley v. Freeman,* 3 Term Rep. It is also laid down in 3 Wooddeson, 199: "Neither is it incumbent on the plaintiff to prove at the trial that the defendant knew the things sold to be of such trivial or inferior worth." The same author in the 2d Vol. says "that a fair price implies a warranty, and that a man is not supposed in the contract of sale to part with his money without expecting an adequate consideration."

In point of real justice, there is no difference whether a man receives the money of another on a consideration which happens to fail, or upon the sale of property which proves to be of less value, by means of a defect, than it was sold for; the principle which enables him to recover in the one case applies with equal strength to the other.

Duffy, for the defendant. It does not appear that a full price was paid for the horse; the forty pounds being paid on account of the horse and negro, and if this fact is so found, the foundation of the plaintiff's argument fails, and consequently the maxim of *caveat emptor* applies in all its rigor. Were it otherwise, and the forty pounds were really paid for the horse alone, yet, as the plaintiff was as skillful as the defendant and had twice examined the horse, once by himself, at another time by an agent, it may be presumed that he knew the defect, and that he now repents of his bargain; in every event he was as likely to know it as the defendant. There was not on the part of the defendant the

slightest appearance of fraud, for he was willing to rescind the bargain and would have done so had the plaintiff thought proper to return the negro as well as the horse. The principles cited from Wooddeson are unsupported by authority.

The Court, in its charges to the jury, said that the last count upon a deceit was incompatible with the two former, which are founded
(113) upon promises, and consequently require a different plea. That the ancient way of declaring, in this action, was in deceit, which had been changed for the convenience of adding to the declaration a general count for money had and received. As this was not done in the present case and as the latter count could not consist with the others, it was only necessary to state the points, upon which the jury ought to be satisfied, in order to find a verdict for the plaintiff.

That no part of the evidence applied to the first count of the express warranty; and the second could only be established by proof that the price paid for the horse was a full one, and that he was unsound at the time of sale, except the defect was visible and apparent, so that the plaintiff must have known it.

If these facts are made out to the satisfaction of the jury, the plaintiff is entitled to their verdict; nor is it incumbent upon him to prove, in this form of action, that he returned the horse; for if the contract is established, this circumstance will not change it. It might, indeed, have afforded a presumption that he knew the defect, if he had not directed his agent to return the horse; but having done that soon after the sale, it seems likely that he then first discovered it.

A return would be necessary if the action had been brought for the price of the horse. In such case the plaintiff must show that the contract is at an end; but where it still continues open, the object of the suit is damages, the proper measure of which is the difference between the price paid and the horse's real value.

Verdict for the plaintiff.

NOTE.—See *Galbraith v. Whyte*, 2 N. C., 464; but the rule that a full price implies a warranty has been since exploded. *Erwin v. Maxwell*, 7 N. C., 241.

(114)

STATE v. FORSYTH.—Tayl., 21.

1. If the prosecutor of an indictment had probable cause, though his motives were of the worst kind, he ought not to pay costs.

2. If the county court order the prosecutor to pay costs, and at the next term revoke this order, and order the defendant to pay them, although such a

proceeding is improper, on an appeal from the last order, the Superior Court will not go into an examination of the fact, if the whole record of the cause has not been brought up.

The defendant had been tried in the county court upon an indictment for an assault, and acquitted; and the court, thinking that the prosecution was malicious, adjudged the prosecutor to pay the costs. At a subsequent term, however, the court reconsidered this judgment and directed the defendant to pay the costs; from which order he appealed, and now moved that the Court should go into the examination of witnesses who were attending, in order to show that in truth the prosecution was malicious, and that, therefore, the first determination of the county court was proper.

But the Court, although they expressed themselves strongly against the practice of a county court's setting aside their judgment rendered at a preceding term, were of opinion that they could not with propriety go into the examination, unless the whole record of the cause below had been brought up and a jury impaneled under their direction to try the issue *de novo*.

That the question of costs did not simply depend upon the motives of the prosecutor, but upon the guilt or innocence of the defendant, which ought first to be duly ascertained. That if the prosecutor had probable cause, though his motives were of the worst kind, he ought not to pay the costs; and it is possible that, upon a trial of the whole case, he might have directed proofs to that point, which may now be excluded from the nature of the inquiry. That to determine the question upon this appeal would be to give judgment upon the incident of a cause which properly belongs to that jurisdiction which has cognizance (115) of the principal subject matter.

NOTE.—Where the defendant in an indictment is acquitted, or where a *nolle prosequi* is entered, he is bound to pay his own costs and no other.—*State v. Whithed*, 7 N. C., 223. Under the 23d and 27th sections of the 35th chapter of the Revised Statutes, when a bill of indictment has been found by the grand jury and a *nolle prosequi* afterwards entered, or when the party has been acquitted on any crime of an inferior nature, the Court may order the prosecutor to pay the costs where the prosecution appears to be frivolous or malicious. It has been decided that the inferior offenses here spoken of mean such, the punishment of which does not extend to life, limb, or member, and the acquittal must be before the petit jury. *State v. Lumbrick*, 4 N. C., 156; *State v. Cockerham*, 23 N. C., 381.

DEN ON DEM. OF CRESSMAN v. GEORGE.—Tayl., 22.

The judgment of a justice does not bind lands; and if the defendant sells his lands before the levy of a justice's judgment upon them, the purchaser will acquire a good title, though the levy be afterwards returned to Court, and the lands be sold under an order of the Court for that purpose.

This ejectment was brought to recover a tract of land lying in Stokes County, to which the plaintiff claimed title first, under a grant from the State to Blackburn, dated 3d April, 1780. A deed from Blackburn to Coffee, dated 16th October, 1785; a judgment recovered by the plaintiff against Coffee, before a justice of the peace, dated 14th June, 1795, and an execution issuing the same day; a levy made on the lands in question, on the 30th July, 1795; the execution returned to the county court, and an order of sale made in September, 1795; a sheriff's deed to the plaintiff of the lands in question, dated 11th March, 1796.

The defendant claimed title under a deed from Coffee to him, dated 18th July, 1795, which was impeached by the plaintiff on the ground of fraud. The question for the opinion of the Court was whether the judgment so bound the land as to prevent Coffee from conveying it independently of any fraud there might be in the transaction as between him and the defendant.

(116) *Henderson for the defendant.*
Duffy for the plaintiff.

By the Court. The Legislature has provided that where there is no personal property whereon to make a levy, the constable shall levy the execution on the real estate, and make return of his proceedings to the ensuing county court; that an order of the court may direct the sheriff to dispose of the real estate. There would be no necessity for this formality if the lands were bound by the judgment in the first instance; the constable might proceed to sell, after satisfying himself that there was no personal property; and such a discretion might have been given to him as the sheriff derives under the 29th section of the Court Law. He is there directed to levy upon and sell lands if, to the best of his knowledge, the defendant has no personal property, or not sufficient to satisfy the execution. If the sheriff were to sell land, though he knew there was a sufficiency of personal property, his sale would unquestionably be good, whatever remedy the defendant might have against him; and the reason is that the lands were bound by the judgment, and the writ gives him authority to sell. The sale of the constable under

the Act of 1786 would be merely void, since the execution neither gives him power to sell nor does the Justice possess competent jurisdiction. Whether a defendant, whose lands are levied upon by a constable under the judgment of a Justice, is at liberty to sell after the levy, is a question worthy of consideration; but as the sale in this case was made twelve days before the levy, the question does not arise.

It is also highly reasonable that lands should only be bound by a proceeding more solemn than that of a Justice's judgment, the existence of which is not to be ascertained by any record. The orders of the county court have sufficient notoriety; purchasers may resort to them and satisfy themselves what judgments are in force against a person with whom they contract. But if the judgment of every Justice is to operate as a restraint upon alienation, a fair purchaser, whatever may be his anxiety to avoid contention or diligence to discover (117) the true state of the debtor's affairs, is liable to be dispossessed. It is no immediate security to him that the seller's means are ample, or that he had retained sufficient to discharge the debt, for the judgment, if it attaches at all, binds every part of the land; as well that which is sold as that which is retained.

Verdict for the defendant.

YARBOROUGH v. BEARD.—Tayl., 25.

1. If a deed be executed by an attorney, his power, or a copy of it, must be produced.
2. A certified copy of an instrument required to be recorded is sufficient evidence for the party when the original is lost, and complete evidence for strangers. But as to instruments not required to be recorded, the register's certificate is of no validity.

This was an action of trespass *quare clausum fregit,* brought to try the title. Plea, *liberum tenementum.* The plaintiff claimed title under Adlai Osborne, as attorney for the trustees of the University, and his deed, as such, was read; a question then arose, whether it was incumbent on the plaintiff to produce the power of attorney constituting Adlai Osborne such, and authorizing him to make a title to lands; and if that were necessary, then, whether, as the original did not belong to the plaintiff, the register's books containing a copy would be sufficient without other proofs of its being a true copy. Upon which questions,

The Court were of opinion, (1) That whenever a deed was executed by virtue of a power of attorney, the power, or a copy of it, must be produced; and that as the plaintiff was not bound to have possession of

the original, he may supply its absence with the next best evidence; (2) That when an instrument of writing must be recorded in order to be valid, a copy, certified by the register, is sufficient evidence for the party who ought to have the original, if it be lost; and is complete (118) evidence for a stranger. In these cases, which were specified in the acts of the Legislature, the law gives evidence to the certificates of the register, because he acts by its direction and under its authority; but in other cases, his certificates are no more admissible than those of a private person; and as registration is not necessary to give validity to powers of attorney, the books cannot be received in the present case. If the person who copied the power into the register's book were present to prove it a true copy, it would be sufficient, upon the common principle of evidence, that if the party has not the original he may give a copy in evidence; if he has no copy, he may prove by parol the contents of the deed.

NOTE.—On the second point, see *Garland v. Goodloe*, 3 N. C., 351.

(119)

HILLSBOROUGH DISTRICT, *April Term, 1799.*

JOHN WILLIAMS, SPRUCE MACAY, and JOHN LOUIS TAYLOR, Judges.

JOYCE v. WILLIAMS.—Tayl., 27.

A sheriff who abstains from selling property which it was his duty to have sold, may recover on a written promise of indemnity for not selling if he believed at the time he had no right to sell.

This was an action of *assumpsit,* founded on a written promise of indemnity made under the following circumstances: The plaintiff was sheriff of Rockingham County when a writ of *fieri facias* against the property of Nathaniel Williams came to his hands, upon which he made a levy and appointed the day of sale. The plaintiff, who had been but a short time in office and was but imperfectly acquainted with its duties, was told by the present defendant, who was an attorney, and brother to the defendant in execution, that a sale could not legally take place unless three actual bidders were present; and was likewise warned by him of the consequences of knocking down the property, unless to a third bidder. This induced the plaintiff to apply to the defendant for his advice professionally, and he then repeated the same information; and that the plaintiff might entertain no doubt of its truth, and to induce him to conduct the sale accordingly, he promised to indemnify him

against all damages he might receive in consequence of discontinuing the sale, in case there should not be three bidders.

The plaintiff then set up a horse, for which the defendant at the first bid offered much more than the value, and no person thinking proper to go beyond this, the horse was consequently withdrawn.

He afterwards set up a negro, for which the agent of the plaintiff in judgment bid the real value at once, but as he was the only bidder, the negro was also withdrawn, whereupon the plaintiff, by the advice and direction of the defendant, and under his aforesaid promise of indemnification, returned on the *fieri facias* "not sold for want of (120) bidders."

For this return an action was brought against him, as for a false return, and a verdict had against him for £25 damages; he was also convicted upon an indictment for a misdemeanor in office, and fined £25, and was put to other incidental expenses and sustained other damages in consequence of the said false return.

The present action was brought on the promise of indemnity to recover a satisfaction in damages for all the loss and injury the plaintiff had sustained by means of the aforesaid return; the defendant pleaded *non assumpsit* and an illegal consideration, and a verdict under the direction of the Court was found against him at October Term, 1798, for the full amount of damages sustained. The defendant then obtained a rule to show cause why the verdict should not be set aside and a nonsuit entered, upon the ground that the written promise was within the Statute of 23 Hen., 6, cap. 7, and consequently void.

At this term *Duffy,* for the plaintiff, showed cause and argued the case on two grounds: First, That the promise is neither within the words nor spirit of the statute; for which he cited *Beaufage's case,* 10 Coke, Croke Eliz., 178; 1 Term Rep., 418. Second, That if it were within the act, yet it comes within that class of cases where the plaintiff is induced to do an illegal act by the false representations of the defendant, and is consequently entitled to a recovery.

Burton, in support of the rule, contended that whenever the condition of a bond, or the consideration of an *assumpsit,* was to do an illegal act, the bond and the promise were void; that the act in the present case was manifestly illegal and had been so pronounced by the judgment of the Superior Court. To prove the first point, he cited 3 Burrows, 1568.

TAYLOR, J. The 8th section of our Act of Assembly of 1777, though expressed in different terms, is substantially the same with the Statute of 23 Hen., 6, cap. 7; and it is directed to the same humane and politic ends, namely, to guard debtors from the oppression and extortion

(121) of the sheriffs and their officers; for if these latter were permitted to take bonds under any latitude of form from persons in their custody, the most flagrant exactions might be practiced with impunity; and the process of law rendered subservient to the worst purposes; they might conduct themselves to such persons, with lenity or rigor, according to the disposition they met to yield to their demands; and in estimating the price of their condescension they would be cautious enough to indemnify themselves against the possible consequences of their misconduct. But, while the policy of the act is sufficiently vindicated by the good it has produced and the decisions which have taken place under it, its object may be effectually attained without increasing the risks or multiplying the difficulties of the sheriff's office. The act restrains him from taking obligations from any person in his custody, and the Statute of Hen. 6 contains equivalent expressions, upon which the construction has been that a bond made to a sheriff, that a party on a *fieri facias* will pay the money into Court on the writ, is not within the statute, according to the case in 10 Coke; if such a bond given by a party himself is good, it follows *a fortiori,* that a bond given by a third person is equally so; for neither is in the sheriff's custody. The case of *Rogers v. Rogers,* 1 Term Rep., 418, serves to show that such has been the uniform construction of the statute, and that it relates only to persons arrested on mesne process, beyond which our Act of Assembly does not extend.

This verdict is therefore a proper one, unless the undertaking is void at common law; and it is argued for the defendant that it is so, because it is founded on an illegal consideration, viz.: that the plaintiff should make a false return. The proposition is generally true that a person cannot be relieved on an action which is founded on an illegal or immoral act, as where a sheriff promises for a sum of money that a prisoner shall escape, the promise is not good. So, if a promise made to a gaoler to pay him money in consideration of his letting the prisoner go at large, it is void, the act being against law. Yelv., 197. The law is the same, where a person promises to pay another money in con-
(122) sideration of his beating a third person; and, generally speaking, if a person promises to save a minister of justice harmless for doing an unlawful act in his office, the promise is void. 1 Cro., 230.

But the rule of law must be considered with this restriction: that the person who does the act knows it to be unlawful at the time; for where the plaintiff pointed out particular goods and desired the sheriff to take them on a *fieri facias,* and in consideration that the sheriff would take them, promised to indemnify him; this was held a good promise, for the plaintiff showing the goods and requiring the sheriff to do execution, it was reasonable he should save him harmless. 2 Cro., 652. Buller's

N. P., 146. In that case, the sheriff committed an unlawful act, and made himself a trespasser; yet, as he knew it not at the time and was urged by the plaintiff to make the levy, he was entitled to recover.

Such promises are according to the common usage of this country, and are frequently the means of leading to the detection of fraudulent transfers of property. The justice and reason of this case are likewise strong on the side of the plaintiff, whose inexperience in office might well incline him to repose in the defendant a confidence by no means unreasonable; since his situation implied skill in law, and the latter having prevailed upon the plaintiff to make this return, by the united effects of persuasion, advice, and a promise of indemnity, ought upon every principle of equity and good faith to meet the consequences.

MACAY, J. The facts of the case are that the plaintiff was about to do execution on the property of N. Williams, in the accustomed and ordinary way; but the defendant told him it was necessary to have three bidders, and that if he made a sale without three, he would involve himself in difficulty. Having but little confidence in his own knowledge of official duty, and believing that he might falsely confide in the defendant's information, especially when he gave the best proof of his earnestness by a written promise of indemnity, he ventured to make the return, and has deeply felt all the consequences. (123)

Now if there were any stubborn principle of law, under which the defendant could shelter himself, it might be lamented, but must nevertheless be obeyed; but I am of opinion that the law, as well as the justice of the case, is with the plaintiff. It is evident that so far from knowing at the time that he was about to commit an illegal act, he had some foundation for believing it was legal, and this excepts the case from the operation of the general principle. Without going at large into the discussion, I think the verdict is right, and ought not to be set aside.

WILLIAMS, J., concurred with the opinion delivered, and mentioned that a case was decided at Halifax, wherein Geddy was plaintiff, upon which occasion the question came before the Court whether a sheriff was entitled to recover on a promise of indemnity, and the Court were of opinion that he was.

Rule discharged.

NOTE.—See the case of *Denson v. Sledge*, 13 N. C., 136, where it was held that a promise to indemnify a sheriff for neglect to levy a *fi. fa.* or for postponing its execution was bad; though the indemnity would have been good, if it had been for levying a *fi. fa.* against A. upon goods in the possession of B.

STATE v. QUINNERY.—Tayl., 33.

1. If an erroneous judgment be rendered on a plea in abatement, the defendant may either appeal from it or plead in chief, and upon a second erroneous judgment assign errors upon the whole record.
2. The recognizance, on a charge of bastardy, to appear at the county court, must be taken before two justices.

This was a writ of error brought to reverse a judgment rendered in the county court of Chatham. The defendant had entered into a recognizance for the appearance of Mask, to abide the order of the county court on a charge of bastardy; and Mask, failing to appear, a *scire facias* was sued out against the defendant, to which he pleaded in abatement, that the recognizance was taken by a single Justice, whereas (124) the Act of Assembly requires the presence of two. Demurrer and joinder. The county court gave judgment that the defendant answer over; whereupon he pleaded *nul tiel record* and a surrender, to the latter of which pleas a replication was entered that there was no record of the surrender; demurrer and joinder; upon the argument of which the county court gave judgment for the plaintiff. The errors were assigned on both the judgments of the county court.

Williams, for the defendant in error. When the county court pronounced judgment upon the plea in abatement, if the plaintiff in error was dissatisfied with it, he ought to have appealed, or should have prosecuted a writ of error upon that judgment; having failed to do so, but making his election to plead in chief, the merits of the first judgment ought not now to be taken into consideration.

But if this point should be taken against me, I contend, secondly, that the judgment given upon the plea in abatement was strictly legal. The Act of Assembly does not require the recognizance to be entered into before two Justices; it is satisfied by the examination being had before two, and the mere form of taking the recognizance is a ministerial act which any one Justice may perform. 2 Hawkins, 84, 85.

Norwood, for the plaintiff in error, was stopped by the Court.

By the Court. That which may be pleaded in abatement cannot afterwards be assigned as error, because it was the neglect of the party not to avail himself of the defect by plea. But if an erroneous judgment be rendered on a plea in abatement, the defendant may either appeal from it or plead in chief, and upon a second erroneous judgment assign errors upon the whole record. A writ of error will not lie upon an interlocutory judgment, the words of the writ being "if judgment

thereof be given," which signify final judgment. The argument for the defendant goes too far; for if it be well founded, it proves that a subsequent erroneous judgment cures the errors of a former one, which would be absurd. (125)

As, then, this error is properly assigned, the only question is whether it be sufficient to reverse the judgment. The Act of Assembly constitutes two Justices a Court, for the special purpose of examining the woman, upon oath, concerning the father of a bastard child, and adjudging that person the reputed father whom she shall so accuse. Though it does not expressly require the same two Justices to bind the man over, yet it is a part of the same proceeding, and must be implied in order to satisfy the subsequent part of the clause, which subjects the reputed father to stand charged with the maintenance, as the county court shall order. The words of the clause next following show that such was the intention of the Legislature, for thereby they extend the powers of the said two Justices to binding over a person charged with having begotten a bastard child not then born. It is not reasonable to suppose that a distinct clause should be inserted for the purpose of giving this power, in a case where the child was not then born, if it had been omitted in the other, where the child might have been already chargeable on the parish. If this is the true construction, then taking a recognizance is in this instance a judicial act, since a discretion must be exercised with regard to the sum, the circumstances of the party, and the probability of his remaining in the county to answer the charge and obey the order of the Court. The whole is a special authority confided to two Justices by an act of Assembly, and must therefore be jointly exercised. As we believe the judgment to be erroneous for this cause, it is unnecessary to examine the second error assigned.

Judgment reversed.

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(126)

BORRETTS v. PATTERSON.—Tayl., 37.

1. Awards are to be construed liberally; and in mercantile transactions, not admitting of certainty, nice objections ought not to defeat an award, if that to which the objection of uncertainty is made, can be ascertained by the context, the objection shall not prevail.

2. The meaning of the rule that an award must be mutual, is that the thing awarded to be done shall be a final discharge of all future claims by the party in whose favor the award is made against the other for the cause submitted.

BORRETTS *v.* PATTERSON.

After argument in this case by *Williams* for the plaintiff and *Duffy* for the defendant, and time taken for consideration, the case was stated and the opinion of the Court delivered by TAYLOR, J., as follows: This is an action of debt upon an arbitration bond; oyer of the condition is craved, which is set out on the record, and is in these words: "The condition of the obligation is such that whereas, in the years one thousand seven hundred and eighty-three and eighty-four, they, the above Bell Smith & Co., and William Borretts, did, in consequence of some previous consultations and conclusions, send by sundry conveyances as well by sea as land, goods, wares, and merchandise, to the care, management, and disposal of the said James Patterson, to a considerable amount, and whereas, there is a controversy in regard to the statement and settlement of those affairs; and, whereas, all parties mutually agree that the said dispute shall be wholly put to arbitration, and have accordingly chosen John London and Amasiah Jocelyn, with an umpire to be chosen by them, if necessary, arbitrators finally to inquire and decide for each and every of the parties, relative to the matters before recited; now, therefore, if the said James Patterson shall and do ultimately, decidedly, and finally, abide by and conform to the sentence, judgment, and decision of the aforementioned arbitrators, and confirm their award with regard to the premises, and shall in future at all times acquiesce in the same, and shall accordingly either make payment or receive payment, as the case may be, then the aforesaid obligation to be void," etc. To this the defendant has pleaded that no award was made; the replication sets out an award in the following words: "We (127) have examined the matters in dispute between Bell Smith & Co. and William Borretts, and James Patterson, of Fayetteville, merchant, and do find that, after fully adjusting the advance on goods and the respective charges and commissions on the sales and remittances, there remains due on these transactions at their close (sixteenth July, 1784), to Bell Smith & Co. and William Borretts, the sum of £401, 8, 3, from the said James Patterson. If any outstanding debts are made to appear due on the said concern, they are to be allowed against the said balance; provided Mr. Patterson shall make it appear that he has taken proper means for the recovery in due time, agreeably to law." Upon these pleadings the jury have found a verdict for the plaintiff, and the Court have now to decide upon the sufficiency of the award. The objections made against it are, that it is not certain, for it directs nothing to be paid; that it is not final, since it opens a new source of litigation; or, at best, leaves the parties as they were before the reference; and because it does not appear whether the outstanding debts were due before the reference, whereas they may possibly have accrued since; that it does

not appear who is to ascertain whether the defendant has used due diligence, and is, in consequence, entitled to the deduction; and, lastly, because it is not mutual, inasmuch as it directs nothing to be done by the plaintiff.

There is no subject in the laws upon which ancient cases are more obscure, or convey less exclusive information than awards. To adopt them in the rigorous application of the rules of construction, or to pursue them through their endless subtlety of refinement, would be, in truth, to render awards of no use, in the main purpose of their introduction—readjusting the controversies of men before a domestic tribunal, unattended with expense, trouble, or delay. Of this nicety many instances may be adduced, but one will be sufficient to attest it. A submission was to the award of four men by name, so as the same award be made and delivered up in writing by them or any three of them; it required several solemn arguments to convince the Court that (128) these words gave authority to any three of the arbitrators to make the award, they supposing that it could not be the same award unless made by the four. If courts of justice had continued in the practice of scanning awards with such rigid scrutiny, the effect would have been that a mode of trial highly beneficial to mankind must long since have disappeared.

But sound and rational interpretations have at length prevailed, and we are furnished with two rules; one respecting awards in general, in 1 Burr., 277, which is to adopt a liberal construction in order that awards may answer the purpose for which they were intended; the other is in 2 Atkyns, 501, that in mercantile transactions which do not admit of certainty, nice objections ought not to defeat awards. Nevertheless, awards must have, to a common intent, all those qualities the want of which is objected to the present one; but whether that possesses them or not should be examined in the true spirit of these rules, and of some others established by law, to advance the utility of this mode of proceeding.

As to the objection of uncertainty, it should be noted that the parties to this transaction, submittants, and arbitrators, are merchants; amongst whom, to say a sum of money is due, is equivalent to a promise of payment, and so understood by debtor and creditor; and amongst all persons such an acknowledgment will revive a debt barred by the statute of limitations, even if the condition of a bond is that a person shall render a fair, just, and perfect account in writing of all sums received; yet, if the obligor neglects to pay over such sums, he is guilty of a breach of the condition. Douglas, 382; *Bache v. Proctor.* But if terms of this bond are that the defendant shall acquiesce in and confirm the award

and make payment, if the case may be so, now it is difficult to conceive how he can comply with this condition and yet refuse to make payment on the award. An award that the one should keep the goods in dispute, paying so much to the other, has been construed imperatively that he should pay; L. Raymond, 612; for if the words of an award have
(129) any ambiguity in them, they shall be so construed as to give effect to it. The principle of this submission was that whoever appeared to be the debtor should pay; the arbitrators have found who was the debtor, and the consequence must follow.

In the settlement of transactions of this kind, the chief difficulty usually is to fix and ascertain the rule by which the account shall be adjusted; a merchant and factor are more apt to disagree respecting the commissions, extra charges, and price of the produce remitted, than concerning the amount or price of the goods originally consigned. So many unforeseen events arise out of the mode of doing business, and the circumstances of the country that, although they understand each other in the beginning, the application of some rule is necessary to the intervening circumstances. When, therefore, by the interposition of friends, they have ascertained the rule by which their accounts shall be settled, the rest is a mere operation of arithmetic which they, themselves, can as well perform. So that, although the amount of the outstanding debts is uncertain yet it may be rendered certain by the defendant, to whom alone it was known, and who might consequently have availed himself of this clause, inserted exclusively for his benefit. It does not appear on the face of the award that the arbitrators knew there were any outstanding debts due on the concern; and if there were any, it must now be intended, after verdict, that the defendant would have claimed the benefit of this provision.

On the other hand, if the outstanding debts had amounted to a larger sum than is found due from the defendant, a total silence in the arbitrators respecting them might have worked injustice. The other parts of the clause, such as that the defendant shall make it appear that he has taken proper means for the recovery in due time, signify no more than the law would have implied without them; that the company should not sustain the losses occasioned by his negligence. But there are authorities which apply with some force against this objection, as in Rolle, 250, an award that one shall pay his proportion which shall appear due upon an account; so in Strange, 903, it is held that if an
(130) award is as final as the nature of the thing will admit of, it is sufficient; as where Marshall, at the instigation of Knightly, brought a *qui tam* action against Phillips in behalf of himself and the poor of the parish; Phillips for himself, and Knightly in behalf of

Marshall, submitted by bond all matters in difference between the parties to arbitration. It was awarded that Knightly should execute a covenant to indemnify Phillips against all costs, damages, and expenses which happen by means of any further proceedings in the *qui tam* action; the objection taken to this award was that it was not final, not putting an end to the suit, but only giving a new action of covenant. But it was held that the award was sufficiently final, and that at any rate it was not competent to the defendant to make this objection, and that the arbitrators had done everything they could do to make their award final. To this may be added the case of *Beale v. Beale,* 3 Vent., 65, where it was awarded that one party should pay his part of the expenses of the voyage, and allow on account his proportion of the loss which should happen to the ship during the voyage; this was held good because the expenses and the loss might be ascertained by calculation.

It is another rule in the construction of awards that if that to which the objection of uncertainty is made, can be ascertained either by the context of the award, or from the nature of the thing awarded, or by a manifest reference to something connected with it, the objection shall not prevail. This rule furnishes an answer to the objection, which states that it does not appear when the debts accrued. Undoubtedly the arbitrators would have exceeded their powers if the debts had accrued after the submission; but that is impossible, from the nature of the transaction, because it appears on the face of the award that the connection closed the 16th July, 1784; consequently all the debts must have accrued before that time.

The meaning of the rule as to the want of mutuality is that the thing awarded to be done shall be a final discharge of all future claims by the party in whose favor the award is made, against the other for the cause submitted. The recovery in this action is an effectual (131) bar against any future claims the plaintiff can set up on account of this award, the judgment here being for the penalty of the arbitration bond.

For these reasons we think there must be judgment for the plaintiff.

NOTE.—See *Blackledge v. Simpson,* 3 N. C., 30; *Bryant v. Milner, post,* 485; *Carter v. Sams,* 20 N. C., 321; *Duncan v. Duncan,* 23 N. C., 466.

Cited: Stevens v. Brown, 82 N. C., 461; *Osborne v. Calvert,* 83 N. C., 370; *Millinery Co. v. Insurance Co.,* 160 N. C., 140.

HYNES v. LEWIS' EX'RS.—Tayl. 44.

Whether slaves, to whom the wife has a right in remainder, vest in the husband if he dies during the coverture, without having reduced them to possession, *quære.*

Upon an action of detinue, tried at April Term, 1796, a verdict was found, subject to the opinion of the Court upon the following case:

That Charles Lewis duly made his last will and testament on the 21st September, 1779, wherein, after sundry devises and dispositions of his property, the will proceeds, as follows: "My will and desire further is that on the death of my wife, all the rest and residue of my estate not herein otherwise disposed of, may be divided into eight equal parts or portions, and one of those parts or portions I give, devise, and bequeath to each of my sons and daughters, respectively, or their heirs, viz.: John Lewis, Charles Lewis, Howel Lewis, Robert Lewis, Elizabeth Shannon, Ann Taylor, and Frances Lewis, and the other eighth part or portion thereof to the sons and daughters of my son James Lewis, deceased, and to their heirs or legal representatives, respectively." The appointment of executors then follows. The testator died on the ..... day of ....., 17...., and the will was admitted to probate on the 21st December, 1779. That Robert Lewis, on the ..... day of .....,
(132) 1779, intermarried with Frances Lewis, daughter of the testator, Charles; that on the 2d September, 1780, the said Robert Lewis made his last will and testament, wherein (*inter alia*) he directs that all his personal property be equally divided among his wife and children; his wife's proportionable part to be for her use during her natural life, and to be disposed of by her in any manner she should think proper during that period, to such of his children as she pleased, and then each child's part to be to them and their heirs forever. That the said Robert Lewis died on the ..... day of ....., 1780, and afterwards, on the ..... day of ....., 1782, Mary Lewis, widow of Charles Lewis, died; upon whose death the executors of Charles proceeded to make a division of the negroes and other estate bequeathed by his will, and the part allotted to Frances Lewis in the said will was set apart, in which were contained the negroes specified in the declaration, and that the said Frances then took them into possession, with the consent of Charles Lewis' executors. That on the ..... day of May, 1790, the said Frances Lewis, having been in possession of the said negroes from the time of the division, and being then in the possession of them, intermarried with the plaintiff, Thomas Hynes, and on the 10th October, 1790, the said Frances died, the said Thomas Hynes having a continual and un-

interrupted possession of the negroes from the time of his marriage until his wife's death. That in 1792, the said Thomas Hynes delivered all the said negroes to Robert Lewis' executors, for the use of Robert's children, but without prejudice to his, Thomas Hynes' right, in which manner the said executors accepted them; and that afterwards, and before the institution of the suit, Thomas Hynes demanded the said negroes from the executors, who refused to deliver them; upon the whole, etc.

This case was fully argued by *Potter* for the plaintiff and *Norwood* for the defendant; but as the principal points relied upon are noticed in the opinion of the Court, their arguments are omitted. After time taken for deliberation,

TAYLOR, J., delivered the opinion of himself and MACAY, J. (133) (WILLIAMS, J., being absent from sickness), as follows:

It is found by the special verdict that in the year 1782, upon the death of Mary Lewis, widow of Charles Lewis, a division was made of the negroes bequeathed by Charles, and that those mentioned in the declaration were allotted to Frances Lewis, then a widow, who immediately took them into possession. That in May, 1790, being so possessed, she intermarried with Thomas Hynes, the plaintiff, who likewise became possessed of the negroes, and that in October, 1790, Frances, then Frances Hynes, died. It is further found that in 1792 the plaintiff delivered the negroes to the defendants, but without prejudice to his right, and that in 1793 they refused to deliver them when demanded by him. So far the plaintiff's title is unattended with any difficulty.

But the defendants say that Charles Lewis, having bequeathed the ulterior remainder in these negroes to his daughter, Frances, during her coverture with Robert Lewis, their testator, and the said Charles Lewis having also died during the coverture, the title became vested in Robert immediately upon the assent of the executors, and of course transmissible to his representative.

The question, therefore, for the opinion of the Court is whether Robert Lewis did become entitled to these negroes, without having reduced the same into his possession during the coverture. It may be premised that, as negroes are considered by our law personal property, and as that is governed by certain general rules, in regard to its division, succession, and the rights that men may hold in it, this species of it, in common with every other, must necessarily be obedient to the like principles. Whatever necessity there may be that this sort of property should be regulated in a manner peculiar to itself, or that questions concerning it should be determined with a view to the exigency of men's affairs; yet

it is obvious that such alterations, accommodated to the nature of the property and the circumstances of the country, can only be made by legislative authority. In the discussion of legal rights, courts of law are bound to apply strict legal principles, and the hardship in a (134) particular case must be overlooked, in the greater benefit resulting to the community, when certain known rules are made the test of men's rights, instead of suffering them to fluctuate in the dangerous uncertainty of private speculation.

The rule of law which ascertains what property the husband acquires by marriage is so clear and well settled that no difficulty could arise from it in the present case; but the argument has turned upon the application of that rule to property circumstanced like the present. That rule declares that the personal property of the wife in possession becomes, by the marriage, absolutely vested in the husband; that the personal property of the wife in action does not vest in the husband, unless he reduces it into possession during the coverture. If he dies without doing so, and the wife survives, it is absolutely hers; if she dies, he has no other method of deriving benefit from such property, than by taking out letters of administration. Co. Litt., 351, *a*. Hence it is important to ascertain the respective boundaries of what is termed property in possession, and property in action; especially as it is argued for the defendant that choses in action, strictly speaking, must be confined to debts upon bond, contract, and the like; to damages for the nonpayment of a debt, or the specific debt itself, excluding by this definition goods, plate, deeds, and writings, as well as negroes.

All personal property is divided into things in possession, and things in action; the first corresponding with the *jus in re*, the latter with the *jus ad rem* of the civil law. Things in possession are used in contradiction to such as are not in actual enjoyment, and which, to become so, must be recovered by suit, whether they consist of money or specific chattels. Thus it is said in 2 Blacks., 439, "Chattels personal or choses in possession, as money, jewels," etc. Consequently, if this money or these jewels were not in possession, they would be chattels personal or choses in action; accordingly, an action of debt was anciently brought to recover a specific chattel, as well as a certain sum of money; (135) the only difference being that the defendant was charged in one case with owing, in the other with detaining; and the action was equally maintainable, whether a chattel was bailed to a defendant, who refused to restore it, or whether a man had contracted to deliver a specific chattel, Gilbert's Action of Debt, 400. The same division of chattels in possession and chattels in action is recognized in Roll., 342, and 4 Rep., 65. It seems, therefore, that when a person's deeds or goods,

and consequently negroes, are in the possession of another, and he can only be restored to them by suit, he has a chose in action, precisely to the same extent as if his demand arose from a bond or promissory note.

The argument that these negroes were vested in Frances Lewis during the coverture, and were therefore transmissible to Robert's representatives, is fallacious; for money in the hands of a trustee for a *feme covert* is vested in her; yet if the husband dies without disposing of it, it survives to her. 1 Vern., 161. Rent that accrues during the coverture, upon a lease made by the husband and wife of the wife's land, is vested in her; yet she shall have it, if she survives her husband. 1 Roll., 350. Many interests may be vested in the wife, which, nevertheless, do not belong to the husband; to complete his title, there must be a vesting in possession, as well as in interest. In this respect, the subject bears some analogy to a case of real property, where a remainder in fee is limited to a *feme covert* after an estate for life; during the particular estate it is vested in her and is transmissible to her heirs; but if the particular tenant survives the wife, the husband shall not be tenant by the curtesy for want of a seizin in fact.

All that vested in Frances, during the coverture, was an undivided eighth part of Charles Lewis' negroes after the death of his widow; of what negroes this part should consist was not ascertained until the division, which took place after Robert's death; so that, in fact, until that time, no specific negroes vested in Frances. She had a claim upon the *residuum,* which, it is true, the widow of Charles Lewis could not defeat by any act of hers, and so far her right was vested; yet this is rather an equitable than a legal right, for the protection of which (136) in a court of law, during the life of the widow, it would be difficult to devise an adequate remedy. Considered as a trustee for Frances, she might have been compelled, in a Court of Equity, to deliver in an inventory of the property, whereby it might be secured against any disposition of hers calculated to defeat the remainder; but no case has occurred where such a right as this has been asserted in a court of law during the life of the first taker. 2 Fearne, 46. Then, the claim of the defendants amounts to this; that the wife, during the coverture, became entitled to an equitable right in remainder, to an undivided eighth part of Charles Lewis' estate; that the husband, their testator, neither did nor could reduce the same into possession, during the coverture, and that he died without making any assignment of it, his wife surviving him. Now chattels of a mixed nature, partly in possession and partly in action, which happened during the coverture, the wife shall have, if she survives. Co. Litt., 351, *a.* The law is the same, if she becomes entitled to a distributory share of an intestate's estate which, never

having been reduced into possession by the husband, survives to the wife. Shower, 25. The reason of those cases would seem to apply with more effect to the present one, which is the claim of a mere possibility.

Some of the cases which have been cited for the defendant shall now be briefly noticed, and an attempt made to point out wherein they appear to us defective in their application. By the case of *Cary v. Taylor,* in 2 Vern., 302, it is to be observed that nothing is decided. The question was whether a distributory share should be considered as an interest vested, so as to belong to the husband, though his wife dies before an actual distribution, and he dies without administering upon her effects; and for the administrator of the husband it was argued that it should be considered as a legacy assented to, and consequently vested in the husband, without administering to his wife. In this latter case the husband survived the wife, a circumstance which rendered his claim to the distributory share subject to the operation of principles in-
(137) applicable to the present case. The husband has a prior right to administer upon his deceased wife's effects, and is not compellable to distribute them, as other administrators are, but is entitled to the wife's choses in action, when recovered, for his own benefit. This was declared to be the law by the Stat., 29th Car., 2, although before that time, doubts were entertained respecting it. Now, as the right to administer follows the right to the property, it is, of course, transmissible to the husband's next of kin, and the administrator *de bonis non* of the wife is considered as a trustee to him. Co. Litt., 351. And in conformity to this rule, the consequences that respectively follow, from the husband's surviving the wife or otherwise, are exemplified in the two cases of *Fowke v. Leven,* 1 Vern., 88, and *Pheasant's case,* 2 Vent., 340. But in the case under consideration, Frances Lewis, by surviving her husband, became entitled to her own choses in action which he had not reduced into possession. The case of *Packer v. Windham,* Finch's Rep., is where money and jewels belonging to the wife were laid hold of by the court of chancery during the coverture as a caution or pledge, till the husband made a provision for his wife. The husband died first, and afterwards the wife without issue, and it was resolved that the money belonged to the husband. But that this decision was to conform to the established principle that the wife's choses in action should belong to the husband only when reduced by him into possession, is manifest from the reasoning of the Court; for they consider that the money was always in the husband's possession, and as only remaining in Court, subject to the wife's equitable claims. The only thing proved by the case of *Molesworth v. Molesworth,* 3 and 4 Brown's Rep., is that

where there is a devise to trustees to pay to one for life and then to pay a legacy to another, the latter is a vested legacy and transmissible. It may be vested and, of course, transmissible, but to belong to the husband it must, as has been observed, be vested in possession. The cases cited from 1 Atkyns, 458, and 1 Peere Will., 378, do not apply in a different manner from those already observed upon, except that by the first it is admitted that a legacy unreceived during the coverture (138) is a chose in action which the husband may recover and enjoy by administering to his wife.

Upon the whole, we are of opinion, from the consideration we have been able to bestow on this case, that the plaintiff is entitled to recover. But as Judge WILLIAMS, who is now absent by reason of sickness, does not coincide with us, and as it is a case of great concern to the parties, upon the points of which we are not aware that any determination has taken place, we think it better that the judgment should be postponed to the next term in order that a case which is likely to settle an important rule of property may be decided with all the advantage it can derive from a more deliberate examination.

NOTE.—See *Lewis v. Hynes*, 2 N. C., 278, and the note thereto; also *Neale v. Haddock*, 3 N. C., 183, and the cases referred to in the note to that case, which establish the law to be, that where a wife has a remainder in slaves, and the husband dies during the coverture and before the slaves have been reduced into possession, the slaves shall belong to the wife instead of going to the husband's representatives.

Cited: Johnston v. Pasteur, post, 582; *Kornegay v. Carroway,* 17 N. C., 405; *Whitehurst v. Harker,* 37 N. C., 293.

(139)

EDENTON DISTRICT, *October Term, 1799.*

JOHN HAYWOOD and JOHN LOUIS TAYLOR, Judges.

STATE v. HASSET.—Tayl., 55.

On an indictment for perjury, the person against whom the defendant testified, and upon whose testimony he was convicted upon a charge for an assault and battery, is a competent witness.

This was an indictment for perjury, charged to have been committed by the defendant, in giving evidence on a trial between the State and George Wynn for an assault and battery committed on the defendant. George Wynn, the prosecutor, was offered by the Attorney-General to prove the perjury.

Slade, for the defendant, objected to his being sworn, on account of the strong bias which he must necessarily feel, to procure the conviction of a person by whom he had been prosecuted, and through whose means he had been found guilty and fined. That from such impressions the mind of a witness ought to be perfectly free, otherwise the facts he relates will be either distorted or so discolored by the resentment which actuates him, as to be equally adverse to the discovery of truth. He cited the case of *Rex v. Whiting,* 1 Ld. Ray., 396, where it was decided that upon an information for a cheat in obtaining by imposition a note for £100, instead of £5, the person thus imposed upon was not admitted to give testimony, because he was in some measure concerned in the consequences of the suit, since a conviction would have a tendency to discharge her from the payment of the £100. That it is there also expressly ruled by the Court that the case was not distinguishable from perjury or forgery, where the party interested in the deed or prejudiced by the perjury shall not be admitted to prove the perjury or forgery. He also cited *Rex v. Nunez,* Str., 1043, where the authority of the former case was recognized and followed; that was an indictment for perjury committed in an answer in chancery, wherein the defendant denied an agreement charged in the bill, not to sue a note given to him by (140) the prosecutor, who, being called upon to prove the agreement, was rejected as incompetent. The same doctrine is also established in *Watts' case,* Hardr., 331, where it is laid down, generally, that no person who is a loser by the deed, or who may receive any advantage by the conviction of the defendant, can be a witness against him in an indictment for forgery. He argued that the same principle is properly extended to perjury, where the prosecutor may consequently derive a benefit from the conviction of the defendant.

By the Court. The cases cited by the defendant's counsel were relied upon in the case of *Abrahams, qui tam, v. Bunn,* 4 Burr., 2255, and were all, upon argument and consideration, overruled. The rule laid down in that case was that the question in a criminal prosecution, being the same with a civil cause in which the witness was interested, went generally to his credit; unless the judgment in the prosecution where he was a witness could be given in evidence in a cause in which he was interested; in the latter case, it would be an objection to his competency. If this rule be correct (and it seems to have been so considered ever since), its application to the present case leaves no room to doubt the competency of the witness.

Objection overruled.

NOTE.—See *State v. Wyatt,* 3 N. C., 56, and the cases referred to in the note.

(141)

HALIFAX DISTRICT, *October Term, 1799.*

JOHN HAYWOOD and JOHN LOUIS TAYLOR, Judges.

SMITH v. WEAVER.—Tayl., 58.

If an action of trespass is brought for killing a slave, pending an indictment for the same fact, and the indictment be first tried and the defendant acquitted of the felony, that proves that the trespass never was merged, and the plaintiff may proceed to his action.

This was an action of trespass for killing a slave, the property of the plaintiff, who had been hired to the defendant. The jury found a verdict for the plaintiff, under the direction of the Court, stating to them that in point of law the defendant was liable, if the facts charged in the declaration were established by satisfactory evidence. The objection taken in the trial was that the offense charged amounted to felony, the civil remedy for which, although the defendant had been indicted and was acquitted, was nevertheless merged in the crime. And now, upon a motion for a new trial, it was argued by

Browne, for the defendant. I contend that the plaintiff is not entitled to maintain this action, and that it will lie, by the general principles of law, yet the writ in this case was prematurely sued out, being done before the determination of the criminal prosecution against the defendant. By the Act of 1774, cap. 31, the offense of killing a slave, the property of another, if committed under such circumstances as, in the case of a freeman, would have amounted to murder, was punishable upon the first conviction with twelve months imprisonment, and by paying the owner the value of the slave; upon a second conviction the offender was punishable with death. By the Act of 1791, cap. 4, the punishment is altered to death upon the first conviction, and the crime is placed in all respects upon the same footing with the murder of a freeman. Thus, if the offense amounted to murder, the civil remedy is merged in the felony; if it amounted to any inferior species of homicide, the offender must be absolutely acquitted upon the indictment, and (142) could not have been found guilty in this action, where the killing must have appeared to the jury willful and malicious; and if so, the offense is felony. The policy of the law in this respect is wisely directed to the public security, by compelling those who have been injured by means of a felony to prosecute the offender criminally. But if the party may obtain a recompense by a civil action, very many offenses will remain unpunished. If it shall be answered that the party plaintiff

has in this case prosecuted criminally, and thereby entitled himself to sue, yet at all events he should have waited the final determination of the charge before he instituted the suit. 1 Bac. Abr., 64, *in notis.*

Baker, for the plaintiff. The rule laid down on the other side is an useful and politic one, when applied to cases within the reason of its operation, but manifestly leads to unjust consequences when extended to others which are not intended to be affected by it. The law has in view that there shall be every reasonable motive to incite men to the prosecution of those by whom they have been injured, by an act amounting to felony, in order that the public justice may be satisfied; but when this is done, there is neither reason nor justice in withholding from the injured party the satisfaction which the offender is able to make him. If a person guilty of felony be pardoned or burned in the hand, he is afterwards liable to the action of the individual. 1 Bac. Abr., 64. Why should he not be equally liable after an acquittal where the prosecution has been *bona fide?* The jury has found the trespass and assessed the damages, and the Court will not disturb the verdict unless some plain rule of law demands it. As to the suit having been brought before the determination of the criminal prosecution, that is right or wrong according to the event. If a conviction had taken place, then the Court would have made the payment of the value of the slave a part of their judgment, and of course the present suit would not lie; but as the defendant was acquitted, it does not signify when the suit was brought.

(143) TAYLOR, J. It is not necessary to inquire what would have been the legal consequences as applied to the present suit if a felony had been committed; because that fact, having been properly put in issue upon a criminal prosecution, has been negatived by the finding of a jury. The plaintiff, in prosecuting for the felony, has done all that the law requires of him, and the acquittal of the defendant could be no broader than the charge; consequently, the trespass remains. I do not think it necessary to decide whether, in any case of trespass, it would be a good defense that the facts proved amounted to felony, although the charge in the declaration was of a trespass merely; because I am clearly of opinion, from the circumstances of this case, that the verdict is properly found.

HAYWOOD, J., assented.

Motion denied.

NOTE.—The doctrine of the merger of trespass in felony does not apply in this State. *White v. Fort,* 10 N. C., 251.

MITCHELL v. BELL.—Tayl., 61.

NOTE.—See same case reported *post*, 244.

STATE v. KNIGHT.—Tayl., 65.

The Legislature of this State cannot define and punish crimes committed in another State.

The defendant was indicted under the fourth section of the Act of 1784, cap. 25, the words of which are, "And whereas, there is reason to apprehend that wicked and ill-disposed persons, resident in the neighboring states, make a practice of counterfeiting the current bills of credit of this State, and by themselves or emissaries utter or vend the same with an intention to defraud the citizens of this State: Be (144) it enacted, etc., that all such persons shall be subject to the same mode of trial, and on conviction, liable to the same pains and penalties as if the offense had been committed within the limits of this State, and be prosecuted in the Superior Court of any district of the State." Being found guilty by the jury, he was now brought up to receive judgment.

TAYLOR, J. As the prisoner was unassisted with counsel at his trial, we have felt it to be our duty to examine whether this indictment and conviction be warranted by a just application of the principles of criminal justice, and of general jurisprudence; and an inquiry having produced great doubts as to the validity of this section of the act, independent of the indefinite terms in which it is expressed, we have thought it right that this judgment should be arrested. The states are to be considered, with respect to each other, as independent sovereignties, possessing powers completely adequate to their own government, in the exercise of which they are limited only by the nature and objects of government, by their respective constitutions and by that of the United States. Crimes and misdemeanors committed within the limits of each are punishable only by the jurisdiction of that state where they arise; for the right of punishing, being founded upon the consent of the citizens, express or implied, cannot be directed against those who never were citizens, and who likewise committed the offense beyond the territorial limits of the state claiming jurisdiction. Our Legislature may define and punish crimes committed within the State, whether by citi-

zen or strangers; because the former are supposed to have consented to all laws made by the Legislature, and the latter, whether their residence be temporary or permanent, do impliedly agree to yield obedience to all such laws as long as they remain in the State; but they cannot define and punish crimes committed in another state, the citizens of which, while they remain there, are bound to regulate their civil conduct only according to their own laws. If our Legislature does not right-
(145) fully possess such a power, its assumption and exercise should be carefully avoided, lest our own citizens should be harassed under the operation of similar laws enacted in other states, whereby acts against which the policy of this State did not require that any punishment should be denounced, may be punished in other states with exemplary severity. This may happen in relation to those acts which are not criminal in the state where committed; but the consequences will be far more serious, if the acts are originally criminal; for then a conviction and punishment in a state having no right to entertain jurisdiction of the offense, and consequently to inflict the punishment, will be disregarded in the courts of that state where the offense arose. The crime described in this section of the act is, no doubt, punishable in Virginia as a common law misdemeanor, and although the punishment may be less severe than that prescribed by our Act of Assembly, yet it is better to yield up the offender to the laws of his own state than, by inflicting a punishment under the exercise of a doubtful jurisdiction, furnish a precedent for a sister state to legislate against acts committed by our own citizens and within the limits of our own territory.

I am authorized by Judge HAYWOOD to declare his concurrence in the opinion, that the prisoner be discharged.

Cited: S. v. Cutshall, 110 N. C., 557; *S. v. Hall,* 114 N. C., 911; *S. v. Hall,* 115 N. C., 818.

PLUMMER v. CHRISTMAS.—Tayl., 67.

In the case of paper not negotiable, the law is not so strict as in the case of negotiable paper, but the assignee must apply for payment in a reasonable time, and also give notice of nonpayment in a reasonable time, and on failure of giving such notice, if a loss really happens, the assignee must sustain it.

Willis executed a bond to Christmas to secure a debt due to the latter, and gave him a mortgage upon a tract of land. About five years

before the institution of this suit, Christmas assigned the bond to Plummer, who, being unable to procure payment from Willis, (146) brought the present action to recover the amount.

By the Court. Where a negotiable paper is assigned, the transaction is to be regulated according to the laws of merchants, by which the assignee is bound to apply for payment within a reasonable time; and if that be either refused or delayed, he must give notice to the endorser, who is not liable unless these conditions be complied with. But with respect to unnegotiable papers, the law is otherwise, being constructed upon the principles of equity and natural justice; for it is right that he should suffer by the loss, whose misconduct has occasioned it. But where no loss really has happened, the assignee may recover the debt, although he has failed to give notice of nonpayment in reasonable time. He may return the paper, when he cannot procure the obligor to pay it. In the present case, no loss of the debts, which must fall either upon one or the other of the parties, has happened, for although the obligor is insolvent, yet the assignor is safe by means of the mortgage.

Verdict for the plaintiff.

NOTE.—See *Pons v. Kelly*, 3 N. C., 45, and the cases referred to in the note thereto.

(147)

WILMINGTON DISTRICT, *November Term, 1799.*

JOHN HAYWOOD and JOHN LOUIS TAYLOR, Judges.

BALLARD v. AVERITT.—Tayl., 69.

1. If a defendant be arrested on a *ca. sa.* and discharged by the plaintiff's consent, the plaintiff cannot have a new execution against him; but if he is arrested, and escapes by the neglect and permission of the sheriff, the plaintiff may have a new execution, though the sheriff could not arrest or hold him in custody on the old writ.
2. On a *sci. fa.* to revive a judgment, if the defendant plead that he was formerly imprisoned for the same debt, the plea is bad for want of showing how he was discharged.

Scire facias to revive a judgment. Plea, that the defendant had formerly been arrested on a *ca. sa.* for the same debt. Demurrer and joinder.

Jocelyn, in support of the demurrer. The plea relied upon by the defendant furnishes no legal objection to the present mode of proceeding. It may be true, and yet the plaintiff be entitled to another execution for his debt. To render such a plea available, it is necessary that it should state how, and by what means, the defendant was discharged, after being taken in execution; for it is the plaintiff's consent alone that will destroy the effect of the judgment. 1 Shower's Rep., 174; 1 Salk., 271; Barnes, 373; 4 Burr., 2483; 2 Mod., 136.

Duffy, for the defendant. It is not customary to draw pleas at length, unless required by the opposite counsel; but, for the purpose of deciding on the merits of a plea, the Court will consider it as stated at full length, and as containing all the formal parts, without which it would be insufficient on a special demurrer. In this view, the demurrer should be applied to the substance and not the form of this plea, and then it is sustainable.

By the Court. Unless the manner in which a defendant came out of custody be stated in a plea of this kind, it is to be presumed that he obtained his discharge by some of those means which still leave (148) the judgment in full force. He may have escaped, or the officer who took him may have suffered him to go at large, in neither of which cases would the plaintiff lose the benefit of his execution. The cases cited are conclusive.

Judgment for the plaintiff.

NOTE.—On the second point, see *Langley v. Lane,* 10 N. C., 313.

BLAKE AND GREEN v. WHEATON.—Tayl., 70.

Two partners may draw a note payable to one of them, and the assignment by him will bind the other.

Wheaton and Tisdale, merchants and copartners in trade, drew a note payable to Tisdale, one of the firm, or order; he endorsed it to the plaintiffs, who brought the present suit against Wheaton and obtained a verdict.

Jocelyn moved in arrest of judgment that the note was made payable by D. Wheaton and J. Tisdale, under the firm of Wheaton and Tisdale, to J. Tisdale, whereby the said James became the payee and payor; that the said James could not have maintained a suit to recover the

contents of the note; neither can Blake and Green, as his assignees, for he cannot transfer that right to another which he possessed not himself.

By the Court. The paper, on which this suit is brought, should be considered as an authority or power given by both partners to Tisdale, to draw on the partnership effects in favor of some third person, and as an engagement of the partners that such draft should be paid. This amounts to an acceptance, and places the contract upon the footing of an order drawn by Tisdale, and accepted by himself and partner in favor of the plaintiff, which is certainly valid. It is not unusual (149) in mercantile transactions for partners to draw, payable to themselves or their order; Douglas, 653; and for one or both to endorse to some third person; then two may, with equal propriety, promise to pay to the order of one.

Reasons overruled.

(150)

NEW BERN DISTRICT, *March Term, 1799.*

JOHN HAYWOOD and ALFRED MOORE, Judges.

STANLY AND WIFE v. KEAN.—Tayl., 93.

A will which has been admitted to probate improperly in the county court cannot be attacked on that ground incidentally; therefore, in an ejectment, a copy of a will may be read as evidence, though one of the witnesses, who proved the will, was a legatee.

This was an ejectment, brought to recover a lot which Mrs. Stanly claimed as heiress to Fonville. The defendant set up a title under the will of Fonville, a copy of which he offered in evidence, the original having been proved in the county court by two subscribing witnesses, and thereupon admitted to registration.

The evidence was objected to on the ground that one of the witnesses was a legatee under the will, which therefore, was irregularly proved; and that it was only in those cases, where the probate was regular, that a copy could be admissible under the Act of 1784, cap. 10, sec. 6, which enacts that "all probates of wills in the county courts shall be sufficient testimony for the devise of real estates; and the attested copies of such wills, or the records thereof by the proper officer, shall and may be given in evidence in the same manner as originals."

Badger for the plaintiff.
Graham for the defendant.

By the Court. The copy is proper evidence unless there be a suggestion of fraud or irregularity in the attestation or execution. It has been decided that a probate does not absolutely bind one who is not party to it; but that he may cause the will to be proved again by calling all parties interested before the Court which took the first probate, and reëxamining the evidence concerning it.

By such a mode of proceeding, there is no danger of surprise to the parties, who are informed of the grounds upon which the will is
(151) to be contested, and may prepare themselves for the emergency.

So, if a foundation is laid for presuming such a fraud as would invalidate the will, the party claiming under it, in the trial of ejectment, may be called upon to produce the original; but then, he ought to have notice of the objection to be made, so that he might prepare to resist it. As this will have been admitted to probate and registration by a Court possessing competent authority, all circumstances necessary to its validity must be presumed to have been duly established before them.

Nonsuit.

Cited: Crowell v. Bradsher, 203 N. C., 494.

TAGGART v. HILL.—Tayl., 95.

NOTE.—See same case reported in 3 N. C., 81, and upon a motion for a new trial, *post*, 205, 370.

Cited: Tagert v. Hill, post, 205; *Tagert v. Hill* (Conf., 164), 7 N. C., 370.

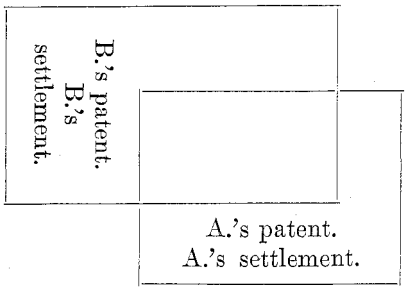
BRYAN v. CARLETON AND ALLEN.—Tayl., 103.

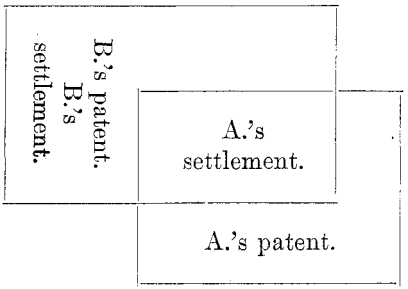
When a tract of land is, as to part, included in A.'s deed or patent, and the same part is also included in B.'s deed or patent, and each grantee is settled upon that part of the grant comprised in his deed, which is not included in both deeds, the possession of the part included in both deeds is in him whose deed or patent is the oldest; but if one of them is actually settled upon such part included in both deeds for seven years together, the possession is his, and the other will be barred thereby.

A question arising in this case, relative to the legal effect of a concurrent possession, where both parties claim under title, the following opinion was delivered:

By the Court. Where a tract of land is as to part, included in A.'s deed or patent, and the same part is also included in B.'s deed or patent, and each grantee is settled upon that part of the land comprised in his deed, although not included in both deeds, the possession of the part included in both deeds is in him whose deed or patent is (152) the eldest.

But, if one of them is actually settled for seven years together, upon the part comprehended in both deeds, the possession is his, and the other will be barred thereby.





NOTE.—See *Borrets v. Turner*, 3 N. C., 113, and the cases referred to in the note thereto.

HANCOCK, BY GUARDIAN, v. HOVEY.—Tayl., 104.

The Act of 1784 (1 Rev. Stat., ch. 37, sec. 19), requiring that deeds of gift shall be recorded, applies only where creditors and purchasers are interested.

Detinue for a negro slave. Upon *non detinet* being pleaded, the case was that the negro sued for had been given and delivered to the plaintiff in presence of witnesses, and had remained in possession of his guardian for several years.

Harris, for the defendant, objected that a deed of gift duly recorded was necessary to complete the plaintiff's title under the seventh section of the Act of 1784, cap. 10, the words of which are: "And whereas, many persons have been injured by secret deeds of gift to children and others, and for want of formal bills of sale for slaves, and a law for perpetuating such gifts and sales for remedy, whereof be it enacted, that all sales of slaves shall be in writing, attested by at least one credible witness; or otherwise shall not be deemed to be valid; and all bills of sale of negroes and deeds of gift, of whatever (153)

nature, shall, within nine months after the making thereof, be proved in due form and recorded; and all bills of sale and deeds of gift not authenticated and perpetuated in manner by this act directed, shall be void and of no force whatever."

MOORE, J. The Act of Assembly referred to does not reach this case. It does not require a deed of gift as essential to constitute a title, but merely provides that where a deed of gift is made, it shall be recorded.

HAYWOOD, J. I am of opinion that no deed of gift is necessary, under the circumstances of this case. The evil the Legislature intended to remedy was the want of a law for perpetuating gifts and sales which, before the passing of the Act of 1784, were made secretly; and the remedy designed was for the benefit of creditors and purchasers, since none others could be injured by the want of perpetuation. In this case the mischief does not exist, for there are no creditors or purchasers; nor was the transaction secret, for a delivery is made, and possession openly and publicly kept afterwards. This is very different from the sort of transaction the act aims at.

Had the transaction been secret, or were the rights of creditors or purchasers liable to be affected, I should have thought a deed of gift necessary; otherwise, the act would produce the effect of making the generality of such transactions more secret than they would have been without it; for, in those cases where the gift is intended to be kept secret, no deed of gift will ever be made, if, when made, it must be recorded, and thus made public; but if not made, the gift will be good without. Such a construction is surely at variance with the spirit of the act.

Verdict for the plaintiff.

NOTE.—See note to *Farrell v. Perry*, 2 N. C., 2.
See same case, 3 N. C., 86-7.

Cited: M'Cree v. Houston, 7 N. C., 451; *Bell v. Culpepper*, 19 N. C., 21; *Tooley v. Lucas*, 48 N. C., 148.

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(154)

GARDNER v. ELLIS' HEIRS.—Tayl., 107.

A *sci. fa.* against an infant heir to charge lands may be served on a guardian appointed by the court *pro hac vice*, but there should regularly be a guardian appointed by the proper court before the *sci. fa.* issues.

HARGETT *v.* BLACKSHEAR.

This was a *scire facias* against an infant who had no guardian, and was issued in order to subject the lands to a debt of the ancestor.

MOORE, J. The practice of appointing a guardian upon the return of a *sci. fa.* after service upon the infant, is liable to objection; for as such guardian gives no security, the infant may lose a remedy against him, if he mismanages the defense. We will, however, appoint a guardian for this defense; but it is proper to take notice that hereafter applications should be made to the proper Court for the appointment of guardians before the *sci. fa.* issues.

HARGETT v. BLACKSHEAR.—Tayl., 107.

Whether one who claims title under an execution is bound to produce the judgment as well as execution, *quære.*

The question of law arising in this case was whether the plaintiff who claimed title under an execution and sale thereupon by the sheriff, was bound to produce the judgment.

MOORE, J. The judgment ought to be produced, otherwise the defendant's property may have been taken and sold by an execution issued without authority. The judgment is the warrant for the execution, and without it no execution can legally issue.

HAYWOOD, J. When an execution issues to a sheriff, he is bound to proceeds by a seizure and sale, without inquiring whether a judgment exists or not, or if it exists, whether it be legal; and if he (155) is bound to sell, it is contradictory to say that none shall purchase. This is the case of a vendee, which distinguishes it from those where it is held necessary to produce the judgment. If there be no judgment, or a void one, or one liable to be vacated for irregularity, or reversed for error, and a plaintiff will take out execution thereon, he is liable for the consequences; and, therefore, when sued, must produce the judgment as well as the execution, in order that the Court may see that it is a good judgment. So, if the sheriff seizes the goods in the possession of a third person (who claims them by a conveyance from the defendant) as still belonging to the defendant, alleging the conveyance to be fraudulent, he must produce the judgment, in order to show that the creditor is a *bona fide* and a judgment creditor,

and one against whom a conveyance, without a fair and valuable consideration, is fraudulent within the act. The books say strangers to the judgment and execution must produce the judgment, but the meaning evidently is as before stated; for if a third person, a stranger, against whom no imputation of fraud is made, sues the sheriff for a seizure of his goods by execution, neither the judgment nor execution will avail the sheriff, since the execution gave him no authority to seize the plaintiff's goods; and why should the judgment be produced, when it will not avail him who produces it? The vendee is altogether a stranger to the judgment, no way accountable for its irregularity, and need not produce it. If the judgment be reversed after the sale, still he shall retain the property; if so, why require him to produce the judgment, which, although it be reversed and produced with the *vacatur,* leaves his title unimpeached? The production of the judgment can answer no other purpose but to show that there was a judgment of some sort, good or bad, when the execution issued. But if his title remains, though the judgment be void, is it not equally unaffected, though there be no judgment? That it is so in the first case arises from his having purchased from a public officer, selling under a lawful authority, viz.: the (156) execution which issued from a proper court, and is duly attested; his claim of title in the other case rests on a foundation equally solid.

Were the law otherwise, and vendees liable to lose the property, whenever a judgment should be declared illegal, irregular, or void, but few would purchase at execution sales. Few, indeed, are qualified to form an opinion on that head, could they even inspect the record, which in many instances it would be difficult to do. Thus, where an execution issues from Currituck to the sheriff of Buncombe, must the intended vendee go all the way to the former for a copy of the record to lay before counsel before he dare purchase? There is no necessity for all this, because in all cases of irregular and void judgments, the plaintiff, and not the vendee, is answerable to the person injured; and it is perfectly right that he who is in fault should be exclusively liable, and not the vendee, who is innocent; for if there be no judgment (a circumstance that will seldom occur), the matter can be easily set right by a *supersedeas* and other remedies.

Is it then advisable to render execution sales, which are the life of the law, subjects of doubt, controversy, and suspicion, for the sake of avoiding an evil, barely possible (and which may easily be rectified if it does occur, though at all times it is little to be apprehended), thereby rendering it dangerous for all men to purchase at these sales, unless they

were convinced of the legality of the judgment; a decree of satisfaction which, in most cases, it would be impossible to attain with certainty?

NOTE.—It is now clearly settled that a person claiming title under an execution sale must produce the judgment as well as the execution; and if the execution be not warranted by the judgment, the sale will not avail to pass the title, though the officer will be protected. *Bryan v. Brown*, 6 N. C., 343; *Whitehurst v. Banks, ibid.*, 346; *Dobson v. Murphy*, 18 N. C., 586.

(157)

BLOUNT, EX'R OF OGDEN, v. STARKEY'S ADM'RS.—Tayl., 110.

An order to pay money is, in the hands of the drawee, evidence of payment; otherwise of an order to deliver goods.

Harris for the plaintiff.
Slade for the defendant.

In this case it was held by the Court that an order drawn by the defendant upon the plaintiff for the payment of money, and by him retained, is evidence that the money was advanced, agreeably to the directions of the order; but that an order under the same circumstances, for the delivery of goods, is not of itself evidence of the delivery; to prove that fact, additional evidence is necessary.

Cited: Kennedy v. Williamson, 50 N. C., 287.

WITHERSPOON AND WIFE v. BLANKS.—Tayl., 110.

If a natural boundary be called for in a grant, a line is to be extended to it, disregarding distance.

The principle question of law arising in this case was whether a line shall be extended so as to reach a natural boundary called for.

Badger for the plaintiff.
Graham for the defendant.

By the Court. The line in controversy, when run to the end of the distance called for, will not reach Cypress Creek; where, by the patent

it is said to terminate; but to reach that place, it must run three times the distance called for. In all such cases the invariable rule is to disregard the distance; and to proceed with the line in the direction called for until it shall intersect the creek or other natural boundary.

Verdict for the plaintiff.

NOTE.—See the cases referred to in the note to *Bradford v. Hill*, 2 N. C., 22, and the note to *Person v. Roundtree, ante*, 69.

Cited: Bowen v. Gaylord, 122 N. C., 820; *McKenzie v. Houston*, 130 N. C., 573.

(158)

SLADE v. GREEN.—Tayl., 111.

If one entitled to two-thirds in three lots sells two lots, the sale is evidence of a partition.

Ejectment. The devisor gave three lots to his wife and two children, equally to be divided; one of the children died after the death of the devisor, whereby his third descended to the surviving child, who sold two of the lots. The third was left unsold for a considerable time.

Slade for the plaintiff.
Woods for the defendant.

By the Court. This is evidence of a partition, and that the third lot was assigned to the widow.

Verdict accordingly.

EDENTON DISTRICT, *April Term, 1799.*

BORRETTS v. TURNER.—Tayl., 112.

NOTE.—See same case reported in 3 N. C., 113.

ANONYMOUS.—Tayl., 113.

NOTE.—See same case reported in 3 N. C., 99.

(159)

TRUSTEES OF THE UNIVERSITY v. SAWYER.—Tayl., 114.

Grants of escheated or confiscated lands, by officers appointed to issue grants for vacant lands, are void, and must be so declared on the trial of an ejectment.

Ejectment. The land was originally granted to a person who left the State before the year 1771, since which time he has never been heard of. In the year 1780, part of the same tract was granted to a person whose title has devolved to the defendant, and in the year 1788 another part of the same tract was granted to another person, whose title had likewise come to the defendant.

It was argued by the defendant that the State, at the time of these respective grants, was entitled to the land, either by escheat or confiscation; and having granted them to persons under whom the defendant claims, could not afterwards make a valid grant of the same lands to the University.

But secondly, supposing the grants under which the defendant claims to be voidable, as having issued by a mistake occasioned by the misrepresentation of the grantees; nevertheless they cannot be avoided on a trial in ejectment. But,

By the Court. The officers authorized by the government to sell and convey vacant lands which had never been appropriated by any grant, have sold and conveyed lands which have been thus appropriated; to this their power did not extend, and consequently all such sales and grants are void. The Court will not, on the trial of an ejectment, declare that grants thus circumstanced shall be recalled and canceled; but they are bound by the positive terms of the Act of 1777, cap. 1, secs. 3 and 9, to declare that they transfer no title.

Verdict for the plaintiffs.

NOTE.—See same case reported in 3 N. C., 98.

Cited: Tyrrell v. Mooney, 5 N. C., 404; *Stanmire v. Powell,* 35 N. C., 315; *Lovinggood v. Burgess,* 44 N. C., 408; *Barnett v. Woods,* 58 N. C., 433; *Board of Education v. Makely,* 139 N. C., 38.

(160)

HALIFAX DISTRICT, *April Term, 1799.*

BUSTIN v. CHRISTIE.—Tayl., 116.

If upon the face of the deed it be uncertain whether the boundary line be at one place or another, parol evidence may be received to show the true place: thus the line called for was "North to Bryant's"; north would not lead to Bryant's corner, though it would strike his line, and there was an old marked line to the corner permitted to be proved by parol.

Ejectment. The question in this case was whether the land in question, which was a triangular piece, was included within the bounds of Jefferie's patent, under which the plaintiff claimed.

This patent began on Fishing Creek, then east 320 poles along Pollock's line to Pollock's corner; thence north to Bryant's; then along Bryant's line 320 poles to the creek. A north course from Pollock's corner intersects Bryant's line, at the distance only of 130 instead of 320 poles from the creek, and at a point 190 poles from Bryant's corner.

The plaintiff's counsel contended that from Pollock's corner to Bryant's described a line from one corner to the other.

The defendant's counsel, on the other hand, insisted that the line described on the patent, being from Pollock's corner north, ought not to be departed from; that the words of the patent were as well satisfied, should the line from Pollock's corner terminate at Bryant's line, as if it terminated at Bryant's corner. He relied upon the case of *Bustin v. Hill,* relative to the same case, where Judge WILLIAMS had so determined.

MOORE, J. Parol evidence has been adduced in this case, tending to prove that there was an old marked line from Pollock's to Bryant's corner; and that some ancient deeds are bounded by it. The first settlers of this country came here at the risk of their lives; induced by the prospect of becoming proprietors of land, and thereby improving their circumstances, they settled in a wilderness then inhabited by savages. They were invited to do so by the Lords Proprietors,
(161) who remained at home in security, received the purchase money, and derived a revenue from the lands, even after they were sold. They appointed and continued in office the persons who received entries, made the surveys, and issued the grants; and therefore ought, in justice, to be responsible for their mistakes. The settlers had no share in the appointment, nor were they at all instrumental in the mistakes that occurred. If these officers injured the Lords Proprietors, they appointed them and must bear the consequences; if a purchaser is likely

to be injured by their mistakes, these ought to be rectified, and the mischief prevented.

The case cited adverts to several others, where this has been done by juries upon trials in ejectment, upon proper evidence of the mistake; and if these cases were law when decided, they continue to be so at this day. If, therefore, the jury are satisfied that the line really intended was from one corner to the other, I am of opinion they ought to find for the plaintiff, notwithstanding it is described in the patent as a line running north from Pollock's corner.

Verdict for the plaintiff.

NOTE.—See *Bradford v. Hill*, 2 N. C., 22, and the note thereto, and also *Person v. Roundtree, ante*, 69, and the note thereto.

Cited: Cherry v. Slade, 7 N. C., 87; *Bowen v. Gaylord*, 122 N. C., 820.

ANONYMOUS.—Tayl., 118.

Damages cannot be claimed under the Act of 1796 (see 1 Rev. Stat., ch. 13, sec. 8), on a bill which has not the words "for value received."

This was an action upon a bill of exchange drawn in this State upon a person resident in Philadelphia, and protested for nonpayment; it had not the words "for value received," and

By the Court. The plaintiff is not entitled to the ten per cent (162) damages under the Act of 1796, cap. 22, by reason of the omission of these words.

YOUNG v. DREW AND SAME v. HARRIS.—Tayl., 119.

The plaintiff cannot declare in ejectment for a whole tract of land, and give evidence of title to, and recover, an undivided moiety.

In these ejectments, the plaintiff declared for the whole tract of land, and gave evidence of a title to an undivided moiety.

White, for the plaintiff, argued that he was not bound to declare for the exact quantity he had a right to recover; but that it was sufficient if he proved a title for the same or any less quantity than that stated in

the declaration. He cited and relied upon the case of *Gaskin v. Gaskin,* Cowper, 657, as an instance of the recovery of two-thirds of the premises comprised in the declaration.

MOORE, J. The plaintiff ought, in this case, to have declared for an undivided moiety of the whole tract; otherwise the action of ejectment will have the effect of a writ of partition; the sheriff cannot put the plaintiff in possession of the half he claims, not being stated to be an undivided half, unless he previously makes a division, and ascertains the moiety the plaintiff is to have. The case cited from Cowper does not resemble the present. That is where one tenant in common recovered against another.

Nonsuit.

NOTE.—These cases have been overruled. See *Squires v. Riggs,* 3 N. C., 150, and the cases referred to in the note.

(163)

KNIGHT v. KNIGHT.—Tayl., 120.

A married woman may file a bill for a separate maintenance against her husband in her own name without a *prochein ami.*

Bill by a *feme* covert for a separate maintenance, *propter sœitiam;* to which there was a demurrer, for that it was not brought by her *prochein ami.*

Plummer, for the complainant, said it had been the practice in this Court to institute such suits, without a *prochein ami;* that in England, the only purpose of requiring a *prochein ami* was that there might be some person to answer for the costs; yet, even there, the books furnished instances of the wife suing alone. 1 Eq. C., *a.,* 67; 1 Ch. Cas., 4, 64. But since the Act of Assembly in this State, requiring all persons who sue to give security for costs before the process issues, the reason of the practice in England, even if it were uniform, does not exist here. He added that such security had been actually given.

By the Court. Let the demurrer be overruled, and the defendant answer.

NOTE.—But see *Ward v. Ward,* 17 N. C., 553, where it was held that in suits by married women, a *prochein ami* is necessary, not only to secure the costs, but when her husband is defendant, to interpose a suitable adviser; and this rule is not dispensed with, even where the wife sues *in forma pauperis.*

BARRY v. INGLIS ET AL.—Tayl., 121.

In an action for assault, any immediate provocation may be given in evidence to mitigate damages, but not any remote provocation.

Trespass, assault and battery, in which evidence was offered of provocation given by the plaintiff some time before the assault.

MOORE, J. Held, that any immediate provocation given to the defendant by the plaintiff, may be shown in evidence to mitigate the damages; but that a remote provocation ought not, for then (164) it would be necessary to go into quarrels and disputes, which prevailed between the parties, perhaps years before the combat. Such things ought not to be considered as alleviating the offense of falling upon the plaintiff, at a subsequent late period, after there was time for the passions to cool, and the defendant's conduct to be guided by reflection.

Evidence refused.

NOTE.—See *Sledge v. Pope*, 3 N. C., 402; *Causee v. Anders*, 20 N. C., 388.

Cited: Johnston v. Crawford, 61 N. C., 344.

FELTS AND WIFE v. MARY FOSTER AND THOMAS WILLIAMS.—Tayl., 121.

Cohabitation as man and wife and having children is evidence of a marriage.

The plaintiffs were entitled by the will of Foster, deceased, to a considerable part of his property, in the event of his widow, Mary Foster, the now defendant, marrying again. The bill charged that she was married to the other defendant, which they severally denied by their answers.

MOORE, J. The answers of the defendants ought to be read to the jury, and by them considered. There is in this case no positive proof of a marriage, but there are circumstances advancing to create a belief that a marriage has taken place; they have lived together a long time as man and wife, have had several children, and the witnesses say that she was a woman of irreproachable character before these things hap-

pened. If so, a presumption arises that she would not thus have cohabited with the defendant unless a marriage had been previously
(165) solemnized. Upon such evidence, I think the jury may find a marriage.

Verdict accordingly.

NOTE.—See *Whitehead v. Clinch*, 3 N. C., 3, and the note thereto.

GREER v. BLACKLEDGE.—Tayl., 122.

The assignor of a bond is not released by the obligor being discharged by a *ca. sa.* under the insolvent debtor's law.

The defendant had assigned a negotiable bond to the plaintiff, who instituted suit against the obligors, and having recovered a judgment, took them in execution upon a *ca. sa.;* from this they were duly discharged under the act for the relief of insolvent debtors.

MOORE, J. The discharge of the obligors is no satisfaction of the debt. The plaintiff is entitled to recover from the defendant, notwithstanding this discharge.

Verdict for the plaintiff.

NOTE.—See *Greenlee v. Young*, 2 N. C., 3.

(166)

WILMINGTON DISTRICT, *May Term, 1799.*

COBHAM v. ASHE.—Tayl., 123.

1. Possession without color of title will not avail anything under the statute of limitations.
2. A right of entry cannot be transferred while another person is in the adverse possession of the land.

In this ejectment it was proved that Walker had sold the land in question to the plaintiff's father, and had given him a bond, conditioned to execute a title at a future day; at the same time the father declared by deed that the land was purchased for the plaintiff, his son. During the late war, the commissioners of confiscated property seized the land as the property of the father, and sold it to the defendant, who took

possession in 1786, and remained in possession unto the present time. In 1798 and a short time before the present suit was instituted, Walker executed a deed to the plaintiff.

HAYWOOD, J. The defendant's possession, though continued for seven years, yet being unaccompanied with any color of title during a great part of that time, will avail him nothing. But the title of the plaintiff is itself defective, because the conveyance from Walker was at a time when the defendant was in possession under an adverse claim; even Walker, who had the legal title before this time, could only have acquired the possession by a suit in ejectment; but this right of entry he ought to have enforced himself, and could not legally transfer it to the plaintiff.

Verdict for the defendant.

NOTE.—Upon the first point, see the note to *Strudwick v. Shaw, ante*, 35; same case, 2 N. C., 5. On the second point, see *Slade v. Smith*, 2 N. C., 248, and the cases referred to in the note.

(167)

BURGWIN v. HOSTLER'S ADM'R.—Tayl., 124.

The representative of a deceased partner cannot be sued while there is a surviving partner.

One of the several partners drew a bill of exchange in the name of the company; the bill came by endorsement to the plaintiff, who brought this suit against the administrator of a deceased partner, there being another partner still alive. Upon the general issue being pleaded, this objection was taken by the defendant's counsel; to which the plaintiff replied that it ought to have been taken advantage of by a plea in abatement, in proof of which was cited the case of *Rice v. Shute*, 5 Burr., 2611.

By the Court. It is true that where one of two partners is sued by a joint transaction, he might, before the Act of 1789, cap. 57, have pleaded this circumstance in abatement; because the plaintiff had made a contract, not singly with him, but with him and another, who was equally bound to contribute to the performance of it. Still, however, the defendant might have severed the contract, and rendered himself alone liable, which he effectually did, if he omitted to plead in abatement; for at no subsequent stage of the proceedings could he avail himself of

the objection. But where one partner dies, the whole debt survives against the other, and the executors of the deceased partner, not being originally liable, cannot be made so by suing them. Hence, as the fact has appeared in evidence that there is a surviving partner, the legal consequence must be applied to it, which is, that he alone is liable.

Nonsuit.

NOTE.—See the Acts of 1789 (1 Rev. Stat., ch. 31, sec. 90), which, it is believed, extends to partners as well as other joint obligors.

(168)

R. SCHAW'S ADM'R. v. R. SCHAW'S HEIRS.—Tayl., 125.

An administrator is not entitled to claim anything for loss of time and personal services, though he will be allowed his necessary expenditures.

In a collateral issue made up under the direction of the Court, between the heir and the administrator, the latter in his account against the estate had raised a charge for his trouble and services in performing the duties of an administrator. Upon the question whether such a charge was proper,

HAYWOOD, J. By the Act of 1789, cap. 23, sec. 2. The administrator shall retain in his hands no more of the intestate's estate than amounts to his necessary charges and disbursements, and such debts as he may legally pay within two years after the administration granted. For actual expenditures, therefore, he is entitled to an allowance, but not for loss of time and personal services. Act of 1799, cap. 22; 3 P. Wil., 249.

NOTE. See *Clarke v. Cotton*, 17 N. C., 51.

Cited: Parker v. Grant, 91 N. C., 343.

STATE v. HALL.—Tayl., 126.

Larceny may be committed of a slave: therefore in an indictment under the Acts of 1799 (1 Rev. Stat., ch. 34, sec. 10), for stealing a slave, it is not necessary to add "with the intention to sell or dispose of to another, or to appropriate to his own use," as that is implied in the charge of stealing.

The prisoner was indicted upon the Act of 1779, cap. 11, for stealing a male slave, the property of the prosecutor, and was thereof found

guilty by the verdict of a jury. The words of the act are "that any person or persons who shall hereafter steal, or shall by violence, seduction, or any other means, take or convey away any slave or slaves, the property of another, with an intention to sell or dispose of to another, (169) or appropriate to their own use such slave or slaves, and being thereof legally convicted, or shall, upon his arraignment, peremptorily challenge more than thirty-five jurors, or shall stand mute, shall be adjudged guilty of felony, and shall suffer death without the benefit of clergy." Upon a motion to arrest the judgment,

Badger and *Jocelyn* argued for the prisoner that the offense of stealing a slave was unknown to the common law, since it did not recognize the condition of slavery, and also because larceny could only be committed of inanimate or irrational subjects; whereas a slave possesses the faculty of reasoning and the power of violation like other men; hence, if carried away by his own consent, it is seduction, if without his own consent he can declare his owner and be restored to him. A slave cannot, like the other subjects of larceny, be concealed forever from the inquiries of his owner. Neither by the Roman law nor by that of any other country where slavery has prevailed, could theft be committed of a slave; and this principle is expressly recognized by the common law, with regard to villeins.

If, therefore, this offense never hath been felony before the passing of the Act of Assembly upon which the prisoner is indicted, it follows that it is not felony unless done under all the circumstances specified in the act, and annexed to it, as forming a part of the crime; one of these is omitted in the indictment. The Judges of a free country are emphatically bound to decide upon penal laws, especially those of the capital kind, according to the letter. They may, perhaps, regulate the construction by the spirit, where the letter comprehends a case manifestly not within the meaning of the Legislature; but they will never extend the act by construction to make a case punishable under it, which the letter does not reach. Upon the strict adherence to this rule, every citizen must depend for his safety, and for the protection of his life against any attempt to deprive him of it, founded on the pretense that he has offended against the meaning of a penal law. If, in case of this kind, constructions are to be allowed, the consequences to the community will be of the most dangerous kind. The caution (170) which has been heretofore observed on such occasions, is evidenced by various authorities. Thus, where the statute of 3 H. 7, c. 2, enacted, "That if any person take for lucre any woman, etc., and afterwards she be married to such misdoer, etc., he shall be capitally punished." Here, although the taking for lucre does not seem to be such a circumstance as

would enhance the offense, yet it must be stated in the indictment, because such are the words of the statute. 4 Bl. Com., 208. So if a statute enacts that those who are convicted of stealing horses shall be capitally punished, yet he shall not be thus punished, who is guilty of stealing but one horse. 1 Bl. Com., 88. The same principle has been applied to the Stat. of 14 Geo., 2, cap. 6, by which stealing sheep or other cattle was made felony without benefit of clergy. The words "other cattle" were considered too loose to create capital offense. 1 Bl. Com., 88.

Then to apply this reasoning to the Act of Assembly, the word "steal" must be connected with and govern the words "slave or slaves, the property of another," as much so as the words take or convey away; otherwise the fact of stealing, no matter what, will be a capital felony. Then, as the words "with an intention to sell or dispose of to another," etc., immediately follow in continuation of the same sentence, before any new subject is taken up, and without any disjunctive particle, they are, by the rules of syntax, concomitant to them; equally, there governed by the verb "steal," as where governed by the verbs "take and convey away." Thus *reddendo singula singulis,* the act stands thus: "that any person or persons who shall hereafter steal any slave or slaves, the property of another, with intention to sell or dispose of to another, or appropriate to their own use such slave or slaves; and that any person or persons who shall by violence," etc. Hence, the crime defined and created by the act is stealing a slave with the intention to sell or dispose of to another, or to appropriate to his own use. These words, marking the intention, being omitted in the indictment, the prisoner is found guilty of an offense altogether different from that which the act of
(171) Assembly seeks to repress by such severe sanctions; wherefore they concluded the judgment ought to be arrested.

MOORE, J. There is no rule of the common law which expressly decides that the stealing of a slave is larceny; but there is a rule which declares that the stealing of the personal chattels of another, with a felonious intent, is larceny; and a slave is the personal chattel of his owner. This rule consequently extends its protection to every species of personal property, though not admitted and known as a subject of property when the law was formed.

With respect to the act of Assembly, it was passed in turbulent times, when a practice prevailed of carrying slaves away, under the pretense that they belonged to the public, as confiscated, or that they were owned by disaffected persons or the like; they were sometimes carried off privately and by stealth, at other times openly and by violence; the former

case is embraced by the word steal; the words next following repress the mischief of carrying slaves away by open force, or by persuasion, or by any other means than by stealth, accompanied, nevertheless, with an intention to appropriate to the taker's own use. The word "steal" does not include, *ex vi termini,* an intention to appropriate to his own use, or to sell and dispose of to another; and, therefore, the intention expressed in the act, if applied to the crime of stealing, is useless and redundant. But the other modes of taking away slaves, enumerated in the act, do not necessarily import the intention of selling them, or of appropriating them to their own use; nor are they, when unaccompanied by such intention, so detrimental or injurious. Of these offenses, the intention forms a principal ingredient, and to them the words must be exclusively referred. I am consequently of opinion that the judgment ought not to be arrested.

HAYWOOD, J. Concurred in the opinion that the judgment ought not to be arrested.

Reasons overruled.*

*The prisoner afterwards received sentence of death, and was executed. See *S. c.*, 3 N. C., 105.

Cited: S. v. Jernigan, 7 N. C., 19; *S. v. Haney,* 19 N. C., 399; *S. v. Williams,* 31 N. C., 145.

(172)

NEW BERN DISTRICT, *March Term, 1800.*

LABAT v. ELLIS.—Tayl., 148.

When the plaintiff sues in his surname with his title of curtesy, and there was a plea in abatement that his Christian name was not inserted, a replication that he was as well known by his title of curtesy as by his Christian name is bad.

The defendant pleaded in abatement that the plaintiff's Christian name was not inserted in the writ. The fact was that the plaintiff was a Frenchman, residing abroad, and his attorney, being unacquainted with his Christian name, had filed the writ in the name of Monsieur Labat.

The plaintiff replied that he was as well known by the name of Monsieur Labat as by his Christian or other name. Demurrer.

Slade for the plaintiff.
F. X. Martin for the defendant.

By the Court. The plaintiff does not deny that he has a Christian name. We are therefore to presume that he has one; that being the case, he ought to have described himself by it.

Writ abated.

BENNERS v. HOWARD EX'RS.—Tayl., 149.

On a promise to deliver goods, a demand before action brought is indispensably necessary.

A special verdict had been found in this case stating, in substance, that in June, 1788, the plaintiff lent to the defendants' testator thirty barrels of rosin; that the defendants' testator died in December, 1790, and the writ was taken out in June, 1792. The question was, whether the writ was a sufficient demand.

(173) *Slade for the plaintiff.*
Graham for the defendant.

By the Court. Where a promise is to pay a sum of money, but no time is mentioned, it is due presently, and an action lies without any request. But where, under the like circumstances, a promise is made to deliver goods or to do a collateral act, it is necessary that the party to whom it is to be done should make a demand of the promiser before an action is brought. Though no express promise be made in the present case, the law implies that the borrower should restore in kind the thing borrowed, on request, or pay the value in damages; but, to maintain a suit for the latter, the request is indispensably necessary.

Judgment for the defendant.

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(174)

HILLSBOROUGH DISTRICT, *October Term, 1800.*

JOHN LOUIS TAYLOR, Judge.

CLARA NEWTON v. ROBINSON.—Tayl., 72.

If a *feme covert* sue in her own name for the amount due for her attendance as a witness during coverture, she shall recover, if her marriage be not pleaded in abatement; advantage of it cannot be taken on a motion for a nonsuit.

NEWTON *v.* ROBINSON.

The plaintiff had been summoned a witness in a cause, wherein the defendant, being the party cast, became liable to pay the costs; in order to recover the amount of her ticket, she warranted him before a magistrate, from whose judgment an appeal was taken to the county court, and the cause was thence brought in the same way to this Court. Pleas, general issue, and set-off. It appeared in evidence that the plaintiff as well at the time of being summoned as of attending as a witness, was a *feme covert,* and that her husband was still alive; whereupon *Haywood* moved that she should be nonsuited, urging that any judgment rendered for her would be absolutely void. The motion was overruled by the Court, and a verdict found for the plaintiff. Afterwards, in the same term, the question was renewed in the form of a motion to set aside the verdict.

Haywood, for the defendant. Upon examining the authorities relative to the question that was made on the trial of this cause, I am apprehensive that a mistake has been committed in delivering the law. They will, as I conceive, show that it was not necessary to plead the coverture in abatement, and that no judgment can regularly be given upon this verdict. It is a general rule that no plea in abatement is good unless it gives the plaintiff a better writ; and hence it follows that in those cases where the plaintiff cannot have a better writ, the defendant cannot plead in abatement. Here the money was due and payable to the husband alone; the plaintiff, if she survive, cannot recover it; consequently, she cannot join with him in bringing the action.
As therefore, she can have no writ, either separately or joined (175) with her husband, no plea in abatement would have availed the defendant. All the cases which will be relied upon, on the other side, to prove the contrary position, will be where the cause of action accrued before the coverture, and where, consequently, the husband and wife might join, because it would survive to the latter. Nor can any case be shown where coverture is pleaded in abatement to an action brought by a *feme covert,* upon a cause of action arising during the coverture. So far has the principle been extended that the earnings of a wife during coverture belong to the husband, that even what has been thus acquired by a wife *de facto* has been held to belong to the second husband, he having no notice of the former marriage. 1 Strange, 80. It is no less clear that a judgment rendered in favor of a *feme covert* is absolutely void; 2 Wils., 3, and that the coverture may be given in evidence, 1 Strange, 79; Buller, 21, 113; 6 Term Rep., 265. He also cited 1 Wils., 224, in order to show that wherever the cause of action will survive to the wife, they must join; whence he inferred that a joinder under any other circumstances would be improper, and furnish a good ground of demurrer to the declaration.

Norwood and *Cameron* for the plaintiff. Coverture in the plaintiff can only be pleaded in abatement; to prove this we rely on Comyns, Dig., tit. Pleader, 2 *a* 1, and 3 Term Rep., 627. As the cause of action arose from the personal labor of the wife and was founded on the certificate of her attendance as a witness, she might have been joined with the husband. 2 Bl. Rep., 1239; Cro. Eliz., 61; Cro. Jac., 205; 2 Wils., 424. Hence, as the plaintiff, by joining with her husband, might have had a better writ, the arguments drawn from the contrary supposition to prove the impossibility of pleading in abatement, lose all their force. Here the defendant, by having pleaded in bar, has admitted the plaintiff able to recover judgment, and therefore she cannot be disabled from having execution, by anything which has happened precedent to the judgment. 2 Ld. Ray, 853. In the case cited from 2 Wils., 3, (176) the judgment was entered up by confession, upon a warrant of attorney, in which case the defendant had no day in Court to plead the coverture, and there was no other way to examine the matter but by motion.

By the Court. It is laid down in the books as a general rule that coverture, either before the writ sued out or pending the writ, is a good plea in abatement. If those cases where a *feme covert* sues upon a cause of action arising during the coverture, really formed an exception to the rule, it certainly was of too much importance to have been overlooked by writers upon this subject; yet no trace of a distinction arising from this source is anywhere to be discovered. It is indeed said in 1 Bac., 16, that by coverture before the writ, it is abated *de facto,* whereas coverture after the writ only proves it to be abatable; but the same writer proceeds by adding that both are to be pleaded; and this is also established by the case cited from 3 Term Rep. If that be correct, the present case is not affected by the distinction. The meaning of it, however, I take to be this, that where it appears upon the face of the writ itself to be false, or that any judgment rendered upon it would be erroneous, the Court may interpose *ex officio,* and abate it without plea; but that whenever the circumstance, tending to show the defect, is extrinsic, it ought to be pleaded. To apply this criterion to the present case, let it be inquired whether this judgment be erroneous. I think both authority and reason decide that it is not. It is said in Carthew, 124, that a judgment rendered in favor of a *feme covert* who sues by attorney, cannot be reversed for error, if the defendant pleads in bar. The very same point is adjudged in 10 Mod., 166, and it is precisely the case under consideration. The reason upon which these decisions are founded is, that the coverture might have been pleaded in abatement,

and that what may be so pleaded cannot be taken advantage of in error. In the view of justice and propriety also, it is right that if a defendant pleads to issue (thereby treating a *feme covert* as if she were *sole,* and compelling her to summon witnesses, and prepare for a trial on the merits, when he might have abated her writ at the outset), (177) he should be bound by the judgment. I incline to think that the cases cited on behalf of the plaintiff show that she might have joined her husband in this action, for the reasons that might have been given, though I do not give any positive opinion on this point, as I conceive it unnecessary in the decision of this cause. For though the rule mentioned, that a defendant pleading in abatement must furnish the plaintiff with a better writ, be general, it is far from universal; and it can not consistently with reason apply to this case. This is a plea to the disability of the person of the plaintiff, founded on her legal incapacity to bring a suit; this alone is stated in the forms of such pleas, which do not prescribe any method in which she may bring another writ. It resembles the pleas of alienage, and those of outlawry, which presuppose that the plaintiff can bring no suit at all, while the disability lasts. In strict language, these are not actually, but only in the nature of, pleas in abatement. Wherever the exception points to the writ or declaration, the defendant must furnish the plaintiff with a better; but where it questions the very power and capacity of the plaintiff to sue, it cannot be thought necessary for the defendant to do a thing upon the absolute rejection and denial of which his defense is built.

Upon the whole, I think the motion must be overruled.

BRYAN v. BRADLEY ET AL., BAIL OF DONALDSON.—Tayl., 77.

If the writ be altered from debt to case, the bail is no longer bound.

Scire facias on a bail bond. Plea, *nul tiel record.* The writ had been originally issued in debt, and, in conformity therewith, the sheriff had taken the bail bond. In the county court the writ had been altered from debt to case, to which latter action the subsequent (178) proceedings corresponded. For the defendant it was argued that these variances were fatal; and,

By the Court. The bail can be made liable in no other manner than as they have stipulated by their bond. In this case it is conditioned to be void if the principal appears to answer to an action of debt, which

the plaintiff hath instituted against him; but a different action from this is afterwards prosecuted; consequently, the condition of the bond is not broken. The bail can say with truth, *non hæc in fœdera venimus.*

Whereupon the plaintiff's motion for the *scire facias* was quashed.

Cited: Smith v. Shaw, 30 N. C., 235; *Bradhurst v. Pearson,* 32 N. C., 56.

CAMPBELL & CO. v. HESTER'S EX'R.—Tayl., 78.

A plea of the statute of limitations, not being a plea to the merits, shall not be added after the pleadings are once made up: therefore an executor shall not be allowed to add the plea of the Act of 1715 (see Rev. Stat., ch. 65, sec. 11), if he neglects to plead it at first.

Appeal from the county court of Granville upon the question whether the defendant, under the circumstances of the case, should be permitted to add the plea of the Act of 1715, concerning proving will, etc., section 9th. The action was founded on an affidavit filed at the May Term, 1800, of the county court, stating, in substance, that the defendant at the return term, about fifteen months before, had employed an attorney, who, he expected, would avail himself of any legal defense there might be to the action; that the pleas had been entered, without the intention of waiving the benefit of any act of limitation that might apply to the case; but that the plea of the act referred to had been omitted, (179) by reason of a belief prevailing in the profession that it was not in force. Upon this affidavit, the county court made an order that the plea should be added; from which the plaintiff appealed.

Haywood, for the defendant, argued that the defendant, being an executor, defending the estate from an old demand, was entitled to any indulgence the law could show; especially as the time limited for the distribution of the estate had expired before the present suit was brought. That Courts had frequently permitted the addition of a plea, where it furnished a substantial defense, and had no tendency to delay the plaintiff. That the act of limitation, having for its object the quiet of men's estates, and the prevention of litigation, was a wise and politic law, and notwithstanding the prejudice sometimes entertained against it, had been denominated by able Judges a just and beneficial statute. That in 1 Wils., 177, the defendant was allowed to add the plea of the statute of gaming, the object of which was to avoid the payment of a debt, to which he was bound by the ties of honor and conscience, though forbidden by a municipal regulation, on the ground of public policy.

That the plea now offered would do justice in the case, and had been omitted only under the influence of a prevailing error.

Norwood, for the plaintiff, admitted that in some cases the Courts had permitted a plea to be added, which amounted to a fair and honest defense, and which had been omitted, through surprise or inadvertence at taking the rules; but that such a plea as was now offered had been uniformly rejected, because its object, instead of a trial on the merits, was to bar the plaintiff, though his claim should be perfectly just. He cited Barnes, 352, 332. 2 Wils., 253.

By the Court. It would be establishing a very bad precedent to suffer this plea to be added, after so long a delay has taken place in this cause. But whatever inclination I might have to permit the addition on the grounds that have been stated, the case cited from 2 Wils. is too strong to be resisted; there the addition of the statute of limitations was denied, because it was not a plea to the merits. The plea now (180) offered is exposed to that as well as to this further objection, that the Act of 1715 contains no exceptions as to infants, *feme coverts,* etc., differing in this respect from all other acts of limitations. As this act therefore would bar all persons upon whose demands the time had run, whatever disabilities they might be under, arguments against the plea of the statute apply *a fortiori* to this case.

Motion denied.*

* *Vide* Bos. and Buller's Rep.

NOTE.—The plea of the statute of limitations may be pleaded after issue joined, upon payment of full costs under peculiar circumstances. *Reid v. Hester, post,* 603; *Johnston v. Williams, post,* 628; *Hamilton v. Shepard,* 4 N. C., 357, 471.

YEARGAIN v. JOHNSTON AND HOPKINS.—Tayl., 80.

In an action for overflowing the plaintiff's land, he need not prove his title, though it be set forth in the declaration, for possession alone is sufficient to support his action against a wrongdoer.

This was an action on the case for overflowing the plaintiff's land, by means of a mill dam erected by the defendant. The declaration stated that the plaintiff was seized in his *demesne* as of fee, and possessed of the lands in question.

Duffy, for the defendant, contended that although the plaintiff was not bound to state his title in the declaration, yet, having thought fit to do so, he was compellable to prove it; for which he cited and relied upon the case of *Bristow v. Wight and Pugh,* Douglas, 640.

By the Court. Possession alone is sufficient to maintain this action against a wrongdoer, and as such the defendants are charged. The gist of the action is a nuisance committed by them upon land in the plaintiff's possession; and as all averments beyond this are immaterial and not put in issue in this action, they need not be proved. The (181) case cited is of a variance in the description of a contract; and the cases therein referred to as warranting the decision of the Court, cannot fairly be extended beyond those cases where records or written contracts are set forth in the declaration; these, if stated at all, ought to be stated truly. The possession here is the ground of the action, and had that been described in any particular way, as derived under lease for years or otherwise, the proof ought to have corresponded with the allegation, but as the *seizin* of the plaintiff is altogether impertinent it need not be proved.

The plaintiff had a verdict.

NOTE.—The Acts of 1809 and 1813 (see Rev. Stat., ch. 74, secs. 9, 10, 11, 12, 13, 14, 15, 16, and 17) prescribe a peculiar remedy by petition for persons injured by the erection of mills.

Cited: Pace v. Freeman, 32 N. C., 105.

SALISBURY DISTRICT, *September Term, 1800.*

JOHN LOUIS TAYLOR, Judge.

JOHN NESBIT v. MONTGOMERY'S EX'RS.—Tayl., 82.

NOTE.—See same case reported *post,* 490.

(182)

NEW BERN DISTRICT, *January Term, 1801.*

JOHN LOUIS TAYLOR, Judge.

ANONYMOUS.—Tayl., 150.

If the nominal plaintiff reside out of the State, the defendant may be sued out of his own district if the suit be brought in the district in which the real plaintiff is an inhabitant.

Assumpsit on notes of hand. The defendant pleads in abatement of the writ, that when it was sued out he was an inhabitant of and resident in the district of Wilmington; that the plaintiff was an inhabitant of the State of Tennessee, and that the parties continue to reside in the said places respectively—wherefore the defendant says he is not bound to answer the writ out of the district of Wilmington. Replication—that William M'Kenzie, who lives in the county of Beaufort and district of New Bern, is the holder and owner of the notes on which the suit is brought, and the real plaintiff in the suit, making use of Blount's name only for the purpose of recovering; and that he was, previously to the commencement of the suit, known and acknowledged by the defendant to be the real owner of the note, and entitled to the money due thereon; and was treated with by the defendant for the discharge of the notes.

Harris for the plaintiff.
Woods for the defendant.

Demurrer and joinder.

By the Court. There are cases where a Court of law has taken notice of equities and trusts for the furtherance of justice; to enable a defendant to set-off a debt due from the person beneficially interested, though no party to the record, and for the purpose of avoiding the plea of bankruptcy. I think the principle may be adopted with equal propriety to avoid a plea to the jurisdiction of the Court, grounded on the act of Assembly, for it stands admitted on these pleadings that Blount is but nominally the plaintiff.

Demurrer overruled.

(183)

WILMINGTON DISTRICT, *May Term, 1801.*

JOHN LOUIS TAYLOR, Judge.

HOSTLER'S ADM'R. v. SKULL.—Tayl., 152.

Trover is founded on the right of property exclusively, and therefore the plaintiff cannot recover if defendant prove property in another when the conversion took place.

Trover for a negro; not guilty pleaded. The plaintiffs were possessed of the slave in question from 1787 until 1794, when he came into the possession of the defendant, who converted him to his own use. It appeared that the slave belonged to the estate of John Vernon, deceased, upon whose goods, etc., the defendant obtained administration in 1798, since the institution of this action; and he now offered in evidence the letters of administration.

The plaintiff's counsel objected to this evidence, on the ground of its having no relation to the question now to be decided, which is, whether the defendant had any right to the property during the continuance of the plaintiff's possession. At that time, the defendant had no claim upon the negro, or right to disturb the plaintiff's possession, which, however acquired, he might maintain against all but the true owner.

Haywood for the plaintiff.
Duffy for the defendant.

By the Court. The issue joined in this case is, whether the defendant is guilty of converting to his own use the plaintiff's property. The former offers to show that he is the person who, at present, has the right both of possession and of property; and it is clear upon the evidence adduced, that the plaintiffs had neither, when the defendant obtained possession of the slave.

Possession alone will enable a person to maintain an action of trespass against a stranger; and then damages are given for the tortious taking; all claim to which is waived, by bringing an action of trover. It
(184) is a fundamental distinction between the two actions, that the one is founded in property, the other in possession; and it is necessary to attend to this because a recovery in trover vests the property sued for in the defendant. Hence, if the general property be in one person and the special property in another, a recovery in trover by the latter against a stranger, will deprive him who has the general property of his right of action.

But a recovery in trespass is not a bar to an action of trover, unless the property has come in question, and has been decided on; for though trover will lie in all cases where trespass will, yet the latter may be brought in certain cases, where trover will not lie. In the present case, for example, the plaintiff might have maintained trespass against the defendant, who was a wrongdoer in disturbing the possession; but an action fitted for disputing and trying the right is improper, where the alleged injury is to the possession only.

Whenever it is said in the books that possession alone gives a sufficient right to maintain trover against all persons except the true owner, it is to be understood, as I conceive, of a possession accompanied either with general or special property, whether the latter be acquired by finding or by a bailment from the true owner. For while the true owner is unknown, the finder of a chattel is apparently the owner, since the means by which he acquired it are lawful; and the owner's consent to his possession may be implied; but that, in an action of trover by the finder against a stranger, evidence is admissible that the ownership is in a third person who does not consent to the plaintiff's action, appears to me perfectly consonant with the principles upon which this action is founded. And it is held, in some late adjudications, that the right of present possession, as well as that of property, is necessary to maintain the action of trover. For these reasons, I think the evidence is proper to be received in connection with the proof that the slave belonged to John Vernon's estate.

Evidence admitted.

NOTE.—See same case on a new trial, reported in 3 N. C., 179, and the note thereto.

Cited: Barwick v. Barwick, 33 N. C., 82.

(185)

QUINCE'S ADM'RS v. MARY ROSS' ADM'RS.—Tayl., 155.

A writ sued out against a person who was named as executor but renounced the office, is not evidence to rebut the presumption of the payment of a bond twenty years old.

Debt upon a bond, to which the defendant pleaded *"solvit ad diem,"* and relied upon the presumption of payment, from the length of time elapsed since the bond was given. Deducting the time between the 6th

of March, 1773, and the 1st of June, 1784, there were twenty-six years to support the presumption.

In order to rebut this presumption, the plaintiff proved that in 1796 he had instituted a suit against a person, as executor of Mrs. Ross, who pleaded that he never was an executor, but had renounced the office; whereupon the suit was discontinued.

Jocelyn for the plaintiff.
Gaston for the defendant.

By the Court. Twenty years are considered sufficient to induce a presumption of the payment of a bond, where no interest has been paid, or demand during that time, and how far these circumstances have a tendency to weaken the presumption, is proper for the consideration of the jury, under the circumstances of each case.

With respect to the demand relied upon by the plaintiff, I do not think it is entitled to any weight, having been made of a person wholly unconnected in the transaction, a fact which might have been ascertained by examining the records of the county court. A writ sued out against the party really liable, though he should not be arrested upon it, if the transaction were *bona fide,* would go a great length in defeating the presumption; so would an imperfect writ, if the proper party were arrested upon it; but this is demanding from one man the debt of another.

Verdict for the defendant.

NOTE.—See same case as reported in 3 N. C., 180, and the note thereto.

(186)

NEW BERN DISTRICT, *July Term, 1801.*

DEN ON DEM. OF HANKS v. TUCKER.—Tayl., 157.

NOTE.—See same case reported 3 N. C., 147.

Cited: Fitzrandolph v. Norman, 4 N. C., 575.

STATE v. STREET.—Tayl., 158.

In an indictment for forgery the omission of a figure in the description of the instrument forged is fatal.

The defendant was indicted on the statute of 5 Eliz., cap. 14, for forging a deed, purporting to be sealed and delivered by James Houston, to the prisoner, Samuel Street, for a tract of land on the south side of Neuse River, beginning at a stake in the aforesaid Street's line, running south twenty west to pine, etc.

The deed produced corresponded with that recited in the indictment, except in the description of the courses, which in the first line was south twenty-two west, instead of south twenty west.

Gaston, for the prisoner. The cases to be found in the books on the subject of variance, even in relation to contracts and civil proceedings, will go the length of showing this mistake to be fatal; but with respect to criminal proceedings, the law requires still greater strictness, and will not allow so severe punishment, as this statute denounces, to be incurred, under an indictment which is not supported in all its material parts.

The charge against the prisoner is for forging a deed, which purported to be a conveyance of a tract of land, circumscribed by the boundaries specified in the indictment; but the State is about to prove him guilty of forging a deed for a tract of land differently bounded; and from this variance in the courses there results, also, a difference in the quantity. The misrecital extends beyond the mere form of the deed, and affects the substance itself. Hence, it will be found that none of the cases will warrant the Court to intend that the deed (187) produced is the one alleged, because the fault consists in a variance of sense, and of a thing material. The figure which is omitted cannot be supplied, on the principle that the word "despaired" was supplied in an indictment of perjury, which undertook to recite a former indictment for an assault; as in the case of the *King v. May,* Douglas, 183; because the indictment in the present case has a plain, consistent meaning. Nor can it be supplied on the ground that the letter "S" was in the case of the *King v. Beach,* Cowper, 229; for here the omission of the figure changes the sense. *Lee's case,* in Leach, 353, and *Cogan's case, ibid.,* 389, are authorities in point to show that this variance is fatal.

The Attorney-General, after noticing the distinction between undertaking to recite the tenor of an indictment, and the substance, as in the present case, submitted the question.

The Court directed the jury that the proof was insufficient to authorize a lawful conviction of the prisoner upon the indictment. That the variance was in a substantial part, and the omission of the figure could not be supplied by any construction warranted by the principles of law.

Verdict, not guilty.

NEW BERN DISTRICT, *January Term, 1802.*

SAMUEL JOHNSTON, Judge.

MILLER v. WHITE.—Tayl., 161.

NOTE.—See same case more fully reported, *post*, 223.

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(188)

HILLSBOROUGH DISTRICT, *April Term, 1802.*

JOHN LOUIS TAYLOR, Judge.

GOBU v. GOBU.—Tayl., 164.

Negroes are presumed to be slaves until the contrary appears; not so with respect to persons of mixed blood.

Trespass and false imprisonment; plea that the plaintiff is a slave; replication and issue.

It appeared in evidence that the plaintiff, when an infant, apparently about eight days old, was placed in a barn by some person unknown; that the defendant, then a girl of about twelve years of age, found him there, conveyed him home, and has kept possession of him ever since; treating him with humanity, but claiming him as her slave. The plaintiff was of an olive color, between black and yellow, had long hair and a prominent nose. The case was argued by *L. Henderson* for the plaintiff and *Haywood* for the defendant; after which the following observations were made to the jury.

By the Court. I acquiesce in the rule laid down by the defendant's counsel, with respect to the presumption of every black person being a slave. It is so, because the negroes originally brought to this country

were slaves, and their descendants must continue slaves until manumitted by proper authority. If, therefore, a person of that description claims his freedom, he must establish his right to it by such evidence as will destroy the force of the presumption arising from his color.

But I am not aware that the doctrine of presuming against liberty has been urged in relation to persons of mixed blood, or to those of any color between the two extremes of black and white; and I do not think it reasonable that such a doctrine should receive the least countenance. Such persons may have descended from Indians in both lines, or at least in the maternal; they may have descended from a white parent in the maternal line or from mulatto parents originally free, in all which cases the offspring, following the condition of the mother, (189) is entitled to freedom. Considering how many probabilities there are in favor of the liberty of these persons, they ought not to be deprived of it upon mere presumption, more especially as the right to hold them in slavery, if it exists, is in most instances, capable of being satisfactorily proved.

Verdict that the plaintiff is free.

NOTE.—See *Scott v. Williams*, 12 N. C., 376.

Cited: Nichols v. Bell, 46 N. C., 34.

WILMINGTON DISTRICT, *May Term, 1802.*

SAMUEL JOHNSTON, Judge.

JASON WELLS v. LEVI NEWBOLT.—Tayl., 166.

NOTE.—See same case reported *post*, 537.

CASES DETERMINED
IN THE
COURT OF CONFERENCE

CASES FROM WILMINGTON, *December Term, 1801.*

SAMUEL CAMPBELL AND WIFE v. ALLICE HERRON, WIDOW, JOHN LONDON AND JOHN LONDON, JR.—Tayl., 199.

NOTE.—See same case reported *post*, 468.

CUNNINGHAM'S HEIRS v. CUNNINGHAM'S EX'RS.—Tayl., 209.

NOTE.—See same case reported *post*, 519.

CASES FROM HALIFAX, *December Term, 1801.*

JONATHAN DAVIS AND WIFE AND MARY DUKE v. GREEN DUKE, ADM'R OF WILLIAM DUKE.—Tayl., 213.

NOTE.—See same case reported *post*, 526.

STATE v. JEFFREYS.—Tayl., 216.

NOTE.—See same case reported *post*, 528.

WILLIAMSON'S ADM'RS v. SMART AND KILBEE.—Tayl., 219.

NOTE.—See same case reported *post*, 355.

CASES FROM HILLSBOROUGH, *December Term, 1801.*

WILKINSON, ASSIGNEE, v. WRIGHT.—Tayl., 227.

NOTE.—See same case reported *post*, 509.

(191)

KENNON v. DICKINS.—Tayl., 231.

NOTE.—See same case reported *post*, 522.

Cited: Bledsoe v. Nixon, 69 N. C., 93.

BROOKS v. COLLINS.—Tayl., 236.

NOTE.—See same case reported *post*, 512.

Cited: Allen v. Simpson, 89 N. C., 22.

STATE v. BOON.—Tayl., 246.

The Act of 1791 relative to the killing of slaves is too uncertain to warrant the Court in passing sentence of death upon prisoner convicted under it.

The prisoner was indicted on the third section of the act passed in 1791, the words of which are, "that if any person shall be hereafter guilty of willfully and maliciously killing a slave, such offender shall, upon the first conviction thereof, be adjudged guilty of murder, and shall suffer the same punishment as if he had killed a free man, any law, usage, or custom to the contrary notwithstanding."

The prisoner was found guilty by a jury in Hillsborough Superior Court, and, being brought up to receive judgment, several exceptions were taken in arrest, by his counsel, upon which the presiding Judge directed the case to be sent up to obtain the opinion of this Court. The case was ably argued by *Haywood* and *Duffy* for the prisoner, and the Attorney-General for the State.

The following authorities were cited in behalf of the prisoner: 2 Hale's Pl. Cor., 334; Kelyng, 104; 4 Bl. Com., 98, 366; 2 Hawk., 446.

HALL, J. The prisoner has been found guilty of the offense charged in the indictment; whether any, or what punishment, can be inflicted upon him, in consequence thereof, is now to be decided. I will first consider whether we have any authority to inflict punishment (192) upon him, from any act of Assembly.

The Legislature in the year 1774 passed an act, entitled an act to prevent the willful and malicious killing of slaves; by which they annexed the punishment of one year's imprisonment to the commission of the first offense; and have declared that the person upon a second conviction thereof, shall be adjudged guilty of murder, and shall suffer death without benefit of clergy. In the year 1791, another act was passed, for the purpose of examining this act. The preamble of which, sec. 3, expresses "that whereas, by another act of Assembly, passed in the year 1774, the killing of a slave, however wanton, etc., is only punishable in the first instance by imprisonment, etc., which distinction of criminality between the murder of a white person and one who is equally a human creature, etc., is disgraceful to humanity, etc., be it enacted, etc., that if any person shall hereafter be guilty of willfully and maliciously killing a slave, such offender shall, upon the first conviction thereof, be adjudged guilty of murder, and shall suffer the same punishment as if he had killed a free man." If we consider that the mildness of the punishment directed to be inflicted upon the first conviction, etc.,

by the former act, is what the latter act in its preamble, sec. 3, complains of, and go no further, our impression at once would be that we had not only power to inflict a punishment upon the prisoner, but also a greater one than was annexed to the offense by the Act of 1774. But the preamble of a statute is no part of it. 6 Mod., 62. Although it is often proper to put such construction on a statute as will agree with the preamble, yet it ought not to be done, when thereby the enacting clause would be confined to it. 8 Mod., 144.

We must then consider the words of the enacting clause, without regard to the preamble, in case they cannot be reconciled. If any person hereafter shall be guilty of killing a slave, etc., such offender shall be adjudged guilty of murder, etc., and shall suffer the same punishment as if he had killed a free man. In case the person had killed a free man, what punishment would the law have inflicted upon him?

(193) Before this question can be solved another must be asked, because upon that the solution of the first depends. What sort of a killing was it, or what circumstances of aggravation or mitigation attended it? Did the act bespeak such depravity of heart as would stamp it with the name of murder, or were they such as justified it? If of the former sort, capital punishment should be inflicted upon the author of it; if of the latter sort, he is guiltless. That to which the Legislature referred us for the purpose of ascertaining the punishment proper to be inflicted is in itself so doubtful and uncertain that I think no punishment whatever can be inflicted, without using a discretion and indulging a latitude, which in criminal cases ought never to be allowed a Judge.

It may be thought that the words "shall suffer the same punishment as if he had killed a free man," from the connexion in which they stand with the words preceding them in the same clause, viz.: "that if any person shall hereafter be guilty of willfully and maliciously killing a slave" should be allowed to have this meaning, and "shall suffer the same punishment as if he had willfully and maliciously killed a free man." I cannot agree to this construction, because it is a rule that penal statutes should be construed strictly. 1 Bl. Com., 88.

Much latitude of construction ought not to be permitted to operate against life; if it operates at all, it should be in favor of it. Punishments ought to be plainly defined and easy to be understood; they ought not to depend upon construction or arbitrary discretion.

Perhaps the Legislature did intend that those words should convey that meaning; but it is not certain that such was their intention; if it were, it might have been easily expressed; and, indeed, if it were so expressed, it would not be altogether free from uncertainty. But suppose that to have been their intention, and that intention plainly expressed

and free from uncertainty; is the benefit of clergy taken away? It is laid down in 2 Hale, 330, that where a statute makes a new felony, clergy is incident thereto, unless it be especially taken away by act of Parliament. This doctrine is recognized by *Sir William Blackstone* in the fourth book of his commentaries, page 98; but I (194) think it unnecessary to consider this part of the case now; because, for the reasons given, I do not feel myself authorized by the act of Assembly to say that any punishment should be inflicted on the prisoner. I will only add that our Legislature seem to have also recognized the doctrine laid down by *Lord Hale,* because in the Act of 1774, before spoken of, the benefit of clergy is taken away in express words upon a second conviction, etc.; the same thing is evidenced by many other acts of Assembly.

II. But it has been also contended, on behalf of the State, that the offense with which the prisoner is charged is a felony at common law, and that having been found guilty by the jury, he ought to be punished, independently of any act of Assembly on the subject. This question arises out of the peculiarity of our situation; slavery not being known to the laws of England, from them we cannot derive our usual information. *Sir William Blackstone* says, liberty is so deeply implanted in the English Constitution, that the moment a slave lands there, he falls under the protection of the laws, and so far becomes a free man, though the master's right to his service may possibly continue. 1 Bl. Com., 127. From this expression I understand the author's meaning to be that the reason why the laws extend their protection to a slave is, because the moment he lands in England he undergoes a change, his condition is ameliorated, and in contemplation of law, at least, he is no longer a slave, but a free man. If this be the reason why a slave comes within the protection of the laws of England, it would follow that if a slave were carried there, and his condition of slavery were not altered, the laws would not extend their protection to him, because a slave in a pure state of slavery has no rights. *President Montesquien,* in his Spirit of Laws, Vol. I., Book 15, cap. I., and *Sir William Blackstone* in his Commentaries, Vol. I., 423, define pure slavery to be, that whereby an absolute power is given to the master, over the life and fortune of the slave. In some countries where slavery has existed, laws have been made from time to time, ameliorating its condition; (195) the power of taking away their lives, or cruelly treating them, has sometimes been restrained; these restraints, we find, were the consequence of positive laws; they did not exist before these laws imposed them; they were unknown in a pure state of slavery. It is said in Co. Litt., 116, *b,* that he that was taken in battle, remained bond to his

taker forever, and he could do with him as with his beast; he could kill him with impunity, etc. Afterwards we find it ordained that the life of a villein was not in the power of his lord; that he that killed his villein should have the same punishment as if he had killed a free man. The lord could not maim his villein; if he did, the King would punish him for maiming his subject, because he disabled him, so that he could not do the King service. Co. Litt., 127, *a*. Villeinage, however, as it existed in England, reflects but little light on our subject; it had attached to it certain rights that were unknown to a pure state of slavery. We have seen that a villein is called the King's subject; that the King has a right to exact services from him; the lord's power over him was not absolute; a villein could not sue his lord, but could bring all manner of actions against every other person; he might have an action of appeal against his lord for the death of his father, etc.; Litt., sec. 189; he might be an executor, and in that capacity sue his lord; sec. 191.

Slaves in this country possess no such rights; their condition is more abject; 2 Sal., 666; they are not parties to our constitution; it was not made for them. What the powers of a master were over his slave, in this country, prior to the year 1774, have not been defined. I have not heard that any convictions and capital punishments took place before that period for killing of negroes. By an act of Assembly, passed in April, in the year 1741, cap. 24, sec. 54, it is declared that if, in the dispersing of any unlawful assemblies of rebel slaves, etc., apprehending runaways, etc., in correction, etc., any slave shall happen to be killed or destroyed, etc., the Court of the county, etc., shall put a valuation upon such slave. In the next succeeding section it is declared that
(196) nothing herein contained shall be construed, deemed, or taken to defeat or bar the action of any person whose slave or slaves shall happen to be killed by any other person whatsoever, contrary to the directions, etc., of this act; but all and every owner, etc., shall and may bring his, her, or their action for recovery of damages for such slave or slaves so killed. From this part of the act, it appears that before the act passed an action could have been sustained by the owner of a slave against any person who killed him; the sole object of the last section is to fix such a construction on the first, and so to explain it, as that such action shall not be defeated or barred. It does not give the action, which before would not lie, but guards it from such construction as would tend to narrow its operation. If, then, this action could have been sustained, it must have been on the ground that slaves were considered as chattels. Killing a person may amount to felony or not, as the circumstances of the case may be that attend it. I understand that this action was sustainable in all cases of a killing of slaves, except in

the cases provided for in the 54th section. If the killing of a slave should be considered a felony at common law, in case it was done under the same circumstances of aggravation as in the case of a free man, would amount to felony, what would be the result? The person offending would be answerable, both *civiliter* and *criminaliter*. The trespass or civil injury would not be extinguished in the felony; but it would depend upon accident whether a recovery could be effected or not. If the indictment should be first tried, and the prisoner found guilty and executed, the action would be at an end; *actio personalis moritur cum persona,* and I take that to be such an action as the maxim would bear upon. These are consequences I cannot be led to believe the Legislature intended to give rise to; that they did not may be further ascertained from the act passed in the year 1774, before mentioned; where it is mentioned that if any person shall be guilty of willfully and maliciously killing a slave, etc., such offender shall suffer twelve months imprisonment, and, upon a second conviction, shall be adjudged guilty of murder, and shall suffer death without benefit of clergy. In (197) sec. 3, it is further declared that such offender shall, on the first conviction thereof, pay the owner such sum as shall be the value of such slave; it is not expressed what compensation shall be made to the owner upon a second conviction, when the offender is to suffer death; nor does the Act of 1791 direct that compensation shall be made to the owner by the offender. So that it does not appear that the Legislature had an idea that the offender should suffer death and also make compensation to the owner of the slave, which, we have seen, would have been the case if the killing of a slave had been felony at common law.

The act passed in the year 1774 is entitled "An act to prevent the willful and malicious killing of slaves." If it was a felony at common law to do so, the punishment due to it was greater than that inflicted by this act. I admit that nothing decisive of the question is to be collected from the preamble, which expresses that doubts existed as to the punishment proper to be inflicted; it is true the Legislature might have thought that the punishment of death for the first offense was too severe, and therefore not proper to be inflicted, and in lieu of it have substituted one year's imprisonment.

The Legislature declare, in the act passed in the year 1791, sec. 3, that the punishment inflicted by the act passed in the year 1774 is too mild; and no doubt they intended, for the first offense, to inflict punishment of death upon the first conviction; if so, and it was a felony at common law to kill a slave under any circumstances, which, in the case of a free man, would amount to felony, would not the same end have been answered by repealing the Act of 1774 and leaving the offense to be

punished at common law, instead of passing an act intended to speak the same language and to inflict the same punishment as was spoken and inflicted by the common law?

I have taken this view of the acts of Assembly to ascertain, as well as I could, the opinion entertained by the Legislature on the latter question. From the consideration which I have given the whole case, if I ever felt disposed to act the most rigid part towards the prisoner, (198) the most I could say, and the greatest length I could go, would be that it is doubtful whether the offense with which he is charged is a felony at common law or not. If it is doubtful whether he ought to be punished or not, that, certainly, is a sufficient reason for discharging him; crimes and punishments ought to be ascertained with certainty. Feeling, however, as I do, but little doubt, I cannot hesitate to say that he ought to be discharged.

JOHNSTON, J. The murder of a slave appears to me a crime of the most atrocious and barbarous nature; much more so than killing a person who is free, and on an equal footing. It is an evidence of a most depraved and cruel disposition to murder one so much in your power that he is incapable of making resistance, even in his own defense; and if, at any time, his conduct becomes so obnoxious that it cannot be longer borne by his master, he has it in his power to dispose of him and remove him to any distance he thinks proper. It is unnecessary to consider what punishment was annexed to the murder of slaves in other countries, either in ancient or modern times; the definition of murder, as laid down in our books, applies as forcibly to the murder of a slave as to the murder of a free man; and had there been nothing in our acts of Assembly, I should not hesitate on this occasion to have pronounced sentence of death on the prisoner.

But the Act of 1791, ch. 4, sec. 3, after enacting "that if any person hereafter be guilty of willfully and maliciously killing a slave, such offender shall, upon the first conviction thereof, be adjudged guilty of 'murder' "; had the act of Assembly stopped here, there could have been no doubt in the present case; but, when it goes on further to assign the punishment, it enacts in these words: "and shall suffer the same punishment as if he had killed a free man." The killing of a free man is punished in different ways, and, in some cases, no punishment is annexed to it; as where a man kills another by accident, or as it is expressed in our books *per infortunium,* or where a man kills another in his (199) own defense. From the context, and taking every part of the section under consideration, there remains no doubt in my mind respecting the intention of the Legislature; but the Judges in this coun-

try, as well as in England, have laid down, and invariably adhered to, very strict rules in the construction of penal statutes in favor of life; such as, that the words should be taken in *mitiori sensu,* where they are doubtful, or will admit of various constructions; and that nothing shall be taken by construction, implication, or reference from the context.

Under these considerations, under the influence of the decisions of the most respectable Judges as reported in all the books which treat of the criminal law, though not without a considerable degree of reluctance, I am of opinion that the judgment in this case should be arrested.

TAYLOR, J. I cannot yield my assent to the position that a new felony is created by the Act of 1791, or that any offense is created which did not antecedently exist. For the killing of a slave, if accompanied with those circumstances which constitute murder, amounts to that crime, in my judgment, as much as the killing of a free man.

What is the definition of murder? The unlawful killing of a reasonable creature within the peace of the State, with malice aforethought. A slave is a reasonable creature; may be within the peace, and is under the protection of the State, and may become the victim of preconceived malice. Upon what foundation can the claim of a master to an absolute dominion over the life of his slave be rested? The authority for it is not to be found in the law of nature, for that will authorize a man to take away the life of another, only from the unavoidable necessity of saving his own; and of this code the cardinal duty is to abstain from injury and do all the good we can. It is not the necessary consequence of the state of slavery, for that may exist without it, and its natural inconveniences ought not to be aggravated by an evil, at which reason, religion, humanity, and policy equally revolt. Policy may occa-
sionally dictate the propriety of enhancing or mitigating the pun- (200)
ishment; may at one time subject the offender to a year's imprison-
ment, and at another to death; yet amidst all these mutations the crime is unchanged in its essence, undiminished in its enormity. The scale of its guilt exists in those relations of things which are prior to human institutions, and whose sanctions must forever remain unimpaired.*

* According to *Judge Blackstone,* the principal efficacy of human laws consist in restraining the conduct of men, as to indifferent points; but, he adds, "with regard to such points as are not indifferent, human laws are only declaratory of and act in subordination to the divine and natural law. To instance in the case of murder: this is expressly forbidden by the divine and demonstrably by the natural law; and from these prohibitions arise the true unlawfulness of this crime. Those human laws that annex a punishment to it do not at all increase its moral guilt, or superadd any fresh obligations *in foro conscientiæ* to abstain from its perpetration."—1 Com., 43.

It cannot be distinctly inferred from the Act of 1774 that the Legislature of that period doubted whether this amounted to murder at common law; they do indeed state, in the preamble of that act, that some doubts have arisen with respect to the punishment proper to be inflicted upon those guilty of the offense; but such doubts resulting from considerations of a political nature may very well consist with an entire conviction that the crime is murder at common law. Doubtless they may ordain whatever punishment they think fit for every crime; they may at one time deem imprisonment sufficiently severe to repress the crime of killing a slave, when perhaps a different state of things may at another period suggest the necessity of an increased severity. But their adopting the lighter punishment does not imply that, before the time of adoption, the act was without guilt. To pursue the argument in its consequences, it will follow that from the first settlement of this State, until the year 1773, no act of the Legislature having passed upon this subject, the crime of killing a slave with malice was not punishable as homicide. The contrary conclusion appears to me most just, namely, that the crime was comprehended under the common law definition of murder, which the statutes of 23 Hen., 8, and 1 Ed., 6, deprived of clergy; that it (201) never ceased to be so considered; but in 1774 the Legislature thought proper to mitigate the punishment of the first offense from death to imprisonment, reserving the common law punishment of death to the second conviction. So it remained until 1791, when the Legislature aimed to restore the former punishment by the act upon which this prisoner is indicted. The principle relied on is quite correct, that whenever an offense is made felony by statute, it shall have the benefit of clergy, unless it be expressly excluded from it; and in all felonies clergy is allowable, unless taken away by statute; but the Act of 1791, repealing that of 1774, necessarily revived the operation of those statutes by which murder is deprived of clergy, and if this act had been a simple repeal, or sufficiently explicit in other respects, judgment of death must have been pronounced against the prisoner. But when the Court is called upon, under an act of Assembly, to pronounce the highest punishment known to the law, they must be satisfied that the language used is clear and explicit to the object intended. For if it admits of two constructions, that must be adopted which is favorable to the prisoner. On this ground, therefore, and the reasons given by the rest of the Court, I think no judgment can be pronounced.

MACAY, J. This indictment is grounded on sec. 3 of the act of the General Assembly, passed in 1791, entitled "An act to amend an act entitled 'An act to prevent thefts and robberies by slaves, free negroes,

and mulattoes,' " passed in 1787, and to amend an act, passed in 1774, entitled "An act to prevent the willful and malicious killing of slaves."

The third section enacts that if any person shall hereafter be guilty of willfully and maliciously killing a slave, such offender shall, upon the first conviction thereof, be adjudged guilty of murder, and shall suffer the same punishment as if he had killed a free man, any law or usage to the contrary notwithstanding.

Homicide, under the laws of this State, is divided into three classes: (I) Murder, which is punishable with death and always attended with malice, express or implied. (II) Manslaughter, which is (202) done on a sudden provocation, unaccompanied with malice; for this offense the offender is entitled to his clergy. (III) Simple homicide, which is either justifiable or excusable, and for which the law of this State has inflicted no kind of punishment, the person charged being deemed unfortunate and not criminal. This is an offense first legislated upon by the Act of 1774, and finally by this act of the General Assembly of 1791, which has not affixed either the punishment of murder or manslaughter to it, but that of killing a free man. The killing of a free man under such circumstances as amounts neither to murder or manslaughter, is no crime; no punishment can be inflicted; the person charged is to be acquitted and discharged on his payment of costs. Therefore, judgment must be stayed and the prisoner discharged.

Judgment arrested.

NOTE.—By the Act of 1817 (see 1 Rev. Stat., ch. 34, sec. 9), it is provided that "the offense of killing a slave shall be denominated and considered homicide, and shall partake of the same degree of guilt, when accompanied with the like circumstances that homicide now does at common law."

Cited: State v. Reed, 9 N. C., 457; *State v. Partlow,* 91 N. C., 552.

STATE v. BUTLER.—Tayl., 262.

NOTE.—See same case reported *post,* 501.

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CASES FROM NEW BERN, *December Term, 1801.*

STANLY v. HODGES.—Tayl., 274.

Laws of 1796, ch. 12, as to witness' fees for attendance construed.

The defendant and one Abraham Bush had a suit pending in the Superior Court of Law for the District of New Bern, in which the present defendant was plaintiff, and which was determined in the Term of March, one thousand seven hundred and ninety-five. The defendant Hodges prevailed in the suit; the plaintiff Stanly was summoned and attended as a witness for Hodges, and took out tickets for his attendance, but did not file them with the clerk. The present plaintiff, Stanly, after the determination of the suit between Hodges and Bush, warranted the present defendant, Hodges, for his attendance, and the cause was removed by *certiorari* to New Bern Superior Court. The plaintiff was proceeding on the trial to give evidence to support his cause at common law, as for work and labor done; but was stopped and nonsuited by the Court; with leave, however, to save the following questions for the opinion of this Court, viz.:

Whether, prior to the act of Assembly passed in one thousand seven hundred and ninety-six, cap. 12, a witness had a right to charge the party at whose instance he had been summoned and attended, for such attendance at common law, for work and labor done; or must, for his remedy, resort to the party cast in the manner prescribed by the act of Assembly passed in the year 1783, cap. II.

HALL, J. The 4th section of the act of Assembly, passed in the year 1783, cap. 11, ascertains the allowance of witnesses attending Court, and says that they shall be paid by the party cast; another act, passed in the year 1796, cap. 12, directs that witnesses may prove the amount due them for attendance, and recover the same from the party by whom they were summoned, before the final determination of the suit. However,

(204) the English practice, or the practice of this State prior to the passage of the Act of 1783, might have been, I have heard of no instance since the passing of that act of a witness having sued for the amount due him before the suit was finally determined, and I suppose it was from an impression that no such suit would lie that the Legislature passed the Act of 1796. In a former suit, which the present defendant instituted against Bush, the present plaintiff was summoned by the now defendant as a witness; the present defendant, then plaintiff, ob-

tained a judgment against the defendant. The plaintiff, a witness in that suit, instead of filing his tickets, the evidence of his debt, in the clerk's office, and having it inserted in the execution, by which means the defendant in the first suit would have been compelled to pay it (the person who really ought to pay it), he held it up a considerable time, and then instituted this suit against the present defendant. The latter had it not in his power to recover the costs for which this suit is brought, from the defendant in the first suit, owing to this conduct in the present plaintiff. Suppose the defendant in the first action in the meantime had become insolvent; if a recovery is had in this action the present defendant must bear the loss, without having been guilty of any neglect. I am of opinion that this action ought not to be sustained.

TAYLOR, J. The Act of 1777, which first ascertains the allowance of witnesses, directs that they shall be paid by the party at whose instance the subpœna shall have issued; and it is for his benefit that the charge shall be inserted in the bill of costs; secs. 33, 45. But a different regulation is introduced by the law of 1783, which provides that the witness shall be paid by the party cast, and contains a like direction as to the taxation of the ticket in the bill of cost.

Though the latter act does not require a construction which shall take away the remedy of the witness against the party who summoned him, yet I think that remedy is postponed until an execution shall have issued against the party cast.

I have always understood this to be the meaning of the act, and the law passed in 1796, for the purpose of reviving the witness' (205) remedy against the party who summoned him, would be superfluous upon any other construction. This act, too, was made expressly to amend and alter that of 1783, and extends only to cases happening in future; when it may be inferred that the Legislature believed they were giving a remedy which did not exist before.

Motion to set aside the nonsuit overruled.

NOTE.—See same case reported *post*, 500.

TAGERT v. HILL.—Tayl., 277.

NOTE.—See same case reported *ante*, 151, and *post*, 370.

SMALLWOOD v. CLARK.—Tayl., 281.

Under the plea of *non est factum*, it cannot be given in evidence that the bond was delivered as an escrow—such evidence is only admissible under a special plea.

This was an action of debt, brought on a promissory note under seal, and assigned to the plaintiff by the original payee, upon the plea of "general issue." The defendant's counsel offered to give in evidence that the writing obligatory was delivered as an escrow to a depositary, who delivered it over to the payee before the conditions of the deposit had been performed; but the presiding Judge at New Bern Superior Court, July Term, 1800, thinking such evidence inadmissible, verdict was taken for the plaintiff, and the case sent up upon a motion for a new trial, to obtain the opinion of this Court upon the above question.

It was argued by *Graham* for the plaintiff and *Woods* for the defendant.

(206) *Woods.* The question reserved in this case for the consideration of the Court is, whether in an action upon a promissory note, under seal, the defendant may give evidence, upon the general issue, that the writing was delivered as an escrow to a depositary, who delivered it over to the payee before the conditions of the deposit were performed. To prove that this special matter may be given in evidence upon the plea of *non est factum,* the following authorities are so fully in point as to admit of no shadow of doubt. 2 Rolle's Abr., 683; Gilb., Treatise on the Action of Debt (bound with his reports), 487; Gilb., L. E., 159; 168, Buller's Nisi Prius; Tidd's Practice of the King's Bench, 203. Nor have I seen a single authority, case, or dictum which, according to my ideas, contradicts, or in the least questions, any of them.

It is indeed said in behalf of the plaintiff that all refer to and ultimately depend on that in 2 Rolle, of which the author himself entertained a doubt; but surely it cannot be supposed that such writers as Gilbert, Buller, and Tidd should cite with approbation, and without any caution to the reader, any authority which was disputable. The manner in which they have stated the law leaves no room to doubt of their opinion, that it was unquestionable; and the high estimation in which their works are held forbids the supposition that they were mistaken. Indeed, the rule laid down in *Whelpdale's case,* 5 Rep., 119, goes much further, and admits the defendant to give in evidence, upon *non est factum,* special matter, which makes a deed void, after it has once had a legal existence; whereas, in our case, the writing never became a deed at all.

But it is objected, in behalf of the plaintiff, that all these authorities speak of a special *non est factum,* which is not the general issue, but a special plea, and this objection has been so much relied upon, and deemed of such importance in the case, that it becomes necessary to examine it fully, to ascertain what kind of *non est factum* is meant by these authorities, and whether the general issue, which is pleaded in our case, is not by fair intendment that plea.

Rolle says it is, *non est factum,* generally pleaded. 2 Abr., 683; Gilb. L. E., 168, uses the very same words, and Buller and Tidd, when they refer to the same passage, must be supposed to mean (207) the same thing.

Lord Holt, in Bushel and Pasmore, 6 Mod., 217, 218, says that "in all his time he never knew such a plea as that, viz., a special *non est factum* in case of escrow, and that all these special *non est factums,* in case of escrow, erasure, etc., are impertinent, for thereby the defendant brings all the proof upon himself; whereas, if he had pleaded *non est factum* generally, he would have turned the proof of whatever is necessary to make it his deed upon the plaintiff." This is said, by the plaintiff's counsel, to be an *obiter dictum,* unworthy of regard. It is, however, the *dictum* of a great Judge, and has never been questioned, although the case in which it is found is very frequently quoted. And Gilb. L. E., 163, 164, assigns the reasons why it was anciently deemed necessary to plead special *non est factum,* viz., to prevent surprise at the trial, and because they usually contained matter of law of which the Court ought to judge, but adds "at this day the law is otherwise." Again, all the authorities say the special matter may be given in evidence. This necessarily excludes the idea of a special plea which is contended, in behalf of the plaintiff, a special *non est factum* is.

A fact is pleaded when it is specially alleged in the plea and offered to the Court. It is given in evidence when, without being alleged in the plea, it is offered to the jury as proof of some other allegation, and in legal phrase, no two things are more distinct than the pleading of matter specially and the giving of it in evidence. Can it then be conceived that these writers, when they say that the special matter in question may be given in evidence, mean only that it may be specially pleaded? This would be absurd. And to maintain that it is necessary at this day to plead a special *non est factum* (that is, in the sense of the objection, a special plea) in case of escrow, is to pronounce *Lord Holt* both ignorant and rash, and to impute to Gilbert, Buller, and Tidd a loose, unintelligible jargon. But it is said, in behalf of the plaintiff, that all the precedents to be found in books of entries and cases of reports on the subject of escrow are precedents and cases of special *non* (208)

est factum. How, it is asked, does it happen that there is no case nor precedent to be found of a general one on that subject? To this I answer that, with regard to precedents in books of entries, they must necessarily be of special *non est factum;* for a general one, in case of escrow, is not distinguishable from a general one in any other case. There are no precedents of *non est factum* peculiar to the cases of erasure, interlineation, and false reading of a deed, and yet these are cases which must have frequently happened. The reason must be, that such special matters have been given in evidence upon a general one. The same observation applies with force in regard to reported cases; the questions in those cases have been such as could arise only in special *non est factums.* In general cases none could arise, except with respect to evidence; and upon a point so simple and infrequent, as whether a deed was delivered as an escrow or not, it is not remarkable that few cases should occur worthy of the notice of a reporter. As few will probably be found of interlineation or false reading of a deed, and yet it will not, I presume, be thence inferred that such matters may not be given in evidence on a general *non est factum.*

But admitting, for the sake of argument, that all the foregoing authorities, contrary to the express words of some of them, speak of a special *non est factum,* I must still be permitted to contend that such plea may be considered the general issue, which we have pleaded.

All the authorities say that a special *non est factum* in case of escrow may conclude to the country, and some of them say it must. In Watts and Rosewell, 1 Salk., 274, such was held ill, because it did not conclude to the contrary. The cases in T. Raym., 179, and 6 Mod., 217, both conclude in that way. And Gilbert L. E., 164, says the general way is to conclude the contrary but it apprehended not to be vicious to conclude with a verification. It is presumed to be a general rule in pleading, deducible from reason and authorities, that a plea which concludes to the contrary is a general issue. A plea which denies the whole declaration is called a general issue because it amounts at once to an issue. 3 Bl. Com., 305. Where the whole contents of a plea are denied, the conclusion must be to the contrary; but a particular fact only, it must be to the Court. 1 Bur., 319; Doug., 429, *non est factum* is a plea which denies the whole declaration and is therefore a general issue; 3 Bl. Com., 305. If it be a special one, it concludes with the same denial, and for that reason ought to conclude to the contrary; see the reason urged in Watts and Rosewell, 1 Salk., 274; with such conclusions it amounts to an issue. It is, then, a general issue. If, therefore, a special *non est factum* may be considered a general issue, as well as a special plea, it would be contrary to reason and the spirit of modern

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practice to consider it a special plea for the purpose of excluding evidence. General pleading is at this day much favored; 3 Bl. Com., 305, 6, and that strictness which was formerly required or indulged under pretense of preventing surprise is justly considered discreditable to the profession.

Graham. The books relied on as authorities for the defendant are 2 Rolle, 683; Gilb. L. E., 159, 168; Gilb. Rep., 437; 6 Mod., 218; Bull., 172; Tidd's Pract., 203. The passage found in Rolle is there given on the authority of one of the Year Books, 9 *H.*, 6, 38, and it must be admitted would be of great weight towards deciding the question, were not the expression of doubt that accompanies it not less strong than the passage, and could it not be shown that the law is not so by more modern authorities, and an uniform practice to the contrary. Whether the *quœre* annexed to this passage be found in the Year Book, or be at the suggestion of Rolle, cannot be a material circumstance; in either case it shows that the law was not then settled, at least; and if Rolle adds the *quœre,* it will follow that his opinion and the practice of his day were at variance with the Year Book. Gilbert's Law of Evidence, and his treatise on debt, in the pages referred to, also give support to the opinion, that escrow may be given in evidence on a general *non est factum.* But we are referred to the single case in Rolle, just examined, for the authority on which his lordship (210) had formed this opinion; the naked *dictum* of his lordship would have been more respectable; resting on the authority in Rolle, which concludes nothing, it certainly derives no additional force from its transposition into Baron Gilbert's treatise.

But it is said the defendant has on his side, also, the opinion of *Judge Holt,* a great and respectable name among the profession of the law; and for this we are referred to 6 Mod., 218, and it is true that this great lawyer does contrive, or is made, rather out of place, it will be allowed to say, *obiter,* that these special *non est factums,* in cases of erasure and escrow, etc., are "impertinent." But when it is considered that the case before the Judge was a case of an escrow, the plea a special *non est factum,* and no question whether escrow might not be given in evidence on a general *non est factum,* made or argued; this expression far from deciding the point, will only excite our surprise at his irrelevancy to the business in hand, or at most, is only to be considered a mere *obiter dictum.*

It is always understood that these accidental expressions of even the most learned and experienced Judges of points of this nature, not under the consideration of the Court, and without any previous investigation, are not to be regarded as authorities, as well, in justice to the Judges,

as from the danger of admitting them. The Judge himself attaches no consequence to them, and on a slight examination often changes his opinion; the reporter, too, having his attention occupied by the principal question, is very liable to error on collateral points. It is worthy of remark that, wherever this opinion, as ascribed to *Judge Holt,* is noticed by subsequent writers, it excites surprise, and its correctness is questioned. 4 Bac. Abr., pleas and pleadings, 62. Perhaps, if this had been the point submitted, his lordship would have made up a different opinion. Neither Buller nor Tidd make any distinction between a general and a special *non est factum.* They, as well as many others, seem to consider both as one plea, in contradistinction to all special pleas in bar, in the actions of debt; thus, they say erasure, cover-
(211) ture, escrow, etc., may be given in evidence on the general issue, *non est factum;* but *per duress, per minas,* release, etc., must be specially pleaded. When, under the first branch, you examine the cases referred to, as Sir T. Raym., 197, and 6 Mod., 218, they are cases of escrow, and the pleas are special *non est factum;* so that the only meaning they can be supposed to have is, that you need not plead escrow, as specially as you must *per duress,* etc., but you may take advantage of it on a *non est factum,* that a special *non est factum,* which concludes to the contrary, and not with a *paratus est verificare,* as do these special pleas. It may, therefore, fairly be presumed that Baron Gilbert has mistaken the true import of earlier writers, and given to them a latitude of construction beyond what they intended. It is concluded, therefore, by the plaintiff that there is no good foundation to say that under a general *non est factum,* delivered as an escrow, may be given in evidence.

In order to prove that a special *non est factum* must be pleaded, it is remarked, in the first place, that to allege the special matter relied on is most consonant to the principle of pleading, which is everywhere avowed, that the Court and adverse party should be fairly apprised of the nature and circumstances of the defense, which can be done only by setting forth the particular facts; thus, surprise is avoided, and the parties come prepared to try the true question. If this principle has force in regulating the pleading, in the British Courts, it becomes much stronger in its application to the mode of pleading in our own Courts. With us, the name or names only, of the pleas are entered on the docket; whereby the hazard of being entangled in special or general demurrers from the nicety required in pleas drawn at full length, is avoided, which was the only evil intended to be remedied by the relaxation of the rule which required all special matter to be specially pleaded.

It is contended, secondly, on the ground of express authority, that the escrow must be pleaded by a special *non est factum;* and the cases that

are deemed such authorities are Com. Dig., pleader (2 W., 18), 643, throughout. *Non est factum* is a good plea, when the bond (212) or specialty was not executed; but if it was, but was void *ab initio* for other cause, such as escrow, among others, a special *non est factum* may be pleaded; so is Morg. vad. mec., 221, 222, Espinassee, debt, 149, and the authorities there referred to; Co. Litt., 56, *a*, 1 Vent., 9; 2 Vent., 10; 1 Salk., 274; 6 Mod., 218; Sir T. Raym., 197; Morg. Ess., 299, 4 Bac. pleader, 62; Lill. Ent., 184, 187, and other modern entries generally. From an examination of these cases and entries, this fact will appear, that escrow has, without exception, in earlier, as well as later times, been pleaded under a special *non est factum;* and this conviction will result; that it has been the opinion of the ablest judges, pleaders, and practitioners that it is the only safe and proper plea.

It is conceived, thirdly, that this conclusion may also be established by reasoning from the practice, to the law; the pleadings in cases are said to be pretty certain indexes to the law. If it be found that in all cases of escrow, whether of ancient or modern date, the plea is a special *non est factum,* especially if no one can be shown, where it was offered in evidence on a general *non est factum,* the conclusion is logical, natural, and strong, that a special *non est factum* is the plea required by law. All the reporters abound in cases of escrow all under the plea of special *non est factum;* a solitary case of escrow, when a general *non est factum* was pleaded, the plaintiff's counsel, after a laborious search, has not been able to find, nor has the defendant's counsel pretended to produce one. If it were thought consistent with the law, would not counsel rather surprise his adversary with a special defense, under the general issue, than to furnish a plea which states explicitly the circumstances on which he rests his defense; which requires more labor and more skill, to place it beyond exception, and which assumes upon itself the *onus probandi?* The special *non est factum,* adapted to the case of an escrow, being carefully inserted in the entry books of pleading, another circumstance from which to infer, it is considered to be a necessary plea.

HALL, J. I think it would be improper under the circum- (213) stance of this cause for the defendant to give evidence of the fact which he has suggested under the general plea which he has pleaded.

TAYLOR, J. It is the common, and I believe the universally received opinion of the profession, that where the general issue is pleaded to a sealed instrument without a subscribing witness, proof of the obligor's handwriting is sufficient to maintain the action. A witness who was present at the delivery, and is able to show that it was absolute and unconditional, is not required in such a case; for, from the signature being

proved, the jury will presume a sealing and lawful delivery. It would, therefore, produce much inconvenience, if by allowing the defendant to give delivery as an escrow in evidence, the plaintiff's action were defeated, when, perhaps, had he been apprised of the defense, he might have adduced evidence to prove a performance of the conditions. But the application of such a doctrine to the case of an assignee, would be replete with injustice, and would impose upon him such trouble and difficulty as might materially contribute to impede the circulation of these instruments. The obligee, being privy to the original contract, may be supposed to understand the terms upon which it was made, and to be ready to vindicate his right to a recovery, whenever the particular objection shall be made known to him. To him, the depositary of the writing is known; the precise terms upon which the first delivery was made, he must also be acquainted with, and how far they have been executed on his part. But the assignee, taking the bond upon the credit of the obligor and obligee, and of the various indorsers whose names it may bear, is probably ignorant of the circumstances of the contract; and least of all will he think it necessary to provide other proof to resist the general issue, than that of the handwriting of the obligor, and that of the first indorser. It does, therefore, appear to me reasonable as well as just that the plaintiff should have notice of this defense by an entry on the docket, so that he might have inquired into the
(214) truth of it, and prepared himself either to resist or yield, as the truth should warrant. And the remark of the plaintiff's counsel has great weight with me, that the simplicity of our mode of practice, which requires only an entry upon the docket, of the defense relied upon, while it preserves what is valuable in special pleading, does effectually guard against the evils for which it has been justly reprobated. If, therefore, the rule of law should appear, upon an examination of the books, to be, that upon the general issue of *non est factum,* delivered as an escrow may be given in evidence, it should be observed that the application of the rule to the case of an assignee could never have been contemplated, since sealed instruments were not made negotiable in this State until 1786; and whatever may be the reason and justice of the rule as between the parties, it seems plain that when a bond goes into a course of circulation, the reason ceases. It is very certain that the authorities upon this subject do not all concur, and it is difficult amidst the conflicting opinions of learned men to pronounce with certainty how the law is at present understood. But if an investigation of judicial decisions produces doubt instead of conviction, it is allowable to take into view considerations from inconvenience, and under that impression I have made these preliminary remarks.

There are several cases of an early date which seem to show that a special *non est factum* was the customary defense in all cases of escrow; and even the reported cases of a later period serve to create doubt rather respecting the proper conclusion of such a plea, than as to the propriety of the plea itself. The following cases are stated in Vin. Abr., Tit. Fait., 18 Ed., 3, 3, 29. Debt upon an obligation: the defendant said that he delivered it to J. S. as an escrow upon certain conditions to be performed, to deliver the plaintiff as his deed; and said the conditions were not performed and so not his deed; this is no plea, because he does not confess any delivery to the plaintiff, by which he shall say that the said J. S. delivered the obligation to the plaintiff and so *non est factum,* and well, because otherwise nothing shall be entered but *non est factum* generally. The plea was held to be defective in this (215) case, because it omitted to state a delivery of the deed from J. S. to the plaintiff. Had this fact been stated, it is admitted that the special *non est factum* would have been good.

9 Hen., 6, 37. If a man seals a deed and delivers it to a third person to keep until a certain condition be performed, and then to deliver it to the obligee, and an action is brought, the defendant may plead this matter, and conclude so not his deed, because it never was delivered as a deed.

19 Hen., 6, 38, and 10 Hen., 6, 25, 26. If a man deliver an obligation to J. S. upon certain conditions, to be performed, to deliver to the obligee as a deed, and if not to keep as an escrow. If the obligee get it contrary to the condition and bring debt, the other cannot show this matter and conclude so *non est factum,* for it was an escrow and never a deed.

The last case furnishes an example where escrow pleaded with a verification as a special plea, was excepted to and overruled on that ground, it being held that such a plea should conclude with tendering an issue. The same point arises in *Watts v. Rosewell,* 1 Salk., 274, where judgment was rendered against a special *non est factum,* because it did not follow the precedents of such pleas in concluding to the contrary; and although in the case of *Bushel v. Pasmore,* cited from 6 Mod., the special *non est factum* did conclude to the contrary, notwithstanding which pleas of that kind were disapproved of by *Lord Holt,* yet the reason he gives is not quite satisfactory at present, however forcible it might have been at that time. That case was decided in 3 Anne, before the passing of the act for amendment of the law which permitted defendants with leave of the Court to enter several pleas. When a defendant was confined to one peremptory plea, it was a material advantage to him that it should be of that kind which would place the burden of proof upon the plaintiff.

But now that several pleas may be entered, one which shall compel the plaintiff to prove his case, and another which shall apprise him of the objections intended to be made against his recovery, justice is (216) more likely to be attained by a reliance on both than by the omission of either. Consider the case even before the Statute of Anne; it strikes me that a general *non est factum* would afford but a very limited and partial security to defendants, whose deeds were delivered as escrows. If there were a subscribing witness and he alive at the time of trial, then indeed the plaintiff being bound to prove by him an actual delivery, so as to make the defendant's deed, must submit to the consequence of such evidence as the witness shall give, and in the case of a real escrow would be prevented from recovering. There, it may be said that a general *non est factum* is most beneficial to the defendant, and that as he had the liberty of entering but one plea, it would have been wrong to have selected that which should have placed the burden of proof upon himself, when by pleading another he might have placed it on the plaintiff. But if the deed had no subscribing witness, or the witness were dead, would a defendant choose to trust his case upon a general *non est factum?* The plaintiff would recover from the presumption of delivery arising from the proof of handwriting and the possession of the instrument, unless the defendant should adduce proof that it was delivered as an escrow; and if the same necessity of bringing forward evidence to prove his case existed, whether he pleaded a general or special *non est factum,* then, as to him, it is not impertinent to plead the special one, which in the view of justice ought to be preferred, because it informs the plaintiff what the point is, which is meant to be disputed. Erasure may be given in evidence on a general *non est factum,* and as that is a fact which appears on the face of the bond, rendering it absolutely void, there is no occasion to give the plaintiff other notice, because he could not, by any proof, restore its validity. But in the case of escrow, the deed must be sealed and delivered by the defendant, conditionally it is true, but whether the condition be of such a nature as to form an escrow in point of law may be a question of sufficient importance in some cases to be submitted to the Court in the first instance, and as the allegation arises from circumstances which cannot be (217) collected from a view of the instrument itself, and which may or may not render it void eventually, accordingly as they are valid in point of law, or true in the point of fact, there seems to be sufficient reason why the defense should be shaped as a special *non est factum.* Reasoning of this kind was anciently thought so just and forcible as to confirm the propriety of making all objections to a deed, which arose from matters *dehors,* by means of a special *non est factum,* whether of

coverture or because the party had no right to the thing transferred, or of erasure, interlineation or addition; all these defenses must have been specially pleaded, that the plaintiff might come prepared to falsify the evidence.

The special conclusion with an *issint non est factum* was referred to the Court for another reason, viz.: that they might decide in the first instance what they might afterwards be called upon to decide upon a demurrer to evidence or a special verdict. But at this day, says Baron Gilbert, the law is otherwise, and if a man pleads "delivered as an escrow and concludes specially *issint non est factum,* the general way is to put it to the jury, because it is, in effect, to say there was no deed at all, but they may put it to the Court by an *hoc paratus est verificare,* because the Court will judge whether he exhibited such matter as will make the deed of no effect at all," etc. From this extract, it appears to have been the opinion of the writer that a special *non est factum* is proper in the case of an escrow; but that the better way of concluding such a plea is to the contrary. The opinion of Morgan, cited by the plaintiff's counsel, as to the propriety of such a plea, though he differs as to the conclusion, is, I think, of great weight, inasmuch as he is a special pleader of eminence, and conversant in the modern practice of the Courts. To this may be also added the case of *Collins v. Blantern,* 2 Wils., 347, where the general principle is recognized that if a bond be void in law, the facts which make it so may be averred and specially pleaded, and that the proper conclusion of such plea is with a verification.

Taking into view all the foregoing considerations, I think the present case is one where the Court may and ought to require (218) some notice of the defense relied upon to be given to the plaintiff.

Judgment for the plaintiff.

NOTE.—See *Anonymous,* 3 N. C., 327, but see *contra, Moore v. Parker,* 5 N. C., 37; same case, *post,* 636.

A. MILLER'S EX'TRX v. GORDON'S EX'R.—Tayl., 300.

To a plea of the statute of limitations of 1715, to debt on a bond by a British subject, replication of the treaty of peace of 1783 is bad.

Debt on a bond executed by the defendant's testatrix to the plaintiff's testator in 1775, plea, the Act of Assembly passed 1715, which bars the

creditors of deceased persons who do not make their claims within seven years after the death of the debtor. Replication, the treaty of peace of 1783. A verdict was found for the plaintiff in New Bern Superior Court, ascertaining the amount of the debt. The cause was sent here to be decided upon the above pleadings.

HALL, J. It is not now to be decided whether the plea of the defendant, in case this suit had been brought by an American citizen, would be a good one; that has already been determined in the affirmative. The plaintiff rests his case on the ground that he is a British subject, had the act of Assembly which is pleaded by the defendant, for its object British creditors only, and were it one of those impediments contemplated by the fourth article of the treaty of peace, the question perhaps would assume a different aspect. But it is a general law, and not made for one person or set of men more than another, and I cannot see any reason why it ought to lose any of its force or operation, when pleaded against a British creditor sooner than if it had been pleaded against another person. Suits were brought by British creditors since the Revolution on open accounts, etc., to which the act of limitation (219) was pleaded, and this plea by our Courts was held to be a good one. If a plaintiff thinks proper to lie still and thereby suffer his claim to be barred, the neglect is his own and he must abide the consequences. I think the plea pleaded by the defendant in the present case should be sustained.

Judgment for the defendant.

(220)

NEW BERN DISTRICT, *July Term, 1802.*

JOHN LOUIS TAYLOR, Judge.

SMITH v. MURPHEY.—Tayl., 303.

NOTE.—See same case reported in 3 N. C., 183.

JOHNSTON v. MARGARET HUNLY.—Tayl., 305.

Land purchased after the making of a will does not pass by any devise in it.

Ejectment, for a house and lot in the town of New Bern. The plaintiff claimed as heir-at-law to Richard Hunly, who had devised the residue of his property to his widow, the defendant, after having made sundry specific bequests. The deed for the lot in question was made to the testator after the executing of his will, though evidence was offered by the defendant to show that the purchase was made before.

Graham, for the defendant. From the time of the contract between the vendor and the testator, the former should be considered as a trustee for the latter, who was in truth the owner of the lot, and had a right to dispose of it as he thought fit. That an equitable estate in lands will pass by devise has long been settled by various adjudications. 1 Ch. Ca., 39; 1 Ves., 437; 2 Vern., 679. And if the disposition to the widow in the present case would be sustained by a Court of Chancery, it will prevent circuity of action to allow her to set up her title in this ejectment. Nor is such a defense a novelty in a court of law; for in *Edward v. Baily,* Cowp., 597, the defendant prevailed on the ground of an equitable title alone, though the legal estate was in the plaintiff.

Woods, for the plaintiff. That a devise of lands is considered in the nature of a conveyance by appointment, and that a man cannot devise lands which he has not, when he makes such conveyance, (221) are positions too clear to require authority or illustration. In this respect, there is no difference between the law of England and of this State; for we have no act of Assembly which allows the disposition by will of lands which the testator may have at the time of his death. Whatever right may be acquired by the devisee in the present instance, it is plainly not such a one as can be opposed to the legal estate which

the law has cast upon the heir, and his claim is also strengthened by certain equitable considerations, which it was useless and even irregular to insist upon in this place.

By the Court. The plaintiff having the legal title is consequently entitled to a recovery in this action. The case cited from Cowper went upon the ground of the plaintiff's attempting to defeat a solemn deed under his hand, whereby he covenanted to let the defendant enjoy the premises; but that is very different from the case of an heir who has done nothing to impair his title.

Verdict for the plaintiff.

NOTE.—See acc. *Jiggitts v. Maney*, 5 N. C., 258, which also decides that if there is a new publication of the will after the purchase, the land may pass.

HENDERSON v. SCURLOCK.—Tayl., 306.

Where the defendant's attorney informed the plaintiff's attorney at one term, that he should file a plea of abatement and then failed to do so, the plaintiff at the succeeding term was allowed to enter judgment as of last term, and execute his writ of inquiry *instanter*.

The writ was returned executed to the last term, and an appearance entered by the defendant's attorney, who informed the plaintiff's attorney, upon entering upon the rules, that he should file a plea in abatement. The plaintiff's attorney, upon learning the substance of the plea, said he should take issue upon it; but no plea was entered, and,
(222) upon motion to enter judgment by default as of the last term and to execute the inquiry *instanter*.

By the Court. It is stated by the attorney for the plaintiff that he should have exercised his right of taking judgment by default at the last term, but for the expectation that the plea in abatement would have been filed; on which he admits that he had intended to take issue. Had this been done, the plaintiff would now be entitled to a trial of the issue, and, in the event of its being found for him, to a peremptory judgment. He ought not, therefore, to be delayed a term by the omission to plead in abatement.

Motion allowed.

MILLER v. IRELAND.—Tayl., 308.

1. The master of a vessel cannot give his protest in evidence.
2. If a bill of lading be not stamped, parol evidence may be given of the contract to carry the goods.

Harris and Stanly for the plaintiff.
Graham and F. X. Martin for the defendant.

It was ruled in this case:

I. That the defendant, a captain of a vessel, could not give in evidence his own protest for the purpose of showing that he was compelled by stress of weather to throw overboard the goods, for the nondelivery of which the action was brought.

II. That the plaintiff might declare on a special agreement to deliver goods, though a bill of lading was signed, which, being without a stamp, could not be given in evidence.

NOTE.—See acc. on the first point, *Cunningham v. Butler*, 3 N. C., 392.

MILLER v. WHITE.—Tayl., 309.

1. A sale of land by two of four executors appointed by the will is good if the others refuse the executorship.
2. If justice be done, the Court will not grant a new trial on the ground of misdirection.
3. A line of a deed or grant calling for the line of another grant shall be extended to it if it be in the course, though beyond the distance.

This cause was tried at the last term, and a verdict found for the plaintiff under the direction of the Court. A rule was obtained by the defendant's counsel, calling upon the plaintiff to show cause why a new trial should not be granted, on the ground that improper evidence was suffered to go to the jury, and on that of misdirection.

After argument by *Haywood* and *Baker* for the plaintiff, and *Harris* for the defendant, the following opinion was delivered:

By the Court. This verdict is complained of: I. Because the deed under which the plaintiff claims was permitted to be given to the jury as evidence of his title, although it was executed by two only of the executors, whereas four were appointed by the will of Bryan, and no

evidence was adduced of the renunciation of the other two. II. It is said that the charge of the Judge was incorrect, in instructing the jury that the first line of Bryan's patent should be continued to Walter Lane's instead of submitting it to them upon the evidence whether the line ought not to stop at the distance.

With respect to the first reason, I shall consider how far such evidence was improper, and whether it is sufficient cause to grant a new trial.

The general principle is, that a naked authority to executors to sell, being derived from the will alone, must be strictly pursued. The special confidence placed in them must be executed by the persons named, and by all of them; and whether they accept the administration or not, they have equal power to make a valid sale. Although it is admitted

(224) that nothing more than a naked power was created in the present case, yet a distinction has been made, where the persons directed to sell are named specially, and when they are referred to as executors, or by a general description; and the cases cited establish this distinction so far as to authorize a sale by the survivors, where executors or sons-in-law have power to sell, some of whom die before the sale takes place. But it is doubtful whether the reason of these cases will authorize a sale by two of four executors when all are alive, and competent to join in the deed, when the sale takes place. The cases are thus noticed in Co. Litt., 112 *b*, 113 *a*. If a man devise lands to A. for term of life, and after his decease his land should be sold by his executors, and he make three or four executors, and during the life of A., one of the executors dies, and then he dies, the other two or three executors may sell, because the land could not be sold before, and the plural number of his executors remains. The impossibility of selling the land during the life of A. seems to be the reason why the other construction was resorted to, in order to give a liberal interpretation to the will. So in the case of *Lee v. Vincent,* cited from Cro. Eliz., one of the sons-in-law died in the lifetime of the donee, and therefore the land could not be sold by all. In both these cases the objects of the devise must have been frustrated, had not the sale by the survivors been adjudged valid; in the case before the Court, such a consequence cannot follow, because the power of all the executors remains in full force.

If the authorities had stopped there, I should have hesitated to decide that the sale in the present case could be made by the two executors without the aid of the Statute of Hen. 8. But case of *Bonifaut v. Greenfield,* Cro. Eliz., 80, advances a step further, and, if it be law, goes the whole length of deciding the present case. It is a devise of land in fee to several executors to the intent that they should dispose of it, and it was adjudged that the sale made by three in the lifetime of

the fourth, he refusing to execute the authority, was valid. Upon the authority of this case, therefore, the deed in question might properly have been relied upon to support the plaintiff's title, if a refusal of the others, either to prove the will or join in the sale, had been (225) proved. For I do not conceive that a renunciation of record is required either by the reason of the thing or the practise and usage of this State. If there was any evidence of the fact before the jury, they were the proper judges of its weight; if there was none, then I apprehend it was improper to submit the deed to them as legal evidence of title; but,

II. Is this a sufficient reason to direct a new trial? A motion for a new trial is an application to the discretion of the Court, which they must endeavor to exercise in such a manner as will most effectually attain the justice of the case. If the merits have been fairly tried and the very right of the cause determined, a new trial ought not to be granted for the purpose of letting the losing party into an objection of a strict legal nature. And as laid down in *Edmundson v. Michael,* 2 Term Rep., 4, that if the Court sees that justice has been done between the parties, they will grant a new trial on the ground of a misdirection in point of law. The plaintiff is a purchaser for a valuable consideration from the executors, who sold in execution of the purpose of the will. The two persons who did not join in the sale have denied that they intermeddled with the estate. Such evidence upon another trial would be a ground for the jury to infer a refusal, and another verdict must place the parties, as to this objection, precisely in the condition they now are. This, however, cannot be a sufficient ground to set aside the verdict.

III. In giving my opinion upon this part of the case, I feel some difficulty arising from the imperfect knowledge I have of the testimony given at the former trial, and which I have been obliged to collect as well as I could from the observations of the counsel. Upon the abstract question of law, and deciding alone upon what appears in the grant under which the plaintiff claims, I should decide in his favor. The description of the land patented is, beginning at a pine and runs south 80 east 40 poles to a stake in the line of Walter Lane's patent, then along the line north 10 east 20 poles to his corner, then east 180 poles to White's line, then with his line, etc. (226)

Upon the face of the patent there is neither ambiguity nor repugnancy, but its primary intention manifestly was that Walter Lane's line should be the boundary; that should be the termination of the first line, and the course of the second; and when it is seen that Walter Lane's patent is issued in 1746, it is a reasonable conjecture that the

line was well established. But upon an actual survey it appears that although Walter Lane's line is in the course called for by Bryan's first line, yet that the distance of the latter gives out forty poles short of Lane's line. If the second line be drawn from the point where the distance of the first ends, it will never reach Lane's corner; and if the third line be drawn from the point where the second ends, it will proceed one hundred and eighty poles into the body of Lane's land, and, of course, never reach White's line, which is the third corner the patent calls for. Such are the consequences which follow from confining Bryan's first line to the forty poles called for in the patent; whereas, if it is extended forty poles further, to Lane's line, and thence to his corner, there was, when the grant issued, vacant land enough to satisfy it. It appears to me that a line called for, if it be in the course and can be shown to be the line of an old patent, designates more effectually than the plotted distance the land which was intended to be secured. If it were intended to be bound by the distance, why refer to the line of another tract? Why not mark a tree at the end of the distance, if it is really surveyed, or specify the distance only if it is plotted. In every case where the line of another tract is called for and no actual survey has taken place, I should apprehend that it was done, either because the surveyor believed that the distance would reach it, or, if he should be mistaken in fact, then that the line and not the distance should ascertain the land which he certifies. I say this in reference to lines well ascertained and in the course called for; and whenever the distance falls short, I think the presumption very strong that the mistake has happened there. But

(227) if in any case of this kind it can be shown that the land was actually surveyed and located according to the distance, and such evidence is corroborated by marked lines and corners, it will then follow that the superfluous descriptions are false, and the patentee can consequently derive no benefit from them. I do not perceive that the case of *Bradford v. Hill,* 2 N. C., 22, is in opposition to this question. There Bryan's corner was four degrees to the east of north of the course called for in the deed to Bustin; notwithstanding which I suppose it was submitted to the jury to decide whether the old marked line from Pollock's to Bryan's corner was not the true one, since the case states that this line was taken by the jury to have been run by some person after the survey. It is true, the Court say, that in all cases where there are no natural boundaries called for, the dispute must be decided by course and distance, or by proving the line and corner. In that I concur, with this qualification, that the distance is not conclusive proof of the line and corner, where an old line is called for which is not variant from the course. Further than this, the present case does not call for an

opinion, though the cases of *Branch v. Ward,* of *Eaton v. Person,* and of *Person v. Roundtree* have gone much further in deviating from the words of the patent; for they all tend to establish this position, that the mistake of the surveyor or of the secretary who filled up the grant, shall not prejudice the patentee.

Rule discharged.

NOTE.—Upon the first point, see *Marr v. Peay,* 6 N. C., 84; *Debow v. Hodge,* 4 N. C., 36; *Wood v. Sparks,* 18 N. C., 389; *Wasson v. King,* 19 N. C., 262.

Upon the second point, see *Allen v. Jordan,* 3 N. C., 132, and the cases referred to in the note on the second point in that case.

On the last point, see *Smith v. Murphey,* 3 N. C., 183, and the cases referred to in the note.

Cited: Cherry v. Slade, 7 N. C., 90; *Wood v. Sparks,* 18 N. C., 395; *Dula v. McGhee,* 34 N. C., 333; *Brown v. House,* 118 N. C., 886.

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PENDER v. COOR.—Tayl., 315.

When the lines called for in a grant were "East 179 poles to an oak, thence southwardly, the various courses of the river"; and there was a marked oak at the end of the distance; and the river from the point where a direct line from the oak would intersect it, ran southwardly; but if the east line went directly to the river, the river from this point of intersection would run westwardly until opposite the oak; *it was held* that the jury ought to find the line to the oak, and thence southwardly to the river, if they believed that to be the real line run when the original survey was made.

Ejectment. The land claimed by the plaintiff was granted in the year 1745, and became the property of Walden in 1764, who, after owning it for thirty years, conveyed to the plaintiff. The courses and distances expressed in the patent were as follows: Beginning on the river, running then west 179 poles, then north 179 to a pine on the road, then east 179 poles to an oak, then southwardly the various courses of the river to the beginning. The pine at the end of the second line was proved, and in running the third line two fore and aft trees were found whose marks denoted age; at the end of the distance and about six poles northwardly of the latter line, was also found a black oak tree marked as a corner, though in appearance the marks were not so old as either those on the pine or on the line trees. This oak, however, was called by Walden his corner tree, and before the sale to Pender he said he could not sell further than the oak. If the third line stops at the termination of the distance, a line drawn thence south reaches the river at the dis-

tance of about 25 poles and leaves out the land claimed by the plaintiff. Whereas, if the third line is continued for 115 poles beyond the distance called for, it reaches the river and includes the land for which the suit is brought.

It was argued for the plaintiff that the river, in the course of the third line, must be the boundary; had it been expressly called for as the termination of the line it could not be more completely designated than it is by the fourth and last line being directed along its various courses to the beginning. The distance, therefore, must be disregarded, according to the cases of *Sandifer v. Foster,* 2 N. C., 237, and *Harts-*
(229) *field v. Westbrook, ibid.,* 258.

For the defendant, it was insisted that the cases cited could not govern this, which had features peculiar to itself, and in no wise resembling those relied upon. Here the word "southwardly" in the grant imports a direction to the river from the point where the distance of the third line gives out, and may well be taken as descriptive of the very short line which reaches the river; this seems evident, when it is considered that 179 poles form the length of each of the principal lines; and that the corner tree at the end of the disputed line, or one very near it, is well established.

Haywood and Stanly for the plaintiff.
Harris for the defendant.

By the Court. To decide this question upon the words of the patent alone, the inclination of my mind would be in favor of the plaintiff's construction. But, upon examining the situation of the land as described in the plot, and upon hearing the evidence with respect to the marked corner, a very strong presumption arises that the word "southwardly" was inserted in the patent for a purpose more significant than that of describing the various courses of the river to the beginning. The case, therefore, resolves itself into a question of evidence, whether the lines and corners are established with such certainty as to create a belief that the third line was intended to stop at the end of the distance, and thence to pursue a southwardly course in order to arrive at the river. For if that was the land originally patented, there should be a verdict for the defendant.

Verdict for the defendant.

NOTE.—See *Sasser v. Alford,* 3 N. C., 148; *Person v. Roundtree, ante,* 69, and the cases referred to in the note thereto.

Cited: Pender v. Coor, 3 N. C., 183; *McPhaul v. Gilchrist,* 29 N. C., 173; *Whitaker v. Cover,* 140 N. C., 284.

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SALTER v. SPIER.—Tayl., 318.

On the trial of an issue in equity, the defendant's answer cannot be read in evidence for him.

Upon an issue in equity, submitted to the jury to ascertain whether satisfaction had been received by the complainant for the property claimed in the bill, it was ruled by the Court that the defendant's answer, affirming the fact, ought not to be read to the jury as evidence of it, for the answer being replied to and put in issue, the defendant is bound to prove the facts he relies upon as a defense.*

* It is a rule in equity that if the facts upon which the complainant grounds his equity, be positively denied by the answer, the Court will not decree in the complainant's favor on the testimony of a single witness. But when the Court doubt concerning the fact, they order a trial at law, with direction that the answer shall be read to the jury, who are to decide what credit it is entitled to. A jury in this State forms a constituent part of a Court of Equity, in the determination of issues of fact; and as the Act of 1782, cap. 11, declares "that the same rules and methods are to be observed in this case, as have been practiced upon questions of fact being submitted by a Court of Chancery to the decision of a common law jurisdiction, it merits consideration whether they ought not, in every case, to decide upon the credit due to the answer." *Vide* 2 Vez., 42; 2 Atkyns, 19; 1 Eq. Cas. Abr., 229, pl. 13.

NOTE.—See *Scott v. McDonald*, 3 N. C., 98, and the cases referred to in the note; by which it appears that the answer is evidence for the defendant where it is directly responsive to the allegations of the bill, but not otherwise.

HUNT v. WILLIAMS AND MILLER.—Tayl., 318.

An answer taken abroad under a commission may be read, though the commission was taken out in blank and filled up by the defendant with the names of two persons, who did not appear either by the commission or certificate, to be authorized to administer oaths where the answer was taken.

The complainant's solicitor objected to the reading of the answer on this ground: A blank commission had been taken out and filled up by the defendant with the names of two persons, who did not appear either by the commission or certificate, to be authorized to ad- (231) minister oaths in Georgia, where they reside. He said that although the Court might direct a commission to any person, yet when the party is intrusted with a blank commission, he ought not to be allowed so much latitude; that he understood that in the case of *Blount*

v. Simpson, the Federal Court of this district had set an answer aside on the same ground, saying a party should direct his commission to a person authorized to administer oaths by the laws of the country in which he resides. For, if anyone could be resorted to indiscriminately, it would be easy to find some person mean enough to certify that an answer was sworn to, although no oath was ever taken.

F. X. Martin for the complainant.
Gaston for the defendant.

By the Court. Surely that is a great inconvenience; but the same mischief might occur if the rule was as stated; for such mean persons, who could be willing to certify that the answer was sworn to, without an oath being taken, would not scruple to add the letters J. P. or any title of office to their names.

Answer read.

NOTE.—See *Irving v. Irving,* 3 N. C., 1.

DAWSON v. SPEIGHT.—Tayl., 320.

If a commission to take an answer be filled up by the master, the party cannot strike out the name of the commissioner to insert another, though he might have done so had the commission been taken out in blank.

The complainant's solicitor objected to the answer being read, on the ground that it was not sworn before John Bolton, the person to whom the clerk and master had directed the commission, but before William Devereux, whose name had been inserted instead of that of John (232) Bolton, which had been struck out.

F. X. Martin for the complainant.
Stanly for the defendant.

By the Court. If a commission be taken out in blank, the party may fill it up, and afterwards, if occasion require it, strike out the commissioner's name; but if the clerk fill up the commission, his act is that of the Court, and the party may not strike out the name of the commissioner and insert another.

Answer set aside.

*** The "Observations on the Act of 1715, ch. 27, with a view to ascertain its proper construction," are to be found in 5 N. C., 22, in note b, to the case of *Stanley v. Turner,* and are therefore omitted here.

CASES RULED AND DETERMINED

BY THE

JUDGES

OF THE

COURT OF CONFERENCE

JUNE TERM, A. D. 1800

JAMES HOGG, SURVIVING EX'R., v. SAMUEL ASHE.—Conf., 3.

When a chose of action is assigned for value received, no debt contracted or liability incurred subsequently shall be allowed even at law as a set-off against the assignee, especially if there be an act of the Legislature taking notice of the assignment and enabling the assignee to sue in his own name.

This was an action of debt brought in the Superior Court of Law for the District of Hillsborough, on a writing obligatory executed by the defendant on the 9th day of December, 1778, to Robert Hogg and Samuel Campbell, merchants and copartners, by which he bound himself to pay them three years after the date thereof; but if a peace should be concluded sooner between Great Britain and America, then six months thereafter, £95 15s 1d, sterling money.

The declaration states that on the ..... day of ....., in the year of our Lord, 1780, Robert Hogg died, having made and duly published his last will and testament in writing, and thereof appointed James Hogg, William Hooper, and James Burgess executors; that on the 21st day of December, in the same year, by indenture bipartite, bearing date the same day and year, between James Hogg of the one part and Samuel Campbell by the name and description of Samuel Campbell of New Hanover, of the other part; the said Samuel Campbell, by (234) and with the consent of William Hooper and James Burgess, for and in consideration of four negro slaves, that same day sold and delivered to him by James Hogg, and in consideration of divers other matters and things thereafter to be performed by the said James Hogg, for the use and benefit of the said Samuel Campbell, did transfer and set over all his, the said Samuel Campbell's right, title, and interest; that is to say, one moiety of all debts or sums of money remaining due and owing to the copartnership of Hogg and Campbell, or the survivor

thereof, or to the representatives of the deceased partner, for or by reason of the said copartnership, from whomsoever the same was due, upon account, bill, bond, note, agreement, or other writing, and all the claim and interest of him the said Samuel Campbell to the said debts: To have, hold, receive, and take the said debts and every of them to the said James Hogg, his heirs, executors, etc., without account to the said Samuel Campbell. And he, the said James Hogg, by the said indenture, did covenant with the said Samuel Campbell that he would take upon himself the payment of all debts due by the copartnership to divers persons, and would at all times thereafter indemnify the said Samuel Campbell, his heirs, etc., from all actions, suits, etc., that might or should be brought against him, by reason thereof; and that he, the said James Hogg, would discharge and keep harmless the said Samuel Campbell, his executors, etc., of and from all the debts which at the time of the death of Robert Hogg were due from the copartnership, and which at the making of the said indenture, were then due and owing on account of the trade and copartnership between the said Robert Hogg and Samuel Campbell.

After the execution of this indenture, Samuel Campbell attached himself to the British enemy, and left this country, and was thereby rendered incapable of carrying on suits at law. At an Assembly, held at Fayetteville, on the 18th November, 1786, an act was passed, entitled "An act to enable and executors of Robert Hogg, deceased, to maintain and defend suits, under the regulations therein mentioned";
(235) which, after reciting that it had been represented and proved to the General Assembly that the said Samuel Campbell, while he was a citizen of this State, and before he withdrew from his allegiance to it, did assign and set over, for a good and valuable consideration, all his right, title, and interest in and to all the debts due to all the said copartnership, to James Hogg, one of the executors and devisees of the said Robert; and that the said Samuel, by withdrawing himself, was disabled by himself or by others, to bring suits in his own name, and that by the death of Robert Hogg the only mode of maintaining suits for the recovery of debts due to the said copartnership, agreeably to the laws then in force, must be in the name of the said Samuel Campbell, surviving copartner of Hogg and Campbell; and that thereby the executors of the said late Robert Hogg were utterly prevented from recovering the just debts due to the copartnership so assigned, and were disabled to carry the will of the said Robert into execution, and to pay his just creditors. It is therefore enacted that the said James Hogg, William Hooper, and James Burgess be and they were thereby authorized and empowered to maintain suits as well in law as in equity in

the names of them, the said William Hooper, James Hogg, and James Burgess, styling themselves executors of the said Robert Hogg, and in the names of the survivor or survivors of them, to sue for and recover all moneys due to the copartnership, in their names as executors, and to have recoveries as fully and as amply in the same manner as Samuel Campbell himself could, if he had remained a true and faithful citizen of this State, and had never assigned his interest in the copartnership to the said James Hogg.

After the passing of the act of Assembly, William Hooper and James Burgess died; and on the 20th day of April, 1796, James Hogg, as the surviving executor of Robert Hogg, deceased, brought this suit, to which the defendant pleaded "General issue, set-off, and notice of set-off, payment at and after," etc.

In the year 1789 the defendant recovered against Campbell the sum of £500 for negroes of the defendant, said to have been carried away by Campbell when he attached himself to the enemy. At (236) the trial of the cause, the plaintiff produced the bond declared on, as also the deed of assignment, and the act of Assembly, mentioned in the declaration, and on this rested his case. The defendant offered the judgment recovered by him against Campbell as a set-off, which was objected to by the counsel for the plaintiff; the objection was sustained by the Court (HAYWOOD and STONE, Judges, at April Term, 1797), and the plaintiff had a verdict for the value of the sterling money, mentioned in the bond, but the jury having given no interest, the plaintiff moved for and obtained a new trial, and the cause being tried at April Term, 1799, the jury found the bond declared on to be the act and deed of the defendant, that the sterling money therein mentioned to be of the value of £212 15 9, and assessed the plaintiff's damages to £119 3 9 and costs, subject to the opinion of the Court on the following questions, viz.:

1. Whether the bond declared on is within the description of these debts which James Hogg is entitled to sue for, under the Act of 1786?

2. Whether the bond declared on is within the description of these debts assigned by Samuel Campbell to James Hogg, by the deed of assignment recited in the declaration?

3. Whether the defendant is entitled to a deduction of the judgment aforesaid as a set-off against the amount of the sum found by the jury?

Upon which questions the cause now came on to be argued.

Williams, for plaintiff. All demands which are unliquidated, and which found only in damages, are incapable of being set off; those demands for which an action of debt or *indebitatus assumpsit* will lie, can only be set off. Principal and essential requisite to a debt, in order to its being set off, is that it should be mutual. Cowper's Reports, 56;

Iredell's Rev., 172. The debts here claimed are not mutual. The debt claimed by the plaintiff was contracted with the partners as joint merchants. The judgment obtained by the defendant, and now
(237) offered as a set-off, is obtained against Campbell in *jure proprio,* for a tort done to the defendant in carrying away his negroes, a transaction which cannot by any means relate to the partnership concerns, and which took place after the death of Robert Hogg, the other partner, and the consequent dissolution of the partnership. There is no instance of a set-off having been allowed, where the debt demanded is not due to the same persons precisely as the debt to be set off is due from. If this judgment shall be allowed to be set off, the deceased partner, Robert Hogg, would be subjected to pay a judgment recovered against Campbell for a wrong of his own. If one man receives rent for another, after his death, by appointment in his lifetime, and then be sued by the executors, he cannot set off a debt due from the deceased, because the deceased never had any cause of action against him; Bull., 180; and so here the defendant never had any cause of action against the plaintiffs, and therefore ought not to be allowed to set off this judgment against him. With regard to the party against whom it may be set off, I take the distinction to be this: Where the debt offered to be set off is recoverable and payable out of the same fund that the debt to be recovered in the action goes to increase, it may set off. Where two plaintiffs sue, and the sum offered to be set off can be recovered of one of them only, it cannot be set off; or where one sues and the sum offered to be set off is due from that one and another, it cannot be set off, because in either case the two actions cannot be reduced to one by a set-off without doing an injury to a third person, by subjecting him to the effects of an action, to which, before the act of set-offs, he would not have been subject. The act did not mean to extend the action of the defendant to a person not liable to it, without the act; but only to give him the effect of an action against the plaintiff, to which the plaintiff was liable without the act, but not subject to by way of set-off; and the law is so with respect to partnership dealings; the defendant cannot, by execution upon a judgment against one partner in his private capacity, seize and sell the whole partnership effects; he can only
(238) seize and sell the share of the partner against whom he has judgment, and the vendee becomes tenant in common with the other. If he cannot affect the other's share by judgment and execution, surely he cannot do it by set-off, which is in lieu of an action. Salk., 392. It is true, indeed, that by the death of Robert Hogg the remedy to recover the partnership debts survived to Campbell; but it is the remedy only which did so, the interest of the deceased did not. It is a rule in the

Law Merchant that *jus accrescendi inter mercatores locum non habet.* 4 Term, 123, 5 Bac. Abr., 580, 589. The interest of Robert Hogg, upon his death, survived to his executors, though the right to recover and get in the debts due to the partnership survived to Campbell, who by no conduct of his own, could burden the share of his deceased partner with an encumbrance other than that to which it was subject at his decease. Though Campbell's share might have been liable had no assignment been made, yet as it was assigned, and for a valuable consideration, and that assignment legalized and confirmed by the act of Assembly, before the defendant obtained his judgment against him, his share passed to the assignee, and is not subject in his hands to this demand. From the time of the assignment Campbell had neither interest in nor remedy to recover this debt. He and his property are liable to the defendant's action on the judgment, and the defendant is liable for the bond to the action of other persons, where recovery will go to increase the fund of the assignee which is not liable to pay the debt due to the defendant, and therefore the plaintiff is not such a person against whom the defendant's demand can be set off.

Haywood, for the defendant. The debt here offered to be set off is not unliquidated, but is reduced to a certainty by judgment. All the cases cited by the plaintiff's counsel in support of the position that unliquidated damages cannot be set off, do not apply to this case. It is wholly immaterial whether before judgment the demand was for damages uncertain or not. Whatever may have been the origin of the defendant's judgment, when the damages were ascertained and judgment rendered for them, they thenceforward were of equal (239) dignity with a debt due by bond. Every set-off is in lieu of an action; and when the sum offered as a set-off can be recovered in an action of debt, etc., it may be set off. And there can be no doubt but an action of debt will lie on the judgment against Campbell.

I admit that mutuality of debts is necessary, in order to a set-off; but the legal interest is only to be considered in a court of law. The assignment at best vests but an equitable interest in the assignee; and the interest in his hands is subject legally to all the encumbrances it was before had the assignment not been made. The share of the debts assigned is still legally considered due to the assignor. The assignment to third persons operates nothing, and so far as it regards the legal interest of the parties, leaves them precisely in the same situation they were in before it; and laying aside the act of Assembly, a judgment recovered against Campbell might be set off against a debt to be recovered by himself. That act, for the furtherance of justice, has vested the executors of the deceased partners with the right of suing; but the

debts recovered do, in contemplation of law, belong to Campbell. The executors by legislative creation are the representatives of the copartnership, and acting for it in the place of the surviving partner, and are subject to all such demands and actions as he is, and, of course, to an action for this debt, and consequently to the set-off. Viewing the case in this light, both the interest of Campbell, and Campbell himself by his representatives, the executors, are now before the Court. This ought to be considered as the action of Campbell to recover a debt which, both now and when recovered, the law deems payable to himself; consequently the debt sued for, and the debt offered as a set-off, are mutual debts within the meaning of the act of Assembly, and are clear of the objection endeavored to be raised for want of mutuality. The act of Assembly is in derogation of the common law, and ought to be construed strictly. 5 Bac. Abr., 650; 10 Mod., 282. By it the executors of Robert Hogg are empowered to sue, naming themselves his executors; (240) but they do not sue as executors, they are put in the place of the surviving partner—they represent him; they are enabled to recover, not for the purpose of paying over to the assignee or his representatives, but for the purpose of paying the partnership debts; they are, for anything expressed to the contrary in this act, to pay the balance to the person entitled by law to receive it, and that person is the surviving partner. They can only recover in cases where he might, were he not disabled; and they are subject in like manner as he would be were the suit brought in his own name.

JOHNSTON, J. The judgment pleaded as a set-off being founded on a cause of action which arose subsequent to the assignment by Samuel Campbell of his interest in the copartnership of Hogg and Campbell to James Hogg, cannot operate to discharge a debt due from the defendant to Hogg and Campbell, which debt appears to have been comprehended in the assignment. I am therefore of the opinion that judgment should be entered for the plaintiff.

TAYLOR, J. The question for the opinion of the Court is, whether this judgment recovered by the defendant in the year 1789, can be set off in this action, which is founded on a bond to which the plaintiffs acquired an equitable title in 1780, and a legal one in 1786. As to the effect of the assignment unaided by the act of Assembly, I cannot subscribe to the argument which asserts that it is a mere nullity, and therefore to be entirely disregarded in a court of law. The common law rule which, for the purpose of avoiding maintenance, prohibits the assignment of a chose in action, does not, by its original meaning and spirit, require, nor has the practical application of it justified a con-

struction so minutely rigorous. If a chose in action is assigned for lawful cause, as for a just debt, it is to some purposes valid even at law. If the lawful cause is wanting, it is neither good in law nor in equity. Bro. Abr., pl. 3. If one assigns a bond over, though it be not in its nature assignable, yet it is a good agreement that the assignee (241) shall have the money to his own use. 12 Mod., 554. In the same case there will be found an instance of a master's assigning an apprentice-bond to another, the contract for which was held good between themselves. An assignment of a chose in action has been held a good consideration for a promise. 2 Bl. Rep., 820. And the power of assignment has, for the convenience of commerce, been extended to *respondentia*-bonds. *Ibid.*, 1272. The case of *Wench v. Kaly*, 1 Term Rep., 619, and the others therein referred to, show how far and under what circumstances a court of law has organized the real, though not the nominal, parties to the suit, and protect their interest, whenever they were made known in a proper manner. All these cases serve to show that regard has been paid to such transactions to a certain degree at least.

But the case of *Deering v. Carrington*, 12 W., 3 B. R., proceeds to a still greater length in the protection of such rights. "Where a bond is assigned over with a letter of attorney therein to sue, and a covenant therein not to revoke, but that the money should come to the use of the assignee, although the assignee be dead, yet the Court will not stay proceedings in a suit upon a bond in the obligee's administrator's name, though prosecuted without his consent, for that those assignments to receive the money to the assignee's own use, with covenants not to revoke, and also with a letter of attorney in them, although they do not vest an interest, yet have so far prevailed in all Courts that the grantee has such an interest that he may sue in the name of the party, his executors and administrators." It seems to me that on the authority of this case a court of law might take notice of such an assignment as is there described, as to all purposes except suing in the name of the assignee; for if he may use the name of the obligee, and even of his representatives after his death, against their consent, and prosecute the suit to judgment, notwithstanding any attempt on their part to stay the proceedings. If he may do these things, ought his right to be defeated by a release given to them, or payments made after notice of the assignment, or by any supervenient claim against the obligee? (242)

The great change which has taken place in the contracts of men, from the improved state of society and the increase of commerce; the desire of giving facility to these transactions by which the circulation of a great proportion of the wealth of the country is promoted,

and the superior estimation in which personal property is now held from what it formerly was, have contributed gradually to relax the rule from the rigor in which ancient writers have laid it down, as far as it respects personalty. Indeed, the rule itself contemplates a distinction between a chose in action real, and a chose in action personal; for Broke, after stating an instance, wherein a chose in action personal may be assigned, proceeds thus: "But a chose in action real, as entry he cannot grant over, and it is not like to a chose in action personal or mixed, as debt," etc. Hard. pl., 14. I am aware, and candor induces me to state, that many of the decisions I have referred to have been considered by an able Judge as usurpations of a court of equity. *Bauerman v. Radenius,* 7 Term Rep., 666. To this opinion I must oppose the observations of another able Judge, in *Maske v. Miller,* 4 Term Rep., 340, the practice of this country (in respect of which I will state two cases in addition to those formerly mentioned; one was the case of *Fleming v. Theames,* tried at Fayetteville, in which I was counsel: It was an action of covenant brought upon an agreement for the delivery of specific articles; the interest in the paper was fairly assigned to a third person, and a memorandum to that effect was indorsed upon the writ. Before the trial, a release was executed by Fleming to Theames, who attempted to avail himself of it, but the Court, without hesitation, rejected it. The other, ... *v. Wilkinson,* was tried before Judge HAYWOOD and myself at Halifax October Term, 1799, the circumstances of which were nearly similar). And lastly, though with less confidence, my own opinion, that it is conformable to a correct, though liberal interpretation of the law.

If justice can be attained in a court of law, without violating
(243) the fundamental maxims upon which it proceeds, the parties ought not to be turned aside by refinements merely technical. What has been so often and so beneficially done, may safely be followed; and the security of men's rights requires that it should be, if upon examination it does not militate with those established principles which it is our duty to preserve.

Secondly. But the Legislature, in 1786, confirmed what the parties had done in 1780, and added the only circumstance it required to give it complete legal validity, the right of suing in the name of the assignee. The act does not profess to interfere with the rights of third persons; nor ought it to receive a construction that will in the least degree impair them. Whatever claim then existed against Campbell, in the shape of legal set-offs, were preserved to his debtors, who, if they might have enforced them against him at the period of the assignment, may also, as I conceive, against his assignees. This is a fair construction of an

Act of Assembly authorizing an assignment for a particular purpose. Even in negotiable instruments, if indorsed after they become due, the law is different on account of the general quality of negotiability conferred on them by statute. But what were the rights of the defendant when the assignment was confirmed? They were altogether vague and indeterminate, possessing no legal existence, and manifestly incapable of forming the subject of a set-off. Until judgment was rendered for the damages assessed by the jury, the defendant had no claim for any specific sum; in legal consideration, his right was not merely defined, but acquired by suit and judgment; and when this took place, Campbell was no longer his creditor.

It is worthy of remark that the preamble of the act states that the assignment was made to James Hogg, one of the executors and devisees of Robert Hogg, for a good and valuable consideration; and the inconvenience sought to be remedied is the disability of the executors of Robert Hogg to recover the partnership debts, and thereby to carry the will of Robert into execution, and pay his just debts. These two circumstances strongly indicate that Robert Hogg was substantially, as well as formally, entitled to all the partnership rights, and that (244) the recoveries authorized by the purview were to be applied according to the direction of his will. But however this may be, it is clear the act gives them a right to recover all that Campbell himself was entitled to at that time. More than this would be derogatory to the rights of others not parties to the act, and therefore unjust. Less than this would be to leave the rights of the assignees at the mercy of Campbell, who, if he could rightfully charge them with a shilling after the assignment, either by his tortious acts or by contracting debts, might encumber the property assigned to the full extent of its value, and thus render the Act of Assembly nugatory. For these reasons I think the plaintiff should have judgment.

MACAY, J. I am of opinion that the bond declared on is within the description of those debts which James Hogg, the plaintiff, is entitled to sue for, under the Act of 1786, and is also within the description of those debts assigned by Samuel Campbell to James Hogg by the deed of assignment recited in the declaration, and for the reasons given the judgment obtained by the defendant against Campbell cannot be admitted as a set-off.

Judgment for plaintiff.

NOTE.—See same case reported in 2 N. C., 471, and the cases referred to in the note thereto. See also *State Bank v. Armstrong*, 15 N. C., 519; *Haywood v. McNair*, 19 N. C., 283; *Bunting v. Ricks*, 22 N. C., 130.

THOMAS MITCHELL v. ROBERT BELL.—Conf., 17.

If an attorney promises his client, during the suit, to indemnify him against the consequences of it, the promise is without consideration, and will not support an action.

This was an action on the case brought by Mitchell against Bell, an attorney in the Superior Court of Law for the District of Halifax, in which the jury, at October Term, 1799, found the following verdict: "We find that the defendant did assume and assess the plaintiff's (245) damages to £32 6s 7d, subject to the opinion of the Court on the following case: That in the year 1792 the defendant, as attorney-at-law, instituted a suit on behalf of the present plaintiff, Thomas Mitchell, against Dred Taylor, executor of Henry Taylor, deceased—living William Lancaster, the other executor; that Dred Taylor afterwards died, leaving Hardy Hunt and Henry Hunt his executors; that a *scire facias* issued at December Court, 1792, against Dred Taylor's executors, and made them parties to the said suit—living William Lancaster, the executor of Henry Taylor—that at the time the *scire facias* was returned, Bell, the defendant, who was the plaintiff's attorney in the aforesaid suit, promised the plaintiff that in case he was nonsuited, thereby meaning cast or in any way defeated, that he, the said Bell, would pay all costs; that the present plaintiff was cast in the county court of Franklin, as appears by the record filed, and paid costs amounting to the sum of £32 6s 7d; and if the law is for the plaintiff, we find for the plaintiff; otherwise, for the defendant."

This case was brought before the Judges at their meeting this term for determination.

JOHNSTON, J. The promise in this case, stated to be made by Bell, is founded on no consideration; therefore, I am of opinion the judgment should be entered for defendant.

TAYLOR, J. This action is founded upon an express promise made by the defendant, an attorney, that if the plaintiff should be nonsuited, or cast in the suit, he would reimburse him all the costs.

Were this an action against the defendant for mismanagement of the cause or neglect of duty, it would have been unnecessary to have stated any other consideration than his undertaking the management of the suit. Every attorney receives the trust accompanied with responsibility to his client, for any loss occasioned by his improper conduct; in such a

case it might be necessary to examine how far he is liable where the loss arises, rather than error in judgment than from neglect (246) or positive misconduct, and likewise to ascertain under which of these two descriptions the defendant's conduct ought to be classed. But in this case all such inquiries are useless, because if the defendant is liable at all, he is so by virtue of his express promise, which would charge him without regard to the means by which the suit was lost.

As a consideration is indispensably necessary to support every assumpsit, it must be ascertained whether nay exists in the present case; it is not pretended that the plaintiff paid anything at the time of the promise, or that he forewent any advantage or benefit that he might otherwise have had; the only consideration that can be possibly set up is, that he employed the defendant as an attorney, and in that character reposed confidence in him; but can that consideration be connected with this promise? I apprehend not, because it was perfectly past and executed.

All the indemnity legally resulting from such misplaced confidence the plaintiff may enforce in another form of action; but to prevail in this, it ought to be shown that the undertaking of the defendant was in consideration of the plaintiff's employing him. It is true that in some cases an *assumpsit* will lie, although the consideration is past, if there was a duty before; but in all of them the duty is coextensive with the promise. In this case the duty extended no further than a careful, diligent, and possibly skillful management of the suit; it did not go the length of making compensation to the plaintiff if he failed in his suit at all events, or under any possible circumstances.

This promise was altogether without prejudice to the plaintiff, or benefit to the defendant; the former would have been precisely in the same situation if the promise had never been made; the latter received no new confidence or reward for making it. It is within the idea of *nudum pactum* most completely. I am therefore of opinion that judgment be entered for defendant.

MACAY, J. This undertaking or promise, being wholly with- (247) out consideration, is void.

Judgment for defendant.

NOTE.—See *Sweany v. Hunter*, 5 N. C., 180; *Johnson v. Johnson*, 10 N. C., 556; *Hatchell v. Odom*, 19 N. C., 302.

SARAH HAYES v. JOHN ACRE.—Conf., 19.

The action of *assumpsit* will lie on either an express or implied promise to pay for the use and occupation of land.

The record in this case stated it to be an action on the case for *assumpsit,* for use and occupation of land, brought in the Superior Court of Law for the District of Edenton at April Term, 1800; there was a verdict for the plaintiff for £7 10, subject to the opinion of the Court, whether the plaintiff can recover in this action for the use and occupation of land.

JOHNSTON, J. I am of opinion that the action is proper, and that judgment should be entered for the plaintiff.

TAYLOR, J. It does not appear from the verdict whether the action was founded upon an express or implied *assumpsit.* Upon the former, I conceive the action was always maintainable; 1 Roll. Abr., 8; and there is an authority in 3 Mod., 73, which warrants the opinion that an *assumpsit* will lie on an implied promise for rent. The reason given for exclusively using the action of debt to recover rent is quite technical and insufficient to overturn the established practice of the country, which is founded in justice and convenience. Many recoveries have been had in such cases upon implied promise, and this objection has not to my knowledge ever prevailed. There ought to be judgment for the plaintiff.

(248) MACAY, J. Upon the verdict in this case, the plaintiff ought to have judgment.

Judgment for plaintiff.

Cited: Hardy v. Williams, 31 N. C., 178; *Long v. Bonner,* 33 N. C., 30.

ABNER ALEXANDER, GUARDIAN, ETC., v. JEREMIAH BATEMAN.—Conf., 20.

Proceedings before a single justice cannot be brought before the county court by *certiorari* or other writ. They can come before it only by appeal.

This was a writ of error, brought in the Superior Court of Law for the District of Edenton, to reverse the judgment of the county court of Tyrrell, in a cause between the above-mentioned parties.

The record states that the plaintiff, Alexander, sued out a warrant against the defendant, returnable before one of the Justices of Tyrrell

County; "pending the warrant, Bateman applied to the Court to have the proceedings brought before them, which was ordered and accordingly done"; and at a Court held for that county, October Term, 1797, a jury was impaneled who found for the defendant; on which the plaintiff prayed a writ of error, and assigned the following errors, to wit: "That by the laws of the land the county courts of pleas and quarter sessions have no power to grant writs of *supersedeas, certiorari, mandamus,* or false judgment, or in any other manner to remove or correct the judgment, sentence, or decree of any justice of the peace (out of session) except by appeal, which the Court in this instance has undertaken to do. Wherefore the said Abner prays," etc. The defendant pleaded *"in nullo est erratum."*

JOHNSTON, J. The judgment and proceedings of the county court should be reversed and set aside, having no jurisdiction, such as they have exercised in this case.

TAYLOR, J. There is no power given to the county courts to (249) direct proceedings had before magistrates, to be brought before them; their jurisdiction is confined to specified and enumerated objects; if it is extended beyond these in one instance, it will be difficult to fix the point where it shall stop.

The regulations which are made relative to appeals from the judgment of a magistrate, will be rendered nugatory by this novel mode of proceeding. Whatever is claimed to be within the jurisdiction of an inferior court ought to be plainly shown, as in pleading, nothing shall be intended within its jurisdiction unless it be expressly alleged.

MACAY, J. The county court have exceeded their jurisdiction. Let their judgment be reversed.

Judgment reversed.

Cited: Barham v. Perry, 205 N. C., 430.

JAMES DALGLEISH v. CHARLES GRANDY.—Conf., 22.

A landlord has no power in this State to distrain for rent, the process of distress never having been adopted here.

This was a writ of error, brought in the Superior Court of Law for Edenton District, to reverse the judgment of the county court of Pasquotank, in a cause between the above-mentioned parties.

The record stated this action to have commenced by a warrant of distress, issued by Grandy, the landlord, directed to the sheriff of Pasquotank, requiring him to go on the land where Dalgleish lived and to distrain so much of the property of said Dalgleish as would satisfy Grandy for one year's rent in arrear, being £150, and to cause the property so distrained to be appraised and sold after the expiration of five days, except they should be replevied; in pursuance of which warrant the sheriff distrained sundry articles of property belonging to Dalgleish, which were replevied. The warrant of distress and replevy bond
(250) were returned to the next court of pleas and quarter sessions held for said county. The defendant, Dalgleish, appeared by his attorney and pleaded *"nil debet,* payment and set-off, tender, refusal, release, and satisfaction, with leave to give the special matter in evidence"; and at September Term, 1796, a jury being impaneled, found for the plaintiff, Grandy, and assessed his damages to £150 and costs; the defendant's attorney then moved in arrest of judgment, and filed his reasons, viz.: That the verdict is contrary to the bill of rights, the Constitution, and the law of the land. That the proceedings are illegal and irregular as they appear on the record, and that even supposing the verdict could be justified by the Constitution and laws of the county, the plaintiff showed no cause of action; which reasons being overruled, the defendant then prayed a writ of error, which was granted, and the cause brought up to the Superior Court.

It does not appear from the record that any errors were assigned; but if they were, they must have been the same in substance and effect with the reasons in arrest of judgment. The question in this case was, whether the remedy elected by Grandy to recover the rent said to be due to him by Dalgleish was a legal and constitutional one or not.

JOHNSTON, J. There being no laws in force in this State regulating proceedings on a warrant of distress for rent, I am of opinion that the judgment of the county court be reversed.

TAYLOR, J. I am not informed of any general usage in this State which has heretofore amounted to an adoption of the common and statute laws of England relative to distresses. They were anciently in the nature of pledges, which the distrainer had no power to sell, and the authority for that purpose is given by the Statute of Will. and Mary, ch. 5, which is certainly not in force here. This warrant directs a sale after the expiration of five days, unless the chattels are replevied, thereby conforming to the provisions of the statute, which have no operation

in this State. The process is in the first instance erroneous. (251) But if this mode of proceeding had ever been sanctioned by custom before the revolution, it is utterly irreconcilable to the spirit of our free republican government. Justice does not make a distinction in favor of a creditor whose debt arises from the lease of land rather than that of him who has hired a chattel; it does not require that the former should be entitled to a process *in rem*, when the latter can only proceed *in personam*, but both should ascertain their demand by the verdict of the jury, allowing to the debtor an opportunity of contesting it before his property is seized upon. The Legislature has provided for these cases when it is expedient that property should be taken in the first instance, and their refusal to pass a law authorizing distresses has been upon the ground that it is unconstitutional. I am of opinion that the judgment should be reversed.

MACAY, J. No such remedy for the recovery of rent, as it is attempted to be used in the present case, is known in this State, and is contrary to the spirit of our laws and government, and cannot be supported.

Judgment reversed.

Cited: Kornegay v. Collier, 65 N. C., 70; *Harrison v. Ricks,* 71 N. C., 12; *Smithdeal v. Wilkerson,* 100 N. C., 54.

SILAS BRIGHT, BY GUARDIAN, v. THOS. WILSON AND WIFE.—Conf., 24.

1. The action of waste will lie in this State.
2. It is not error for the judgment in an action of waste to be for the damages only and not also *pro* the place wasted.

This was a writ of error brought in the Superior Court of Law for Edenton District, to reverse the judgment of the county court of Currituck, rendered in a cause between the above-mentioned parties. The plaintiff brought a writ of waste in the words following, (252) to wit: "State of North Carolina, to the sheriff of Currituck County—Greeting: You are hereby commanded to summon Simon Wilson and Franky, his wife, that they be before the Justices of our county court of pleas and quarter sessions, to be held at the courthouse of our said county on the last Monday of February next, to answer unto Silas

Bright, an infant, etc., by Aaron Bright, his father and natural guardian, in a plea why in the houses, lands, and woods, in the county of Currituck aforesaid, which in the right of said Franky they hold for the term of the life of the said Franky, by the devise of Silas Bright, deceased, they have made waste, spoil, and destruction to the disinheriting of him the said Silas, against the provisions of law and to the damage of him, the said Silas, 500 pounds; herein fail not," etc.; which, being executed and returned to February Term, 1797, the defendants appeared and pleaded "the general issue, with leave to give the special matter in evidence," and the cause was continued from term to term until May Term, 1798, when a jury being impaneled and sworn, found the defendants guilty of having committed waste in the premises charged in the plaintiff's declaration, and assessed the plaintiff's damages to £138 8d and costs; whereupon the defendants prayed and were allowed a writ of error, and by their attorney assigned the following errors, to wit: "That in the record and proceeding aforesaid, and also in giving the judgment aforesaid, there is manifest error, to wit, that the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said Silas Bright to have and maintain his aforesaid action thereof against the said Simon Wilson and Franky, his wife; there is also an error in this, to wit, that by the record it appears that the judgment aforesaid, in form aforesaid given, was given for the said Silas Bright; whereas, by the laws of the land, the said judgment ought to have been given for the said Simon Wilson and Franky, his wife, against the said Silas Bright; and the said Simon Wilson and Franky, his wife, pray that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed
(253) and annulled, and altogether held for nothing, and that they may be restored to all things they have lost by occasion of the said judgment.

William Slade for plaintiffs in error.

JOHNSTON, J. I am of opinion that the judgment of the county court should be affirmed.

TAYLOR, J. No special errors are assigned in this case, and I have not, upon a view of the record, been able to discern any; the writ in its substantial parts is conformable to the precedent in the register, and though the judgment does not appear to be rendered according to 6 Ed. 1, for the place wasted, yet that omission being for the defendant's benefit, was not, I presume, intended to be assigned.

MACAY, J. I am also of opinion that the judgment of the county court should be affirmed.

Judgment for defendants in error.

NOTE.—See *Ballentine v. Poyner*, 3 N. C., 110, and the cases referred to in the note.

Cited: Dozier v. Gregory, 46 N. C., 104.

ISAAC GUION v. WILLIAM SHEPHARD, TREASURER OF PUBLIC BUILDINGS FOR CRAVEN COUNTY.—Conf., 26.

In a writ of error, the errors must be assigned when the writ is filed, which must be fifteen days before the Superior Court.

The record in this case stated that at a Court held for Craven County, on the second Monday of September, in the year of our Lord one thousand seven hundred and ninety-eight, William Shephard, by Thomas Badger, Esq., his attorney, produced to the Court the following notice against Isaac Guion, late treasurer of public buildings in (254) Craven County, viz.:

"New Bern, 24th July, 1798.

"SIR:—I received your note and should have no objection to your continuing to have the management of repairing the jail, if with propriety such a thing could be done; on examining the Act of Assembly under which the treasurer holds his office, I find that he alone is answerable for the proper disposition of the moneys, and for the sufficiency of the repairs. He, of course, cannot delegate his authority to any other person. I must therefore insist that you pay over to me the amount of the moneys in your hands, before the ensuing Court, to be held for Craven County, otherwise I shall then move for judgment to be entered up against you agreeable to Act of Assembly, for the amount and interest up to that time.

"I am, your obedient servant,

WILLIAM SHEPHARD."

"To Isaac Guion, Esq."

"July 26th, 1798, this day delivered Isaac Guion, Esq., a notice of which this is a true copy.

"WILLIAM DUDLEY, Dep. Sheriff."

On motion of the plaintiff's attorney, judgment was entered up against Isaac Guion for the moneys in his hands as late treasurer, with interest. The defendant prayed and was allowed a writ of error, returnable to the March Term of New Bern Superior Court, 1799; and on the second day of April, 1799, being the 13th day of the term of March, 1799, *Edward Graham, Esq.*, attorney for plaintiff in error, assigned error the following words, to wit: "The want of trial by jury," and the Court ordered the following entry to be made on the minutes and records of the Court for that day, to wit, "the second day of April, 1799, being the 13th day of March Term, 1799.

(255) "Isaac Guion

"v.

"William Shephard, Treasurer, etc.

"Writ of Error. Errors assigned by the plaintiff in error this day, saving all objections of the defendant."

And now the question was, at what time ought the plaintiff in error to file his assignment of errors.

JOHNSTON, J. Errors should be assigned and filed with the proceedings at the time by law pointed out for filing them with the clerk of the Superior Court. I am therefore of the opinion that the writ of error be dismissed.

MACAY, J. The errors ought to be assigned and filed fifteen days before the time of holding the Superior Court of Law, to which the writ of error is returnable.

Writ of error dismissed.

NOTE.—See 1 Rev. Stat., ch. 4, sec. 17.

Cited: Petty v. Jones, 23 N. C., 411.

WILLIAM CARTER, *qui tem*, v. JOHN B. BRAND.—Conf., 28.

Where A. had a judgment and execution against B., and on the day of sale consented to indulge B. in consideration of a sum more than the legal interest for the time of indulgence, and afterwards the judgment, together with this sum, was paid; *it was held* that this was usurious, and that A. was liable in an action for the penalty, under the statute against usury.

CARTER *v.* BRAND.

This was an action of debt upon the statute of usury, commenced in the county court of Glasgow, to which the defendant pleaded *nil debet,* and *stat. lim.* The plaintiff had a verdict in the county court, and the defendant appealed to the Superior Court of Law for the District of New Bern, at March Term, 1799; the cause was tried, when the jury found a special verdict, in the words following, to wit: "That the defendant does owe the sum of two hundred and thirteen (256) pounds ten shillings and six pence, and that the plaintiff instituted his action within the time limited by law, subject to the opinion of the Court upon the following points reserved, viz.:

"1st. Whether this action is subject to the operation of the Act of Parliament passed in the 31st year of Elizabeth, chap. V, and on a question arising out of these facts, which the jury find, to wit: That on the thirty-first day of January, one thousand seven hundred and ninety-four, the said William Carter was indebted to the said John B. Brand in the sum of one hundred and six pounds eleven shillings and nine pence, for which judgment had been obtained and execution thereon had issued, which execution the sheriff had levied, and had appointed the said thirty-first day of January to sell the property levied on to satisfy the same; and on that day the said John B. Brand did agree that the said sale should be postponed eighteen days, in consideration that the said Wm. Carter would pay him, the said John, ten dollars more than the legal interest arising on said sum; and afterwards the said John B. Brand, to wit, on the eighteenth day of February next following, did receive from the said William Carter the amount of the said judgment, and also the said sum of ten dollars more than legal interest, as aforesaid, for the said postponement and forbearance." And the question submitted to the Court is, whether the case upon these facts is within the statute of usury. "If the opinion of the Court upon the law and facts above stated is in favor of the plaintiff, they find for the plaintiff, and assess six pence damages and six pence costs; but if the opinion of the Court should be in favor of the defendant, they then find for the defendant."

JOHNSTON, J. From the facts stated in the special verdict, I am of opinion that the contract is usurious, and that there should be judgment for the plaintiff.

MACAY, J. I am clearly of opinion that the facts stated in the special verdict amount to usury.

TAYLOR, J. Every case arising upon the Act of Assembly to (257) restrain excessive usury must be viewed in all its circumstances,

so as to ascertain the real intention of the parties. If that be corrupt in the substance and design, no pretext however plausible, no contrivance however specious, no coloring however artful, with which the transaction is veiled, will secure it from the censure of the law. *Crimen omnia ex se nata vitiat.*

I think this special verdict discloses a clear case of usury. There is a debt due and an agreement to postpone the sale by which it was to be satisfied, for a consideration of ten dollars beyond the legal interest. The actual receipt of the debt, as well as the excessive interest for the forbearance, is also found. No part of the principal is put in hazard, but the whole is actually secured by the levy; nor is the agreement to pay the excess subject to any contingency, but is found to have been positive and absolute. In short, I do not perceive any principle upon which the attempt is usually made, to take cases of this sort out of the Act of Assembly.

If the doubt arose from the circumstance, that the execution being levied, the plaintiff had, therefore, no right to postpone the sale, but could only use his good offices to that end with the sheriff, I should not conceive it as making an alteration in the case. For although the law does upon the levy vest a possessory property in the sheriff to enable him to protect it from wrongdoers, yet he is substantially the agent or trustee for the plaintiff as to the produce of the goods. The law creates a privity between them, and will consider many acts done by the sheriff, by direction of the plaintiff, as the acts of the plaintiff himself. Thus he may by parol discharge a defendant when taken in execution upon a *ca. sa.*, and if a payment of the money to the sheriff will, upon a *fi. fa.*, discharge the execution, by the same reason will a payment to the plaintiff himself, who may consequently put a stop to the sale. Cases might arise where a sale of all a defendant's property was about to be made under such circumstances, as that the judgment could not possibly be discharged, when perhaps a postponement of the sale would pro-
(258) duce a different result. Cases of combination also between the sheriff and the bidders might be checked by the timely interposition of the plaintiff, and thereby much future litigation saved. I think from the statement in this case that the postponement and forbearance must be considered as the acts of the then plaintiff; and that if they were not so, nothing would be more easy than to evade the act upon which this suit is brought.

Judgment for plaintiff.

The Judges gave no opinion in this case respecting the operation of the Act of Parliament, passed in the 31st year of Elizabeth, chap. V.

Cited: Pratt v. Mortgage Co., 196 N. C., 297.

JOHN LEAKE, EX'R., ETC., v. JOHN MURCHIE, SURVIVING PARTNER OF JAMES GALLOWAY & CO.—Conf., 32.

A writ of error may be granted upon notice to the attorney at law who obtained the judgment, when the party resides out of the State.

This was a motion made in Salisbury Superior Court of Law, March Term, 1800, for the allowance of a writ of error upon a judgment obtained by Murchie, the surviving partner of *James Galloway & Co. v. Leake, Executor of Rose,* in the county court of Rockingham.

The plaintiff in error produced the affidavit of one Matlock, stating that he had delivered a written notice to the attorney, who obtained the judgment in the county court, that the executor intended moving for a writ of error at this term, the affidavit also stated that Murchie, the surviving partner, was an inhabitant of the State of Virginia; and the question reserved for the opinion of the Judges at their meeting at this term was, whether notice to the attorney who obtained the judgment complained of was sufficient notice to authorize the Court to grant the writ of error.

The Act of Assembly authorizing the Superior Courts to grant writs of error, to correct the errors of any inferior court, to prevent obtaining writs of error by surprise, requires "that the party (259) praying such a writ in a civil cause shall give notice in writing to the adverse party, at least ten days before motion of his intention to move for such writ; and no such writ shall be granted without affidavit of such notice." *Vide* Iredell's Rev., page 307, 74 sec., ch. 2, Act 1777.

JOHNSTON and MACAY, JJ. We are of opinion that notice to the attorney-at-law who recovered the judgment complained of is sufficient notice to authorize the Superior Court of Law to grant the writ of error.

Writ of error allowed.

JOHN ARMSTRONG ET AL. v. WILLIAM BEATY ET AL.—Conf., 33.

When a defendant is served with a copy of a decree of the Court of Equity and refuses to perform it, an attachment is the proper mode of compelling performance.

This was a case in equity from Salisbury District; the record states, that at September Term, 1799, the complainants obtained a decree against the defendants, and had legally served them with a writ of execu-

tion of the said decree, as appears from the return made on said writ by the sheriff of Lincoln; it further states that William Beaty, one of the defendants, has absolutely refused, and still does refuse to perform the said decree; and the question reserved for the opinion of the Judges at their meeting this term was, what process is proper to enforce compliance with a decree made by the Superior Courts of Equity.

JOHNSTON and MACAY, JJ. The defendant, William Beaty, having been duly served with a copy of the decree made in this case, and having refused to perform that decree, we are of opinion that an attachment ought to issue to compel a performance.

NOTE.—In decrees of a Court of Equity for any sum of money, execution may issue as at law. See 1 Rev. Stat., ch. 32, sec. 6.

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DUNCAN M'AUSLAN ET AL. v. JOHN GREEN ET AL.—Conf., 33.

1. Under the Act of 1784 (see 1 Rev. Stat., ch. 64, sec. 1), a widow of an intestate dying without children is entitled to only one-third part of his personal estate.
2. The Court of Equity allowed commissions at the rate of five per cent only, though the county court had allowed at the rate of ten per cent on the whole amount of the estate.

This was a case in equity from the District of New Bern. The bill states that the complainants are the brothers and sisters of Alexander M'Auslan, late of New Bern, dec., who died intestate, possessed of a large personal estate, *without issue,* leaving Sidney M'Auslan, since married to Furnifold Green, one of the defendants, his widow. The bill charges that by Act of the General Assembly, made for settling intestates' estates, the estate of their deceased brother ought to be divided into three equal parts, one of which should be allotted to the said widow, and the remaining two-thirds equally divided among the complainants, who are the next of kin to Alexander M'Auslan, deceased. The bill then states that Sidney M'Auslan, widow of the deceased, and John Green, of New Bern, administered on the estate of Alexander M'Auslan, and that the widow afterwards intermarried with Furnifold Green, and that the whole estate of the deceased has come to the hands of the said administrator.

The answer of Furnifold Green and Sidney, his wife, admits the death of the intestate, Alexander M'Auslan, and that she with John Green, one of the defendants, administered on the estate and that the personal

estate of the said Alexander M'Auslan to a large amount, after paying debts, etc., has come to their hands, but insists that she is entitled to one-half of the clear surplus of the said estate.

The answer of John Green, the other defendant, also admits the death of Alexander M'Auslan, intestate, and that he with Sidney M'Auslan, his widow, since married to Furnifold Green, obtained administration on his estate, that he has sold the personal estate to a large amount, and has paid to Sidney, wife of Furnifold Green, and to him in (261) right of his wife since their marriage, nearly one-half of the clear surplus of said estate, upon the supposition and belief that she was entitled to one-half, there being no issue. His answer then insists that he is entitled to retain a commission of ten per centum on the whole amount of said estate, which was the allowance made him by the county court of Craven on the settlement of his accounts. It is admitted by the other defendants that he alone has had the care and management of the estate.

Two questions were referred to the Judges for their decision in this case:

1. To what share of the personal estate of Alexander M'Auslan who died intestate, without issue, is his widow entitled?

2. Ought any commissions to be allowed the administrator for his care and trouble; if any ought to be allowed, at what rate per centum?

JOHNSTON, J. The widow has a claim to no more than one-third of the intestate's estate, and a commission of five per centum is fully adequate to the services of the administrator, such as they appear to me.

MACAY, J. I am of opinion that the widow of the intestate is entitled to one-third part of the personal estate, and to no more. Acts of 1784, sec. 8, and chap. 22; and that commissions ought to be allowed at the rate of five per centum.

Decree accordingly.

NOTE.—On the allowance of commissions to executors and administrators, see *Hodges v. Armstrong*, 14 N. C., 253, and *Walton v. Avery*, 22 N. C., 405.

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WILLIAM SPENDLOVE v. JANET SPENDLOVE ET AL.—Conf., 36.

The Court of Equity will issue a writ to the sheriff to take out of the defendant's possession, property which is the subject of a suit, if it appears that there is danger of the removal of the property, unless he gives security for its production, etc.

SPENDLOVE *v.* SPENDLOVE.

This was an original bill, brought by *Peter Mallett* and *Edward Jones,* Esquires, attorneys in fact for the complainant, who is an inhabitant of the Island of Jamaica. The bill states that the complainant and the defendants are the natural children of Goodin Elletson, formerly of Bladen County, who was possessed of a large estate, consisting of lands and negroes; and being so possessed, on the 29th of July, in the year of our Lord, 1783, made his last will and testament in writing, whereby he devised all his estate, both real and personal, to be equally divided between and among them, the said Janet, Roger, and William Spendlove, his natural children, share and share alike, and to their heirs, etc., forever.

The bill further states that after the death of Goodin Elletson, the defendants possessed themselves of his whole estate; that a Court held for Bladen County, in February, 1790, made a division of the negro slaves of the testator, and allotted twenty-six negroes as the proportion of the slaves which the complainant was entitled to under the will aforesaid.

The bill then states that the said slaves allotted to the complainant were hired by the county court of Bladen to the defendants for one year, and an order was made by said court, directing the defendants to hire out said negroes each and every year, and to make return of the hiring to the next succeeding court. This never was done by the defendants, but they kept possession of the slaves and worked them for their own use and benefit.

The bill then states that the defendants have wasted all their own estates both real and personal, and that the complainant is convinced it is their intention to send off or dispose of such of the slaves as (263) they can, before they can be recovered from them in the usual course of law; and that they have now no visible property whereby the complainant or any creditor can have satisfaction for any recovery to be had or made of them. The bill then prays a decree for the said slaves and the profits of their labor, and prays a writ to the sheriff of Bladen, or to such other person as the Court shall direct, empowering and directing him to take into possession all and singular the negro slaves divided and allotted to the complainant as his share and portion of the negroes of the estate of the late Goodin Elletson, dec., and their increase; to be hired out, and to be subject with the profits thereof to such order and decree as the Court shall make in the premises; on condition to be released if the defendants shall give security in such sum as the Court shall direct, to be accountable for the delivery of the said slaves whenever a recovery should be had.

An affidavit was made by the said attorneys in fact to the truth of the said bill.

The defendants filed a plea and demurrer to the bill; but the question for the consideration of the Judges was whether or not it was proper to direct the issuing of the writ prayed for by the complainant commanding the sheriff of Bladen County to take the said slaves into his possession and to hire them out, etc., unless the defendants gave bond and security for the delivery of them on the determination of the suit.

After some time taken for the consideration of this question,

JOHNSTON and MACAY, JJ., directed a writ to be framed agreeable to the prayer of the bill, which being made, was signed by them.

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STATE v. JAMES GLASGOW.—Conf., 38.

1. The words "good and lawful men" in the caption of an indictment, inquest, etc., mean freeholders.
2. The civil division of the State into counties, etc., must be taken notice of judicially by the Courts.
3. If a public officer, intrusted with definite powers to be exercised for the benefit of the community, wickedly abuses or fraudulently exceeds them, he is punishable by indictment, though no injurious effects result to any individual from his misconduct. The crime consists in the public example, in perverting those powers to the purposes of fraud and wrong, which were committed to him as instruments of benefit to the citizens and of safety to their rights.
4. The Secretary of State of the State of North Carolina, whose duty it was under an act of the Legislature to issue land warrants under certain circumstances, was held liable to be indicted in the Courts of this State for fraudulently issuing such warrants, though the title to the lands for which the warrants were issued was in the United States, and not in this State.

At a Court begun and held at the city of Raleigh, on the tenth day of June, in the year of our Lord, one thousand eight hundred, and in the twenty-fourth year of the independence of the State, before the Honorable SPRUCE MACAY, JOHN LOUIS TAYLOR and SAMUEL JOHNSTON, Esquires, Judges of the Superior Courts of Law and Courts of Equity of and in the said State, assigned by letters patent under the great seal of the said State, made to them, the aforesaid Judges, and also to the Honorable JOHN HAYWOOD, as one of the said Judges, or to any two or more of them, by virtue of an act of the General Assembly, entitled "An act directing the Judges of the Superior Courts to meet together to settle

questions of law and equity arising on the circuit, and to provide for the trial of all persons concerned in certain frauds," and to inquire (by the oaths of good and lawful men of the counties of Wake, Franklin, Johnston, Chatham, Orange, and Cumberland, and any of them, and by other ways, methods, and means by which they might or could the better know) more fully the truth of all offenses and frauds committed within any district of this State by any person or persons whomsoever (who (265) hath or have been duly apprehended, or shall or may be apprehended to answer the same, where such offenses have been committed on or in the office of the Secretary of State, or on or in the office of John Armstrong, or on or in the office of Martin Armstrong, in the fraudulently issuing, procuring, receiving, or transferring land warrants, or in the fraudulently issuing, procuring, or receiving grants on such warrants at any of the said offices; of all frauds and offenses of all and all manner of persons whomsoever, concerned in the commission of any of the said frauds within any of the districts of this State, by whomsoever or howsoever, had, done, perpetrated, or committed, and by what person or persons, and to whom, how, and in what manner, and of all articles and circumstances howsoever concerning the premises, and any of them, and to hear and determine the same according to the laws of this State; and also the said Judges and any one or more of them, to inquire as aforesaid concerning all and singular the premises, and any two or more of them, to pass final sentence on such person or persons as shall be convicted upon such inquiry to be had as aforesaid according to the laws of this State; by the oath of Pleasant Henderson, etc. (here follows the names of the grand jury), good and lawful men of the counties aforesaid, then and there duly impaneled, sworn, and charged to inquire for the State. It is presented in manner and form as follows:

The jurors for the State upon their oath present, that by an act of the General Assembly entitled "An act to amend an act entitled 'An act for the relief of the officers and soldiers of the continental line, and for other purposes,'" passed at Hillsborough on the eighteenth day of April, in the year of our Lord one thousand seven hundred and eighty-three, the Secretary of State was directed to issue a warrant of survey to each and every person entitled to land by virtue of the said act, entitled "An act for the relief of the officers and soldiers of the continental line, and for other purposes therein mentioned," for such quantities of land within the limits of the land reserved by the act last mentioned for the said (266) officers and soldiers, as he, she, or they, by the said act, should be entitled to; which warrant should be directed to Col. Martin Armstrong, who was appointed by the act first mentioned surveyor for that purpose, and was authorized and required to execute and return the same

into the Secretary's office within the same time and in the same manner as is required in other cases; and the said Secretary of State was required by the said act first mentioned to make out grants for all surveys which should be thus returned to his office, which grants should be authenticated by the Governor, countersigned by the said Secretary, and recorded in his office.

The jurors aforesaid, upon their oath aforesaid, do further present that James Glasgow, of the county of Greene, Esquire, on the seventh day of January, in the year of our Lord one thousand seven hundred and eighty-six, and in the tenth year of the independence of the said State, at the said county of Greene, within the jurisdiction of their honorable court, then and there being Secretary of State of the said State of North Carolina, and being then and there in the exercise of the said office, and being empowered and intrusted by law with the issuing of land warrants as aforesaid, unlawfully, wickedly, and fraudulently, and in violation of the duties of his said office, did make out a certain fraudulent writing, purporting to be a duplicate military land warrant in favor of the heirs of Elijah Roberts, a private in the line of this State, for six hundred and forty acres of land, within the limits of the land reserved for the officers and soldiers as aforesaid, and he, the said James Glasgow, did then and there sign his name to the said writing as Secretary of State, and issued the same from his said office, as a true, good, and lawful military land warrant; when in truth and in fact he, the said James Glasgow, then and there well knew that an original warrant had been previously made out and issued by him, the said James Glasgow, as Secretary of State aforesaid, to the said heirs of the said Elijah Roberts, for his right as a private in the said line; and he, the same James, had no right nor authority by law to make out or issue any other such warrant to such heirs for said right, to the great damage of (267) the State, etc.

The jurors aforesaid, on their oath aforesaid, do further present, that a certain James Mulherrin afterwards, to wit, on the first day of January, in the year of our Lord one thousand seven hundred and eighty-nine, and in the thirteenth year of the independence of the State, under color of a certain unlawful and fraudulent writing, purporting to be a duplicate military land warrant, and to be issued on the seventh day of January, in the said year one thousand seven hundred and eighty-six, by the said James Glasgow as Secretary of State, in favor of the heirs of Elijah Roberts, a private in the line of this State, for six hundred and forty acres of land within the limits of the land reserved for the said officers and soldiers aforesaid, did illegally and fraudulently procure and cause to be made in favor of him, the said James Mulherrin, a certain

survey of six hundred and forty acres of land in Davidson County, on Hickman Creek, etc. (the course of the land), and did afterwards, to wit, on the first day of May, of the said year one thousand seven hundred and eighty-nine, fraudulently return the said survey, together with the said last mentioned illegal and fraudulent writing, purporting as aforesaid into the said office of Secretary of State, in order to obtain a grant from the State to him, the said James Mulherrin, for the said land last mentioned—he, the said James Mulherrin, pretending that a certain Elijah Robertson had assigned to him, the said James Mulherrin, the said last mentioned illegal and fraudulent writing, purporting as aforesaid—so as to entitle him, the said James Mulherrin, to obtain the said grant in his own name, although he, the said James Mulherrin, did not produce to the said Secretary of State any legal evidence to prove that he, the said Elijah Robertson, was entitled by law to the military land warrant of the heirs of the said Elijah Roberts, so that he, the said Elijah Robertson, had legally assigned the same to him, the said James Mulherrin, so as to entitle the said James Mulherrin to obtain a grant for the said land last mentioned to himself as aforesaid.

(268) And the jurors aforesaid, upon their oath aforesaid, do further present that the said James Glasgow, on the eighteenth day of May, in the year of our Lord one thousand seven hundred and eighty-nine, and in the thirteenth year of the independence of the State, at the said county of Greene, within the jurisdiction of this honorable Court, then and there being Secretary of State, and in the exercise of the same office, and being intrusted by law with the making out grants as aforesaid, well knowing that the said writing purporting to be a duplicate military land warrant was illegal and fraudulent; an original warrant having previously been issued for the same right by him, the said James Glasgow, as Secretary of State as aforesaid; and that the said James Mulherrin had not produced to him, the said James Glasgow, as Secretary aforesaid, any legal evidence to prove that the said Elijah Robertson was entitled by law to the military land warrant of the said heirs of the said Elijah Roberts, deceased, or that the said Elijah Robertson had legally assigned the same to him, the said James Mulherrin, so as to entitle the said James Mulherrin to receive a grant to himself for the said land last mentioned, unlawfully, fraudulently, and wickedly, and in violation of the duties of his said office, did make out a certain fraudulent grant from the State to him, the said James Mulherrin, for the said six hundred and forty acres of land, situated and bounded as aforesaid, and did then and there cause the said grant to be authenticated by the Governor, and did countersign the same himself as Secretary of State, and recorded it in his said office, to the great injury of the State, etc.

The jurors aforesaid, upon their oath aforesaid, do further present, that the said James Mulherrin afterwards, to wit, on the first day of February, in the year of our Lord one thousand seven hundred and ninety-three, and in the seventeenth year of the independence of the State, under color of a certain illegal and fraudulent writing, purporting to be a duplicate military land warrant, and to be issued on the said seventh day of January, in the said year 1786, by the said James Glasgow, as Secretary of State as aforesaid, in favor of the heirs of Elijah Roberts, a private in the line of this State, for six hundred (269) and forty acres of land, within the limits of the land reserved for the officers and soldiers aforesaid, did illegally and fraudulently procure, and cause to be made in favor of him, the said James Mulherrin, a certain other survey, for six hundred and forty acres of land lying on Mill Creek, on the south side of Cumberland River, and bounded as follows: Beginning, etc. (corners of land), and did afterwards, to wit, on the eleventh day of May, in the said year of our Lord one thousand seven hundred and ninety-three, fraudulently return the said survey, together with the said last mentioned illegal and fraudulent writing, purporting as aforesaid into the said office of Secretary of State, in order to obtain a grant from the State to himself for the said land last mentioned, he, the said James Mulherrin, pretending that a certain Elijah Robertson had assigned to him, the said James, the said illegal and fraudulent warrant, so as to entitle him, the said James Mulherrin, to obtain the grant in his own name, although he, the said James Mulherrin, did not produce to the said Secretary of State any legal evidence to show that he, the said Elijah Robertson, was entitled by law to the military land warrant of the said heirs of the said Elijah Roberts, deceased, or that the said Elijah Robertson had legally assigned the same to him, the said James Mulherrin, so as to entitle the said James Mulherrin to obtain a grant for the land last mentioned to himself, as aforesaid, and although he, the said James Mulherrin, had previously, to wit, on the eighteenth day of May, 1789, aforesaid, obtained a grant from the State to himself, for another tract of six hundred and forty acres of land, before that time surveyed, in virtue of the said last mentioned illegal and fraudulent writing, purporting to be a military land warrant.

And the jurors aforesaid, on their oath aforesaid, do further present, that the said James Glasgow, on the seventh day of January, in the year of our Lord one thousand seven hundred and ninety-four, and in the eighteenth year of the independence of the State, at the said county of Greene, within the jurisdiction of this Court, then and there being Secretary of State as aforesaid, and in the exercise of the same (270)

office, and being intrusted and empowered by law with the making out grants as aforesaid, well knowing that the said last mentioned warrant as aforesaid was illegal and fraudulent as aforesaid, an original land warrant having been previously issued for the same right by him, the said James Glasgow, as Secretary aforesaid; and that the said James Mulherrin had not produced to him, the said James Glasgow, any legal evidence to prove that the said Elijah Robertson was entitled by law to the said military land warrant of the said heirs of the said Elijah Roberts, deceased, or that he, the said Elijah Robertson, had legally assigned the same to the said James Mulherrin, so as to entitle him, the said James Mulherrin, to obtain a grant to himself for the said land last described, and also then and there well knowing that he, the said James Mulherrin, had previously obtained a grant from the State to himself for another tract of land in virtue of the said last mentioned illegal and fraudulent writing purporting, as aforesaid, unlawfully, fraudulently, and wickedly, and in violation of the duties of his office, did make out a certain false and fraudulent grant from the State to the said James Mulherrin for the said six hundred and forty acres, situated and bounded as last aforesaid, and did then and there cause the said grant to be authenticated by the Governor, and did countersign the same himself, as Secretary aforesaid, and recorded it in his office, to the great detriment of the State, to the evil and most pernicious example of all others in the like case offending, and against the peace and dignity of the State.

To this indictment he pleaded "not guilty," and a jury being impaneled and sworn to try the issue between the State and the said James Glasgow, found him guilty in manner and form as he was charged in the bill of indictment.

The counsel for the defendant moved for a new trial upon several grounds, but relied chiefly on the ground of the verdict being contrary to the evidence. The Court declared they were satisfied with the verdict, and refused to grant a new trial. The Attorney-General then (271) prayed for judgment against the defendant, when *Haywood,* for the defendant, moved in arrest of judgment and filed his reasons, to wit:

1. The caption does not state any legal authority in this Court to take the said indictment; the commission is stated to be made to the Judges to inquire by the oaths of good and lawful men of the counties of ....., and there is no law of this State which authorizes an inquiry otherwise than by the oaths of freeholders.

2. The caption does not state the indictment to have been found by the oaths of freeholders.

3. There is no such commission as that stated in the caption; the commission, by virtue whereof this Court sits, is a commission to inquire of the offenses committed in the office of the Secretary of State, or in the office of Martin Armstrong, or in the office of John Armstrong, in, etc., but the commission described in the caption is to inquire of offenses in the two former offices only.

4. The commission, by virtue whereof this Court sits, is to inquire by the oaths of freeholders, whereas the commission, by virtue whereof the indictment is stated so to be taken, is to inquire by the oaths of good and lawful men only.

5. The several offenses in the indictment mentioned are supposed to have been committed on the several times therein mentioned at the county of Greene, within the jurisdiction of this Court, not stating the said place to be within any of "the districts of the" State, whereby the Court might see that the said offenses were committed within the extent of their jurisdiction; and, in fact, at those several times there was no such county as the county of Greene within any district.

In the first count of the said indictment it is not stated otherwise than by implication that any original warrant had issued before the issuing of the duplicate therein mentioned.

The original warrant, so stated by implication, is not described nor set forth so as to show to the Court that the duplicate therein mentioned is a copy thereof, and for the same lands and number of acres, and in favor of the same person and for the same claim the duplicate is.

It is not stated in the said first count that any injury did (272) actually ensue the issuing the said duplicate.

The original warrant, stated by implication, is stated to have been issued to the heirs for the right of the deceased, which is repugnant.

The second count states that the said James Glasgow well knew that the said warrant had been legally assigned to the said Mulherrin, so as to entitle him to receive a grant; all that part of the sentence after the and/or being governed by the antecedent words "well knowing," and not by the antecedent words "had not"; and therefore it was in law no crime to issue the said grant to Mulherrin, and yet in contradiction to this plain consequence, it states the said grant to have been issued unlawfully, fraudulently, and wickedly.

It is not alleged in the second count that Mulherrin did not produce evidence of his right, but only said although he did not, which is not any positive averment.

It states the issuing a grant, knowing that one original warrant had issued, not averring that a grant had issued upon the original, or that it was intended to issue upon the same, or that the original was in being.

In the last count it is not stated that a grant had issued upon the same duplicate that any former grant had issued upon, but only that it issued upon the duplicate mentioned in the last count.

In the last count it is not averred that a grant issued upon the duplicate therein mentioned, previous to the issuing the grant therein stated to be issued on the seventh day of January, one thousand seven hundred and ninety-four, but only the well knowing that Mulherrin had previously obtained a grant then issued, that stated in the said count, which is not any positive averment that two grants issued thereon.

The fraud therein stated is supposed to be committed against the State of North Carolina, when at the same time it appears that the lands stated to be included within the description of the grant were not the lands of North Carolina, but of the United States, and that (273) such fraud as is in the indictment supposed is subject to the cognizance of the Courts of the United States, and consequently not of any Court in this State. J. HAYWOOD.

MACAY, J., delivered the opinion of the Court.

As our opinions rest upon a few plain and obvious principles, it is unnecessary to enter into an elaborate examination of the cases cited in support of this motion. They are, generally speaking, good law (though to this the case cited from 1 Dyer, 69, forms an exception), but we do not think they apply to the case under consideration.

With respect to all those reasons which proceed upon the ground that the expressions "good and lawful men" are inserted in the caption and commission, instead of the word "freeholders," the answer is, that these words are to be understood according to the subject matter relative to which they are applied. In this instance, the words are used as forming an inquest; and an inquest formed of good and lawful men must be of freeholders. *Liberos et legales homines* are the terms which have always been used in the *venire facias,* and their legal import and signification is freeholders, without just exception. 3 Bl. Com., 351; 4 Bl. Com., 350. But even an objection to the caption of an indictment, founded in the omission of such words, ought not to prevail, especially if the indictment be in a Superior Court, and that which is omitted be in common understanding, implied in what is expressed. 2 Haw., cap. 25, sec. 126.

The exception arising from the supposed error in setting out the commission is not founded in point of fact, and has, therefore, been abandoned in the argument.

It is certainly an undeniable rule that the place where an offense is stated to have been committed must appear to be within the jurisdiction of the Court which tried it; and the question for us to decide is whether

the county of Greene does not appear to be within the jurisdiction of this Court? This Court is authorized by the commission to inquire into any offenses it describes which were committed within any district of the State; the county of Greene is within a district of the State, (274) and hence it necessarily follows that it is also within the jurisdiction of this Court. The civil divisions of the territory of the State into districts, and their subdivision into counties, serve to define and limit the boundaries of jurisdiction allotted to the Superior Courts; in this respect they form an essential part of the public law of which the Court can no more be ignorant than of the fact that every county in the State is within some one of its districts. Hence, if an offense is laid to be committed in a county corresponding in name with one in the State, we must, in reference to the extended jurisdiction of this Court, understand it to be one and the same. Would it not be fanciful and extravagant to presume it to be out of the State? And why make the presumption that it has been ceded to Congress when we know the fact is otherwise? Besides, the offense is laid to have been committed by the Secretary of State, being there (in the county of Greene) in the exercise of the said office; here, again, in order to give effect to this objection, we must make another unreasonable presumption, that the Secretary of State was exercising his office, and did issue from his office out of the State this military land warrant. But, in truth, if it had appeared on the trial that the offense was committed without the limits of the State, the defendant would have been discharged for want of jurisdiction. But if the place laid is within the jurisdiction of the Court, a mistake in that point would not have been material, unless the place had formed a part of the description of the offense, and was not stated merely as a venue. 4 Bl. Com., 306. In fine, the reasoning upon which all the cases are founded, which were cited to prove the necessity of naming the ville, is obviously inapplicable to the present topic, because the jury are summoned altogether from other counties than that where the offense is laid to have been committed. As to the objections made to the first count, it is to be remarked that the gist of the offense there stated is the fraudulently issuing a duplicate warrant, knowing the original to have been previously issued. We do not think it necessary that a positive (275) allegation should have been made that the original was issued, but it was necessary that proof to that effect should have been made on the trial, and it accordingly was made. In principle, the same objection was made in *Rex v. Lauby,* 2 Str., 904, and overruled. If a positive averment of the issuing the original warrant was unnecessary, it follows that the objection growing out of its not being particularly described must also be invalid.

It is further objected that no injury is stated to have ensued the act of thus issuing the duplicate.

If the act was done in the manner charged in the indictment, and as the jury have found it, the defendant has certainly committed a misdemeanor, which is indictable at common law. No rule of law requires that a circumstance which forms no ingredient in the crime should be stated in the indictment; and if a public officer, intrusted with definite powers to be exercised for the benefit of the community, wickedly abuses or fraudulently exceeds them, he is punishable by indictment, although no injurious effect results to an individual from his misconduct. The crime consists in the public example, in perverting those powers to the purpose of fraud and wrong, which were committed to him as instruments of benefit to the citizens, and of safety to their rights. If to constitute an indictable misdemeanor a positive injury to an individual must be stated and proved, all those cases must be blotted out of the penal code where attempts and conspiracies have been so prosecuted; yet they are numerous and authoritative. 3 Bac., 549, in notes, new edition.

The offense charged in the second count, succinctly stated, is this, that the defendant issued a grant to Mulherrin upon a duplicate warrant, which had been previously issued to the heirs of E. Roberts, the right to which Mulherrin claimed under an assignment from Elijah Robertson. In order to fix this as a fraudulent act upon the defendant, it is deemed necessary by the drawer of the indictment to describe the agency that Mulherrin had in the business; accordingly, the count begins with
(276) stating the steps taken by him in order to obtain the grant, pretending that Robertson had assigned the warrant to him, although he did not produce any legal evidence to prove either Robertson's title or his assignment; and the offense as laid consists in issuing the grant under all the circumstances of the application made by Robertson, and with a full knowledge of them. These are therefore repeated in the second branch of the count, and introduced by the participle "knowing," which necessarily refers to the whole of them, and carries the sense throughout the whole paragraph which contains the recital of Mulherrin's acts or omissions. The sense of the whole count aids the construction, and unless the former is separated from the latter part of it, it is understood, upon reading, thus—that the defendant, well knowing that the duplicate was illegal, etc., well knowing that Mulherrin had not produced to him any legal evidence to prove that E. Robertson was entitled, etc., or to prove that he had assigned it to Mulherrin, fraudulently issued the grant, etc.

The four following objections to the second count have been substantially answered in noticing the exceptions to the first. What concerns the essence of the crime and the gist of the charge is laid with certainty sufficient to enable the defendant to know the offense wherewith he is charged, and to enable the Court to discern upon the record a crime punishable by law. In misdemeanors, where no particular technical phrases are appropriated to describe the act, nice and overstrained exceptions have not usually prevailed. 2 and 3 Bur. Rep. The last reason is founded upon the supposition that the lands stated to be included within the description of the grant were not the lands of North Carolina, but of the United States, and it is thence concluded that the fraud is exclusively cognizable in the courts of the United States. However the fact may be as to the title of the lands, the defendant was a public officer of the State of North Carolina, and it was by virtue of that character alone that he was enabled to commit the offense charged in the indictment. All his acts wore the semblance of official duties, and but for the inquiry now instituted might still retain the stamp of public (277) authenticity. By his signature the faith of the State was pledged for the purity and honesty of the documents to which it was annexed, and her character, honor, and dignity required that it should never be pledged in vain. The security of the citizens' rights, no less than the reputation of the State, was intimately connected with a faithful discharge of the duties appertaining to an office of such high importance; a confidence commensurate therewith was reposed in him, and this, after patient examination, is found by the jury to have been abused in the particulars charged. To the jurisdiction of the State, therefore, we think he is strictly and properly amenable.

Reasons overruled.

Cited: State v. Snuggs, 85 N. C., 544; *Carr v. Coke,* 116 N. C., 247.

STATE v. SUE, SLAVE OF JOHN GATES.—Conf., 54.

Under the Act of 1741 (Iredell's Rev., ch. 24), authorizing the county courts to pass such judgments upon a slave convicted of any other crime or misdemeanor than conspiring to rebel or making insurrection (for which the punishment of death was prescribed) as the nature of the crime or offense shall require, the Court cannot pass sentence of death for any crime or offense for which a freeman would not also be liable to be so punished.

The prisoner had been tried in the county court of Person, on a charge of giving or procuring to be given to William Cocke and several of his family, to wit, Sarah, Polly, and Susanna, all of the same county, a poison supposed to be arsenic, with an intent to kill the said persons, and was found guilty of the fact by the jury impaneled and sworn to try the issue; on which conviction the Justices present passed the following sentence: "That the prisoner, Sue, is guilty of death under the Act of Assembly in that case made and provided, and that the said Sue, on Monday, the 14th day of April, 1800, be taken to the place of execution, and between the hours of 11 and 4 o'clock of that day she be (278) hanged by the neck until she be dead."

On the first day of the Superior Court of Law, held for the District of Hillsborough, on the 6th day of April, 1800, by his Honor SAMUEL JOHNSTON, Esq. *Duffy,* on an affidavit, stating the trial, conviction, and sentence passed by the Court of Person, on the said slave, Sue, moved for and obtained writs of *supersedeas, certiorari,* and *habeas corpus,* directed to the sheriff and justices of the said county, in consequence of which the sheriff of Person brought up the said slave to the Superior Court, together with the record of her trial, conviction, and of the sentence passed on her; and *Jones,* Solicitor-General for the State, moved that she should be sent back to receive the sentence of the county court, which was opposed by *Duffy* for the prisoner, who contended that the county court of Person had no authority to pass sentence of death on the prisoner, the crime of which she was convicted being one of such a nature as was not by the laws of the land punishable with death, and he cited Iredell's Revisal, Laws of North Carolina, Act of 1794, ch. 11, sec. 1, which enacts, "That it shall hereafter be the sole duty of the jury sworn on the trial of any slave or slaves to give a verdict of guilty or not guilty on the evidence submitted to them by the court, and on the verdict so given in by the jury, it shall be the duty of the county court, when sitting on the trial of any slave or slaves, or of three justices, when they shall be sitting on any such trial, to pass judgment and sentence on the slave or slaves so tried before them, agreeable to the verdict of the jury and the laws of the country." This act he contended, gave the court no power to inflict any other or more severe punishment on a slave when convicted of an offense than by the laws of the country a free man would be subject to on conviction of the offense of the same nature; that the offense of which the prisoner was convicted was such a one as if committed by a free man would not subject him to the loss of his life; that the Legislature had no intention to punish slaves in a more sanguinary manner than free men convicted of the same

offense; and that a supposition to the contrary was a charge (279) against the Legislature of violating the laws of humanity.

It was contended by *Jones,* Solicitor-General for the State, that there was no doubt but that the General Assembly intended to make a difference in the trials of slaves and of free men; that this intention was apparent and obvious, by having reference to the several acts of the Legislature prescribing the mode and regulating the trials of slaves, particularly one passed in the year 1741, Iredell's Rev., 94, ch. xxiv, entitled "An act respecting servants and slaves," in the 48th section of which act it is enacted "That every slave committing such offense (meaning conspiring to rebel, make insurrection etc., as mentioned in the 47th section), or any other crime or misdemeanor, shall forthwith be committed by any justice of the peace to the common jail of the county within which the said offense shall be committed, there to be safely kept; and that the sheriff of such county, upon such commitment, shall forthwith certify the same to any justice in the commission of the said court, for the time being, resident in the county, who is thereupon required and directed to issue a summons for two or more justices of the said court and four freeholders, such as shall have slaves in the said county; which said three justices and four freeholders, owners of slaves, are hereby empowered and required, upon oath, to try all manner of crimes and offenses that shall be committed by any slave or slaves at the courthouse of the county, and to take for evidence the confession of the offender, the oath of one or more creditable witnesses, or such testimony of negroes, mulattoes or Indians, bond or free, with pregnant circumstances, as to them shall seem convincing, without the solemnity of a jury; and the offender being then found guilty, to pass such judgment upon such offender, according to their discretion, as the nature of the crime or offense shall require; and on such judgment to award execution." He contended that the subsequent acts of the Legislature, respecting the trials of slaves, by no means restricted the discretionary power which the Act of 1741 gave to the county courts in passing such judgment upon slaves as the nature of the crime or offense of which they (280) might be convicted required; that the expression contained in the Act of 1794, declaring it to be the duty of the county court sitting on the trial of any slave or slaves to pass judgment on the slave or slaves so tried before them, agreeable to the verdict of the jury and the laws of the country, means those laws only which have been passed to regulate the trial of slaves, not the laws of the country the benefit of a trial by which free men claim and are allowed; that the public good frequently required that slaves should be punished by death for offenses which, if committed by free men, would not be so dangerous in their consequences,

and therefor not in them deserving so severe a punishment; that the great misfortune of having slaves among us cannot now be remedied, and the Legislature, from the laws they have enacted on the subject, appear to be impressed with the necessity of punishing crimes and offenses committed by them with great severity; which seems to be the reason why the punishment of offenses committed by them is left in the discretion of the court before whom they are tried, whom the Legislature thought would be competent to decide how far the public good might require that particular offenses should be punished with more severity than others; that the county court, having exercised the discretion which the Act of 1741 gave them, by sentencing the prisoner to be punished with death; that the Court ought to presume it done for the public welfare and not reverse their judgment and sentence.

This case being wholly new, his Honor, Judge JOHNSTON, desired that it should be adjourned to the meeting of the Judges at this term, when it came on to be argued by *Jones,* Solicitor-General for the State, and *Duffy* for the prisoner, both of whom argued as in the Superior Court of Hillsborough, and cited the same Acts of Assembly, and which renders repetition of them here unnecessary.*

(281) JOHNSTON, J. It does not appear to me, from any construction which I can make of the laws of this State respecting the punishment of slaves, that they are made liable to be punished with death in any case where the like punishment is not by law to be inflicted on a free man, except only in the cases mentioned in the 47th section of the act concerning servants and slaves, passed in the year 1741.

I cannot prevail on myself to adjudge in any case that a crime shall be punished with death unless there is an express law for that purpose, and am of opinion that no implication, however obvious can be admitted in such case, and that the discretion allowed in these cases must apply to the *quantum* or measure, not the degree of punishment.

Therefore, it is my opinion that the judgment be reversed, and that the prisoner be remanded to receive such other punishment, short of death, as the Court who tried her shall think just, so that the same be warranted by the laws and Constitution of the State.

TAYLOR, J. In ascertaining the true construction of the act, it is necessary to take into view some others which have been made relative to the same subject. The whole are founded on a principle of severe

* The reporter was present and took notes of this case when argued in Hillsboro Superior Court, and the arguments being nearly the same in both Courts, he has given them as made in the former.

policy, absolutely necessary to guard society against the evil consequences resulting from the condition of slavery. Where some offenses had been previously provided against in an act passed the same session, one perhaps at the time of frequent occurrence, in the nature of a conspiracy by three or more to rebel or murder, is by this act made punishable with death; the next clause requires that upon a slave being convicted of any other crime or misdemeanor, such judgment shall be past, according to the discretion of the Court, as the nature of the crime shall require. These expressions do, in my opinion give the Court a power to inflict any punishment upon any crime or misdemeanor where a specific punishment had not been previously directed by law. In such cases the prescribed punishment must be inflicted, but in all others the Court are to regulate their discretion by the nature of the crime. This will depend upon their frequency, enormity, the temptation to commit (282) them, the necessity of an example, and a variety of other circumstances that ought, in a peculiar manner, to be considered in estimating the offenses of these persons.

It certainly could not be the intent of the Legislature that they should be punished according to the ordinary penal code, for then it were necessary to have gone further than a simple regulation of the trial, and not to have said anything about the punishment; and because by the former act the offense of stealing certain property is punishable with whipping and the pillory; whereas, stealing money would only be punished by burning in the hand. This is a discrimination in favor of an offense of equal magnitude, which I do not think the Legislature intended to make. The Act of 1786, Iredell's Revisal, page 588, does in the preamble recognize the fact that many persons by cruel treatment to their slaves, cause them to commit crimes for which they are executed. It then proceeds to take away the allowance which had been theretofore made to the owners of such slaves.

The cruel treatment here alluded to must consist in withholding from them the necessaries of life, and the crimes thence resulting are such as are calculated to furnish them with food and raiment. It then appears that, in 1786, the Legislature was perfectly aware that from 1741 until that time it had been the practice to execute slaves upon a conviction of grand larceny, when free persons were only burned in the hand, and they have not declared that this is a false exposition of the law. It seems to me that the acts subsequently made had no other end than to extend to them the trial by jury and to ascertain the respective provinces of the Court and the jury, still leaving the discretion of the former as to the punishment unlimited, as the first act had made it.

I am sensible that the law is a harsh one, and I fear that abuses have been committed under it; but these may be controlled by the Legislature whenever they think fit to interpose. Thinking as I do, from the short time I have had to deliberate on this case, that their intention is
(283) free from doubt, a sense of duty compels me to pronounce it, however repugnant it may be to my private notions of humanity.

MACAY, J. The Act of Assembly passed in 1741, sec. 47 of ch. xxiv, makes the consulting, the advising, the conspiring to rebel, to make insurrection, the plotting or conspiring of three or more slaves to murder any person or persons whatsoever, to be felony, and on conviction to suffer death. Sec. 48 of same chapter directs the manner in which every slave committing such offense, or any other crime or misdemeanor, shall be tried, and what evidence shall be admissible, and directs the three justices and the four freeholders, on the slave or slaves being found guilty, "to pass such judgment on such offender, according to their discretion, as the nature of the crime or offense shall require, and on such judgment to award execution." The offense found by the jury in this case is an attempt to poison; therefore the offense does not come under the description of any of those offenses enacted by the 47th section; had the act stopped here, she must have been acquitted. But section 48 empowers the three justices and four freeholders to try her for any other crime or misdemeanor, and to pass such judgment, according to their discretion, as the nature of the offense may require.

Crimes and misdemeanors were offenses known by the law at the time of passing this act, and the punishment also known and established. The offense found against Sue is an attempt to poison; if the same offense was committed by a free person, it could not be punished with death—it is only a misdemeanor of an aggravated nature, and could be punished with fine, imprisonment, and other corporal punishment; no judgment of death could be given. The punishment of this particular offense was known when the act passed; the act has made no alteration in the punishment, it was then discretionary with the Court. It never was conceived that the Court could give judgment of death for this offense; they could fine, imprison, or inflict other corporal punish-
(284) ment as had been established by common usage. The discretion given by the Act of Assembly is a legal discretion, not the power of altering punishments, or affixing to any offense a punishment unknown to the law. This would be for the Court to legislate, not to adjudicate, a power unknown to any of the Courts of this State. The justices of the county court have pronounced a judgment different from the nature of the offense, which the jury have found against the prisoner; their discre-

tion only extends to increasing or diminishing the punishment. Let the judgment pronounced by the said justices against the prisoner be reversed, and the prisoner be remanded to said justices to receive such judgment as the laws and Constitution of this State will warrant.

NOTE.—The section of the Act of 1741, under which the question in this case arose, was superseded by later provisions. See 1 Rev. Stat., ch. 111.

Cited: State v. Lawrence, 81 N. C., 525.

THE STATE v. JOSEPH HARGATE.—Conf., 63.

A defendant in an indictment is not bound to pay the witnesses for the State, except upon conviction.

The record in this case stated that the defendant had been indicted in the Superior Court of Law for the District of Salisbury for grand larceny, and upon his trial was found not guilty, on which he was ordered by the Court to be discharged upon the payment of costs. *Williams* (of Chatham), counsel for the prisoner, prayed that the following question should be submitted to the consideration of the Judges at their meeting at this term, viz.: Whether a person being tried and acquitted on an indictment for felony shall be liable to pay the witnesses summoned in behalf of the State for their attendance. The question was directed to be brought up, which was accordingly done, and now at this term it came on to be argued by *Williams* for the defendant, and the (285) Attorney and Solicitor-General for the State.

Counsel for the defendant. The practice which has heretofore prevailed of subjecting persons who have been indicted for felony and acquitted, to the payment of the witnesses summoned on behalf of the State, appears not only unjust, as a payment of costs is some punishment on the innocent, but to be a practice against the express law of the land. In Iredell's Revisal, Laws North Carolina, page 363, ch. 4, sec. 19, it is declared that great injustice is done to witnesses appearing in behalf of the State, by their having no allowance for their attendance at the Superior and county courts as such; for remedy of which it is enacted, that from the passing of this act such witnesses shall be allowed the same for their daily attendance as is allowed to witnesses attending upon civil prosecutions, and such fees for attendance shall be paid by the

defendant "upon conviction," and if the State shall fail upon the prosecution of any offense of an inferior nature, the Court may, at their discretion, order the costs to be paid by the prosecutor, in case such prosecution shall appear to have been frivolous or malicious; and in case the defendant shall not be able to pay the costs, or the Court shall not think fit to order the prosecutor to pay the same, that then, and in that case, the clerks of the Superior Courts and county courts shall grant a certificate of attendance to such witnesses in manner as tickets are directed to be granted to witnesses in civil causes; and such tickets may be received by the sheriff in payment of public dues. The expression made use of in the act, "that such fees for attendance shall be paid by the defendant upon conviction," implies, in the strongest terms, that the defendant shall not be subject to the payment of such fees for attendance of witnesses when acquitted of the charge exhibited against him, but upon conviction only; and that as the defendant in this case was acquitted on the indictment preferred against him, that it would not only be unjust but illegal to tax him with the payment of the attendance of witnesses summoned in behalf of the State, to establish a
(286) charge, which upon fair and legal investigation proved groundless.

Counsel for the State. The practice in the Superior Courts of this State, with respect to the payment of witnesses for attendance in behalf of the State by the defendant, has been uniform and invariable ever since the passing of the Act of 1779, which was passed, as is declared in the preamble to the XIX section, to remedy the injustice done to witnesses who attended on behalf of the State, and who before that time had no allowance for their attendance; and this practice has applied as well where the defendant has been acquitted as upon conviction. In every case where the bill of indictment has been found to be true by the grand jury, the Court has ordered the defendant to pay all the costs incurred in carrying on the prosecution, even although on the trial of the issue of traverse joined between the State and the defendant, he has been acquitted. This practice having commenced with the existence of the Act of 1779, serves to show that the construction put upon it by the Courts of that day is correct, and that the practice was by them deemed strictly consonant with the law. For if a person charged with a crime of a capital nature was to be liable for the payment of the State's witnesses, upon conviction only, and the Court having in such case no authority to order the prosecutor to pay the costs, then would the witnesses be left wholly unprovided for, a situation in which it is clear the Legislature never intended to leave them, but to relieve them from which this Act of Assembly seems to have been expressly passed. The power of the Court to order the prosecutor to pay the costs extends

to prosecutions for offenses of inferior nature only, and not to prosecutions for offenses of higher degree; and the present prosecution being for an offense of the latter description, the witnesses for the State will not receive any compensation for this attendance, unless the practice which has so long and uniformly prevailed be now adhered to.

The counsel for the defendant replied, after which the following opinions were pronounced:

JOHNSTON, J. I am of opinion that the defendant is not bound (287) to pay the witnesses summoned on the part of the State, but on his conviction by the petit jury.

TAYLOR, J. The Act of 1779 does not extend to charge a defendant with the payment of the witnesses on behalf of the State in any cases of acquittal. A conviction is the only case where he is so liable; nor is provision made for the payment of witnesses in any case, except the defendant is convicted, or where being acquitted upon an inferior charge, the Court exercises the discretion of ordering the prosecutor to pay the cost. Upon the rule that a statute giving costs shall be construed strictly, they cannot do this where the defendant is acquitted upon a capital charge. The manner in which witnesses for the State shall be paid when the defendant is acquitted on a charge wherein the Court has no authority to order the prosecutor to pay them seems to be *casus omissus*.

MACAY, J. Before the Act of the General Assembly, passed in 1779, witnesses appearing in behalf of the State were not paid. By the 19th section of that act, upon conviction, the defendant must pay the witnesses for the State; on an acquittal he is not to pay such witnesses for their attendance.

Judgment for the defendant.

NOTE.—An Act of Assembly passed this year, after the foregoing decision, explaining the former law on the subject, and making various regulations respecting the payment of State witnesses. *Vide* Acts of 1800, chapter 17.

NOTE.—See *State v. Whithed*, 7 N. C., 223, and 1 Rev. Stat., ch. 35, sec. 27.

(288)

THE STATE v. ERASMUS CUMPTON.—Conf., 67.

While the law was that all simple assaults should originate in the county court, where an indictment was found in the Superior Court "for assault with intent to murder," and upon a trial the jury found the defendant not guilty "of the assault with intent to murder, but guilty of an assault," *it was held* that the Superior Court had jurisdiction to pronounce judgment on the defendant.

The defendant was indicted at Hillsborough Superior Court, April Term, 1800, for an assault upon one Absalom Knight, with an intent to kill and murder, and upon the trial of the issue of traverse the jury found the defendant not guilty of an assault "with an intent to murder, but guilty of an assault, and the Court fined him twenty shillings." The question reserved for the consideration of the Judges in this case was, whether, as the defendant had been indicted for an assault, with an intent to murder, and the jury had found him not guilty of an intent to murder, but guilty of an assault, had the Superior Court jurisdiction of the offense found by the jury. The doubt as to jurisdiction arose from the sec. 8, ch. 3, of the Acts of 1790, Iredell's Rev., page 696—which enacts that all indictments for assaults, batteries, and petit larcenies, and actions for slander, shall in future originate in the county courts of pleas and quarter sessions only.

Per Curiam. The Superior Court has jurisdiction of the offense charged in the indictment, and on the finding of the jury there ought to be judgment for the State.

Judgment for the State.

Judge JOHNSTON observed in this case, that the defendant might have pleaded that the assault charged was a common assault, and traversed the intent to murder, that therefore the Court had not jurisdiction, etc.

NOTE.—The Superior Courts had afterwards concurrent jurisdiction with the county courts of all kinds of assaults. 1 Rev. Stat., ch. 31, sec. 20.

(289)

HILARY BUTTS' ADM'RS v. ISAAC PRICE.—Conf., 68.

Letters of administration granted in another State will not entitle the administrator to maintain a suit here.

This was an action of detinue brought by the plaintiffs, administrators of Hilary Butts, deceased, in Salisbury Superior Court of Law, to

recover a number of negroes in the possession of the defendant. The jury sworn to try the issues joined between the parties found the following verdict: "We find that Hilary Butts, in his lifetime, was possessed in his own right of the negroes, Mary, Phœbe, and Lydia, and of the negroes, Bacchus and Nat, children of the said Mary, as in the plaintiff's declaration mentioned, and that the said several negroes were taken away by force from Hilary Butts, by persons unknown to this jury, and that the defendant does detain the negroes of the value of, etc. We, the jury, further find that the plaintiff's claim to the said negroes, under letters of administration granted to the plaintiff, Mary Scruggs, wife of Richard Scruggs, by Theophilus Lundy, register of probates in the county of Effingham, in the State of Georgia, bearing date the 1st day of December, 1783. We also further find that the said negroes were in this State in the lifetime and at the time of the death of the said Hilary Butts. If the law be for the plaintiff, we find for the plaintiff, and assess the damages, etc., and if the law be for the defendant, we find for the defendant."

The question reserved for the opinion of the Court is, whether letters of administration granted in the State of Georgia shall be valid and entitle the administrators to recover in this State property which was in this State at the time the intestate died, under whom the plaintiffs claim.

By the Court. The only point in this case upon which we deem it proper to give an opinion is that which is specially stated and made the question upon the record; for being thus particularly reserved by the Court, it is to be intended that they wished it to undergo a further consideration, and that the parties expected by its decision to (290) have a decision of the cause. Had the facts alone been found by the jury, and the verdict left at large for the judgment of the Court, the application of the law to it must have been guided by all the circumstances of the case, and then it would have been competent to inquire whether the objection made by the defendant to the letters of administration could be attended to, after pleading to issue. But as the objection was received by the Court, who has not suggested any doubts as to the mode of making it, but has desired a determination purely on its merits; as this Court has no power to correct the errors or reverse the decision of any other; and more especially, because it would introduce much confusion and defeat the end for which this Court was established if, when one question was especially referred to them, they should decide the cause upon others which might be collected from the record, we think ourselves confined to the question which has been made. Upon that some decisions have heretofore taken place in the Superior Courts in

conformity with the cases to be found in the books tending to show that letters of administration granted in a foreign country will not enable the administrator to recover goods. The reasons of those cases in England, arising from the peculiar organization and powers of the Ecclesiastical Courts, may not apply with sufficient force to this country to warrant the adoption of the doctrine in its full extent, but so far as their analogy extends to prove that an administration granted in another State will not enable the administrator to recover goods of the intestate situated in this, their authority is supported by justice, reason, and convenience, compelling the person to whom administration is granted to give security for the payment of debts, prevents injustice being done to the creditors here, who may have trusted the intestate, upon the faith of the property he possessed, and who would otherwise be under the necessity of pursuing the administrator into other states. A different policy or a collision of laws might there postpone the priority he had here, and perhaps in some instances deprive him of his debt, notwithstand-
(291) ing the most diligent endeavor to procure payment. In addition to the propriety of affording all possible security to the creditors in this State, cases may arise where a foreign administration may be obtained upon effects here which may thus be removed to another state, although the intestate might have died without relations, entitled to a distribution, either by the laws of one country or the other. Our Act of Assembly, which in such cases vests the goods in the State, after payment of debts, would become nugatory.

NOTE.—See *Anonymous*, 2 N. C., 355, and the second note thereto. See also *Nisbet v. Stewart*, 19 N. C., 24.

Cited: Leake v. Gilchrist, 13 N. C., 81; *Smith v. Munroe*, 23 N. C., 347; *Plummer v. Brandon*, 40 N. C., 194; *Sanders v. Jones*, 43 N. C., 247; *Morefield v. Harris*, 126 N. C., 627; *Hall v. R. R.*, 146 N. C., 346.

SAMUEL VANCE v. CALEB GRANGER'S EX'RS.—Conf., 71.

An injunction or order of the court of equity, directing a promissory note to be deposited with the clerk and master, by which the plaintiff was delayed in bringing his suit, will not prevent the commencement or stay the operation of the statute of limitations.

This was an action on the case, brought in the Superior Court of Law for Wilmington District, on a note, to which the defendants pleaded general issue, set-off, and statute of limitations.

The jury find the note was executed by Caleb Granger on the 13th July, 1785, for the sum of one hundred and thirty pounds 4s. 3d. They also find that by an injunction issued 7th July, 1787, by order of the Honorable Samuel Ashe, Judge in the Court of Equity, and an order of the said Court, that the note aforesaid was lodged in the hands of the clerk and master in equity, and that it appears to them that thereby the plaintiff was hindered from bringing suit on said note; that he afterwards brought suit on the 14th February, 1791; we further find that there is due to the plaintiff on a note the sum of £150 (292) 10s. 1d.

The question arising on this special verdict was, whether the plaintiff's demand was barred by the act of limitation.

By the Court. Whatever hardship there may be in this case, there is no legal ground or principle to warrant the Court to render judgment for the plaintiff. The act of limitation would amount to a general and positive bar, were not certain exceptions contained in the proviso; we cannot add to these others, which the Legislature has omitted, nor construe cases to be within the saving, which is plain were not meant to be included. A Court of Equity has, under circumstances similar to the present, interposed its authority to restrain a defendant from pleading the act; but as a question of law, the decision must be for the defendant.

Cited: Broadfoot v. Fayetteville, 124 N. C., 494.

THE EXECUTRIX OF JOHN ESTIS v. JOHN LENOX.—Conf., 72.

An action for a penalty abates upon the death of the plaintiff.

This was an action of debt brought in the lifetime of the plaintiff's testator to recover the penalty of fifty pounds created by chapter 7 of Acts of 1791, against those who should harbor or maintain any runaway slaves. To this action the defendant pleaded general issue, statute of limitations. After issue was joined, and before trial, Estis died, and his executrix, the present plaintiff, applied for and obtained leave to carry on the suit; on the trial of the cause, the plaintiff had a verdict, and the defendant's counsel moved an arrest of judgment for the reason following: That the action of debt, founded on the penal statute, made and provided in this case, is not such an action as will survive to exec-

utors or administrators; and therefore judgment ought to be given
(293) for the defendant. The question for the opinion of the Court was upon the sufficiency of this reason.

By the Court. The recovery in this action is of a forfeiture for an offense described in the Act of 1799, ch. 11, sec. 4, which being unaccompanied with a duty, and arising simply *ex maleficio,* the suit will be neither for nor against executors. The penalty is given for the offense merely without reference to the actual loss or damage which the testator's property may have sustained; and in this respect the case is to be distinguished from those where executors may bring certain actions which yet, on account of the form of pleading, would not survive against them; as in the action of trespass, for taking any goods in the lifetime of the testator, the value of the goods as well as the injury done, will be estimated in the damages. The same principle extends to an action of trover for the conversion committed in the lifetime of the testator, and to any other action which is maintainable by the executor.

With respect to the Act of 1786, ch. 14, sec. 1, its manifest intent was to enable executors and administrators to carry on such suits only as might have originated, or such as might have been commenced against them. The common law principle, relative to the dying of personal actions with the person, retained the same operation after this act as it possessed before. This construction, which has uniformly prevailed since the passing of the act, has received a legislative sanction, by the act passed in 1799, whereby the actions of ejectment, trover, detinue, and trespass, where property is in contest, are allowed to be revived. By enumerating these cases, and specifying one species of the action of trespass, which may survive, it is perfectly just that all other cases which were affected by the maxim continue still to be so.

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(294)

JOSHUA FREEMAN v. JESSE LESTER.—Conf., 73.

Where, under the Act of 1795 (New Rev., ch. 433), a treasurer of public buildings was elected by the county court, and afterwards another person was elected to the same office under the Act of 1797 (New Rev., ch. 488), and brought suit against the first for money remaining in his hands, *it was held* that the Court would not decide incidentally on the constitutionality of the latter act, but that in that case the authority was sufficient to sustain the action.

FREEMAN *v.* LESTER.

The following case was agreed to by the counsel of the parties: Lester was elected treasurer of public buildings by the county court of Surry at ..... Term, 1796, under the Act of the General Assembly, passed in the year 1795, who gave bond and security for executing his office, and continued in the same until 1798, when the Court of Surry proceeded, under the act passed at the session of the General Assembly in the year 1797, to the election of a treasurer of public buildings, when Joshua Freeman, the present plaintiff, was elected by a majority of the Justices of the said county, and entered into bond and security for the performance of his duty.

Freeman gave Lester ten days' notice, that under the last mentioned act he should at the next Court to be held for said county, move for judgment and award of execution against him for all moneys which he had received as the former treasurer, and which he had failed to account for and pay over to his successor in office. It is admitted by Lester that he received the sum of two hundred pounds from the treasurer of the State, to be expended according to the directions of the Act of 1795.

The county court gave judgment for the sum of two hundred pounds, with interest, agreeable to the Act of 1797, from which judgment Lester appealed to the Superior Court for the District of Salisbury.

Duncan Cameron for plaintiff.
Francis Locke for defendant.

The question arising on this statement is, whether, after Lester had been appointed under the Act of 1795, the Act of 1797, vacating his office, was a constitutional law or not. (295)

By the Court. We cannot thus incidentally decide upon the validity of the act by which Lester was removed from his office. That its authority was sufficient to sanction the present action, and to justify the recovery made, cannot admit of any serious doubt.

NOTE.—On the point on which the Court refused to decide incidentally, see *Hoke v. Henderson*, 15 N. C., 1, where the Court decided that the Act of 1832, respecting the election of clerks by the people, was unconstitutional and void, so far as its provisions had the effect of removing clerks then in office, before their regular terms had expired.

JOHN G. BLOUNT, ADM'R OF DANIEL NEAL, v. WILLIAM HADDOCK.
Conf., 75.

Slaves, to whom the wife has a right in remainder, do not vest in the husband, if he die during the coverture without having reduced them to possession.

This was an action of detinue brought in New Bern Superior Court of law for a negro man named George. Pleas *non det.* and stat. lim. The cause was tried at March Term, 1800, and the following special verdict found: "That the negro in question was the property of William Taylor, who on the 26th May, 1765, made a deed of gift of the same to his daughter, Sarah Taylor, in the words following, to wit: 'North Carolina, Pitt County: To all whom these presents shall come: Know ye that I, William Taylor, of the county and province aforesaid, for the love, good will and affection which I have and do bear towards my daughter, Sarah Taylor, have given one negro boy named George, which said negro boy I do by these presents, fully, freely, and absolutely give, grant, and bequeath to my said daughter, Sarah, to her, her heirs and assigns forever, reserving the use of the said negro to me, my wife,
Dinah, during our natural lives, and after our decease, to be her
(296) own right and property, which said negro I promise myself, my
executors, to warrant and defend to her, the said Sarah, against the lawful right, title, or claim of any person whatever. In witness whereof, I, the said William Taylor, have hereunto set my hand and seal, this 27th May, 1765.

WILLIAM (his X mark) TAYLOR.

Signed, sealed and delivered in the presence of
Martin Nelson,
Mary Nelson,
and
Mary Edwards.
May Court, 1765: ordered to be registered.'"

That Sarah, the daughter, afterwards intermarried with Daniel Neal, the plaintiff's intestate; that the said Sarah died about the year 1775, and the said Daniel soon afterwards; that William Taylor, the donor, died in the year 1794, and Dinah, the wife of the donor, died in the year 1795; that the said William Taylor and Dinah, his wife, continued in the possession of the said negro until their deaths. The jury pray the advice of the Court, if the plaintiff be entitled to recover.

By the Court. As this property never vested in possession during the coverture of the plaintiff's intestate with his wife, Sarah, he could only have recovered in the event of his surviving the donor and his wife, by taking out administration upon his deceased wife's effects. And even then the property would have been assets in his hands to pay the debts of his wife, contracted while she was *sole*. Upon his death, his administrator can recover at law only such things whereof he might have acquired the possession in his own right, and not those which he was compellable to pursue in a representative character. The administrator of the wife, therefore, is the proper person to bring this action; and when the property is recovered, it will be liable, as before, to the legal claims against the wife, and the residue belongs to the representatives of the husband as her next of kin. (297)

NOTE.—See the case brought by the administrator of the wife against the same defendant, 3 N. C., 183, and the cases referred to in the second note thereto.

Cited: Weeks v. Weeks, 40 N. C., 120.

WILLIAM ALSTON v. BULLOCK ET AL., BAIL OF SEARCY.—Conf., 77.

Where costs, which accrued after judgment, were not set forth in the *sci. fa.* against the bail, *it was held* to be no variance, on the plea of *nul tiel record.*

This was a *scire facias* brought by the plaintiff, William Alston, v. the defendants, in Hillsborough Superior Court of Law, as bail of Reuben Searcy, to which the defendants, among other things, pleaded *"Nul tiel record."* The question made was, whether the omission of 2s 8d charged on the *ca. sa.* v. the principal, was such a variance between the judgment and the *scire facias* as would sustain the plea of *"Nul tiel record."*

By the Court. There is no failure of record in this case. The judgment and costs correspond; a variance arises from an omission of a charge for the seal, which is contained in the first list of endorsed fees; but that forms no necessary part of the record, and is not included in the judgment of the Court.

(298)

DEN ON DEM. JOSEPH CUNNINGHAM v. NICHOLAS MICHAEL.
Conf., 77.

All lands, the legal title to which remained in Henry Eustace M'Culloch on the 4th of July, 1776, were confiscated and the legal title thereof vested in the State.

The following case agreed by the counsel of the parties: On the 8th day of December, in the year of our Lord, 1772, Henry Eustace M'Culloch sold for and in consideration of the sum of ..... pounds, three hundred and thirty-one acres of land, being the land in question, to Frederick Michael, father of the defendant; that said M'Culloch executed a bond to said Michael at the time of the said sale, in the words following, to wit: "Know all men by these presents, that I, Henry Eustace M'Culloch, of the Province of North Carolina, bind and oblige myself to Frederick Michael, of Rowan County, in the penal sum of four hundred pounds, proclamation money—conditioned to be void on my making him, or such person as he shall direct, in writing, a good and sufficient deed, right and title forever, to three hundred and thirty-one acres of land lying on both sides of Swearing Creek, as the same was surveyed the 11th day of November last, on the payment of a certain bond given by the said Michael to the said Henry Eustace M'Culloch, and bearing even date herewith"; that the said Frederick Michael entered upon and took possession of the land aforesaid, and continued in possession of the same until his death; and that the defendant has been in possession ever since; that there was paid to the said H. E. M'Culloch, by said Frederick Michael, £12 on the 23d day of December, 1772; that there was paid to *Thomas Tronhock,* attorney-in-fact for said M'Culloch, £11 18s by said Frederick Michael, on the 4th of February, 1773; and that these payments were made in part discharge of said bond given by said Michael to said M'Culloch, for the aforesaid land; that the lands aforesaid were sold by the commissioner of confiscated property, and purchased by the plaintiff, who hath obtained a grant from the
(299) State for the same, dated the 8th day of November, 1784, and that suit was brought by the plaintiff in May, 1791, and that all the lands, tenements, and hereditaments of said Henry Eustace M'Culloch, and every right, title, and interest which he had on lands in the State of North Carolina on the 4th day of July, 1776, were confiscated, forfeited, and vested in the said State, and that the said lands were sold upon the ground of the right to the same being in said H. E. M'Culloch on the said 4th day of July, 1776; and it is further agreed that at the

time the plaintiff purchased said land of said commissioner, he knew that said Michael had purchased said land in manner before mentioned from said H. E. M'Culloch.

W. L. Alexander for plaintiff.
Archibald Henderson for defendant.

By the Court. The legal title of this land was unquestionably in M'Culloch on the 4th July, 1776, Michael having only an equitable right, in the assertion of which a court of equity would have aided him upon his paying the purchase money. It was therefore rightfully the subject of confiscation as the property of M'Culloch, and was accordingly confiscated and vested in the State, from whom the plaintiff derives his title. The extent of the defendant's claim upon the justice of the State, or how far a court of equity would interfere against the present plaintiff, on the ground of notice, it is neither necessary nor proper that we should decide upon the present occasion.

WILLIAM WOFFORD, TO THE USE OF CHARLES M'DOWELL, v. JAMES GREENLEE.—Conf., 79.

Where a party cannot sue in his own name on a note, having but an equitable interest therein, he cannot except under special circumstances, avail himself of it by way of set-off.

This was an action on the case brought in Morgan Superior Court of Law on a note in the words following:

I promise to pay, or cause to be paid unto William Wofford, (300) Esq., or to his assigns, the full and just quantity of six hundred gallons of good whiskey, on or before the 15th day of June, which shall happen in 1792, to be delivered at the subscriber's still-house in Burke County, it being for value received of him, this 1st day of November, A.D., 1790.

(Signed) JAMES GREENLEE.

On the said note there was the following endorsement:

I hereby assign over my right of the within note to Chas. M'Dowell, this 30th July, 1791.

(Signed) WILLIAM WOFFORD.

On this note there was a verdict for the plaintiff, subject to the opinion of the Court, whether the following notes offered on the trial as a set-off should be admitted as such:

I promise to pay or cause to be paid to Mr. John Cooper, or order, the sum of eight pounds specie, to be discharged in any merchantable produce at the common prices, upon the 25th of December next, being for value received. Witness my hand, this 24th July, 1784.

(Signed) WILLIAM WOFFORD.

On which note there was the following endorsement:

I assign over my right, title, and interest of the within note of hand to James Greenlee, for value received of him, this 10th day of August, 1784.

(Signed) JOHN COOPER.

I promise to pay, or cause to be paid to Mr. James Lee, or order, the sum of ten pounds current money of the State of North Carolina, on or upon the first day of June next ensuing the date thereof, but may be paid or discharged in any merchantable produce, or common
(301) trade, at the common custom or selling prices, being for value received. Witness my hand, this 3d March, 1788.

(Signed) WM. WOFFORD.

On which there was the following endorsement:

I hereby assign over my right of the within note to James Greenlee, for value received of him, this 7th March, 1788.

(Signed) JAMES LEE.

By the Court. The two notes upon which this question arises, not being payable in money alone, are not negotiable under the act; the endorsement, therefore, would not enable the defendant to sue for them in his own name; nor, for the same reason, to set them off. But for the purpose of showing that they form the proper subject of a set-off, that class of cases has been referred to, wherein courts of law have taken notice of an equity and a trust, and have given effect to the claims of a person beneficially interested, though no party to the record. Without tracing particularly these cases, which are often recurred to, it is sufficient to observe that whenever the principle which governs them has been acted upon, it was because the justice of the case manifestly re-

quired it; and for the purpose of giving that decision according to the merits in the first instance, which a court of equity would ultimately have pronounced, though with greater delay and expense to the parties. These authorities have guided many decisions in our own courts, and must continue to have a just influence upon cases where the same or similar circumstances justify their application. There are, however, two circumstances in this cause which render it improper that the defendant should be considered as the owner of the notes, for the purpose of admitting them as set-offs. One is, that the note upon which the suit is brought, though not negotiable, is assigned to M'Dowell, for whose use the money is to be received. This appears on the face of the proceedings; and if we regard the assignment of these notes as vesting the property of them in the defendant, equal justice requires that the assignment to M'Dowell should be also considered as vesting (302) the other note in him! Then the set-off would not be against a claim of Wofford, but of M'Dowell, and of course mutuality, its essential principle, is wanting. Greenlee's equitable interest ought only to be taken into consideration by the Court for the purpose of lessening the demand of Wofford, the real debtor, upon the note; but to give it the effect of lessening the demand of M'Dowell, who is as well entitled to the whole amount as Greenlee is to the set-off would be to pervert the principle of the cases referred to. It is rather singular that Greenlee, having these two notes (as it appears by the date of the endorsement), should have given the notes sued for to Wofford, without deducting the amount of them.

NOTE.—See *Stanly v. Green, ante*, 66, and the note thereto.

JOHN WALKER v. BERNARD & JOHNSTON.—Conf., 82.

If a tenant in common recover a judgment against his cotenant, and direct the execution to be levied on a particular part of the tenant, he is estopped to claim a partition against the purchaser.

This cause came before the Judges on the following statement, agreed upon by the counsel of the parties: John Walker and Daniel Bernard were seized on the 23d October, 1783, as joint tenants, and by the operation of the Act of 1784 became tenants in common, in fee simple, of four lots and one-half in the town of Wilmington, described by the numbers 227, 226, 231, 232, and 236, and upon the petition of the said

John Walker, for a partition of the said lots, the following special verdict was found in the county court of New Hanover, March, 1799:

"The jury being impaneled and charged with this cause, find the following facts: That Daniel Bernard and the plaintiff, Walker, were possessed of the several lots mentioned in the petition, under a
(303) conveyance made by Solomon Ogden, dated 25th October, 1783, referring thereto; that the petitioner, Walker, obtained a judgment and execution against Daniel Bernard; that on the sale made in pursuance of said execution to satisfy said judgment, the petitioner, Walker, directed the sheriff to sell the lot No. 231, mentioned in the defendant's answer; that the said petitioner, Walker, was present at the sale of said lot, No. 231, and that the same was then purchased by the defendant, Johnston, and was conveyed to him, the said Johnston, by the sheriff of New Hanover County, for a valuable consideration, and that the defendant, Johnston, became possessed of said lot in pursuance of said sale."

Upon which special verdict the county court pronounced judgment in favor of the defendant, Johnston, against the prayer of the petition, from which the plaintiff appealed.

The question is, whether the facts and proceedings found by the above verdict to have been done by John Walker, amount to a severance or partition of the interests of the said tenants in common.

By the Court. The only privity by which tenants in common are united is that of possession, and even this proceeds from the impossibility of each tenant ascertaining which is his own part; when the respective severalties can be ascertained, the tenancy is dissolved. A deed is not necessary in all cases to make partition between them; for it may be done by parol, if done upon the land, this amounting to a livery in law, and is in its nature as well calculated to give notoriety to the transaction as if the parties had entered into a deed. If there be any case wherein a partition is good by parol, the circumstances stated in this special verdict are such as would have warranted a jury to infer the existence of whatever was necessary to complete it, and as a matter of evidence, the partition might have safely been presumed. And although the facts found may not amount to a legal partition since the Court cannot supply any conclusions of facts, yet they are such as plainly estop the petitioner from a division of the lot in question. The judgment obtained
(304) by him, the sale of this lot, by his direction and in his presence, and the receipt of his debt out of the produce, amount to a strong assurance to the purchaser, that it was the separate property of Bernard; and he had reason to feel himself safe in going on to improve the prop-

erty and render it more valuable. The petitioner is therefore debarred by these acts from claiming any benefit from the lot; for could it be even supposed that no severance had ever taken place, notwithstanding these indications of it, proceeding from a person to whom it must have been known, yet the circumstance of his standing by and concealing his title, or rather disclaiming any title by ordering the sale, are alone sufficient to authorize the Court to pronounce a judgment for the defendants. In this case the sheriff and Walker may be considered as tenants in common, who mutually consented to a partition in the premises.

NOTE.—Tenants in common of lands cannot make partition by parol. *Anders v. Anders*, 13 N. C., 529; *McPherson v. Seguine*, 14 N. C., 153.

HARRIS, BRALEY & CO. v. WILLIAM LENOIR ET AL.—Conf., 85.

If the same jury attend on the premises in ten different caveats for different claims to different parcels of land, the caveators in all the cases being the same, but the defendants different, the jurors shall receive pay in each case.

This case came before the Judges upon the following statement made and signed by the counsel for the parties in the several suits depending in Morgan Superior Court:

"There were ten several caveats for different claims to different parcels of land in the county of Wilkes; the caveators in all were the same persons, but the defendants were different in each; all were tried by a jury on the premises; in all of them the jury consisted of the same men, and they were three days in trying all the caveats on the several parcels of lands."

The question for the opinion of the Court is, Is each juror (305) entitled to one day's pay, i. e., 8s as a juror, in each of the ten caveats, amounting together for each to £4 2s, or is each of such jurors entitled only to be paid for three days' attendance as a satisfaction in and for the whole of such ten caveats, amounting to £1 4s each?

Evan Alexander for plaintiff.
John Williams for defendant.

By the Court. The act regulating the attendance of juries upon the premises, gives no direction to the Court with respect to apportioning their pay; and without a latitude of that kind, it is impossible not to

follow the obvious construction of the law. The allowance of eight shillings per day is made to them in each case, without reference to the portion of time less than a day, they may be employed in the duty; and hence, if they perform the service in one hour, they would be entitled to the same allowance. And perhaps they would be justly entitled, unless it could be considered that the value of the service was lessened by being quickly dispatched, or enhanced by occupying more time; or unless where juries are called from their private affairs, upon a duty of this kind, a line could be drawn between the inconvenience sustained by those who complete the business in part of the day, and that felt by those who were employed throughout the day. As they are entitled to this allowance in one case, the same expressions give them the same claim in every other; and as the services have been rendered in ten cases, and for different parties, on one side, each party liable to the costs is bound to pay the jurors at the rate laid down in the act. We are not apprised of any rule by which a different allowance could be made consistent with the provisions of the law, which are alone to guide us. The juries when summoned are bound to attend in every case, and a failure in this respect subjects them to forfeiture, and an action by each party grieved.

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(306)

MARK POWELL v. ANDREW HAMPTON.—Conf., 86.

1. The attachment law does not require the plaintiff to swear positively to the amount of his debt; therefore, *it was held* good where the plaintiff swore that he had good reason to believe that the defendant and his connections "had endamaged him to the amount of" a certain sum.
2. Where an attachment was executed and returned to a court on the same day on which it was issued, the return is irregular, but is helped by the statute of jeofail, after verdict or judgment by default.
3. It is not error for the court to order goods attached to remain in the hands of the sheriff of the county, such sheriff being the plaintiff in the suit.
4. If a plaintiff in attachment fail to give bond or file an affidavit, it should be pleaded in abatement; it cannot be taken advantage of by writ of error.
5. It is not error that the sheriff who summoned the jury to execute a writ of inquiry in an attachment was the party plaintiff in the cause.
6. If an officer executing an attachment returns "executed and returned" without specifying on what he has levied, the return is informal, but is cured by the statutes of jeofail, after verdict or judgment by default.
7. It cannot be taken advantage of by writ of error that no declaration or other paper setting forth the nature of the charge was filed in a suit by attachment.

POWELL *v.* HAMPTON.

This was a writ of error brought in Morgan Superior Court to reverse a judgment obtained by the defendant in error v. the plaintiff in Rutherford county court by original attachment in the words following:

"State of North Carolina—Rutherford County.
"To any regular officer of Rutherford County—Greeting:

"Seal, Jonathan Hampton.

"Whereas, Andrew Hampton hath complained on oath to me, a justice of the peace for said county, that he hath good reason to believe that Mark Powell, late of said county, and his connections, have endamaged him to the amount of," etc., the rest in the common form. At October Term, 1782, the attachment was returned, "executed July 12, 1782, by me, Henry Trout, Constable"; and at the same term it was ordered by the Court that the goods attached remain in the hands (307) of the sheriff, and that he take proper measure to secure the same, until the event of the suit be known; and judgment by default was entered. At January Court, in 1785, a jury was impaneled and sworn to inquire of the plaintiff's damages sustained, etc., who assessed his damages to £129 2s and costs, and upon this judgment was entered and an execution issued, under which the property attached was sold. The following are the assignments of error:

1. That the suit was instituted by original attachment, and the plaintiff therein hath not sworn positively to any debt or damage due or done by him, the said Mark, but that said plaintiff had good reasons to believe that said Mark and his connections had endamaged him, etc.

2. That the said attachment was executed and returned by a constable to July sessions, 1782, viz., the 12th of July, being the same day on which the said process was dated and granted by Jonathan Hampton, Esq.

3. That it was then ordered by the Court that the goods attached remain in the hands of the sheriff until the event of the suit, and that the said plaintiff was then sheriff of the county of Rutherford, to whom said order was directed.

4. That the plaintiff did not give bond to prosecute his suit, nor did make and sign affidavits of the facts set forth therein according to law, and return the same.

5. That the plaintiff, Andrew Hampton, being the sheriff of said county, did summon the jury to execute a writ of inquiry on said suit, and did as sheriff preside at the trial.

6. That Henry Trout, the constable who executed said attachment, hath not returned on what lands or goods the same was levied, but barely endorsed "executed and returned."

7. That no declaration or any other paper setting forth the nature of the charge was filed, and therefore the said Mark Powell, for these reasons, prays that the said judgment may be annulled and reversed.

The question is, are the foregoing matters assigned for error,
(308) or any of them, sufficient to reverse the judgment obtained in the county court?

By the Court. We have considered the exceptions taken to this record, and shall briefly state, in the order of assignment, the reasons which lead us to conclude that this judgment ought not to be reversed.

1st error. The Act of Assembly upon this subject, Iredell, page 301, does not require that the party obtaining an attachment shall swear positively to the amount of his debt or damage. It is sufficient that he swears to the best of his knowledge and belief, and the oath taken in the present case does not substantially differ from that required by the act. Had it varied from the effective meaning of the act, it must have been considered as no oath at all, and then the defendant might have availed himself of it by plea in abatement, and wherever an exception may be so taken, it cannot be assigned as error. The act has at once prescribed the form of proceeding, and directed the manner in which any omission shall be taken advantage of by the defendant. If, therefore, this be an error, it would be wrong to reverse a judgment long since rendered, where the defendant might, in the first instance, have abated the writ.

2. We conceive that this irregular return is helped by the two statutes of Jeoffail, 18th Eliz., ch. 14, and 4 and 5 Ann., ch. 16, the first of which provides that judgment shall not be stayed or arrested by reason of any imperfect or insufficient return of any sheriff or other officer, and by the latter act the same practice is extended to judgment by default.

3. This is altogether a collateral matter, no way essential to the gist of the action, nor in any respect connected with the regularity of the judgment. But it does not appear on the face of the record that the defendant in error was the sheriff of the county when this order was made, and presumption, if made at all, should be rather to support than destroy a judgment. The order itself likewise is merely surplusage.

It is directory on the sheriff to do that which the law has already
(309) enjoined upon him, for it may fairly be interpreted that he either keep the goods in his custody or deliver them upon being replevied. Let this exception, however, have its greatest force, and we think it comes completely within the spirit and meaning of the statutes of the 16th and 17th Car., 2d ch. and 4 and 5 Ann., ch. 16.

4. This should have been pleaded in abatement.

5. Admitting that this appeared upon the record, which it does not, yet it is to be considered that the jurors are appointed by the Court, and

the sheriff possesses no other power than merely as a minister to summon them to attend. Even in England, where the mode of appointing juries is extremely different, this objection could only form a cause of challenge to the array, and if omitted to be so taken, could not be assigned for error. Challenges might also have been made on the same ground had the inquest been formed of talesmen; but to presume that they were so formed would be to make an error where none appears.

6. The return is certainly informal, but is cured by the statutes before referred to.

7. If there be any weight in this objection, as applied to original attachments, we think that under the circumstances of this case it cannot be taken advantage of in error.

NOTE.—See *Bickerstaff v. Dellinger, post,* 479; *State Bank v. Hinton,* 12 N. C., 397; *Skinner v. Moore,* 19 N. C., 138; *Minga v. Zollicoffer,* 23 N. C., 278.

Cited: Garmon v. Barringer, 19 N. C., 503.

THE SURVIVING PARTNERS OF ALSTON, YOUNG & CO. v. BRESSIE PARISH'S HEIRS.—Conf., 91.

A default should not be set aside the third term after it was taken nor without imposing on the defendant the usual terms of entering only such pleas as will bring forward the merits of the case.

This was an action of debt brought upon a bond executed by the father of the defendants in his lifetime to the plaintiffs. The writ was executed and returned to May Sessions of Granville (310) County, 1799; the defendants made no defense, a judgment by default was taken, at August Court the cause was continued; and at November Term the defendants moved the Court to set the judgment by default aside, and for leave to plead such pleas as they might think proper, intending to plead the Act of 1715, "barring all claims against the estates of deceased persons, after the expiration of seven years from the death of the debtor." The county court set the judgment by default aside, without restricting the defendants in pleading. From this decision the plaintiffs appealed to Hillsborough Superior Court of Law, and after argument the question was submitted to the Judges here.

By the Court. The default in this case was taken in a manner to the two rules of practice established by the Court law, and is therefore un-

exceptionable in point of regularity. The discretion residing in the Court to set aside such judgment ought to be exercised with a view to the attainment of justice, and the prevention of delay under the particular circumstances of each case. It is necessary not only that the application should be made within a reasonable time, but the merits likewise which the defendant seeks to have tried ought to be clearly and concisely stated in an affidavit. It follows that this default was improperly set aside, because done at the third term after it was duly taken, and without imposing on the defendant the usual terms of entering a plea which should bring forward the merits of the cause.

NOTE.—See *Andrews v. Devane*, 3 N. C., 373, and the cases referred to in the note.

(311)

HUGH COOMER v. WILLIAM LITTLE.—Conf., 92.

Where the commissioners appointed to settle the army accounts issued a certificate in the plaintiff's favor upon which the defendant drew the money, *it was held* that the plaintiff's cause of action thus accrued, and that a lapse of three years thereafter would bar him.

This was an action on the case instituted originally in the county court of Orange to recover the sum of $81.30, being the value of a certificate issued in favor of the plaintiff by Robert Fenner, commissioner appointed in 1786 to settle the army accounts, and drawn by the defendant. Pleas, general issue, statute of limitations. The plaintiff had a verdict subject to the opinion of the Superior Court of Law for Hillsborough District, whether in an action brought to recover the value of a certificate drawn more than three years before the bringing of the suit, the statute of limitations would operate to bar the plaintiff's demand.

By the Court. Nothing appears in this case to take it out of the general principle, that the statute of limitations begins to run from the time the plaintiff has cause of action against the defendant. In the year 1786 the defendant received the money to the use of the plaintiff, who might then have instituted a suit, and consequently in three years from that time the pleading the statute would bar his recovery.

NOTE.—See *Sweat v. Arrington*, 3 N. C., 129.

Cited: Com'rs. v. MacRae, 89 N. C., 97; *Rhodes v. Love*, 153 N. C., 474.

THE STATE v. JOHN COLE, SHERIFF.—Conf., 93.

Where taxes were due on the land for two years, and the sheriff sold the land for the taxes of the first year for a sum sufficient to pay the taxes of that year, but not those of the last year, *held* that the lands in the hands of the purchaser was not liable for the taxes of the last year.

David Allison, residing in Philadelphia, was seized of a tract of land containing ..... acres, lying in the county of Richmond. (312) This tract was duly returned by Allison or his agents in the tax list for the year 1795, but not for the year 1796; neither the taxes for 1795 nor 1796 were paid; and the defendant, in consequence thereof, after the 1st day of April, 1796, advertised the land for sale for the payment of the taxes for the year 1795, and on the 23d of September, 1796, sold the same for £175, which was a small sum more than sufficient to pay the taxes for 1795, but not sufficient to pay those due for 1796. Afterwards the defendant, sheriff as aforesaid, demands the tax due for 1796 from the purchasers under the sale, but they refuse to pay it, and the defendant is sued by the treasurer for these taxes. It is agreed that if the lands in the hands of the purchasers under said sale, they being now in possession, are not liable, the sheriff is not. The question is, are they liable or not?

By the Court. Those lands in the hands of the purchaser were not liable for the taxes for the year 1796.

ELIAS COLKINGS' ADM'RS v. THE SURVIVING PARTNER OF JAMES THACKSTON & CO.—Conf., 93.

A reference to arbitrators will take a case out of the statute of limitations.

This was an action on the case brought in Fayetteville Superior Court of Law, pleas, general issue, statute limitations. The jury sworn find the defendant did assume and assess the plaintiff's damages to £76 8 2, subject to the opinion of the Court on the following points: In July Term, 1792, two actions were depending in the county court of Cumberland between John Burgwin, surviving partner of James Thackston & Co., against the present plaintiffs. The plea of set-off was pleaded, and the death of James Thackston was suggested at (313)

that term, and an order was made referring both causes to John Eccles and John Winslow, as by the records of the county court will appear, and which are to be considered as part of this case; that on the 10th day of October, 1792, the said referees made their award as follows: "We, the subscribers, appointed referees in the suits depending in the county court of Cumberland, between the surviving partners of James Thackston & Co. and the administrators of Elias Colkings, have examined the several accounts between the parties and taken the testimony of Lewis Barge, John Baker, and Archibald M'Mullan, find a balance due the estate of Elias Colkings, as above stated.

Fayetteville, Oct. 10, 1792.

(Signed) JOHN ECCLES,
JOHN WINSLOW."

That the award was returned to the county court, and at January Term, 1793, of said Court, judgment was given thereon in both suits for the defendants, the administrators of Elias Colkings, that this action was brought within three years after the reference aforesaid. If the Court should be of opinion that the above reference, award, and judgment are sufficient to take the cause of action out of the statute of limitations, or if the plaintiff in this action can maintain it on the references and submissions aforesaid, then and in either of those cases judgment is to be given for the plaintiff on the verdict. But if the Court shall be of opinion that this action cannot be maintained either way, then judgment of nonsuit to be entered.

By the Court. The plaintiffs and the defendants, having agreed to refer the matters in dispute between them to arbitrators, take the case out of the statute of limitations, and the present suit, having been brought within three years after the reference had been entered into and made a rule of court, the present plaintiffs are entitled to recover in this suit.

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(314)

JAS. M'ALISTER'S ADM'RS v. JAS. SPILLER'S EX'RS.—Conf., 95.

An action for seducing away a slave does not abate by the death of the defendant.

The plaintiff's intestate possessed and was legally entitled to the service of a negro named King by hire for the space of one year, commencing the 1st of January, 1795, and ending the 1st of January, 1796.

James Spiller, the defendant's testator, in the year 1795, seduced, enticed, and persuaded the said negro, King, to absent himself from the service of the said James M'Alister, and did maintain and keep the said negro, King, in his possession during the remainder of the year. The jury find the defendant's testator guilty, and assess the plaintiff's damages to £.....; the suit was commenced against Spiller in his lifetime, and duly revived against his executors, and against whom said verdict was had.

The questions are, whether such suit was abated by the death of James Spiller, so that it could not be revived against his executors; and whether, as said suit was revived without any plea in abatement, judgment shall now be rendered against the said executors.

By the Court. This action having been brought for the seduction of a slave from his master's service, and the defendant's testator keeping the slave in his possession to the injury of the plaintiffs, the action did not abate on the death of James Spiller, and after his death was properly prosecuted by the plaintiffs.

GILBERT M'CALLOP'S EX'RS v. WARREN BLOUNT AND WIFE.—Conf., 96.

Slaves, to whom the wife has a right in remainder, do not vest in the husband, if he die during the coverture, without having reduced them into possession.

The following case stated by the counsel for the parties to this (315) suit, brought in Wilmington Superior Court. John Moore, by his last will and testament, bequeathed sundry negroes, in the following words, to wit:

"It is my desire that the following negroes, to wit, Cæsar, Tom, Nan, Dorcas, Doll, and Davy, and all their issue, if any, should remain with my beloved wife, Mary, during her widowhood, to raise her children upon; and after her intermarriage, to be equally divided amongst my beloved daughters, Annis, Mary," etc.

John Moore died, and his widow took possession of the negroes, agreeably to the will. During her widowhood, Annis, one of her daughters, intermarried with Gilbert M'Callop, who soon after died, during the widowhood of John Moore's wife. In a short time after the death of Gilbert M'Callop, John Moore's widow intermarried with a certain Mr. Bulls; in consequence of which a division of the negroes above men-

tioned was made amongst the daughters of John Moore, according to his will, and the part allotted to Annis, the widow of Gilbert M'Callop, was given to her, and she intermarried with the defendant Warren Blount.

The widow of John Moore had possession of all the above named negroes from the time of John Moore's death to her intermarriage with Bulls. Gilbert M'Callop never had possession of any of them during his life. The executors of Gilbert M'Callop have brought suit against Warren Blount and wife, and the question is, Do the negroes allotted off to Annis, the wife of Warren Blount, belong to them or to the executors of Gilbert M'Callop?

By the Court. By the devise in the will, the negroes in question were to remain in the possession of the widow of John Moore during her widowhood, and on her marriage were to be equally divided between his two daughters, Annis, Mary, etc. Annis intermarried with Gilbert M'Callop during the widowhood of John Moore's wife, and Gilbert M'Callop died during her widowhood. Neither Annis nor her husband were entitled to the possession of the negroes until the marriage of John Moore's widow. As Gilbert was not, nor could have possession of the said negroes during his life, his executors cannot have them
(316) after his death. They belong to Annis and her husband, the present defendants. 2 Bl., 433; 1 Bacon, 289.

NOTE.—See *Neale v. Haddock*, 3 N. C., 183, and the cases referred to in the second note thereto.

Cited: Johnston v. Pasteur, post, 585; *Weeks v. Weeks,* 40 N. C., 120.

AUGUSTUS BENTON v. WM. DUFFY, BAIL FOR GREEN.—Conf., 98.

1. It is only where the question between the parties has once been decided upon confession of verdict that the judgment can be pleaded in bar to another action: Therefore, where a plea of *nul tiel record* to a *sci. fa.* reciting a judgment against James H. Green was found for the defendant because the judgment was against James Green, *it was held* not to be a bar to a *sci. fa.* reciting a judgment against James Green.

2. The county to which a *ca. sa.* against the principal should issue, in order to charge the bail, is the county in which the defendant was arrested, unless the return of the sheriff or something equally satisfactory and conclusive evinces that the county where the defendant was taken no longer continues to be his proper county.

BENTON *v.* DUFFY.

The plaintiff obtained a judgment in the county court of Orange against James Green, for whom the defendant in this suit was bail; a writ of *fi. fa.* issued, and a small part of the demand was satisfied; for the balance a writ of *ca. sa.,* issued to the county of Orange, to which the sheriff returned "not to be found"; before the *ca. sa.* issued to Orange, the defendant informed the plaintiff, or his agent, that Green resided in the county of Edgecombe, and requested that the process might issue to that county; this was, however, refused, and when the defendant made his defense to the *scire facias,* grounded on the aforesaid return, he, among other things, relied on this as proof of collusion to charge the bail. Judgment was given for the defendant upon the plea of *nul tiel record* to the first *scire facias,* because the *scire facias* stated that the judgment had been recovered against one James H. Green, and the record was of a judgment against James Green.

A second writ of *scire facias* issued, and was returned "exe- (317) cuted"; and the defendant pleaded *"Nul tiel record,* former judgment no *ca. sa.* to the principal's proper county, collusion to charge the bail, surrender of the principal, death of the principal, discharge of the bail by the election of the plaintiff to sue out a *fi. fa."* The plaintiff replies, there is such a record, *nul tiel record,* as to former judgment, as to the plea of *ca. sa.,* etc. Plaintiff replies a *ca. sa.* to Orange, where James Green was resident at the time the writ was sued out against him, and he arrested, etc. Defendant rejoins, that at and before the time of issuing the *ca. sa.* to Orange, the principal resided in Edgecombe, and the plaintiff had notice thereof; demurrer to the rejoinder and joinder, replication and issue as to the pleas, collusion to charge the bail, surrender and death, etc., demurrer as to the plea of discharge of the bail by issuing *fi. fa.* and joinder. The county court gave judgment upon the several pleas and demurrers for the plaintiff; the defendant appealed to the Superior Court of Law for Hillsborough District, when he withdrew the pleas that the bail was discharged by the election of the plaintiff to sue out *fi. fa.,* surrender of principal and death of principal; and a jury being impaneled, found that there was no collusion to charge the bail. Whereupon, the Court ordered that the plea of *nul tiel record* and the plea of former judgment, and replication thereto, and plea of no *ca. sa.* to the principal's proper county, the replication, rejoinder, demurrer and joinder thereon, be transmitted to the Court of Conference for a final determination.

By the Court. In the former suit, the plea of *nul tiel record* went only to the existence of the particular judgment recited in the writ, namely, against James H. Green, and the production of a judgment against James Green was considered by the Court a failure of record. The

questions whether the defendant became bail for James Green, whether a judgment was obtained against him, whether the subsequent steps were legally taken so as to charge the bail, were neither discussed nor
(318) decided on. And it is only where the question between the parties has been once decided upon confession or verdict that the judgment can be pleaded to bar another action. Hence, if a party fails by reason of a defect in his declaration, or by misconceiving his action, or by suing as executor when he was administrator, the judgment will be no bar in another action for the same cause.

The *ca. sa.* has in this case issued according to the act.

By the proper county is meant that wherein the defendant was arrested, which the clerk can at once ascertain by examining the writ, which serves as his guide in issuing the execution. This ought not to be departed from, unless a return of the sheriff, or something equally satisfactory and conclusive, evinces that the county where the defendant was taken no longer continues to be his proper county.

NOTE.—See *Finley v. Smith*, 14 N. C., 247, which decides that the proper county, *prima facie*, to which a *ca. sa.* should issue, in order to charge the bail, is the county where the original writ was executed. But if the defendant has acquired a *domicil* in another county and the plaintiff has notice of it, the *ca. sa.* ought to issue to that county.

WILLIAM G. BERRY AND WIFE v. MARY McALLISTER'S EX'RS.
Conf., 100.

Where a tenant for life bequeathed one-half of the emblements to which she was entitled to her daughter and left an executor, who, after reaping and housing the crop, married the daughter, but died before he had sold or otherwise disposed of it, *it was held* that his possession of the crop was only as executor, and that upon his death the wife and not his administrator was entitled to it.

This was a petition exhibited in Wilmington Superior Court for a distributive share of the estate of Mary McAllister, and the following facts were agreed upon by the parties and their counsel:

1. That Archibald McAllister, being seized of a plantation in Brunswick County, called Belleville, and possessed of sundry negroes
(319) who had been usually employed upon it, devised the plantation and negroes to his wife, Mary McAllister, for life, remainder to his brothers and sisters, of whom James McAllister was one, and died in the year 1793.

2. That after the death of Archibald, Mary, who was tenant for life, and James, who was one of the remaindermen, lived upon Belleville plantation, and made one family; but James had the superintendence and management of the plantation and negroes, and in the spring of 1794 planted the crop of rice in question.

3. That about the month of May, 1794, while the crop was growing, Mary died, leaving a daughter, the petitioner, Sarah Eliza, and a son, to whom she devised the residue of her estate equally, which residue included her share of said crop, and appointed James McAllister and Benjamin Mills, among others, her executors.

4. That upon the death of Mary, James proved her will, and alone qualified as executor, continued to superintend the crop in the same manner as he had done in the lifetime of Mary, and when it was grown reaped and stacked it.

5. That in the month of January, 1795, after the crop was reaped and housed, James married the petitioner, Sarah Eliza, the daughter of Mary, to whom Mary had devised one-half of the residue of her estate as aforesaid.

6. That about the month of April or May, 1795, James McAllister made a contract with one William Prestman, of South Carolina, for the sale and delivery of a large quantity of rice far exceeding the whole crop aforesaid, but no mention was made in said contract of the crop in question, nor was the crop ever delivered, nor during the life of James McAllister threshed out, but remained at his death on Belleville plantation, in the same state and condition which it was in at the time it was reaped and stacked as aforesaid.

7. That James McAllister died about the month of September, 1795, leaving his wife, Sarah Eliza, who is since married to the petitioner, William G. Berry, and upon the death of James, Benjamin Mills, one of the executors named in Mary's will, qualified, took possession of the crop, which remained upon Belleville as aforesaid, caused it to be threshed out, and sold at public vendue as the property of Mary, (320) and took bonds payable to himself as her executor.

Now, the question submitted for the opinion of the Court is, whether that half of the crop which was devised as aforesaid by Mary McAllister to her daughter, Sarah Eliza, was, by the aforesaid acts of James McAllister, vested in him, so as to go to his administrator, or whether it survived to his widow.

By the Court. That part of the crop in question, devised by Mary to her daughter, Sarah Eliza, never vested in James so as to make it his property. He acted only as an executor of Archibald McAllister, and it

does not appear that any act of his extended to taking possession of one-half of said crop as his own, and without such interference we must presume he acted as executor. 2 Blac., 433.

NOTE.—See *Dozier v. Sanderlin*, 18 N. C., 246.

ISAAC DAVIS v. THOMAS GIBSON.—Conf., 102.

1. *Assumpsit* will not lie where a party has a remedy on a covenant under seal; therefore, where in a charter party under seal the defendant expressly covenanted to man and victual the vessel for the specific voyage and back again, etc., and afterwards sold her in a foreign port and received the money, *it was held* that, as the whole tenor of the contract showed that it was the intent of the parties that the vessel should return, it was a breach of the charter party for the defendant to sell, for which the plaintiff could bring covenant or debt, which was a higher remedy than *assumpsit*.

2. On an appeal from the county to the Superior Court, the plaintiff shall not change the declaration filed in the county court; and if there was no written declaration, he shall be confined to the grounds of action declared below.

The plaintiff instituted an action upon the case against the defendant in the year 1794, in the county court of New Hanover, for the sum of £850. At March Term, 1797, of said Court the plaintiff moved to (321) amend his writ, and alter it from case to debt, agreeably to the following copy of the minutes of said county court: "In the suit, *Isaac Davis v. Thomas Gibson,* the plaintiff moved for leave to alter the writ from case to debt, which was opposed by the defendant, and it was ordered on argument, by the Court, that the plaintiff take nothing by his motion; from which decision said plaintiff prayed an appeal to the Superior Court, which was granted; and at ..... Term, 179..., of said Court, upon a motion for that purpose, the said Court refused permission to alter the writ. At November Term, 1799, the plaintiff filed his declaration in case, for money had and received to the use of the plaintiff, to which the defendant pleaded the general issue; and at November Term, 1800, on the trial of the said cause, it appeared in evidence, and was proved, that the defendant had gone in the vessel mentioned in the charter party to the West Indies, and sold her for 850 dollars, and received the money, but had paid it to the captain of said vessel, as the defendant declared, who, the defendant said, was authorized to receive it, though it appeared that the captain was put in the vessel

as captain by the defendant. But the Court ordered a nonsuit upon the ground that the plaintiff had originally issued his writ upon a sealed instrument, and ought not afterwards to alter the cause of action, which said sealed instrument is as follows:

"*North Carolina—sct.*

"This charter party of affreightment, indented, made, concluded, and agreed upon this 2d day of January, A.D. 1794, and in the 18th year of American Independence, between Thomas Gibson, merchant of the Island of St. Bartholomew, of the one part, and Isaac Davis, pilot of the town of Wilmington, State aforesaid, on the other part, witnesseth, that the said Isaac Davis, for the consideration hereinafter mentioned, hath granted and to freight letten, and by these presents doth grant and to freight let unto the said Thomas Gibson, his heirs, executors, administrators and assigns, the whole of the schooner Rambler, (322) of Wilmington, whereof he, the said Isaac Davis, is sole owner, to proceed from the port of Wilmington as soon as possible, and to proceed to the Island of St. Eustatia, St. Bartholomew, or St. Thomas, which may be most convenient, the said Isaac Davis to deliver to the said Thomas Gibson, or his assigns, the schooner Rambler, well appareled and fit for sea, and the said Thomas Gibson to man and victual her for the said voyage, and back again to the port of Wilmington, and to pay to the said Isaac Davis the sum of one hundred Spanish milled dollars for the run to either of the said islands and back again, to him the said Isaac Davis, his heirs and assigns. And it is further covenanted and agreed upon that the said schooner Rambler shall not be detained in any of the aforesaid islands, that is to say, in her port of delivery, making a provision for Charterer's privilege of trying markets for the space of twenty-four hours in any of the aforesaid islands, more than the space of eighteen days. In case of detention said Gibson agrees to pay the sum of six dollars *per diem* for every such day's detention. And the said Thomas Gibson doth also further agree to pay to Capt. Robert French all balance of charter money as specified, and all such demurrage as arises aforesaid on delivery of cargo in any of the above mentioned islands. And he, the said Gibson, covenants, and by these presents agrees to indemnify said Isaac Davis from any penalty or loss which may incur by said vessel being employed in any contraband or illicit trade during the term of charter. And the said Thomas Gibson doth covenant and further agree to well and sufficiently man and victual the said schooner Rambler for said voyage and back again to the port of Wilmington, and for the true performance of all and every the articles, covenants and agreements before mentioned, they, the said Thomas

Gibson and Isaac Davis, do hereby bind themselves each party to the other in the sum of two hundred dollars, to be paid by either of the parties failing in the performance thereof, or his heirs, to the other party or his assigns. In witness whereof, the said parties have hereunto
(323) set their hands and seals, the day and year above written.

(Signed) ISAAC DAVIS. [Seal.]
THOMAS GIBSON. [Seal.]

"N. B.—We, the parties above named, do agree to have the said schooner Rambler insured for six hundred dollars, to pay the insurance one-half each party.

ISAAC DAVIS. [Seal.]
THOMAS GIBSON. [Seal.]"

The questions are:

Whether it appears by the record produced and hereto annexed that the action was founded on the said sealed instrument; if so, then whether the plaintiff can alter the declaration which he made in the county court:

Or having made no declaration, can vary the real and true ground of his action.

And supposing that he will now be permitted to declare in case, whether he has not a better writ;

And whether the bail being now liable, he should be permitted to vary his original ground of action, so as to charge them.

By the Court. The true question for us to decide is, whether the plaintiff might have maintained an action of covenant upon the charter party annexed to the record. For if that action would lie and furnish a complete remedy for the sale of the schooner, it follows that the action of *assumpsit,* without any express promise by the defendant, to pay the money to the plaintiff, after the sale of the vessel, but founded merely on the *assumpsit* raised by law, cannot be sustained. The defendant expressly covenants to man and victual the vessel for the specific voyage and back again to the port of Wilmington, and to pay a certain sum for the run to either of the islands mentioned, and back again. Demurrage is to be paid if the vessel is detained in her port of delivery beyond a certain time, and the whole tenor of the contract shows that it was the intent of the parties that the vessel should return to Wilmington.
(324) If, then, the defendant, instead of facilitating her return, as he was bound to do, hath altogether prevented it by selling the vessel, such an act amounts to a breach of the charter party, which, like any other deed, must be construed according to the design of the makers.

The plaintiff for this had an higher remedy by action of covenant or debt, and upon this appearing, it was proper for the Court to direct a nonsuit. The declaration filed in the county court ought not to be changed on an appeal; and if the grounds of action are declared to the defendant, though without a written declaration, and the parties proceed to trial accordingly, the same grounds are understood to exist, and to form the basis of the action upon the trial of the appeal. It is unjust that the defendant, who has prepared himself for the trial in one form of action, should by the appeal be surprised with another and totally different action, to which his defense may be altogether inadequate. It is equally so that the plaintiff, after hearing his adversary's defense and evidence, should be allowed to alter and mould his action so as to avoid its force and direction.

NOTE.—See, on the first point, *Wilson v. Murphey*, 14 N. C., 352; and on the second, *Downey v. Young*, 12 N. C., 432.

ARTHUR WALLER v. SAMUEL PITTMAN ET AL.—Conf., 107.

The sureties in an appeal bond cannot be charged, if the condition of the bond leave out the most effective part required by law, to wit, that the sureties should be discharged on the performance by the appellant of the judgment in the Court above.

This was a *scire facias* brought in Halifax Superior Court of Law to compel the defendants to pay a sum of money recovered by the plaintiff against Benjamin Waller, whose securities the defendants were, on an appeal taken from the county to the Superior Court, plea *"nul tiel record"*; the bond produced in the following words: "State of North Carolina. Know all men by these presents, that we, Benja- (325) min Waller, Samuel Pittman, and James Slotter, are held and firmly bound unto Arthur Waller in the full sum of one hundred and sixty pounds, to the which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents; sealed with our seals, and dated this twenty-third day of May, A.D. 1792.

"The condition of the above obligation is such that, if the above bounden Benjamin Waller shall well and truly prosecute an appeal taken by him this day from the judgment of the county court of Halifax, passed against him in favor of Arthur Waller, to the Superior Court of

Halifax District, and if the decree is confirmed; or if the said Benjamin Waller shall fail to prosecute the said appeal, the said Benjamin Waller shall well and truly pay to the said Arthur Waller twelve and an half per cent interest on the sum decreed, then the obligation to be void; else to remain in full force and virtue.

(Signed) BEN. WALLER. [Seal.]
SAM'L PITTMAN. [Seal.]
JAMES SLOTTER. [Seal.]

"Witness: L. LONG, Clerk."

By the Court. This is an appeal taken under the directions of an Act of Assembly, prescribing the manner in which such bonds shall be taken, and directing the mode of prosecuting the appeals. The defendant ought not to be charged by virtue of such a bond, unless the provisions of the act have been substantially pursued; nor is it right to make any intendment against sureties, beyond that which they have stipulated to perform. The Act of 1777 requires that the appellant shall enter into bond with two sufficient securities for prosecuting the appeal with effect, and for performing the judgment, sentence, or decree which the Superior Court shall pass or make therein, in case such appellant shall have the cause decided against him. By the Act of 1784 it is provided that when the judgment shall be affirmed in the Superior Court, or the appel-
(326) lant shall discontinue his appeal, then he shall pay to the plaintiff in the original action at the rate of 6 per cent; and this is directed to be inserted in the condition of the bond. This is increased to 12½ cents by the Act of 1785, which is to be paid where the appeal is not prosecuted, or where the Court affirm the judgment. From these several acts, which are all that relate to the subject, and which therefore should be taken together, it is apparent that the most effective part of the condition is left out of this bond. So that were the securities able to prove that the appellant had performed the judgment of the Superior Court, it would not save the penalty. Though, in ordinary cases, the circumstance of the condition of a bond being insensible and repugnant operates only to avoid the condition, and still leaves the bond single and binding upon the obligor, yet that principle is not applicable to this case. There it is said to be the folly of the obligor to enter into such a bond from which he can never be released, yet here they must have supposed they were entering into a legal bond.

NOTE.—See *Forsyth v. McCormick*, 4 N. C., 359; *Orr v. McBryde*, 7 N. C., 235.

JOHN BRICKELL'S EX'RS v. WILLIAM BATCHELOR.—Conf., 109.

Covenant will not lie on the assignment under seal of a bond for the payment or delivery of tobacco, the breach assigned being that the obligor did not deliver the tobacco.

This was an action of covenant brought in Halifax Superior Court, and the following verdict found by the consent of the parties. The jury find the covenant in the following words: "I promise to pay Jesse Bowers or his assigns six thousand weight of good tobacco by March next, for value received. Witness my hand and seal, this 10th October, 1781. (Signed) HARRISON MACON. [Seal.]"

On which they find the following endorsements: (327)

"I endorse the within to William Batchelor, as witness my hand and seal, this 22d October, 1782.

(Signed) J. HICKS. [Seal.]"

"I endorse the within to John Brickell. Witness my hand and seal, this 22d October, 1782.

(Signed) W. BATCHELOR. [Seal.]"

And it is submitted to the Court, whether an action of covenant will lie on the above endorsement of W. Batchelor for the damages sustained by the nonperformance of the covenant of the said Harrison Macon.

By the Court. MACAY and JOHNSTON, J., were of opinion that this action could not be sustained.

ANTHONY HUTCHINS v. HECTOR McLEAN.—Conf., 110.

In detinue, where no value is laid in the writ of the property sued for, the defendant should demur; he cannot, after a verdict finding the value, move it in arrest of judgment.

This was an action of detinue brought in Fayetteville Superior Court, and the writ was "to answer Anthony Hutchins, of a plea that he render to him the following negro slaves, to wit, a female slave named Milly,

and her three children, to wit: Creecy or Lucretia, Simon, and Lettice, which he unjustly detains, to his damage of five hundred pounds." The plaintiff had a verdict in which the value of each slave was found; and the defendant's counsel moved in arrest of judgment, that no price or value is laid for the negroes named in the writ as being detained.

By the Court. The reasons in arrest of judgment cannot avail the defendant. He ought to have demurred for the cause assigned in his reasons in arrest of judgment, but having pleaded an issuable plea, (328) and that being found against him, it is too late, after the verdict, to take the exceptions. This defect being excused by the several acts of the General Assembly for the amendment of the law.

Cited: West v. Ratledge, 15 N. C., 38.

JAS. SUMNER ET AL. V. WILLIAM BARKSDALE AND WIFE.—Conf., 111.

Acts of Assembly take effect from the beginning of the session in which they are passed.

This was a petition exhibited in Halifax Superior Court to obtain partition of sundry tracts of land; the petitioners stated they are the children and heirs at law of Josiah Sumner, deceased; that William Sumner departed this life about the seventh day of May, 1784, an infant under the age of twenty-one years, seized and possessed of several tracts of land; that the said William left no child living at the time of his death, or any brother or sister, whereby a certain James Sumner and Seth Sumner and Josiah Sumner, the father of the petitioners, brothers of David Sumner, the father of the said William, become heirs at law to the said William, and entitled to the lands by descent, agreeably to the Acts of Assembly in such cases made and provided, as tenants in common; that the said Seth Sumner died without issue, that Josiah, the father of the petitioners, is also dead; and that James Sumner is also dead, and devised part of the land to Creecy, the wife of the defendant Barksdale, and the residue to his executors, for the payment of debts, and for other purposes.

The defendant demurred, because it appears from the petitioners' own showing that William Sumner, in the petition mentioned, died on the 7th day of May, 1784, at which time, by the laws of this State then in force, the lands of the said William, dying an infant, must have de-

scended to the oldest brother of David, the father of the said William, and could not descend to all the brothers of the said (329) David and their representatives.

The Act of the General Assembly entitled "An act to regulate the descent of real estates, to make provision for widows, and to prevent frauds in the execution of last wills and testaments," under which the petitioners claimed was passed at a General Assembly begun and held at Hillsborough, on the 19th day of April, 1784, and was ratified the 2d day of June, 1784. And the question was, at what time the said act took effect, whether from the first day of the session or from the day of the ratification.

By the Court. The only question in this case is, at what time the act of the General Assembly entitled "An act to regulate the descent of real estates, to make provision for widows, and to prevent frauds in the execution of last wills and testaments" shall take effect. This law was passed at a General Assembly begun and held at Hillsborough on the 19th day of April, 1784, and was ratified on the 2d day of June, 1784. The rule established in Great Britain is, that the statutes take effect from the first day of the sitting of the Parliament at which they were passed. The same rule has been held in this State with respect to what time our acts of Assembly shall take place. It has appeared necessary that there should be some particular time stated and known when the acts of the General Assembly should have effect, and the rule established in England has been adopted in this State, and continued in use until the General Assembly passed the law in 1799, saying they should not have effect and be in force until thirty days after the rising of the General Assembly, unless otherwise expressed. William Sumner, under whom the complainants claim, died on the 17th day of May, 1784, intestate, without any child living, and without any brother or sister. Therefore, under the rule established at the time of his death, when the acts of the General Assembly of this State are to be in force, the (330) complainants are entitled to the prayer of their petition.

NOTE.—See the Act of 1799 (1 Rev. Stat., ch. 52, sec. 36), by which it is provided that Acts of Assembly shall only be in force from and after thirty days after the termination of the session in which they are passed, and not before, unless otherwise expressly directed in the acts themselves.

Cited: Hamlet v. Taylor, 50 N. C., 38.

RICHARD MULLINGTON'S EX'RS v. JAS. SHIPMAN.—Conf., 113.

If a testator bequeath a negro woman to A., and her future increase to B. and others, the children of the woman born after the death of the testator will go to the legatees B. and others.

This was an action of detinue brought in Wilmington Superior Court of Law, to recover a negro slave named Amy. Richard Mullington, on the 13th day of May, 1776, made and duly published his last will and testament in writing, and among other things devised as follows:

"I give and bequeath to my granddaughter, Lucy Lewis, one negro wench named Moll; that is to say, the said wench only, the children of her body to be disposed of or given, as hereafter mentioned or directed, the said wench to her, her husband or assigns forever.

"Item. I will and desire that the children which shall or may be born of the aforesaid negro wench, Moll, bequeathed to my granddaughter, Lucy Lewis, be delivered to the young children, according to their birthrights, beginning with Aaron, then Moses, so down to the youngest"; and appointed the present plaintiff, Josiah Lewis, his executor.

The jury found the foregoing devises; that Richard Mullington died in November, 1776; that Lucy Lewis, the legatee in the will mentioned, was married to the defendant on the 10th February, 1779; that the negro girl, Amy, in the declaration mentioned, is the child and natural issue and increase of said negro, Moll; that she was born after the decease of the testator, and after the said Negro, Moll, was de-
(331) livered to the defendant, to wit, on the first day of March, 1779; that the defendant is husband to Lucy Lewis in the said will named; that the executor of said will assented to said legacy to defendant's wife, and that negro, Amy, was in the possession of the defendant on the 10th day of May, 1787, and was at that time demanded by the plaintiff, executor of said will; that the defendant, Shipman, refused to deliver her up, and that she is of the value of £250; and that Aaron Lewis and Moses Lewis, the legatees, are also living. Whether the law be for the plaintiff or defendant, the jury are ignorant, and pray the advice of the Court. If it be for the plaintiff, they find, etc.; if for the defendant, they find, etc.

By the Court. The rules of the ancient common law, respecting personal goods and chattels, have been disregarded, and a man by deed or will may dispose of the use of his books or furniture to one man, and the

remainder over to another, and the remainder will be good. 2 Blac., 398. And of course he may, in like manner, dispose of any part of the increase of his personal estate, but not in such manner as to create a perpetuity. The plaintiffs are entitled to recover the negro slave in question.

NOTE.—See *Pearson v. Taylor*, 20 N. C., 188; *Conner v. Satchwell, ibid.*, 202.

JUNE TERM, 1801

JOHN SIMPSON v. JEAN NADEAU.—Conf., 115.

The question of "prize or no prize" is exclusively of admiralty jurisdiction, even though the vessel captured was not carried in for condemnation.

This case was as follows: Sometime about the beginning of the year 1796, the schooner Bellona, a privateer commissioned by the Republic of France, in a cruise off the island of Jamaica, fell in with the brig called the Sally, loaded in part with sugars and coffee, and in part with American produce. The brig had no register on board, and the privateer took her on the high seas, under the pretense of a prize, carried her into the port of St. Jago, in the island of Cuba, within the Spanish dominions, and without any regular form of condemnation sold said brig and cargo. Afterwards the said Simpson instituted an action of trover against the said Nadeau in the Superior Court of New Bern District, upon the principle that he was the owner of said brig and cargo; that he was an American citizen, and consequently that said brig and cargo were neutral property, and not liable to capture; and that said Nadeau was owner of said privateer, and as such, liable to the plaintiff for damages by reason of such capture. On the trial, Simpson proved property in said brig and cargo, and obtained a verdict for £1,245 and costs, subject to the opinion of the Court, whether the Court had jurisdiction of the cause.

Haywood, for the plaintiff. The plaintiff, who is a citizen of North Carolina, has had his property taken upon the high seas, and it is said he can have no remedy in this Court. If the maritime courts have not jurisdiction then to do justice, this Court ought to take jurisdiction. To ascertain the proper tribunal before which this question ought to be heard and determined, we must take a view of admiralty courts, and they are divided into two, the one called the prize court, the (333) other the instance court; the first has power to inquire whether a capture is legal or not, and to award restitution where the capture is illegal. The admiralty court does not take jurisdiction because the property has been on the high seas. In the present case, the prize was not carried into a country where a decision could be had; if the vessel had been carried into a French port, the court of admiralty would, on the facts declared in this case, have determined the capture to be

illegal, and awarded costs and damages against the captors and the vessel to be restored. If the Federal Courts and prize courts of this country have no right of inquiry into this subject, then it clearly results that this Court has a right, and unless it had the maxim that for every wrong the law provides a remedy, would be evaded.

The first process used in courts of admiralty, is to seize the vessel, but here the vessel was not within the jurisdiction of the courts of this country. Let us inquire whether the thing having been done on the high seas gives jurisdiction to the other branch of the admiralty court, called the instance court; and I contend that the latter has a concurrent and not exclusive jurisdiction, and if a court of common law has first got the cause before it, it ought to proceed, and in such a case no prohibition ever did or can issue where the court of common law has the cause before them; no case can be shown where a cause brought in a court of common law was abated, because a court of admiralty had jurisdiction.

I will first show that this branch of the admiralty court cannot have jurisdiction, unless they can proceed *in rem.* 1 Com., 392—Godbolt, 260. The first process is against the ship and goods. The same doctrine to be found in 3 Dallas, 186. The cause here reported was dismissed because the vessel was *infra presidia,* and the court could not proceed *in rem.;* the prize courts have exclusive jurisdiction, because they decide according to the laws of war and the laws of nations, and it would be very unsafe to trust the municipal courts to decide on those laws. The second branch of the admiralty court, i. e., the instance court, judges on the municipal laws, and consequently has jurisdiction concurrent with the court of common law. (334)

In all transitory actions, by fiction, the cause of action arising in foreign countries is said to have arisen in the country where the suit is brought; 3 Black. Com. . . ., establishes this doctrine, and proceedings of admiralty courts are very familiar to those in the municipal courts, embracing some cases growing out of particular treaties and foreign laws. Formerly complaints were made that the courts of common law had taken jurisdiction of causes arising on the high seas, by a fiction; to these complaints it was answered by the Judges of the courts of common law, that no prohibition has ever been granted; 4 Co. Inst., 134; that the prize courts have no jurisdiction, because the thing is not within their power, and the instance courts have only a concurrent jurisdiction with the courts of common law.

It has been said that the plaintiff ought to sue in the prize court of France. Was he to do so, he would be told that the subject matter never came within their jurisdiction; when, therefore, he cannot sue in

the maritime courts of our own country, and this court has power to give him redress, it surely ought to do it.

It will not show, that for a taking on the high seas, an action will lie in a court of common law, unless the vessel was taken as a prize; Douglas, 603. The case here cited proves that the admiralty court has not exclusive jurisdiction, and had it been otherwise, the court of common law would have dismissed the cause. And this case further shows the clear definition of the prize and instance courts to be such as I have given.

It will be insisted that the vessel was taken as prize, and therefore the courts of admiralty have exclusive jurisdiction; the case states the vessel to have been taken on pretense of prize. The jurisdiction of the court extends to cases of all descriptions, and will proceed unless it is disclosed that another court has exclusive jurisdiction, and the objection to the jurisdiction of the court, put on the record in proper time, which not being done, it gives the court jurisdiction, and they will proceed,

(335) and unless the court are apprised that it was taken as prize, they will give judgment. 1 Shower, 6; 3 Mod. Reports, 194—same case.

I insist upon it, even if the ship was taken as prize, the objection comes too late to oust this court of jurisdiction; it ought to have been pleaded in time. Co. Litt., 127. Whenever a defendant enters a plea which constitutes a general defense, he cannot afterwards be permitted to object to the jurisdiction of the court. 1 Mo., 181; 2 Mo., 273. The jurisdiction of this court attached on the cause immediately on the defendant's pleading the general issue.

If a cause is depending in an inferior court, it ought to appear by the proceedings that the cause is clearly within the jurisdiction of that court, otherwise the judgment will be reversed; but in a court of general jurisdiction, it is too late to make an objection against the jurisdiction after it is admitted by the pleadings.

Admitting that the cause of action here arose on a taking as prize, yet it ought to be shown, and they ought to prove clearly that it was taken as prize, and was a legal capture; and if it be not shown that it was taken as prize, then it must be taken as trespass. If France and Great Britain are at war, and the cruisers of one power take the vessel of a neutral nation, the taking cannot be held as prize, but mere trespass; and this action being in trover creates no difference. If it be alleged that the Bellona had a commission from the French Republic to cruise and make captures, yet it ought to be shown that the taking was in pursuance of the commission; and she certainly had no power to capture American vessels. What does the commission authorize? It can

only authorize the taking of vessels belonging to enemies, or the vessels of neutral nations engaged in contraband trade, and to constitute the taking these as prize, there must be a condemnation by a proper tribunal.

By the treaty made between America and France, whenever a vessel is taken by a French privateer, it must be carried into port to be tried by a French court; and if the captor does not carry it into a French court for trial, the taking to be held a trespass *ab initio*. By the laws of nations, he ought to carry it into port for trial, in (336) some court of competent jurisdiction; if he does not, the taking is a trespass. This doctrine is to be found in 1 Dallas, 106, and the consequence deducible from his not doing this, is that he is a trespasser *ab initio*.

By the 13th article of the French treaty, it is expressly stipulated: "In order to regulate what shall be deemed contraband of war, there shall be comprised under that denomination gunpowder, saltpetre, petards, match, ball, bombs, grenades, carcasses, pikes, halberts, swords, belts, pistols, holsters, cavalry saddles, and furniture, cannon, mortars, their carriages and beds, and generally all kinds of arms, munitions of war, and instruments fit for the use of troops; all the above articles, whenever they are destined to the port of an enemy, are hereby declared to be contraband, and just objects of confiscation; but the vessel in which they are laden, and the residue of the cargo shall be considered free, and not in any manner infected by the prohibited goods, whether belonging to the same, or different owner." It clearly appears from the conduct of Nadeau, subsequent to the capture, that he never intended to have her tried, and that he did not pursue his authority and commission. Whenever a man acts under an authority, and does not pursue it strictly, he shall be taken a trespasser *ab initio*. *6 Carpenter's case,* 2 Stra., 1184.

Jocelyn, for the defendant. The facts in this case, out of which arises the question now submitted to the Court, in a few words, are these:

The Bellona privateer, commissioned by the Republic of France, in a cruise off the Island of Jamaica, fell in with and captured the brig . . ., loaded in part with sugar and coffee, supposed to be the produce of the British plantations, and without a register on board to designate the country to which she belonged. Under the suspicious circumstances, the privateer took her as and for a prize, carried her into the Island of Cuba, and sold vessel and cargo without the formality of a legal condemnation.

The plaintiff, who was owner of the brig and cargo, instituted
(337) an action of trover against the defendant, owner of the privateer,
upon this principle, that the defendant is owner, is liable for the acts of the captain, and as the captain illegally took the brig and cargo, the presumption in law is, that the same came to the hands of the defendant, and consequently that he is guilty of the trover and conversion charged in the declaration.

The jury gave a verdict in favor of the plaintiff, subject to the opinion of the Court, whether it has jurisdiction of the cause; and on behalf of the defendant, I am to show that it has not. This principle I shall endeavor to establish upon two grounds:

1. That the privateer, having acted under the orders, and in conformity to the existing regulations of its own government, the owner cannot be made personally liable in any court of this country, to a citizen of a neutral country, for any damages this neutral may have sustained by reason of a capture, however contrary to the law of nations this capture may have been. It is purely a matter of government, and the injured party must apply to government for redress.

2. But admitting, however, that there are courts in this country competent to give redress, and to which the plaintiff might have applied for relief, I contend that the Federal district admiralty court has sole jurisdiction in the present case, and that a court of common law can take no cognizance thereof, but that the admiralty court alone has jurisdiction, exclusive of every common law court whatsoever.

In respect to the first point: The French government, conceiving the interests of their nation materially affected, and the safety of their commerce endangered in some essential particulars, by the operation of some clause in the treaty entered into between this country and Great Britain, passed a law authorizing their cruisers and armed vessels to capture neutral, and particularly American vessels having on board any article of British manufacture, or of the growth and produce of their colonies, etc. Under the authority of this act, the privateer captured the plain-
tiff's brig, justified in such capture by the other circumstances,
(338) to wit, the want of a register. If this privateer then has simply
pursued the orders of its own government, and in consequence thereof the plaintiff has sustained an injury, I apprehend that it is not in the power of any court in this country to grant relief. Neither ought a court of judicature to take cognizance of such a case. Application should be made to the Executive, by whom compensation will be demanded from the offending nation.

It would be a strange construction of the law of nations, and the thing impracticable in itself, where each and every individual of that

country by whom a capture has been made, liable to the claims of those whose property has been taken upon the high seas, which country has thought proper to pass a law for that very purpose.

If the government to which the sufferer belongs cannot procure justice from the hostile nation, reprisals would be justifiable upon the principles and for the reasons laid down in the case of *Hughes v. Cornelius,* 2 Show., 232.

One important object of our mission to France was to procure compensation for spoliation and illegal captures.

It is not to be presumed that our envoys would demand, much less that the French Government would consent to a double satisfaction; that is to say, that each injured individual, in a court of this country, should be permitted to obtain satisfaction for his particular damage, and afterwards be entitled to the same amount, through the medium of a treaty. Besides, the courts of the several states, not bound by the law of nations, nor by the decisions of each other, might and most probably would decide differently upon the same subject, by means of which infinite confusion would ensue, in consequence of such contrary adjudications.

2. But admitting, however, that there are courts in this country competent to give redress, I contend that in the present case a court of common law has no jurisdiction whatsoever, not even a concurrent jurisdiction; but on the contrary, that a court of admiralty is the proper tribunal to which the plaintiff ought to have applied for relief; that it has complete and sole jurisdiction, exclusive of all common law courts whatsoever.

There is no principle more firmly established, no point of law (339) better known and understood than this, that a court of common law cannot determine a question of prize or no prize; and further, if the principal taking was as prize, a court of common law cannot entertain jurisdiction of any incident connected with it. On the contrary, if the admiralty had jurisdiction of the original question, they must necessarily determine every circumstance incident thereto.

This has been settled by a series of decisions for ages, and the doctrine has never been shaken even by a single authority. Molloy, new ed., 57, 58, 59, 85; 1 Lord Raymond, 211; Cro. Eliz., 685; 1 Lev., 243; v. Mod., 340; Doug., 595; 3 Term Rep., 323; 3 Blac. Com., 108; 1 Dallas, 221; 2 Dallas, 160; 3 Dallas, 6, 54; 4 Term Rep., 385; Carth., 398; 2 Keb., 360.

Upon the principle, then, that the law is as I have stated it to be, it only remains to examine whether the present case is virtually, as well as in express words, within the authorities cited. This will instantly

appear by referring to the facts: The Bellona privateer, commissioned by the Republic of France, employed in an hostile manner against the subjects of Great Britain, between whom and the citizens of France an open war existed, in conformity to the laws and regulations of its own government, upon the high seas, took the plaintiff's brig as and for a prize. The plaintiff, who claims to be an American citizen, and consequently a neutral, states that this brig and cargo, being neutral property, were not, by the law of nations, liable to capture, and therefore he has brought an action of trover at common law to recover damages for the tort.

What, then, are the Court called upon to decide? Before they can sustain this cause and render judgment for the plaintiff, they must first decide upon the validity of the capture; they must first determine the taking to have been illegal, and of a necessary consequence pronounce an opinion upon the question of prize or no prize.

If the captors were authorized and justified in taking the brig, if she really was liable to capture, and was a good prize, then it is
(340) evident that the plaintiff ought not to recover upon the intrinsic merits. But whether the captors were authorized and justified in taking the brig or not, whether the capture was legal or not, and whether she was a good prize or not, are questions I undertake with submission to say never were determined in any court of common law governed upon principles similar to ours; but such cases in every instance have been uniformly declared cognizable in a court of admiralty alone.

View this cause in the gross or in the detail: bring it forward in any form of action whatsoever, whether trover or trespass; analyze it into all its parts, and under every circumstance, still this great and important question, that is to say, Was the plaintiff's brig a legal prize or not, will stand forward, exposed and distinguished, as the most prominent feature of the whole case.

Let the action be what it may, yet this previous question must be first disposed of before the plaintiff can be entitled to a judgment. If this Court render judgment for the plaintiff, they at the same instant pronounce the capture to have been illegal, and the brig no prize. And if in any collateral action such a question can be determined in a court of common law, the admiralty court, by a fiction, may be deprived of jurisdiction in every instance.

It is highly reasonable that such exclusive jurisdiction should be vested in the admiralty courts, and it is founded upon maxims of the best policy. Sovereign independent states, acknowledging no superior, must necessarily resort to some tribunal governed by laws and usages which, possessing no force but by the consent of all, must, when that

consent is obtained, necessarily be binding upon all. This consent is the law of nations, and this tribunal the admiralty court, governed by the law of nations, and not by the municipal law of any particular kingdom or state; for the municipal law is not binding upon any but those who belong to or reside within the limits of such particular kingdom or state; whereas, the law of nations is binding upon the whole world, for the whole world are parties to, and bound by the (341) decrees of an admiralty court.

From these observations, and many others to the same purpose that might be adduced, I hope I may with confidence conclude that this Court, as a court of common law, has not jurisdiction of this cause. Because, in this case, is necessarily involved a question of prize or no prize, which, with all its incidents, are exclusively cognizable in a court of admiralty.

Many objections have been raised to the application of the foregoing principles to the present case, which it will be necessary to examine. These objections may be classed under the following heads:

It is stated by the counsel for the plaintiff:

1. That the Federal district admiralty court is not competent, and does not possess sufficient power to grant the plaintiff adequate relief.

2. That if the admiralty court possesses any jurisdiction, it must be as a prize court, and not as an instance court. That as a prize court it cannot proceed, unless the subject matter, that is to say, the prize itself, be within the reach of the court, for the proceedings are *in rem.*, and not *in personam.*

3. That the captors did not carry the prize *infra præsidia,* neither was she legally condemned, consequently the captors are trespassers *ab initio,* and liable to the original owner in an action of trespass or trover in a court of common law.

4. That the courts of common law have concurrent jurisdiction with the admiralty courts. And although the Superior Court of Common Law will frequently grant a prohibition to the admiralty courts, yet such common law courts will not send a cause originally instituted before them, to be tried in the admiralty.

5. That the defendant ought to have pleaded to the jurisdiction of the common law court, and could not take advantage of this court's want of jurisdiction under the plea of not guilty.

With regard to the first objection, I do not hesitate to declare that if the district admiralty court had not competent jurisdiction, and possessed no power to afford relief in the present case, that a court of common law ought to hesitate some time before it should pro- (342) nounce that the plaintiff must go without remedy. But on ex-

amination it will be found that the admiralty court possesses full and ample power for this purpose. It is enacted in the 9th section of the Judiciary Bill, that the admiralty court shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction. The word civil is here used in a sense opposed to criminal, and embraces every cause cognizable by the tribunal, either on the prize or instance side of the court. 3 Dall., 12, 13.

As to the second objection, it is laid down by the Supreme Court of the United States, in the case of *Glass et al. v. The Sloop Betsy et al.*, 3 Dall., 16, that the admiralty court considered either as an instance or a prize court, possesses all the powers of an admiralty court; and it will appear that there was no circumstance in the present case which could have prevented the plaintiff pursuing his remedy in that court to the utmost extent of satisfaction.

In the first place, in order to obtain a decree for damages, it is not necessary, as I apprehend, even on the prize side of the court, that the subject matter, that is to say, the prize itself, should be within the reach of the court. In some cases it would be impossible, and in others impracticable.

Suppose a privateer, in a manner obviously illegal, should capture a neutral vessel and order her to port, and on the passage the prize should be lost; in this case it would be impossible to proceed *in rem.* or bring the subject matter before the court, and yet I conceive there can be no doubt but that the original owner of the captured vessel might proceed, by libel, against the captors and recover ample damages for this illegal taking, as completely as if the prize were in the hands of the marshal of the court.

Again, suppose the captors should take a vessel as prize, and sell her in some foreign country without any regular condemnation, and so contrive that she should never come within the reach of the court. (343) In this case, although the subject matter is still in existence, yet by reason of the illegal conduct of the captors, the original owner is entirely prevented from pursuing his claim *in rem.*, and if the doctrine contended for by the plaintiff's counsel be correct, the former owner can never be entitled to satisfaction in this case, although he is deprived of the means, by the captor's own wrong, which the law will not permit.

Upon an examination of the authorities and the practice of the admiralty courts, it seems evident that, in order to entitle the injured party to recover damages for an illegal capture, it is not necessary that the subject matter itself should be before the court—though it may be necessary where restitution is prayed for.

In cases where damages alone are demanded, the practice sometimes is to issue a monition and notify the captors to bring the prize into court. Carth., 398. And upon this, whether it is brought in or not, the complainant goes on to a decree.

In many cases this formality is not required; and it is clearly laid down in the suit of *Le Caux v. Eden,* Doug., 594; that damages may be recovered in the admiralty courts even for a personal injury sustained in consequence of a capture. In this case there was not the least necessity that the prize itself should be in court; neither were the proceedings *in rem.,* but against the captors personally; so in every instance where damages alone are prayed for.

In Clerke's Prax. Cur. Adm., it appears that the first process usually is, by an arrest of the defendant's person, who is then compelled to enter into a stipulation in the nature of bail, or a recognizance. 3 Blac. Com., 108. And being in court by this process, the complainant is entitled to proceed for such damages as he can make appear he has in any manner sustained, either in his person or goods, by reason of this illegal capture.

Then, I apprehend, both from the reason of the thing and by authorities, I have showed that the District Court possesses all the powers of an admiralty court, either as an instance or a prize court. That although the subject matter, the prize itself, was not and could not have been before the court, yet the present plaintiff might have (344) proceeded in the admiralty court against the defendant *in personam,* by arrest, and recover ample satisfaction for any injury he had sustained; consequently the District Court was competent to afford him full and adequate relief.

As the cause now is before the Court, there is nothing contained in the third objection which can in any manner avail the plaintiff.

The captors carried the prize into a port in the Island of Cuba, under the dominion of the King of Spain, who then was in an alliance offensive and defensive with the French Republic, and both at open war with Great Britain. And nothing is more usual than for two powers so connected to permit their cruisers respectively to carry their prizes to and condemn them in each other's ports. This privilege was granted by France to American privateers, and was the constant practice between the two countries during the Revolutionary War.

Upon this principle, then, the plaintiff's brig was carried as a prize *infra præsidia.*

It does not follow that because a prize is not legally condemned, that the captors are trespassers *ab initio;* or that they are trespassers in any respect whatever.

The law certainly is this: whenever a vessel has been legally taken, as in the case of a neutral loaded with contraband goods, or endeavoring to enter a port in a state of actual blockade, or an open enemy, the captors are not trespassers in any sense of the word; neither can an action in any form be maintained for this capture.

If the prize has not been legally condemned, the consequence will be this: the original owner may seize her, in the hands of any person, and at any distance of time, wherever she may be found; for until a regular condemnation takes place, the owner is not divested of his property. But still an action of trespass cannot be maintained for the capture, although no condemnation followed, because the taking was at first legal. And the case of the six carpenters, and other cases cited by the plaintiff's counsel, do not in the smallest degree apply to the case of the legal taking of a vessel as prize.

(345) The commission granted to the privateer, authorizes her to take the vessel, goods, etc., of the enemy, and of course the vessels, goods, etc., of those who, by the law of nations, have placed themselves in the situation of an enemy. Then, whether after a legal capture, the prize was carried *infra præsidia,* or whether she was legally condemned or not, are circumstances of which the original owner cannot take such an advantage as will enable him to maintain an action of trespass; he can only regain possession of his property which, for want of these formalities, has never been altered, and of which he has never been legally divested.

But admitting, for the sake of argument, that the plaintiff's brig, the prize, was not carried *infra præsidia,* and was not legally condemned, and consequently that damages are recoverable on that account, we are then brought back to the original ground of discussion, and that great question still remains behind: Can a court of common law take cognizance of such a question, and award damages to the plaintiff?

If it be true, as the plaintiff's counsel contend, that unless the prize be carried *infra præsidia,* and there regularly condemned, the captors are trespassers *ab initio,* and liable for damages, then I ask, do not these important facts form a material part of the question of prize or no prize? Can this or any other court decree damages in such a case, unless it be first ascertained whether the law requires the prize to be carried *infra præsidia,* and also whether it requires a regular condemnation in order to vest the property in the captors? And let me further ask, would not this investigation necessarily lead the Court to decide upon the validity of the capture, and consequently determine, not collaterally and incidentally, but in the very first instance, the question of prize or no prize?

To me it appears impossible to separate the supposed trespass from the principal taking as prize. This would be to divide between two different jurisdictions the same entire transaction.

If all this be true, then I apprehend this third objection of the plaintiff is entirely removed, upon the principle before es- (346) tablished, viz.: that a court of common law cannot take cognizance of a case necessarily involving in it a question of prize or no prize.

The fourth objection requires but a short answer. Every authority which has been introduced, and many others which might have been read, lay it down as clear, express, and settled law, that in every case wherein the plaintiff claims damages for a tort committed upon the high seas, if it appear that the inquiry complained of was occasioned by or happened in consequence of a taking as prize, that the courts of common law have no kind of jurisdiction whatsoever, neither of the principal question nor of any circumstance or incident connected with or arising out of it. On the contrary, that the admiralty courts have sole and exclusive cognizance, not concurrent, but exclusive, of all common law courts whatsoever.

And the cases of *Le Caux v. Eden,* Doug., 594, and *Ross et al. v. Rittenhouse,* 2 Dall., 160, completely show, that although a suit be originally instituted, even in the highest court of common law, yet if it appear to be a cause of admiralty jurisdiction, they will dismiss it and send it to its proper tribunal for adjudication.

With regard to the fifth objection, I have to observe that the present cause is an action of trover, and it has been repeatedly ruled that the defendant, in an action of trover, can plead nothing except "not guilty and release"; every special plea amounting to nothing more than the general issue. Further, the declaration is in the usual form, and in a plea to the jurisdiction, it cannot appear either by the declaration or plea, whether the court has jurisdiction or not, until the testimony is gone into, and then it would have been too late to take any advantage under the plea.

But without having recourse to the circumstances of this particular case, so far as it involves the question of right pleading, it is sufficient for me to show that the law upon this subject is already settled. Lord Chief Justice *Lee,* in the case of *Rous v. Hazard,* lays it down as a clear principle of law, that if to an action of trespass for taking a ship as prize, the defendant pleaded not guilty, the plaintiff (347) could not recover.

This doctrine is recognized and illustrated by the Court in the case of *Le Caux v. Eden,* and Justice BULLER observes, that upon the general plea of not guilty, no action can be maintained, where the question

relates to prize; and for this reason: That if the taking was a trespass at common law, it would have been incumbent on the defendant to have pleaded specially; but that a capture as prize was not a trespass at common law, and therefore under the plea of not guilty the plaintiff could not recover.

The principle is confirmed by *Lord Kenyon,* in the case of *Owen v. Hurd,* 2 Term Rep., 644, who declares that even the consent of parties cannot give the Court jurisdiction where it had none before; and that the Court is bound to take notice that it had not jurisdiction.

Agreeably to these decisions was the cause of *Plaice v. Campbell,* determined by the Circuit Court at Raleigh: It came out in evidence that the plaintiff's right was founded upon a capture on the high seas as prize. Immediately upon this discovery the Court ordered the cause to be dismissed, and said that they were bound to notice their want of jurisdiction, and that it was not necessary in that case to plead it.

If, however, this should be deemed an insufficient answer, I have to remark that the plaintiff is precluded from taking any advantage for the want of this plea. For whether this Court has jurisdiction of this cause or not, is the very question which the jury, by their verdict, have reserved for the opinion of the Court. And the question now before the Court is not whether the defendant was bound to plead to the jurisdiction, but whether the Court in fact has jurisdiction.

Therefore, as the case now stands, it is totally immaterial whether the plea was entered or not.

Before I conclude, it will be necessary to examine one authority, upon which the plaintiff has very much relied, to prove that the Court has jurisdiction. It is the case of *Beake v. Tyrrell,* 1 Show., 6. And it is there stated that trespass at common law will lie for the recovery (348) of damages in taking a ship on the high seas as prize.

Did the facts in this case warrant the opinion of the Court, and justify the use of expressions in that broad and extensive manner which these expressions seem to import? Yet I might assert, and with confidence, too, that one solitary authority ought not to weigh against a series of decisions to the contrary; and these decisions made, too many years afterwards, when the learning upon maritime affairs, and the doctrine of admiralty jurisdiction, became much better defined and understood.

But there is not the least occasion to resort to such reasoning, for upon examination it will appear that this case, so far from impeaching the doctrine and undermining the ground upon which I stand, will support both, and be found in an exact line with all the authorities cited.

This case is also reported in 5 Mod., 194; Comb., 120. And upon a review of the whole, it appears that, by a charter granted to the East India Company, they had an exclusive right to trade to the East Indies, and that every ship found trading within the limits of the charter without a license for that purpose from the company, became liable to forfeiture.

It further appears that the plaintiff was owner of a ship, and that this ship, as an interloper, was seized by the defendant, captain of an armed vessel, for a breach of this clause of the company's charter, in trading within these limits without a license; and in consequence of such seizure was condemned as forfeited to the company, in some one of the company's courts, erected by virtue of their charter.

The plaintiff instituted an action of trespass against the defendant to recover damages for this capture, and the action was held to be maintainable in a court of common law, and clearly it was so; but the confusion arises in calling this seizure a prize, for it was nothing like a prize in any one particular.

A right to take a vessel as prize is founded upon the *jus belli,* and never permitted except during a state of actual war. (349)

At this period no war existed; it was the case of an English armed vessel taking an English merchant ship, during the time of a profound peace, and procuring a condemnation in the private court of the East India Company—a court not governed by the law of nations, which is binding upon all nations, but erected under the authority of a private statute, and of whose proceedings and decisions the King's courts were not bound to take the least notice. Therefore, it was incumbent upon the defendant not only to plead all these matters specially, but also to prove the truth of them, and also to show that the court in which the ship was condemned had competent jurisdiction; which he failing to do, judgment was given against him.

The particular circumstances of this case easily account for the observations of Chief Justice HOLT, who, in delivering the opinion of the Court, says: "It doth not appear how this ship came to be a prize: it doth not appear that there was any cause to seize her as such, nor shown that there was any war; it is not shown whose court of admiralty it was, nor before what Judge." Questions, that the learned Judge never would have made, had the ship been taken *jure belli,* and condemned in a court of competent authority.

The whole of this shows that this vessel was not taken as a prize in the sense we use the term at this day; but seized as forfeited for a breach of the charter and the revenue laws of the company.

It is in principle the same with the following case: During the suspension of our intercourse with France and her colonies, the President was authorized by act of Congress to grant permits to certain vessels to go under certain restrictions to the French West Indies.

Suppose, then, one of our armed ships should have met an American vessel trading between the French Colonies and the United States, without a permit—should seize and bring her in for condemnation—I ask, in what court would the proceedings be? Undoubtedly on the common law side of the Federal Court, and she would be considered not
(350) as a prize, which can only be made in time of war, but as a vessel forfeited for the breach of a particular statute. And were the owner of this vessel disposed to institute a suit for this taking, the action would be cognizable in a court of common law, agreeably to the above case in Shower.

This decision is in unison with the opinion of the Court in the case of *Le Caux v. Eden,* and is the very case which Lord Chief Justice *Lee* had in view when he stated, that for taking a ship on the high seas, trespass at common law would lie, but not when a ship is taken as prize.

Considering this as a fair explanation of the case and sanctioned by authorities, I feel no hesitation in saying, with submission to the Court, that this case, so much relied upon, will not support the ground upon which the plaintiff's counsel has built his argument. That so far from proving that the courts of common law have cognizance of the question of prize, it clearly shows that the Court entertained jurisdiction of that particular case for the express reason that the vessel was not taken as prize, but merely forfeited for a breach of the company's charter. And there is no doubt but that the courts of common law have exclusive jurisdiction of all cases of penalties and forfeiture, and every question founded upon or arising out of them.

Having now, as I conceive, fully answered the objections set up by the plaintiff, I have only to add that it seems evident that a court of common law cannot take cognizance of any cause in which is involved the question of prize or no prize, and have endeavored to show that the present case is completely of that nature, and that judgment cannot be rendered for the plaintiff here, without first deciding upon the validity of the capture, and declaring the prize to have been illegally taken, which a court of common law has no power to do.

I have also endeavored to show that the district court has full and adequate power to grant relief, and that no impediment existed which could have deprived the plaintiff of his remedy in that court.

And as the plaintiff has clearly mistaken his remedy, I pray
(351) that the cause may be dismissed for want of jurisdiction in this Court to sustain it.

Haywood, in reply. The great question in this cause is narrowed to a single point, viz.: Whether a court of admiralty has exclusive jurisdiction or not. All the authorities show that the instance court of admiralty has concurrent jurisdiction; and those which say they have exclusive, are referable to the prize court. The prize courts have exclusive jurisdiction, because they proceed *in rem.;* the prize court can never proceed unless the thing is within their power. There can be no occasion to apply to the Government for redress, when the person doing the injury comes within the jurisdiction of the court of admiralty on the instance side, and consequently, as I contend, within the jurisdiction of this Court.

Jocelyn, in conclusion. Suppose the vessel had been brought into New Bern; would Simpson, in order to recover damages, have his own vessel seized? Certainly not; he might have proceeded against the person, and the court of admiralty would have been competent to give relief. 2 Dallas, 165. The question whether prize or no prize being at rest, a libel might be exhibited for damages, by reason of the illegal capture.

If our courts of admiralty are both prize and instance courts, then this case comes completely before them, taking it in either point of view, or whether the proofs be *in rem.* or *in personam.*

HALL, J. In England there are two admiralty courts of civil jurisdiction; the one is called the instance court, the other the prize court. In many instances the courts of common law have jurisdiction of trespasses committed on the high seas, as for seizing, stopping, or taking a ship on the high sea not as prize. But whenever the trespass complained of is a taking, etc., on the high seas as prize, the courts of common law have not jurisdiction. The nature of the question, not the locality, constitutes the rule on which depends the jurisdiction of the courts of common law. But for the taking, etc., as prize (of which the courts of common law have not jurisdiction), the prize courts have sole and exclusive jurisdiction. Doug., 592. A trespass for taking a (352) ship, etc., not as prize, is the object of municipal law. The prize court is governed by rules and regulations peculiar to itself. In this Court, generally disputes arise not between citizens or subjects of the same, but of different nations. It is therefore proper that such disputes should be determined by the laws and usages of nations, and such regulations as may exist between the nations to which the parties belong; so that the same rules of decision are common to prize courts, whether established in one country or another. The powers of the instance courts and prize courts constitute the extent of jurisdiction of the courts of

admiralty in the United States. 3 Dallas, 16. It appears from the record in this case that the defendant captured the brig by virtue of a commission from the French Republic, and in consequence of the said brig's being without a register, etc., the defendant sets up no claim to the brig, nor justifies the taking of her on any other ground. Is this, then, a question of prize or no prize, or not? I think it is, and that this Court consequently has not jurisdiction, but that the court of admiralty has sole and exclusive jurisdiction in cases of this description.

It has been urged for the plaintiff that this matter ought to have been pleaded to the jurisdiction of the court, and that the not pleading it in that form is a waiver of it; but consent cannot give original jurisdiction to a court which has it not. 2 Burrow, 746; 2 Wash. Rep., 215. It was decided in the case of *Row v. Hassard,* cited in Doug., 581, that the plaintiff could not recover in trespass for taking a ship as prize, the plea of not guilty being pleaded. It has also been urged for the plaintiff, that unless the Court will grant him relief he will be without a remedy, because only the person of the defendant is within the reach of the courts of admiralty, and those courts will not proceed against the person in the first instance.

I think this is a case of prize or no prize, and that the courts of admiralty have exclusive jurisdiction of it. I know of no authority warranting an exception from this general rule, in the case where the person of the captor only, and not the vessel captured, is within (353) the jurisdiction of the courts of admiralty. It has likewise been urged for the plaintiff, that as the defendant converted the brig to his own use before any adjudication took place respecting her by a proper tribunal, he ought to be considered a trespasser *ab initio.* In order to ascertain the merits of that argument, we must have recourse to the particular usages and regulations that may exist between the countries to which the plaintiff and defendant may belong. To go in search of these would lead us out of our course; they exclusively belong to the prize courts. If it is said that the brig Sally belonged to the citizens of a neutral nation, and therefore could not be the subject of prize, it may be observed that the owner of a neutral ship may violate his neutrality by carrying contraband goods, by taking part with one of the belligerent powers improperly, etc. Whether the being without a register, etc., would justify a capture, etc., is not, I think, for this Court, but a prize court to determine. I am of opinion, therefore, that however strongly the justice of this case may plead for the plaintiff, that this Court has not jurisdiction of the subject matter for which this suit has been brought, and that judgment should be entered for the defendant.

JOHNSTON, J. In this case, in order to decide whether the plaintiff has a right to recover, it must be inquired into, whether the vessel and cargo were prize or not; and it stands admitted in every case where the question of prize or no prize must be decided, that the courts of common law have no jurisdiction, but that it appertains exclusively to the courts of admiralty. There are cases where the courts of common law have taken cognizance of torts committed on the high sea by one British subject on the property of another; but do not find that in any instance they have sustained a suit by a subject against a foreigner acting under a commission from his sovereign.

MACAY, J. This case states that the brig and cargo were taken on the high seas under the pretense of a prize, by the privateer Bellona, commissioned by the Republic of France, the brig and (354) cargo carried into the Spanish port of St. Jago, in the Island of Cuba, and there sold without any regular condemnation. That the defendant was owner of the privateer, that the brig had no register on board. The plaintiff, being an American citizen, claims said brig and cargo as neutral property, as not liable to capture. A verdict has been obtained in this case in the Superior Court of Law for the District of New Bern, subject to the opinion of the Court on this question: Whether the Court has jurisdiction of this case. To determine this question, it will be necessary to inquire whether this brig and cargo were taken on the high seas as a prize; and if so taken, whether she was or was not a prize.

The case states that she was taken by a privateer commissioned by the Republic of France, "under the pretense of a prize"; that she had no register on board. The expression, according to my understanding, is the same as if the case had stated she was taken as a prize; the caption was for the purpose of making a prize of her and cargo; then the other question arises, was she a prize or not? To determine this, the court of admiralty has the sole, undisturbed, and exclusive jurisdiction, which they are bound to determine agreeably to the law of nations. 3 Black., 108; 69 Doug., 504; *Le Caux v. Eden,* 2 Dall., 160; 4 Term Rep., 382; 1 Mol., 57; 3 Durn. & East., 341, 343, 344. In opposition to these authorities I find but one, Comb., 120, *Beake v. Ferrell,* in which it appears that on the question prize or not, the courts of common law and admiralty have a concurrent jurisdiction. In 1 Show., 6, this case is also reported and explained: She was seized by the East India Company, and there condemned by their admiralty. The question, prize or no prize, to be determined by the law of nations, made no part of this question. All the other authorities that I have been able to examine do ex-

pressly state that the courts of admiralty have the sole and exclusive jurisdiction of determining prize or no prize. It is true that trespasses may be committed on the high seas by one ship taking goods (355) from another tortiously, and by various other means of which the courts of common law have jurisdiction. Where the admiralty court has not original jurisdiction of the cause, the jurisdiction of the courts of common law is not entirely taken away. 3 Blanc., 108; Comb., 462. But in no case have they interfered where the question, as in the present case, is prize or no prize. I am of opinion that the Superior Court of Law had not jurisdiction.

Judgment for defendant.

NOTE.—See acc. *Hallett v. Lamothe*, 7 N. C., 279.

WILLIAMSON'S ADM'RS v. SMART AND KILBEE.—Conf., 146.

1. The personal estate of an intestate, no matter where it be, is distributable according to the laws of the country where the intestate was a resident, or, in other words, where he was a citizen or subject at the time of his death. Therefore, *it was held* that slaves in Virginia which belonged to the estate of the intestate, who was a citizen and an inhabitant of this State, must be distributed according to the laws of this State.
2. A person is not bound by a judgment to which he is neither party or privy.

This was an action of trover, brought in Halifax Superior Court of Law, to recover the value of several slaves, and the following special verdict was found, viz.: That Thomas Davis, in the year of our Lord, 1724, on the 4th day of March, duly executed his last will and testament, as follows, viz.:

"In the name of God, Amen. I, Thomas Davis, of the upper parish of the county of Isle of Wight, being of sound sense and memory, and calling to mind the certainty of death, and the uncertainty when, do make this my last will and testament, etc. I give and bequeath to my sons, Thomas Davis and William Davis, all my tract of land I bought of the widow Blake, to be equally divided among them; my son Thomas to enjoy that part whereon he now lives, and my son William (356) that part where my son lived. I say I give the lands unto my aforesaid sons and their heirs forever, and my will is, that if either of my aforesaid sons shall think fit to dispose of his part, that the other shall have the refusal, if he desires it, paying a reasonable rate.

Item. I give and bequeath to my daughter Frances Williamson, the use of my negro Sarah, for and during her natural life, and after her decease I give the said negro Sarah, and her increase, amongst the children lawfully begotten of her body, to be equally divided among them. Which said negro girl, Sarah, so bequeathed, shall be in full of any further demand of any part or parcel of my estate; and I declare that my son George Williamson, and my daughter, shall have no more right to claim anything else. *Item.* I give unto my loving wife, Elizabeth Davis, the plantation I now live on, for and during her natural life, and after her decease I give the said land to Benjamin Davis and to his heirs forever. *Item.* I give to my grandson, Thomas Davis, a negro boy called Robin, and the heirs of his body lawfully begotten; and for want of such heirs after his decease, I give the said negro to my son Benjamin, and to his heirs forever. *Item.* I give to my son Thomas Davis and his heirs, my negro boy, Harry. *Item.* I give to my son William Davis and his heirs, my negro boy called Sam. I give and bequeath to my loving wife the use of my negro woman, Cate, during her life, and after her decease I give the said negro woman and her increase unto my son Benjamin Davis, and the heirs of his body, and for the want of such heirs then to Thomas, William, Edward, and Benjamin Davis, to be equally divided amongst them. *Item.* I give to my wife during her widowhood my negro boy, Dick, and afterwards I give the said negro boy, Dick, unto my son Edward, and his heirs. *Item.* I give unto my loving wife, Elizabeth, my plantation bought by me of William Exum during the term of her widowhood, and no longer. *Item.* I give my lands aforesaid, bought of William Exum, unto my son Edward Davis, and his heirs forever. *Item.* I give and bequeath the use of all the rest and residue of my estate unto my loving wife during the term of her widowhood; when she shall marry (357) again, I give the same to be equally divided amongst my sons Thomas, William, Edward, and Benjamin, share alike with her, and do appoint my loving wife, Elizabeth Davis, sole executrix of this my last will, hereby revoking any and all other wills, whether by word or deed, heretofore made or done.

"Witness my hand, this 6th of March, 1721.

"(Signed) THOMAS DAVIS. [Seal.]"

Which was duly admitted to probate in the court for said county of Isle of Wight on the 23d of April, 1722. And the jury do further find that the said Frances Williamson, in the said will named, had six children lawfully begotten, and among others her son, William Williamson, who moved into this State, then province, and died in the year 1768, in

the month of April, leaving nine children, and amongst others George Williamson, his eldest son and heir-at-law. And the jury further find that the said Frances Williamson departed this life sometime in the month of January or February, 1769. And the jury further find that on the 23d of March, 1769, the following proceedings were had in the county court of Amelia, in the dominion of Virginia, as appears by the copy of the record in these words:

At a court held for Amelia County, March 23, 1769,

Jacob Williamson, George Williamson, John Moreley, and Elizabeth his wife, Henry Turpin and Annie his wife,

v.

George Williamson, an infant under the age of 21 years, by George Williamson, his guardian, and Nathaniel Williamson, an infant, by Nathaniel Williamson, his guardian.

} In Chancery.

This cause was this day heard upon the bill of the complainants and the answer of the defendants. In consideration whereof, it is decreed and ordered that William Archer, John Scott, William Giles, and
(358) Edward Ross, or any three of them, do divide the slaves in the bill mentioned, viz.: Sharper, Dick, Peter, Doll, Cæsar, Edith, Patt, Sall, Cate, Jane, Sall, Phœbe, Lucy, Dill, Phil, Lewis, Aggy, Hannah, Sall, Bob, Sukey, and Roger, agreeable to the last will of Thomas Davis, deceased; and that they allot and assign unto the plaintiffs each a sixth part thereof, having regard to the value of the slaves in said division; and that they make report to the court in order to a final decree.

AMELIA COUNTY, March 31, 1769.

Pursuant to the above decree, we have divided the negroes, and allotted them to the persons therein mentioned, in the following manner, viz.: John Moreley's lot, Dick, Cate, Lewis, and Lucy; Jacob Williamson's lot, Sharper, Cæsar, Edy, and Dill; George Williamson, son of William Williamson, Sall, Sall, Hannah, and Phœ; Henry Turpin's lot, Peter, Doll, Sall, and Patt; Nathan Williamson's lot, Aggy, Sukey, and Bob; George Williamson's lot, Jane, Roger, and Phil.

And the jury further find that the said Sall, Sall, Phœbe and Hannah, in the said division named, were a part of the increase of the said negro woman, Sall, in the aforesaid will of the said Thomas Davis, mentioned, and a sixth part of the negroes descended from said negro Sall.

And the jury do further find that Sarah, in the said will, bequeathed, was at the time of the death of the said Thomas Davis, in the dominion of Virginia; and the said other negroes, Sall, Sall, Hannah, and Phœbe, from the time of their birth until the day of the division above mentioned, had also continued in the dominion, now State of Virginia.

And the jury do further find that the said William Williamson above named, died in this province, in the county of Bute, in the month of April, in the year 1768, and this his widow, one of the plaintiffs, since married to Peter Cox, the other of the said plaintiffs, took out letters of administration on the estate of the said William Williamson the 9th day of February, 1769.

And the jury do further find that the said George Williamson, (359) by his guardian, George Williamson, the elder, did receive and take into his possession the said negroes in the said record of the court of Amelia, above stated; and some time afterwards, upon coming to age, he brought said negroes into this State; and that the said negroes afterwards had the following increase, viz.: John, Cate, Lewis, Fanny, Arthur, Nancy, Rachel, and Milley.

And the jury do further find that the said George departed this life in the month of August, in the year 1780, leaving his widow and a child named Nathan. And the jurors do further find that their possession was a joint possession.

And the jurors do further find that the wife of the said Kilbee obtained letters of administration on the estate of her husband, George Williamson, the younger, soon after his death, and the said Peter Smart is the guardian of the child of said George Williamson, deceased.

And the jurors do further find that the said Peter Cox demanded the said negroes of the said Smart and Kilbee, in right of his wife as administratrix, in the year 1786. With respect to the law, the jurors are ignorant, and pray the opinion of the Court thereon; if it be for the plaintiff, they assess his damage to £800; if for the defendants, they find them not guilty.

HALL, J. In this case both the plaintiffs and defendants claim the negroes for which this action is brought, under William Williamson, one of the legatees of Thomas Davis. The special verdict states that William Williamson removed himself to and became a citizen of this State, where he lived to the time of his death. It is admitted that at the time of his death, by the laws of Virginia, negro property was made to descend like land to the heirs-at-law, he making on that account some pecuniary satisfaction to the next of kin; and that at that time, by the laws of this State, property of that description was made distributable

equally among all the children of an intestate. The question is
(360) whether the negroes for which this suit is brought shall be disposed of agreeably to the laws of Virginia (they having been in Virginia at the time of the death of William Williamson, their owner), or by the laws of this State where William Williamson was a resident at the time of his death. I take the rule of law in each case to be this: that the personal estate of the intestate is distributable according to the laws of the country where the intestate was a resident, or, in other words, where he was a citizen or subject at the time of his death. Ambler 25, 415; 2 Vesey, 35. Although by the laws of Virginia, negroes are made to descend like land to the heirs-at-law, in many other respects they are considered to be personal estate; and indeed our law would view them as personal estate, when any case like the present would occur, notwithstanding the laws of Virginia would ever view them in all respects as real property. I cannot think the decree made by the court of Amelia strengthens the defendant's title, because the plaintiffs were not parties to it; had they been parties to it, and the grounds on which the present pretensions rest, been made known to that court, I presume their decree would have been different. I think that all the children of William Williamson are equally entitled to the property in dispute among whom the plaintiff will be compellable to make distribution, after debts are paid, etc., and that judgment should be entered for the plaintiffs.

JOHNSTON, J. Judge TAYLOR having fully explained the principles on which I found my decision, it is unnecessary to repeat them. I concur fully with him.

TAYLOR, J. The material facts of this case are that Thomas Davis by his will, which was admitted to probate in the year 1722, bequeathed a female slave, of the name of Sarah, to his daughter, Frances Williamson, during her life, and after her decease, the wench and her increase to be equally divided among the children of Frances. Frances had six children, one of whom, William, removed into this State and died
(361) in 1768, leaving a widow and nine children, George being his eldest son.

Afterwards, in the beginning of the year 1769, Frances died; upon which the issue of Sarah were divided, under the authority of a Court of Chancery in Virginia. A sixth part was allotted to George, as the heir-at-law of William; this was received by his guardian, and afterwards, upon his arriving at full age, brought into this State by himself; until which time all the negroes descended from Sarah had remained constantly in Virginia. George died in the year 1780, leaving a widow

and child, who possessed themselves of the negroes, which they have retained ever since. The widow of William administered upon her husband's estate, and afterwards intermarried with Peter Cox, who, together with his wife, hath brought the present suit to recover the negroes as of the goods and chattels of William; having previously demanded them of the defendants, one of whom defends as administrator in right of his wife, to George Williamson, and the other as guardian to George's child.

From these facts two questions arise: One is whether the division made in Virginia ought not, as far as it respected the share claimed through William, to have been according to the laws of this State, whereof William before and at the time of his death was a citizen and inhabitant. The other is whether, upon the supposition that the division was improperly made, the decree directing it is not conclusive as the sentence of a court of competent jurisdiction.

As to the first, I consider it perfectly clear and well settled that although the descent of lands is to be regulated according to the law of the country wherein they are situated, yet the succession and distribution of movable property is to be guided by the law of the country where the owner has his domicile. This is a principle of the law of nations, which has been recognized and sanctioned by a variety of adjudications. 2 Vesey, 35; Ambler, 25; 4 Term, 184, etc.; Bl., 131, 437, 691; Ld. Kaimes, 274; Vattel, b. 2, c. 7, s. 85; c. 8, s. 109, 110. I can entertain no doubt that these authorities must be approved and acted on by the courts of this State, upon an application to distribute the effects of a foreigner, if made within due time; and that they would (362) receive evidence of the law according to which the distribution was sought. I do not indeed recollect any decision upon this point in our own courts; but my opinion is founded no less upon the weight and number of the cases than upon the intrinsic justice of the principle which pervades them. It seems also to acquire strength in its application to the United States, from the nature of their political relations, which are calculated equally to cherish a spirit of friendly intercourse among their respective citizens, and to promote in each state a respectful deference to the laws of all.

The court of Virginia would without doubt have given effect to the claims of the other parties concerned, unless there be some law of that state expressly to prevent it. The existence of such a law, however, cannot well be imagined, because there can be no reason wherefore that state should be concerned about the manner in which strangers hold that sort of property, which they may freely carry away with them. All that, as a state, they can be interested in ascertaining is whether the party asserting a claim has really a right, according to the laws of his

own country; and whether those laws vest a chattel in one person or direct its division among twenty, they equally merit respect and observance. Therefore, if in the State of Virginia this property is clothed with some of the qualities of real estate—if like that it is made descendable to the heirs at law, and exempted from the payment of debts, where there are sufficient assets without it, so far as its nature is changed; put in all other respects it remains and must be considered as chattel property; and the local policy which hath thus distinguished it must necessarily confine the operation of the laws respecting it to the citizens and inhabitants of that State. This must be understood, however, in relation to the laws ascertaining the right, and not those prescribing the remedy. The latter must, from their nature, bind equally strangers and citizens.

Slaves being then chattel property, notwithstanding incidents
(363) annexed to it applicable only to the citizens of that state, there is a conflict of laws in the two states relative to them; and in every such case the laws of the country where the owner resides must prevail. Secondly, the order made by the Court of Chancery in Virginia relative to this division cannot be conclusive as to the title of the negroes in question. Of the persons claiming a right under William, George alone was party to the suit in which it was pronounced. The other children and the widow of William were neither parties nor privies, nor was there any person before the court interested to protect their rights, or even to disclose them. Had the distribution been among all, George's share would have been so much less, and therefore he was interested to keep their pretensions out of view. Besides, the points now in contest were not decided upon the former occasion. The only question then was whether the property should be divided into six equal shares, in which, no doubt, all the parties concurred; the question now is whether the widow and children shall share with George the sixth part he received. The present plaintiffs, therefore, and those for whom they claim, have never been heard, their rights have never been asserted; and, under such circumstances, it is contrary to natural justice and to the law both of Virginia and this State that they should be concluded by the decree. My opinion is, consequently, in favor of the plaintiffs.

MACAY, J. It is sufficient for the determination of this cause that in Virginia negro slaves are considered as chattel property. Wash. Rep., ... Immovable property follows the disposition of that State wherein it is situated; but the succession and disposition of movable property is not regulated by the law of the country where it is locally situated, but by that of the owner's *patria* or domicile. 4 Term Rep., 184; *Hunter v. Potts.*

Judgment for plaintiffs.

(364)

CHARLES HAUGHTON v. NATHANIEL ALLEN.—Conf., 157.

1. A garnishee may have a writ of error on the judgment against himself, or the defendant in the attachment.

2. A writ of error is, in this State, a writ of right to which a party is entitled upon complying with the requisites of the Acts of Assembly (1 Rev. Stat., ch. 4, sec. 17).

John Cox was indebted to Haughton in the sum of nine hundred and seventy dollars and forty-four cents, by note bearing date the 13th August, 1796, payable three months after date. On the 4th day of August, 1798, Allen sued out an original attachment against the said Cox, returnable to September Term of Chowan County Court, and the following endorsements made thereon:

"Executed and summoned in writing, Charles Haughton, as garnishee, the 4th day of August, 1798. Charles Roberts, Sheriff."

At September Term a judgment by default was taken against the defendant Cox. Charles Haughton, the garnishee, was called out on his garnishment, a conditional judgment entered against him, and an order made for a writ of *scire facias* to issue, which accordingly issued, and a judgment final was taken against the garnishee, and a writ of inquiry awarded to ascertain the amount due on the note on which the suit was brought, and damages assessed at £572 10 5—and 6d. costs.

At April Term, 1801, of Edenton Superior Court, Haughton, by his counsel, obtained a rule on Allen to show cause why a writ of error should not issue to remove the records and proceedings in the aforesaid suit, and the following points were made for the judgment of the Court:

1. Whether the writ of error issuing from the Superior Court is a writ of right to issue of course upon a compliance with the requisites of the act of the General Assembly in such case made and provided, or whether it can only issue upon the assignment of sufficient errors.

2. Whether a garnishee in a cause can take advantage of error (365) in the proceedings against him, by writ of error issuing from the Superior Court—and

3. Whether the writ of error issuing from the Superior Court is the proper remedy to correct errors in proceedings by attachment.

The errors intended to be relied upon for reversing the judgment were: (1) That the proceedings in the cause by attachment were not stayed according to the directions of the Act of Assembly. (2) That the said garnishee had never been summoned, or brought into court, as garnishee, according to due course of law.

HAUGHTON *v.* ALLEN.

HALL, J. The first question that arises in this case is whether a writ of error will lie for the plaintiff in error, who is a garnishee, to reverse a judgment obtained against himself. Whenever a new jurisdiction is erected by Act of Assembly, and the Court that exercises this jurisdiction acts as a court of record, according to the course of the common law, a writ of error lies on its judgment; but when it acts in a summary manner, or in a new course different from the common law, and in a manner peculiar to itself, then a writ of error will not lie; in this case the proper remedy is by *certiorari*. 1 Com. Rep., 80; 1 Ld. Raymd., 469; *ibid.*, 6 Cow., 524. The county court, where the judgment was obtained against the plaintiff in error in this case, is a court of record, and it does not proceed in a summary manner in a course different from the Superior Courts, when it is said that a writ of error will not lie, except when the proceedings below have been according to the course of the common law. The reason is that the Superior Courts proceed according to the course of common law themselves, and when an inferior court proceeds in any other way, the Superior Courts cannot judge of their proceedings by comparing them with their own. In such a case a *certiorari* may issue to remove the proceedings, in order that the Superior Court may determine whether the inferior court has pursued its authority or not. But in the present case the same mode of proceeding is common to both courts; and on that ground I cannot see any reason why a (366) writ of error will not lie, as well in this case as in any other.

But it is said that this writ will not lie for a garnishee, because he is neither party nor privy to the judgment. The authority relied upon is 2 Bac., 198, where it is said, if a judgment be given against B. and the money of C. attached by force of a foreign attachment in London, C. shall not have a writ of error, because he comes in by garnishment by the custom, and is neither party nor privy. The judgment here spoken of must be the judgment against B., not the one against C. This idea is strengthened from the analogy which this case bears to the case of bail; they cannot have a writ of error to reverse a judgment against their principal, but they may have it to reverse the judgment against themselves, because they are parties to it. So, in this case the garnishee is party to the judgment entered against him. It is objected that the effect of a reversal of the judgment against the garnishee will render the judgment against the defendant in the attachment a nullity, as there is no property or debt attached but that of the plaintiff in error. If that effect is to be ascribed to the true cause, that cause will be found in the irregularity of the proceedings of the plaintiff at law; and if that would be the effect, it will be an effect proceeding from himself. I think, therefore, a writ of error will lie for a garnishee to reverse a judgment

against himself. The next question to be considered in this case is whether a writ of error issuing from the Superior Court is a writ of right, to issue of course upon a compliance with the requisites of the act of the General Assembly, passed in 1777, ch. 2, sec. .....; or whether it is only to issue upon the assignment of sufficient errors. It is said for the plaintiff in error that a writ of error is a writ of right; 2 Salk., 504; but what is the legal substantial import of that expression? I think the security of the citizen under that writ would not be impaired or lessened by understanding it to mean that the party praying it shall have the proceedings in which error is assigned examined by the Superior Court. This, I take it, is the true substantial right and benefit claimed under that writ. County courts cannot correct errors in their own proceedings. When a writ of error is applied for, then it is a matter (367) of right to have it granted for that reason. In England it is frequently applied for, when it is a thing of course to grant it, and that for the same reason. 1 Richardson's Practice, 327; 1 Attorney's Practice, 378. But if application is made for the allowance of it to the same court that is empowered to correct the error, may not that court determine upon the merits of the errors assigned, upon a motion to allow a writ of error, as well as at any subsequent court, after the writ of error shall have been allowed? Our Act of Assembly requires that the errors shall be assigned before the writ shall be allowed, and that the opposite party shall have ten days previous notice of the application intended to be made for it. Why is this required, unless it is for the purpose of putting it in the power of the court to determine upon the merits of the errors assigned, and giving the opposite party an opportunity to oppose the allowance of a writ of error? In England, generally, the errors were not assigned till after the allowance of the writ; and then the plaintiff in error had a *scire facias ad audiendum errores* against the defendant. But in this case, if the matter assigned for error appeared to the court to be no error, nor color for error, it would not grant a *scire facias ad audiendum errores*. 2 Bac., 207, 6th edit., in a note. Surely, if the court is possessed of the merits of the case, it can determine as well upon them before as after the allowance of the writ of error. What is the consequence of the contrary practice—a party, without even the shadow of plausibility, may apply for a writ of error, and have it allowed, and thereby delay his creditor, although he has not the smallest prospect of succeeding in reversing the judgment. This is the inconvenience that, I think, the Legislature intended to guard against when, by the Act of 1777, ch. 2, they require that the errors shall be assigned, and the opposite party notified of the time when the writ of error will be moved for. It is said that the words of the act are that the Superior Courts "shall

have power and authority to grant writs of error," and that they have no discretion to exercise. When we view the whole section, and see (368) that errors must be assigned, and notice given the opposite party, etc., I am led to make a different conclusion, and think that the Superior Court has a power to refuse it. Other writs, it is said, are of right. Why? Because the merits of the plaintiff's pretensions to the thing for which the suit is brought cannot be judged of or determined upon by the person to whom the application is made for it; nor before the writ is returned, and the pleadings made up. I am therefore of opinion that when an application is made to the Superior Court for the allowance of a writ of error, that that Court has a power to refuse the allowing of it, in case the errors assigned appear to them to be insufficient. As I am alone in this opinion, it will be unnecessary to give any opinion respecting the sufficiency or insufficiency of the errors assigned upon the present motion, made for the allowance of a writ of error.

JOHNSTON, J. The writ of error in England is acknowledged to be a writ of right; and is so in my opinion in this country, on the plaintiff in error complying with the requisites called for by the Act of Assembly; and the Court has no right to decide on the errors assigned till the record is before them, which cannot be till certified by the return of the writ. In England the writ of error is returned into court before the errors are assigned—upon assignment of errors, the plaintiff prays a *scire facias ad audiendum errores,* which the court sometimes refuses, if the errors assigned be not thought sufficient; but the record is then before the court, and they judge from the face of the record. The assignment of errors, and notice to the defendant required by our law, is in order that he may be prepared to proceed instanter on the return of the writ to a discussion of the errors, in order to prevent delay, by proceeding as they do in England by *scire facias.*

The garnishee is party to the judgment, because immediately affected; it binds his property, which may be immediately taken in execution in consequence of it.

The case in Bac. Abr., title error B, page 198, is not warranted (369) by Broke's Abr., 187, to which it refers. In Bro. Abr., 286, C, "it is said by some, the garnishee in London, upon foreign attachment on the custom, may have writ of error, and the plaintiff in attachment in another's hands may; for the judgment is not only against the garnishee, but the defendant also, that the other shall be discharged against him, which is the extinguishment of the debt of the defendant against the garnishee"; and cites the Year Book, 22d Ed., 4, 31. This is all I can find in Broke applicable to the subject; and serves to show that the

garnishee has always been considered a party to the judgment, and for that was entitled to a writ of error.

I am not acquainted with the manner of proceeding on foreign attachments in London, nor do I consider it material to be known, as our attachment is not founded on that custom, nor in any manner dependent on it, but arises out of the Act of Assembly; we must therefore be governed by the rules there laid down, and the principles arising from them. From these it appears to me that the judgment against the defendant and that against the garnishee are so connected that the one cannot exist without the other; for, unless the plaintiff find property in the hands of the garnishee, he cannot obtain judgment against the defendant; and unless he obtain judgment against the defendant, he cannot seize his property in the hands of the garnishee. So that the natural consequence of the reversal of a judgment against the defendant on attachment would be that he would have a right to demand and recover the money or other property which, by that erroneous judgment, had been condemned in the hands of the garnishee. Again, if the judgment against the garnishee is reversed, there is then nothing to support the judgment against the defendant, which must fall of course. Thus, it would appear that the two were but different parts of the same, and each part essentially necessary to the support of the other.

MACAY and TAYLOR, JJ., agreed with JOHNSTON, J., *in* (370) *omnibus.*

Writ of error allowed.

Cited: Swaim v. Fentress, 15 N. C., 604; *Skinner v. Moore,* 19 N. C., 149; *Smith v. Cheek,* 50 N. C., 216.

JOSEPH TAGERT v. JORDAN HILL.—Conf., 164.

1. Where a sheriff has levied an execution on goods, and upon an injunction from a court of equity being served upon him, had redelivered the goods, *it was held* that he was not liable to the plaintiff, though no security had been given for the injunction.

2. In a hard action, where the jury have found for the defendant, whose conduct has been *bona fide,* and the practice under which he acted as a public officer has been general, though perhaps not strictly consonant to law, the Court will not grant a new trial.

TAGERT *v.* HILL.

This was an action on the case brought in New Bern Superior Court of Law, and the jury found a verdict for the defendant; the plaintiff moved for and obtained a rule to show cause why a new trial should not be granted, and the following facts were agreed by the counsel of the parties:

1. That the plaintiff, Joseph Tagert, obtained a judgment against Anthony Walke, of Franklin County, for £.....; upon which judgment a writ of *fieri facias* was issued and delivered to the defendant, who then was sheriff of Franklin.

2. That the defendant, by virtue of said writ of *fieri facias,* took possession of property to the amount of £....., consisting of a store of goods.

3. That Anthony Walke obtained an injunction against the plaintiff's judgment, which was served upon the defendant, who thereupon restored the goods which he had taken to Walke.

4. That Walke's injunction was dissolved upon Tagert's answer, but Walke had removed himself and property out of the State.

(371) *Woods,* for the plaintiff. The plaintiff, through the misconduct of the defendant, who was sheriff of Franklin County, had lost his debt, and the jury which tried this cause have done him injustice in finding against him. When the writ of injunction came to the defendant's hands he was bound to stop the sale, which, but for that, he would have made. A *supersedeas* and injunction do not authorize the sheriff to redeliver the goods. Whenever a seizure is made, the plaintiff then must look to the sheriff for his debt; if he has begun execution he may proceed to sell, and his doing so cannot be considered a contempt.

Haywood, for the defendant. The question in this case is, whether the sheriff ought to have redelivered the property or not. There is such a general rule that a sheriff, on a *supersedeas,* is not restrained from going on to sell; but this rule does not hold in its application to injunctions. 1st. It never was the law in England. 2d. It never was the law of this country; and admitting it may be the law in England, yet general custom proves that it never was in use in this country. But should both of these grounds fail, then I contend that the writ issued by the Judge warranted the sheriff in redelivering the goods.

Upon inquiry, I find that the rule which prevailed here before the revolution was, that whenever an injunction issued, a bond was executed by the party obtaining it, conditioned to perform the final decree which should be made in the cause; this was filed in the chancery office, and was accepted in the room of the money, which, by the English practice, must be deposited when the injunction is obtained. Whenever this bond

was given, it would be highly unjust to sell the goods of the debtor; and if, in England, the goods were restored upon the money being deposited, then it will result that in this country the goods should be restored upon the filing of the bond. The reason why the bond is accepted here in lieu of the money is that in England money is more plentiful than in this country; and the plaintiff at law is rendered equally safe by the filing of bond with good security, as if the money was deposited.

The practice since 1782 has been uniformly to restore the (372) goods, from a belief that the sheriffs entertained, that the Judge who granted the injunction had done his duty by taking bond, or requiring the money to be deposited.

Some years ago Judge SPENCER granted an injunction, under which the sheriff restored a number of negroes, levied upon to satisfy a very considerable demand. The negroes were removed, the injunction was dissolved, the plaintiff at law completely lost his debt, and the conduct of the sheriff who restored the negroes was considered to be conformable to law and general usage; and no lawyer who was consulted would advise bringing a suit against him.

Another case which will serve to show that it was held to be the duty of the sheriff, upon being served with an injunction, to restore the goods, is that of Alexander Joice, former sheriff of Rockingham County, who refused to deliver the goods upon a Judge's *fiat* for an injunction, although no writ of injunction had then issued, and sold the property. For this he was indicted in Salisbury Superior Court and convicted of disobeying the Judge's order. This case formed a public adjudication, and served as notice to all sheriffs who might be placed under similar circumstances. I have reason to think that this decision was not strictly conformable to law; yet it has established a practice which ought now to be adhered to.

The rule, then, in England, that the sheriff is bound to go on to sell, is counteracted by the practice in this country. How would a sheriff act if he cannot sell? In a great variety of instances, he could not keep the goods; if he is not bound to sell, he is not bound to keep the goods; and the consequence is that the goods must be restored to the complainant.

If, in England, an injunction be applied for after verdict, the money must be deposited before it can go. C. Cancel., 447—same doctrine, 2 Ch. Ca., 4; 2 Bro. Ch., 185. And from these cases it clearly appears, that if the deposit is made the goods are to be restored.

Suppose the sheriff executes property which dies in his hands, he may levy again—the first service does not discharge the debtor; (373) and this proves that the rule is not true in the extent, as laid down

by Mr. Woods. Whatever the law on this subject may be, the sheriff is bound to obey the precept, to follow its words, to rely on the Judge, to believe that he had done his duty in taking a proper bond, and not to inquire into the legality of the writ. The words of the injunction are: "You are to forbear and desist from carrying the judgment into effect." If he has levied, this restrains him from selling; if he cannot sell, he is not bound to keep them; and the complainant is the only person entitled to the possession of them.

Baker, on the same side. If the law were otherwise than as laid down by *Mr. Haywood,* the greatest injustice would be produced. Suppose the case of one imprisoned on a writ of *capias ad satisfaciendum,* who obtains an injunction; unless he is restored to his liberty he gains but little; indeed, he may, according to *Mr. Wood's* construction, put on the words of the injunction, be continued in confinement until he can prove a final determination of a tedious suit, notwithstanding his claims to relief are strong and undeniable. But if the party imprisoned, upon obtaining an injunction, be entitled to be restored to his liberty, then is the complainant also entitled to the possession of his goods, when he has obtained an injunction—both of which practices are conformable to the general usage of the country.

Let us inquire how this case stands between the plaintiff and the defendant; it is a question of loss. The goods levied upon were not at most worth more than £140 or £150; either the plaintiff or defendant must lose it. This is a hard action, and one that ought to be considered *stricti juris,* and not to be favored. The jury, however, have found a verdict for the defendant. Justice does not require that the verdict should be set aside, nor that the defendant, who it is admitted acted uprightly and without fraud, should pay the debt out of his own pocket.

I therefore hope that the rule will be discharged.

(374) *Woods,* in reply. No case can be found where the property was restored, although the money was deposited. If a sheriff has money in his hands, and he is served with an injunction, he is bound to retain it, and has no authority to restore it. The sheriff is not to go back to inquire what was the practice previous to the year 1782; and as it is well known that no bonds to secure the principal sum have been taken since that time, greater caution is required for the sake of creditors. Does the injunction authorize the sheriff to recede? Surely not; it only authorizes him to stop; and certainly there is a material difference.

I cannot suppress the astonishment I feel in hearing of the indictment of the sheriff of Rockingham; to my mind, the conduct of the Attorney-General, in preferring an indictment against him for such a pretended

offense, was much more irregular than that of the sheriff who disobeyed the order of a Judge not directed to him, but to another; and his fate ought to excite our compassion, rather than furnish a general conclusion.

This is not such a case as comes under the general rule of hard actions, where new trials are refused. The sheriff ought to be informed what his duty was; if he did not think it worth while to seek for information, he ought to abide by the loss.

HALL, J. It is said in this case, in argument for the defendant, that before the revolution it was the practice of the Courts of Equity, upon granting injunctions after verdict, to direct bond with security to be taken for the amount of the sum for which the injunction was granted; and this practice was substituted in the room of the practice in England, which in such cases directed the money to be paid into court. The Act of 1782, ch. 11, declares that the Courts of Equity in this State shall possess all the powers and authorities that the Court of Chancery, which was formerly held in this State under the late government, exercised; so that if such were the practice before the revolution, it was the practice at the time when the injunction in question was granted; and the property seized by the defendant, as sheriff, and restored to Walke by him upon being served with the injunction, stood in the same (375) situation as if the money for which the injunction was granted had been directed to be paid into Court. If the money which the plaintiff claimed had been really paid into Court, I see no good reason why the property levied upon might not have been restored. The belief that the practice of taking bond, etc., as before spoken of, did exist before the revolution, derives some of its support from the circumstance that money at that time, in this country, was not so easily procured as in England, and of course directions to make deposits in Court could not be so easily complied with; and also from the circumstance that such a practice has prevailed for some years—at least since the revolution—and sheriffs, as far as I have observed, have conformed themselves to such a practice. If there had been a direction to stay the property levied upon in the hands of the sheriff, perhaps the case might have been different; it is not reduced to a certainty what the practice in such cases was before the revolution. I am glad, however, that this case can be decided on another ground. It is not pretended in this case the defendant, in any respect, acted a fraudulent part; he acted as every sheriff acted in a similar situation for a considerable time past. The case has been fairly examined by a jury, who have found a verdict for the defendant; it is a hard action. For these reasons I am not for granting a new trial.

JOHNSTON, J. In the case, *Tagert v. Hill,* although in England, agreeable to practice in that country, the sheriff is bound to keep possession of the goods, and may even proceed to sale; which I suppose, in case the goods are of a perishable nature, is the usual practice. It is true there is no positive law in this country to justify the sheriff in deviating from the practice in England. But the constant practice in this country, as far as I know, has been that the sheriff, on being served with an injunction, has in all cases delivered up the goods to the defendant; and no one instance occurring to me that an action has been (376) brought against a sheriff for so doing, though cases where the plaintiff may have suffered a loss, as in the present case, must necessarily have taken place, it is not a matter of surprise that the sheriff should think himself justified in acting as all others heretofore have done in like cases.

In England there is no positive law in this case more than in this country—it depends on the practice of the courts, sanctioned by judicial decisions; and the only difference is that in this country though the practice in this country has been uniformly different, it has passed *sub silentio,* and not sanctioned by a decision of the courts. If this will not justify the sheriff who acts agreeably to this practice, *bona fide,* without fraud, collusion, or corruption, it will go great lengths to excuse, and had, no doubt, great weight with the jury who found in his favor; and this appears to be a hard action, and not to be maintained, but upon principles *stricti juris,* on a practice not hitherto in use in this country. I am not disposed to disturb the security which the defendant has in a verdict; therefore I am of opinion that no new trial should be granted.

MACAY, J. What was the practice of the sheriffs in the Courts of Chancery, under the former government, I know not, nor have I had it in my power to get any information, except from those gentlemen who had practiced in them—the sheriff's returns being "stayed by injunction." It seems that on obtaining an injunction, the complainant always filed his bond in the office; this bond was for costs; but whether the sheriff restored the goods he had levied on, upon being served with the injunction, I cannot say. I have been informed it was; and therefore the practice began with the sheriffs, under the present Court of Equity, to restore the property levied on, when served with an injunction. If any such practice has ever prevailed, I do not remember it. It could not have been general, or some case must have come within my observation. There can be no doubt that, under the laws of England, the sheriff might, after he had levied, sell the goods, notwithstanding an injunction had issued and been served upon him—he could not (377) restore the goods without making himself liable for their value.

The Judges who tried this cause were divided in their opinions. Judge MOORE held that the sheriff, by restoring the goods he had levied on, made himself liable to the plaintiff for their value. Judge HAYWOOD held that the sheriff had done nothing more than what was justifiable under the practice of the former Court of Chancery, as well as the present Court of Equity. The jury had the whole matter before them, and found for the defendant. Either the plaintiff or the defendant must lose the value of the goods levied on, Green being insolvent. The practice being very doubtful, and this being a case *stricti juris,* I will not deprive the defendant of the benefit of the verdict in his favor.

NOTE.—See, on the second point, *Allen v. Jordan,* 3 N. C., 132, and the cases referred to in the note.

See *Taggert v. Hill,* 3 N. C., 81.

Cited: Patton v. Marr, 44 N. C., 379.

WILLIAM GILES' HEIRS v. WILLIAM GILES' EX'RS.—Conf., 174.

1. A will of real estate in writing may be revoked by parol; but the words of revocation must denote a present intention to revoke. Therefore, where a devisor directed the person with whom his will had been deposited to burn it, who refused to do so, but said he would deliver it to the testator to be by him disposed of as he pleased; but as it was not delivered back, however, and the testator afterwards said the will should stand, *it was held* that there was no revocation.

2. A revocation of a will of real estate carried completely into effect cannot be revived by any subsequent declaration by parol.

William Giles, of the county of Rowan, made his last will and testament in writing, in which he devised real and personal estate. The will was attested by three witnesses, and placed in the hands of Montford Stokes for safekeeping. Some time afterwards William Giles directed Stokes to burn the will; Stokes said he would not, but would deliver the will do him (Giles), and he might burn it if he pleased. This conversation passed on in the presence of three witnesses. The (378) will, however, was not delivered by Stokes to Giles, nor was it burned by Stokes. After this conversation Giles said that he had made his will and it should stand; that he had made provision for his wife; that she was to have one-half of his estate. This conversation passed between Giles and three or four other persons at sundry times, and had relation to the will in the hands of Stokes. Then Giles died, leaving said will in Stokes' possession.

The executors named in the will obtained the will, and offered it for probate in Rowan county court. This was contested by the heirs of Giles, upon the ground that the will had been revoked by the parol directions given by Giles to Stokes to burn the will. An issue of *devisavit vel non* was made up and tried. There was an appeal to the Superior Court for Salisbury District, and the issue was tried at March Term, 1801, and found in favor of the executors. A new trial was moved for, upon the ground that the Court had misdirected the jury, and these points reserved:

1. Can a will in writing, duly executed, and published in the presence of two subscribing witnesses, whereby lands and personal estate are devised, be revoked by parol; the will being made since the Act of Assembly respecting wills?

2. If such will may be revoked by parol, can it not be republished by parol?

If such will has not been revoked by parol, then judgment for the executors. If such will can be revoked by parol, but may also be republished by parol, then judgment for the executors. If the will has been revoked by parol, and cannot be republished by parol, then judgment to be entered, that the devise of lands in the will is void, and judgment for the will as to the personal estate.

By the Court. It appears that parol revocations of wills in writing have, in some instances, been held good in England before the statute, 29 Ch. 2; but this must depend upon the particular circumstances of the case; such as, that it was the intention of the testator to die
(379) intestate; and that the revocation was complete and conclusive, and not dependent on any subsequent act. And these circumstances are all proper for the consideration of the jury.

There is a case reported in Tothill, 286, where it is said to have been ruled that a will in writing should not be revoked by parol; and this is before the statute of frauds. But the facts are not particularly set forth.

The case cited from Perkins, Sec. 479, in Viner, title devise, is a much stronger case than the present, where a man had made his will and two years afterwards made another will. On his deathbed, being dumb, both the wills were handed to him, and being desired to deliver that back which he intended should stand as his will; and he handed back the will which was first executed, and this was established as his after his death.

The case of *Cott v. Dutton,* 2 Sid., 2, 3, where the testator declares his first will, and not his last should stand, and the first will had the preference.

In looking into the last case, there appears circumstances unfavorable to the execution of the second will, though it was to the benefit of his own daughter; the first in favor of a more distant relation—both the wills are said to be duly published. In both these cases, though the first will was completely revoked by the publication of the second; yet not being cancelled or destroyed, they were restored by the parol declaration of the testator, which could not have been done, if they had not actually canceled.

In the case now under consideration, it appears the testator did not intend to die intestate; inasmuch as he declared at the same time that the devise to his wife should stand good. He did not consider the revocation complete until the will was canceled and destroyed, and accordingly gave order to Mr. Stokes, the person who held the will, to cancel and destroy it, which that person refused to do, but informed the testator that he would deliver it to him, and that he might himself cancel and destroy it. The testator never took his will out of the hands of Stokes, nor at any time demanded it for the purpose of canceling or destroying it; but some time after knowing his will to be still in (380) existence, and in the hands where he had placed it, declared that it should stand as his will.

Taking all the circumstances of this case into consideration, it appears to us, in the first place, that Giles did not intend to die intestate; in the second, that he did not consider the revocation complete until the will was canceled or destroyed; and lastly, as he never called for the will to cancel or destroy it, that it was his intention that it should continue as his will, as appears by his subsequent declaration. Had he considered his first declaration a complete revocation, without the destruction of the will, and that the paper in the possession of Stokes was not valid and unrevoked, the presumption is that he would have made a new will to the same effect. It would therefore be contrary to every principle of equity to adjudge that a man died intestate, where, from a fair and equitable construction, the intention of the testator appeared otherwise; and where that intention can be supported without violation of any principle of law or equity. We are therefore of opinion that the will is good to every intent and purpose.

Had the revocation been completely carried into effect, and the will canceled, it could not have been revived by any subsequent declaration by parol.

NOTE.—The law as to parol revocations of written wills of real estate has since been altered by the Act of 1819. The Code (1883), sec. 2176.

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DEN ON DEM. OF WILLIAM FARIS AND WIFE, ET AL., v. SAMUEL SIMPSON.—Conf., 178.

1. The proviso to the 6th section of the Confiscation Law of 1779, ch. 5, did not vest in any title in the wife and children of absentees.
2. Under the Confiscation Law of 1776, titles were not divested out of the persons coming within its operation without proceeding in the nature of an office found. But the second Confiscation Act of 1779, the estate of the persons named therein were divested by the force of the act itself.

This was an action of ejectment, brought in New Bern Superior Court, and the following special verdict was found: "That the premises in question were granted to Robert Palmer in the year 1759; that 1771 he went to England; that he attached himself to the enemies of the United States during the war between Great Britain and the said United States, and did not return until the year 1785; that William Palmer was in this State in the year 1779, and under her protection, having been in the same from the year 1769, and remained here until the Revolutionary War; and that he is the eldest son of the said Robert. That he, the said William, made his will, and devised the premises to the lessor of the plaintiffs, and died at New York in 1786. That in the year 1787 the commissioner of confiscated property sold the premises to the defendant as confiscated property. That the wife of Robert Palmer, in the year 1771, went with him to England, and has never returned to this State. That the said Robert Palmer is the person named in the confiscation acts." The jury pray the advice of the Court, and if, etc.

JOHNSTON, J. Some years before the American Revolution, Robert Palmer, who was seized and possessed of the premises in question, removed to England, and settled in London, where he continued to reside to this time, leaving in this country his eldest son, William Palmer, who became a citizen of this State, and since the revolution died, in the lifetime of his father, leaving the plaintiff, Mary, his widow, and several children. By his will, duly executed, he devised the lands in
(382) question to the said Mary, who afterwards intermarried with William Faris.

By an act of the Legislature, passed in their session of November, 1777, ch. 17, it is enacted, that "all the lands, etc., of which any person was seized or possessed, or to which any person had title on the 4th day of July, 1776, who on the said day was absent from this and every part of the United States, and who still is absent from the same, etc., and still resides beyond the limits of the United States, shall and are hereby

declared to be confiscated to the use of this State; unless such person shall, at the next General Assembly, which shall be held after the 1st day of October, in the year 1778, appear, and by the said Assembly be admitted to the privilege of a citizen of this State, and restored to the possession and property which to him once belonged within the same."

The first Assembly after the 1st day of October, 1778, was held in January, 1779, who passed an act to carry the Act of November, 1777, into effect. After setting forth in the preamble that "whereas many persons who come within the description of the aforesaid act, or some one of them, have failed or neglected to appear before the General Assembly during the present session, and submit to the State whether they shall be admitted citizens thereof, and restored to the possession which to them once belonged; whereby all such persons have clearly incurred and are become liable to the penalties of the aforesaid act"; the Assembly then goes on to enact, "That all the lands, etc., of every person and persons who come within, or are included within the description of the aforesaid act, or either of them, shall be and are hereby declared to be forfeited to the State, and shall be vested in the same, for the uses and purposes hereinafter mentioned, and for no other purpose whatsoever." Commissioners are appointed, and by the sixth section of the act they are directed, among other things, to let the lands, and by a proviso to that section it is provided, "nevertheless, that the child or children of such absentee or absentees, now in or under the protection of this State, shall be allowed so much of the estate of such absentee or absentees, as such wife, child, or children might have enjoyed (383) and have been allowed, as if such absentee had died intestate in this State, or any of the United States."

Robert Palmer was one of those who did not appear before the General Assembly and claim the privilege of becoming a citizen; Wm. Palmer was his eldest son, and would have been his heir-at-law and entitled to the inheritance of the premises, if his father had died in this State or any of the United States. The plaintiffs claim under the proviso above recited.

In October, 1779, the Assembly passed another act to carry into effect the act passed at New Bern in November, 1777. The preamble to this act declares that whereas, etc. (the same as in the Act of January the same year), and enacts, "that all the lands, etc., of Robert Palmer, and a number of others whose names are enumerated, which all or either of the persons aforesaid may have had on the 4th of July, 1776, or at any time since, shall be, and hereby declared to be confiscated, fully and absolutely forfeited to this State, and shall ve vested in the hands of commissioners for the purposes after mentioned."

By the 7th section of this act the commissioners are empowered to sell the lands, etc., and execute conveyances to the purchasers.

By the 16th section of the same act the Act of January, 1779, and every clause of it, is repealed and made void, any law to the contrary notwithstanding.

The defendant became a purchaser under this act, or the act passed in April, 1782, ch. 6, nearly to the same purpose as the above, and obtained a conveyance from the commissioners, duly executed, under which he claims.

It is first to be considered, by what authority the Assembly assumed a power to seize upon and appropriate to the public or any other use, the lands of individuals. For this information, it is necessary to have recourse to the fundamental principles of our government, as laid down in the bill of rights and Constitution, from which alone they derive all the powers and authorities which they have a right to exercise
(384) over the persons and property of the citizens, either collectively or individually.

The bill of rights, section 25, after describing the boundaries of the State, declares "that the territories, seas, waters, and harbors, within the boundaries therein delineated, are the right and property of the people of this State, to be held in sovereignty," etc.

To this general declaration there are some reservations and exceptions. Of these it is only necessary to attend to the third proviso, as follows: "And provided further, that nothing herein contained shall affect the titles or possessions of individuals holding or claiming under the laws heretofore in force, or grants heretofore made under King George III, or his predecessors, or the late lords proprietors, or any of them."

By the declaratory part of this section, the people of this State assume to themselves, collectively, the right of property of all the lands within the boundaries of the State, not heretofore appropriated; and thereby disclaiming all right to interfere with the right of property heretofore vested in individuals, in the manner described in the proviso above. It is evident that by this proviso the titles of individual citizens of this State are secured to them, and placed out of the power of the collective body of the people; and consequently no act of their representatives in the General Assembly could divest or impair the titles which they held, under royal or proprietary grants, before the Revolution, or the existence of our present government; and any act which might be unadvisedly or arbitrarily made to that purpose would be a mere nullity, and would fall prostrate before the bill of rights, which is paramount to the acts of the Assembly, and exercises a controlling power over them, as often as they exceed the bounds prescribed to them by that instrument, which

should ever be held sacred and inviolable, as the best security of our civil rights, against the assumption of tyranny and despotism; such an act should not and ought not to have any weight to influence a decision in any court of judicature.

It is then to be considered how far this proviso or saving can have any influence or tendency to establish or secure the titles of (385) others than citizens from the assumption and appropriation of the Legislature.

The declaratory or enacting part of the clause regards the citizens or body of the people collectively within the boundaries therein described, and confers no territorial rights except to them; the saving in the proviso is to secure to the individuals of that collective body of the people their separate and individual titles to their lands, but cannot, as I apprehend, mean or intend to secure titles to lands or vest interests in individuals, not individuals of the collective body of the people of this State, but aliens and foreigners who had never become parties to the compact on which our government was formed, nor residing within the limits of its territory.

There were, however, at that time certain persons, our former fellow subjects, inhabitants of the State, who had not acceded to the revolution, and who never became parties to the social compact, who by the law of nations had, notwithstanding, a right to sell and dispose of their lands and remove their property. (See Vattell, Book 1, ch. 3, sec. 33.) The Act of April, 1777, ch. 3, delineates who are considered citizens of this State, or as they express it, "owe allegiance to the State"; and in the same act declare it necessary that all persons who owe or acknowledge allegiance or obedience to the King of Great Britain, and refuse to take an oath of allegiance to this State, within a limited time, should be removed out of the State, allowing them to sell their lands, and remove their effects, and if not sold within a limited time, to be forfeited to the State. As the persons above described were inhabitants of the State at the time of the Declaration of American Independence, and at the time when the Constitution and bill of rights were adopted, they might perhaps be considered to come within the proviso, and the titles to their lands continued to be vested in them until they declared their election either to become members of the State, or to adhere to the royal government; which election they had a right to make, agreeably to the law of nations. (See the authority above referred to.) During that interval, they might sell or dispose of their lands; but as soon as (386) they had made their election in favor of the old government, and by that disclaimed any connection with the government established by the new Constitution, they were deprived of all the privileges which

accrued from it, unless under such indulgence as might be extended to them by the Legislature, in whom, as representatives of the people, the right of disposing of the public property, under such limitations and restrictions as they thought proper, were vested.

It is now to be considered whether William Palmer, under whom the plaintiffs claim, was at any time seized, or had any title in law to the premises.

At the time of the declaration of rights and adoption of the Constitution, Robert Palmer, being an alien, could not, as I conceive, acquire or hold any rights from them; he could not have acquired a title to any lands in this State for himself—all which he acquired by purchase or descent would be vested for the use of the State, who might at any time lay her hands upon them, if he had died after that period, even before any act for confiscating his property has passed—his heir-at-law, though a citizen of this State, could not have taken by descent, because his ancestor did not die seized; the premises having, agreeably to the principles above laid down, vested in the citizens of this State; and to entitle the heir, he must claim as heir to him who was last seized. Therefore, William Palmer, and they who claim under him, to entitle them to a recovery in this case, must derive a title from the State.

The only color of title shown by the plaintiffs is the 6th section of the 5th chapter of the Act of January, 1779; the words are, "shall be allowed," which seem to refer to some future act, to be executed by the State. Upon a claim being exhibited and admitted, there is no authority delegated by the act to any one to examine the claim, and carry into effect the intentions of the Legislature; the legal estate continued to be vested in the public, and could not be divested but by an actual conveyance or transfer, directly vesting it in some individual in words of the present tense; but words such as those used in the proviso, in (387) the future tense, cannot convey or vest the title of an estate; at most they amount only to a promise, and such a promise as in the case of a private person would not, perhaps, be binding in equity, as it was made without any valuable consideration. And yet, as it was made by so high and respectable an authority, and under such circumstances as it appears to me should have been held sacred and inviolable, and most conscientiously complied with and fulfilled.

The circumstances I allude to are these: that absentees who are at a great distance, perhaps aged and infirm, might probably rest contented that their property should be enjoyed by those who would be entitled to it after their death, which they might consider at no very distant period. The act, however, which passed in October, 1779, having revoked the promise of the State, if it can be considered as a promise, by repealing

the act of January, and declaring it null and void before any steps were taken substantially to carry their intention into effect, the claim of William Palmer was annihilated, and no longer existed either in law or equity, and the purchase under the last act stands good and valid.

Therefore, I am of opinion that judgment be entered for the defendant.

If it should be considered that the words in the proviso to the 25th section of the bill of rights, saving the titles or possessions of individuals, being general, extends to secure the titles of all persons, as well aliens as citizens, who claim under royal or proprietary grants, then Robert Palmer is included within the saving clause, and was not divested of his title, nor had the Assembly any right to appropriate his lands, which I do not admit; yet the plaintiff, in such case, cannot recover, having derived no title from him.

TAYLOR, J. In order to render the opinion which I am about to deliver as perspicuous as possible, I will state the substance of those confiscation laws which relate to the present question; the first, which was passed in 1777, comprehends three descriptions of persons:

1st. Those who on the 4th July, 1776, were absent from the (388) State and the United States, and continued absent when the law was passed.

2d. Those who at any time during the war attached themselves to or abetted the enemies of the United States.

3d. Those who have withdrawn themselves from the State or any of the United States, since the 4th of July, 1776, and still continue beyond the limits of the United States.

Of all such persons the property is declared to be confiscated, unless they shall, at the next General Assembly, which shall be held after the 1st October, 1778, appear and be admitted to the privileges of citizens, and restored to the property which once belonged to them.

The second, passed in January, 1779, to carry the former into effect, after reciting in the preamble that many persons within the description of the first had failed to appear, declares that all the real and personal estates of such persons shall be forfeited to the State, and vested in the same for the uses expressed in the act. The act then proceeds to direct the appointment of commissioners, and to prescribe their duties, with respect to renting the real and selling the personal estates; and to the 6th section is added this proviso: "That the wife, child, or children of such absentee or absentees, now in or under the protection of this or the United States, shall be allowed so much of the estate of such absentee or absentees as such wife, child, or children might have enjoyed, and have

been allowed, if such absentee had died intestate in this State or any of the United States."

The third act, passed in October, 1779, recites that many of the persons coming within the description of the former, have failed or neglected to appear, according to the requisitions of the first act, whereby they have clearly incurred and become liable to the penalties of the first act. The persons who have thus clearly incurred the penalties of the said act are then enumerated, and among them Robert Palmer is specially named.

The 16th section repeals and makes void the act passed in Jan-
(389) uary, 1779. The 17th section reserves to the wives and widows of the described persons, who reside within the State, the right of dower, and directs that a proper subsistence should be allowed to them out of the sale of their husbands' estates, for themselves and the minor children who reside in the State. The quantum of the allowance is, however, to be ascertained by the Assembly. The confiscation laws subsequently passed have no other connection with the case before the Court, than being parts of one system; they may occasionally serve to explain and illustrate the intention of the Legislature. The plaintiff sets up a title to the premises under William Palmer, who, it is said, as eldest son of Robert Palmer, became seized by the operation of the proviso contained in the law of January, 1779. If under that clause he acquired a clear and obvious title, a very interesting inquiry would arise, to ascertain how far it was affected by a subsequent repeal of the act; a question which may, perhaps, on investigation, appear to be embarrassed with new and peculiar difficulties, on account of the manner in which repealing clauses are worded, almost uniformly throughout our statute book. That right acquired, or acts done, under a statute, while it remains in force, continue unimpaired and valid, notwithstanding its subsequent repeal, is a well known principle of law; but it seems to be different when a former act is declared to be null and void. The view I have of the present case does not require me to give any opinion on this point, though I confess that nothing short of the clearest conviction would induce me to decide that a title acquired by the proviso was taken away by the subsequent act, because, upon the supposition that Robert Palmer's estate was confiscated by the law of January, 1779, the proviso for his resident children is founded in the clearest principles of justice, and not forbidden by any obvious reasons of policy. To rescue innocence from the punishment denounced against delinquency; to combine the indispensable measures of self-preservation, with a beneficent regard to the rights of humanity, were objects highly becoming the legislative character, and they have been accordingly attended to in all the
(390) laws upon this subject, though the modes have been varied ac-

cording to the urgency of the times. To a greater or less degree the principle has been kept in view throughout the whole system: *peccata suos teneant auctores; nec ulterius progrediatur metus, quam reperiatur delictum.* No law provides so amply for the children as that of January, 1779; no other gives them that portion of their father's estate which they would have inherited in case of intestacy; it would therefore be most agreeable to discover satisfactory grounds upon which to decide in favor of a title claimed under this proviso. But the right being claimed as one strictly legal, and created by a positive law, it must appear to be so to those who are required to give it judicial sanction. The principal question then is, Was the estate of Robert Palmer confiscated by the Act of January, 1779? If the affirmative of this question should be established, two others naturally arise in the case, viz.: whether the terms of the proviso are sufficiently operative to vest an immediate seizin in William. And lastly, if they were, then whether it was divested by that law being subsequently repealed and made void. Upon the latter question it is unnecessary for me to give an opinion, because I think no confiscation in the particular case was effected by the act. The freehold must have been divested from Robert Palmer before it could be granted by the State to William; but a legislative declaration, that a certain description of persons had incurred the penalties of the law, and that their estates were thereby confiscated, could not of itself effect a silent transfer of their property. Such an act must from its very nature be inchoate, and fall short of its object, until the property of the persons described be seized, as having incurred the forfeiture. To determine whether a person's conduct had been such as the law intended to punish, and to ascertain what property in consequence thereof had accrued to the public, various methods might have been devised, and probably that adopted by the act was no less effectual than any other. Whatever steps are directed to be taken for this end should have been pursued, and in the manner prescribed. They seem essential to impart to the law its intended rigor and operation; and this will (391) be more apparent when the directions and different modes of proceeding are particularly examined. Commissioners are to be appointed, who are to give bond, and perform their duties under the sanction of an oath. They are to take possession of their property for the use of the State; to enter in a book the property which has come to their knowledge or possession, with the name of the former owners, and whether there are any adverse claimants; and they are to report their proceedings to the county court. If any citizen of the State, or of the United States, puts in a claim to the lands, the proceedings of the commissioners are to be transmitted to the Superior Court, where the question is to be

finally determined. If any person having a claim do yet neglect to exhibit it before the county court, and their property is in consequence wrongfully sold, the Assembly is to reimburse them. These, and other things contained in the law, were so many qualifications to the general confiscatory clause, and necessary to determine when and how they should operate. They furnish a proof that the Legislature had in view that principle of the common law that the State can neither take nor give lands without some solemn and authentic act or matter of record. The requisite degree of certainty and solemnity was contemplated in the discharge of the several duties assigned to the commissioners. It is said in *Page's case,* 5 Co., 53, "There are two manner of offices; one that vesteth the estate and possession of the land in the State, when it hath not any right or title before, and that is called an office of entitling as in case of purchase by an alien, etc. There is another office, and that is called an office of instruction; and that is where the estate of the land is lawfully in the State before, but the particularity of the land doth not appear on record, so that it may be put in charge." An attainder for treason is put by the writer as an example of the latter kind; and the nature of that, when examined, shows that the proceedings directed by the act in question ought to be viewed as an office of entitling. By the English law an attainder follows either from the judgment of
(392) outlawry or of death, in cases of treason and felony; or it is created by an act of parliament, passed for the very case. In the first instance, the forms of proceeding being regulated by preëxistent laws, require the utmost certainty and precision; in the latter, the penalties of an attainder are invariably inflicted upon the offenders by name; and that some degree of certainty is necessary in this respect, appears from Fort., 86. By whatever means, therefore, an attainder arises, it is a solemn and notorious act, specific in its object, personal in its direction, and not requiring the aid of other circumstances to complete a divesture.

It does not appear from the special verdict that any proceedings whatever were had against Robert Palmer's estate under this law; and thence I think it follows that the title continued in him until the Act of October, 1779, when he was specially named, and his estate confiscated. The act itself may be regarded as a proof that the Legislature entertained the same opinion. For if Robert Palmer's estate was effectually confiscated by the first law, where was the necessity of passing another for the same purpose? If the first divested all his estate, there was nothing left upon which the latter could operate; for it seems he was absent from the country in the intermediate time. Nor is this kind of proof weakened by the supposition that the latter act may operate upon such property as

was not disposed of to William by the first, such as the dower of the wife, or the share of a child not resident. This is assuming what no reasonable construction of the act will warrant; namely, that so much of the property as was not allowed to William, as a resident child, remained in Robert. The law either amounted to a confiscation or it did not; if it did, then two-thirds of the real, and a share of the personal estate, were to be allowed to William; the other third of the real, and the shares of the personal, would clearly belong to the State, if there were no resident children. In either case nothing remained to Robert; for the nature of a proviso is to except something from the operation of the purview, which must otherwise have been subject to it.

After what has been stated, it would be almost unnecessary to (393) add that, in my opinion, the real estates of those persons who were the objects of the confiscation acts, were not divested by the declaration of rights—that instrument had a very important operation in vesting in the people of the State certain rights appertaining to tenure, which were before in the King and lords proprietors; but the individual titles derived from others were not, I think, meant to be affected.

Judgment for the defendant.

Judge MACAY gave no opinion in this case, being interested in some lands claimed by the lessors of the plaintiff.

Upon the same grounds, Judge HALL gave no opinion, because he had not been appointed until after the opinions of the other Judges had been made up.

NOTE.—See, on the second point, *Bayard v. Singleton, ante,* 5.

ABNER PASTEUR v. JOHN JONES ET AL.—Conf., 194.

Where a tenant covenanted to build and leave in repair, and did build, but the houses were destroyed by fire, a court of equity will compel him either to rebuild or pay the value of the buildings, and the bill may be against either an assignor or assignee of the lease, when the lessor has not consented to the assignment.

This was a case in equity, brought in New Bern Superior Court, and referred for the opinion of the Judges upon the following statement of facts, viz.:

PASTEUR *v.* JONES.

1. Judith Pasteur, mother of the complainant, was seized in fee of a piece of land in New Bern, described in the complainant's bill, at the time of the contract hereinafter mentioned with Jones & Neale.

2. That John Jones and Abner Neale were at the time of the said contract partners in trade, under the firm of Jones & Neale.

3. Some time before the 1st October, 1785, it was agreed be-
(394) tween Judith Pasteur, of one part, and Abner Neale, in the name of the company of Jones & Neale (but in the absence of Jones from New Bern) of the other part, that Jones & Neale should put upon the land before mentioned, at the expense of Jones & Neale, such buildings as the company should have occasion to use in the course of their trade; and when the buildings are completed, persons should be appointed by the parties mutually to name a term of years for which said Jones & Neale should have the land on lease, in consideration of their putting and leaving, at the expiration of the term, the buildings upon the land.

4. That in pursuance of such agreement between Judith Pasteur and Abner Neale, Neale put upon the land, at the expense of the company, buildings of the value of £400, and a term of seven years was named by persons mutually chosen as aforesaid.

5. That in further pursuance of such agreement between Judith Pasteur and Abner Neale, the said Judith, on the 1st October, 1785, executed the lease hereto annexed.

6. That the company of Jones & Neale occupied the said lands and buildings for the purpose of carrying on trade and merchandise from the date of the said lease till the 30th day of April, 1787; when Jones, for a valuable consideration, assigned his interest in the lease to Abner Neale.

7. That Abner Neale, on the 9th day of August, 1787, for a valuable consideration, assigned all his interest in the lease to Richard Ellis.

8. That said Richard Ellis, by himself and others, his tenants, occupied and enjoyed the premises from the last mentioned assignment till about the 28th September, 1791, when said buildings were consumed by fire.

9. That Richard Ellis died in the year 1792, and George Ellis obtained administration on his personal estate.

10. That Judith Pasteur, in the month of July, 1786, in consideration of the natural love and affection which she had and bore to her son, the complainant, assigned all her interest in the premises to him.

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(395) The clause in the lease by which the complainant insisted the defendants were bound to leave the buildings, etc., on the land is

as follows: "And the said Jones & Neale do, for themselves, their heirs, executors, administrators, and assigns, covenant and agree to and with the said Judith Pasteur, her heirs, executors, and administrators, that they, the said Jones & Neal, their heirs, executors, administrators, and assigns, will leave all houses, outhouses, fences, and other improvements that are now on the said part of a lot or parcel of land, or that they or any of them may erect hereafter on the same, in good tenantable order and repair, under the penalty of paying double the value thereof to the said Judith Pasteur, her heirs, executors, administrators, or assigns; and that they will not move off the premises any house, outhouse, fence, or other improvements which they have already built, or may hereafter build thereon, under the like penalty."

Woods, for the complainant, cited Dyer, 33; Alleyne's Reports, 26, 27; 1 Fonblanque, 366.

Haywood, for the defendants, cited 1 Dallas, 210; Ambler, 619; 1 Salkeld, 199.

HALL, J. It is expressed in the agreement between Judith Pasteur and Abner Neale, amongst other things, that said Jones & Neale "shall put and leave, at the expiration of the term, the buildings upon the land." In the lease from Judith Pasteur to Jones & Neale there is a covenant on the part of the lessee "that they, their heirs, executors, administrators, and assigns, will leave all houses, etc., that are now on the said lot, etc., or that they or any of them may erect hereafter on the same, in good tenantable order and repair." The lessees accepted of the lease, and enjoyed the premises under it. I am of opinion that the lessees are liable under that covenant, and that the rule of law is well established that where a lessee covenants to repair the buildings, and so leave them, binds him, and makes him liable in case they are burned down by fire, etc. 2 Com. Rep., 627; 1 Term, 310, 710—and that in the present case the complainant is entitled to the sum of £400, the value of the houses, with interest thereon, from the expiration of the lease (396) till paid.

JOHNSTON, J. The question in this case is whether the lessees are bound to perform their covenant, namely, to leave all such buildings on the lot as they should erect on it during the term in good repair at the expiration of the term; and whether they may be discharged from this covenant by an inevitable accident, intervening before the expiration of the lease, which wholly destroyed the buildings. It is a doctrine laid down in all the books on this subject that all persons are bound to perform their covenants voluntarily entered into, under all circumstances.

The distinction appears to be that where a duty is imposed by implication of law, the nonperformance is excused by inevitable accident—if by a voluntary and express covenant for a valuable consideration it is otherwise; because if it was intended that the lessees should avail themselves of such excuse, it would have been excepted in the contract, as is usual. Com., 627; Dyer, 332; Alleyne, 26; 1 Fonblanque, cases referred to in notes, 361 to 366.

This is the general doctrine; but this is a much stronger case than any stated in any of the books; for here the houses erected on the ground previous to fixing the time for which the lease should continue, were valued at £400; and it was at the same time considered that the use of the ground for seven years was equivalent to their value. The lessees have had the use of the land for seven years; it is therefore, in my judgment, equitable that they should fulfill their part of the contract, either by leaving the buildings which had been erected in repair at the end of the term, or paying the plaintiff so much as well enable to erect similar buildings.

With respect to the question against whom shall the plaintiff have redress—whether against the lessee or assignee—I am of opinion that the lessor has his remedy against the lessees in the first instance, as the assignment was not made with his consent or approbation, but is not precluded from proceeding against the assignee at his election.

(397) TAYLOR, J. The spirit of this contract was, that the lessor, at the end of the term, should have the lot restored, improved in its value by the amount of the buildings which Jones & Neale should erect. These were to be such as suited the convenience of the company, and were to be kept in repair, and left on the lot. The consideration of the actual expense in building, and the possible increase of expense in reparation, and leaving the buildings on the lot, was the privilege of enjoying the lot for seven years; in other words, an agreement on the part of the lessor that, for the time mentioned she would forego, and that Jones & Neale might enjoy all the benefit of the possession. This mode of compensation was fixed on by the parties in lieu of annual rent; but the premises being destroyed by fire before the end of the term, the defendant on that ground claims an exemption from the performance of the covenant; not because the terms of agreement are not sufficiently extensive, taking them in their common signification, but because it was not contemplated by either of the parties that the lessee should rebuild after a destruction by fire. Were the question to be decided at law, a series of concurrent authorities, ancient and modern, would not permit us to doubt what the true rule was. Clearly the tenant is bound to pay the

rent, notwithstanding the destruction of the premises, in respect of which the rent is reserved. Indeed, the covenant to pay the rent and to repair stands upon the same footing in that respect; and in both the liability of the tenant flows from the general rule which has been stated.

No case has been produced wherein equity has relieved further than to discharge the party from the penalty, which is a thing of course; and this does not appear to me to be such a case as would warrant the Court to make a precedent. I am therefore of opinion that a decree should be made against the defendants for the principal sum, with interest, to be computed from the expiration of the lease.

MACAY, J. The lease and covenants were executed on the 1st (398) October, 1785; Jones & Neale continued in possession of the premises until the 30th April, 1787, when Jones assigns his interest to Neale for the consideration of £300. On the 9th August, 1787, Neale assigns the remainder of the term to Richard Ellis for the consideration of £400. Richard Ellis and his tenants occupied the premises until the 28th September, 1791, when the buildings on the premises were consumed by fire. The buildings on the first of October, 1785, were of the value of £400. Jones & Neale agreed and covenanted that those buildings should be left on the land at the expiration of the term, which would end on the first of October, 1792. Jones & Neale, by themselves and their assigns, had possession of the premises near six years, and on the 9th August, 1787, had between them received £700; and now they say they ought not to rebuild the houses, because they were consumed by fire before the expiration of the term. Where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and has no remedy over, there the law will excuse him; but where the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity; because he might have provided against it by his own contract. Therefore, if the lessee covenants to repair a house, and it be burned down by lightning, yet he ought to repair it. Alleyne, 27. He must rebuild it. Com. Rep., 632; 2 Durn. & East., 550. The leaving the houses on the premises in good tenantable order and repair at the end of the term was all the rent the plaintiff was to have for his term; and therefore Jones & Neale, by their covenant, have bound themselves to leave the houses on the premises in such order and repair at the end of the term, under the penalty of double their value. As the lessee has the advantage of casual profits, so he must run the risk of casual losses, and not lay all the burden on the lessors. The houses having been built as a consideration for the term, and burned down before the expiration of the

term, and not rebuilt before the expiration thereof, the plaintiff
(399) receives nothing. The case cited from 1 Dall., 2—10, for defendants cannot bear upon this case. There it was the opinion of the Court that the rent must be paid, because of the express covenant to pay it; and that the whole burden should not fall on the lessors. The other case from Amb., 619, is where accidents by fire were expressly excepted in the covenants.

Let judgment be rendered for the plaintiffs against the defendants for £400, with interest from the 2d October, 1792, until paid.

Cited: Chambers v. North River Line, 179 N. C., 202.

DEN ON DEM. OF THOMAS SUTTON AND WIFE v. JONAS WOOD.
Conf., 202.

1. A devise by a testator to his two sons, A. and B., in fee, and that if either of them should die without lawful issue begotten of their bodies, his son C. should have the lands of the one so first dying, is too remote, and the limitation to C. is therefore void.

2. Where a testator, after several bequests of specific chattels to his wife, proceeded thus: "Also all the remainder of my estate, whether within doors or out, that was not before given away—all the residue of my estate and every part thereof, I give to my wife S. W., she paying all my just debts and funeral charges, etc., to her and her heirs forever;" *it was held* that his real estate passed to his wife in fee.

This was an action of ejectment, brought in Halifax Superior Court, to recover possession of a certain tract or parcel of land lying in Northampton County, and the following special verdict found: That Jonas Wood, father of the defendant, being seized in fee of the lands in question, on the 17th day of August, 1790, duly made and published his last will and testament in writing, and, among other things, devised: "Item. I give and bequeath to my son, Cullen Wood, my plantation and lands, by the name of Mall's Ridge, bounded as follows: Beginning at the head of the Hog pen Branches, in Joseph Wood's line, at a blazed tree; thence along a line of blazed trees to the Great Pocoson to a pine; thence along a line of blazed trees to the head of Robertson's Branch; then
(400) down the run of the said branch to Lemuel Burkett's line to Godwyn Cotton's line; thence along said Cotton's line to Joseph Wood's line; thence along the said Joseph Wood's line to the first station, containing four hundred acres, be the same more or less, etc. Item. My will and desire is, that if either of my two sons, Cullen Wood or

Lawrence Wood, should die without lawful issue begotten of their bodies, that my son, Jonas Wood, shall have the lands of the one so first dying; and in that case, as aforesaid, do give and bequeath the aforesaid lands of the one so first dying, unto my son, Jonas Wood, to him, his heirs and assigns forever." And afterwards departed this life, and the said will was duly proved and recorded. That Cullen Wood, the devisee under said will, entered upon and was seized of the lands in question, agreeable to the devise thereof to him in the said will; and being thus seized, on the 7th day of May, 1792, duly made and published his last will and testament in writing, in the words and figures following: "Item. I give and bequeath to my wife, Sarah, all my horses, cattle and sheep, that was not before given away, and the remainder half of my growing crop. Also all the remainder of my estate, whether within doors or out, that was not before given away; all the residue of my estate, and every part thereof, I give to my wife, Sarah Wood, she paying all my just debts and funeral expenses, etc., to her and her heirs forever." And afterwards departed this life without issue, leaving his brother, Lawrence Wood, upon which the said will was also duly proved. That the said Thomas Sutton intermarried with the said Sarah Wood, widow and devisee under the will of the said Cullen—the defendant having entered upon the premises, by virtue of the devise in the will of the said Jonas, deceased, as aforesaid. After the death of the said Cullen this suit is brought; and if the Court shall be of opinion that the law is for the plaintiff, they find the defendant guilty of the trespass and ejectment set forth in the plaintiff's declaration, and assess 6d. damages and 6d. costs. If not, they find the defendant not guilty.

HALL, J. The first question that arises in this case is what (401) estate was created in Cullen Wood by the following clause contained in Jonas Wood's will: "My will and desire is, that if either of my two sons, Cullen Wood and Lawrence Wood, should die without lawful issue begotten of their bodies, that," etc. It is a general dying without issue, which may happen 500 years hence, and not an event that must necessarily take place in any reasonable time. I therefore think, by this clause in the will, an estate tail was created in Cullen. Although the fact may have been that Cullen died without issue at the time of his death, that will not alter the case. The same construction must be now made upon the will as would have been made upon it at the testator's death. 2 Bur., 878.

If the limitation to Jonas Wood is to be considered in the light of an executory devise, not being to take place till after an indefinite failure of issue, etc., it is too remote; and if it was too remote in its creation, no

event will warrant a different construction afterwards in support of it. If, then, an estate tail was created in Cullen, the Act of 1784 converted it into a fee simple, and Cullen had a right to devise it. But whether he exercised that right or not is the next question. The clause in Cullen's will is very general and expressive: "Also all the remainder of my estate, whether within doors or out, that was not before given away. All the residue of my estate, and every part thereof, I give to my wife, Sarah Wood, she paying all my just debts, funeral charges, etc., to her and her heirs forever." The word "estate" has a very general meaning; it includes both real and personal estate. The direction that the devisee shall pay his debts is also circumstance deserving of notice. 3 Modern, 45. I think the land in dispute passed to Sarah Wood by that clause in her husband's will, and that judgment should be entered for the plaintiffs.

JOHNSTON, J. The devise over in the will of Jonas Wood before the Act of 1784 would have been held a contingent remainder, and not an executory devise; for though the contingency of one of the broth-
(402) ers, Cullen or Lawrence, dying without issue, might possibly take place in the lifetime of the other, yet such contingency was not necessary to vest the remainder in the defendant, for it might also take place many years after they were both dead, on a failure of issue in tail—the limitation over on the death of either of the brothers is not confined to his dying without issue in the life of the survivor, but would take place on a failure of issue at any future period, however distant; and the death of Cullen in the lifetime of Lawrence, though there were no failure of his issue till after the death of Lawrence, yet Jonas would be entitled to the remainder, so that it is evident the interest of Jonas did not depend on Cullen's dying in the lifetime of Lawrence—the devise over to Lawrence can therefore be considered no other than a remainder, contingent on the failure of the issue in tail, of course void under the laws of this country.

The devise in the will of Cullen, after giving several specific legacies to his wife of negroes, stock, etc., he adds in the same clause: "Also all the remainder of my estate, both within or out, that was not before given away." This gives his wife all the residue of his personal estate; and had he gone no further, there might have been some reason to conclude that he meant to give no more than personal estate. He then goes on as follows: "All the residue of my estate, and every part thereof, I give to my wife, Sarah Wood, she paying all my just debts, funeral charges, etc., to her and her heirs forever." This last appears to me a distinct devise, independent of anything that went before; and if it did not operate as a devise of his lands, it would be altogether nugatory, his

whole personal estate having been before disposed of in the most unequivocal terms.

It is observable that where the testator gives the remainder of his personal estate, he uses no words of inheritance, whereas in the last devise he expressly gives to her and her heirs forever.

Wherefore, it is my opinion that, under the will of Jonas Wood, Cullen took an estate in fee, and that the devise over to Jonas is void, the contingency upon which it was to take effect being too remote.

I am also clearly of opinion that the plaintiff, Sarah, took an (403) estate in fee in all the lands whereof her former husband, Cullen Wood, died seized; therefore, that judgment should be entered for the plaintiffs.

TAYLOR, J. The testator, by separate clauses in his will, devises to his two sons, Cullen and Lawrence Wood, two several tracts of land, to them respectively in fee simple. In a third clause he desires that if either of his two sons should die without lawful issue begotten of their bodies, that his son, Joseph, should have the land of the one so first dying; and in that event he devises the land of the one so first dying to his son, Jonas, in fee simple. In the succeeding clause he desires that, in case both his sons, Cullen and Lawrence, should die without lawful issue begotten of their bodies, James Wood should have the lands of the one so dying last in fee simple.

After the death of the testator, Cullen Wood entered upon the land devised to him, and died seized, leaving no issue; living, his brother, Lawrence Wood. The lessor of the plaintiff intermarried with the widow and devisee of Jonas.

The first question in this case is whether the limitation in the will of Jonas Wood to his son, Jonas, is effectual as an executory devise. The intention of the testator ought to be collected from the whole of the will taken together, and, therefore, though a fee simple is given to Cullen by one clause, yet it is qualified and narrowed down by such words as would, before the Act of 1784, have made it into an estate tail general. In consequence of that act, the estate devised to Cullen was a fee simple; and therefore the ulterior limitations to Jonas and James would have been clearly void, as common law conveyances. It is not necessary to show that they cannot be supported as contingent remainders; for it is an axiom that one fee cannot be in remainder after another. The limitation to James also is entirely unsupported by any of the principles which govern executory devises. It is limited to take effect after an indefinite failure of the brother who died last; and there is not in the will the slightest ground upon which a restriction can even (404) be argued.

With respect to the devise over to Jonas, it seems to me that the arguments offered in support of it are founded on a misconstruction of the will, which supposes that the limitation to Jonas is upon a contingency which must happen, if ever, within a life in being, and that consequently there is no tendency to a perpetuity. If the words of the will would fairly warrant the construction that the testator meant the limitation to Jonas to take effect only in the event of one brother dying without issue, in the lifetime of the other, nothing more would be necessary to support it as a good executory devise, according to the case of *Pells v. Brown,* Cro. Fac., 590. But the words "so first dying" must not be separated from the antecedent words, "without lawful issue begotten of their bodies"; for that were to make a supposition, contrary to the express words of the will, that the testator did not mean to provide for the issue of his two sons; and would lead to this consequence, that Jonas should take the land of him who died first, though he might have left issue. But the intention clearly was that Jonas should not take as long as there was any issue of the son who should die first. It follows, that if one of the sons had died leaving issue, which should afterwards fail in any indefinite period of time, living the issue of the other son, the limitation to Jonas would take effect, if the intention of the testator consisted with the rules of law. It is a limitation upon an unrestricted failure of issue, and would, if sanctioned, produce all the mischief which the law is so solicitous to avoid; and the cases to be found in the books relative to perpetuities apply *a fortiori* to the circumstances of this country, where restraints upon alienation are equally adverse to the spirit of the Constitution and the form of government. It does not appear to me that this case is to be distinguished in its material circumstances from that of *Forth v. Chapman,* 1 P. Williams', 667. There the testator gave the residue of his real and personal estate to his nephews, W. and G., and if either of them should die and leave no issue of their respective bodies, then he gave the premises to D. It was decided that the construc-
(405) tion as to the freehold was, that if W. or G. died without issue generally, and of course that the limitation over to D. was too remote. And were this the case of personalty, there are no expressions or circumstances in the will that would afford a ground for construing the words "first dying without heirs of his body lawfully begotten," a dying in the lifetime of the survivor, notwithstanding the inclination of courts to support such devises over.

The next inquiry is whether the words of Cullen Wood's will are sufficiently comprehensive to convey these lands to his widow? After sundry bequests of chattels, the residuary clause gives to his wife all the remainder of his estate, whether within doors or without, not before

given away—all the residue of his estate, and every part thereof, she paying all his just debts, etc., to her and her heirs forever. The word estate comprehends everything a man owns, real and personal, and ought not to be limited in its construction, unless connected with some other word which must necessarily have that effect; or unless it is so used by the testator as to indicate his intent that it should not be received in its ordinary acceptation. But here he adds the words, "and every part thereof"; and the devise is accompanied with a condition, that his wife shall pay his debts out of it. It is also expressed in such language as is applicable to the devise of real property; and the impression made upon the mind by the whole tenor of this will is, that he did not mean to die intestate as to any part of his property. The case of *Tanner v. Morse,* in cases temp. Talbot, and other cases therein referred to, seem to be decisive on this question.

MACAY, J. Agreed *in omnibus,* and judgment for the plaintiffs.

NOTE.—On the first point, see *Bryant v. Deberry,* 3 N. C., 356, and the cases and Acts of Assembly referred to in the note. See, also, *Brown v. Brown,* 25 N. C., 134.

On the second point, see *Mably v. Stainback, ante,* 33, and the cases referred to in the note.

Cited: Brown v. Brown, 25 N. C., 136; *Buchanan v. Buchanan,* 99 N. C., 311.

(406)

THE STATE v. JAMES CARTER.—Conf., 210.

In an indictment for murder, where the letter "a" was omitted in the word "breast" in describing the place of the wound, judgment was for that cause arrested.

This was an indictment against the prisoner for the murder of William Loaper, upon the bill in the words and figures following, to wit:

STATE OF NORTH CAROLINA,
District of Fayetteville.

SUPERIOR COURT OF LAW, April Term, 1801.

The jurors for the State, upon their oaths, present, that James Carter, late of the county of Robeson, within the district aforesaid, laborer, not having the fear of God before his eyes, but being moved and seduced by

the instigation of the devil, on the twenty-second day of November, in the year of our Lord one thousand eight hundred, and in the XXVth year of the independence of the State, with force and arms, in the county aforesaid, in and upon one William Loaper, in the peace of God and the State, then and there being, feloniously, willfully, and with malice aforethought, did make an assault; and that he, the said James Carter, with a certain knife of the value of six-pence, which he, the said James Carter, in his right hand then and there held, the said William Loaper, in and upon the left breast of him, the said William Loaper, then and there feloniously, willfully, and of his malice aforethought, did strike and thrust, thereby giving to the said William Loaper, then and there, with the knife aforesaid, in and upon the aforesaid left *brest* of him, the said William Loaper, one mortal wound, of the breadth of one inch, and of the depth of four inches, of which said mortal wound the aforesaid William Loaper then and there instantly died; and so the jurors aforesaid, upon their oath aforesaid, do say that the said James Carter, the said William Loaper, in manner and form aforesaid, feloniously,
(407) willfully, and of his malice aforethought, did kill and murder, against the peace and dignity of the State.

EDWARD JONES, *Sol. General.*

Plea not guilty. The jury sworn to try the issue of traverse, found the prisoner guilty of the felony and murder in manner and form as charged in the bill of indictment. And the counsel for the prisoner moved an arrest of judgment, for the following reasons:

1. Because, in the caption of the indictment, the term of the Court is not sufficiently expressed, the year being written in numerical figures.

2. Because the place of the wound in that part of the indictment which charges with giving a mortal wound, and which states the length and breadth of the wound, is not sufficiently, or at all set forth.

WILLIAM DUFFY.

JOHNSTON, J. I am of opinion that the judgment should be arrested for the second reason, notwithstanding the meaning of the word "brest" is unequivocally explained by the antecedent words, where the wound is charged to be given under the left *breast,* and the mortal wound is charged to be given on "aforesaid *left brest";* yet I consider myself bound by all the authorities which require the greatest strictness and accuracy in all capital proceedings, and which do not appear in any instance to have been dispensed with, though in some cases carried to a degree of critical exactness, not easily to be reconciled to good sense or sound understanding; and though this case may by some be considered of that

description, yet I am not disposed to give a judgment which might appear in any respect to run counter to the opinion of the most learned and respectable Judges, who have written or decided in like cases.

TAYLOR, J. I have no disposition to withhold my assent from the principle that a criminal charge, and particularly one which may affect the life of a citizen, should be expressed fully, clearly, and accurately. A due observance of this principle guards against the (408) evils of discretional judicature; and whilst it affords additional security to civil freedom, and advances the claims of humanity, connects with the specific crime its legal and appropriate punishment. Wherever plain and intelligible authorities give countenance to an exception, either by application or just analogous reasoning—wherever the reason of the law speaks, though the law itself be silent, it is fit that objections so supported should be sustained by a court of justice. But, according to my apprehension, the doctrine has already been extended to a sufficient degree to answer all the purposes of security and justice; and to extend it further might justify those objections which have heretofore been alleged in reproach of the law.

The defect in the indictment for which this motion is made is the omission of a single letter, a vowel which, if inserted, could not be founded in articulation, and the want of which could not possibly mislead the jury who found the bill, or anyone who reads it, as to the true meaning of the words. If, taken with the context, it were possible to affix any other meaning to the word, then that part of a man's body which is denominated the left breast, or if the word were wholly insensible, and conveyed no meaning, then the objection would strike me in a different light; but connected, as it is, with the adjuncts "aforesaid" and "left," the mind does not hesitate in applying its obvious signification. I do not think that much light can be thrown on this question by the cases that have been cited relative to indictments in Latin, the genius of which language is so essentially different from ours; for that it is by the varying termination of the substantive that the different connections and relations of one thing to another are expressed; whereas prepositions are chiefly used in the English language for the same purpose. Hence, the addition or omission of a single letter in a Latin word is more likely to confound the sense than in an English one. In the case cited from Cro. Eliz., 137, there is not only a false concord of case and gender; but the plural termination of the substantive "brachia" renders the sentence altogether uncertain; and the objection to the indictment (409) arising from this circumstance strikes deeper than the neglect of grammatical precision. We also learn from *Long's case,* which has been

cited from 5 Co., that false Latin doth not vitiate an indictment, nor any false concord between the substantive and the adjective, because, though the expressions be incongruous, yet they are Latin, and significant, and convey the sense as clearly as if they had been properly expressed. Otherwise it is if a word be used which is not Latin, or one that is proper Latin be used in another sense, whether different or more extensive. Another case is cited from Cro. Jac., 133, which appears to me not to bear upon the question. It is an indictment of perjury upon the Stat. of Eliz., which ought to have been hereby recited; but in a material part of the indictment the word "admitteret" is used instead of "amitteret," which the statute contains; and for this variance the outlawry was reversed—the two words belong to verbs which have distinct meanings; the one signifying to lose, the other to admit—such an error, which made nonsense of the sentence, could not but be fatal.

Then as to the case cited from Ld. Raym., 1515, where "austrialia" was used instead of "australia," that was decided to be insufficient on the ground of variance; upon which subject, though the law is emphatically strict, yet it will appear that this decision is not reconcilable with its true doctrine. For this, as laid down in Cowper, 229, and Salk., 660, appears to be, that where the omission or addition of a letter does not change the word, so as to make it another word, the variance is not material; but that where the misrecited word is in itself not intelligible with the context, there the variance is fatal. Upon this principle it was, that "undertood" for "understood," in an indictment for perjury, was held not to be material; that "recieveed" for "received," in an indictment for forging a bill of exchange, was held not to vitiate the indictment, the Court considering that it was only misspelled, and that there was not a possibility of mistaking it for any other word in the English language. *Hart's case,* Leach, 146. And upon the same principle,
(410) also, it ought to follow that the case in Ld. Raym., should have been differently decided, since the addition of a letter did not make it a distinct word.

Considering this case, then, as well upon the authorities as upon the reason of the thing, I apprehend that it is not possible to mistake this word so misspelled for any other, and that the motion ought not to prevail.

HALL and MACAY, Judges, agreed in opinion with Judge JOHNSTON, and the judgment arrested.

NOTE.—*Quære,* whether such a defect would be fatal in an indictment since the Act of 1811. (1 Rev. Stat., ch. 35, sec. 12.)

JOHN CARRINGTON v. JAMES CARSON.—Conf., 216.

One surety cannot sue another for contribution at law.

This was an action on the case brought by Carrington against Carson, to compel him to pay to the plaintiff the sum of £86 10 11½, being one-half of a sum which the plaintiff, as joint security in a bond with the defendant, had paid by execution for Andrew Burke, the principal.

Plea, *Non assumpsit*. The plaintiff had a verdict in the county court of Orange, from which the defendant appealed to Hillsborough Superior Court, and on the trial the plaintiff had a verdict for the above sum, subject to the opinion of the Court on the following question, viz.: "Is an action maintainable by one voluntary security in a bond against another voluntary security in the same bond, the first having been compelled by execution to pay the whole money due by the principal debtor?" If such action cannot be maintained, then judgment to be entered for the defendant.

HALL, J. The plaintiff and defendant were both securities for Burke in a bond executed to the trustees of the University—the plaintiff has been compelled to pay the amount of the bond by suit. The (411) question is, Can he compel the defendant to contribute the one-half which he has been compelled to pay? In this mode of action, 'tis true there is a moral obligation upon the defendant to pay to the plaintiff one-half of the sum the plaintiff was compelled to pay, in case the transaction has been a fair one. It is true that this action on the case has been much extended, and made to embrace many cases of equitable and moral obligation; but I recollect no case where it has been held that this action would lie in a case like the present one; which is a strong argument to prove that no such action can be sustained. Lyttleton, sec. 108; Doug., 580; Ld. Raym., 944. Many instances of the sort have occurred, and many instances may be given, where bills in equity have been brought to obtain relief. When this money was paid by the plaintiff, to whose use was it paid? To the principal's use—there is no doubt but that an action would lie against the principal. If it was paid to his use, could it be paid to the use of the defendant also? If so, it was paid to the use both of the defendant and the principal; of course, the plaintiff has an action against both of them jointly. Again, the bond was executed jointly and severally—they all undertook to pay, and each one of them took upon himself to pay the whole. I am of opinion judgment should be entered for the defendant.

JOHNSTON, J. I am of opinion that the plaintiff cannot recover in this action, his only relief being in equity, unless in the case of an express promise. The other Judges agreeing in opinion, judgment for defendant.

NOTE.—See *Robinson v. Kenon*, 3 N. C., 181. But now by the Act of 1807 (1 Rev. Stat., ch. 113, sec. 2), one surety may have an action at law against his cosurety.

Cited: Powell v. Matthis, 26 N. C., 85.

(412)

FREDERICK W. MARSHALL v. JOHN LOVELASS ET AL.—Conf., 217.

1. All persons interested should regularly be made parties to a bill, but where the enforcement of this rule would be attended with inconvenience, as where there are a great many persons interested in the same right, this rule may be dispensed with; but some of the persons interested must be named as complainants, and it will not be sufficient for the bill to be filed by a mere agent or attorney of the person interested.
2. Lands held by one, who ceased to be citizen by the Revolution, in trust for the Unitas Fratrum, were not confiscated by the confiscation acts.
3. The Court, before and instead of pronouncing a judgment on a demurrer to a bill, may give leave to the party complaining to amend his bill and to state that matter, without which the demurrer would be allowed.

This was a case in equity from Morgan Court, in which the complainant, for himself and the concerns of the Unitas Fratrum in this State, states that the said Unitas Fratrum had been acknowledged as an ancient Protestant Episcopal Church by the Parliament of Great Britain, and the Bishops of the Church of England, by a public act of Parliament of the year 1749, before the Revolution; and as such has subsisted in this State above forty years; and the title and style of the said public act of Parliament have been acknowledged and ratified by acts of the General Assembly of this State. That the said church has no joint stock, or funds, nor revenues, yet at sundry times the active members have made loans among their friends and able members, for general concerns; in particular, for new settlements, as has been done in the case of the Wachovia District in this State, and the expenses of that colony for the first years; for which purpose great capitals were raised, upon condition that creditors who might come over to America should receive payment in land; but if they remained, to be paid by the sale thereof to be made by him who had the fee. That the complainant came over to America to manage the affairs of the Unitas Fratrum—

that the lands purchased were conveyed to him; and that by an Act of the General Assembly, passed at Hillsborough in 1782, the deeds made to him were confirmed, and he was thereby authorized to transact the business of the Unitas Fratrum. (413)

That the complainant, by the appointment of the said Unitas Fratrum, hath been duly authorized by them to institute suits either in law or equity, in relation to the matters to be complained of—that they are bound and concluded by all such judgments and decrees as shall be given by the courts of this State, upon any suits which he may institute in relation to the same.

That Henry Cossart, who was agent for the Unitas Fratrum, known and admitted as such by the act of Parliament before spoken of, representing to the late Earl Granville that the Wachovia District, sold and paid for as good land, had been found to contain much poor land, had, on the 12th November, 1754, obtained, by way of retribution, two deeds of grant in the name of Henry Cossart, agent for the Unitas Fratrum, upon a plot returned into the land office by the surveyor of Wilkes County, wherein mention is expressly made that the said lands were surveyed for the Lord Advocate, Chancellor and Agent of the Unitas Fratrum, all of whom were officers, agents, and trustees of the same; which lands are described by butts and boundaries; the first tract containing 3,840 acres; the second containing 4,933 acres. That the lands were conveyed and granted to said Cossart in trust for the Unitas Fratrum, and not otherwise.

That Henry Cossart died before the Declaration of Independence, in the year 1776, leaving Christian F. Cossart, of Antrim, in Ireland, his heir at law, upon whom the lands descended, and who was seized thereof before the Declaration of Independence; that the said Christian F. Cossart, at the time of the said descent, was a subject of the King of Great Britain, residing in Ireland, and from that time hath continued and still is a subject of the said King, and since the time of the descent hath never come over to this State. That by the Declaration of Independence, the said C. F. Cossart became an alien to this State, by which, or by virtue of the confiscation laws passed in 1777, and at divers times afterwards, the lands held in trust, as to the legal title, are supposed to have become vested in the State. That the complainant (414) is advised that the lands having vested in the State, by a voluntary acquisition, in default of any legal proprietor, that the equitable interest which the Unitas Fratrum before had, was in nowise injured, impaired, or diminished; and that every person obtaining any grant or conveyance of the legal estate of said lands from the State, either with an intent to defeat the trust estate of the said Unitas Fratrum or with

notice of the Unitas Fratrum, or their trustees, equitable interest thereon, became seized of the said legal estate only in trust for the Unitas Fratrum.

That C. F. Cossart, after the descent of the said lands to him, on the 3d day of November, 1772, that the lands might be sold for the use and benefit of the Unitas Fratrum, executed a power of attorney to the complainant to sell and dispose of the lands in his name, and to appoint attorneys under him to carry the objects of the power into execution. The complainant was called to Europe before he sold, but previous to his departure, on the 4th day of October, 1774, he executed a power of attorney to the Rev. John Michael Graff, now deceased, being one of the members of the Unitas Fratrum, authorizing and empowering him to sell the lands descended from Henry Cossart to the said C. F. Cossart. That the said John Michael Graff, on the 22d July, 1778, articled to sell and convey to Hugh Montgomery, of Salisbury, the two tracts of land, for the sum of £2,500, procl. money, 8s. per dollar, to be paid in specie, and received of Montgomery £1,000 in part. That on the 23d July, 1778, by a deed duly executed to pass lands, John Michael Graff conveyed the lands to Montgomery, and for securing the payment of the residue of the purchase money, Montgomery demised the lands to Graff for a term of 500 years, with a proviso to become void if the money was paid. Shortly afterwards Graff died, and Traugott Bagge, of Salem, administered upon his estate, and knowing that the term of 500 years was vested in Graff in trust for the Unitas Fratrum, he, on the 30th December, 1784, assigned it to the complainant, agent and trustee for the Unitas Fratrum.

(415) That in all those transactions John Michael Graff considered himself, and was considered by Hugh Montgomery and the Unitas Fratrum, to have been acting as the agent and trustee of the Unitas Fratrum, and that the name of Cossart was used only because the legal estate of the land was supposed to reside in him. That Hugh Montgomery conveyed the land to trustees for the benefit of two infant daughters, and by his last will and testament charged his whole estate, both real and personal, with the debt due to the Moravians, which he directed to be paid in gold or silver.

That John Lovelass and others, pretending to derive title under William Lenoir, who obtained a grant under the authority of the land laws passed in 1777, are in possession of the lands. The bill then prays, that if the legal estate be vested in the defendants, that they be decreed to convey to the trustees of Hugh Montgomery, for the benefit of his daughters, and that the executors of Hugh Montgomery be decreed to pay the balance of the purchase money, and the interest due thereon.

To this bill the defendants demurred, and for causes of demurrer show that by the bill it is stated:

1. That Frederick William Marshall sues for himself and the concerns of an Episcopal Church (called by him the Unitas Fratrum) in this State. But the bill does not show what persons these are who, beside the said F. W. Marshall, have brought the suit, nor what interest they have respectively therein, nor indeed that they have any interest at all, in law or equity, to the lands sued for in and by said bill.

2. The said F. W. Marshall sets forth that by the appointment of the Unitas Fratrum he had been duly authorized to institute suits at law or equity in relation to the matters in the bill, and they are bound by the acts of the said F. W. Marshall to be obedient to any judgment or decree rendered on all suits brought by him on their behalf; and he further showeth in his bill that the lands now sued for were procured by Henry Cossart out of funds raised by active members of the society, on loan by their friends and able members of the society, for general concerns; and that as to the lands purchased in this State, the creditors were to receive payment in land, if they came over to (416) this country, or out of the sales thereof by him who had the fee; whereby it appears that if the lands held by Henry Cossart were held in trust, it must have been to convey to creditors who lent their money, and came to this State, or in trust to sell and raise money for such of them as did not come to this State, and are now aliens—or the estate must have been held in trust for a corporation of aliens, named the Unitas Fratrum. Yet who those creditors were does not appear, neither their names, places of abode, nor the sums lent by them respectively. Whether those creditors were the original lenders of the money, or whether they claim as representatives of such original lenders, does not appear; neither does it appear that the suit has been brought by them, or by any power from them, or any of them. And as to the society called the Unitas Fratrum, it is not stated that such society ever was incorporated; nor doth the said F. W. Marshall show by what legal means he has been authorized to sue, or in anywise act as agent of the Unitas Fratrum, who do not appear ever to have been legally incorporated, and who, as he saith, have no joint stock, funds, or revenue.

3. It appears by the bill that Henry Cossart, to whom the land in question was granted, was an inhabitant of Ireland, and it is not stated that he ever entered on this land, or that any person ever did enter thereon under any power from him. It also appears that the said Henry Cossart died, leaving Ch. F. Cossart, his son, a native of Ireland, and resident there, his heir at law; but it does not appear that the said Ch. F. Cossart ever did enter on the same lands, claiming the same as

heir, or that any other person acting by a power from him, ever did enter thereon in his name and to his use, so as to vest the said lands and estate of the said Henry Cossart in said Christian, as heir, etc.

4. It appears by the bill that Ch. F. Cossart, at the time of the Declaration of Independence, was an inhabitant of Ireland aforesaid, part of the dominions of the King of Great Britain, and it is not stated that he ever afterwards came to this State, or any of the United (417) States, and became a citizen, so as to enable him to hold real estate in this country. And that the sale of the land by John Michael Graff, as agent or attorney of said Ch. F. Cossart, to Hugh Montgomery was made in the year 1778, when said Ch. F. Cossart was an alien enemy.

5. It appears that the Unitas Fratrum is a religious society, and was so at the time of the purchase of Henry Cossart, and the grant made to him of the lands now sued for; yet it is not stated that license from the King of Great Britain was obtained to enable him to make such purchase in trust for the Unitas Fratrum.

Wherefore, and divers other good causes, the defendants do demur, etc.

Duffy, for the defendants, and in support of the demurrer. The first and second causes of demurrer go to the form of the bill, which is certainly defective for want of parties—all persons concerned in lands, however numerous, must be named. Harrison's C. P., 91. No attorney can bring a suit in his own name. Mitford, 144; 2 Vesey, 312. A few creditors may sue for many, but the names of all must be inserted. Finch's Ch., 592. The cases which have been decided regarding the South Sea bubble are not to be regarded as precedents; and if F. W. Marshall sues for the society, he ought to name them all. Where the inheritance is concerned, all the parties ought to be before the Court. Bunberry, 181. Wherever there is a *cestui que trust,* he must be a party. Finch's Prec., 275; Gilb. C., 252; 2 Eq. Ca., 165.

This bill would be no bar to a suit brought by the Unitas Fratrum, when they were properly named. 1 Bla. Com., 467. If they are not a corporation, then they must be severally named. If there be no joint stock or revenue, how can Marshall be appointed to sue for them? It is said that he does so by virtue of an act passed in 1782 (see in Martin's collection of private acts the act to vest in F. W. Marshall all the lands, etc.)—there is no power given to him by this act to sue for the Unitas Fratrum.

No persons should be harassed by a suit which does not finally (418) settle the question; and if a decision be made for the defendants they are unsafe, because they may be disturbed by another suit.

A. Henderson, on same side. The complainant, F. W. Marshall, states that he sues for himself and the concerns of the Unitas Fratrum. Upon the face of the deed to Cossart there is no trust—one of the stipulations mentioned in the bill is, that he who lent money should take land from him who had the fee, if he came to this country; if not, to have the money repaid from the sales of the land. The lenders of the money ought to have been made parties, as they certainly have an interest in the property in question. Marshall does not appear from the bill to have any interest in the land—only those who loaned the money are stated to have an interest therein. And although the rule that a few may sue for many be true, yet where one alone sues, it ought to be stated that he has an interest in the thing in question.

If the complainant sues by appointment, it will be proper to inquire by whom he is appointed—and it does not appear that it was either by those who lent the money or the society at large. The question here is independent of the first deed, but arises on the second, which was made by way of retribution. The bill states that it was made for the Unitas Fratrum—upon the face of it, it was made for Cossart. The parties to the bill, and those for whom the deed was made, are at variance. It would be highly unjust to decree the lands to the complainant for the Unitas Fratrum generally, as those who lent the money are alone entitled to have them. On the 3d cause of demurrer I shall make no remark.

The 4th cause of demurrer states that Christian Frederick Cossart was an alien—that he never came to this State. And the conveyance from Graff to Montgomery, being in 1778, shows that the complainant, and those for whom he sues, have no right either in law or equity. It is of importance here to inquire who had the right to the lands on the fourth day of July, 1776; on that day I contend they escheated, and if they did not escheat, that they were afterwards confiscated.

Whenever there ceases to be a person who can legally take and (419) hold the land it escheats. 1 Black. Re., 133. The case of *Bayard v. Singleton,* in New Bern Superior Court, was determined on the ground that at the time that Cornelle executed the deed to his daughter, under whom the plaintiff claimed, he was an alien, and not entitled to past lands; consequently, that the lands had escheated, and escheats are recognized by the laws of this State. (See the Acts of 1715.)

If the land had escheated, it then becomes necessary to inquire, In what manner has the State taken? I contend that the land is taken by the State, exempt of any trust—for in England, when the Lord or King takes by escheat, they take discharged of the trust. 1 Coke's Rep., 122, *Chudleigh's case.* Before the Statute of 27 Henry, 8, whenever feoffee to uses did anything which produced escheat, the land reverted to the

Lord discharge of the trust. Uses and trusts are substantially the same. 1 Bl. Rep., 180, 182; 1 Alk., 591; Hardress, 491. The same doctrine which governed uses now governs trusts—all the cases which will be read on the other side are mere *obiter dictums.*

The case of *Eales v. England,* Eq. Ca. Ab. and Finch's Prec. in Ch., 200, have no application to the present case.

I shall now speak of the operation of the acts of confiscation on this case. The acts of the General Assembly, to be found in Iredell's Rev., pages 341 and 364, show what lands the State intended to seize, and to what uses the State seized them. The land in contest is completely within the operation of these acts. Cossart did not embrace the opportunity of becoming a citizen, and thereby holding the land, as he might have done; he chose to remain abroad, and the loss is a consequence resulting from his own conduct. Confiscation of property belonging to people of a certain description was an high act of sovereignty, executed by the representatives of the free men of this State in a moment of severe pressure; and, however hard the operation of this law may be on Marshall and his associates, yet, as it is the omnipotent fiat of a sovereign and independent people, the Court cannot say that the
(420) State took the lands for any other uses than expressed in the laws by which the property is acquired.

Williams (Ch.), for the complainant.

A demurrer admits the truth of the facts stated in the bill. If this be a true rule, then, it sufficiently appears that the Unitas Fratrum have an interest in the land. There are many exceptions to the general rule, that all parties ought to be joined. If it were adhered to, it would frequently prevent the administration of justice. The Unitas Fratrum constitute a voluntary society, and not a corporation, and the lands acquired by them are vested in one for the use of the whole; and the suit being brought by Marshall for them, they are substantially parties. The case from Prec. in Chancery, 592, was the case of a voluntary society, and shows that a few may sue for the whole, and it is not necessary to make all parties by name, where they claim one general trust.

As to the second cause of demurrer, Is it to be supposed that those who lent money to purchase the Wachovia settlement are still unpaid, and that they still have a lien upon the land? Certainly not. If the lenders of the money came to America, they were to be paid in land; if they remained in Europe, they were to be paid the money advanced, with the interest. It cannot be supposed that those creditors had any lien upon the land; if they had, they must have joined in the conveyance of it. The complainant states that he is authorized to bring suits in law and equity for the Unitas Fratrum, and the demurrer admits the truth of the

allegation; and it can only be denied by plea or answer. If it be not necessary to state the names of each individual, then also it is unnecessary to state their respective interests.

As to the fourth cause of demurrer, Mr. Henderson has contended that the land escheated and became discharged of the trust; this is denied on the part of the complainants.

At the time of the Declaration of American Independence, this was a part of the mother country; and before that event, any of (421) the subjects of the King of Great Britain were entitled to purchase and to hold lands in this or any of the United States. When independence was declared, Cossart became an alien to this State, but I contend that his alienage worked no forfeiture of his estate. When the war broke out those who did not like the new government were at liberty to sell their lands and retire with the proceeds where they pleased; and this is agreeable to the law of nations. Vattel, B. 1, sec. 33, 195. This doctrine seems to have been held in view by the framers of the Constitution. Iredell's Rev., 276. Declaration of Rights, sec. 25. This section only changes the sovereign, and by it no escheat can take place, and aliens may still take and hold lands. This section provides that the titles made by the King and the Lords Proprietors shall not be affected; and the General Assembly of this State have shown that they were under the influence of this opinion, as appears from the 3d chap., Acts 1777. Iredell's Rev., 284, 285, by which, in substance, it is enacted that those who leave the country may sell their property and export the proceeds in any kind of produce, naval stores excepted; but if any real estate remained unsold three months after the departure of such person, that it should be forfeited to the use of the State. It was clearly considered that by the Declaration of Independence no forfeiture of lands was produced. In November, 1777, Iredell's Rev., 322, they again had liberty to sell. On page 341 we find the Confiscation Act: By this it was considered that on the 4th day of July, 1776, persons therein described held lands in the State, and continued to hold them without escheat till they were confiscated; and it was thereby enacted, that unless the absentees appeared by the time therein limited to become citizens, their lands should be confiscated. These acts are the expositors of the Declaration of Rights and of the Constitution, and ought to be regarded. According to Lord Coke, expositions made of an instrument at or about the time of its passing or creation, are the best and strongest expositions.

There is another act in Iredell's Rev., 364, which refers back (422) to the 4th day of July, 1776, and prevents any improper conveyance in the meantime; and declares the lands of all persons of the description of those mentioned in the Acts of 1777 to be absolutely forfeited.

At the termination of the war a treaty was made between the King of Great Britain and the United States of America, which proves that the lands were not considered as escheated. Art. 6 (the words are): "There shall be no future confiscations." If the lands had escheated by the change of government, there would be nothing left for this article to operate on.

By the private act passed in 1782 we have a legislative declaration that the lands of the Moravians, and this tract particularly, are not considered as confiscated. Cossart is not named in any of the confiscation acts, and although of that general description of persons whose lands were intended to be confiscated, yet he has never been proceeded against in such manner as to divest him of his right; and until he hath been found by inquest to be of the description of persons named in the act, his lands are not confiscated.

Although we should not be able to show any cases to prove that the king or lord took the escheat subject to the trust, yet, as this is a court of equity, the relief asked for by the complainants ought to be extended to them. If the feoffee and his heirs are bound to perform the trust, why is not the lord or the State bound also to execute it? The lord cannot show that he is entitled to the escheat till he shows that he made a grant, and that his tenant died, or committed some crime for which he is attainted. Why, then, should the lord say, because the feoffee is dead, the *cestui que trust* shall be deprived of the estate?

In the case of *Eales v. England,* Finch's Prac., ch. 200, the trustee died without heir, and the lord took the estate subject to the trust. This is a case of modern decision, and overrules the opinion that the king or the lord takes discharged of the trust. It is laid down in 1 Eq. Ca. Ab., 384, that no act of the trustee shall prejudice the *cestui que trust.*

Hence, it follows that the rights of the *cestui que trust* remain (423) unimpaired, whether the trustee continues to execute the trust himself or whether by his death or attainder the estate devolving upon the lord carries with it and fastens upon him the duty of executing the trust.

Mr. Williams, further to show that if the State took the lands it was subject to the trust, cited 2 Plow., 488; Pet. of Right—2 Bla. Com., 329, 330; 5 Bac. Abr., 360, pl. 50, 393, pl. 1; 1 Harr., 29; 1 Eq. Ca. Ab., 384 [D], pl. 1 in Margine; 1 Bla. Re., *Burges v. Wheate.* He made no remarks on the 3d or 5th cause of demurrer.

Haywood, on the same side. It must be admitted that when the lands were purchased by Cossart and the deed made to him it was for the use of the Moravians—they had the real and substantial right in the land, and although they have never parted with it, yet by the operation of

some of the acts of the General Assembly their interest is to be transferred, and they are to be deprived of it; but fortunately for the complainants, the law is not calculated to do such manifest injustice.

It has been contended that Cossart became an alien to this State; that the land escheated, and that the State has taken it discharged of the trust. I will first consider what is an escheat; it does not arise in consequence of alienage, it happens where the tenant dies without heirs, or attainted of a crime which corrupts his blood, and destroys the inheritance. 2 Bla. Com., 241; 1 Bl. Re., 132, 133, 143, 164, 174, 175, 184, 185. It is a confusion of terms to say that lands escheat for alienage, and by forfeiture; because in the one case the land goes to the lord, in the other to the king.

Escheat is a consequence of feodal tenure; no such tenure existed in this country at the Declaration of Independence. When the lands of this country became *allodial,* feodal tenures ceased, and with them escheats also. If it be considered that the State took the land by forfeiture, and not by escheat, then the authorities cited to show that where, in cases of escheat, the lord takes discharged of the trust, fail of application in the present case.

Where an alien purchases lands, he may hold till an office found; and the reason why in England it is necessary is that the people (424) being jealous of the power of the king, procured it to be declared by Magna Charta that the king should not take till an office found. Hardress, 495; 2 Vesey, 541; Co. Litt., 2 [6]; Dyer, 283; 5 Repts., 52; 3 B. C., 259; 3 Mo., 101; 5 Re., 110; 3 Inst., 254; 2 Inst., 169; 2 B. C., 294. The State of North Carolina had no right to take the land till an office found that Cossart was an alien, and now the time to show that fact is past. Moreover, the Legislature, in 1782, clearly expressed their determination that they would take no advantage of Cossart's alienage.

Suppose, then, that the land came to the State by confiscation, yet it must take it with the trust attached to it, and the alienees of the State must take it subject to the trust, because they had no notice of the claim of the Unitas Fratrum; they cannot show that the trust was separated from the land when it came to the State. Cossart's title was merely nominal—a trustee for the Moravians; and the State taking his right stands in his place, and is their trustee; and it was certainly so understood when the General Assembly, by the Act of 1782, declared that the confiscation should not extend to the lands of the Unitas Fratrum.

All the cases cited to prove that the king takes discharged of the trust are mere *dictums,* laid down out of complaisance to the king; but the more modern decisions show that the king can be a trustee. 1 Vesey, 453; Saunders on Uses and Trusts, 192. And although the king cannot

be sued, yet his alienee may be, for he does not partake of his privileges or immunities.

Suppose that neither the State or alienees are suable, yet the trust attaches upon the estate in the hands of the tenants, and the court will appoint some person to execute the trust. Saunders, 116, establishes the rule that the disability of the trustee shall not prejudice the trust, and the court of chancery will proceed as if there was a trustee.

As to the objection for want of parties, the demurrer is a silent thing—you cannot take more into view than is disclosed by the bill; no persons are mentioned in it but the Unitas Fratrum of this State;
(425) and no history of Moravian settlements which shows that there are others of the society in Europe ought to be regarded or allowed to affect this case. I would ask, Could the lenders of this money come into court and demand a conveyance of all the land? Certainly not. Theirs is only a personal contract, and if their money was not paid to them, they might recover it, unless they chose to take the land according to stipulation. A judgment in this case will be conclusive, and will bar any others of the Moravians from bringing suit respecting the property in question. Marshall is their attorney—his acts bind them as well when they are generally described as when particularly named.

Duffy, in reply. It is insisted by the complainant's counsel that the title of Christian F. Cossart is saved by the bill of rights; the true rule is that you must construe the section according to the subject matter of the context—the individuals mentioned must mean the citizens of North Carolina, and not aliens. If the construction was otherwise, then almost all the lands of this State would be monopolized by aliens, and the claim of Lord Granville and his heirs would thereby be revived. The acts of confiscation, so far from supporting the construction contended for, show that at the time they were passed the Legislature considered that from the 4th day of July, 1776, those persons had lost their rights; because it is declared that they "may return and be restored to the possessions which to them once belonged." And although acts of confiscation were passed, yet they seem to be more out of abundant caution than intended to operate on what had before that time escheated.

It has been argued that Cossart's title has never been extinguished, because no office has been found; I contend that has been done which is equal to an office found, viz.: By the Declaration of American Independence, and its subsequent confirmation, the land escheated; and the passing of the Act of 1778 is an express taking away of his right.

The only case where the king takes subject to a trust is where
(426) there is a forfeiture, and not where there is an escheat. In the one case he takes under the tenant; in the other he takes by title

paramount, for the want of heritable blood. It is certainly the opinion of the complainants that the lands in question have either escheated or have been confiscated; otherwise, C. F. Cossart might bring an action of ejectment against the tenants, and recover the possession.

Henderson, in reply. Does Marshall, the complainant, show that he is of the Unitas Fratrum—that he is interested in the matter in dispute? He certainly does not. It doth not appear that he hath anything more than a mere appointment, which cannot give him any right to sue in his own name. The bill is defective, inasmuch as it doth not show that the lenders of the money ever came to this country and received lands, or that their money has been repaid.

I am inclined to think that the position which maintains that an alien loses his land by forfeiture in England is correct; and the true reason seems to be that it is a punishment on him for his presumption in purchasing lands which he cannot hold. But it is otherwise where the lands escheat for the want of heritable blood, and then they go to the lord.

If land be purchased by one who dies without issue, it escheats. Why not escheat where he dies leaving a person incapacitated by law to take? Whenever land is taken by forfeiture, it vests immediately on the purchaser; but it does not escheat till the heritage blood fails. Mr. Haywood admits that the State took in 1776 by forfeiture, but he alleges it took subject to the trust; but the State has expressly declared that she exonerated herself from the trust, and would not execute it; and this conclusion results from the Act of 1779. The fact of Cossart's absence from the United States is admitted by the bill, and that he never returned is also admitted. It then follows that there can be no necessity of having an office found to establish a charge the truth of which is admitted.

The inference drawn from the last section of the private act passed in 1782 is, in my opinion, directly against the complainant—it shows that the General Assembly considered the title of the State to the (427) land in Wilkes as good, and that they intended nothing more than to authorize the registration of the power therein mentioned. If anything more than this was intended, they would certainly have used the same operative words as are used in the sections which confirm the lands conveyed by Hutton and Medcalfe.

If all the authorities cited yesterday are to be overruled by precedents in chancery, then it is useless to show what the law has been for three or four hundred years. The hardship of the case is entirely out of the question, and arguments which are built upon it ought to be disregarded. The Court cannot supply the place of a trustee when the land escheats, as they may do in the case of corporations. If the trust is dead, 'tis

useless to supply a trustee—it would be better to show how the trust can be revived than to devise a way to supply a trustee. It is useless to show that the alienees of the State can be sued without showing that they took the trust along with the legal estate; for as the trust was extinguished before the alienees took, the land passed discharged of the trust; for the State cannot hold in trust for aliens. Gilbert on Uses, 43; 1 Co. Re., 122; Har., 495.

HALL, J. The bill is brought by F. W. Marshall, who sues for and in behalf of himself and the concerns of the Unitas Fratrum in this State. To this bill there is a demurrer, in which one cause of demurrer set forth is that the bill does not show what persons those are that (besides the said F. W. Marshall) have brought this suit.

At the same time that the demurrer was argued, a motion was made by the complainant's counsel for leave to amend the bill, in case it should be thought by the Court that the cause of demurrer before stated was a good one. I will first consider whether it will be proper to grant leave to amend the bill. Wherever the Court has power to permit an amendment to be made, it is better to exercise it than to suffer a suit to go off, upon an objection to form, or indeed any objection in which the (428) merits of the cause are not involved. A plaintiff may amend his bill upon payment of costs of the demurrer. Wyatt's Register in Ch., 68. After argument of a demurrer to the whole bill, and the demurrer held good, it is not usual to allow an amendment, because the bill is regularly out of Court. But from this rule of practice it seems there are some exceptions; one is, in case of a demurrer for want of parties; in this case an amendment has been permitted to be made, although upon argument the demurrer has been held good. 2 Ch. Ca., 197; 2 P. W., 300; Wyatt's Register in Ch., 164.

This case has been set for hearing upon bill and demurrer—it has been argued; but as yet the Court has given no opinion. I feel myself authorized, at this stage of the proceedings, to allow the bill to be amended, upon the complainant's paying the costs of the bill, and one fee for counsel. The leave given to amend the bill arises from a conviction that this part of the demurrer would prove fatal to the bill, in case it was to rest on that issue alone. Although it may not be necessary to give the reasons on which that conviction is founded, I will do it in a concise manner, as all the Court have not the same impressions with respect to the demurrer. Here two questions arise: (1) Was it necessary that the names of all or any of the individuals composing the U. F. should have been mentioned by name in the bill? It is regularly true that all persons interested should be made parties by name, because, although a decree

may be made if that is not the case, yet none but parties, and those claiming under them, are bound by it. 1 Harrison's Cha., 32, 6 Ed. This is a good general rule and, like most others, stands proved by its exceptions. Those exceptions are founded on necessity, and the impracticability of obtaining justice in many cases by a strict adherence to that rule, where there are a great many persons all interested in the same way. If it was indispensably necessary to make them all parties by name, there would, in all probability, be so many abatements by death, etc., that it would be extremely difficult ever to come to a final determination. 2 Eq. Ca. Ab., 167. It is said by Lord Ch. Hardwicke, in the (429) *Mayor of York v. Pilkington and others,* 1 Atk., 282, "that a bill may be brought against tenants by a lord of a manor for encroachment, etc., or by tenants against a lord of a manor as a disturber, to be quieted, etc. As in these cases there is one general right to be established against all, it is a proper bill—nor is it necessary all the commoners should be parties. So, likewise, a bill may be brought by a parson for tithes against the parishioners, or by parishioners to establish a *modus,* for there is a general right and privity between them, and, consequently, it is right to institute a suit of this kind."

The case in 2 Browne's Rep., 338, was a case where it was thought practicable that all the parties, to wit, the part owners of the ship, might be named in the bill; and whenever that is the case, it is proper to name them. But whenever it is not practicable, with a view to settle the rights in question, it is unnecessary to make all the individuals parties by name—and with this principle I think common reason and the authorities I have seen on the subject accord. I therefore think that in the case now before us, where the individuals composing the U. F. are so numerous, that to require that each individual should be named as a complainant would so much embarrass the future progress of the suit, and subject it to so many unavoidable delays, as to amount nearly to a denial of justice; and, of course, that such a requisition ought not to be made. Although, for the reasons before stated, I do not think in some cases that all persons should be made parties by name, yet I think some of them ought; and that in the present case some of the individuals composing the U. F. should have been mentioned as complainants. The inconvenience of making all of them parties by name does not hold good against the requisition that some of them should be made parties by name; and in proportion as the reason fails, on which the exception as before stated is founded, so in proportion ought the rule that all persons interested should be made parties by name be adhered to. A bill may be brought by a few creditors on behalf of themselves and the rest; the names of all of them need not be mentioned, but the names

(430) of some of them must. If the names of some of them are not mentioned, it is certainly a good cause of demurrer; and there can be no aid decreed from the circumstances that the name of their agent is mentioned in the bill who sues on their behalf. A bill cannot be brought by an agent in his own name, it must be brought in the name of his principal. 2 Vesey, 313. I therefore think that the names of some of the individuals composing the U. F. ought to have been expressed.

(2) What interest does it appear from the bill F. W. Marshall has in the property in dispute? Or, in other words, is it to be collected from the bill that he is one of the U. F.? The bill expresses that the suit is brought by F. W. Marshall, on behalf of himself and the concerns of the U. F. in this State. From this expression it appears that whatever his interest may be, it is distinct from that of the U. F. If he was one of the U. F. and sues in that character, it certainly is not so expressed—it is stated not only that he sues on behalf of the interest of the U. F., which interest, to wit, the interest of the U. F., comprehends his own, if he sues as one of them; but further expresses that he sues on behalf of himself. Now, if he sues on behalf of himself, as one of the U. F., the expression means nothing more than is to be collected from the one immediately preceding it, where he says he sues on behalf of the interest of the U. F. Suppose it was asked and ascertained what his interest was, would that satisfy a desire to know what the interest of the U. F. was? Or, suppose it to be known what the interest of the U. F. was, could that be relied upon as a certain knowledge of what the interest of F. W. Marshall was?

It appears from other parts of the bill that C. F. Cossart, after the descent of the lands in question to him, executed a power of attorney in the year 1772 to F. W. Marshall, empowering him to sell, etc., said lands, and also authorizing him to constitute other attorneys. That in 1774 F. W. Marshall executed a power of attorney to John Michael Graff, who sold such lands to Hugh Montgomery. That Hugh Mont-

(431) gomery, by deed, etc., demised the said premises to the said John M. Graff, for and during the term of five hundred years, with a proviso, etc., that the same should be void upon the payment of the purchase money. That the said John M. Graff afterwards died. That Traugott Bagge became his administrator. That he assigned the said term to F. W. Marshall, then and now the agent and trustee of the said U. F. It is again expressed that, by the appointment of the said U. F., the said F. W. Marshall hath been duly authorized to bring suits, that the U. F. are bound by all judgments rendered in such suits. Thus it appears what interest F. W. Marshall really has. In the first place, he

is agent for selling the lands; in the next, for instituting suits. If he brings this bill as agent, etc., for the U. F., but not in their names, or the names of any of them, we have already seen that the suit is not well brought. It did not follow that because he was an agent for the U. F. that he was one of them, because that agency might as legally have been intrusted to a person that was not as to a person that was of the U. F. If he sues as assignee of the term of five hundred years, that is an interest distinct from that claimed by the U. F. In another part of the bill it is stated that he has the fee; if so, the U. F. has it not, so that that is an interest distinct from theirs. He may act as agent, etc., be possessed of the term, etc., or have the fee, etc., and still not be one of the U. F. If he is one of them, those interests are distinct from that claimed by them. I conclude that it does not appear from the bill that F. W. Marshall was one of the U. F., and that had leave not been given to amend the bill, this part of the demurrer must have proved fatal to it. The first cause of demurrer goes on to state that the bill does not set forth what interest they (the individuals composing the U. F.) respectively have; nor indeed that they have any interest at all, in law or equity, to the lands sued for. The bill expressly states that the lands in question were conveyed and granted to Henry Cossart in trust, etc., and thereforward held the said land as trustee for the said U. F. and not otherwise. The facts stated in the bill must, at this stage of the proceedings, be received and taken as true; if so, what interest (432) the U. F. has clearly appears from the bill.

With respect to the second cause of demurrer, this is not a dispute between the lenders of the money and the complainants. How could the complainants comply on their part, viewing the interest of the lenders of the money in the light in which the demurrer places it, unless they had the fee, either to make payment with, if the lenders of the money came over, or to sell by him who had the fee. The bill does not state that the land was held in trust for the lenders of the money—a recovery in the present instance cannot prejudice any right which the lenders of the money may have. The U. F., whether incorporated or not, appear to have been recognized by the Legislature of this State in the year 1782 as having an existence, and capable of having lands held in trust for them. Martin's Collection of Private Acts, 105. The preamble of this act states that, "Whereas, F. W. Marshall hath made it appear to this General Assembly that all the tracts of land within this State belonging to the Lord Advocate, the Chancellor, and the agent of the U. F. or United Brethren, have been transferred to him from the former possessors in trust for the U. F." And the act then goes on and, after

declaring some deeds to be valid and directing them to be admitted to probate, vests certain lands in F. W. Marshall in trust as aforesaid.

As to the 3d and 4th causes of demurrer, it appears from the bill that the lands in dispute were conveyed to Henry Cossart, as agent, etc., in the year 1754, and that no adverse claim has been set up until that on which the defendants now rely, or that from which they attempt to derive title. That C. F. Cossart, to whom the lands descended, was, at the time of the Declaration of Independence and ever afterwards, a subject of the King of Great Britain. I suppose it cannot be contended but that these lands were legally held by the Cossarts until the Declaration of American Independence. Immediately after this declaration, the State of North Carolina, like the other states in the Union, became a sovereign and independent State, and chose for herself her present form of
(433) government. In the 25th section of the Bill of Rights it expressed "that the property of the soil in a free government, being one of the essential rights of the collective body of the people," it is necessary, in order to avoid future disputes, that the limits of the State should be ascertained. After ascertaining the limits, etc., it is further expressed that "all territories, seas, etc., therein are the right and property of the people of this State, to be held by them in sovereignty." In the third proviso of the same section it is further expressed "that nothing herein contained shall affect the titles or possessions of individuals holding or claiming under the laws heretofore in force, or grants heretofore made by the late King George III, etc., or the late Lords Proprietors, or any of them." Thus, the people of this State assert their claim to the territory, etc., included in its boundaries, but without prejudice to titles or possessions held, etc., as in the said proviso set forth. Next come the acts of confiscation, designating what persons are not citizens; and for the reasons set forth in their preambles, confiscate the property of people of certain descriptions. Among persons of the description whose property was confiscated was C. F. Cossart, the person who it is stated in the bill held their offices in trust for the U. F. It has been argued for the defendants that, inasmuch as the heritable blood of the said Cossart became extinct and he and his heirs could no longer hold the lands, the State took them by escheat, not subject to the trust of the U. F., and that the State had a right to grant them to the defendants, not subject to the trust; and the doctrine of escheats in England is relied upon. In England escheats are divided into those *propter defectum sanguinis* and those *propter delictum tenentis.* The one sort, if the tenant dies without heirs—the other, if his blood be attainted. 2 Bl. Com., 245. It cannot be pretended that the lands in question escheat to the State as coming within the latter description, *propter delictum tenentis,* because, although

a nation has a right to change its form of government, yet any individuals of that nation are under no obligation to submit to such change; they have a right to retire elsewhere, sell their land, etc., (434) and take with them all their effects. Vattell, b. 1, ch. 3, pa. 30. In conformity to this principle, the Legislature of this State gave leave to such persons as were ordered out of the State to sell and dispose of their estates, etc. Iredell, 286. It could not then be said that persons who did not wish to submit to the form of government of this State, and withdraw their allegiance from the King of England, were guilty of any crime. The other sort of escheat is where the tenant dies without heirs. Is that the case in the present instance? Does it appear that C. F. Cossart died without heirs? It does not. The fact appears to be that he did not die without heirs; but that he became incapacitated to hold lands in this country some time after these lands descended upon him, because he continued to be a subject of the King of Great Britain. This case has no parallel that I am aware of in the English books. Lord Keeper Henly says, in *Burges v. Wheate,* 1 Bl. Rep., 178, that if lands do escheat, not subject to a trust, he supposes it no injury or absurdity at all, *volenti non fit injuria.* The creator of the trust determines to take the conveniences of the trust with its inconveniences when this trust estate was created. What was the security of the U. F. against a loss of it by an escheat of the legal estate? That the trustee would not die without heirs—that he would commit no offense in consequence of which his blood should be attainted. It is true, if the trustee conveys the legal estate for a valuable consideration to a purchaser without notice, the trust estate may thereby be destroyed; but this depends upon other and quite different principles. At the time this trust estate was created, it was not contemplated that any acts of confiscation would form the medium of escheat, and thereby operate a loss of the trust estate to the owners thereof, against whom it is not pretended the confiscation laws were ever intended to operate. Suppose that before the revolution, either in England or in this country, a law had passed declaring that persons of any particular description should no longer hold lands in this country; if the Lords Proprietors had seized upon lands thus situated, I think they would have taken it with its encumbrances. It (435) is not that I imagine that the State has a right to take a greater interest, or a larger estate, than the Lords Proprietors could have done. With what intent did the Legislature of North Carolina pass the acts of confiscation? And what was the mischief which existed at that time? And what was the remedy intended to be applied? For such a construction ought to be put upon a statute as may best answer the intent which the makers of it had in view. 4 Ba. Ab., 647. And that intent

is sometimes to be discovered from the cause or necessity of making an act of Parliament, etc., and sometimes from foreign circumstances; when this can be discovered, it must be followed with reason and discretion in the construction of an act, although against the letter of it. Idem., 648. The motives by which the Legislature were actuated in passing these laws are set forth in the preamble of one of them—Iredell, 341—that "whereas divers persons, who have heretofore owned and possessed lands, etc., in this State, have withdrawn themselves from the same, and attached themselves to the enemies of the United States of America, etc., and also divers persons having been beyond the bounds of the United States at the beginning of the present war, have failed to return and unite their efforts for the common defense of American liberty; and it is expedient and just that every person for whom property is protected in any state should join in defense thereof whenever the same is threatened or invaded." Time is then given to persons whose situations are described as above, alleging favorable circumstances, to become citizens, etc., otherwise their property is to be confiscated. Thus we at once see their intent in passing the law, the mischief which prevailed, and the remedy intended to be applied. I see no reason for believing that the Legislature intended that the acts of confiscation should operate upon persons of any description except those described in the preamble of the act. Their object was to hold out inducements to them to remain with us, by darkening and rendering as gloomy as possible their prospect in case they left us and sought to attach themselves to the enemies of our country. The avowed object of these acts was to increase the security which the citizens of the State had to their rights; by no means to impair it. C. F. Cossart was one of those persons described in the confiscation laws; his property was confiscated, it was said, and of course the legal title to the land in question; be it so. Was it the object of the Legislature to confiscate any rights, etc., but those of which he was possessed? If not, the operation of the acts of confiscation is commensurate to the causes which gave birth to them, and the remedy rationally proportionate and equal to the mischief. If, however, their operation is extended further, and made to include the rights of our own citizens, persons not described in the preamble I have just recited, but persons for whose benefit, in common with other citizens, the confiscation laws were passed, such extension of their operation can have no corresponding cause in that preamble, nor can be reconcilable with any motive that actuated the Legislature upon that occasion. Their object certainly was to secure, not to destroy the rights of their own citizens. Let us suppose it a doubtful case, and suppose also that the Legislature were present, and the question put to them, Did you intend

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to injure the rights of your own citizens by passing the confiscation laws? Let such an answer be given as it may be supposed they, being upright and reasonable men, would give. 4 Bac., 649. No person can imagine that the Legislature would say that, without any cause, they intended to sacrifice their fellow citizens; for I can venture to believe that if such a sacrifice was to be made, it would be without cause. Suppose all the persons whose names have been mentioned, or whose property has been confiscated, in and by the confiscation laws, to have been naked trustees without any beneficial interest, could the Legislature have thought that those trustees would be affected one way or the other by the confiscation laws? The beneficial interest, in the present instance, is in our own citizens, nothing but a naked and unprofitable title was in C. F. Cossart. The Legislature, in all probability, knowing this, have not thought proper to make mention of his name in any of the acts of con- (437) fiscation. I suppose the facts to be that all the persons who are mentioned by name in the Confiscation Act of 1779, Iredell, 379, not only had the legal estate in them, but had also the beneficial interest attached to it; at least that the Legislature supposed that to be the fact by a general expression—the act then includes "all others who come within the meaning of the confiscation and this act, etc." The act certainly intended to operate only upon the interests of those who deserted the American cause and attached themselves to our enemies. It never intended, by confiscating the legal estate, a thing of no moment to Cossart, to deprive our own citizens of the trust estate. If compensation is to be made to the State by C. F. Cossart, because he attached himself to the enemies of our country, why involve in that compensation the rights of some of the citizens of the State, to whom in part that compensation is to be made? If this argument stands in need of any support, it may be derived from the proviso in the bill of rights before spoken of—the section of which this proviso is a part, declares that all of the territory, etc., of the State is the right and property of the people of this State. The State, however, did not think proper to interfere with or affect the titles or possessions which any of her citizens held or claimed under the laws before that time in use, or grants before that time issued. The possession of the lands in question by the U. F. or by persons claiming under them, which is the same thing, was a possession guarded by the proviso, as having been obtained in consequence of the issuing of a grant before that time, under the then existing laws of the country. Although affairs in North Carolina, as well as in the whole Union, had assumed a new aspect, the rights of individuals before that acquired were not forgotten. The same spirit of protection, which so strongly manifests itself in this section of our bill of rights, I am of opinion had

not taken its leave of our legislators when they passed the acts of confiscation. The 3d section of the Act of 1782, before spoken of, Martin's Collection of Private Acts, 105, declares that the power of attorney of C. F. Cossart, dated 3d of November, 1772, empowering said
(438) F. W. Marshall to sell his lands, be admitted to probate, etc., registry in the county of Wilkes, and be as good and valid in law as it could or might have been had the act of confiscation never been passed. The intent of the Legislature, as far as it is discoverable in this act, was not to destroy but to secure the rights of the complainants to the lands in question. Did they intend to amuse them by saying that the power of attorney should be valid, etc., and at the same time deprive them of that in support of which they declared it should be valid? For my own part, I attribute to them no such duplicity. It is said in Vattel, Book 3d, ch. 13, p. 575, that formerly in conquests even individuals lost their lands, etc., but at present war is less terrible to the subject; things are transacted with more humanity; it is against one sovereign that another makes war, and not against quiet subjects. The conqueror lays his hands on the possessions of the State, etc., while private persons are permitted to retain theirs—they suffer but indirectly by war, and to them the result is, that they only change masters. If an adherence to this principle would have afforded protection and a security to the rights of our citizens, in case a conquest had been made of our State by some other or third nation, how much more strongly ought the principle to be adhered to, when the people of which the complainants are a part, became masters of it, and possessed the sovereign power. It may be said that the faith of the State is in some measure pledged to support the titles of the defendants.

Was the State consulted in one stage of the proceedings which the defendants have thought proper to adopt in procuring a title? If it were, I am a stranger to the fact. If they thought proper to enter these lands and obtain grants for them, knowing at the same time of the claim set up by the complainants, they must abide by the consequence—the act was their own. The fifth cause of demurrer has not been argued, and I suppose is not relied upon by the defendants. I think the whole demurrer should be overruled, except that part of it as to which leave has been given to amend.

(439) JOHNSTON, J. The complainant sues in behalf of himself and the concerns of the Unitas Fratrum in this State. It is set forth that

The U. F. are acknowledged as an ancient Protestant Episcopal Church;

Have no joint stock or funds;

Have negotiated loans by their agents, for the purpose of making new establishments or settlements, and in particular for the purchase and settlement of Wachovia. The lenders had their option either to come to this country, and receive lands to the value of their respective loans, or remain in Europe, and be reimbursed from the sale of the lands.

That the lands of the U. F. were conveyed to complainant, by deed of lease and release, by their secretary, James Hatton; and that he was afterwards authorized to sell and transact the business of the U. F. by act of the General Assembly, which confirmed the deeds so made.

That he is empowered by the U. F. to institute suits, etc.

That Henry Cossart, known agent of the U. F. and admitted such by act of Parliament, obtained two grants of land from Earl Granville to him, as agent for the U. F., the one for 3,840 acres, more or less; the second for 4,933 acres, more or less, both in Wilkes County; that these lands were granted and conveyed in trust, and that the grantee held the same in trust as a trustee for the U. F.

That before the 4th of July, 1776, Henry Cossart died, leaving Christian Frederick Cossart residing in the Kingdom of Ireland, his heir-at-law, who continued to reside in that kingdom, and never came to America, and was never admitted a citizen of this or any of the United States.

That Ch. Frederick Cossart, in the year 1772, after the death of his father, the original grantee, executed a letter of attorney empowering the complainant to sell the said lands, with power of substitution; in pursuance of which he, on the 4th of October, 1774, substituted John Michael Graff to execute the said power in his stead.

That John Michael Graff, in pursuance of the said substitu- (440) tion, on the 23d of July, 1778, sold to Hugh Montgomery, for a valuable consideration, and conveyed as well the legal estate, which was supposed to be vested in Cossart, as the equitable interest of the Unitas Fratrum in the said lands.

That Graff received £1,000 in part of the purchase money; and to secure the payment of the balance, £1,500, took a lease on the whole lands for five hundred years, to be void on the payment of that balance with interest.

That Graff soon after died intestate, and administration of his estate was committed to Traugott Bagge, who in December, 1784, assigned the lease to the complainant in trust for the U. F.

That in the year 1778 Hugh Montgomery entered upon and took possession of the premises, and that his trustee and executors have from

that time continued in possession of some part of it, but never have paid up any part of the balance of £1,500, or the interest.

That the General Assembly have validated and confirmed the power of attorney, under which the lands were sold to Montgomery.

Demurrer 1st. That U. F. are not parties, etc.

It appears by the bill that the complainant F. W. Marshall holds in trust for the U. F.; it is therefore necessary, in order to entitle the complainant to a decree, that the *cestuis que trustent,* whoever they may be, should be made parties; though it is said it is not always necessary to make the trustee a party. *Kirk v. Clark,* Cha. prec., 275; Vin. Abr., Title Party, p. 250, fol. ed. It is said that the U. F. are known and acknowledged a religious society by act of Parliament before the revolution, and recognized as such by our acts of Assembly since, which have confirmed their titles to certain tracts of land within this State; that they are very numerous, and it would be extremely inconvenient, if not altogether impracticable, to set forth the individual name of every member of the society; yet certain individuals by name might sue, in behalf of themselves and the rest of the society, in conjunction with the trustee;

as in the case of the treasurer and managers of the Temple Brass
(441) Works Company. 2 Cases in Equity Abridged, 168.

2d. Though it appears plainly, from the facts set forth in the bill, that the U. F. have an interest in the lands, they are not in Court to claim it. It is true F. W. Marshall says he is empowered to prosecute suits for them; but he is only their agent or attorney, and cannot maintain a suit in his own name. It does not appear to me that it is necessary to make the money lenders parties other than such as came over to this country and received lands in satisfaction for their loans. The presumption, however, as was well observed by one of the counsel for the complainants, is, that after so great a length of time the money has been paid, or the lenders satisfied in some other way; if not, they may have their remedy against the borrowers, but have no lien on the lands, as it appears the money was intended for other purposes as well as to purchase lands, and none of them have any claim on the lands except such of them as may come to this country with a view to settle on them. Therefore it was not necessary to make the lenders of the money parties, or any of the U. F. but such as are acknowledged citizens of this State, who alone have any pretense to claim an interest in it.

3d. It was not necessary that Cossart should enter—he had no right to the possession, having only a naked trust, for the use and benefit of the U. F., who were the only persons who had the sole right of occupation and possession under the Stat. of 27 Hen. VIII.

4th. It appears that the lands in question were granted by Earl Granville to Henry Cossart, in trust, for the use of the U. F. and for no other use or purpose whatsoever; that he died sometime in the year . . . and that the trust descended to his son, C. F. Cossart, who, before the Declaration of Independence executed a letter of attorney to F. W. Marshall to sell and dispose of the lands, who substituted J. M. Graff for that purpose, and who, in the year after the declaration of rights, sold, etc. It is therefore contended that C. F. Cossart, at the time of forming the constitution and bill of rights, being an alien, his estate evolved on the people of the State, in their col- (442) lective capacity, who took the estate discharged of the trust.

It would be useless to look into books for a case in every respect similar to the one now in question. The case which comes nearest to it is where the trustee died, leaving an alien his heir-at-law; in that case it is contended the lands would escheat to the lord, discharged of the trust. And there are some cases to warrant this opinion, though the case of *Eales v. England,* reported in Precedents in Chancery, states the law to be otherwise, that the lord would hold as trustee for the benefit of the *cestui que trust.*

All the cases that are to be met with in the books, however, differ from this, that the trusts were created, and conveyed by a tenant who held under a superior lord, who was entitled to the escheat free from any trust, to the use of the grantee only. In this case Earl Granville, who was entitled to the escheat, created the trust himself, and granted the estate in trust to the first grantee. Therefore, if the grantee had died, leaving an alien his heir, and for that cause the estate had escheated to Earl Granville, I am clearly of opinion that he would have taken it charged with the trust, as he could not, on any principle either of law or equity, be allowed to avoid his own deed, so as to destroy a trust created by himself *bona fide,* and for a valuable consideration.

It is next to be considered in what manner this trust was effected, by the revolution and change of government by which Earl Granville's interest in his estate in this country became vested in the collective body of the people, when they assumed the sovereignty of the State. By the 25th section of the Declaration of Rights, after describing the limits of the State, it is declared that all the territories within those limits "are the right and property of the people of this State, to be held by them in sovereignty." 1st proviso, saving to the Indians their rights to hunting grounds. 2d proviso, reserving a right to establish one or more governments to the westward. 3d proviso, "That nothing herein contained shall affect the titles or possessions of individuals holding or claiming under the laws heretofore in force, or grants (443)

heretofore made by the late King George III, or his predecessors, or the late lords proprietors, or any of them." This proviso should on all occasions receive a liberal construction in favor of the rights of individuals to guard them against the encroachments of the public functionaries then established, and who by this instrument were vested with certain limited powers, from which the titles and possessions of individuals are expressly excepted. This Congress, which represented all the free inhabitants of this State, clothed with all their authority, and invested with all their rights, restrained by no law, unawed by any authority, in the plenitude of their power, have drawn a line between the proper rights in landed property of the individual citizen, and those of the collective body of the people. All titles or possessions, held or claimed under former laws or grants, either royal or proprietary, are secured and confirmed to the individual, so that he cannot be divested of them, but on a trial in due course of law. And this is a fundamental principle, which cannot be departed from by any power existing under the Constitution, without a direct and manifest violation of that sacred compact, to which it is the duty of every citizen to adhere and defend from every attack, however respectable the authority may be from whence it may originate. It has been contended by the counsel for the complainant, that by this proviso the right of C. F. Cossart is saved; but this position cannot be supported from a rational or grammatical construction of that clause. The declaratory part in the first instance vests the whole in the collective body of the people; the proviso then reserves certain rights to individuals, which can only mean individuals of the collective body of the people of this State, or of the people who were then represented in that Congress. C. F. Cossart never was one of the people of this State, nor was he one of the people represented in that Congress; he therefore cannot avail himself of any benefit or advantage from the saving in that proviso. But though it does not extend to the confirmation of Cossart's right, yet it fully comprehends (444) the rights of the U. F., who were then inhabitants of the State, and individuals of the collective body of the people, who held a rightful possession under a *bona fide* purchase, for a valuable consideration, and a grant from one of the late lord proprietors; not only an actual but a legal possession, under the Act of the 27th H. VIII, ch. 10, for transferring uses into possessions, which vests the possession in him of them that have the use. Thus the possession of these lands are irrevocably vested in the U. F. by the Constitution.

It has been said by the counsel for the defendants, that the Acts of Assembly, commonly called the confiscation laws, have vested the use of all lands held by persons who were not resident in this State, or some

one of the United States, at the time of the Declaration of Independence, and have not since been admitted as citizens of the State. Should that be the case, it can have no effect on the interest of the U. F., which is secured to them by the Constitution, which must be admitted to be paramount to an act of the Legislature, which is itself a creature of the Constitution. These acts, however, in other respects, may well stand without interfering with the Constitution; but when duly considered, will be found to vest no right to the lands of aliens in the State, other than it had under the Constitution. The confiscation acts had in view three other objects, on all of which they might operate with propriety: 1st. To direct in what manner the estates of aliens should be sold and disposed of. 2d. To confiscate and forfeit the lands of traitors, and of such citizens of this State, or of any of the United States, who had gone over to the enemy, on conviction. 3d. To restore to aliens their estates, on their taking the oaths to government and becoming citizens.

The lands of aliens being already vested in the State, any further act could add nothing to the validity of the right of the State; but it was necessary to point out the mode of disposing and conveying these lands. In every other respect, these acts, so far as they relate to aliens, operate as acts of grace and favor, holding forth to them the generous offer of restoring their estate on their becoming citizens. And when the Legislature discovered so plainly a disposition to be not only (445) just but generous, in regard to aliens, it ought not to be presumed that they meant to deprive their own citizens of rights, which they held under the solemn sanction of the Constitution. As the land was secured to the U. F. by the Constitution, if I am right in my position, it is unnecessary to say anything of the inquest of office relied on by the counsel.

In regard to the conveyance made to Montgomery, it is evident that Cossart, at the time of making the conveyance by his attorney, had no interest in the estate, and of course his attorney could convey nothing. But it is charged in the complainant's bill that this defect is remedied by an act of the General Assembly; so far, however, as that conveyance affects the interest of the U. F., if made by their consent, and under their authority, it is sufficient to convey their interest and to vest the use and possession of the premises in the purchaser, his heirs and assigns; and they, in return, are bound to fulfill their engagements with the U. F. Thus far I have considered the estate or interest which the collective body of the citizens of this State acquired in the lands heretofore vested in the King of Great Britain and his subjects, in the same light in which it was stated by counsel on both sides, namely, that it

was acquired by escheat. But it appears to me, on such consideration as I have been able to bestow on the subject, after looking into such authorities, both ancient and modern, as I could procure, that the acquisition of property obtained by the State at the revolution was not an escheat, as defined by any elementary writers on the laws of England—none of these have omitted it, and all of them correspond with the definition given by Blackstone, vol. 2, p. 244. I shall therefore only cite that respectable authority in his own words: "Escheat, we may remember, was one of the fruits and consequences of feudal tenure; the word itself is originally French or Norman, in which language it signifies chance or accident, and with us denotes an obstruction of the course of descent, and a consequent determination of the tenure by some (446) unforeseen contingency, in which case the estate naturally results back, by a kind of reversion, to the original grantor, or lord of the fee." Every person knows in what manner the citizens acquired the property of the soil within the limits of this State. Being dissatisfied with the measures of the British Government, they revolted from it, assumed the government into their own hands, seized and took possession of all the estates of the King of Great Britain and his subjects, appropriated them to their own use, and defended their possessions against the claims of Great Britain, during a long and bloody war, and finally obtained a relinquishment of those claims by the treaty of Paris. But this State had no title to the territory prior to the title of the King of Great Britain and his subjects, nor did it ever claim as lord paramount to them. This State was not the original grantor to them, nor did they ever hold by any kind of tenure under the State, or owe it any allegiance or other duties to which an escheat is annexed. How then can it be said that the lands in this case naturally result back by a kind of reversion to this State, to a source from whence it never issued, and from tenants who never held under it? Might it not be stated with equal propriety that this country escheated to the King of Great Britain from the Aborigines, when he drove them off, and took and maintained possession of their country?

At the time of the revolution, and before the Declaration of Independence, the collective body of the people had neither right to nor possession of the territory of this State; it is true some individuals had a right to, and were in possession of certain portions of it, which they held under grants from the King of Great Britain; but they did not hold, nor did any of his subjects hold, under the collective body of the people, who had no power to grant any part of it. After the Declaration of Independence and the establishment of the Constitution, the people may be said first to have taken possession of this country, at

least so much of it as was not previously appropriated to individuals. Then their sovereignty commenced, and with it a right to all the property not previously vested in individual citizens, with all (447) the other rights of sovereignty, and among those the right of escheats. This sovereignty did not accrue to them by escheat, but by conquest, from the King of Great Britain and his subjects; but they acquired nothing by that means from the citizens of the State—each individual had, under this view of the case, a right to retain his private property, independent of the reservation in the declaration of rights; but if there could be any doubt on that head, it is clearly explained and obviated by the proviso in that instrument. Therefore, whether the State took by right of conquest or escheat, all the interest which the U. F. had previous to the Declaration of Independence still remained with them, on every principle of law and equity, because they are purchasers for a valuable consideration, and being in possession as *cestui que trust* under the statute for transferring uses into possession; and citizens of this State, at the time of the Declaration of Independence, and at the time of making the declaration of rights, their interest is secured to them beyond the reach of any Act of Assembly; neither can it be affected by any principle arising from the doctrine of escheats, supposing, what I do not admit, that the State took by escheat.

On consideration of this case, I am of opinion that the bill is insufficient for want of proper parties, as set forth in the demurrer, and ought to be dismissed, unless the Court permit the parties to amend, by adding the proper parties. That the other causes of demurrer are not material, and ought to be overruled.

On the motion of the complainant to amend, I am of opinion that as there has not yet been any judgment on the demurrer, that on application to the Court of Morgan District, they be permitted to amend, by inserting proper parties in their bill, on paying the costs of the bill and demurrer, and one attorney's fee. (See Mitford on Pleading, E. III, 146-147.)

TAYLOR, J. The argument of this cause has been conducted in a manner which reflects much honor upon the candor and liberality of the counsel concerned, while it attests in an equal degree their learning and diligent research. The general principles involved in (448) this case are unquestionably of the first importance, derived not merely from the value of the subject in dispute, which, however, is very considerable, but principally from the influence a decision of them must necessarily have, in ascertaining the law of the State, upon points hitherto undecided. It is on this account that my opinion, on some of

the questions, will be given with diffidence; but whatever misapprehensions I may entertain, consolation is derived from the hope that my errors will, at least, be rendered harmless by the judgment of my brethren.

Two questions arise out of the demurrer; one as to the complainant's right, the other as to the sufficiency of the mode in which he has thought proper to prosecute it. For the sake of perspicuity, therefore, it will be proper to state distinctly the charges in the bill under these respective heads:

1st. In relation to the plaintiff's right. On the 12th of November, 1754, Henry Cossart, as trustee for the U. F., obtained from the late Earl Granville two grants for tracts of land in Wilkes County, upon a representation being made to him that a considerable portion of the Wachovia District, a former purchase on the same account, was barren and unproductive, although it had been paid for as arable land. Before the Declaration of Independence, Henry Cossart died, leaving Christian Frederick Cossart, of Antrim, in Ireland, his heir-at-law, who became seized, as the law requires.

Christian F. Cossart, being a subject of the King of Great Britain, and resident in his dominions when the independence of the United States was declared, is supposed to have become an alien to this State, whereby the lands are vested in the State, or by virtue of the confiscation laws subsequently passed.

On the 3d of November, 1772, Christian F. Cossart, in order that the said lands might be sold for the benefit of the U. F., constituted F. W. Marshall, the complainant, his attorney for that purpose, giving him authority to appoint one or more attorneys under him with like
(449) powers. On the 4th of October, 1774, Marshall appointed John Michael Graff attorney for the same object, and with the same power.

On the 23d of July, 1778, Graff, in pursuance of his authority, sold the lands to Hugh Montgomery, who paid part of the purchase money and received a conveyance duly executed; and in order to secure the residue, mortgaged the land to Graff, in trust for the U. F. Graff soon after died, and Traugott Bagge, his administrator, on the 30th December, 1784, assigned the term to F. W. Marshall, then and now the agent of the Unitas Fratrum.

In July, 1778, Montgomery took possession of the land, and continued during his lifetime, as his trustees have done since his death, in possession of part of the same.

In December, 1779, Montgomery conveyed the lands to trustees, of whom John Brown is the survivor, in trust for two infant children, and

until their arrival at full age. At the same time Montgomery also made his last will, whereby he charged the rest of his real and personal estate with the payment of his just debts, and particularly the debt due to the Moravians.

The bill then charges a number of persons by name with having taken possession of the lands, pretending to derive a title under William Lenoir, who has obtained grants for the same, under the pretended authority of the land law passed in 1777, claiming the land discharged from the trust.

By an Act of Assembly, passed in 1782, it is enacted that the power of attorney of Christian F. Cossart, dated the 3d April, 1772, empowering the said Marshall to sell his land, be admitted to probate and registry in the county of Wilkes and be as good and valid in law as it could or might have been had the act of confiscation never passed.

2d. In relation to the remedy. That the U. F. has been acknowledged as an ancient Episcopal Protestant Church by the Parliament of G. B. and the Bishops of the Church of England, by a public act of Parliament of the year 1749. As such it hath subsisted in this State about forty years, and the title and style of the said act of Parliament has been acknowledged and ratified by acts of the (450) General Assembly of this State, as well as in various legal proceedings since.

The church has neither joint stock, funds, nor revenue, yet at sundry times the active members among them, such as the lord advocate, the chancellor and agent, have caused loans for general concerns to be made among their friends and able members, particularly for new settlements, as was done in the purchase of the Wachovia district. For these objects great capitals have been raised, upon condition that the creditors should receive land in payment if they came to this State, or out of the sale thereof by him who has the fee.

F. W. Marshall, the complainant, is at present seized in fee of the lands which he is authorized to sell, and in general to conduct and manage their concerns. He is likewise authorized to institute suits in law or equity concerning the matters complained of in the bill; and the U. F. are bound and concluded by all such judgments and decrees as may be rendered in any court of this State in which suits may be brought.

Besides the general prayer, the bill seeks a disclosure of the defendant's title, a conveyance of the legal estate, if they have any, to Montgomery's trustees, or a surrender of the possession for the benefit of the heirs.

If the title which Christian F. Cossart had in these lands was divested out of him, and vested in the State, it must have been either by confis-

cation, forfeiture by reason of alienage, or escheat for want of a legal proprietor.

If by either of these means it shall appear that the legal title has devolved upon the State, it will then be necessary to inquire whether it is subject to the trust or equitable claim which accompanied it in the hands of Cossart.

1st. The act passed in 1782 appears to me to have precluded the necessity of investigating the question, whether the confiscation laws attached upon the lands as the property of Cossart; for, on the supposition that they did so attach, the terms of the act, though not strictly appropriate, are yet sufficiently expressive of the will of the (451) makers, that as to this property confiscation shall not operate.

Its avowed object is to quiet the minds of those persons to whom conveyances had been made, or were to be made of any part of the lands transferred to Cossart in trust for the U. F. To this end, the purview explicitly declares that the power of attorney from Cossart to Marshall shall be as good and valid in law as it could or might have been had the act of confiscation never been passed. The manifest design of the power of attorney was to enable Marshall to perform those acts for the benefit of the society, which Cossart, being absent beyond sea, could not, on that account, conveniently execute himself. If the act had merely admitted the power to probate, the questions of Cossart's right, and the consequent goodness of the sales, might have been still left open to future discussion. But it does not rest there; it gives validity to the power, and does therefore virtually and in effect confirm and validate the sales which had been made, or which might thereafter take place under it, so far at least as they required protection against the confiscation acts.

Thus far it seems necessary to proceed, for the sake of giving to the act a construction which is absolutely necessary to effectuate the intention of the Legislature, and one without which it is deprived of all sensible effect or useful energy; a construction, too, which is warranted by the maxim, *"Quando lex aliquid concedit, concedere videtur et id per quod devenitur ad illud."* A person whose title has been divested out of him by confiscation cannot sell, neither can he authorize another to sell for him; yet if an Act of Assembly gives validity to a power of attorney made by him, the sale taking place under it is necessarily confirmed. Nor can it be doubted that the same consequence will follow, if an Act of Assembly restore validity to a power of attorney made by a person having good title at the time, though it becomes defective by subsequent causes. The latter is supposed to have been the situation of Cossart when the act was passed.

The only defect of title in Cossart that seems to have been contemplated by the drawer of the act is the one arising from (452) confiscation; all others, from whatever cause, are omitted. It is probable that his title was not believed to be exposed to any other objections, and if it had been, that they also would have been provided against. I infer this from the apparent futility of passing an act for the purpose of redeeming a title from defects of one kind, when it is equally vulnerable in other parts. Forfeiture by reason of alienage and escheat are neither brought into view, nor is their possible operation guarded against; and I think that the Court cannot, upon just principles of construction, extend the act so as to remove the defects which may arise from these sources. Were the words used in the act obscure or doubtful, then the intention of the Legislature must have been resorted to in order to find the meaning; but here is no obscurity; the words are plain, their signification is obvious. Had expressions of general and comprehensive import been made use of, then the other supposed defects might have been considered within the equity of the act; but as they have specified confiscation alone, it cannot be safely asserted that they meant to comprehend the other cases of forfeiture and escheat. A construction of this kind would seem to infringe the rule that private statutes ought to be construed strictly. 2 Mod., 57. Whereas, the construction that wrests the sales from the imperfection cast on them by the confiscation laws is the genuine and necessary interpretation of the letter. It is also recommended by its perfect conformity to the principles of an enlarged and liberal justice. In this case, as in many others that appear in the private acts, the Legislature subscribed to the propriety of relinquishing claims under the confiscation acts, which, if vigorously insisted on, might have deprived one man of his property, for the absence or delinquency of another. They have accordingly, in several instances, abstained from appropriating to the public use lands whereon persons having a right in conscience were disposed to settle; and in virtue of their ownership, to render to the State the fidelity of good citizens. The law in question seems to offer a merited tribute of justice to a society of men, who in the midst of many difficulties established the workshops of industry, and diffused the habits of (453) moral order where, but a short time before, the silence of uncultivated nature reigned through the forest.

I will conclude this part of the case by remarking that the Legislature had an undoubted right to renounce claims which the public, whom they represent, might derive under the various acts of confiscation. The rights of third persons, though not expressly saved, are understood in all such cases to be guarded by equity. 8 Co., 138. Such rights, how-

ever, do not appear in any of these proceedings, and therefore the act is not impeachable on that ground. The unavoidable consequence is, that the title of these lands was either in Montgomery's trustees or in the State; if the latter acquired it by confiscation, then the Act of Assembly amounts to an abandonment of such right.

2d. Before the year 1776, it cannot be doubted that Christian F. Cossart, being, together with the inhabitants of this State, common subjects of the same sovereign, was capable of taking by descent lands situate in the then province, and of holding them. Before that period also the descent was cast, and Cossart was, in the full legal sense of the term, tenant in fee simple, and as such liable to execute the trusts, with which the title was incumbered. But the argument is, that by the severance of these States from the British Empire, he became an alien, and thenceforward incapable of holding any real estate within this territory; and that the consequence of his alienage was a forfeiture of his lands to the State.

The cases upon this subject to be found in the books do not furnish a ground of strict analogy, nor even sufficient data wherefrom direct inferences can be drawn applicable to the new and peculiar modifications proceeding from our revolution. By the term alien, the writers mean a person born out of the King's allegiance. No instance is to be found where lands once lawfully acquired have become forfeited on the ground of posterior alienage; the possibility of such a case seems to be (454) excluded by the doctrine in Calvin's case, Co. Rep., and a fundamental maxim of the common law, *"nemo potest exuere patriam."* Some of their late writers have, however, considered the inhabitants of the United States as aliens, from the recognition of their independence; and it is possible they might be considered in the same light by the law of that country, in all the consequences of that character. Whether they have subjected lands owned in that country by the citizens of this, to the principle of alienage, I am not informed. I am inclined to believe they have not, in any instance; because the late treaty with that nation recognizes in one of its articles the holding of lands in that country by the citizens of this, and so vice versa.

It may, however, be thought that some of the reasons upon which the common law found the incapacity of an alien to hold lands, apply, with undiminished strength, to attach alien disability to those who became aliens by the revolution. In both cases it would be equally impolitic to permit the permanent property in the soil to be held by those who owe no constant allegiance to the government, lest the influence thus generated might be directed against the policy and welfare of the country. But if the opinion be correct (which is advanced by a writer of reputa-

tion, 2 Bl., though denied in Parker, 144), that the forfeiture which ensues the purchase by an alien, is intended by way of punishment for his presumption in attempting to acquire any landed property; such a reason totally fails in its application to cases circumstanced like the present. For punishment cannot with justice be inflicted where neither crime has been committed nor presumption manifested.

In the acquisition of his title, Cossart was passive—it was cast upon him by the operation of law, which would have continued to extend its silent protection to it, but for an event which was beyond the reach of individual agency. Had he even been an inhabitant of the State before the commencement of the revolution, and dissatisfied with the prospect of the new political arrangement about to open, writers on the law of nations say that a person so situated may dispose of his (455) effects and remove wheresoever he pleases. This principle is likewise recognized in the confiscation laws of this State. If the doctrine rested upon this ground alone; if aliens were to be deprived of property purchased by them, only by way of punishment for having attempted to become proprietors, then it is clear that such a consequence ought not to be extended to persons who take property before the separation of the United States from Great Britain. But with whatever reasons of policy or justice confiscation may have been extended to those who abandoned their country in the hour of danger, and neglected to avail themselves of the privilege of selling; or to those who, after having pledged their allegiance to the new government, united their hostile exertions with the enemy, no blame can, with propriety, be imputed to the persons who thought proper to remain in their own country. If forfeiture of the lands of such persons, arising from their incapacity to hold, be the consequence of the revolution, it must then be rested upon the single ground of public policy, from which I do not apprehend that any principle arises which warrants the application of more rigorous or summary justice to divest their titles, than might have been called forth had they purchased, being aliens. I cannot discern any reason why the law of forfeiture on account of alienage, if it is applied to these persons, should not be accompanied with the same restrictions, which belong to it in the case of an alien purchasing before or since the revolution. The one may purchase but cannot hold; the other was at the time competent both to purchase and hold, but his capacity for the latter is supposed to be destroyed by supervenient causes. An alien, according to the common law definition, does by purchase acquire the freehold, and become tenant to the lord of whom the lands are holden. And until office found, he is recognized as a tenant for many purposes; therefore survivorship shall take place between an

alien and a subject who purchase in joint tenancy, which continues until it is severed by the office; because the freehold being in the alien by livery, shall only be divested by the solemnity of an office. (456) Dyer, 283. On a covenant to stand seized, an use will arise for an alien. Godb., 275. An alien tenant in tail may suffer a recovery and dock the remainders. Goldbor., 102. Although common recoveries are deemed to some intent fictitious, yet the writ of entry must be brought against one that is actually seized of the freehold by right or by wrong. Pigot, 28. Therefore, unless an alien was considered as seized of the freehold, he could not be a good tenant to the præcipe. It is also generally true, that wherever an alien takes by his own act, the freehold is considered as in him, until an office, although he is not permitted to take by an act of law even for the benefit of the king.

From these authorities and this reasoning, I think these conclusions are deducible: That in the application of the law of forfeiture to Christian F. Cossart, he ought to be considered in the light of an alien purchasing lands in this province or State, either before or since the revolution—that in the one case the lands would not have been divested out of him, and vested in the lords proprietors; nor in the other in the State, without an office. That this solemnity not having been performed, no title of forfeiture has accrued to the State.

3d. Escheat for want of a legal proprietor. The general acceptation of the term escheat, according to the common law, supposes that the person last seized has died without heirs, or that his blood is attainted. In the one case the writ of escheat must show the death of the tenant. 10 Viner, 155. In the other, there must be judgment of death given in some court of record against the felon found guilty, by verdict or confession of the felony; or it must be by outlawry of him. Bac., Use of the Law, 38. It denotes an obstruction of the course of descent, and a consequent determination of the tenure, by some unforeseen contingency, in which case the land naturally results back by a kind of reversion to the original grantor or lord of the soil. 2 Bl., 244. According to another writer, it imports something happening or returning to the lord on a determination of the tenure only. Wright on Ten., 117. The word originally signifies anything coming accidentally or by (457) chance, and in such sense comprehending casual obventions and forfeitures of all kinds. In the general and comprehensive sense of lands left without any lawful proprietor, from whatever cause, it is probable that the Legislature used the term, when, in 1789, they vested all escheats in the University. But the questions whether the lands of Christian F. Cossart were comprised under this general denomination,

whether they were left without any lawful proprietor, and devolved upon the State as an escheat, I conceive it unnecessary for me to give an opinion upon, because there are other grounds upon which I can decide this case, in a manner satisfactory to my own mind; and without necessity I should feel reluctant in giving an opinion upon a point, respecting which the greatest lawyers have disagreed, and which may probably be the only question in some future case. Its importance entitles it to a separate and solemn argument and deliberate investigation; and it might be unsafe to decide it, but under all the light which these may reflect upon it.

4th. It is contended that the State has taken this land discharged of the trust, in analogy to the prerogative of the King, who is incapable of being a trustee; and to the lord by escheat, who, coming in by title paramount, and in the *post,* takes the land free from any collateral charges, wherewith the tenant has incumbered it. To maintain these positions, and the consequences drawn from them, a great variety of authorities has been introduced; but I cannot, after a careful perusal, collect from them that the law is so settled at this day. Assuredly the doctrine is not reconcilable with the broad and liberal principles adopted by this Court, in the consideration of trust estates; nor with the reason and policy of making the statute of uses.

As trusts are said to be the mere creatures of a Court of Equity, into which they were drawn on account of some scruples which the common law judges could not surmount, a system has been steadily persevered in with respect to them, most likely to effectuate their intent; and at the same time to avoid those inconveniences which had rendered uses odious. It could not, therefore, be just to suffer them to fail, (458) and the right intentions of the parties to be undermined, by reason of any disability in the trustee. In this Court he is properly considered as the mere instrument of conveyance, and can extinguish the right of *cestui que trust* only in a single instance, that of conveying to a purchaser without notice of the trust, and for a valuable consideration. In conformity with this equitable notion, the decisions have been extended to a great and beneficial length. Where a trustee has been incapable through some legal disability to convey or execute an estate, the court of chancery has removed him out of the trust. 2 Chan. Ca., 130.

Wherever there is a defective or improper trustee, chancery acts as if there were none. 1 Brown Cha. Ca., 81. And in every instance the Court is solicitous to carry into effect the intention of the person who is really the owner of the land, and to attach the trust to the land itself, rather than make it dependent on the personal competency of the trustee.

The source of all complaints against uses, as they prevailed previous to the Statute of H. VIII, was, that the feoffees were considered as the true owners; and the mischiefs which flowed from them, under the influence of this opinion, would result in an equal degree from trusts, were the estate of the trustee held in greater estimation than that of the *cestui que trust.* That statute divested the possession out of the person seized to the use, and transferred it to the *cestui que* use, with a view of annulling those inconveniences which were occasioned by considering the feoffee as the real owner; which character subjected him to the performance of the feudal duties, gave dower to his wife, placed his infant heir in wardship to the lord, and forfeited the estate upon his attainder.

The principle upon which the doctrine in *Chudleigh's case* is founded is, that persons coming in by a paramount and extraneous title, are not seized to an use, as the disseizor, abator or intruder of the feoffee, or the tenant in dower, or by the courtesy of a feoffee, or the lord entering upon the possession by escheat; none of these claiming under the feoffee, but being, as the law expresses it, in the *post.* When that case was decided, trusts had not undergone much discussion; their principles were but partially developed; and the foundation only of that system laid, by which they have been since made to answer the beneficial ends of uses, without their inconveniences. In justice and reason, the title of persons so claiming was no better than that of the heir or alienee. Every volunteer claimant, and every claimant with notice, whether they come in the *per* or the *post,* ought to be bound to the performance of the trust. And in relation to this point, the sentiments of Lord Mansfield are applicable: "I apprehend the old law of uses does not conclude trusts now; where the practice is founded on the same reasons and grounds, the practice is now followed. Its positive authority does not bind where the reason is defective; more especially that part of the old law of uses which did not allow any relief to be given for or against estates in the *post,* does not now bind by its authority in the case of trusts." 1 Bl., 1155.

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The decisions, so far as the point has been decided, justify these sentiments. If a trustee commits felony, though the land are forfeited at law, yet *cestui que trust* may have relief in equity; so if he commits treasons. 3 Com., 386. The trustee of a legacy dying before the legacy is paid, shall not prejudice the legatee; so if a trustee of land dies, without heir, though the lord by escheat will have the land at law, yet it will be subject to the trust in equity. Prec., ch. 202.

If A puts out money at interest in the name of B, who afterwards becomes *felo de se,* A may be relieved against the King, upon the Statute 33 Hen. VIII. 1 Eq. Ca. Abr., 384. The general principle which

prevails in a Court of Equity is to consider the trustee as having the legal ownership so far only as to be beneficial to *cestui que trust,* and not subject to any advantage or disadvantage which may arise from the trustee personally, as having the legal estate. These authorities derive countenance and support from Gilbert on Eq., 172; 1 Brown Cha. Ca., 204.

Nothing can be fairly collected from the case of *Burgess v.* (460) *Wheate,* 1 Bl., 123, or from Fonblanque's note to Gilbert's Treatise, to impeach the soundness of the doctrine. In the former it was only decided against the opinion of *Lord Mansfield,* that the crown could not in equity, upon a failure of the heirs of *cestui que trust,* claim against a trustee by escheat, if he had the legal estate in him, upon the principle that the title by escheat could only arise where there was a defect of a tenant; but that the ground of escheat failed, whenever there was a tenant, whether he were beneficially interested or not. The Court did not decide, nor did the case present the question, whether a lord by escheat was discharged of the trust, as against the *cestui que trust;* but the opinion of the majority of the Court was, that if an estate, liable to a trust, come to the King, the land will, in equity, be equally bound by the trust in the hands of the King, as of a common person.

If, then, the persons beneficially interested in this case, possessed a right against the State, notwithstanding the escheat from the trustee, the cause between the present parties ought to be decided without prejudice from the consideration that the plaintiffs can have no remedy from the State. For whether such a remedy against the State existed or not, which could only properly be tried where the State was a party, I should think that this Court might furnish them with an adequate remedy against persons claiming under the State with notice of the trust, which is the character given by the bill to these defendants. The doctrine of prerogative, if introduced here to govern questions relative to the rights of the State, should not be extended further than just analogy and a temperate application of its principles will warrant. It should be made subservient to the purposes of justice, while it protects the immunities of the State; and such of its consequences as promote these objects, should be adopted with the doctrine itself. Now, though a suit will not lie against the King, yet his prerogatives are not transferred with the property to his grantee. Thus his patentee shall not take advantage of the maxim, *nullum tempus occurrit regi.* Poph., 26. If the King grant lands which he has seized without title or matter of record, (461) the person having right may enter upon the grantee without petition. Skin., 608. If the King enters without title, or seizes land by a void or insufficient office, he is no disseizor; but if by letters patent

he grants the lands so seized, and the patentee enters, he is a disseizor; because he has time to inquire into the legality of his title, which the King is supposed to want leisure for. 5 Bac., 607. "In all cases where the party grieved may have a *monstrans de droit,* or *travers* against the King, there if the King granteth over the land, the party grieved may enter, or have his action against the patentee." 4 Rep., 212. Viewing these authorities as creating a difference between the crown and its grantee, and so authorizing a full legal remedy against the latter, where only the partial remedy of a petition or plea of right was allowed against the former; and considering that there are cases where our Legislature has sanctioned bills in equity for injunctions against the State, I am led to the conclusion that the present defendants are not privileged from answering by reason of deriving their title from the State.

The objections to the form of the present bill have been rested upon the following grounds of argument: That all persons materially interested in a suit in equity ought to be made parties plaintiff or defendant, however numerous they may be, so that a decree complete and final may be made. That the persons who advanced money for the purchase of these lands being entitled to satisfaction, either in lands if they came to this country, or out of the money arising out of the sale of the lands if they did not come, ought to have been parties to the bill, and that the members who compose the U. F. ought to have been named in the bill, and their interest stated. That the creditors who advanced money, together with the sums respectively loaned by them, should likewise have been stated, in order that the Court might see the nature and extent of their interest. And it is particularly insisted upon, that although the bill is brought by Marshall, in behalf of himself and the concerns of the U. F., yet it would be unjust to decree for all the members, since
(462) they alone are beneficially entitled, by whose assistance the lands were purchased.

To ascertain the due weight of these objections, it will be necessary to inquire who the parties concerned in interest really are, and what are the ends and purposes of the bill.

The U. F. is an association of persons voluntarily submitting to certain regulations, with a view of promoting objects of a religious and social nature. They have neither incorporation, joint stock, nor funds; but they prosecute, under the influence of a sentiment common to the whole community, certain ends which they deem necessary to the prosperity of their society. If, in their native country, they possessed not the assurance that the toils of their industry would meet an adequate reward, or that free toleration would be allowed to the exercises of their religion, it was natural to seek a more favored clime, where new settle-

ments for the accommodation of their members might be formed, under happier auspices. With this view the lands purchased from Lord Granville were obtained, by means of loans procured from their able members, by the lord advocate, chancellor and agent, and active members. The security for the money advanced consisted in their agent's responsibility to convey lands to them if they came over to this country, or to sell lands and reimburse them out of the proceeds, if they did not. So long as the title of the lands purchased by their agent remained in him, the creditors had an option, either to compel him to convey to them in satisfaction of their respective debts, or to sell, and by that means satisfy them. But when he, clothed with full powers for that purpose, made sale of the lands, the rights of the creditors were necessarily abridged to a simple claim of the money which they had advanced. In the specific lands, which form the subject of the present controversy, it is apparent that the creditors, whoever they are, can have no interest. All they can ask or obtain is the money due on the sale, and this they can only receive in the event of its appearing that Graff's sale to Montgomery conveyed a good title. If, on the other hand, Graff had no right to sell, the steps by which that conclusion is arrived at, (463) lead also to this other, that the complainant has no right to the land. The bill accordingly seeks a decree that the defendants may convey the legal title, if they have any, to the trustee of Montgomery, or that they may deliver possession of the land to the trustee, for the use and benefit of the infants; and that the executor of Montgomery may pay the complainant in trust for the U. F. the principal and interest due upon the purchase. Should the claims of the complainant be established by a decree, his character will be that of a trustee for so much money as is recovered for those creditors who made advances for the Wachovia purchase. It is then to be examined, whether the principles of equity require, or the authorities cited prove, that all the persons who lent money ought to have been parties to the bill.

It is expedient for several reasons, that all persons concerned in a demand should be called before the Court.

If it appears upon the face of the bill that there are other parties whose rights may be affected by a decree, it would be vain and useless to go on to a decision of the cause: For a decree made under such circumstances is liable to reversal, or at least none but the real parties, and those claiming under them, are affected by it, and the persons who are left out may vex the defendants with another suit. Wherever any of these inconveniences may follow, from the omission of parties, the general rule ought to be observed, and all the parties interested, however numerous they may be, should be brought in.

Unless this case, under all its circumstances, comes within some of the exceptions to the rule, the demurrer on this ground must prevail. It will be proper, in order to ascertain this question, to examine in the first place the cases cited, by which the rule itself is illustrated. The case of *Leigh v. Thomas,* 2 Vesey, 312, the substance of which is, that a bill was brought for an account of prize-money, and to have two shares paid to two plaintiffs, as agents, which they claimed under the general articles on which the cruise was set on foot. In them there was no appropriation of shares to persons afterwards appointed agents,
(464) but a general provision that the crew should have liberty to appoint two agents. The plaintiffs were appointed agents by a subsequent deed, signed by sixty-four out of eighty, the number of the whole crew; and they brought this bill in behalf of themselves and of the said sixty-four. Upon a demurrer for not making the whole crew parties, the master of the rolls was of opinion that the whole crew ought to have been made parties, because the subsequent agreement could not be binding on them; and that they had a right to litigate the claim set up by the plaintiffs of two shares on their own account. This decision is clearly justified by the reasons on which the rule is founded. No decree made in the case could have been binding on the absent part of the crew, who had given no authority for the suit, and whose rights were improperly attempted to be drawn into controversy without their consent.

The case of *Kirk v. Clark and others,* Finch's Prec., 275, was where a bill was brought by a trustee to compel the specific performance of marriage articles, and the *cestui que trust* was not made a party; and therefore it was prayed that the cause might not go on, after opening the bill and answer, because if the bill should be dismissed, the *cestui que trust* would not at all be bound by it; and so the defendants liable to another suit for the same cause—and the *cestui que trust* was directed to be made a party. It was observed in that case, that bills had been sometimes allowed which were brought by a *cestui que trust,* without making the trustee a party; yet that was upon the *cestui que trust's* undertaking for the trustee that he should conform to what decree should be made, which might be reasonable, he having no interest at all in his own right; but a trustee could not so undertake for his *cestui que trust.*

The principle and policy of the rule are again manifest in this case: The rights of the person substantially interested shall not be litigated without making him a party, nor shall the suit be tried in the absence of a party nominally concerned, if by possibility he may renew the contest. The *cestui que trust* may undertake that the trustee
(465) shall conform to the decree, because the former is really the true

party; but a trustee cannot so bind the *cestui que trust.* If the *cestui que trust,* instituting a suit in his own name, may proceed to a decree upon his undertaking that the trustee shall conform to it, by the same reason may the latter prosecute a suit where the *cestui que trust* undertakes for himself. It can be of no importance by whom the suit is brought, if the party not before the Court is bound, either by himself, if the *cestui que trust,* or by the *cestui que trust,* if the trustee, not to disturb the decree which shall be made. This reasoning is of force in the present case, when connected with the statement in the bill, that the complainant is authorized to institute suits in law or equity concerning the matters complained of, and that the U. F. are bound and concluded by all such judgments and decrees as may be rendered, etc.

The case in Bunbury, 53, and that of *Hanne v. Stevens,* 1 Vernon, 110, do further establish the general doctrine, and the reasoning in the latter case demonstrates its propriety, that a defendant, as a trustee for three persons, is not bound to answer a bill brought by one of the *cestuis que trustent;* for otherwise he might be thrice called to an account for the same matter.

But the circumstances of the complainant being authorized to bring suit for the others concerned in interest, and of the present suit being brought to recover the money for which the land sold, seem to bring the present case completely within the principle of those wherein it has been held that creditors seeking an account of real and personal estate for payment of their demands, a few suing on behalf of the rest, may substantiate the suit. The following case is very applicable, both in authority and the reasons on which it is founded: Finch, 592, *Chancey v. May.* This was a bill brought by the present treasurer and manager of the Temple Mills Brass Work, in behalf of themselves and all other proprietors and partners in the first undertaking, except the defendants, who were the late treasurer and managers, being about thirteen in number, and was to call them to an account for several misapplications, mismanagements and embezzlements of the copartnership, in the late South Sea times, to a great amount. The copartnership (466) consisted originally but of eighteen shares, but those eighteen shares, in the year 1720, were split and divided into five hundred. The defendant demurred for that all the rest of the proprietors were not made parties, and so everyone had the same right to call them to an account, and then they might be harassed and perplexed with multiplicity of suits. But the demurrer was disallowed: 1st. Because it was in behalf of themselves and of all others, the proprietors of the said undertaking, except the defendants, and so all the rest were in effect parties. 2d. Because it would be impracticable to make them all parties

by name, and there would be continual abatements by death and otherwise, and no coming at justice if all were to be made parties.

With equal propriety it may be said in the present case, that the suit being brought by Marshall, in behalf of himself and the concerns of the U. F., all the persons who have an interest in the money advanced are virtually and in effect parties, and if continual abatements would not be the necessary effect of inserting the whole, at least endless delays might be expected as the natural consequence.

It is needless to multiply authorities upon this part of the case, for in every view of it presented to my mind, the suit is properly instituted by Marshall in behalf of himself and the others concerned. From this mode I cannot foresee that any inconvenience will arise, any deterioration of the rights of others, or any needless and unjust vexation to the defendants; for a decree, in the present form of the bill, will forever preclude the persons who are interested, by having advanced the money to effect the purchases, from suing the party defendants, on the grounds made by the present bill.

If, by the judgment of the Court, the demurrer should be overruled, and the defendants required to answer—if the complainant's power to prosecute suits for the U. F. and his capacity to bind them by a judgment should then be doubted, the Court before whom the cause is tried may, and no doubt will, require such proofs of his asserted au-
(467) thority as will clothe their decree with conclusive effect.

Upon the whole of this case, the general conclusions of my opinion are, 1st. That the private act passed in 1782, did effectually and completely clear Cossart's title to the lands which he held as trustee for the U. F., from all defects and imperfections, to which any of the confiscation acts passed by the Legislature of this State might, before that time, have subjected it.

2d. That the State gained no title by forfeiture on account of alienage, for want of an office, or something equivalent; even if the principles of the common law warrant the extension of this doctrine to persons who lawfully held lands in this State prior to the revolution, and who have not since become citizens of this State, or any of the United States —a proposition which I am not at present prepared to admit, in the extent insisted on.

3d. Waiving any positive opinion upon the question whether the lands escheated to the State, under the comprehensive notion of the term, which casts upon the sovereignty of the country all titles to lands which would otherwise be destitute of a lawful proprietor, I am decidedly of opinion that even such a legal title would be subject to the

equitable right of the *cestui que trust,* and is, in the hands of persons claiming under the State, subject to the equitable remedy of the *cestui que trust.*

4th. That the manner in which the complainant's bill is framed with respect to parties, is warranted by reason and sanctioned by authority, consequently that the demurrer ought to be disallowed.

NOTE.—On the first point, see *Vann v. Hargett,* 22 N. C., 31. And on the last point, see *Van Norden v. Primm,* 3 N. C., 149; *Belloat v. Morse, ibid.,* 157.

Cited: Benzein v. Lenoir, 16 N. C., 225.

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SAMUEL CAMPBELL AND WIFE v. ALLICE HERRON ET AL.—Conf., 291.

1. When a devise would give to heirs what they would take without it, they shall be in by descent. But where the devise makes an alteration in the limitation of the estate, the heirs take by purchase.
2. A devise to the widow for life with remainder to the testator's three daughters (his heirs at law), their heirs, executors, administrators, and assigns, makes the daughters joint tenants.

This cause originated in the Court of Equity for Wilmington District. The complainants by their bill allege, that Rufus Marsden, on the fifth day of March, 1749, duly made and published his last will and testament, containing, among other things, the following devises: "I give, grant and devise, and bequeath unto my loving wife, Allice Marsden, all my houses and lots in the town of Wilmington, in the province of North Carolina, to have and to hold to her, my said wife Allice Marsden, for and during the time of her life; and after her decease, to the use of my three daughters, namely, Hannah, Allice, and Peggy, and to their heirs, executors, administrators, and assigns forever, and to no other use or uses whatsoever.

"*Item.* I give, grant, devise, and bequeath unto my loving wife, Allice Marsden, all my personal estate of what kind or nature whatsoever, and after her decease to the use of my three daughters, Hannah, Allice, and Peggy, to their heirs, executors, and assigns forever, and to no other use or uses whatsoever." And soon afterwards died, leaving his widow and three daughters living at his death.

Hannah, one of the daughters, intermarried with Arthur Mabson in 1754, by whom she had issue, Allice, one of the complainants, and

shortly afterwards died—Arthur Mabson, her husband, also died before Allice the widow.

In 1758, Allice Marsden, the widow, died, leaving the other two daughters, Allice and Peggy, and the granddaughter, Allice, living.

In 1765, Allice, the daughter, intermarried with Benjamin Herron, who died soon afterwards.

(469) In 1785, Peggy, the other daughter, intermarried with John Lordan, one of the defendants, by whom she had issue, John Lordan, another of the defendants, and died.

In 1772, Allice, the granddaughter, intermarried with Samuel Campbell, the other defendant.

After the death of the widow, Allice and Peggy, the daughters, took possession of the whole estate, and they and the said John Lordan have remained in possession thereof ever since, and enjoy the rents and profits of the same.

The complainants claim one-third part of the estate of Rufus Marsden, and the profits accrued since the death of Allice, the widow, and pray an account and division.

To this bill the defendants demurred, and for cause stated, that Rufus Marsden, in the bill mentioned, devised the property claimed to his three daughters, Hannah, Allice, and Peggy, as joint tenants, and that Hannah died, Allice and Peggy surviving.

Wright, in support of the demurrer. It is contended on the part of the defendant: 1st. That the devisees in the will of Marsden, took by purchase and not by descent. 2d. That they took an estate in joint tenancy, and not as tenants in common.

1st. They took by purchase. Although the general rule be acknowledged, that where the heir takes nothing more by the devise than he would without it, he shall be considered in by descent (for reasons however which exist not in this country). Yet wherever the ancestor devises the estate to his heir, with other limitations than the cause of descents would direct, or makes use of words which constitute and convey an estate, and which draws with it other incidents and qualities, the heir to whom the same is so devised shall be said to be in by purchase. Hob., 29, 30; Gilb. on Devises, 112, 113; Powell on Devises, 439; 2 Bl. Com. by Christian, 241, note; 1 Cro., 431. The words made use of by the devisor are such as convey an estate in joint tenancy; the incidents and qualities of which differ from an estate in coparcenary. Parceners cannot have an action of waste against each other by virtue of

(470) the Stat. of West. II, nor can they have an action of account, by the 4 Ann, as joint tenants and tenants in common. Parceners alone were compellable by common law to make partition; they have but

one estate, and do not hold by distinct moieties as tenants in common, and there is no survivorship among them as among joint tenants. Therefore, wherever an estate is devised by words which constitute either an estate in common, or in joint tenancy, though to the persons who are the heirs of the devisor, they take by purchase and not by descent; because the qualities incident to those estates are not incident to such an estate as the heirs would take, if considered in by descent.

2d. The devisees took as joint tenants, and not as tenants in common. Joint tenancy was anciently favored by the laws; and although the reasons which induced a construction of deeds and wills, which tended to the support of joint tenancy, do not exist with the same force as formerly, yet the rule is still the same. That wherever the estate is given to two or more, without explanatory words, the persons to whom it is given take as joint tenants; for notwithstanding the reasons have failed upon which the rule was founded, the rule itself still exists, in the same manner as all other rules of law exist and are in force, without having the reasons on which they were built to support them in their operation. This principle is recognized by Powell in his Treatise on Devises, 356. The following authorities apply, to prove that the words of Marsden's will convey to the devisees an estate in joint tenancy. 3 Lev., 127; 1 Leo., 112, 113, 315; Cro. Eliz., 431; Gilb. on Devises, 113; Powell on Devises, 439; Owen, 65.

No instance can be produced where such words, without some other words severing the estate, were held either in law or equity to convey a tenancy in common. That the rule is still the same as formerly, the opinions of the first law characters in the kingdom of Great Britain, the late commentator on Coke upon Littleton, will confirm . . . Co. on Litt., 190, 6 note; 3 Ves. jun., 628.

It is also to be observed that the construction of wills is the (471) same in a court of equity as in a court of law. 2 Bur., 1108; 3 Bl. Com., 435; 2 Com., 537; 2 Brown, 233. It is therefore concluded, on the part of the defendants, that the demurrer should be maintained, inasmuch as the authorities prove that the words made use of by the will of R. Marsden, convey an estate in joint tenancy; which drawing with it other incidents than such as are attached to an estate in coparcenary, places the devisee in of an estate by purchase, and not by descent.

Haywood for the complainants.

1st. The rule of construing wills at the present day is that the intention of the testator shall prevail. 3 Bur., 1634; 3 Atk., 619; 5 Bur., 2703; 2 Bro. Ch., 51.

2d. The old rule, which I do not dispute, was established in very ancient times, when the Judges favored joint tenancies, in order to avoid multiplication of tenures and of services. Salk., 158, 392; 9 Mod., 159.

3d. As the tenures wore off the rule was gradually departed from, until the intent and not the words became the governing principles, and induced the Judges to construe the words as conveying a tenancy in common; first in wills and then in deeds. 2 Ves., 252, 259; 2 Atk., 121; 3 Atk., 731; 1 P. W., 14; Cow., 660.

4th. If the intent is now to govern, the daughters took as tenants in common, for the intent of their father was that they should take as tenants in common, and not as joint tenants.

1. For the same reason as in 2 Ves., 252, a settlement upon children. He could not mean that if one died leaving children, that those children should not have anything.

2. He was a layman, and not knowing the use of words has thrown in a number, hoping they would discover his intentions, "Executors." How could the property go to the executors of Allice, if it survived upon her death? Suppose a devise by Allice to her executors.

(472) 3. "Administrators." How could it go to them, if it survived upon her death?

4. "To no other use or uses." If it survives does it not go to those who are not the heirs of Allice, to her sisters instead of her child, and directly contrary to the intention of the testator, and the words of the will?

5th. These are the very words the Legislature has used to sever the joint tenancy. Iredell, 489.

6th. In the clause relative to the personalty, the same words were used, and no one can doubt the testator's intentions, that the part of each child should go to her executors, consequently that a will might be made of it, and for want of a will that it should go to administrators. The same words in the same will must of necessity have the same meaning.

By the Court. It is not doubted, but that if a person devises land to one who is his next heir, and his heirs, the devise is void, and the heir shall take by descent; or if a testator devise that his lands shall descend to his son, the devise is void, and the devises shall be in by descent. Powell on Devises, 427, 428, and the authorities there cited. 1st. Because it was for the benefit of creditors. 2d. Because the lord would have been defrauded of the fruits of his seigniory, the consequence of descent. But wherever the devise makes an alteration of the limitation

of the estate, from that which takes place in the case of descent, then the principle ceases to operate, and the heir takes by purchase. Pow. Dev., 439. In the present case, if the lands, etc., had descended to the three daughters, they would have taken as coparceners. Survivorship therefore never could have taken place between them. But the testator, after giving a life estate to his wife in the premises, gives, grants, etc., the use of them to his three daughters, named Hannah, Allice, and Peggy, and to no other use or uses whatsoever.

It is admitted that the words made use of in this devise, in feudal times, would have created an estate in joint tenancy—the reason assigned why joint tenancies were favored in those times is, that it prevented a multiplication of tenures. But it is said, that as the (473) feudal tenures wore off, this rule has been gradually departed from; that the intent and not the words should form the rule of decision. It is true that joint tenancies are less, and tenancies in common are more favored than they anciently were, particularly where a father is making provision for his children, and makes use of any words which a court can properly lay hold of and make instrumental for that purpose. 1 P. W., 14; 2 Atk., 122; Cowp., 660; 2 Ves., 252, 256; 3 Atk., 731. But every one of these cases proves that an estate created by the same words that are made use of in the present instance, must be a joint tenancy. The ground of decision in every one of them was particular words made use of, from which the court collected an intent in the devisor to create a tenancy in common; such as, "equally to be divided," etc., "respectively," etc. But we know of no case, even in a will or in deeds, which derive their operation from the statute of uses, where the same or similar words are not made use of, that a similar determination has taken place; so that these cases are rather exceptions to the general rule; and as no words are made use of here that can bring the case within any of the exceptions, it must be considered a joint tenancy.

Can it be presumed, in the case of *Regden v. Valliers,* as reported in 2 Ves., 252, and 3 Atk., 731, above cited, that *Ld. Hardwicke* would have made the same determination, had the words "equally to be divided between them," not have been made use of in this deed? Or would his reasoning have been applicable to the case, had these words been omitted? Although the reasons that formerly favored joint tenancy do not hold now so strong as formerly, yet the rules to which they gave rise in many respects exist. Pow. Dev., 355—although frequently inconveniences are felt from them. We therefore think that the words made use of in this device create a joint tenancy, there being no particular circumstances or words in it from which an intent can be collected that

the testator meant to convey a tenancy in common. Pow. Dev., 439; Cro. Eliz., 431; 2 Vern., 545; 3 Lev., 127, 128; Co. Litt., 189; 1 Lev., 112.

(474) Bill dismissed with costs.

Judge TAYLOR gave no opinion, having been of counsel in the cause.

NOTE.—On the first point, see *University v. Holstead*, 4 N. C., 289; *M'Kay v. Hendon*, 7 N. C., 209.

On the second, see Act of 1784 (1 Rev. Stat., ch. 43, sec. 1), by which the principal incident of joint tenancy, to wit, survivorship, is abolished.

Cited: M'Kay v. Hendon, 7 N. C., 211; *Yelverton v. Yelverton*, 192 N. C., 617.

SAMUEL BICKERSTAFF v. HENRY DELLINGER.—Conf., 299.

1. The attachment law does not require the plaintiff to swear positively to the amount of his debts; therefore, *it was held* good when the plaintiff swore that he had good reason to believe that the defendant had, in company with others, damaged him to the amount of £219.
2. If the plaintiff in attachment fail to give bond or file an affidavit, it should be pleaded in abatement; it cannot be taken advantage of by writ of error.

This was a writ of error brought in Morgan Superior Court of Law, to reverse a judgment detained by the defendant against the plaintiff in error in Lincoln county court, by original attachment, in these words:

"Whereas, Henry Dellinger hath complained on oath to me, Daniel M'Kissick, a justice assigned to keep the peace for the county of Lincoln, that he has just cause to suspect that Samuel Bickerstaff, in company with others, hath endamaged him to the amount of two hundred and nineteen pounds ten shillings; and oath having been made that the said Bickerstaff has removed himself out of your county, or so absconds or conceals himself that the ordinary process of law cannot be served on him, and the said Henry Dellinger having given bond and security, according to the directions of the act of the General Assembly in such case made and provided, you are therefore commanded that you attach the estate of the said Bickerstaff, if it be found in your county, or so (475) much thereof, repleviable on security, as shall be of value sufficient to said damages and costs; and such estate so attached in your hands to secure, or so to provide, that the same may be liable to

further proceedings thereupon to be had at our next Court of Pleas and Quarter Sessions to be held for the county of Lincoln, on the first Monday in July next, so as to compel the said Samuel Bickerstaff to appear and answer the above complaint of the said Henry Dellinger, when and where you shall make known to the said court how you shall have executed this writ. Witness, Daniel M'Kissick, a member of said court, this 17th May, 1783, and in the 7th year of American Independence.

"DANIEL M'KISSICK, J. P. [Seal.]

"To the Sheriff of Lincoln County to execute, or James Martin, constable." On which was endorsed the following return: "Levied on 300 acres of land, on the waters of Buffaloe Creek.

JAMES MARTIN, Constable."

The following affidavit was returned at the same court:

STATE OF NORTH CAROLINA,
Lincoln County.

This day came Henry Dellinger before me, a justice assigned to keep the peace for said county, and made oath that he has reason to suspect that Samuel Bickerstaff, in company with other tories in the British service, did come to his house, on the 26th day of January, in the year 1781, and took, destroyed, and carried away the following articles, to wit: 300 gallons brandy, at 8s—£120—and other articles, which are mentioned in the affidavit, amounting in all to £219 2s. And that he never received them, or any of them, nor any value for the above-mentioned articles.

Sworn to and subscribed, this 17th May, 1783.

HENRY DELLINGER.

Daniel M'Kissick, J. P.

The case stood thus on the docket of the county court: (476)

Henry Dellinger
vs.
Samuel Bickerstaff.

Or: Attachment—Jury charged—Verdict £219 2 and costs.

On which execution issued, and the land mentioned in the return on the attachment was sold.

The following errors were assigned by Mr. *John Williams,* counsel for the plaintiff in error, to wit:

That no bond or security for satisfying all costs which might have been awarded to the said Samuel, in case the said Henry had been cast

in the said suit, and also all damages which might have been recovered against the said Henry in any suit or suits which might be brought against him for wrongfully suing out such attachment, was ever taken or returned to the said county court.

That the said Henry never swore to the amount of his damages or demand in the said suit, to the best of his knowledge or belief.

That there was no complaint made on oath to any justice of the peace of the said county court, that the said Samuel, at the time of granting such attachment, had removed, or was removing himself out of the county privately, or so absconded or concealed himself that the ordinary process of law could not be served on him.

That the original attachment does not appear to be granted by any justice of the county court of Lincoln, or any Judge of the Superior Court of Law.

That the said original attachment was directed to the sheriff of Lincoln County, or to James Martin, constable; and that by the record aforesaid appears to have been levied by the said James Martin, as constable, on land, when, by the law of the land, the same attachment ought to have been directed to the sheriff or coroner of Lincoln County, and not to any constable.

That there is no declaration filed and remaining of record in the said suit, and that the complainant, as it appears in the affidavit filed in the same suit, and the said original attachment, and the matter thereof is not sufficient in law to maintain the said action.

(477) That there was no issue joined, nor any judgment by default given, nor inquiry awarded as to damages, whereupon the verdict of the jury in that suit finding for the plaintiff, and assessing his damages and costs, could or can be founded.

That judgment was rendered for the said Henry, when by law it ought to have been rendered for the said Samuel.

Plea *in nullo est erratum.*

By the Court. We have considered the exceptions taken to this record, and shall briefly state in the order of assignment the reasons which lead us to conclude that this judgment ought not to be reversed.

1. The Act of Assembly upon this subject, Iredell, 301, does not require that the party obtaining an attachment shall swear positively to the amount of his debt or damage. It is sufficient if he swears to the best of his knowledge and belief; and the oath taken in the present case does not substantially differ from that required by the act. Had it varied from the effective meaning of the act, it must have been considered as no oath at all, and then the defendant might have availed himself of it by plea in abatement; and wherever an exception may be

so taken, it cannot be assigned as error. The act has at once prescribed the form of proceeding, and directed the manner in which any omission shall be taken advantage of by the defendant. If, therefore, this be an error, it would be wrong to reverse a judgment, long since rendered, when the defendant might in the first instance have abated the writ.

2. We conceive that this irregular return is helped by the statutes of Jeoffail, 18 Eliz., ch. 14, and 4 and 5 Ann, ch. 16—the first of which provides that judgment shall not be stayed or arrested by reason of any imperfect or insufficient return of any sheriff or other officer, and by the latter act the same practice is extended to judgments by default.

3. This is altogether a collateral matter, no way essential to the gist of the action, nor in any respect connected with the regularity of the judgment. But it does not appear upon the face of the record that the defendant in error was the sheriff of the county when this order was made; and presumption, if made at all, should be rather to (478) support than destroy a judgment. The order itself is likewise mere surplusage—it is directory on the sheriff to do that which the law has already enjoined upon him; for it may be fairly interpreted, that he either keep the goods in his custody or deliver them on being replevied. Let this exception, however, have its greatest weight, and we think it comes completely within the spirit and meaning of the statute of 16 and 17 Car., 2, ch. 8, and 4 and 5 Ann., ch. 16.

4. This should have been pleaded in abatement.

5. Admitting that this appeared on the record, which it does not, yet it is to be considered that the jurors are appointed by the court, and the sheriff possesses no other power than merely as a minister to summon them to attend. Even in England, where the mode of appointing juries is extremely different, this objection could only form a cause of challenge to the array, and if omitted to be so taken, could not be assigned for error. Challenges might have been also made upon the same ground, had the inquest been formed of talesmen; but to presume that they were so formed would be to make an error where none appears.

6. The return is certainly informal, but is cured by the statutes before referred to.

7. If there be any weight in this objection, as applied to original attachments, we think that under the circumstances of this case it cannot be taken advantage of in error.

Judgment for the defendant in error.

NOTE.—See *Powell v. Hampton, ante,* 306, and the cases there referred to in the note.

Cited: Skinner v. Moore, 19 N. C., 149.

(479)

THE STATE v. THOMAS GAYNER.—Conf., 305.

If a prisoner challenge peremptorily more than thirty-five jurors on a capital trial, the challenge shall be disallowed.

The prisoner was indicted for horse stealing in the Superior Court of Law for Halifax District, April Term, 1801, and pleaded not guilty. On this trial he challenged thirty-five jurors, without showing any cause, and they were rejected accordingly. When the next was drawn and called to the book to be sworn, he challenged him also, and claimed a right to challenge as many others as he thought proper, and to exclude them without showing any legal cause. The question being argued, the Court overruled the challenge; a jury was sworn, and the prisoner found guilty. But the Court, at the instance of his counsel, deferred passing judgment, and ordered the question to be transmitted to this Court.

The case was argued by the Attorney-General for the State, and by *Haywood* for the defendant.

HALL, J. It is admitted that previous to the making of the statute, 22 Hen. 8, ch. 14, any person arraigned for felony might have challenged as many as thirty-five jurors peremptorily. But in case such person peremptorily challenged above thirty-five, he was doomed to the *peine forte* and *dure,* by which means he avoided a trial by jury. But that statute directs that no person arraigned for felony can be admitted to make any more than twenty peremptory challenges. This statute was in force in this State until the passage of the Act of 1777, by the 94th section of which it is enacted, that every person on trial for his life may make a peremptory challenge of thirty-five jurors. It has been contended that inasmuch as the Legislature by that act put it in the power of a prisoner to challenge thirty-five jurors, the same number that he might have challenged peremptorily at common law, he also had a right to challenge peremptorily a greater number than thirty-five, by which means, as at common law, he would defeat a trial by jury. In
(480) other words, that the Act of 1777 operated a repeal of the Stat. 22 H. 8, ch. 14. I cannot subscribe to such a construction. I cannot but entertain a belief that the Legislature only intended to put it in the power of a prisoner peremptorily to challenge a greater number of jurors than by the Stat. 22 H. 8, ch. 14, he had a right to challenge; but that in addition to this privilege they intended him no other. If they had intended that the prisoner, by challenging thirty-six jurors,

should defeat a trial by jury, they must have also intended, either that he should draw down upon himself the judgment of *peine forte* and *dure,* or that he should not be suitably punished, however grossly he might have offended. That the Legislature intended either cannot be admitted. I think the Act of 1777 only intended that a prisoner might challenge thirty-six jurors, under the same rules and regulations that he might have challenged 20 under the Stat. of 22 H. 8, ch. 14, before the passage of the act; if so, no prisoner since that statute has been admitted to challenge more than twenty jurors; if they did, such challenges have been overruled, and so I think they ought to be in case a prisoner, since the passing of our act, peremptorily attempts to challenge more than thirty-five jurors. One strong reason why, under the Statute of H. 8, peremptory challenges to more than twenty was not allowed, was because the sentence of *peine forte* and *dure* could not be pronounced against the challenger, as not being authorized either by common law or the statute. Much less ought such challenges to be countenanced here, as our Act of Assembly makes no provision of that sort; and if it did, such provision would be rendered ineffectual by our Constitution. I am therefore of opinion in this case, that the prisoner had not a right to challenge peremptorily more than thirty-five jurors, and that as he did so, it was proper to overrule it.

JOHNSTON, J. By the common law, the prisoner was allowed to challenge thirty-five jurors, without assigning any cause; if he challenged more, without cause shown, he was treated in the same manner as if he had stood mute, and had sentence to suffer most cruel death (481) for his obstinacy and contempt of the court.

By the Stat. 22, H. 8, ch. 14, the prisoner is restrained from challenging more than twenty peremptorily, and from that to this in England, and from the establishment of the government of this country under the charter of King Charles 2, until the session of Assembly in 1777, the practice has uniformly been, that if a prisoner, after making peremptory challenges to the number of twenty, and after made further challenge, without showing cause, such further challenge was disallowed and prevented, and the jurors sworn. One reason given by Hale, in his history of the Pleas of the Crown, 2d, 270, why, if a prisoner challenge more than twenty peremptorily, such challenge shall be overruled, is, "because the statute hath made no provision to attaint the felon, if he challenge above the number of twenty."

By the Declaration of Rights, sec. 9, "No free man shall be convicted of any crime, but by the unanimous verdict of a jury of good and lawful

men, as heretofore used." By this regulation the cruel manner of putting a prisoner to death at common law, where he stood mute or challenged peremptorily a greater number than was permitted by law, is altogether done away. Judgment of death could therefore be pronounced only in cases where the prisoner is found guilty on trial by jury, or where he, on his arraignment, confesses the charge by pleading guilty.

By the act passed November, 1777, sec. 94, the prisoner may make a peremptory challenge of thirty-five jurors; but makes no provision to attaint the felon if he challenge above that number, which brings it expressly within the reason above laid down in Hale. It, however, makes an alteration in the manner of the trial of prisoners from what was heretofore used, and not perfectly conformable to the rule laid down in the Constitution; but as it only extends that rule in favor of life, it has passed *sub silentio,* and never been questioned. Had it been objected to by the counsel for the State, there appears to me great doubt whether the privilege allowed by the act could be supported on constitu-
(482) tional principles. Had the act, instead of increasing the number of challenges, restrained them to a less number than twenty, no Judge would have hesitated a moment to have allowed the prisoner to make his peremptory challenge to the number of twenty, notwithstanding the act. Or the act had directed that in case the prisoner should challenge more than thirty-five, he should suffer *peine forte et dure,* as at common law, there is no doubt but it would be equally disregarded.

Upon the whole, I am clearly of opinion that the Act of 1777 is only an extension of the number of challenges, which had been restrained by the 22d of H. 8, and that the manner of trying criminals heretofore used is in no other respect altered. That the Judge who, in this case, rejected the challenge, and ordered the jury to be sworn, was warranted in that judgment by legal and constitutional principles; and that the prisoner being found guilty, sentence of death should be pronounced against him.

MACAY and TAYLOR, JJ., concurred in opinion with the other two Judges, that the prisoner had no right to challenge more than thirty-five jurors, without showing legal cause.

ANN JONES v. WILLIAM JONES ET AL., EX'RS, ETC.—Conf., 310.

The children of a female slave who is specially bequeathed, if born after execution of the will and before the death of the testator, go to the residuary legatee.

On the 9th day of April, 1787, Margaret Jones made her last will and testament, in which were the following bequests, to wit: "I give and bequeath to my beloved son, William Jones, one negro, named Tena. Should my son, William, die without an heir, in that case all the property herein bequeathed to fall to his sisters, if living.

"I give and bequeath to my beloved daughter, Ann Jones, one (483) negro boy named Harry, and all the remainder of my property, with Dick."

After the execution of the said will, and before the death of the testatrix, the woman, Tena (bequeathed to the said William Jones) had two children, to wit: Moll and Jude. The testatrix died in the year 1871, without altering or revoking her said will. Thereupon the defendants caused the same to be duly proved, qualified as executors thereof, and took into their possession the said Moll and Jude.

Ann Jones, the plaintiff, filed her petition against the defendants, and claims the said Moll and Jude, as part of the residuary property of the testatrix, which had not been before specifically given away.

And the question is, whether Ann Jones is entitled to the negroes, Moll and Jude, by virtue of that clause of the will which gives her the remainder of the testatrix' property. Or is William Jones entitled to the same, by reason of the bequest of the negro woman, Tena, the mother of Moll and Jude?

By the Court. As the will did not begin to operate until the death of the testatrix, no right to Tena vested in William Jones until that time; she remained the property of the testatrix, who was entitled to all the profits arising from her; consequently her children, the negroes in question, were the property of the testatrix at her death; and as they were not specifically bequeathed by her, form part of the *residuum* of her estate, and are included in the bequest to Ann, the plaintiff, of the remainder of the testatrix' property.

Judgment for plaintiff.

NOTE.—See *Pearson v. Taylor*, 20 N. C., 188; *Hurdle v. Elliott*, 23 N. C., 174; *Cole v. Cole, ibid.*, 460.

Cited: Powell v. Cook, 15 N. C., 499; *Covington v. McEntire*, 37 N. C., 319; *Stultz v. Kiser*, 37 N. C., 541; *Richmond v. Vanhook*, 38 N. C., 586.

(484)

WILLIAM DRY'S EX'RS v. JAMES ROPER'S EX'RS.—Conf., 311.

A forbearance to sue for more than seven years after the death of a testator and qualification by his executors, will bar the claim under the Act of 1715, notwithstanding the Act of 1789. (See 1 Rev. Stat., ch. 65, secs. 11 and 12.)

This was an action of debt brought in the Superior Court of Law for the District of Fayetteville, and came before the Court on the following statement made by the counsel for the parties, viz.: "On the 26th May, 1797, the executors of William Dry brought this suit, on a bond with a penalty, conditioned for the payment of £100 procl. money, on the 1st of October, 1775, of which £24 were paid by Roper in December, 1774, and that no other payments have been since made. It is admitted that Roper duly executed the bond, and that he departed this life sometime in the year 1782, and also that his executors qualified in the same year.

The defendants pleaded *solvit ad diem* and *solvit post diem,* relying on the presumption created by the lapse of twenty years. They have also pleaded the act of the General Assembly, passed in 1715, concerning proving wills and granting letters of administration. And whether by either of these pleas the plaintiff is barred of a recovery, is submitted to the opinion of the Court.

Edward Jones for plaintiff.
Francis Locke for defendant.

By the Court. We are of opinion that the plaintiff is barred by the Act of 1715, referred to, more than seven years having elapsed from the death of the debtor before this suit was brought.

Judgment for defendant.

It is proper to be remarked by the reporters, that in the case of Ogden, administrator, etc., Blackledge, executor, etc., which went to the Supreme Court of the United States, from the Circuit Court of North Carolina, it was determined that the Act of 1715 was repealed by an act
(485) passed in 1789, and therefore no bar to a recovery in a case such as the foregoing. It is much to be regretted that, on such an important question, such different decisions have been made and that the right of recovery in such a case should depend on the mere circumstance of the plaintiff being entitled or not to sue in the Court of the United States.

NOTE.—See *Young v. Farrel,* 3 N. C., 219, and the note thereto.

JAMES BRYANT v. JAMES MILNER.—Conf., 313.

An award which merely directs a sum of money to be paid, but without stating the matter of controversy, or directing a release or saying that the payment shall be in satisfaction of any specified injury or demand, may be rendered sufficiently certain, final, and mutual by averments connecting the award with the submission.

The plaintiff brought an action of debt in the county court of Person, upon an award, and declared in the following manner, to wit:

James Bryant complains of James Milner, in custody, etc., of a plea that he render unto him sixty dollars, of the value of thirty pounds, which to him he owes and from him detains. For that whereas a certain controversy had arisen and existed between the said James Bryant and the said James Milner, of and concerning a horse which the said Bryant had lent to the said Milner, and the said Milner had not returned to the said Bryant; that they, the said Bryant and Milner, being willing to settle and determine the said controversy in an amicable and friendly manner, on the seventh day of September, in the year one thousand seven hundred and ninety-nine, in the county of Person aforesaid, submitted the said controversy to the arbitrament and award of James Cochran, David Mitchell, Drury Jones, William Mitchell, and Wilson Jones, arbitrators mutually chosen and agreed upon, by the said Bryant and Milner; and they, the said James Cochran, David Mitchell, Drury Jones, William Mitchell, and Wilson Jones, being so (486) chosen and appointed arbitrators as aforesaid, then and there undertook to hear and determine the matter of controversy aforesaid so existing between the said Bryant and Milner; and having heard the allegations and evidence of the said parties, of and touching the said matter of controversy, they, the said James Cochran, David Mitchell, Drury Jones, William Mitchell, and Wilson Jones, arbitrators as aforesaid, then and there did arbitrate, settle, and determine the said matter of controversy, and then and there rendered, under their hands and seals, their award of and upon the same matter of controversy in the words and figures following, to wit: "We, the subscribers, having been chosen to arbitrate a certain matter of controversy between James Milner, of the one part, and James Bryant, of the other part, do award, that the said Milner shall pay unto the said Bryant sixty dollars, or secure the same to be paid, on or before Christmas next, by giving his bond with security. Given under our hands and seals, this seventh day of September, 1799"; whereof the said Milner then and there had notice. By force of which award the said James Milner became indebted to, and

liable to pay the said James Bryant, the aforesaid sum of sixty dollars, or secure the same to be paid, on or before Christmas then next following the date of the said award. And the said James Bryant saith that the aforesaid sum of sixty dollars is of the value of thirty pounds current money of this State. Yet the said James Milner," etc. The defendant pleaded the general issue, no submission, and that the arbitrators proceeded *ex parte* and partially; on which issues were joined.

The plaintiff having appealed from a judgment against him in the county court, the cause was tried in the Superior Court for Hillsborough District, at April Term, 1801, when the jury found a verdict for the plaintiff, but subject to the opinion of the Court on this question, "Whether the award as declared on was sufficient to enable the plaintiff to recover." And thereupon the cause was transmitted to this Court.

Norwood, for the plaintiff. Courts anciently considered awards (487) as judgments, and construed them strictly, without attending at all to the intention of the arbitrators, unless expressly stated in the award. Kid on Awards, 154; Brownl., 92; Yelv., 98. This rule of construction produced great mischief and rendered injurious that method of settling controversies which would otherwise have been of great utility to the community. The Judges, therefore, in the latter end of the reign of James I, departed from this rule, and adopted one more liberal and more conducive to justice, holding that awards should be interpreted liberally, as contracts, according to the intentions of the parties, and of the arbitrators. Kid on Aw., 155, 156. Awards ought to be liberally construed, because made by Judges on the parties own choosing. 1 Bur., 277. Under this rule, awards made on parol submissions ought to be interpreted as verbal agreements. An award, though under seal, is not a specialty; and if made on a parol submission, is of the same nature with the submission, and ought to be construed by the same rules. 1 Bur., 279, 281. In an action of debt upon an award, made under a parol submission, the plaintiff may by averment connect the award with the submission, and thereby cure a defect, which otherwise would have been fatal. 1 Bur., 274, 278, 279; Allen, 51, 52; 1 Wils., 58. If an award recites the controversy, and orders a sum of money to be paid, it shall be intended in satisfaction of that controversy, and the award held good. Kid on Aw., 152, 153, 150, 148, 149; Com. Rep., 328. If the award is not made on the submission, or there is any other objection to the award, the defendant must show it by plea; for the Court will not presume anything which will destroy the award, but will presume that no such circumstance did exist. Wilson, 163; 2 Mod., 227; 1 Bur., 277; 2 Cro., 663. In debt on an award, the plaintiff need not show anything more than the submission; that the arbitrators acted;

that they made an award on the matters submitted; the amount of the award; that the defendant had notice of the award; and a breach by the defendant. Kid., 198; 1 Bur., 881; 1 Salk., 72. When an award is annexed to the submission by proper averment, either in a declaration or plea, all the material facts are put upon the record, (488) in as full and conclusive a manner as if the matter submitted had been mentioned in the award. Com. Rep., 330.

In this case, the declaration states a submission by the parties of a controversy relative to a horse; that the arbitrators acted under that submission, and made an award of the controversy so submitted; that the defendant had notice of the award; and assigns a breach. I therefore contend that judgment ought to be given for the plaintiff.

But suppose I should admit that no authority has been cited which comes up to the case, the plaintiff would, on principle, be entitled to judgment. For the books referred to incontestably prove that the Judges in England, having observed the inconvenience and injustice of the ancient rules governing the construction of awards, have from time to time so changed and amended those rules as to render them more conducive to justice and the good of the community. The entire change of the rule in the time of James the First, and many decisions made since that time in support of awards, evidence the authority of the Court in such cases, and hold forth an example worthy of imitation, when good policy and justice require an extension of the present rule. In this case the only objection to the award is, that the controversy submitted and settled is not identified by the award itself; and it will be contended the award cannot be supported by an averment of that fact. I cannot see what inconvenience or injustice would result from permitting such an averment, particularly in support of awards made on parol submissions; because it might be done in a plea as well as in a declaration, and therefore mutually beneficial to the parties; and the judgment in such cases would be conclusive, and might be pleaded in a subsequent suit on the original cause of action. In many other cases it is not only permitted, but is absolutely necessary to support the principal matter of declarations and pleas by proper averments. Thus, in pleading a former judgment, the defendant must aver that it was given on the same cause of action; and in pleading a release of all demands, the defendant (489) must aver the demand on which he is sued existed before the execution of the release; these two cases appear to be much stronger than the one before the Court. In one instance a record, and in the other a deed is supported, and made to apply in a particular manner, by the averment of a fact not appearing on the face of them; the present case is a parol transaction, and therefore certainly more open to aver-

ments. It is a good policy to render as easy and certain as possible this amicable and cheap method of settling disputes.

Haywood, for defendant. The award is not certain or final; no particular controversy is recited; no release is awarded; nor is the money directed to be paid in satisfaction of any specified injury or demand. It is not mutual, because it does not discharge any cause of action, and as it cannot be supported by averment, leaves the defendant exposed to a suit on the original controversy. 1 Bur., 274; 2 Stra., 1024; 2 Bur., 701; 1 Salkeld, 69.

By the Court. We are of opinion that the award is sufficiently certain to be understood that the money awarded was in satisfaction for the horse, which was the only matter of controversy mentioned in the submission, and that on a recovery in this action, the plaintiff will be barred from maintaining any other action respecting the subject submitted. Therefore that the award is sufficient, and that judgment should be entered for the plaintiff.

NOTE.—See *Borretts v. Patterson, ante,* 126, and the cases referred to in the note thereto.

(490)

JOHN NESBIT v. DAVID NESBIT ET AL., EX'RS.—Conf., 318.

An assignee by estoppel merely, where no interest passed by the assignment, cannot maintain an action of covenant.

The plaintiff brought an action of covenant in the Superior Court for Salisbury District, and declared thus: "David Nesbit and John Brown, executors of the last will and testament of Hugh Montgomery, deceased, were summoned to answer John Nesbit of a plea of covenants broken, etc. Whereupon the said John Nesbit, by his attorney, *Alfred Moore,* complains that whereas, Andrew Cranston, by deeds of lease and release, bearing date respectively the third and fourth days of February, in the year of our Lord one thousand seven hundred and fifty-eight, for and in consideration of ten pounds proclamation money, to him in hand paid by Hugh Montgomery, merchant and ordinary keeper in Salisbury, for and on behalf of Mary Montgomery (now wife of Anthony Newnan), daughter of said Hugh, did convey and make over the fee simple estate of and in one messuage and lot of land, situate, lying and being in the town of Salisbury, in the county of Rowan, known and described in the plan of the said town by the number one (No. 1) in the southwest square

of the said town, and containing by estimation twelve square poles, unto the said Mary Montgomery (now Newnan). And whereas, afterwards, to wit, on the 23d day of April, in the year of our Lord 1762, at Rowan County, in the said district, the said Hugh Montgomery and Mary, his wife, by a deed poll then and there executed, purporting to be made by the said Hugh and his wife, for and on behalf, and for the use of their said daughter, Mary Montgomery (now Mary Newnan), sealed with the seals of them, the said Hugh Montgomery and Mary, his wife (which said deed poll the said John Nesbit now brings here into Court), for and in consideration of the sum of sixty pounds, proclamation money, to them paid by William M'Connel, merchant, for the use of their said daughter, Mary, did bargain and sell to the said William M'Connel, the messuage and lot of land aforesaid, to have and to hold the same to him, the said William M'Connel, his heirs and assigns forever, (491) with the buildings and improvements thereon, and did in and by the said deed poll by them duly executed as aforesaid, covenant, promise and agree to and with the said William M'Connel, his heirs, executors, administrators, and assigns, that he, the said William M'Connel, his heirs and assigns, should forever thereafter peaceably and quietly have, hold, use, occupy, possess, and enjoy the same messuage and lot of land and premises, without any let, suit, trouble, denial, or interruption of her, the said Mary Montgomery (now Newnan), their said daughter, or any other person or persons whatsoever, lawfully claiming or to claim by, from, or under him, the said Hugh and Mary, his wife, or their said daughter, Mary (quitrents only excepted). And the said Hugh and Mary, his wife, did therein also further covenant, promise and agree to and with the said William M'Connel, that in case the said Mary, the daughter, her heirs or assigns, should at any time thereafter enter into the said bargained premises, so as to dispossess the said William M'Connel, his heirs or assigns, or break, determine, nullify or make void the said sale to him, William, that then the said Hugh and Mary, his wife, and their heirs, or either of them, shall return and pay back to him, William, double the purchase money aforesaid paid by said William, with interest, and pay also for all damages unto the said William M'Connel, his heirs or assigns, whatsoever they may suffer thereby.

"And the said Hugh and Mary, his wife, did therein also further covenant, promise, and agree, for themselves, their heirs, executors, and administrators, to and with the said William M'Connel, his heirs and assigns, that he, the said Hugh, or the said Mary, his daughter, when she should arrive at age (which would happen in the year 1773), should and would, at and upon the request, and at the cost and charges in the law of him, the said William M'Connel, his heirs or assigns, make, do,

and execute, or cause and procure to be made, done and executed, all and every such act or acts, conveyance or assurance in the law whatsoever, for the better and more perfect conveying and assuring of the said messuage or lot of land and premises unto the said William
(492) M'Connel, his heirs and assigns forever, as by the said William M'Connel, his heirs or assigns, or by his or their counsel learned in the law should be reasonably devised, advised, or required. By virtue of which sale to the said M'Connel, he entered on the said bargained premises, and was thereof duly seized according to the legal operation and effect of the said deed poll. And being so seized, afterwards, to wit, on the first day of August, in the year of our Lord, 1768, in the county and district aforesaid, by a certain indenture then and there executed, between the said William M'Connel and Jane, his wife, of the one part, and the said John Nesbit of the other part (which indenture, sealed with the seals of the said William and Jane, his wife, the said John Nesbit now brings into Court, the date whereof is the same day and year last aforesaid), which indenture hath also been duly proved and registered in due form of law, the said William and Jane, his wife, for and in consideration of the sum of forty-five pounds proclamation money, to them in hand paid by the said John Nesbit, granted, bargained, and sold unto the said John Nesbit, his heirs and assigns, the one-half part of the said lot number one (No. 1) purchased by him, William, as aforesaid; that is to say, the half part thereof lying to the south, and containing six poles in length, fronting the main street, and running twelve poles back, with the advantages, hereditaments, and appurtenances to the same half lot belonging, and all the estate, right, title, interest, claim, and demand of them, the said William M'Connel, and Jane, his wife, of, in and to the same half lot of land and premises, and every part thereof, to have and to hold the same to him, the said John Nesbit, his heirs and assigns forever, to his and their own proper use and behoof. And the said William and Jane did then and there, in and by the said indenture, covenant and agree to and with the said John Nesbit, that they, the said William and Jane, the premises and every part thereof, so by them sold to the said John Nesbit, would warrant and forever defend against them, the said William and Jane, and their heirs, by virtue whereof the said John Nesbit entered into the
(493) said half lot of land to him so sold as aforesaid, and was thereof seized according to the operation and effect of the said indenture.

"Nevertheless, a certain Anthony Newnan, who intermarried with the said Mary, daughter of the said Hugh and Mary Montgomery, having notice of the premises, afterwards, to wit, on the ..... day of ....., in the year of our Lord one thousand seven hundred and ....., claiming

title to the same half lot (sold to the said John as aforesaid), in right of his second wife, Mary, daughter of said Hugh, did interrupt the said John in his enjoyment and possession of the same, and did set up the title of the said Mary, his wife, and by force and virtue of the same did enter on the said half lot and turn said John out of possession and the enjoyment of the same half lot, and hath ever since, under and by virtue of his said wife, Mary's, title aforesaid, held the same. And the said John also saith, that on the .....day of ....., in the year ....., in the county and district aforesaid, he requested the said Anthony Newnan and Mary, his wife, daughter of said Hugh as aforesaid (she, the said Mary, being then of age, that is to say, of the age of twenty-one years and upwards, to execute an indenture of bargain and sale, so as to convey to the said John, at the proper costs and charges of the said John, the said half lot in fee, agreeably to the tenor and effect of the said covenant made by the said Hugh and Mary, his wife, with the said William M'Connel as aforesaid; but the said Anthony and Mary, his wife, then and there refused to execute the same, or in anywise to convey the title of her, Mary, the daughter, to said John, of which the said executor of the said Hugh afterwards, to wit, on the ..... day of ....., in the year ....., at the county and district aforesaid, had due notice, but have not procured the said Anthony and Mary, his said wife, to perform the covenant aforesaid of the said Hugh, which, on the part of the said Mary, the daughter, and those claiming by, from, or under her, was to be performed; nor have the said executors made the said John any satisfaction on account thereof; wherefore the said John saith, that he, the said Hugh, in his lifetime, and his said exec- (494) utors since his death, have not kept the covenant aforesaid made by the said Hugh, and thereby said John hath sustained damage to the value of ....., and therefore, etc."

The jury having found a verdict for the plaintiff, and assessed his damages, the defendants moved in arrest of judgment, and assigned the following reasons: (1) That the covenant made by the testator is not such an one as can be assigned, so as to enable the assignee to sue in his own name; (2) That it is a covenant in gross; therefore the assignee can take no advantage thereof.

By the Court. The question whether this action is maintainable by the assignee, under all the circumstances of the case, may receive some illustration by a statement of the substantial parts of the second and third resolutions in *Spencer's case*. By the second, it appears that if a man covenants for himself and his assigns, yet if the thing to be done be merely collateral to the land, and does not concern the thing demised

in any sort, the assignee shall not be charged. The instances stated are, where a lessee covenants for himself and his assigns to build a house upon the land of the lessor, which is not parcel of the demise, or to pay any collateral sum of money to the lessor; as an action would not lie in any of these cases against the assignee of the lessee, it follows for the same reason that no action would be maintainable by the assignee of the reversion against the lessee. The reason is satisfactorily explained by the examples stated in the third resolution. The first of these is a lease of a stock of cattle or goods with a covenant to deliver them or the value at the end of the term. This does not bind the assignee, because it is a thing merely in action in the personalty, and is destitute of the privity which subsists between the lessor and lessee of lands in respect of the reversion. The next instance is of a lease of house and lands, with a stock of cattle or sum of money rendering rent, with a covenant by the lessee, that he or his assigns shall redeliver the money or cattle at the end of the term. Neither is the assignee bound in this case, al-
(495) though the rent might have been increased in respect of the money and cattle; because, the covenant is personal and binds only the covenanter, his executors and administrators.

From the whole of this case, it may be laid down as a rule without any exception, that a covenant to run with the land, and bind the assignee, must respect the thing granted or demised, and that the act covenanted to be done or omitted, must concern the lands or estate conveyed. But when it appears on the face of this declaration, that the defendant's testator who sold the lot, neither had, nor pretended to have, any title to it; that, on the contrary, Mary, his daughter, had the complete seizin under the deed from Cranston; that the testator, having conveyed no title to M'Connel, the plaintiff could consequently derive none from him, it may be asked, what is there to create any privity between these parties, either of estate or contract? The maxim, *transit terra, cum onere,* presupposes a transfer of the land, and when that actually takes place, it forms the medium of a privity between the assignees. Unless, therefore, a presumption is made against the unequivocal statement in the declaration, the title of this lot never ceased to be in the daughter, from the time Cranston conveyed to her. Suppose the father and mother had entered into the covenants contained in the deed, by a separate instrument, unaccompanied with any conveyance of the land, no one could argue that an assignee might enforce in a court of law the benefit of such a contract. Can the case, then, be materially altered by annexing these covenants to a deed of bargain and sale, which, as a conveyance under the statute of uses, transfers only what the bargainor might rightfully convey? For the declaration shows that rightfully he

could convey nothing. If one man covenants that another shall quietly enjoy or obtain a conveyance for an estate which is owned by a third, this binds the covenanter and his executors or administrators to the covenantee, but cannot extend to the assignees of the latter. Nor can I conceive that the law is different, where a man sells an estate and makes the same covenants, provided it appears upon the declaration that he had no right. Both cases are equally devoid of that privity (496) which can alone form the basis of reciprocal remedies to the parties.

So far the case has been briefly considered, as influenced by the general principles laid down in *Spencer's case*. Some other authorities approach more directly to the question upon the record. The case of *Webb v. Russell*, 3 Term Rep., 393, explicitly shows that there must be a privity of estate between the covenanting parties; and therefore if a mortgagor and mortgagee of a term make a lease, in which the covenants for the rents and repairs are with the mortgagor and his assigns, the assignee of the mortgagee cannot maintain an action for the breach of the covenants, because they are collateral to his assignor's interest in the land, and therefore do not run with it. The mortgagor, having no more than an equitable title, could transfer no privity; but yet he, himself, might sue upon the covenants, as was done in this very case. 1 H., Bl., 562. In that case, the claim, though perfectly consonant with natural equity, and even so strong on the merits as to inspire the Court with a wish that they might see a ground whereon to decide in the plaintiff's favor, was nevertheless compelled to yield to the rules and policy of the law. It therefore furnishes an answer to all the arguments which might be drawn from the justice and convenience of supporting the present action; since it is of primary importance to preserve in an uniform and steady direction, the principles of law which govern estates and contracts, that a knowledge of the consequences may assist men in regulating their transactions. And upon this occasion, it may not be improper to use the language of a diligent and learned author: "Arguments from inconvenience certainly deserve the greatest attention, and where the weight of other reasoning is nearly in equipoise, ought to turn the scale. But if the rule of law is clear and explicit, it is vain to insist upon inconvenience; nor can it be true that nothing which is inconvenient is lawful, for that supposes, in those who make laws, a perfection which the most exalted human wisdom is incapable of attaining, and would be an invincible argument against ever changing the law." Harg. Coke Litt. (497)

The case next to be examined is that of *Noke v. Awder*, Cro. Eliz., 373, 476, which I will succintly state. The plaintiff declared that

John King let the lands to the defendant for a term of years, who granted them by indenture to one Abel, with a covenant that Abel and his assigns should peaceably enjoy, without interruption of any person, and that Abel assigned to the plaintiff. The declaration then states, that long before John King had anything in the lands, one Robert King was seized in fee, and died seized, whereupon the land descended to Thomas King, who entered upon the plaintiff, and ousted him. After a verdict for the plaintiff, the exception taken in arrest of judgment was that the plaintiff not having shown that John King had anything when he made the lease to the defendant, and the defendant having granted to Abel by indenture, nothing passed thereby, but by estoppel; then when Abel assigned to the plaintiff, nothing passed, for a lessee by estoppel cannot assign anything over; consequently, the plaintiff was not such an assignee as could maintain an action of covenant against the defendant, and the Court were of opinion that covenant will not lie upon an assignment of an estate by estoppel.

This case may, we think, be considered as good law, because it is in exact conformity with the principles before stated, which governed the decision in *Webb v. Russell,* and because it is noticed by late and respectable writers. Its authority, however, has been supposed to be weakened by what fell from the Court in *Palmer v. Ekins,* 2 Ld. Ray., 1551, but a slight examination will serve to evince that this idea is founded in mistake, and instead of being thus shaken, it is in truth confirmed and established. The case was this: The plaintiff, Palmer, in an action of covenant against Elizabeth Ekins, for nonpayment of rent, declared that John Palmer was seized in fee, and being so seized, by indenture demised to the defendant, a messuage for twelve years, rendering rent to the lessor and his assigns, by virtue of which the defendant entered,

(498) and that afterwards John Palmer, by lease and release, conveyed the reversion to the plaintiff. The breach is then assigned in the nonpayment of the rent. The defendant pleaded a special *nil habuit in tenementis,* which was overruled upon demurrer, upon the ground that it appeared upon the face of the declaration that the lease was made to the defendant by indenture, which estopped him from such a plea; and further, that an assignee might take advantage of an estoppel, because he was privy in estate.

Between the two cases there is this striking difference, which presents itself at once—that in the latter, the declaration discloses a good title in John Palmer when he leased to the defendant, and a clear reversionary interest when he assigned to the plaintiff, who was therefore not merely a claimant by estoppel, but (if we may so express it) an assignee *in pleno jure.* Whereas in *Noke v. Awder,* the declaration shows that

when John King made the lease to the defendant he had no estate, and consequently that the defendant's lease to Abel was only by estoppel, who could assign no interest to the plaintiff. But in *Palmer v. Ekins,* as the plaintiff received the estate by assignment, a privity was thus created, and he might take advantage of the estoppel, which appeared upon the declaration.

It is evident, then, that this case does not, either expressly or by implication, warrant the inference that an assignee by estoppel may maintain covenant. The proposition which it does warrant is essentially different, viz.: that an assignee (by which is meant an assignee with an interest) may take advantage of an estoppel appearing upon the face of the declaration. From the whole of the case it may be fairly collected, that the judgment would have been rendered against the plaintiff, had it appeared upon the declaration that he was no more than an assignee by estoppel.

It is scarcely necessary to make any remarks upon the cases cited to show that parties or privies in estate or interest are bound by estoppel. The position is admitted, but it can only be correctly applied to those cases where the privity appears upon the face of the proceedings, certainly not to those where the want of privity is manifest. Then admitting that Montgomery's deed (which is a deed poll) would, (499) if nothing more appeared upon the declaration, but that the assignment and the breach estop him from denying his title, which is nearly the case in 2 Ld. Ray. Yet under the circumstances which do exist in the case, there are two rules which must be taken into the account; one is that a stranger shall neither be bound by nor take advantage of an estoppel; the other is, that where the truth is apparent upon the same record, there the adverse party shall not be estopped to take advantage of it; for he cannot be estopped to allege the truth, when it appears of record. Coke. Litt., 353 *b*.

The remarks we have made lead us to this conclusion: That the plaintiff, placed in the best possible light, is no more than an assignee by estoppel; that there is a total absence of that privity between him and the defendant, which could alone form the chain of legal communication; that the covenants made by Montgomery were collateral to the title; and because these things distinctly appear upon the declaration, we are of opinion that the judgment should be arrested.

Cited: Redmond v. Staton, 116 N. C., 143; *Parrott v. R. R.,* 165 N. C., 316.

(500)

DECEMBER TERM, 1801

ISAAC STANDLEY v. RICHARD HODGES.—Conf., 330.

The witnesses of the prevailing party could not, after the Act of 1783 (see New Rev., ch. 189, sec. 3), warrant for their attendance after judgment in the suit.

This cause came from New Bern Superior Court on the following case: The defendant and one Abraham Bush had a suit pending in the Superior Court of Law for the District of New Bern, in which the present defendant was plaintiff, and which was determined in the term of March, 1795. The defendant Hodges prevailed in that suit. The plaintiff Standley was summoned and attended as a witness for Hodges, and took out tickets for his attendance, but did not file them with the clerk. The present plaintiff, Standley, after the determination of the suit between Hodges and Bush, warranted the present defendant, Hodges, for his attendance, and the cause was removed by *certiorari* to this Court. The plaintiff was proceeding on the trial to give evidence to support his cause at common law, as for work and labor done, but was stopped and nonsuited by the Court, with the leave to save the following question for the opinion of the Judges, viz.:

Whether, prior to the Act of Assembly passed in the year 1796, ch. 12, a witness had a right to charge the party at whose instance he had been summoned and attended, for such attendance, as at common law, for work and labor done; or must for his remedy resort to the party cast, in the manner prescribed by the Act of Assembly, passed in 1783, ch. 12.

By the Court: We are of opinion that the nonsuit was properly directed, and ought to stand—the plaintiff not having adopted (501) that mode of recovery sanctioned by law.

NOTE.—See *Moore v. Islar, ante*, 81, and the cases referred to in the note. S. c., *ante*, 203.

Cited: Carter v. Wood, 33 N. C., 24; *Belden v. Snead,* 84 N. C., 244.

THE STATE v. BUTLER.—Conf., 331.

An indictment for forcible entry and detainer, upon the English statute of 21st of James 1st (see 1 Rev. Stat., ch. 49, sec. 6), must specify the kind of term from which the party is expelled to authorize a writ of restitution; and the term must be unexpired at the time of the trial.

STATE *v.* BUTLER.

This was an indictment brought in Hillsborough Superior Court for forcible entry and detainer, as follows:

"The jurors for the State upon their oaths present, that Isham Parham, late of the county of Granville, in the District of Hillsborough aforesaid, on the fifteenth day of January, in the year of our Lord one thousand seven hundred and ninety-nine, was possessed of a certain messuage with the appurtenances, situate and being in the county of Granville, in the District aforesaid, for a certain term then unexpired, and being so possessed thereof, one John Butler, late of the county of Granville, in the District aforesaid, laborer, afterwards, viz., on the fifteenth day of January, in the year aforesaid, into the said messuage with the appurtenances aforesaid, the freehold of one Isaac Hunter, in the county of Granville, in the district aforesaid, with force and arms and with strong hand, unlawfully did enter and the said Isham Parham from the peaceable possession of the said messuage with the appurtenances aforesaid, then and there, with force and arms and with strong hand, unlawfully did expel and put out the said Isham Parham from the possession thereof so as aforesaid, with force and arms and with strong hand, being unlawfully expelled and put out, the said John Butler him the said Isham Parham, from the aforesaid fifteenth day of (502) January, in the year aforesaid until the day of the taking of this inquisition, from the possession of the said messuage with the appurtenances aforesaid, with force and arms and with strong hand, unlawfully and injuriously, then and there, did keep out, and still doth keep out, to the great damage," etc.

Being found guilty by the jury, in Hillsborough Superior Court, a motion was made by the Solicitor-General that a writ of restitution should be awarded; upon which the cause was sent up to this Court to obtain a decision on that point.

The question was here argued by *Norwood* for the defendant and *Haywood* for the State.

Norwood. Some rules are laid down in the books, directory of the manner of drawing indictments of forcible entry, which appear not to have been strictly attended to in the present instance. The exceptions arising on the face of the indictment, together with others of a more general kind, I mean to urge as reasons why the writ prayed for should not be awarded.

I. It is a rule that the tenement in which the force is charged to have been committed must be described with certainty, in order that the defendant may be apprised of the manner in which to make his defense, and that the sheriff may know exactly the possession to which the party praying the writ is to be restored. The words of the indictment are, "that Parham was possessed of a certain messuage with the appurte-

nances, situate and being in the county of Granville aforesaid, in the district aforesaid." This description is liable to the objection of vagueness and uncertainty, as much so as many of those instances which the books furnish, as having been held fatal to indictment. 1 Hawk., Pl. B. 1, ch. 64, sec. 37, where the cases are collected, and 4 Com. Dig., 210, D. 3.

II. The estate which the party expelled had in the land ought to be shown in a particular manner, to entitle him to the benefit of this writ, under any one of the statutes. The indictment states that Parham "was possessed of a certain term then unexpired." But it ought spe-
(503) cially to have defined the term, whether for life or years, that it might appear to the Court that the term is still unexpired. If the indictment had been on the 8 Hen., 6, it must have shown that the party put out of possession was seized of a freehold, otherwise he could not be entitled to restitution under that statute. If the indictment be founded on sec. 21, 1 Car., XV, it ought to show that he was possessed of a certain term for years; for neither tenant for life nor tenant at will are entitled to restitution under that statute. 1 Haw., Pl. B. 1, ch. 64, sec. 38; 4 Com., 210; 1 Salk., 260; 1 Ventris, 306.

III. A writ of restitution cannot properly be issued to the party expelled unless it appears to the Court that his right to the possession continued at the time the indictment was found. Here it is stated that he was possessed of a term unexpired on the fifteenth of January, 1799, the time of the expulsion; but it cannot be inferred that the term remained unexpired when the bill was found. On the contrary, it appears by a copy of the lease filed by the prosecutor that the term ended the third of March, 1799; whereas the indictment was found at April Term, 1800. A writ of restitution cannot, then, be awarded to Parham—for he has no right to the possession. Can it be awarded to Hunter? I apprehend not. (I) Because the indictment does not show that Hunter was in actual possession. (II) Because it does not appear that Parham held under Hunter. It is true the indictment calls it the freehold of Hunter, which it might be, and yet Parham be a disseizor. It should have been clearly stated that Parham held under a lease from Hunter.

IV. The Superior Courts cannot entertain jurisdiction upon all, or any of the statutes, relating to forcible entries. There is no act of Assembly conferring that jurisdiction in express terms, nor can any other authority be shown for it. Besides, the writ of restitution, as used in England, is not given by the common law, but by the several statutes enacted for the purpose. Those statutes ought to be strictly pursued, and there is not one of them that will warrant issuing the writ upon this

indictment. And as the writ is not at common law, it cannot be (504) issued on this record. 1 Plow., 206-7.

V. By the Constitution of this State, no man can be deprived of his rights or property but by the verdict of a jury, or his own admission or consent. Upon this indictment, neither the right of property nor of possession were put in issue; the force only has been decided upon. The defendant ought not, therefore, to be molested in his property or possession.

Upon these reasons, it is apprehended that the motion will not be granted.

Haywood. It is admitted that certainty and precision are requisite in the statement of a criminal charge, and particularly in a case of this kind, where restitution is sought, but it would have been difficult, if not impossible, to have drawn this indictment so as to have effected those objects more completely. It certainly is not necessary to be more particular in a case of this kind than in a declaration of ejectment; in both restitution is to be made, and the property detained should be so specified that the sheriff may, without difficulty, execute his writ. Yet this description would have been sufficient in an ejectment, and even less certainty than this indictment contains. 1 Term, 11. It would be sufficient in an indictment, or a plea in bar. Cowp., 683; 1 Term, 65; Doug., 154.

Nor was it necessary to have been more particular in stating the quantity of estate the defendant had in the land. Term is certain enough; it signifies, in legal acceptation, a term for years. An estate for years is frequently called a term, *terminus.* 2 Bl. Com., 143; Cok. Litt., 45, *b;* and the indictment must be understood that, at the time it speaks, the term was then unexpired, for it states that the defendant "still doth keep him out of possession." It follows that the defendant appears upon the face of the indictment to be a tenant for years whose term is unexpired; and such a one is entitled to restitution by the 21 Jac., ch. 15. This is not an indictment upon the 8 Hen., 6, and therefore no seizin is necessary; it is upon the first mentioned statute, and the defendant being within the benefit of that, it is (505) not his term travel out of the indictment to ascertain whether his term still continues. As to jurisdiction, I take it to be a settled rule that the Superior Courts have a general jurisdiction upon all criminal matters, whether arising at common law or by statute, unless taken away by express negative words. 2 Haw., B. 2, ch. 3, sec. 6. The act establishing these Courts invests them with a general criminal jurisdiction (Iredell, 297), though partial limitations have been since made. The jurisdiction in this case, therefore, cannot be ousted, unless it be done by a law for that purpose; but none such exists.

Lastly. If the constitutional objection be valid, then all the statutes relative to forcible entries are at once repealed; yet they have been used ever since the Revolution, and generally considered to be part of the law. Iredell, 353. But the proceeding in those cases does not affect the right of property or possession. If the defendant has either, he may resort to the legal mode of establishing his claim, to that mode directed by the bill of rights, secs. 1, 12, 14. It is such conduct as the defendant's that has a tendency to violate the instrument referred to; for he is endeavoring to establish a possession not sanctioned by law, and without resorting to the trial by jury.

HALL, J. It is agreed by the counsel in this case that the only question now to be decided is whether a writ of restitution ought to issue or not. It appears that the lease, under which Parham claims the land, has expired. He therefore cannot be put in possession by this writ, and no other person can have the benefit of it. For this reason, therefore, I think it ought not to issue.

TAYLOR, J. Various objections have been made to the awarding of a writ of restitution in the present case; they relate either to the power and jurisdiction of the Court or to the legality and fitness of exercising such a power, under the several exceptionable aspects in which this case has been presented.

(506) The legitimate authority of the Superior Courts is to be sought for in the act by which they are established, in the declaration of rights and the Constitution, in the theory and frame of our Government, and in the result of a legal and regulated analogy to the courts of a similar construction, in the country whence our municipal law is derived. By the Act of 1777, the Superior Courts are invested with cognizance of all pleas of the State, and criminal matters of what nature, degree, or denomination soever; whether brought before them by original or *mesne* process, or by *certiorari,* writ of error, appeal from any inferior court, or by any other ways or means whatsoever. The same powers and authorities which were exercised by any former Judges in this territory are likewise accorded to them, with the exception of those cases wherein the act has otherwise directed, and of those where the form of government and constitutions have opposed barriers to the ancient jurisdiction. The words of the act are manifestly comprehensive enough to include a power of administering complete relief, under the statutes of forcible entries, unless the kind of relief provided by them shall appear to be incompatible with the provisions of our bill of rights. But I cannot discern that the least invasion will be made of the consti-

tutional rights of a citizen by awarding a writ of restitution. It is certainly true that no jury has passed upon the defendant's property; and if issuing this writ amounted to a decision upon that, it might be fairly argued that he was condemned unheard. But the law has declared that whosoever enters upon the possession of another, with circumstances of violence and terror, shall, upon conviction, pay a fine to the State, and be deprived of the possession which he has thus wrongfully acquired. It is no protection to the wrongdoer that he had a right to the freehold or possession, or that he had before been unlawfully deprived of them; for the person who has used such violent methods of doing himself justice is alike criminal with him who has not even the pretense of a right to assert. It was to guard the public peace and to prevent the strong from forcibly ejecting the weak that the several statutes upon this subject have been passed; and these objects are most (507) effectually attained when to a fine is superadded a writ of restitution; thereby holding out to the offender the absolute inutility of a possession acquired by forbidden means. Still, however, the right of possession or of property is not concluded; for the defendant may have recourse to those methods of establishing them which the law has provided. The jury having found that the possession was obtained by force, the legal consequence is that the defendant is to be deprived of it for that reason, and the party complaining to be restored, he being the person through whom the Constitution has been violated; for he has been deprived of his possession without a trial by jury, and without the sanctions of the law of the land. If the Superior Courts may entertain jurisdiction of indictments upon these statutes, and this they have done both before and since the Revolution, then the Act of 1777 contains an express provision which warrants them "to issue execution and all other necessary process thereupon." The latter words evidently embrace a writ of restitution, without which the justice held out by the statutes cannot be completely dispensed.

The extent of jurisdiction in criminal cases, both original and appellate, given to the Superior Courts by the Act of 1777, and others subsequently passed, produces to a certain degree an analogy between these courts and others, whose jurisdiction can only be taken away by express negative words. And under such restrictions and qualifications as the Constitution and principles of our government, as well as the arrangement of our judicature, impose, the following description will apply to the Superior Courts: "That they may proceed as well on indictments found before the other courts, and removed into them by *certiorari,* as on indictments originally commenced in them, whether the courts before

whom such indictments were found be determined or suspended, or still *in esse,* and whether the proceedings be grounded on the common law or on some statute making a new law concerning an old offense, and appointing certain justices to execute it, as the statutes of forcible
(508) entries," etc. 2 Haw., Pl. B. 2, ch. 3, secs. 3, 6. From these considerations, I am inclined to believe that the power of awarding a writ of restitution is one of those which the Superior Courts may rightfully exercise.

I will now give my opinion upon the specific objections which have been made to the exercise of the power in the present case.

I apprehend that the first exception cannot be supported. "The term messuage is sufficiently certain and intelligible; by the grant of a messuage, the orchard, garden and curtilage will pass." Co. Litt., 5, *b,* and so by the devise of a messuage, though *cum pertinentiis* be not added. Cro. Eliz., 89, *b.* In an indictment for forcible entry and detainer, it is necessary to set forth the quality of the thing entered upon, as into a messuage, meadows, wood, etc., for entering into tenements generally is not good, because of the uncertainty. 2 Roll's Rep., 46. But some of the authorities show that the kind of possession of which the restitution is sought should be stated with such certainty as to evince that it is authorized by some one of the statutes. The present indictment will not warrant a restitution on the 8 Hen., 6, because it does not state that the place wherein the force was committed was the freehold of the party grieved, at the time of such force. Latch's Rep., 109. Nor are there any words in this indictment which necessarily imply that fact, as that the defendant disseized Isaac Hunter, which would be impossible, unless the freehold were his at the time of the force committed. 1 Haw., 284, sec. 38. And if this point should be rendered doubtful by the contrariety of authorities, Yelvert., 28, still it is necessary to sustain this application that the defendant should have been charged with putting out and expelling Isham Parham, and disseizing Isaac Hunter. Yelvert., 165. The disseizin is the main point in such an indictment, and must be set forth in substance. 2 Roll's Ab., 80. But it is admitted by the counsel for the State that this indictment is not grounded on 8 Hen., 6, but is maintainable on the 21 Jac., in support of which it is argued that the word term technically signifies a lease for years, and that under
(509) the latter statute a tenant for years is entitled to restitution. Upon this point, the authorities are clear and explicit, that the indictment must state that the party was possessed of a term for years; and that possession, simply, or the possession of a term, is not sufficient; since, in the first case, it may be understood that he was tenant at will, and in the latter that he was possessed for term of life. 1 Ventris, 306.

I think it so plain that upon this objection a writ of restitution ought not to be awarded, that it is unnecessary to give an opinion upon the rest.

Motion denied.

NOTE.—See *Sherrill v. Nations*, 23 N. C., 325.

WILKINSON, ASSIGNEE, v. WRIGHT.—Conf., 341.

The Act of 1786 (1 Rev. Stat., ch. 13, sec. 3), making bonds assignable, did not operate upon bonds theretofore made.

This was an action of debt, brought in Hillsborough Superior Court, upon a bond which was made before the act passed in 1786, by which bonds were made negotiable. The question for the opinion of the Court was whether this action was maintainable by the assignee.

HALL, J. The first section of the act entitled "An act to make the securities therein negotiable," passed in the year 1786, ch. 4, declares that "all bonds, bills and notes, etc., shall, after the passing of this act, be held and deemed to be negotiable, and all interest, etc., shall be transferable by endorsement, in the same manner and under the same rules, etc., as notes called promissory or negotiable notes have heretofore been." Its operation is not confined by express words to bills, bonds, etc., executed after that time; so that if the present question were to depend upon a construction to be made upon this section alone, independent of others in the same act, perhaps it would not be (510) improper to decide that this action has been rightfully brought.

The proviso in the third section declares, "That this act shall not extend to or have any operation with respect to any bonds, bills, etc., liquidated or settled accounts heretofore given or made." I think it is apparent that this proviso is confined solely to the regulations of interest, because it speaks of liquidated or settled accounts, which are not included in the first section, and which are not made negotiable by this act. When the third section speaks of liquidated and settled accounts, it speaks of them as being subject to carry interest after a particular time, and places them, in that respect, upon the same footing with bonds, bills, notes, etc., then, when the proviso speaks of liquidated and settled accounts, it can mean nothing more as to them than to ascertain the time they shall be subject to the rules of interest in that section established. Nor do I think it means anything more as to bonds, bills, etc. Had it

been intended that this proviso should in any respect control the whole act, it is not likely it would have been inserted in the middle of it; so that I think nothing can be collected from that proviso decisive of the question before us.

The first proviso in the 5th and last section declares that "The act of limitation of this State shall apply to all bonds, bills, and other securities hereafter executed, made transferable by this act, after assignment or endorsement thereof, in the same manner as it operates by law against promissory notes."

It might not be a very strained construction to say that from the words "bonds, bills, and other securities hereafter executed, transferable by this act," it was the sense of the Legislature that none but such as were executed after that time should be transferable by the act; and with this construction I am inclined to agree, and to be of opinion that the action is not well brought. If the impressions which heretofore have regulated the practice in this respect are of any weight, they will serve to support this opinion. Suits have been seldom, if ever, brought, as far as I can learn, in the names of assignees of bonds, executed
(511) before the passage of the Act in 1786. I am of opinion that judgment should be entered for the defendant.

TAYLOR, J. I cannot collect from any terms used in this Act of Assembly that the Legislature meant to give it a retrospect beyond the time of its commencement; and a construction of that kind ought to be adopted in those cases only where it naturally and necessarily arises from the words.

The act does not, according to the policy observed in some of the states, merely enable the assignee of a bond to sue in his own name; leaving him still liable to the equity, which the obligor might claim against the obligee. It goes further, and places the assignee of a bond upon the same footing with the endorsee of a note. The latter, in case of an endorsement before the note is due, will be permitted to recover against the maker, notwithstanding any payments made by him to the original payee, and notwithstanding any illegality in the consideration of the note; except in the cases of gaming, usury, coverture, and infancy.

If the Act of 1786 be construed to extend to bonds executed before that time, obligors may be deprived of just advantages, and exposed to inequitable recoveries by assignees, which could by no means be foreseen when their contracts were entered into. It ought not, therefore, to be presumed that the act meant to destroy or impair rights which existed before its commencement. 2 Mod., 310.

If it should be thought that the proviso added to the third section is not coextensive with the whole act, but intended merely to confine the

rule of computing interest to contracts thereafter to be made; still I think that the proviso in the fifth section explains what contracts the Legislature meant should be comprehended in the act. The object of this latter proviso is to apply the statute of limitations to bonds, bills, and other securities, after the assignment or endorsement thereof. If it were intended to confer upon bonds executed before the act the quality of negotiability, it is just as reasonable and necessary to apply the statute of limitations to them, from the time of their endorse- (512) ment, as to bonds executed after the act; and as there can be no policy in subjecting the latter to the operation of the law, while the former are unaffected by it, a construction leading to such a consequence ought to be avoided. On this ground, therefore, I conceive the words of the proviso, "all bonds, bills, and other securities hereafter executed, made transferable by this act," as descriptive of the contracts which were alone intended to be comprised in the act.

JOHNSTON and MACAY, JJ., concurred.

Judgment for the defendants.

Cited: Peace v. Nailing, 16 N. C., 295; *Ashley v. Brown,* 198 N. C., 372.

ANDREW BROOKS v. ELI COLLINS.—Conf., 345.

Under the act fixing the jurisdiction of the county courts at twenty pounds, the defendant should have pleaded that the sum due was less than twenty pounds when the action was commenced—otherwise the Court will not, on motion after verdict finding less than twenty pounds, set aside the verdict and enter a nonsuit.

This was an action of *assumpsit,* instituted in the county court of Orange. The damages laid in the writ were above twenty pounds. After a trial in the county court, it was brought up to Hillsborough Superior Court by appeal.

Upon the trial of the cause it appeared that the parties, being tradesmen, had worked together for their joint emolument until they earned thirty-two pounds, when they came to a settlement, and the balance of eight pounds was found due to the plaintiff. They afterwards continued to work until they earned one hundred and six pounds more, the whole of which sum was received by the defendant. The plaintiff admitted the receipt of fifty pounds from the defendant, on which evidence the

(513) jury gave a verdict for the plaintiff, assessing his damages to eleven pounds seventeen shillings and sixpence.

A rule was obtained on the plaintiff to show cause why the verdict should not be set aside and a nonsuit entered.

Norwood showed cause. These two principles of law, on the doctrine of nonsuits, are established and known: (I) That a plaintiff cannot be nonsuited before the jury leave the box but with his own consent. 2 Term, 275. (II) That the Court will not permit him to enter a nonsuit after the jury have returned and declared their verdict. He has the right of putting his cause to the jury and risking a verdict, if he thinks proper; but should he do so and the jury find against him, then he cannot enter a nonsuit, because such a practice would give him the advantage over the defendant of receiving the verdict if in his favor, and destroying it if against him. To enter a nonsuit on the rule obtained in this suit would be contrary to both these principles of law, and give to the defendant that advantage which is denied to the plaintiff.

The practice of granting such rules, if established, will give the defendant another advantage over the plaintiff; he may omit to move for a nonsuit before the evidence is closed, when, perhaps it would be in the plainitff's power to supply the defect relied on by the defendant; and after a verdict is entered against him, move for and obtain this rule, set aside the plaintiff's verdict, and enter a nonsuit in its stead. But if such rules are refused, and the defendant compelled to move for a nonsuit before the jury retire, these evils will be prevented, and the parties stand on equal ground. For should the plaintiff refuse to be nonsuited, and obtain a verdict on evidence materially defective, the defendant would be entitled to and might easily obtain a new trial; but I apprehend that even in such a case he ought not to set aside the verdict and enter a nonsuit in its stead, unless on a rule entered by consent.

The practice in England of granting rules, somewhat similar to the one in this suit, is modern; and it has not, it appears to me, been sufficiently attended to in this State. I suppose that practice to be
(514) founded on the statute of 14 Geo. 2, ch. 17, which provides, "that if the plaintiff neglects to bring the issue to trial according to the course of the Court, the Court, on motion or notice, shall give judgment as in case of a nonsuit, unless they allow further time; and the defendant shall recover his costs." If the rule in this suit is not founded on this statute, it is not supported by any one principle of law; and if intended to be founded on this statute, it must be discharged, for the issues were brought to trial according to the course of the Court, and the plaintiff obtained a verdict well warranted by the evidence. 1 Bur., 358. But whether the rule is founded on that statute or not, it is a clear principle that the rule shall be discharged, unless a nonsuit, if moved for

before the jury returned, would have been proper and legal. In this case it is not pretended that such a nonsuit would have been legal; the rule, therefore, ought to be discharged. If the county court had jurisdiction in this case, the plaintiff is certainly entitled to a judgment; and that the court had jurisdiction I think, on the examination of the several acts, there can be no doubt. The first act on the subject is that of 1777, ch. 2, sec. 61, by which jurisdiction is given to the county courts in all cases where the debt is above five pounds. By the same act, sec. 69, jurisdiction is given to a single justice in all cases where the debt is five pounds or under. The next act is that of 1785, sec. 4. By this act the jurisdiction of a single justice is raised to ten pounds. Under this act the county courts and justices had concurrent jurisdiction of a debt of ten pounds, and of all sums between that and five pounds. The Act of 1786, ch. 14, sec. 7, is next. This raises the jurisdiction of a single justice to twenty pounds, and contains this proviso: "Provided, also, that no suit shall be commenced in the first instance, returnable to the county court, for any sum under twenty pounds." This proviso appears to me to relate to the suit only, and the sum mentioned in the writ, and not to the balance which may be found on a settlement of the accounts due the plaintiff. And in this construction I am supported by a decision. Haywood's Rep., 122, and the universal opinion that if the defendant pleads in abatement, "that (515) the balance due the plaintiff is not twenty pounds," the plaintiff may well reply the writ for a larger sum. For if this construction is not good, the replication would be bad on demurrer; and what may be pleaded in abatement can never afterwards be taken advantage of. This construction will not render the proviso nugatory; it will still prevent suits on all bonds for small sums. It certainly ought not to extend to the balance on long and great accounts, in the settlement of which are frequently involved the greatest intricacy and difficulty. It often happens that the plaintiff does not know the balance due him on such accounts, and that he forms erroneous opinions of the law arising on them; and shall he, in such a case, after he has prosecuted his suit to a verdict, be nonsuited because that verdict does not happen to amount to twenty pounds? If my construction be not the true one, great evil and injustice will be the consequence of a decision in this case. The law is positive; it leaves no discretion in the Court, and must be carried into execution in all cases. The Court could not take notice of any claim or demand set up by the plaintiff, unless proved and found by the verdict. The judges of the Superior Court, by act of Assembly, have a discretion in such cases; but the county courts would have none. If a plaintiff should honestly enter on his accounts the credits to which the defendant was entitled, leaving a balance of above twenty pounds due

him, and bring his suit; if he should by any accident or misfortune, fail to prove an item on his account, he would be nonsuited and have the costs to pay. Creditors whose demands were not much above twenty pounds would be under the necessity of leaving out of their accounts all items, however just, the proof of which was doubtful, so as to bring their debts within the jurisdiction of a single justice. This proviso is omitted by the Act of 1794, ch. 13, and I contend that the seventh section of the Act of 1786 is entirely repealed by the twenty-third section of this act; and that the county courts and justices have concurrent jurisdiction of debts of twenty pounds, and of all debts under that sum and
(516) above five pounds, and insist that the rule in this case ought to be discharged.

HALL, J. This is an appeal from the county court. The jury in the Superior Court have found a verdict for a sum under twenty pounds; a motion is made by the defendant's counsel to set aside the verdict, after it is recorded, because the county court, in the first instance, had no jurisdiction, the sum being under twenty pounds. The verdict being recorded, I think it ought to stand. This motion, in substance, might have been made at an earlier stage of the proceedings; had that been done, in all probability it would have been granted.

TAYLOR, J. The question in this case is whether the verdict shall be set aside and a nonsuit awarded, upon the ground that the recovery is for a sum under twenty pounds, the suit having been commenced in the county court. The act which regulates the jurisdiction of the Superior Courts, by the value of the suit, gives power to direct a nonsuit: (1) Where a greater sum is demanded than is due, on purpose to evade the act. (2) Where a suit is commenced contrary to the true meaning of the act. But if the recovery is less than the sum which marks the jurisdiction, still, if an affidavit be made that the sum sued for is due, and that the want of proof or the lapse of time has prevented a recovery, then judgment shall be rendered for the amount legally proved. No difficulty has arisen in the practice under this act; the regulations of which afforded a clear and satisfactory guide, so far as they extend.

As to the jurisdiction of the county courts, the subject is left at large, except in regard to the sum for which the suit is brought; the act is silent as to the manner in which the question shall be examined, and as to the judgment which shall be given; nor does it either allow or prohibit the recovery of a less sum than twenty pounds. The intention of the Legislature seems to be clear enough as to the object—that a single justice should have jurisdiction of all debts of the kind specified
(517) in the act, of twenty pounds and under, and that the county court

should have original jurisdiction of the same debts. As to these, therefore, the jurisdiction of the magistrate must be exclusive, and that of the county court merely appellate; and thence we may draw the certain conclusion that the sum laid in the writ, being above twenty pounds, is not of itself sufficient to give jurisdiction to the county court if the debt be under that sum. For the writ, except in a few instances where of necessity it must correspond with the demand, furnishes no evidence of the sum really due. Under a different construction, the Act of 1786 might be evaded, in numerous cases, at the pleasure of the plaintiff, and the jurisdiction of a single magistrate totally absorbed in that of the county court.

The question then occurs, Shall the sum recovered ascertain the jurisdiction of the county court? I conceive that this would be a rule equally fallacious with that drawn from the sum laid. The plaintiff may recover less than twenty pounds when his debt is really more. A witness summoned to prove an item in his account may be absent; the defendant may lessen the debt by a set-off, or bar part of it by pleading the statute of limitations. In none of which cases do I think it would be right to withhold the judgment of the county court for the sum recovered, though less than twenty pounds. The sum for which a suit is in substance instituted is that which the defendant owes at the issuing of the writ. If the parties have opposite demands against each other, which are connected from having taken their rise in the same transaction, or otherwise, then the balance is the debt, and that being less than twenty pounds when the suit commences, cannot be recovered by action. But if the opposite accounts begin in distinct transactions, and are unconnected, each demand is a legal debt and recoverable by action. 1 Bl. Rep., 651; 4 Bur., 2133; 5 Term, 135; 3 Term, 599. Now it is entirely at the option of the defendant whether he will set off his demand or not. The plaintiff cannot compel him to do it, and before the suit it cannot be known whether it will be done, or even what the amount of the opposite demand is. It would be hard, therefore, (518) if by setting off the plaintiff were prevented from recovering his debt in the county court, and equally so if he, under the belief that it would be set off, and thereby reduce his claim to a less sum than twenty pounds, should begin the business by way of warrant before a magistrate, and the defendant should then withhold the set-off. 2 Wils. Rep., 68; 3 Wils. Rep., 48. The same observation will apply to the statute of limitations, which may or may not be pleaded at the defendant's option, and which, though pleaded with effect, leaves the plaintiff's debt unextinguished, since it may be revived by a subsequent promise. In cases of this kind, therefore, the proper inquiry seems to be, not whether the sum contained in the writ is more than twenty pounds, or that found by the

jury less, but what was the amount of the plaintiff's debt when the suit was brought. It is desirable that some regular and uniform practice should be established as to the mode of taking advantage of the smallness of the sum. My own opinion is that the most regular way would be to plead that the sum due was less than twenty pounds when the action was commenced; though, upon the general principle relative to the jurisdiction of inferior courts, I am far from thinking that this is the only method. It would save time and expense if the matter were brought before the Court by way of motion to stay proceedings, before the trial; when the amount could be inquired into upon affidavit, as is practiced in analogous cases. 5 Term, 64; 4 Term, 495. Or the objection might be taken at the trial, so as to give the plaintiff an opportunity of submitting to a nonsuit, should the opinion of the Court be against him. But I think the practice would be inconvenient and unjust to permit the defendant to avail himself of this objection when he makes it for the first time after the jury have found their verdict. Taking this to be the case from the record sent up, I am in favor of the plaintiff's having his judgment; since his adversary has submitted his cause to the juris-
(519) diction of the court, in every stage, except the last, of its progress.

Rule discharged.

NOTE.—See *Anonymous*, 3 N. C., 71.

Cited: Allen v. Simpson, 89 N. C., 22.

THOMAS CUNNINGHAM'S HEIRS v. THOMAS CUNNINGHAM'S EX'RS.—Conf., 353.

Slaves cannot take anything under a devise for maintenance.

This was a case sent up from Wilmington Superior Court.

Thomas Cunningham, in September, 1792, duly made his last will and testament, by which, among other things, he devised as follows: "It is my will and desire that five feet of an alley be left from Front Street to low-water mark, as convenient as may be to the other bequeathed lot; then I will and desire that forty feet back, including the house where Mr. Potts is now resident, be at the expiration of the lease rented out for the maintenance of a negro woman of mine, named Rachel, and the maintenance and education of her three mulatto children, named Mary, Ritty and Chrissy, and the child of which she is now pregnant." After devising part of a lot to Edmund Robeson, the will proceeds thus, "and

the rest and residue of the said lot to be rented yearly for the maintenance of Rachel and her three children, already named, with the child of which she is now pregnant; with all the rest of the land lying between Lee's Creek and Deep Inlet Creek, between Rachel and her three children, share and share alike, to them and their heirs.

"*Item.* I will and desire that my negro men, Virgil and Quash, together with my negro woman Tamer, should live on the plantation where I now reside, on Lee's Creek, to work for the maintenance of Rachel's children during the natural life of the said negroes.

Item. I will and desire that Rachel and her children should be (520) set free immediately after my decease."

The defendant, as executor of Thomas Cunningham, the testator, took possession of that part of the real estate, the rents of which are directed by the will to be applied towards the maintenance and education of the negro woman Rachel and her children. For this part of the estate the action was brought.

Rachel and all her children, before and at the time of making the will, and ever since, have been slaves.

For the defendant it was insisted that by the words of the will he is entitled to the possession of the real estate, in order to receive the rents and profits, and to pay the same to the negro woman, Rachel.

The plaintiff's claim was rested on the following grounds: (I) That supposing the words of the will are sufficient to pass the estate to the negro woman, Rachel, and her children, yet, by law, negro slaves are incapable of taking or holding real estate. (II) And admitting they are capable, yet there is no express devise of the lands in question to the executors; consequently, the lands descend to the plaintiffs as heirs at law of the testator.

HALL, J. I think that the devise in question is void and cannot take effect. The maintenance and education of some of the devisees is what the testator appears to have been anxious for. How can it be effected? They are slaves, and their owners have a right to them and their services; if they are educated, it must be by his permission, and if it is attempted without, it is a violation of his right. If this property had been conveyed in trust for the same purpose, a performance of the trust could not be compelled in a court of equity, for the same reason. Admit that they could bring a suit to recover this property, after a recovery, could they have a right to enjoy it? Suppose the owner took it from them, would they have a remedy against him? They certainly would not.

TAYLOR, J. The intention of the testator seems plainly to have (521) been to transfer the beneficial interest in the lands to Rachel and

her children; and were there no legal impediments to the effecting of such an object, I should think the words made use of equivalent to an express devise of the land. But it is indispensable to the validity of every devise that there be a devisee appointed who is competent to take. Slaves have not that competence; for a civil incapacity results from the nature and condition of slavery. And it would be a solecism that the law should sanction or permit the acquisition of property by those from whom it afterwards withholds that protection without which property is useless. From this principle an important difference arises between slavery as it is established in this State and the condition of villeinage as it existed in England prior to the statute, Car., 2. A villein might bring an action against any person who did him an injury, except his lord; and even against him in some particular cases. If, therefore, he purchased land, although the lord might enter upon it and seize it to his own use; yet while he permitted the villein to hold, the land would descend to the children of the latter, in a regular course of descent; and the law, while it furnished them with a remedy against any who should disturb their possession, also gave them, in time, a title by prescription against their lords. A villein might also lawfully dispose of what he had acquired if he completed the transfer before his lord made a seizure.

In all these instances the characteristics of slavery are different; for a slave can bring no action; he can neither acquire nor transfer property, by descent or purchase; nor will prescription avail him to assert a title against his master. The devise cannot, therefore, in the present case, operate anything.

JOHNSTON and MACAY, JJ., concurred.

Judgment for the plaintiff.

(522) *Jocelyn* for the plaintiff.
Sampson for the defendant.

NOTE.—See *Haywood v. Craven*, 4 N. C., 360; *Wright v. Lowe*, 6 N. C., 354; *Huckaby v. Jones*, 9 N. C., 120; *Turner v. Whitted, ibid.*, 613; *Stevens v. Ely*, 16 N. C., 493; *Sorrey v. Bright*, 21 N. C., 113; *Pendleton v. Blount, ibid.*, 491; *White v. Green*, 86 N. C., 45. By an act passed in 1830 (1 Rev. Stat., ch. 111, sec. 59), a testator may emancipate his slaves by his last will, upon condition of their being removed out of the State; and if they are thus emancipated and sent out of the State they may take property bequeathed to them under the same will. *Cameron v. Commissioners of Raleigh*, 36 N. C., 436.

Cited: Kirkpatrick v. Rogers, 41 N. C., 134.

CHARLES KENNON v. ROBERT DICKINS.—Conf., 357.

In equity, as a general rule, interest upon interest is not allowable. But when the sum is ascertained and the annual payment of it forms part of the contract, where it is not so specific that an action of debt may be sustained, and interest recovered by way of damages for the detention, and particularly where the payment of the principal sum is postponed to a very distant period, upon the faith of the regular and punctual discharge of the interest, interest upon interest ought to be allowed.

This was a case from Hillsborough Superior Court. The bill stated that the complainant, on the 15th of September, 1771, contracted with the defendant for the purchase of several tracts of land; and that the intention and understanding of the parties was that one thousand pounds, Virginia money, was to be the price of the land, to bear interest from the first of December, 1771; that there was to be a credit of fifteen years for the payment of the principal sum, but the interest, computed at six per cent, was to be paid annually; and if at any time the complainant should pay a larger sum than the interest due, the excess should be applied to the extinguishment of the principal.

The complainant gave his bond, dated September 30, 1771, in the penalty of two thousand pounds, Virginia money, with Lewis as security, to which was annexed the following condition: "The condition of the above obligation is such that if the above bound Charles (523) Kennon and Howell Lewis do and shall well and truly pay unto the said Robert Dickins, etc., the just sum of sixty pounds, current money of Virginia, annually, for the term of fifteen years, on or before the fifth day of December in every year, and after the expiration of the term of fifteen years, viz., on or before the fifth day of October, in the year 1786, the further sum of one thousand pounds, current money as aforesaid, then the above obligation to be void, etc. Memorandum, that if any part of the within principal shall be paid before the expiration of the fifteen years, in that case the part paid to carry interest no longer than to the time the same was paid." The bill then stated that on the tenth of December, 1771, the complainant paid the sum of one hundred and eighty-four pounds, six shillings and six pence, which, after deducting the interest of the ten days due, left a balance of one hundred and eighty-one pounds, eleven shillings and three pence, that ought to have been applied to the discharge of the principal, and that afterwards various other payments, which are specified in an account annexed to the bill, were made, and which, if properly applied, discharged the whole of the debt. Instead of which, an execution has issued for the sum of one hundred and fifty pounds, by reason of the defendant's charging interest

on the sixty pounds payable annually, which being itself the interest of the thousand pounds, ought not to bear interest. The complainant alleged that this is usurious, and directly against the intention of the parties, as well as the memorandum annexed to the bond.

The defendant, in his answer, affirmed that he intended the price of the land to be nineteen hundred pounds, Virginia money, payable in fifteen annual installments, at sixty pounds each, and the last payment to be one thousand pounds; and he understood that if default was made in the payment of any of the installments, that they should bear interest from the time they respectively became due. He conceives that the condition of the bond furnishes evidence of this, by arranging the payment at different and distant days. He believes the intention of annex-
(524) ing the memorandum to the bond was, that if the complainant should pay any part of the money before the time it became due, that such payment should bear interest until the next day of payment. He admits the payment on the 10th of December, 1771, but insists that the first installment of sixty pounds, as well as the ten days interest, were then due. He likewise admits the other payment charged in the bill, and says that their application, according to the true intent of the contract, left a balance due on the 20th of April, 1792, of one hundred and fourteen pounds and ten pence, for which he has taken out execution.

Norwood, for the defendant. Supposing the purchase money to have been one thousand pounds, and the installments the interest of that sum, according to the complainant's allegation; yet the case comes expressly within the exceptions to the general rule that interest shall not bear interest. These exceptions have been extended to the following cases: Judgments at law bear interest upon the accumulated sum of principal and interest. 1 Bl. Rep., 267. A master's report, 1 P. W., 653; so, with the assignee of a mortgage. 1 Ca. Ch., 258. The parties, by agreement, may make interest principal. 4 Term, 613; 1 Ves. Jur., 451. And where a mortgage deed contained a special clause of redemption, by which it was agreed that the debtor should pay one thousand pounds at a future period, and sixty pounds interest in the meantime, by half-yearly payments, it was decreed that the interest reserved in the deed should be reckoned principal. 1 Ver., 190. An annuity, also, though it is the nature of interest, shall carry interest. 2 Eq. Cas. Abr., 530.

But the defendant positively answers that the fifteen annual payments are principal, as well as the last payment; and the memorandum refers to the within principal. The bond must therefore be examined to ascertain the intention of the parties; and upon the face of this it appears that all the installments form principal. Upon the complainant's own principles, however, his statement is erroneous. The first annual installment was due the first of December, 1771; the first payment made

by the complainant was on the tenth of that month; yet he (525) deducts the whole of that payment from the thousand pounds, which he is pleased to call principal, without regarding the sixty pounds then due.

By the Court:* According to the complainant's allegation, the parties understood the purchase money to be one thousand pounds, Virginia currency, to bear interest at six per cent, payable annually, with a credit of fifteen years for the payment of the principal sum. On the other hand, it is affirmed by the defendant that the price of the land, as intended and understood by him, was nineteen hundred pounds, Virginia currency, payable by installments, according to the terms of the bond; the condition of which, as far as it has any weight in explaining the original transaction, gives countenance to this statement. If it be adopted as the ground on which the case is to be decided, no doubt can be entertained that the installments bear interest from the time they respectively became due; for being principal debts, and secured by specialty, such a consequence follows of course. But even if the complainant's statement were assumed as a true representation of the contract, and these installments of sixty pounds considered the interest of the principal purchase money, still the authorities cited go a great length towards showing that a court of equity might justly sanction the recovery of interest, upon a failure in payment according to the agreement of the parties. As a general rule, interest upon interest is not allowable. But, when the sum is ascertained, and the annual payment of it forms a part of the contract, where it is so specific that an action of debt may be sustained, and interest recovered by way of damages for the detention, and particularly where the payment of a principal sum is postponed to a very distant period, upon the faith of a regular and punctual discharge of the interest, it ought in justice to be allowed. To such a case, the principal upon which interest is generally allowed seems to apply with strict propriety, viz., to supply the place of prompt payment, (526) and indemnify the creditor for his forbearance.

Injunction dissolved.

Cited: Bledsoe v. Nixon, 69 N. C., 93.

*Judges Johnston, Macay, and Taylor.

JOHNATHAN DAVIS AND WIFE, ET AL., v. GREEN DUKE, ADM'R OF WILLIAM DUKE.—Conf., 361.

Advancement of personal property made by an intestate in his own lifetime to his children are, under the Act of 1784 (1 Rev. Stat., ch. 64, sec. 1), to be brought into distribution for the benefit of the widow.

This case was brought from Halifax Superior Court. A petition was filed by the widow and next of kin to obtain distribution of the intestate's, William Duke's, estate. The county courts had referred the accounts to commissioners, who reported that the petitioner, Mary, the widow of William Duke, was entitled to an equal share with the children of the intestate's personal estate, including the advancements made by the intestate in his lifetime to his children. Part of the estate, however, was disposed of by a nuncupative will, which was not brought into the account. The exception to the report was that the widow is not by law entitled to a share in the advancements to the children.

Baker argued in support of the exception that it was plain from the words of the act of distribution that a child advanced by the intestate in his lifetime was to have an equal share with the other children, and that what he had received was not to be brought in for the benefit of the widow. To her was allotted by the Act of 1766 one-third of the surplus, and in directing the division among the children, she is not brought into view. Accordingly, it has always been held the widow was not entitled under that act. That although by the Act of 1784 the provision for the widow was differently modified, yet no allowance was made her (527) with respect to a child's advancement. If this had been intended by the Legislature, they would have expressed it in some of the laws by which this subject had so frequently been brought before them.

Haywood, for the petitioner, admitted that the construction contended for on the other side was the true and proper one, under the two Acts of 1715 and 1766; but he argued that, from the scope and design of the Act of 1784, as well as the phraseology it uses, it may be clearly inferred that the law is now different. The first acts referred to provide that the widow should have "one-third part of the surplus." This was allotted to her, without any regard to the number of children, or any view to make her share equal to theirs. But when the Legislature, by the Act of 1784, aimed to make an equality between her and the children, instead of surplus, they say personal estate; and wherever there are more than two children the widow shares equally with all of them, she being entitled to a child's part. It is also proper to be noticed that the Act of 1792, cap. 7, sec. 2, declares the intention of the former law to

have been to make the distribution of intestates' estates equal, without confining the principle to the children. From this view of the subject it will appear that the report is framed with propriety.

By the Court:* That the Act of 1766, appointing a method of distributing intestates' estates, was intended to produce the most perfect equality among the children, with respect to the distribution of their intestate father's estate. With this view, the material parts of the statutes of 22 and 23 Car., 2, and 1 Jac., 2, are incorporated into it. Whatever construction, therefore, is correct, in relation to those statutes, must be so with respect to this act, which has taken them for its basis, and which has even literally followed such of their provisions as affect this case. The law declares that no child who has received an advancement (except the heir at law) of an equal value with a distributive share, shall have any part of the surplus with their brothers or (528) sisters; but if the estates so given them are not equal to the other shares, the children so advanced shall have so much as will make them equal. This act entitled the widow to a fixed proportion of the estate, not liable to be varied by the number of children, though it was increased if there were none. To make the children's shares equal with each other was the design of the law; but to make the widow equal with the children, though it might happen in some cases, formed no part of the policy of the act. It has, therefore, been properly decided that a widow can derive no benefit from an advancement, which is brought into hotchpot. But the Act of 1784 extends to the widow that principle of equality which was before confined to the children, and in all cases where there are two or more, she is equally entitled to the personalty with them. This is evident from the law using the expression "a child's part," which, *ex vi termini,* imports as large a share as any child has. Now, if an advancement were brought in for the benefit of the children, to the exclusion of the widow, this act, made to improve her condition, would, in many instances, have a contrary effect; because, instead of the third, to which formerly she had a certain claim, her proportion must depend upon the number of claimants. The exception, therefore, ought not to prevail.

Report confirmed.

Cited: Littleton v. Littleton, 18 N. C., 330; *Headen v. Headen,* 42 N. C., 162.

*Judge Hall gave no opinion, having been of counsel in the case.

THE STATE v. WILLIAM JEFFREYS.—Conf., 364.

The Court will not quash an indictment for petit larceny, unless the defect be very plain and obvious. Hence, they refuse to quash where the caption of the indictment was as follows: "State of North Carolina, Franklin County, March sessions, 1798."

This was an indictment for petit larceny, brought from Halifax Superior Court, the caption of which was in these words: "State (529) of North Carolina, Franklin County, March sessions, 1798."

The defendant's counsel moved that it might be quashed, because it did not appear on the face of the indictment before what court it was taken, nor indeed that it was taken before any court. Every caption of an indictment ought to show that it was taken before a court which had jurisdiction of the offense. 2 Haw., 359, sec. 119.

Attorney-General, in reply. Admitting that before the year 1784 a formal caption was necessary in such a case, yet the act of Assembly of that year, ch. 34, has cured all defects of this sort, unless it can be said with propriety that the caption is part of the indictment.

That act repeals a former one, by which an adequate compensation was allowed to those law officers whose duty it is to draw indictments in the county courts; but the repealing act fixes so small a fee as the recompense for each indictment that the Legislature must have foreseen that neither the skill nor the circumspection which are requisite to draw indictments, with technical precision, could be tempted into the service of the country. Against the inconveniences which would naturally arise from this regulation, they have endeavored to provide, by enacting, "That no bill of indictment or presentment shall be quashed, or judgment arrested, for or by reason of any informalities or refinements, where there appears to the county court sufficient in the face of the indictment to induce the court to proceed to judgment." These words appear to be sufficiently extensive to embrace every possible defect, provided the sense and substance can be collected from the indictment. If the Legislature were now about to remedy, by a law, such defects as the one under consideration, they could not, in my apprehension, convey their meaning more forcibly than they have done by the expressions they have employed; unless, indeed, they were to enumerate all the defects they intended to remedy, which would be absurd. It cannot be imagined that the Legislature deemed it of no consequence to remedy de- (530) fects in the caption, while they were convinced of the necessity of remedying those in the body of the indictment; for it is probable that the bill was drawn by a lawyer, and any person in the least degree

conversant with such subjects knows that the task of framing captions with accuracy is more difficult than that of drawing the other parts of a bill. A caption is undoubtedly a part of a bill of indictment; it is the introduction to the other parts, is on the same paper, and must be conjoined with the bill itself. It is therefore within the act which declared "no bill of indictment, etc."

By the Court:* Whenever an application is made to the court to quash a bill of indictment, it should be founded on such an objection as is obvious and palpable; for if the question be susceptible of doubt whether the exception is fatal or not, the party will be put to plead or demur. The Act of Assembly contains expressions of very comprehensive import, and certainly takes away the force of many exceptions to an indictment in the county court, which would still prevail if made in the Superior Court, to an indictment originally found there. It presents to the county court this question, Do you see enough upon the face of the indictment to induce you to give judgment? If this appears, by the plain deductions of common sense, though the terms of art be omitted, either in the description of the offense, the mode, the place, or the time of its commission, the indictment must be sustained. It is possible, therefore, that enough appears in the caption of this indictment to warrant an intendment, that it was found at Franklin County Court; for to what else can the word "sessions" be referred? But upon this we give no positive opinion; for it being discretionary with the court, whether they will grant this motion or not, we do not think any argument in its support can be drawn either from the crime itself or the nature of the objection.

Motion overruled.

NOTE.—See *State v. Roach*, 3 N. C., 352, and the cases referred to in the note. See, also, *State v. Wasden*, 4 N. C., 596.

Cited: State v. Wasden, 4 N. C., 597; *State v. Heaton*, 81 N. C., 545.

*Judge Hall gave no opinion, having been of counsel in the case.

(531)

JUNE TERM, 1802

RICHMOND PEARSON ET AL. V. OBADIAH SMITH.—Conf., 367.

Possession will support trespass against a party, who interrupts that possession by force.

This was an action of trespass *quære clausum fregit,* brought by the plaintiffs in Salisbury Superior Court of Law, for the purpose of trying their title to a fishery in the river Yadkin. On the trial, at September Term, 1801, the jury found a special verdict, viz.:

"The jury find, that on the 20th day of December, 1791, the State, by a patent deed granted the land mentioned and included in the lines and boundaries described in the plaintiff's declaration to William Giles; and that all of the said land so included in the said boundaries is the bed of the river Yadkin, covered with water, except about one acre and a little bar or sand bank, about the middle of the river, which is not usually or commonly covered with water, and is not a natural but an artificial bank, raised by some persons for the purpose of fishing, prior to the date of the said grant.

"That afterwards, to wit, on the sixth day of January, in the year 1792, the said Wm. Giles conveyed the said close so included as above to the plaintiffs, Richmond Pearson and Henry Giles, who afterwards, to wit, in the month of March, in the year 1792, aforesaid, previous to the bringing [of] this action by the plaintiffs, was in the actual possession thereof; and being so thereof in the actual possession as aforesaid, the said defendant did forcibly enter therein and drive away certain persons there fishing for the use of the plaintiffs, and under their permission.

"The jury further find, that many years ago, at what precise time the jury are ignorant, the said fishing bar was a shallow of the river, and by the work and labor of some persons to the jury here unknown,
(532) was raised as above set forth; and that on or about the month of April, in the year 1781, the same bar was in the use and occupation of the said William Giles and one Charles Baxter, which said Baxter sold his share thereof, or such interest, if any he had therein, to the said Obadiah Smith.

"And the jury further find, that the said Obadiah Smith, the defendant, hath never entered the same in any land office in this State, or obtained any deed or grant thereof from this State. But whether or not the said place," etc.

STATE *v.* HENDRICKS.

By the Court: The jury having found that the defendant drove the plaintiffs from their possession by force, there can be no doubt that he was guilty of a trespass; therefore, judgment should be entered up for the plaintiffs.

NOTE.—See *Myrick v. Bishop*, 8 N. C., 485; *Smith v. Wilson*, 18 N. C., 40.

STATE v. DANIEL HENDRICKS.—Conf., 369.

An indictment, charging the offense to have been committed in November, 1801, and in the 25th year of American Independence, *held* to be bad, and the judgment arrested, because the offense is charged to have been committed in two different years.

The defendant was indicted for horse stealing in Salisbury Superior Court of Law, March Term, 1802. The indictment laid the offense "on the thirtieth day of November, in the year of our Lord one thousand eight hundred and one, and in the 25th year of the Independence of the State." The defendant, being tried and convicted on this indictment, moved in arrest of judgment, and assigned the following reason, to wit: "The offense laid in the bill of indictment is charged to have been committed in the twenty-fifth year of American Independence; whereas, in truth and in fact, it was done in the twenty-sixth year of the said independence, as is apparent in the form of the indictment." (533)

By the Court: The fact is charged to be committed on the 30th day of November, in the 25th year of the Independence of the State, and in the year of our Lord 1801, which is in the 26th year of Independence; therefore, charged to have been committed in two different years; which is contradictory, and vitiates the indictment.

No indictment can be good without precisely showing a certain year and day, of the material facts alleged in it. 2 Hawk. P. C., 235. It is certain that if the indictment lays the offense on an uncertain or impossible day, as where it lays on a future day, or lays one and the same offense at different days, etc., it will be held bad. *Ibid.* This is expressly the case in question. The offense is charged to have been committed on the same month in two different years, which is impossible. We are therefore of opinion that the judgment should be arrested.

NOTE.—See *State v. Sexton*, 10 N. C., 184; *State v. Woodman, ibid.*, 384.

HUDSON HUGHES ET AL. V. THE TRUSTEES OF THE UNIVERSITY.—Conf., 370.

Where confiscated lands were sold by the State and the contract afterwards relinquished and the lands surrendered to the State before the year 1794, the lands passed to the University of that year. (See 2 Rev. Stat., page 428.)

The complainants filed their bill in the court of equity for Salisbury District, at March Term, 1800. By the bill it appears that the complainants, Hudson and Joseph, in the year 1795, purchased a tract of land of the defendants, who sold by Adlai Osborn, their commissioner and attorney, which land was claimed by them as having been the property of Henry E. McCulloch, consequently confiscated, and by the Act of Assembly passed in the year 1794, granted to and vested in the (534) defendants; that in August, 1795, the said Adlai Osborn, in the name of the defendants, executed to them a deed, sufficient in legal form to convey to them the land in fee simple; and that they at the same time, with Edward Yarborough, their security, executed a bond to the defendants for the payment of the purchase money of the said land. The bill then charged that the land had been sold by the State to one Brandon, before the passage of the said act, who before that time had, by petition, prevailed on the Legislature to dissolve the contract by releasing him from the payment of the purchase money, and receiving the land again, to the use of the State. That the defendants had commenced an action at law on the said bond, and threatened to compel the complainants to pay the said purchase money, and insisted that the land so sold to them was not within the meaning and operation of the said act, and that the defendants had no title to the same. The complainants prayed an injunction, etc., until the question on the operation of the act should be judicially settled, etc. An injunction was accordingly granted; and the usual proceedings being had, the bill was taken *pro confesso,* and the cause heard on the bill.

By the Court: By the Act of 1794 it is contemplated that the remnant of confiscated property unsold by the commissioner might contribute to furnish means for a permanent establishment, etc. Then it gives it all the lands not heretofore sold, etc. We are of opinion that the purchase by Brandon, being relinquished before the grant to the trustees, and the estate being then in the State, that it passed with the other property, and was vested in the trustees in the same manner, and that they had as good a right to convey it as they had to convey any other confiscated property.

(535)

JESSE BRUTON'S EX'RS v. LEN H. BULLOCK'S EX'RS.—Conf., 372.

Contracts in depreciated currency should be scaled according to the rate existing at the time the contract was made.

Len H. Bullock executed to Jesse Bruton a bond in these words, to wit: "I promise to pay to Jesse Bruton, his heirs or assigns, the sum of fifteen hundred pounds, proclamation money, to wit, three hundred pounds on the third day of August, 1775; three hundred pounds on the third day of August, 1776; three hundred pounds on the third day of August, 1777; three hundred pounds on the third day of August, 1778; and three hundred pounds on the third day of August, 1779, for value received. Witness my hand and seal, 3d day of August, 1774." On the 5th January, 1775, Jesse Bruton assigned this bond, in the usual manner, to Messrs. Hamilton & Co.

The suit was tried in the Superior Court of Law for Halifax District, at April Term, 1802. The jury found the value of the money mentioned in the bond to be £1,020 15s., and assessed damages for the detention of the debt to £48 9 7. The plaintiffs, being dissatisfied with the verdict, moved for a new trial; and the case was referred to this Court.

MACAY, J. This appears to me to be a proper case for a jury to ascertain the value of the bond, who may have all the circumstances relating thereto laid before them.

JOHNSTON, J. This was a bond, executed in 1774, to secure the payment of fifteen hundred pounds, proclamation money, at five equal payments, commencing on the third day of August, 1775, and ending in August, 1779. At the time the contract was made, and the two first payments became due, the proclamation money had not depreciated; but that currency, and all other paper money, had greatly depreciated before the last payment became due. The jury in their verdict gave the plaintiffs only so much as the nominal sums were worth on the days they became payable; whereas, the plaintiffs contend they should (536) have given the value of the nominal sums as it was at the time when the contract was entered into. When a person enters into an obligation in writing, attended with the legal ceremony of sealing and delivery, the law presumes, without other evidence, that he has received a consideration equal in value to the sum he obliges himself to pay; if, therefore, the jury give a less sum than that which the parties themselves had in contemplation at the time when they entered into the contract, the plaintiff does not receive a compensation adequate to the value

of the property transferred to the defendant at the time; thus, the defendant obtains an advantage and the plaintiff sustains a loss which neither of them had in contemplation at the time when the contract was entered into; therefore, in order that the plaintiffs should have the real benefit of their contract, according to the intention of the parties, if they take the subject under their consideration, should find what was the value of proclamation money in the present currency, agreeable to their relative value to specie, respectively. I am therefore of opinion that the new trial be allowed.

TAYLOR and HALL, JJ., were of opinion that a new trial ought to be granted.

NOTE.—See *Hamilton v. Person*, 3 N. C., 236; *McNair v. Ragland*, 16 N. C., 516. Otherwise now, Code of 1883, sections 1183, 1189.

SMOOT & THOMPSON v. WRIGHT'S ADM'RS.—Conf., 374.

An executor cannot plead that he has fully administered since the last continuance; as every plea of fully administered must have reference to the commencement of the action, or at least to the time of process served.

The defendant pleaded that he had fully administered since the last continuance, to which there was a demurrer and joinder.

(537) By the Court: A plea since the last continuance is to set forth matter which has happened pending the suit, and after having pleaded to the action at a former term; and though there are some pleas which an executor or administrator may plead after the last continuance, yet we know of no instance where this plea could be admitted; for, if it should be found for the defendant that he had fully administered since the last continuance, it ought not to bar the plaintiff of his recovery. In order to bar the plaintiff, it must be pleaded and shown that the defendant had fully administered before the commencement of the action, or at least before any process served on him. We are therefore of opinion that judgment should be entered for the plaintiffs on the demurrer.

NOTE.—See *Woolford v. Simpson*, 3 N. C., 132, and the cases referred to in the note.

JASON WELLS v. LEVI NEWBOLT.—Conf., 375.

If a tenant in tail aliens in fee and dies, leaving the issue in tail free from any of the disabilities mentioned in the statute of limitations, and such issue neglects to enter or make claim for seven years after the death of his ancestor, he and his issue will be forever barred.

This was an action of ejectment in Wilmington Superior Court. At the trial in May Term, 1802, the jury found a special verdict in substance as follows, to wit:

"The jury find that the land in question was granted to William Wells in the year 1735; who some years afterwards, by his last will and testament devised the same to his two sons, Joseph and Henry, in the following manner, viz.: "I give and devise the plantation whereon I live to my two sons, Joseph and Henry, and their heirs lawfully begotten of their bodies forever; to be divided, each of them to have one-half of the wood land and one-half of the cleared ground; and in want of heirs of either of them, then the whole to go to the survivor or his heirs, and in failure of both of their heirs, then to my right heirs forever," and died in the year 1743. Henry died under age and without issue (538) in 1749. Joseph, who survived Henry, by deed of bargain and sale, bearing date the 3d day of February, 1761, for a valuable consideration, conveyed the land in question to Stephen Lee and his heirs forever. The operative words in the deed are "give, grant, bargain, sell, alien, enfeoff, convey, and confirm," with a covenant or warranty in the words following, to wit: "And furthermore, I, the said Joseph Wells, for myself, my heirs, executors, and administrators, do covenant, grant, promise, engage, and agree to and with the said Stephen Lee, his heirs, executors, administrators, and assigns, the above bargained land and premises, together with all the privileges and appurtenances thereunto belonging, forever hereafter, to warrant and defend against the lawful claim or demand of all manner of persons whatever." Stephen Lee and those claiming under him have been in possession of the land ever since. Joseph Wells died in the year 1787, leaving issue, David, his eldest son, William, his second son, and two daughters. David Wells died in 1798, leaving issue, Jason, the lessor of the plaintiff, Joseph and Elizabeth. Upon these facts the jury doubt, and pray the opinion of the Court.

Gaston, for the defendant. The first object of inquiry appears to be what estate Joseph Wells had in the land contended for at the time of his conveyance to Stephen Lee. Should it appear that he was seized in fee thereof, it will follow that having absolutely disposed of all his

interest, the present plaintiff can claim nothing by descent from him. If, on the contrary, Joseph Wells was merely tenant in tail, it will then be necessary to examine whether the entry of the issue has been taken away.

1. The defendant contends that Joseph Wells was seized in fee. The words of the devise are, "To my two sons, Joseph and Henry, and their heirs lawfully begotten of their bodies forever, to be divided; each of them to have one-half of the cleared ground, and each of them one-half of the wood land; and in want of heirs of either of them, then the whole to go to the survivor or his heirs, and on failure of both their heirs, then to my right heirs forever." It is admitted that by the former part of this devise estates tail are granted to Joseph and Henry, and that the words "in want of heirs of either of them" are to be construed as if they were "in want of heirs of the body of either of them"; because it is impossible that either of them should die without heirs as long as the other survived. *Webb v. Herring,* Cro. Jas., 416. But it is contended that the subsequent words, "and in want of heirs of either of them, then the whole to go to the survivor or his heirs," did, upon the death of Henry without issue, in the lifetime of Joseph, vest in him (Joseph) an absolute estate in fee. The very definition of an estate in fee simple is, where lands are given to a man and his heirs, generally and simply, without specifying what heirs, but referring that to his own pleasure, or to the disposition of the law. This is plainly the case here, "the whole to go to the survivor or his heirs"—not heirs male nor heirs female, not heirs of his body, but heirs generally. The last words of the devise, "and in failure of both their heirs, then to my right heirs forever," cannot, under the authority of the rule laid down in *Webb v. Herring, supra,* and in the other cases reported in the books on the same head, be considered as confining the meaning of the word "heirs" just before used to that of heirs of the body; because it is not impossible that the sons should die entirely without heirs while there were heirs remaining of the father. The heirs of the father are not necessarily the heirs of the son, as the father may have children by different venters, who cannot inherit from each other. It is therefore believed that, under the devise, each son was tenant in tail of the part to him devised, with remainder in the whole to the survivor in fee, and that the subsequent limitation over to the right heirs of the devisor is void, it being a limitation of a fee upon a fee.

2. If, however, it should be thought that Joseph Wells was but a tenant in tail at the time of his conveyance to Stephen Lee, it is then contended that by that conveyance a discontinuance was made, which took away the right of entry of the issue in tail, and that an ejectment cannot be supported.

No position appears to be laid down in our law with more clearness or more force than that an ejectment will not lie, except the lessor of the plaintiff have in him a right of entry. Rupnington on Ejectments, pages 10 and 11; 3 Black. Comm., 206; 3 Woodeson, 44 and 45.

Lord Coke defines a discontinuance, Co. Litt., 325 *a*, to be "an alienation made or suffered by tenant in tail, or by any that is seized in *auter droit*, whereby the issue in tail, or the heir, or successor, or those in reversion or remainder, are driven to their action, and cannot enter." Estates tail are known to have originated from what were termed at common law "fees conditional." These were fees limited and restrained to some particular heirs exclusive of others, as to the heirs of a man's body, by which only his lineal descendants were admitted, in exclusion of collateral heirs. A gift thus made, to a man and the heirs of his body, was considered as a gift on condition, that the thing given should revert to the donor, if the donee had no heirs of his body, but if he had, that it should remain to the donee. As soon as the donee had issue, his estate became to most purposes absolute.—He could alien the land, and thereby bar his issue, and also him in reversion. The nobility of England, anxious to perpetuate their possessions in their families, procured the statute *"de donis conditionalibus"* (13 Edw. 1), to be made, by which it was enacted that from henceforth in such gift the will of the donor should be observed, and that the lands so given should at all events go to the issue, if there were any, or, if none, should revert to the donor. Upon the construction of this statute it was determined that an estate of inheritance still remained in the donor; this got the name of an estate tail. Innumerable inconveniences attended estates tail. Some of them are stated with great force and elegance by Justice Blackstone in his Commentaries. Children grew disobedient—farmers were ousted of their leases made by tenants in tail—creditors were defrauded of their debts—latent entails were produced to deprive purchasers of the lands they had fairly bought—and treasons became frequent. They were justly branded as the source of new contentions and mischiefs unknown to the common law, and almost universally considered as the common grievances of the realm. In *Anthony Mildmay's case,* reported 6 Co. Rep., 40, it was resolved by the Judges that "these perpetuities," so they style them, "were against the reason and policy of the common law." In *Mary Portington's case,* 10 Rep., 42, it was observed "that these perpetuities were born under some unfortunate constellation," and similar expressions are frequently met with in the ancient reporters. It is not therefore to be wondered at that various artifices were used to elude these new restraints upon property. One of these was carried into effect through the medium of a discontinuance. This cannot perhaps be better explained than by using the language of the eminent conveyancer and

lawyer, Mr. *Butler,* in one of his Annotations on Coke Litt., 15 Ed., Hargrave and Butler's Co. Litt., 191 *a,* note 77, v. 8. "It has been observed that though the statute *de donis* took away the power of lawful alienation, it did not suspend the vesting of the fee. The alienation, therefore, of the donee, tenant in tail, was no forfeiture; and the alienee, as he took his conveyance from a person seized of the fee, was considered as coming in under a lawful transfer of the inheritance. Now it was an established rule of law that whenever any person acquired a presumptive right of possession, his possession was not to be defeated by entry. The consequence of this was that in these cases the alienation was unimpeachable during the life of the alienor, and after his decease, the heir could not assert his title by the summary process of entry, but was driven to the expensive and dilatory process of formedon: this was termed a discontinuance. The expense and delay attending a formedon frequently prevented the tenant in tail from resorting to it to assert his right. In the course of time the period for asserting it elapsed, and thus therefore, virtually, the discontinuance proved a bar to the entail." It was not, however, by every mode of conveyance that a tenant in tail could operate a discontinuance. No conveyance but such as took effect by way of transmutation of the possession, or such as on account of the particular solemnities attending them were deemed sufficient to disturb the original seizin, could of themselves work a discontinuance. Thus, Litt., sec. 598, page of Coke, 328 *a,* tells us, "If a tenant in tail be disseized, and he release by his deed to the disseizor and to his heirs all the right which he hath in the same tenements, this is no discontinuance; because a release passeth nothing but the right which may lawfully be released, without hurt or damage to others; and therefore nothing of the right could here pass to the disseizor, but for term of the life of tenant in tail, who made the release." Neither will a conveyance that takes effect by the statute of uses operate a discontinuance, where the possession remains with the party; for in such cases the original seizin is not disturbed: there is no transmutation of possession—a mere bargain and sale, it is conceded, cannot operate a discontinuance. A feoffment certainly may. Thus Litt., sec. 595, page of Coke 326 *b.* "If tenant in tail of certain land, thereof enfeoff another, etc., and has issue and die, his issue may not enter into the land, albeit he has title and right to this, but is put to his action, which is called a formedon *en le descender.*" The conveyance referred to in the special verdict, and made a part of it, must be considered either as a feoffment or as a bargain and sale. Why should it not be considered as a feoffment?

A feoffment is defined by Justice Blackstone, 3 Comm., 314, "the gift of any corporeal hereditament to another." The apt words whereby to make it are "give, grant, enfeoff." To complete and perfect feoff-

ment, the feoffer used to give the feoffee seizin of the land; what the feudists called investiture. This was done by the ceremony called livery of seizin, which ceremony was held necessary to complete the donation. Had this ceremony been used at the time of making the conveyance, which we are now considering, that conveyance would undoubtedly have operated as a feoffment. It was an immediate gift of the inheritance. It has the technical and proper words, "give, grant, enfeoff." It was intended to operate on the possession as well as the right, the possession being here conveyed and the use limited to one and the same person. But our Act of 1715, cap. 38, secs. 5, 23, directs that all conveyances of land proved and registered as by that act directed "shall be valid and pass estates in land without livery of seizin, attornment, or other ceremony whatsoever." The necessity, therefore, of livery of seizin to perfect a feoffment is taken away by this act. The notoriety occasioned by a registration of the conveyance in the county where the land lies is adopted by the act as a substitute for the notoriety arising from the actual tradition of possession. This conveyance, therefore, having been duly proved and registered, should have the same effect as if livery of seizin had been made with it. It must then operate as a feoffment. Let it be remembered that the rule of law is, "That where conveyances may operate both by the common law and the statute of uses, they shall be considered as operating by the common law, unless the intention of the parties appears to the contrary." See Hargrave and Butler, Co. Litt., 271 *b*, note 231, III, 3, explaining the conveyance by lease and release.

But admitting the conveyance to be a bargain and sale, yet the warranty annexed to it works a discontinuance. Thus, Littleton, sec. 601, p. 327 *b*, observes that "if the tenant in tail release to his disseizor, and bind him and his heirs to warranty, and die, and this warranty descend to his issue, this is a discontinuance by reason of the warranty." For which Lord Coke immediately gives as a reason, "if the issue in tail should enter, the warranty, which is so much favored in law, would be destroyed." In note 284, to 330 *a*, of Co. Litt. it is also stated that although a bargain and sale, etc., etc., will not of themselves work a discontinuance, yet "if a warranty is annexed to a bargain and sale, etc., it may produce a discontinuance."

Here is a warranty. The words are: "I, the said Joseph Wells, for myself, my heirs, executors and administrators, do covenant, grant, promise, engage, and agree to and with the said Stephen Lee, his heirs, executors, administrators, and assigns, the above bargained land and premises, together with all the privileges, etc., etc., forever hereafter do warrant and defend against the lawful claim or demand of all manner of persons whatever." If, instead of *do* warrant, the phrase of *to* war-

rant had been used, there would be much force in the observation made by one of the counsel for the plaintiff, that this is not an actual warranty, but merely a covenant to warrant. The expression is *do* warrant. The conjunction *and,* perhaps, should have been inserted, and then the intention of the parties would have clearly appeared. There would be then both a warranty to bar the issue and a covenant to indemnify and secure, which would bind executors. But without the insertion of the conjunction, if surplusage be rejected, there remains a clear warranty. If there be any ambiguity, the deed is to be taken most favorably for the grantee, and most strongly against the grantor.

Perhaps it will be said on the part of the plaintiff that, although there be a discontinuance which takes away the right of entry, and although an ejectment cannot (as has been shown) be brought but by him who has a right of entry agreeably to the general principles of law, yet that as actions of formedon have never been in use in this country, and as only such parts of the common law and such statutes as were in force and in use here before the Revolution are declared by our Legislature to be in full force now within this State; if the lessor of the plaintiff have but a right of property, that will be sufficient to support an ejectment. To this it is answered that, admitting that actions of formedon cannot be brought, it is the province of the Legislature and not of the courts to alter (if deemed necessary) the established principles of law; and that, if the courts could legislate on this subject, they would not do so in support of entails, which are so strongly reprobated by our Constitution and bill of rights. [See bill of rights, sec. 23, and Const., sec. 43.] But it is denied that actions of formedon may not be brought. Such actions are expressly taken notice of and jurisdiction of them given to certain courts and withheld from others. See Act of 1777, cap. 2, sec. 61, page 310, and Act of 1785, cap. 2, sec. 1, page 547.

3. It is denied by the defendant that the plaintiff has in him even a right of property, which would enable him to support any action; and it is insisted that the absolute title to the premises in dispute is in the heir of Stephen Lee, although Joseph Wells had but an estate tail when he conveyed to said Lee.

Let it be admitted that this conveyance passed a title *prima facie* good, yet defeasible upon the death of Joseph; defeasible, if not by entry, by suit. If it has not been defeated within the time prescribed by our Act of 1715, for quieting men's estates and avoiding suits in law, it has become absolute and indefeasible. Examine the second section of that act and it will be seen that this case is one to which it applies. "All possessions of or titles to any lands, etc., etc., derived from any sales made either by creditor, executors, or administrators of any person deceased, or by husbands and their wives, or by husbands in right of

their wives, or by endorsement of patents or otherwise, of which the purchaser or possessor, or any claiming under them, have continued or shall continue in possession of the same for the space of seven years without any suit in law, be and are hereby ratified, confirmed, and declared good and legal, to all intents and purposes whatsoever, against all and all manner of persons; any former or other title, or claim, etc., etc., to the contrary notwithstanding."

It would not have been easy to find language more strong, more comprehensive than the Legislature have used. This is a title derived under a sale, and the purchaser has continued in possession more than seven years without suit at law, while there were persons in being entitled to bring suit, and who did not come under any of the exceptions afterwards mentioned, who were not infants, *femes covert, non compotes,* imprisoned, or beyond seas. This title, therefore, thus derived, is, in the words of the act, good and legal, to all intents and purposes, against all and all manner of persons.

It may be contended on the part of the plaintiff that the above recited clause was intended to operate only on sales that had been made previously to the act. But no evidence of such an intention is to be found in the act itself. The participle "deprived" is used generally, and is as susceptible of a future as of a past signification. No auxiliary is prefixed to it to limit its time. It might with equal propriety have been subjoined to the verb *to be,* used in the future, as in the past tense. If the Legislature had intended that this clause should operate only on titles that *had been* derived, it is presumable they would have so expressed themselves. If they had meant it to have effect only on such titles only as should *thereafter* be derived, it would have been equally easy to declare such intention in plain and precise words. Having used the word indefinitely, it is conceived they had in view both description of cases. But should such a construction be put on *this* clause as the plaintiff will probably contend for, such a construction as will prevent its application to the present case, it is nevertheless firmly believed that the subsequent clauses of the act, the third and fourth, will be sufficient for the defendant's purpose. Before our Act of 1715 there were times of limitations settled, beyond which no man, either in an action to establish the right or to recover the possession, could avail himself of the seizin of himself or his ancestors, or take advantage of the wrongful possession of his adversary. By the statute of 32 Henry 8, cap. 2, sixty years were made a limitation to a writ of right, and fifty years (in general) to an assize and writ of entry. By the statute, 21 James 1, cap. 16, twenty years were fixed as a limitation to entries and ejectments, and to actions of formedon. The words of this last mentioned statute as to formedons are strong and pointed. "All writs of formedon *in descender,* etc., etc.,

of any manors, etc., etc., at any time hereafter to be sued or brought, by occasion or means of any title or cause hereafter happening, shall be sued and taken within twenty years next after the title and cause of action first descended or fallen, and at no time after the said twenty years." By this statute, if an action of formedon was not brought within twenty years after the right to such action had *first* descended, that is (as in our case), after the death of the tenant in tail who discontinued, such an action could never afterwards be brought, neither by the immediate issue, who permitted the twenty years to elapse, nor by the issue of that issue. The statute does not distinguish between them. It would indeed have been idle to have called it a statute for avoiding suits in law, if it had permitted the subsequent issue in tail at any indefinite period of time to have brought an action of formedon, provided twenty years had not elapsed since *his* alleged title had descended. Were this the case, the discontinuee and his heirs might enjoy the lands purchased for centuries, and yet be liable on the death of every heir of the body of the first tenant in tail to be evicted by his successor. That the construction contended for by the defendant is correct will appear pretty evident from the comment of Lord Coke on the statute, 22 H., 1, and the note thereon. Co. Litt., 115 *a*, and note. Twenty years are also the limitation to entries by this statute. Our Act of 1715, by its third and fourth cases, makes seven years a limitation to all actions respecting land, by declaring that no person shall either "enter or make claim" but within that period after the right to entry or claim accrues; and by declaring further that, with certain exceptions as to infants, etc., a possession of 7 years without entry or suit in law shall be a perpetual bar against all and all manner of persons whatsoever, "that the expectation of heirs may not in a short time leave much land unpossessed, and titles so perplexed that no one will know of whom to take or to buy lands." Joseph Wells, it will appear from the special verdict, died in 1787. David, his eldest son, lived till 1798; Stephen Lee, and those claiming under him being in actual possession of the premises during the whole period.

4. The defendant also urges that his right to the possession of the premises is completely established, if it should fail on the preceding grounds, by the Act of 1784, cap. 22. If that act converted the estate tail (admitting for the moment that such it was) into a fee simple, the plaintiff is undoubtedly barred by the act of limitation.

The clause of the act which is believed to have this effect is the fifth. This clause, reciting that "Entails of estates tend only to raise the wealth and importance of particular families and individuals, giving them an undue influence in a republic, and that they prove in many instances the sources of great contention and injustice," enacts, "That from and

after the ratification of the act, any person seized or possessed of an estate in general or special tail, whether by purchase or descent, shall be held and deemed to be possessed of the same in fee simple, fully and absolutely, without any condition or limitation whatsoever to him, his heirs and assigns forever, and shall have full power and authority to sell and devise the same as he shall think proper, and such estate shall descend under the same rules as other estates in fee simple;" and it further ratifies and makes valid all sales made by tenants in tail, in actual possession since the first day of January, 1777. This act undoubtedly is entitled to the most liberal construction, since it is made in consequence of a constitutional injunction. Its title is, "To do away entails." The words "seized or possessed," in the former part of the clause, should not be confined to mean actually possessed; for in the latter part of the clause the words "actually possessed" are made use of: The expression would not have thus varied if the meaning remained the same. It is therefore conceived that the entail of the lands sued for was broken by the Act of 1784.

The sons of Joseph Wells were entitled, on his death, to a fee simple therein, and as they did not prosecute their claim within the period assigned by law, all deriving title under them are forever barred. A construction similar to this has been, it is said, put upon this act by the Federal Circuit Court of this State in the case of *Harrison v. Gilmour.*

Thus, therefore, the defendant insists:

1. That Joseph Wells was seized in fee at the time of his conveyance to Stephen Lee.

2. If he were seized in tail, that this conveyance worked a discontinuance which has taken away the right of entry, without which an ejectment cannot be supported.

3. That seven years possession since the death of Joseph Wells had under the Act of 1715 perfected and completed the title of Stephen Lee.

4. That the estate tail was broken by the Act of 1784, and claim not having been made within the time prescribed in our act of limitations, the sons of Joseph Wells and all claiming under them are forever barred.

Should any one of these points be determined in favor of the defendant, the plaintiff cannot have a judgment. If all the grounds of defense taken should fail, it is submitted whether the plaintiff can recover but a ninth part of the lands sued for. Joseph Wells died since the Act of 1714, leaving three sons—David, the eldest son, died since the Act of 1795, leaving issue, besides the plaintiff, a son and a daughter. The Act of 1784, regulating descents, directs that all the sons should inherit equally, and the Act of 1795 places the daughters on the same footing with the sons.

Haywood, for the plaintiff. This case is not within the Act of 1784; it is to be decided by the law prior to that act, and as if that act had never been made.

The act provides for two cases. One where tenant in tail is found in possession at or after the act; his estate tail is converted into a fee; if he is not in possession, but has a right to it only, that right is not impaired, nor his remedy to recover it abridged. As the object of the act was to do away [with] perpetuities, it was not necessary to this end that rights of entry of tenant in tail should be destroyed, nor the defeasible estate of a wrongful possessor should be rendered indefeasible at the expense of tenant in tail out of possession. For the estate, when recovered and reduced into possession, instantly becomes a fee by the operation of the act, and the perpetuity as completely done away as it could be by annulling rights of entry; and, moreover, the invasion of the right of property is avoided; the words "seized or possessed," etc., were purposely inserted to exclude the idea of intermeddling with rights of entry or of action.

The other case provided for is that of a solely tenant in tail after the first day of January, 1777, evincing a clear intent not to interfere with alienations made before that period, and to leave them as they were under the regulation of the laws in being. The case before us falls under neither of those branches of the act, and is in no wise affected by it.

What, then, was the law as it regards this case before and at the passing of the Act of 1784? It was, that a conveyance by tenant in tail made by bargain and sale, release, covenant to stand seized, or other conveyance not operating by way of feoffment, passed no more to the bargainee than the bargainor could lawfully convey: A base fee, determined by the entry of issue in tail, and, consequently, by his ejectment. Litt., secs. 606, 607, 609, 610; 2 Ld. Raymond, 778; 3 Burrow, 1703. Lee's estate was of this kind, and was defeasible by entry or ejectment of the issue in tail, and is so at this time, unless the right of possession of the issue has been destroyed by some of the means adverted to in the objections raised against his recovery. These shall now be considered and be attempted to be removed.

The first objection is, that the estate of the surviving devisee, which came to him on the death of his brother, was not an estate tail, but an estate in fee, and well conveyed to Lee. Answer: Supposing this to be so, he had still an estate tail in his own moiety, and we are entitled to recover that, though the objection be valid; but it is not valid; the limitation, if I recollect it, is "if the survivor die without heirs, then to the right heirs of devisor." Now, it is a rule that whenever an estate is limited to the right heirs of the devisor by will, and the quality of the estate is not altered by the devise, the right heirs take by descent, as well

that they may be liable to the specialty debts of the ancestor as to the feudal duties owing to the lord. Then, the estate contained in this limitation came by descent, immediately on the death of the devisor, to one of these devisees; for it is not stated, and therefore cannot be assumed, that he had any other sons: On the death of the last son, it descended on some one, who was both the heir of the son and of the devisor; it was impossible, therefore, that the survivor could die without heirs general so long as there were heirs of the devisor, who necessarily were his heirs also to take; and, consequently, the dying without heirs here spoken of must have been intended heirs of the body, and create an estate tail. Cowp., 234; 1 P. W., 23; Salk., 233, pl. 12. The defendant cannot say the devisor might have an elder son by another venter, who was the heir of the devisor, and not the heir of the surviving devisee: No such fact is found by the verdict, and we cannot travel out of it; nor was any such fact proved on the trial, were we allowed to travel out of it. In the case cited from Salk. and P. W., it was taken that A. was the heir of the devisor, and the brother of the whole blood to B., it not being found otherwise; so here there is no finding that the devisees were not of the whole blood, nor that there was any son of the devisor who was his heir and not the heir of the devisees, in case of their deaths without children. Therefore, on the death of the survivor, the estate limited to the right heirs of the devisor must have gone to the eldest son of the survivor; or, had he died without children, to the uncle on the father's side, being precisely the same persons who are heirs of the survivor, and also heirs of the devisor, and then the limitation of the estate to the survivor on the death of his brother, and for want of heirs of the survivor, over, is the limitation of an estate tail; Fearne, 4 Ed., 350, 351.

Again, the intent of the devisor is plain, that the survivor, on the death of his brother, shall have an estate descendable to his heirs, but at the same time such an estate as leaves another estate for the heirs of the devisor; and this is the very description of an estate tail. There is no way to get over considering it as such but by supposing the devisor had an elder son by another venter; but, for the reasons already given, no such supposition should be made. If it can legally be made, the cases from Salk. and P. W. are not law, for in these there was as much room for such supposition as here; there was no finding in these cases that there was not an elder son of the half blood. The survivor, then, of these devisees was seized of an estate tail in both moieties, with the reversion in fee to himself by descent.

Another objection is that a feoffment in fee by tenant in tail works a discontinuance, and that the deed to Lee is a feoffment. The law, as stated, is not denied; but it is denied that this deed is a feoffment. The

deed agrees in every part of its description with that of a bargain and sale, which is, "a contract in consideration of money, passing an estate in lands, by deed indented and registered." 1 Ba. Ab., 273. The words "alien, grant, enfeoff," are as proper for a deed of bargain and sale as the words "bargain and sell"; Sanders, 345; 8 Rep., 93 *b*, 94 *a;* 3 Leonard, 16, pl. 39. Should the word "enfeoff," therefore, be found in this deed, no just inference can thence be drawn in favor of the objection; the same argument would convert almost every deed into a feoffment, for it is very general and in almost all deeds. We should look well to the consequences of such an opinion before it be adopted. What is a feoffment? The definition of it is, "a conveyance by delivering possession upon or within view of the land conveyed." Sanders, 206. A deed forms no part of the conveyance, though it may accompany the feoffment, and is of use to evidence the quantity of estate conveyed; 2 Ba. Ab., 483; still, however, if the deed expresses an estate in fee, and the feoffer deliver seizin for life, the feoffee can hold but for life; Litt., sec. 359; Co. Litt., 222 *b;* for the estate passes by the livery, and not by the deed. There was no livery; whatever estate passed, passed by the deed; it was not a conveyance by feoffment, for nothing can constitute a feoffment but livery and seizin. It is argued, however, that the Act of 1715, cap. 38, sec. 5, allows of a feoffment without livery and seizin; if this be so, the act has changed the nature and description of a feoffment, and has made a deed to be a feoffment, which, before, it could not be. The words which are supposed to have worked this alteration are, "all deeds registered shall pass estates in lands without livery of seizin, attornment, or other ceremony." Does it follow that because livery and seizin, or feoffment (for these terms are synonymous), are rendered unnecessary or unessential to the passing of estates in lands, that, therefore, deeds conveying estates shall be deemed feoffments? Certainly no dispensing with livery and seizin is dispensing with feoffment. If a man chooses to convey by feoffment, he may; but then he must perform all the ceremonies which are requisite to constitute a feoffment; otherwise, it will not be a conveyance by feoffment, since the act any more than before.

Admit, however, that the nature of a feoffment is changed by the act from what it was, and that some ceremonies are now omitted which were formerly essential; the consequences and the effects of the omitted ceremonies will cease with them, *causa cessante, cessat effectus.* Then, it follows that the discontinuance, being the effect of livery and seizin, ceases with it. Wherefore is it that a discontinuance is operated by the feoffment of tenant in tail? It is because tenant in tail, having the inheritance, and the possession of the inheritance, not a possession for life only, coextensive with the *quantum* of interest in the estate, and trans-

ferring it by livery, not only passes the possession for his life, which he lawfully may transfer, but also the possession of the inheritance, which belongs to the issue, and which he ought not to transfer; and so leave no right of possession which can descend to the issue, but a right of property and of action to recover it; which is a discontinuance. Gilb. on Tenures, 108, 109. It is the actual transfer of the possession which produces this effect; and, accordingly, if he passes the estate by deed, for instance, a bargain and sale or release, which latter is a conveyance of the common law, that passes no more than he lawfully may pass, namely, a possession for the life of the grantor, leaving a right of possession to descend to the issue, and works no discontinuance; Litt., secs. 598, 599, 600, 601.

If, then, livery and seizin be the cause of the discontinuance, where tenant in tail conveys by feoffment, where he conveys by deed, called a feoffment without livery of seizin, there will be no discontinuance, unless the argument goes further and proves that the act meant to impart to this deed, called a feoffment, all the properties of a true and proper feoffment. That cannot be maintained, for the act gives to the deed registered the property of passing the *estate* in the land; not to the actual possession of it. What is this estate which the deed passes? No more than the interest or estate which the grantor may lawfully pass. It surely was not the intent of the act to make the deed pass a tortious estate, like the feoffment, whereby tenant for life, or other inferior estates, may pass a fee, and displace remainders and reversions, and turn them to a right, unless entry be made in the lifetime of the alienee, who may, from the secrecy of the conveyance, not be apprised immediately of the deed. Considering the deed as a feoffment, to all purposes, will draw after it these consequences; and what, then, is become of the estates of remaindermen and reversioners placed in this situation? There is no remedy in this country but the ejectment; the benefit of this will be lost to them.

Another objection is that a deed of bargain and sale, with warranty, works a discontinuance; and if this is not a feoffment, it is a deed of bargain and sale, with warranty; the law is admitted, but here is no warranty at all.

"A warranty is a covenant real, annexed to lands or tenements, whereby a man and his heirs are bound to warrant the same, and either upon voucher, or by a judgment upon a writ of *warrantia chartæ* to render other lands to the value of those that shall be evicted by a former title, or may be used by way of rebutter." Co. Litt., 365 *a*.

In our case the covenant is not annexed to lands; for if the grantee be evicted and die, his executors must sue upon it. Bul. N. P., 158; 2 Levinz, 26, 62. An action of covenant is the proper remedy, not a *warrantia chartæ;* it is a covenant binding his executors and adminis-

trators, for they are expressly named in it; a warranty cannot affect executors and administrators, but the heirs of the warrantor only. When the executors or administrators shall be sued, the recovery will be in money, not in lands; for they have no lands of equal value to give. No one will deny but that if the grantee be evicted the executors of the grantor and his personal estate are liable to retribute the lessee; then it cannot be a warranty, but a covenant for warranty, or to warrant, like that stated in 1 Vesey, 516; 2 Bl. Com., 304. Had the expression been, "I covenant to warrant," there could have been no doubt. "I covenant for my heirs, executors, etc., the lands, etc., do warrant," amounts to the same thing; the warranty in both instances is placed in the infinitive mood; turn it into Latin, it is *convenio me warrantizare*. If both the covenant and the warranty be placed in the indicative mood, some part must be rejected to make sense of the rest. If we reject that part of the covenant which is personal, "I covenant for myself, my heirs, executors, etc., do warrant," there will indeed be a warranty, but not one that answers the purpose of the defendant; for the heirs of the warrantor are not named. Co. Litt., 383 *b*, 384 *b*. The warranty expired with the life of the warrantor, and never descended upon the heirs, so as to create a discontinuance.

If it be argued that the words are to be taken most favorably for the grantee, the answer is, a personal covenant, binding both executors and heirs, both the real and personal estate, is most favorable for him; 2 Bl. C., 304; and no doubt such was the intent of the parties. This was an estate tail, liable to be reclaimed; it was proper that the grantee should have the highest possible security, and a resort both to real and personal estate of the grantor. For what would have been his situation if the grantor had no real estate, but personal enough, at the time of eviction? The grantee, if this were a mere warranty, could have no recompense at all.

But say here is a warranty, annexed to the lands and binding on the heirs of the warrantor; what then is the result? On the death of the surviving brother, after 1784, it descends on his heirs, his three sons; on the death of the elder of those, after 1795, one-third of the warranty descended on his three children, and the lessor of the plaintiff is liable to one-third of that one-third only, Co. Litt., 393; he can only be rebutted for one-ninth part of the premises sued for; the other eight-ninths he is entitled to recover. Warranty always descends to those who are the heirs of the warrantor, by the general law of the country; otherwise, it would serve but little purpose for the protection of estates; for then, instead of rebutting the claim of all the heirs of the warrantor, it would rebut the claim of one only; the others might recover notwithstanding the warranty. For example, the father conveys, and warrants the lands

of the grandfather, and dies, leaving ten sons or children; the grandfather dies; the elder son, if the warranty descends upon him, only will be rebutted; the other nine may sue, and cannot be rebutted; but if it descends on all, then all are rebutted.

Another and last objection, but much relied on, is the act of limitations, and the lapse of years in the time of the issue of the grantor, after the death of the grantor; which, it is argued, barred that issue, and on his death the issue now plaintiff.

It would be an unaccountable circumstance if tenant in tail, or the issue in tail, were not allowed to bar his issue by any deed he could execute, nor by any release he could give to the bargainor, however solemnly executed; but could effect the same thing by his laches.

The act of James is, word for word, the same with our act of limitations, except as to the additional words in ours, which will presently be commented on. Under that act, if the tenant in tail, or issue in tail, be barred of his entry, that will not bar the next issue in tail. Com. Rep., 124. For the words of the act are, "No person or persons shall at any time hereafter make an entry into, etc., but within twenty years next after his right or title which shall first descend or accrue to the same." As the title of the issue first accrues on the death of his ancestor, then, and not before, does the time begin to attach upon him.

It is true our act has an additional expression: "All possessions held without suing such claim as aforesaid shall be a perpetual bar against all and all manner of persons." Therefore, says the defendant, the issue in tail shall be barred, for he is directly within the general expression, "all and all manner of persons."

A little reflection will demonstrate the incorrectness of this idea. Nothing more can be meant by it than that all and all manner of persons shall be barred, who, having a right of entry, have not exerted it within the limited time; it were too unreasonable to say that the party by his neglect should bar any other estate than his own, or should give an indefeasible fee against all persons entitled after him, as well as against himself. Let us suppose a case: A. is tenant for life, B. the reversioner. A. is ousted and the seven years lapse. B. is as much within the expression, "all and all manner of persons," as the issue in tail is; yet no one will attempt to say that B. is barred by the laches of A., the tenant for life. No; A.'s estate is barred, then, perpetually, and the estate of the possessor is rendered indefeasible to the extent of A.'s estate that is barred, and no further. Whatever estate is lost by the neglect of the owner to enter within time, the same estate is acquired by the possessor; for the right of possession of the true owner becoming extinct, by the operation of the act, and there being no person who can bring forward a claim of possession to disturb the possessor, his title is secured thereby.

The possessor only acquires an indefeasible fee when the estate of the owner neglecting to enter is a fee. In the case put, the owner or tenant for life is perpetually barred, and all and all manner of persons whatsoever, as to that estate which belonged to A., namely, an estate for life; so, in the case before us, the issue neglecting to enter was perpetually barred, and all and all manner of persons claiming his estate, whether by execution, sale, or other purchase; but, as in the case put, the tenant for life cannot affect by his laches any other than his own estate; so neither can the issue in tail who neglected to enter affect any other than his own estate. And the issue in tail and reversion may enter when his title accrues by the death of the preceding tenant.

The position would be monstrous that tenant for years, for life, in dower, by the curtesy, might vest an indefeasible fee in the possessor, by not entering within seven years, and bar those behind them forever. A. having no right, might convey to B., and give him a color of title, B. enter, and the particular tenant refuse to sue him till the seven years were expired; and as all and all manner of persons were thereby perpetually barred, and an indefeasible fee vested in B., the reversioner, remainderman, and heir of the estate held by curtesy could never recover. Yet the meaning attempted to be put upon the words, "all and all manner of persons," extends as much to these persons as to the issue in tail. The title of any of them does not accrue till after the death of the precedent temporary owner, and the case of the issue in tail is not distinguishable from any of them; it is impossible that the construction contended for can prevail.

JOHNSTON, J. I am of opinion that this case is not affected by the Act of 1784. That act converted no estates tail into estates in fee, but such whereof there was a person "seized and possessed," and confirmed only such alienations in fee as had been made by tenants in tail in possession since the year 1777. Joseph Wells aliened the land in 1760, and no one has ever been "seized in tail therein from that period to this day." I think this therefore a *casus omissus;* one for which the Legislature has not made provision in their Act of 1784. I am also of opinion that if the plaintiff is entitled to recover at all, he is entitled to recover the whole of the land contained in the declaration of ejectment; for that (539) the Acts of 1784 and 1795 regulated the descent of fee simple estates alone, and meddled not with the descent of entails. On all the other points my opinion is favorable to the defendant. I incline to the belief that Joseph Wells was actually seized in fee at the time of his conveyance to Stephen Lee; and that if he were seized in tail, a discontinuance was operated by the conveyance, which barred the right of

entry of his issue. This conveyance, I think, should be regarded as a feoffment, but if it were viewed as a bargain and sale, there was a clear warranty annexed, which gave it the same effect as to the operation of a discontinuance. With respect to the statute of limitations, I entertain no doubt but that, as neither entry or claim has been made on Stephen Lee or his heirs, within seven years after the right to defeat his title had first descended (that is, within seven years after the death of Joseph Wells), and as the person then entitled to make such entry, or bring such suit, did not come within any of the exceptions mentioned in the act, the lessor of the plaintiff could not disturb the possession of the defendant. The long possession of Lee and of those claiming under him is, in the words of the act, "a perpetual bar against all and all manner of persons whatever."

HALL, J. I think that Joseph Wells was seized of an estate tail, and not in fee simple, at the time he conveyed the premises in question to Stephen Lee. I also think that that conveyance did not work a discontinuance of the estate tail, because I consider it to be only a deed of bargain and sale, which of itself would not have that effect, and that there is not contained in it any such warranty as would qualify it to produce that effect. Were these the only points in the case, I should be of opinion that the plaintiff would be entitled to recover, as the reasons and authorities on which this opinion is founded are fully contained in the arguments of the plaintiff's counsel, I suppose it to be unnecessary here again to repeat them. But there is another point made in the case, founded on the act of limitations, which, as I have thought somewhat more doubtful, I have endeavored to consider more fully; and I think from the (540) best consideration I have been able to give it, that that point should be decided in favor of the defendant. If each of the issue of tenant in tail, as they may happen to become entitled to the estate tail, are to be considered as quite distinct persons, and possessing distinct rights, no way dependent one on the other, then this opinion must be erroneous, because the act gives the right of entry or making claim within seven years next after their right or title shall accrue or descend, and it cannot be said that the right of entry accrues to anyone until the death of the person entitled to the estate tail next before him. This may be more fully illustrated by the case put by Mr. *Haywood,* of the tenant for life and the reversioner, which I think good law, for surely the laches of the tenant for life would not prejudice the right of the reversioner, because their rights are distinct. Mr. *Butler,* in note 281, upon Littleton, section 595, says, among other things, "that though the estate of the tenant in tail as to his right of possession, or rather, as to his

beneficial property in the lands, has only a duration for the term of his life, yet in the eye of the law he is considered as seized of an estate of inheritance." In the case of *Penyston v. Lyster,* Cro. Eliz., 896, it was decided "that if tenant in tail conveys by bargain and sale, and the bargainee levies a fine with proclamations, and five years pass in the life of the bargainor, who dies, this fine shall not bar the issue in tail, but he shall have five years after the death of his father, because the father could not enter to avoid the fine, and his issue was the first to whom the right descended. But it is said in the same case that if tenant in tail had been disseized, and the disseizor had levied a fine, and the tenant in tail had suffered the five years to pass, etc., that shall bind his issue, because the tenant in tail had a right at the time the fine is levied, and therefore the issue was not within the saving. So we see that the issue are not barred in the first case, because the father could not enter against his bargain and sale; but in the latter case they are, because the right of entry was in the father, which he did not avail himself of. The
(541) same distinction is taken in Sheppard's Touchstone, pages 32 and 33, and the cases there cited, where it is said, "If a tenant in tail discontinue in fee, and the discontinuee levieth a fine with proclamations, and five years do pass, and tenant in tail dieth, in this case his issue shall have five years after the descender to bring his formedon; but if tenant in tail discontinue rendering rent and die, and the issue accept the rent (which doth bar him for his time) and then the discontinuee levieth a fine and dieth; in this case the issue of the issue shall not be barred by the five years after the fine, but shall have five years after the death of the issue." Here it is strongly implied that if the issue had not accepted the rent, but had suffered five years to pass, his issue would have been barred. To the same effect, see 1 Dy., 3a; 3 Com., 358 and 9; 3 Coke, 87, and many other books. It may therefore be said, if the tenant in tail to whom the right first accrues does not pursue his right in time, his issue shall be barred; but if lessee for life levy a fine or make a feoffment in fee, and the feoffee doth levy a fine, he in reversion of remainder shall not be bound by the next five years after the fine levied, but shall have five years next after the death of tenant for life. Cro. Car., 156-7; Shep. Touchstone, 32, and the cases there cited; 3 Com., 358-9. Thus, we see that in this respect the rights of the issue in tail cannot be likened to those of a tenant for life and those of a remainderman, etc. But it may be said, and truly, that those adjudications were not made on the statute, 21st James I, ch. 16: 'Tis true that is not the case; but in the statute on which they were made there is a saving to all persons, provided they assert their right within a certain time after it accrues; and I merely mention those cases to show that, if

the right first accrued to the tenant in tail and he did not exercise it in a proper time, the issue was barred. The time of limitations in a formedon by Sta., 21st Jac., is twenty years; within which space of time, after his title accrues, the demandant must bring his action or else is forever barred. 3 Bl., 192. Now, in case twenty years should elapse during the life of the issue in tail, and that issue dies, I am not aware at present of any adjudged case that would entitle the issue (542) of that issue to his action at any time within twenty years more. The same statutes, which it is said our act of limitation so much resembles, give the right of entry, provided that right is exercised within twenty years, and it appears to me that in case the right of entry is once lost, that right can no more be revived in any succeeding issue than can the right to bring a second formedon. With respect to the case of *Hunt v. Bowine,* in 1 Com. Rep., 124, relied on by plaintiff's counsel, it is to be observed that the right of entry then did not exist until within twenty years before it was made. There was a discontinuance, and the right of entry was thereby taken away; and the right of entry did not exist till the discontinuance ceased, which happened within twenty years before the entry made. If twenty years had elapsed during the life of the issue without entry, after the right of entry accrued and he had died, and the entry of his issue had been held good, then, indeed, it would have been an authority in point. Joseph Wells, in the present case, had no right of entry, that first attached to David after his death, which happened in 1787; David died in 1798, without having exercised that right, more than seven years after the death of his father. I therefore think judgment should be for the defendant.

MACAY, J. Let judgment be entered for the defendant.

DUNCAN McFARLAND v. HENRY W. HARRINGTON.—Conf., 407.

A plea in abatement that the declaration was not served on the defendant, must be filed within the first three days of the term, under the Act of 1777.

The plaintiff sued out a writ against the defendant, returnable to Fayetteville Superior Court, October Term, 1801. The defendant pleaded in abatement, to wit: "The said Henry W. Harrington, in his proper person, comes and pleads, that he has not been served (543) with a copy of the declaration in said suit; therefore he pleads the

same in abatement of said suit, and prays the said suit may be abated." This plea was sworn to and filed the 31st day of October, 1801, as appears by the affidavit of the defendant. The plaintiff demurred, and among other causes assigned the following one, viz.: "The said plea is also insufficient in this, that the same was not filed within the three first days of the term of this Court, to which the writ aforesaid was returnable, as appears by the defendant's own showing on the face of the said plea."

By the Court: This plea, being under the Act of Assembly passed in the year 1777, could only be sustained by being filed within the first three days of the term. That being omitted, the cause of demurrer thence arising is sufficient. Therefore, the plea is overruled.

NOTE.—The declaration is not now required to be served on the defendant, but must be filed in the clerk's office, on or before the third day of the term to which the writ is returnable; otherwise the suit shall be dismissed by the Court at the costs of the plaintiff.

HENRY W. HARRINGTON v. DUNCAN McFARLAND.—Conf., 408.

1. In penal actions the material facts on which the action depends must be stated with precision, and therefore, where the declaration only alleged by way of recital, as "whereas the said defendant having," etc., *it was held* bad.

2. None of the statutes of jeofails, not even the Act of 1790, extends to penal actions.

This case originated in Fayetteville Superior Court, where the plaintiff declared in the following manner:

"Henry William Harrington, who sues as well for the State of North Carolina as for himself, in this behalf, complains of Duncan McFarland, who being in the custody of the sheriff, etc., of a plea that he render to the said State of North Carolina, and to the said Henry William (544) Harrington, who as well, etc., five hundred pounds lawful money of the State of North Carolina, which he owes the said State of North Carolina, and to the said Henry Wm. Harrington, and unjustly detains; for this, that whereas, by an act of the General Assembly of the State of North Carolina, passed at New Bern, in the year of our Lord one thousand seven hundred and eighty-five, in the tenth year of the independence of the said State, entitled 'An act to amend an act passed at New Bern, in November, one thousand seven hundred and eighty-four,

entitled an "Act to describe and ascertain such persons, who owed allegiance to this State, and to impose certain disqualifications on certain persons therein described," it is enacted by the authority of the same that every person who at any time since the fourth day of July, one thousand seven hundred and seventy-six, attached himself to or traitorously corresponded with, or in any manner aided or abetted the enemies of this State in prosecuting the late war, shall be incapable of holding or exercising the office of Governor, Counsellor of State, Delegate in Congress, Judge or Justice of the Peace, Member of the General Assembly, or any office of honor, profit or trust, whatsoever, within this State.' And it is by the aforesaid act further enacted, that any person of the above description offering himself as a candidate, or consenting to serve as a member for any county in the General Assembly, or who shall hereafter offer as a candidate for, or accept of or qualify to either of the aforementioned offices, or holding either of the said offices, shall presume to continue to exercise the same ten days after being served with an authentic copy of this act, or after the expiration of three months from the ratification hereof, shall forfeit and pay the sum of five hundred pounds current money for every such offense, to be recovered in any court of record within this State, one-half to be applied to the use of the person suing for the same, and the other half to the use of the State: *Provided, nevertheless,* that nothing herein contained shall be construed to include any of the good citizens of this State from holding and exercising any of the aforesaid offices who were under the necessity of receiving protection from the late common enemy, and who after (545) receiving that protection did not stay voluntarily with them, nor took any active part in any manner, by furnishing them willingly with provisions, or bearing arms against the State, or accepting any appointment under the said enemy, civil or military. And the said unfortunate citizens having only received protection as aforesaid, and having renewed their allegiance to the State in good time are hereby restored to the rights and privileges of citizens, as fully as if they had never received protection from the common enemy as aforesaid, any law to the contrary notwithstanding. And whereas, the aforesaid Duncan McFarland, on the 14th and 15th days of August, in the year of our Lord one thousand eight hundred, at the county of Richmond, within the district aforesaid, did offer himself as a candidate to represent the county of Richmond aforesaid in the General Assembly of the said State, and did consent to serve as a member for the said county of Richmond aforesaid in the General Assembly aforesaid, and did actually serve as a member thereof. And the said Henry Wm. Harrington, who, as well, etc., in fact says, that the offering as a candidate to represent the county of Richmond

aforesaid, in the General Assembly aforesaid, and consenting to serve as a member for the county of Richmond aforesaid, and his actually serving as a member thereof in the General Assembly aforesaid, was after the expiration of three months after the ratification of said act. And, whereas, the said Duncan McFarland having since the fourth day of July, A.D. 1776, attached himself to, or traitorously corresponded with, and aided or abetted the enemies of the said State during the late war with Great Britain, he, the said Duncan McFarland, hath forfeited and become liable to pay the aforesaid sum of five hundred pounds, by reason of which, and the force of the said act of the General Assembly, the said Duncan hath become liable to pay the said Henry Wm. Harrington, who as well, etc., the said sum of five hundred pounds," etc.

The defendant demurred, and stated the following causes of demurrer, viz.:

(546) 1. That the said declaration does not show in any manner in what court the suit is pending.

2. That the defendant is not therein precisely alleged to be in custody of the sheriff, or otherwise shown to be before the court.

3. That the said declaration is uncertain and insensible, inasmuch as a certain act of Assembly is therein pretended to be recited, and no conclusion drawn therefrom.

4. That a certain act of the General Assembly therein pretended to be recited, or in part recited, and on which action is founded, is untruly recited, and is materially variant as recited in the declaration, from the act itself.

5. That to the material fact on which the action depends, to wit, the defendant's adherence to the enemies of the State during the late war with Great Britain there is neither time nor place alleged; neither is the fact itself alleged precisely, but by the way of recital, viz.: "Whereas, the said Duncan having since, etc., attached himself," etc.

6. That the said declaration is uncertain in that part thereof which charges the defendant with having offered as a candidate to represent the county of Richmond in the General Assembly, inasmuch as it does not appear how or for what he was a candidate, whether to represent the said county in the Senate or House of Commons.

7. That the said declaration does not charge the defendant with having committed any offense; neither does it conclude as it ought to do, after charging the offense, with the words "contrary to the form of the statute in such case made and provided."

By the Court: The fifth cause of demurrer must prevail, connected with the additional circumstance that the charge is in the disjunctive,

and does not call the defendant to answer any one of the offenses specifically, which the act of Assembly enumerates. In penal actions precision in the charge is indispensable for the same reason that it is required in indictments; and none of the statutes of jeofail, nor (547) even the Act of 1790, intends to them.

NOTE.—The act "concerning the amendment process, pleading and other proceedings at law," contained in the Revised Statutes. (1 Rev. Stat., ch. 3, sec. 10), extends to penal actions by express provision.

Cited: Martin v. Martin, 50 N. C., 349.

ARCHIBALD HAMILTON & CO. v. HERBERT HAYNES' EX'RS.

Lands in Virginia descended are equitably assets, and charge the heirs in this State with the debts of their ancestor due by specialty and binding his heirs; and if the heirs have sold the land and received the value, a decree shall be made against them for the amount.

The complainants filed their bill in the Court of Equity for Halifax District, calling on the defendants to discover what assets had descended and came to their hands and possession respectively; and to account for the same. The cause was tried by Judge JOHNSTON at October Term, 1802, who decreed, "that the defendants, Spruce Macay and Elizabeth, his wife, and Mary Haynes, the heirs of Herbert Haynes, pay to the plaintiffs the sum of one thousand and fifty-two pounds three shillings, current money, being the amount of assets in their hands, as heirs to the said Herbert, for land situated in Virginia, which descended to them and was sold by their agent."

The above decree was made, subject to the opinion of this Court, on the question, whether lands in Virginia, which descended to the defendants Elizabeth and Mary, and were sold by them before the commencement of this suit in equity, ought to be made liable to the payment of the plaintiffs' debt, being due on a bond given by the father and ancestor of the said Elizabeth and Mary, whereby he bound himself and his heirs for the payment of the said debt.

Brown, for complainants. If an heir sold lands descended before any action brought, the money was always assets in equity. Com. Dig. Chancery, 2, G. I; 1 P. W., 777; *Coleman v. Winch.* And surely the authorities of Chief Baron Comyns and Lord Macclesfield (548) ought to be decisive. 3 Term Report, 64.

Even in 1 Vern., 282, the plea was overruled, and it does not appear what afterwards became of a suit. It is like many of Mr. Vernon's cases, but a loose note hastily taken by a gentleman in the full tide of practice, and indiscreetly published by others after his death. But from the authority of the two distinguished Judges, who, after that period, presided in the two different Courts of Equity in England, we may safely take it that the rule was fully settled as first above laid down; and it is, perhaps, owing to that circumstance, as well as to the interference of British statutes, that we meet with so little on the subject in the books.

I take it for granted that no law of Virginia can be shown barring a creditor of any remedy which before the settlement of that country he had in England against lands, either in law or equity.

2. The case stated is, from inadvertency, incomplete, in not stating when the lands descended; but the bill charges that Herbert Haynes died (and of course the lands descended) in 1792; this statement is not denied in the answers, and is, I believe, correct, and therefore ought to be considered one of the facts constituting the case; and if so, then an act of the Virginia Legislature, passed the 17th day of December, 1789, and printed in the Revised Code, page 53, decides the question at once, for section 6 is as follows: "And be it further enacted, that where any heir at law shall be liable to pay the debt of his ancestor in regard of any lands, tenements, or hereditaments descending to him, and shall sell, alien, or make over the same before any action brought, or process sued out against him, such heir shall be answerable for such debt or debts in an action or actions of debt, to the value of the said lands so by him sold, aliened, or made over," etc.

The bill was properly brought whether the money was equitable or legal assets.

TAYLOR, JOHNSTON, and HALL, JJ. The lands in Virginia, which descended to Elizabeth and Mary, the heirs of H. Haynes, were
(549) subject to the payment of his debts due by specialty, whereby he bound himself and heirs; and the heirs, having sold the lands and received the value of them, are liable to pay the complainants the amount of the money so received, notwithstanding the sale of the lands took place before the commencement of the action. We are therefore of opinion that the decree as pronounced in the District Court is right, and ought to be carried into execution.

ROBERT WADE, TRUSTEE, ETC., v. JAMES EDWARDS.—Conf., 416.

A special property as trustee, derived from the order of a Court in Virginia accompanied by possession under the order, is sufficient to maintain detinue for slaves.

Detinue for the recovery of slaves. The record filed in this Court states the following case:

Charles Edwards, of the county of Halifax, in the State of Virginia, being possessed of the slaves in question, duly made his last will and testament on the 14th day of March, 1785; and thereby bequeathed one-third part of his estate to Letty, his wife, during her life, the residue of his estate to his children, to be equally divided among them, when his son, Leonard Edwards, should arrive at full age; and thereof appointed Letty, his wife, executrix, and Thomas Edwards and Samuel Clay, executors.

The testator died in the county of Halifax aforesaid, on the 10th day of February, 1790; his will was proved in the court of that county on the 20th day of June following; and Letty qualified as executrix thereof, and soon afterwards possessed herself of the personal estate of the testator, and among other things, of the slaves in question, the said Thomas Edwards and Samuel Clay having refused to qualify or take any part in the management of said estate.

The said Letty, at the time of proving the will, with Robert Wade and others, her securities, entered into and, conditioned to (550) be void, if she should well and truly return an inventory of the estate of the said Charles Edwards, deceased, administer the said estate according to law, make a true and just account of her actions and doings therein, when required, and deliver and pay the legacies contained in the will according to law; which bond was required by and executed according to the tenor and effect of an act of the General Assembly of the State of Virginia.

The said Letty, on the 10th day of June, 1793, intermarried with Leonard Cheatham, who joined with her in the administration of the said estate.

Robert Wade, the plaintiff, being one of the said securities, became alarmed at the manner in which the said Leonard and Letty were managing the said estate, and to protect himself and the other securities, filed his petition in the court of Halifax County aforesaid, praying relief, according to an act of the General Assembly of that State, in the following words, to wit: "When securities for executors and administrators conceive themselves in danger of suffering thereby, and petition the

court for relief, the court shall summon the executor or administrator, and make such order or decree therein, to relieve and secure the petitioners, by counter security or otherwise, as shall seem just and equitable." And such proceedings were had on the said petition, that the court aforesaid, on the 29th day of April, 1794 (the said Leonard and Letty having failed to give counter security) passed the following order, viz.: "It is ordered, therefore, that the said Leonard and Letty, his wife, executor, etc., as aforesaid, do deliver the estate of the said Charles Edwards, deceased, into the hands of the said Robert Wade, for his indemnity."

By virtue of this order or decree, the plaintiff was afterwards possessed in this State of the slaves in question, and remained possessed thereof until they came to the possession of the defendant, who still detains them from the plaintiff. The slaves were in the State of North Carolina, resident on a plantation of the testator, at the time of his death,

(551) and have continued in this State ever since.

Norwood, for the plaintiff.

1st. Did the authority of the executrix, applied by the probate of the will, her qualification, and letters testamentary in the State of Virginia, so extend to this State as to enable her to prosecute suits here without obtaining letters testamentary in this State?

2d. Did that authority devolve on the plaintiff, by the operation of the law of Virginia, and the order made by Halifax County Court, so as to enable him, as trustee, to prosecute suits here in his own name?

3d. If the plaintiff had no such authority, will this action lie on his own possession (he being responsible to the creditors and legatees), notwithstanding he has named himself trustee?

1. It is a general rule of law that personal property shall be governed by the laws of that country where the owner is domiciled. 4 Term Rep., 192; Prec. in Chan., 577; 2 Vez., 35; Amb., 25; 1 Hay. Rep., 357; *Williamson v. Smart and Kilbee, ante,* 355.

And, therefore, a will made and proved according to the laws of the country where the testator resided, vests in the executors a right to all his personal property, wherever found. And the distribution of the property is governed by the same rule. 2 Ba. Ab., 416; 6 Co., 48; Prec. in Chan., 577; Toller, 47; Amb., 25; 2 Vez., 35. It is, however, held by some that whenever the property is found within a different jurisdiction, the executor must obtain letters testamentary from that jurisdiction before he can recover the property by suit. But as to this rule, it is to be observed:

1. That the reason assigned for it in England is merely formal; and founded on the right of jurisdiction only. 2 Ba. Ab., 399; 1 Com. Dig., 369; 1 Haywood's Rep., 357; 2 Vez., 35; Amb., 25.

2. That a new probate of the will is not necessary, the formal letters in such cases being founded on the former probate, or letters of administration. Amb., 415.

3. That the executor may, without such formal letters, take the (552) property into his possession in any part of the world, if he can obtain it without suit. 2 Atk., 63.

4. That the reason of the rule having never existed in this State, the rule itself has never been received into practice; the courts permitting executors to maintain suits by virtue of letters obtained in any other country. A reason different from that assigned by the Judges of England induced our courts to adopt the rule as to administrators. It is this: They give bond and security for the faithful administration of the assets, and thereby the creditors of this State are secured in the recovery of their debts; otherwise, an administrator of another state or country might collect in the assets here, by an agent, and not pay the debts due to the citizens of the State. But executors do not give bond, and, therefore, the application of the rule would not have the same beneficial effect, and, consequently, ought not to be applied.

5. The courts of this State are bound by the probate of the will, and the grant of letters testamentary by the court of Halifax County, in Virginia. Fed. Const., Art. IV, sec. 1; 1 Laws of Cong., 115.

The Constitution must mean something more than that a copy of a sentence of the court of one State should be evidence of that act of the court in the other states; for a copy of a record had that effect by the common law before the adoption of the Constitution, and I suppose it could not have been intended merely to enforce that common law principle. I therefore contend that the Constitution gives to the judicial acts of a court of record of our State the same force and effect in all the other states which they have in another court of same state, so far as they evidence a preëxisting right or duty. And, if so, the right and authority of the executrix being given by the will, the effect of the probate and grant of letters testamentary, being only evidence of that right and authority, will extend to this State. But perhaps it will be objected that this argument will operate in favor of administrators as well as executors, and, consequently, cannot have any weight, as this question, so far as it affects administrators, has been determined. The answer to this objection is easy. An executor derives his author- (553) ity from the will, which is coextensive with his right under the will, the probate and letters being evidence of his right and authority; but an administrator derives his right and authority from the act of the court only, and, consequently, they cannot extend beyond the jurisdiction of the court that granted the administration.

Second. It was the intention of the law of Virginia to deprive executors of the possession of the assets, and of all their powers, and to vest them in the securities, and make them responsible for the after management of the estate. It must have this operation or the securities will not be protected against the waste and misconduct of the executors, and the creditors and legatees may be greatly injured. For the executor, if he should be sued, being exonerated from further responsibility by the order of the court, and having no assets in his hands to indemnify him for expenses, would defend himself only by pleading the order of the court and the delivery of the assets in consequence of it, and not the interest of the estate; but, permit judgment to pass against it, whether the claim was just or unjust; and if unjust, injure the legatees and oppress the securities; and whether just or unjust, subject the creditor to the necessity of bringing another action against the securities. The principal object of the act was to secure the rights of creditors and legatees, by compelling executors to give security. It ought to have a liberal construction, so as to give it this effect, without subjecting them to any additional trouble, delay, or expense; and if my construction prevails, this object will be effected; but, if a contrary one should be adopted, the consequences would frequently be injurious to creditors and legatees, and ruinous to the securities. It would certainly be inconvenient and absurd to give an action against one man, the executor, who has no interest in the event, and who most probably feels some resentment against the security; and to give the sole possession of the assets liable to satisfy the judgment to another person, the security, and make him responsible for the conduct of the executor. I have always understood that the (554) courts in Virginia have given this act the construction which I contend for; and believe that this plaintiff has prosecuted suits in his own name as trustee in the State of Virginia with effect.

The authority of the security, who by the order is converted into a trustee, must be as great and as extensive as the executors before the order was made; in fact, the security must be substituted in the place of the executor, or the objects of the act would almost entirely fail. For, if the authority of the trustee should be confined to Virginia, the executor might continue to collect in the assets in every other part of the world, and might waste them as fast as he collected them. This would be fatal to the security in many instances, and would have been so in the present, most of the assets being in this State.

Third. All persons who have a special property, and are answerable over, may maintain an action of detinue. 2 Ba. Ab., 46; 3 Com. Digest, 358. In this case the plaintiff had a special property in the slaves, was legally in possession of them, and is answerable over to the creditors and legatees. The action will, therefore, well lie, unless the circumstance of

his having named himself trustee is fatal to it. That addition is mere surplusage, and will not vitiate the action. The plaintiff declared on his own possession, and therefore the addition of trustee can have no more influence in the cause than if an executor should bring an action on his own contract for the sale of the assets, and name himself executor, which has always been held to be surplusage.

Haywood, for the defendant. The probate of the will, and grant of letters testamentary in this case, extended only to the State of Virginia. The executrix herself could not maintain an action here without first obtaining letters in this State. It is indeed true that the will vested in the executrix a right to the testator's property in every part of the world; but Virginia could not give the authority necessary to enable her to maintain a suit for it beyond the limits of that state; the authority and remedy must be given by the court having jurisdiction where the property is found. But if the authority of the executrix extended (555) to this State, and she might have maintained an action here by virtue thereof, yet it does not follow that this action will lie in the name of the plaintiff as trustee by virtue of that authority. For neither the act or order of the court of Virginia extended to this State; and if they had, they would not support the action. They only gave him the right of possessing the assets, and not the right of transacting the business of the estate in his own name. No inconvenience or injustice will arise from this construction, because he may prosecute suits in the name of the executrix, and defend such as may be brought against her. Thus far, perhaps, the courts will take notice of his interest, and enable him to defend it.

As the plaintiff has brought his action as trustee, and declared in his own possession as trustee, he must show a title as trustee, or he cannot recover. His possession in this State being in his individual capacity, will not support the action. He makes out his title to the property by means of the trust; consequently, it was necessary to name himself trustee, as much so as it would have been to have named himself executor had he been suing in that right. Indeed, he alleges that he possesses the authority of an executor; and, surely, if he had brought his action as executor he could not recover in his individual capacity.

By the Court: It appears by the record in this case that the plaintiff had possession of the property in question, under an order of the court of Halifax County in the State of Virginia, which directed that the property should be delivered by the executrix to him for his greater security; and that the court was empowered by the laws of that state to make such an order. It has been urged for the defendant that the executrix herself could not maintain an action in this State, by virtue of

letters testamentary obtained in Virginia; and that the plaintiff could not derive an authority from her to bring suits which she herself did not possess. That point has never been directly decided in this State, (556) nor is it indispensably necessary that it should be decided in this case. If, however, the executrix had sold the property, and the purchaser, in consequence thereof, had obtained the possession of it, that purchaser could maintain an action for it in this State, in case he became dispossessed of it. So, in the present case, the property was conveyed to the plaintiff under very high authority, so much so, that we are inclined to believe that, against that conveyance (or what is tantamount thereto, the order of the court), an action could not be sustained for it by the executrix in her own name. If so, the power of suing devolved upon the plaintiff. But be this as it may, we think this action may be sustained by the present plaintiff, by virtue of the right which he derived to the property from the order of the court, and the possession which he had of it under that order. For this reason, we think judgment should be entered for the plaintiff.

JOSEPH BROWN v. ELIZA LUTTERLOH.—Conf., 425.

A demise laid to have commenced on the 1st of February, 1801, and possession taken under it; "afterwards, to wit, on the 1st day of January, 1801, defendant entered," etc. This was held good, for the word "afterwards" shows that the entry of the defendant was after the demise to, and possession of, the plaintiff; and the words "1st of January, 1801," being repugnant, may be rejected.

This was an action of ejectment in the Superior Court of Hillsborough District, on the trial at October Term, 1802. The plaintiff abandoned the first count in his declaration, which was on the demise of one Pilkington, and gave evidence sufficient to support the last, which was on the demise of Joseph Brown. The defendant, however, having taken, in the course of the trial, an objection to this count, the Judge advised the jury to find a verdict for the plaintiff, subject to the opinion of the court on the sufficiency of that count; and a verdict was accordingly entered.

The second count laid the demise to John Doe, the nominal (557) plaintiff, on the 1st day of February, 1801, to hold from the 31st of January then last past, the term of twenty years. And thus proceeded, "by virtue of which demise the said John Doe entered into the tenement and land last aforesaid, with the appurtenances, and was thereof possessed, until the said Richard Roe afterwards, to wit, on

the first day of January, in the year last aforesaid, with force and arms, entered into the same tenement and land with the appurtenances, in and upon the possession of the said John Doe and him from his said farm (his term therein being not yet expired), ejected, expelled, and removed, and the said John Doe being so ejected, expelled, and removed, the said Richard Doe hath withheld from him, and still doth withhold from him the possession thereof."

The objection taken by the defendant's counsel was that the ouster was laid before the commencement of the term.

Haywood, for the plaintiff. Before I say anything immediately to this case, I will briefly state the nature of an action of ejectment, and the manner in which courts have latterly considered and treated that action. They view it as a fiction created by them, for the benefit of the parties and the advancement of justice. The plaintiff, the demise, the entry of the plaintiff, the defendant, the entry of the defendant, and ouster of the plaintiff are all mere fictions, and they never existed. The lessor of the plaintiff and the tenant in possession are the persons really interested; and the question to be tried is whether the lessor, at the time the action was commenced, had such a title as would enable him to make the lease stated. It is a creature of the court, entirely under the control of the court, open to every regulation and order necessary to expedite the real justice of the case. If the lessor of the plaintiff shows a sufficient title, the court will not permit him to be disappointed by an objection to the fictitious parts of the declaration; for fictions are created by the law and practice of the courts for the benefit of suitors, and are so governed as to prevent an injury by their operation. Sheridan's Prac., 504; 4 Bur., 2449; 2 Black. Rep., 940, 931; 2 Bur., 667; 3 Bur., 1292, 1294, 1295; 1 Bur., 134, 629; Runn., 1, 2; 1 Mod., 252; Hay. Rep., 329, 501.

The objection in this case ought to be considered by the Court as if taken by way of reasons in arrest of judgment, and not as an objection to the plaintiff's title or the sufficiency of his evidence. For it is not the province of the jury to judge of the regularity and sufficiency of the pleadings, but of the Court. And, therefore, as the plaintiff's title was proved, the jury ought to have given him a general verdict, without paying any attention to the objection, which could not be regularly urged in any other manner but in arrest of judgment. The jury were, in fact, sworn to try the title of Joseph Brown, and not whether Joseph Brown made the lease to John Doe stated in the declaration, and whether he entered, etc., and Richard Roe ousted him, etc.; consequently, it was improper for them to render a verdict subject to the opinion of the Court on those questions, they being not at all involved in the inquiry before them. Hay., 501, 330. A practice of subjecting verdicts to the sufficiency of pleadings would indirectly repeal most of the statutes of

jeofail, and if it should prevail in this case, would deprive the plaintiff of the benefit of those statutes.

It is not necessary for the plaintiff expressly to mention the day of the ouster, provided it appears to be after the commencement of the term and before the action was brought. Runn., 216; Cro. Jac., 311.

If the plaintiff expressly lays the ouster before the commencement of the term, or at a time not arrived, or at a time in any other manner impossible or repugnant, or states the term in such a manner as that it appears to have expired before the commencement of the action, or before the verdict, the defect may be amended before the trial, and is cured by a general verdict. Runn., 216; Esp., 445; Bul., 106; 2 Bur., 1159, 1162; 4 Bur., 2414; Cro. Jac., 96, 154, 426, 428, 311; Hay. Rep., 501.

The plaintiff, by his declaration, alleges that he, by virtue of the demise, entered on the premises, and was thereof possessed until the said R. R. afterwards entered into the same tenement, upon the possession of the plaintiff and ejected, expelled, and removed him from his said farm; and that the plaintiff, being so ejected, expelled, and removed, the said Richard Roe hath hitherto withheld from him, and still doth withhold from him the possession thereof. Is it possible that any man who has the smallest knowledge of the English language, and who is in the enjoyment of a single ray of reason, can read this allegation without deciding in an instant that the plaintiff entered after the demise, and was ousted before he brought his action; and that the first day of January was inserted by mistake instead of the first day of February? That day is repugnant to all the rest of the declaration, and must be rejected, the count being good without mentioning the day of the ouster.

John Williams, for the defendant. The question for the decision of the Court is whether the second count is sufficient to enable the plaintiff to recover upon. In the second count the demise is laid on the first day of February, 1801, for twenty years from the thirty-first day of January then last past. An entry is alleged by virtue of that demise; and the ouster is laid to have been afterwards, to wit, on the first day of January in the year last aforesaid. Now, it is a rule in law that in ejectments the demise must be laid after the lessor's title accrued, and on some day before the delivery of the declaration. Runn., 82; 2 Stra., 1087; Lill. P. Reg., 503. The commencement of the supposed lease must be laid at a time preceding the ouster. Runn., 84; Yelv., 182. But the law does not necessarily oblige the plaintiff expressly to mention the day of the ouster, so that it appears to have been after the term commenced and before the action brought. Runn., 85; Cro. Jac., 311.

The objections to the second count arise on the laying the ouster, viz.: (1) If the day and month laid under the scilicet is to have any effect,

then the ouster is laid before the commencement of the lease, and a month before the plaintiff confessedly had any title. (2) If that day and month, viz., 1st day of January, be rejected, then the ouster is not expressly laid before the action brought, which is as necessary, according to the rule, as that it should appear to have been after the term commenced.

The general rule of law in declarations, in all actions, requires that all substantial facts should be laid in proper time and place. 1 Ba. Ab., 102. But I admit that it has been held in Cro. Jac., 311, that the day of the ouster is not necessary to be mentioned; but then I contend that it must in some other manner appear, from the month or year, that it was committed before an action was brought; that in all those cases the decision has been either in arrest of judgment after verdict or in error. This clearly appears to have been the opinion of the Court in the same authorities. Time is never wholly dispensed with, but some part of it must be inserted in the declaration to show that the ouster complained of was committed before the bringing of the action. Thus, if the ouster be laid in such a year, without naming the month or day, it is good after verdict, if the action appears to be brought in some subsequent year, as in the case of *Merrell v. Smith,* Cro. Jac., 311, where the ouster was laid the 6th of James, and the action brought the 7th of James; but if, as in the present case, the ouster had been laid, and the action brought in the same year, and there had been no month or day of the ouster mentioned, then the ouster would not have appeared before the commencement of the action, and it would have been bad, as plainly appears from that case; for the Court there held that the ejectment, being made between the making the lease and the bringing the action, was good enough, although there be not any day alleged. So, in *Adams v. Goose,* Cro. Ja., 98, a case like the present, on the ouster being laid under a scilicet before the commencement of the term, the day under the scilicet was rejected as being repugnant to the word *postea;* and although the day of the ouster was rejected, and so no day laid, yet it was held good after verdict on motion in arrest of judgment, because the commencement of the action appeared of record, and the month and year of the ouster were expressed, viz., September 2, Ja. 1, and the action was brought March 3, Ja. 1, it was therefore expressed to be before action brought, and so good. And so, in *Jesmond v. Johnston,* where, in trover, the conversion was laid *postea,* viz., 1 May, 14 Ja. 1, and the possession the 3d May in the same year, and held good, the action appearing to have been brought before. In the present case, the ouster and commencement of the action were in the same year. The action was commenced early in the year, and the time of the year in which the ouster was committed does not appear.

It was argued that, as the declaration alleges the ouster as a fact in the perfect time, it must be presumed before the action brought. The rule I have shown negatives all presumption. The presumption and rule cannot stand together. A day and time is necessary in all actions; and particularly in *assumpsit,* the time of the promise; in trover, of the conversion; and in ejectment, of the lease. 1 Com. Dig., 331; Cro. Eli., 96; Plow., 24. And that, if no time be laid but after a verdict, and that be rejected, it is bad. 5 Com. Dig., 332, 333.

It is to be remarked that the question before the Court is before it as on demurrer. There is no verdict for the plaintiff to cure any ambiguity. The verdict depends on the decision of the question; if the second count be good, then it is for the plaintiff, but if bad, then for the defendant. The objection was taken at the trial as early as the defendant could. She could not demur in ejectment. Runn., 71; 3 Bl. Com., 202. And that such objections would prevail on demurrer. 5 Com. Dig., 331, 332, 333; Cro. Eli., 37; Plow., 14.

Haywood. Mr. Williams insists that the case ought to be considered as upon special demurrer, because the defendant took the exception at the earliest stage of the proceeding in her power, and because a defendant cannot demur in ejectment; yet he says that such an objection would be good upon demurrer. This argument is completely *felo de se,* for if the objection would in this action be fatal, the courts would permit the defendant to demur. But the courts, always averse to objections which destroy the action without deciding the merits of the case, and having the tenant in possession in their power, will not permit him to take such an objection, even at the first stage of the cause, but will compel him to enter into the common rule, and thereby oblige him to try the merits of the case only. How absurd would it then be to allow the objection to be taken at the time and in the manner now attempted! The Court will consider the whole record, and if it contains sufficient matter, will give judgment for the plaintiff, notwithstanding any irregularity in entering the verdict, or subjecting it to a question arising merely in the regularity of the pleadings. The case, therefore, stands as upon a general verdict, and reasons in arrest of judgment; consequently, according to the cases cited, judgment ought to be given for the plaintiff.

By the Court: It appears to us that it may be taken that the ejectment took place between the time of the ouster laid and the time of the commencement of the action. If so, the declaration is sufficiently certain to enable the plaintiff to recover, for it is not necessary that it should be stated that the ejectment was made on any particular day. *Merrell v. Smith,* Cro. Jac., 311. It is true, in that case, the year in which the ejectment was made is set forth; but it is said, without particular reference to that circumstance, that the ejectment being made between the

making of the lease and the commencement of the action, is good enough, although there be not any day certain alleged to examine this case by that rule. The demise is laid on the first day of February, 1801, and a possession under it is not stated until afterwards, to wit, on the first day of January last aforesaid, the ejectment took place. Upon the authority of the case of *Adams v. Goose,* Cro. Jac., 96. Buller, 106, the words "to wit, on the first day of January last aforesaid," being impossible and repugnant, should be rejected; if so, it will appear clear (558) enough that the ejectment happened *after* the lease was made, and also *after* there was a possession under it. The declaration then states that "the said John Doe being so ejected, etc., the said R. R. hath hitherto withheld from him, and still doth withhold from him the possession thereof." At what time is it supposed the declaration speaks this language? At the moment it has become an instrument in the hands of the law to have justice done to the plaintiff. If so, it must be understood to speak of an injury which has already been committed, and not of one which after that time might be committed. If, therefore, an action of ejectment was not the creature of the court, open to every equitable regulation for expediting the true justice of the case (contrary to what is expressed in the case of *Lee v. Ellis,* 2 Black. Rep., 940), and was it altogether unconnected with fiction, we should understand the declaration as stating a fact which *had* happened after the lease made, and before the action brought; and think the allegation of the trespass and ejectment sufficient. We are, therefore, of opinion that the plaintiff is entitled to judgment.

NOTE.—See *Hogg v. Shaw, post,* 576.

WAIGHTSTILL AVERY v. JOHN STROTHER.—Conf., 434.

1. Lands lying in one county cannot, under the entry laws of this State, be entered in another, and a grant issued on an entry made in another county is void.

2. Entries and grants of land within the Indian boundaries are void under the Act of 1783.

This was an action of ejectment, brought in Morgan Superior Court, for the recovery of a tract of land, situated on the west side of Pigeon River, opposite to the Flowery Garden. The record states a case agreed, which in substance is as follows: 1st. That the line (559) agreed upon by the treaty, made at the Long Island of Holston,

in the year 1777, between the white people and the Cherokee Indians, is the same, from the cession line to the Apalachian ridge, as the line described in the acts of the Assembly passed April, 1778, and May, 1783.

2d. That the tract of land claimed by the parties in this suit is the same, and is situated on the west side of the big Pigeon River, within the territory set apart for the Cherokee Indians, by the act of Assembly passed May, 1783.

3d. That the plaintiff claims by an entry made in the Entry Office of Rutherford County, in July, 1791, after the treaty made by Blount in the same year, and before the ratification thereof; and a grant issued on the said entry on the 4th day of January, 1792.

4th. That the county of Buncombe was established, by an act of the General Assembly, passed in December, 1791, after the ratification of the treaty obtained by Blount; and that the defendant claims by virtue of an entry made in the Entry Office of the said county of Buncombe, and a grant therein obtained.

5th. That the Indians, by the treaty so effected by Blount, sold the land in dispute, with other lands, and received the full consideration agreed upon as the price of those lands, except the annual pension, before the entry made by the plaintiff as aforesaid; and that the same were ceded by the Indians and became the property of the State of North Carolina, by virtue of that treaty, and the Indian title thereby extinguished.

6th. That the said treaty was ratified before the date of the plaintiff's grant; and that it was known to the Governor, at the time of issuing the said grant, that the land therein granted was part of the lands acquired by the said treaty.

7th. That the land in dispute lies to the south of Granville's line; and that by act of Assembly, passed in November, 1788, the lands lying to the south of Granville's line, west of the Indian boundary, were added to the county of Rutherford.

Argument for the plaintiff. A treaty becomes obligatory by
(560) the execution, and begins to operate at that time, without the aid of a ratification. Therefore, in this instance, the Cherokees, having executed the treaty with the intention of conveying their lands, and having at the same time required the full consideration for them, had done everything on their part which was necessary to vest the lands completely in the State of North Carolina; and the subsequent ratification confined that operation from the date of the treaty; consequently, the fee simple of the land in question was vested in the State at the time the plaintiff made his entry.

The reason and intention of the acts of Assembly, passed in April, 1778, and May, 1783, so far as they prohibited the entry of lands over

what was in those acts designated the Indian line, was to protect the Indian lands from encroachments by the white people; when, therefore, the Indian title was extinguished by the sale of the lands, those acts ceased to operate, there being no longer any subject matter on which they could operate, and, consequently, were virtually repealed by that treaty. The effect of those acts being thus removed, the entry in question, and the grant founded on it, are good, and the plaintiff's title sufficient to enable him to recover in this action.

Argument for the defendant. The plaintiff can recover only by the strength of his own title; and if it shall appear that this title is bad, judgment ought to be given for the defendant.

It is believed that the plaintiff's grant is void on two grounds. First. Because the lands, when entered, did not lie in the county of Rutherford, where the entry was made. Second. Because the entry was prohibited and the grant obtained therein declared void by the act of Assembly, passed 1783, sec. 6.

It is agreed that the land in dispute lies on the west side of Big Pigeon River, within the lands described by the Act of 1783, sec. 5; and by that act reserved to the Cherokee Indians. Rutherford County, by section 23 of that act, and by the Act of 1788, ch. 10, was extended west to the Indian boundary, as limited by the Act of 1783, that is, to Big Pigeon River, and not to any line or boundary which might afterwards be made; and there is no act of Assembly extending (561) that county beyond, or authorizing an entry in that county of lands on the west side of that river.

It may also be observed, from the case agreed, that the land in dispute lies within the bounds described by the third section of the Act of 1783, ch. 2, for which lands (except those prohibited) John Armstrong's office was opened, and again discontinued in the year 1784; after which, until Buncombe was established a county, no office existed in which those lands could be entered.

If the plaintiff had any authority for making his entry, he must have derived it from the Act of 1777, ch. 1, revived by the Act of 1783, except so far as it comes within the purview of the last-mentioned act. The Act of 1777 ascertains what lands may be entered, and points out the manner in which title shall be obtained. It provides only for entering with the entry taker of any county a claim of lands lying within such county. The Legislature foresaw that much inconvenience and mischief would follow if lands were permitted to be entered in a different county from that in which they lay; and to provide against every possible mischief of that kind, by section 9, grants not obtained in the manner by the act directed, or in the evasion of the provisions and restrictions thereof, are declared utterly void.

The land in dispute did not lie within the county of Rutherford, nor within any other county, at the time the entry was made, but within the district for which the office had been discontinued; the grant, therefore, having not been obtained in the manner the act pointed out, but contrary to the provisions and restrictions thereof, and there being no other law authorizing the plaintiff's entry, it is concluded that this grant is utterly void.

In the Act of 1788, ch. 10, there is a legislative declaration that entries in Burke and Rutherford of lands not in the counties where the entries were made, are contrary to the intent and meaning of the acts in such case provided; and from the Acts of 1784, ch. 17, 79, sec. 3, and ch. 45, sec. 4, the like inference may be drawn. As much prop-
(562) erty depends on this question, the opinion of the court on this part of the case would be very desirable.

Secondly. It is agreed that the land in dispute lies within the bounds set apart to the Cherokees, by the Act of 1783, sec. 5; by the same act, sec. 6, all entries of land within those bounds, and grants obtained thereon are declared void. The prohibition in this act continued until the lands should accrue to the State, by treaty or conquest, so as to come within the provisions of the Act of 1777, sec. 3. And it is denied that those lands accrued to the State until the ratification of Blount's treaty. By article the 15th of that treaty, it was to take effect from and after the ratification thereof; so that, by the treaty itself, it was stipulated that the Indian title to those lands should accrue to the State from the ratification, until which time it remained in the Cherokees. The plaintiff's entry being made previous to the ratification, and before the title accrued to the State, the grant obtained thereon is made void by the 6th section of the Act of 1783.

It is contended that the defendant's title is good. Buncombe, after the ratification of the treaty, was established a county, by Act of Assembly, in December, 1791, with all the rights, privileges, and immunities of other counties. Few or none of the Acts of Assembly establishing other counties, since the Act of 1777, mention anything with regard to entering lands; yet all of them have opened offices for receiving entries; and their right to do so has never been questioned. The defendant's entry was made in the county of Buncombe, in which county the land lay, and after it had accrued to the State by purchase.

JOHNSTON, J. By the Act of November, 1777, sec. 3, a right is given to the persons therein described, "To enter with the entry taker of any county within this State a claim for any lands lying in such county." It appears that the lands in question are situate in Buncombe County, and that the entry was made with the entry taker for the county of

Rutherford, who had no right to take entry of lands except within that county; he, therefore, in this particular, did an act not (563) founded on any authority, and, of course, a mere nullity in itself, on which no legal grant could issue. The same act, sec. 9, declares that every right, title, etc., which shall not be obtained in the manner by the act directed, or by fraud, illusion, or evasion of the provisions and restrictions thereof, are deemed and declared utterly void.

The grant to the plaintiff appears to me to come expressly under this description: It was obtained by a process not warranted by the Act of Assembly, there being no entry, such as was described by the act; there was no ground for issuing the grant; it was, therefore, obtained fraudulently, with a manifest view to elude and evade the act; and consequently utterly void. I am, therefore, upon this point, without going into the other matters stated in the case, of opinion that judgment be entered for the defendant.

MACAY, TAYLOR, and HALL, JJ. By the Act of Assembly, passed in the year 1783, chap. 2, sec. 5, the land in question was included within the Indian boundaries, and reserved to the Cherokee nation; by the Act of 1778, chap. 3, sec. 5, all entries and surveys of land, which had been made or thereafter should be made within the Indian boundaries, were declared to be utterly void, and of no force or effect, and by the Act of 1783, chap. 2, sec. 5, all such entries and grants therein are declared utterly void. The plaintiff's entry was made within the Indian boundaries; consequently his entry and grant are both void, and therefore, he has no title to the premises in question.

Judgment for the defendant.

NOTE.—See on the first point, *Lunsford v. Bostion*, 16 N. C., 483. See, also, act, 1 Rev. Stat., ch. 42, sec. 29, which validates such entries and grants under certain circumstances.

Cited: Strother v. Cathey, 5 N. C., 164; *Stanmire v. Powell*, 35 N. C., 315; *Barnett v. Woods*, 58 N. C., 433; *Harris v. Norman*, 96 N. C., 62; *Brown v. Brown*, 103 N. C., 216; *Gilchrist v. Middleton*, 107 N. C., 679; *Brown v. Smathers*, 188 N. C., 174.

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JUNE TERM, 1803

SAMUEL DICKERSON v. JOSIAH COLLINS AND NATHANIEL ALLEN, AND JOSIAH COLLINS v. SAMUEL DICKERSON AND NATHANIEL ALLEN.—Conf., 441.

When three tenants in common sell their estate at auction, confining the bidding to themselves, the purchaser must pay to the other two the whole amount he bids, and not *two-thirds* only.

The complainants and defendants being seized, as tenants in common, of a large tract of land, covenanted with each other to put up and sell, in one lot, part of the tract; no person to bid except themselves; the highest bidder to be the purchaser. The purchaser or purchasers to be allowed two years' credit on his or their giving bond with approved security for the purchase money, with lawful interest from the date thereof. The land was accordingly put up on the 9th day of December, 1789, and purchased by Dickerson. In May, 1791, he tendered a deed for the land to Nathaniel Allen to be executed, and a bond for one-third of the purchase money, bearing interest from that time; Allen accepted the bond and executed the deed. A like tender being made at the same time to Collins, he refused to execute the one or accept the other.

MACAY, J. This must be considered as a sale, and the sum bid, as the price or purchase money; and as the parties had contracted that bond and security should be given for the purchase money, with interest from the date, Dickerson becoming the highest bidder, Collins is entitled to one-half of the purchase money, with interest thereon from the day of sale until paid. And on receiving the principal and interest, he shall do such acts as shall secure to the defendant Dickerson, an estate in fee simple in said lands.

TAYLOR, J. I cannot, after a frequent revision of my first
(565) impressions in this case, reconcile my mind to any other construction of the agreement, than that which requires the purchaser to give bond and security for the whole amount of the purchase money. There is surely weight in the argument, that as the bidding was confined to the partners, the purchaser cannot be understood to have bought his own right, which remained as it was before the sale, and could not be an ingredient in his estimation of the price. The spirit of the agreement seems to be, that any one of the partners may buy out the

other two, or that any two may buy out the third; and that the highest sum bid shall be the consideration of the shares so purchased. So material a change of the contract, as that of lessening the price in the proportion of the purchaser's share, ought not to be made, without the most clear and explicit understanding of the parties; or unless it resulted plainly from the words of the agreement. As the interest of these parties was, before the sale, equal, it appears to me no one could bid more than he was willing to give, constantly keeping in view that he was purchasing what belonged to others, and not that which he already owned. Indeed, so far as any light is reflected from usage, it is favorable to such a construction; particularly to the case of joint owners of vessels setting them up to the highest bidder, and excluding strangers.

HALL, J. It is the wish of the parties that this agreement should be carried into effect. Collins insists that he is entitled to half, and not a third only, of the purchase money; Dickerson insists, and Allen agrees with him in opinion, that he is entitled to only a third of it. I think it must have been the understanding of the parties that the bonds should be executed, in a reasonable time after the sale; otherwise interest from the sale to the time of executing them would be lost. It is true, Dickerson alleges as a reason for not having made a tender of them sooner, the difficulty he met with in procuring a deed to be drawn for the land, which would meet with the approbation of Collins. Be this as it may, I think Collins is entitled to interest from the time of the sale to the time of the tender of the bonds, or whatever principal sum is (566) due to him. I also think he is entitled to interest from that time until payment shall be made, provided he is entitled to one-half instead of one-third of the purchase money. This seems to be the great point on which the parties differed in opinion, and which prevented them from carrying the contract into effect. If the land had been exposed to public sale, the purchaser would have been compelled to pay the full amount of the money bid, because it would have been understood to be the value of the land, and the purchaser would have had no interest in it until it was sold. If, at such sale, one of the owners of the land had bid for it, which he might have done, the money bid by him would also have been considered as the value of the land; but he would have been entitled to a deduction of one-third on account of his interest in it. The only difference between such sale and the one in question is, that the liberty of bidding was reserved to the proprietors only. Why was it thus exposed to sale? In order that the value of it might be ascertained; that he who fixed the highest value on it should become the purchaser; but being already owner of a third part of it, I think he is, on that account, entitled to a deduction of one-third of the amount bid for the land. In

the case of a sale made by a company of merchants, of any article, as mentioned by Dickerson's counsel, if one of the company became the purchaser, he would be charged in the books of the company with the full amount of the money bid by him; but being one of the company, he would be entitled to a credit equal to his interest in the concern. It has been alleged by Collins that Dickerson bid off the land for himself and Allen, under some agreement made by them for that purpose. I cannot see how that circumstance can affect the case. They had a right, certainly, to make such a contract, or any other that did not interfere with the one they had made with Collins.

It is no matter for whose benefit it was bid off by Dickerson, provided he acted up to that agreement. When £3,060 were bid for the land, Collins might have bid more, if he thought that sum under the (567) full value; he did not choose to do so, because (the presumption is) he supposed it was not worth more. If, indeed, Collins had not been able to purchase their rights, upon the terms on which the sale took place, or if he had been misled by false appearances, by them held out for that purpose, and on either of these accounts the land had sold for less than its value, because they did not bid against each other, and that for the purpose of defrauding him, there would be something in the allegation. This, however, it does not appear was the case. I am therefore of opinion that Collins is entitled to one-third of the purchase money only, with interest thereon from the time of the sale until he refused to execute the deed, etc., that from that time until he shall execute the deed, interest shall stop; that Dickerson, upon the execution of a sufficient deed, shall either pay the aforesaid principal and interest or cause the sum to be paid in a short time.

Decree. That the purchase money, that is to say, the one-half of the sum bid, with interest from the day of sale, be paid to Josiah Collins; and on the receipt of said sum and interest, that Josiah Collins shall convey the land so purchased in fee.

ROBERT OGDEN, ADM'R. OF CORNELL, v. BRITTAIN KING'S EX'RS.
Conf., 446.

Interest will continue to accrue on a debt if the creditor were in this country when the debts became due, although he be afterwards absent without leaving an agent.

Action of debt on a single bill for money, payable on the 2d day of June, 1774. On the trial the jury found the issues for the plaintiff and

assessed in damages interest from the issuing the writ only. The plaintiff moved for a new trial, on the ground that he was entitled to interest from the day of payment.

Samuel Cornell, the intestate, was a British subject, resident at New Bern. On the 17th day of August, 1775, he left that place (568) and went to England, where he remained until December, 1777, when he returned to New Bern, but was not permitted to come on shore, he refusing to comply with the requisites of the Acts of Assembly concerning absentees. He died in February, 1778, at New York, leaving a will, which was proved, and one of the executors qualified, who died in 1786. On the second Monday of March, 1798, the plaintiff obtained letters of administration in this State.

MACAY, J. This debt became due the 2d day of June, 1774. Samuel Cornell continued in this State, then province of North Carolina, until the 17th day of August, 1775, above one year after the money was payable. It was then the duty of Brittain King to have paid the debt; and having failed to do what he ought to have done, he must answer the consequences. 1 Fonb., 424, 425. The jury have allowed interest only from the issuing of the writ, 13th day of August, 1798. I am therefore of opinion a new trial ought to be granted.

JOHNSTON, J. It is a settled rule, both in law and equity, that the plaintiff shall recover interest from the time his debts became due. "It is the constant practice," says *Lord Thurlow* at Guildhall, "either by the contract or in damages, to give interest on every debt detained. 1 Vez. Jun., 63. When a note is due it bears interest from that time. Esp., 170; *Blaney v. Hendrick,* 3 Wels., 205. Now the note in this case became due June, 1774, at which time it became the duty of the defendant to pay or tender the money; on his failure, he became bound to pay interest as damages for the detention. The plaintiff's intestate did not leave the country until upwards of a year after the note became due; his leaving the country afterwards is no reason why the defendant should be excused from the payment of interest, as the first default was in him; and if from this, he now suffers any inconvenience, it cannot be charged to the absence of the intestate. "But every man must suffer for his own delay or neglect. And therefore he who does not perform his part of the contract at the time agreed on by the parties, or (569) appointed by law, must stand to all the consequences." 1 Fonb., 424, 425; 2 Fonb., 431. And a Court of Equity will not give relief in such cases. It is unnecessary to decide in this case how far a defendant would be liable to the payment of interest, where at times when the money became due, the plaintiff was absent from the country and had

carried the evidence of the debt with him; or dead, and no person legally authorized to receive the debt and give a discharge; so that the defendant had it not in his power to comply with the contract; therefore I give no opinion as to that point. I have not, however, been able to discover from my researches any case where the defendant has been excused from the payment of interest under such circumstances. The general principle seems to be, that the defendant having the possession and use of the money, the presumption is that he made a profit from it equal to the interest. But this appears to me to be a principle which would, if strictly applied, impose a very great hardship, if not a manifest injustice, on a punctual and conscientious debtor, who had provided the money at the day, and held it at his own risk, until there was a person who had a right to receive it, and to whom he could pay it with safety.

I am of opinion, under the circumstances of this case, that the plaintiff is entitled to interest, in damages, from the time that the note became due, deducting only the time of the war, as regulated by the Act of Assembly, until the time of entering the verdict. 2 Bur., 1077, 1094; 3 Bur., 1375; 5 Term Rep., 556.

TAYLOR and HALL, JJ., concurred with this opinion.

Rule made absolute.

NOTE.—A debtor, who is ready to pay his debt when it becomes due, is excused from paying interest thereon if the creditor conceals his place of residence, and the debtor knows not where to apply to make payment. *Child v. Devereux*, 5 N. C., 398.

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JOHN WILKINGS v. GEORGE M'KINSIE.—Conf., 448.

Where A had money in the hands of B who could not pay it but offered a bill on New York, which A did not want, but finding that C was willing to take it, received the money from him, and C, in consequence of an order from A, received from B his bill of exchange; and upon the protest of this bill, and B's failure. *Held:* That A was not accountable to C for the money paid for the bill, as he was neither endorser nor had promised to become responsible.

This was an action of *assumpsit* for money had and received to the plaintiff's use, tried in Wilmington Superior Court, May Term, 1803, when a verdict was taken for the plaintiff, subject to the opinion of the court on the following case:

M'Kinsie had money in the hands of John Barclay, and applied to him for $1,000. Barclay could not raise the money, but could draw bills

on New York. M'K. did not want money in New York, but undertook to sell B.'s bills, and applied to Wilkings, who said he wanted a bill on New York and would pay $500 down, and give his note for the balance, payable in a short time, if the bills were drawn in sixty days. M'K. agreed. Wilkings paid the $500, and gave his note to M'K. for the balance; M'K. gave an order to W. on B. for $1,000. W. applied and got B.'s bill for $1,000, which was returned protested for nonpayment. M'K. sued W. and recovered the amount of the note; and now this suit is brought to recover back the $1,000, being the amount paid by W. to M'K. The bill was in due time forwarded to New York, protested, and returned; of which due notice was given to M'K., and also notice that the order was not satisfied; which was protested as appears by the written protest. The notice was given immediately after the bill was returned. But before the return of the bill, B. committed an act of bankruptcy, to wit, on the 26th January, 1802, and was declared a bankrupt some time about the latter end of February or beginning of March. That the order was drawn for money, and was retained by W.; but it was understood by the parties that W. was to receive a bill of exchange.

Jocelyn, who argued this case for the plaintiff, cited 12 Mod., (571) 408; 2 Salk., 442.

Wright, who argued for the defendant, cited 6 Term, 52, and 7 Term, 65.

MACAY, J. From the case stated, it appears to me that M'K. sold the bill of exchange to the plaintiff, and received the money as to the price thereof; and that Wilkings took upon himself all the consequences. In this point of view, the law is settled. 3 Term, 757; Andrews, 108; 1 Salk., 124; 12 Mod., 408. And, therefore, a new trial ought to be granted.

JOHNSTON, J. It appears to me that in this case there is no cause of action against the defendant. He contracted that Barclay, who was then in good credit, and as well known to the plaintiff, a merchant residing in the same town, as to the defendant residing in the country, should draw a bill in favor of the plaintiff; neither of them had any doubt of the goodness of the bill. When the plaintiff received Barclay's bill the contract of the defendant was fulfilled; the money was applied to the use of Barclay by being immediately placed to his credit, in discharge of his debt due to the defendant; and the plaintiff was accommodated with the bill contracted for. The defendant had nothing further to do; his placing the money to the credit of Barclay was the same as if Barclay had himself received the money and paid it into the hands of the defendant. The whole must be considered as one entire transaction, the same as if the defendant, instead of drawing an order, had ac-

companied the plaintiff to Barclay, who having received his bill and paid his money, and Barclay had immediately handed it over to the defendant in payment. In such case the defendant could not be held accountable, and this does not appear to me to differ in substance from the present case. In the case of 6 Term, 52, the defendant gave a draft assuring the plaintiff it would be immediately paid. In this case M'Kinsie gave no such assurance, the bill was taken on the credit of Barclay only. In the case, 7 Term, 64, the question was, whether
(572) the plaintiff had such a property in the plate as would entitle him to recover in an action of trover. It was held that he had not, there being no actual delivery, and the notes for the plate not being paid, in consequence of the bankruptcy of the banker. This case differs essentially from the case in question. The case, 2 Salk., 442, does not apply—as in that case the plaintiff did not agree to take paper in discharge of his debt. The case, 3 Term, 757, is much stronger than the case at bar; for there the defendants not only sold the bill of another without endorsing, but after the failure of the person on whom it was drawn, promised to take it up; yet, it appearing that the bill was taken on the credit of the person on whom it was drawn, it was held by the court that the defendants were not liable, and that they were not bound by their promise. In the case, 1 Salk., 124, and 12 Mod., 203, it is said that if A. sells goods to B., and B. is to give a bill in satisfaction, B. is discharged though the bill is never paid; for the bill is payment. See, also, the case of the *Governor and Company of the Bank of England v. Newman.*

HALL, J. It does not appear that the plaintiff had any reliance upon the defendant, as to the bill which was drawn by Barclay in favor of the plaintiff. Barclay's circumstances, for aught that appears, were known as well to plaintiff as to the defendant. At that time they were doubted by no person. The defendant was not a party to the bill, nor did it pass from him, either by endorsement or delivery. If, however, notwithstanding that it appeared that it had been the understanding of the parties, that the defendant should stand as a security to it, the case would be different; but as this does not appear to have been the case, I think a new trial should be granted.

Judge TAYLOR concurred with the other Judges.

Rule absolute.

Vide Kyd on bills, 90 to 95; Chitty, 122, 3, 4, 5, and the authorities there cited.

NOTE.—See same case upon new trial as reported in 3 N. C., 333.

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PETER SCHERMERHORN v. CHARLES AND PETER PELHAM.—Conf., 452.

Damages and interest on bills are to be assessed according to the law of the place where the bill was drawn, and not where it was endorsed.

Action by the endorsee against the endorser of a bill of exchange. Verdict for the plaintiff subject to the opinion of the court: whether damages and interest are to be calculated agreeably to the laws of New York, where the bill was negotiated and endorsed; or agreeably to the laws of ....., in the West Indies, where the bill was drawn, and where the drawer resided.

By the Court. The question in this case is, whether the damages to be recovered on a protested bill of exchange shall be regulated by the laws of the country where the bill is drawn, or of the country where it is endorsed, in an action against an endorser.

The laws of individual states, stating the damages to be paid on protested bills of exchange, are frequently different from each other, but always relate to bills drawn within their respective jurisdictions; therefore, though the bill be endorsed over ever so often, and travels through ever so many countries, yet the nature of the original contract is not changed; which is, that if the bill is not paid, the drawer shall be liable to pay not only the principal, but the damages and interest stipulated by the laws of the country where the bill was drawn. When the bill is endorsed, the endorser places himself in the situation of the original drawer, and subjects himself to the same duties which he was bound to perform; so far it becomes the bill of the endorser; but to call it a new bill to all intents and purposes, as was alleged at the bar, would be to destroy the nature of it, by changing it from a foreign to an inland bill. For instance, if A. draws a bill in the Island of Jamaica, in favor of B., who resides in New York, on a person resident in that city, B. endorses the bill to C., in the same city; if by this endorsement it becomes a new bill to every intent and purpose, it is then divested of its original character of a foreign, and is changed into an inland bill; and (574) C., in his action against B., the endorser would be only entitled to common interest. Therefore, all that can be understood, by an endorsement being in the nature of a new bill, is that the endorser places himself in the situation of the drawer, and must be answerable to the endorser in the same manner as the drawer must ultimately be answerable to him.

JOHN HARDISON v. JOSEPH JORDAN.—Conf., 454.

A civil action is maintainable against a justice of the peace, acting in his office out of court, either maliciously, oppressively, or corruptly.

This action was commenced in Halifax Superior Court of Law. The plaintiff declared, to wit:

"Joseph Jordan, late of the county of Bertie, was attached, to answer John Hardison of a plea of trespass on the case, etc. And whereupon the said John Hardison, by *Blake Baker,* his attorney, complains that, whereas, a certain Amasa Perrin, on the ..... day of ....., in the year of our Lord one thousand seven hundred and ninety-nine, at the county of Bertie aforesaid, had instituted a suit, by way of warrant, against the said John Hardison, for the recovery of a sum of money pretended to be due and owing by the said John Hardison to him, the said Amasa Perrin; and the said suit, on the day and year aforesaid, at the county aforesaid, was tried by the said Joseph Jordan, a justice of the peace of the said county, who had competent power to try the same. And he, the said Joseph, on such trial, gave judgment against the said John Hardison in favor of the said Amasa Perrin, upon the said warrant, for the sum of six pounds, besides costs of suit. From which judgment of the said Joseph the said John prayed an appeal to the county court of Bertie aforesaid. And the said John then and there offered to the said Joseph two good and sufficient securities for prosecuting (575) the said appeal with effect, to wit: Samuel Mares and John Harrison, both of the said county, then and there being sufficient persons, and having each of them sufficient property within the county aforesaid, and were good and sufficient securities for the said John's prosecuting the said appeal with effect, according to the directions of the Act of the General Assembly in such cases made and provided. Nevertheless the said Joseph, being not ignorant of the premises, and well knowing that the said Samuel Mares and John Harrison were good and sufficient securities for the said appeal as aforesaid; not considering the duties of his said office, and disregarding the directions of the said Act of Assembly, but contriving and maliciously intending unjustly to aggrieve and oppress the said John in this behalf, and unjustly and maliciously to deprive him of his said appeal, and to subject him unjustly and maliciously to the payment of the said unjust judgment and costs, did then and there refuse to accept the said Samuel Mares and John Harrison as securities for the said appeal; and did then and there refuse to grant the said appeal, although he, the said Joseph, was then and there requested so to do by him, the said John, whereby the said John was unjustly and maliciously deprived of the said appeal, and was

thereby unjustly compelled to pay the said sum of six pounds, together with the sum of ....., for the costs of the said warrant. Wherefore," etc.

There was another count in substance the same, only charging that the defendant refused the appeal corruptly, etc.

The jury, on the trial at October Term, 1801, found the defendant guilty upon the first count; but not guilty in manner and form as charged in the second count.

The defendant's counsel moved in arrest of judgment, and filed the following reasons, viz.:

1st. Because the defendant was acting in his judicial capacity as a justice of the peace when he refused to grant an appeal as complained of, and stated in the plaintiff's declaration.

2d. Because it is not sufficiently stated in the plaintiff's declaration how the plaintiff suffered any damage in consequence (576) of the defendant's refusing to grant the plaintiff an appeal.

The counsel for the defendant argued that an action at the suit of the party will not lie against a Judge on an official act. 1 Danv. Abr., 179, secs. 1, 2, 4.

Or a justice of the peace for what he does while acting as such. 2 Haw. Pleas of the Crown, ch. 13, sec. 20; Carth., 494; Bacon's Abr., Appendix, Justice of Peace, F.

By the Court. A civil action is maintainable against a justice of the peace acting in his office out of court, either maliciously, oppressively, or corruptly. 2 Stra., 710.

The declaration states, "the said John was unjustly and maliciously deprived of his said appeal, and thereby unjustly compelled to pay the said sum of six pounds, with the sum of ....., for the costs of said warrant. This appears to us to be sufficiently certain. We are therefore of opinion the reasons in arrest of judgment ought to be overruled.

NOTE.—See *Cunningham v. Dillard*, 20 N. C., 485, which seems to be at variance with this case.

NOKES ON THE DEM. OF JAMES HOGG v. MARRIAN SHAW ET AL.

Conf., 457.

Where the date of the demise and the commencement of the term was left blank in a declaration in ejectment, the declaration was held ill and the judgment arrested.

There were blanks left in the declaration, in this case for the date of the demise, and the commencement of the term; it was perfect in other

respects. The jury found a verdict for the plaintiff, and the defendants moved in arrest of judgment, on two reasons, to wit: 1st. That there was no existing term stated in the declaration. 2d. That there was no date to the demise.

(577) *Attorney-General Seawell* for defendants. It was contended in the court below that the present defect was like the cases of impossible dates, and the objection, coming after a verdict is cured. That had the objection been taken at the trial, the court would have amended. I will endeavor to answer them in their turn. The action of ejectment is a possessory action, and the declaration contains a statement of such facts as plaintiff must make out on the trial, namely, a title in his lessor, a lease to him, his entry afterwards, and the ouster, by defendant, after the entry. The lease, entry, and ouster in some instances are still proven, in others admitted by the common rule, and thus the parties proceed to trial without making any further question of them. The notion I entertain of a verdict curing a defect is that it is some matter of form which does not relate to the plaintiff's title, and is either expressly cured by some one of the statutes or else is the omission of some allegation which the court will intend was necessarily proven, or the plaintiff would not have obtained a verdict. This leads us to examine whether this be a mere matter of form, or whether we are left at liberty to presume it proven; and a discussion of these two points will answer all the reasoning in support of the declaration. The demise which is stated to have been made is surely for some purpose; it is intended to show that the plaintiff is entitled to the possession. Why must it be stated to have been made at a certain time? That it may appear on the face of the proceedings that the entry of and ouster by defendant were tortious. It is not contended that a lease without a date would be void; such an one would take effect from the delivery; but it is said that when an ejectment is brought upon such a lease, the plaintiff should state in his declaration the time it was made in order that the defendant may appear a wrong doer. If it be said that the lease is mere matter of form, whence arises it, that in a declaration where the plaintiff claims title from two lessors, though in truth they be the absolute and indisputable owners of the land and entitled to the possession, yet when it appears on trial that they are tenants in common, the plaintiff cannot re-

(578) cover? So if it should appear that one was tenant for life and the other remainderman. Cro. Ja., 613; 6 Coke Rep., 14, 15. Yet, if the lease was mere matter of form, these objections ought not to prevail, inasmuch as the plaintiffs have the undoubted right, and by laying separate demises, would be entitled to recover. If the lease is mere matter of form, to what purpose are the repeated applications to enlarge

the demise or lease? If after verdict they would do no hurt, and if upon trial the court would amend, we are left to consider, with surprise, that so many of the learned should have labored so hard to obtain these unnecessary amendments. And it seems somewhat contradictory that the Judges should consider themselves employed in the furtherance of justice, when in no event the plaintiff could be injured; and that this has been the uniform language of the courts on the enlarging of all demises. See 2 Bl. Rep., 940; 4 Bur., 2447; *Young v. Erwin,* 2 N. C., 323.

I am aware that it will be said the case of *Brown v. Lutterloh, ante,* 556, from Hillsborough, bears some analogy to this. That was where the ouster was laid anterior to the time when the demise was stated to have been made. That case was determined upon the authority of *Adams v. Goose,* Cro. Ja., 96, and *Swimmer v. Grovesnor,* cited in Bul. Ni. Pri. (and rightly, too, in my opinion). There the court could form a perfect declaration by rejecting what was laid under a scilicet, for by rejecting what was laid under that as surplusage, and making the preceding word "afterwards" relate to the time when the demise was stated to have been made, all was sensible and right, and so was the judgment of the court of *Brown v. Lutterloh, supra.* Compare this case with those cited; is there any part of this declaration which can be rejected, so as to supply the defect and make it sensible? Does it appear on any part of it that the plaintiff has or ever had title to the possession? For the least, entry and ouster, though fictions, are not matters of form; they are contemplated to exist, and whenever it appears that they cannot, and consequently do not, the plaintiff cannot recover. The case of *Baker v. Cole,* from Burr., 1159, which was also insisted on at the trial below, may deserve a further notice. That was an impossible (579) date, the pleadings were of Hilary term, the first of George the III; the demise was stated to have been made the 30th of May, in the 33d year of his said majesty, and the ouster afterwards. By examining when the pleadings were made up, and that all these things must have taken place previous thereto; that no 30th day of May antecedent could have been in the reign of the then king; by applying these things *secundam subjectam materiam,* the whole could be rectified; and a further difference that there was a sensible though mistaken date.

But I have not been able to find a single case where an improbable date was held good in a declaration, except, perhaps, where it was laid under a scilicet. It is worthy, further, to remark that this certainty in the commencement of the demise (and consequently must be stated with the same) gives birth to its common appellation of term; it is its certain commencement, and certain ending, which circumscribes and terminates it. And Mr. Blackstone, in 2 vol. of his Commentaries, page 143, lays

it down that every estate by whatever words created, that has a certain commencement and certain ending, is an estate for years, and, therefore, is frequently styled a "term" from Terminus, and that every lease for years, which has not a certain beginning and certain ending, is void. It was hinted on the argument below, that the demise in a declaration of ejectment is different from a lease for years; but a little inquiry only will be necessary to convince us of the inaccuracy of such a doctrine. I will only revert to my argument on the history of the action, and only ask the method which is to be used to recover unoccupied premises; there the things are actually done, which in the present form exist only in contemplation, and the same kind of lease in the action to recover unoccupied premises is supposed to exist or to have been made, which is actually sealed and delivered in the other case. If, then, a declaration is served without any statement of demise, would a plaintiff be entitled to judgment? Then a demise stated, which is not certain in (580) itself, and cannot be certain by anything on the face of the proceedings, when examined by the settled rules of law, is void and of no account. It is laid down in Runnington, 90, and 1 Vent., 137; 1 Mod., 180, cited, that where the limitation in the demise is wholly uncertain, it is void, and plaintiff cannot have judgment; it is admitted, however, that in the cases cited, the declaration was held good, but they prove the principle laid down by Runnington. If on the trial of ejectment it should appear that no demise was stated, could the court permit the plaintiff to state one? They could not; and this proven by the authority of *Baker v. Cole,* before cited, where it is expressly ruled that the court cannot aid a defective title. But in no case whatever has it ever been held that the court would amend a total want of title. Let this question be asked: Suppose a joint lease should be stated, and upon examination the lessors appear to be tenants in common, would the court permit the plaintiff to amend? If in neither of these cases they would, it must then follow of course that the demise is something more than matter of form. When a perfect and complete demise is stated, the enlarging that, is only creating a larger estate, and not creating a thing which did not exist before; if then the lease turns out not to be matter of form, but the plaintiff's title, it follows, of course, that it is not cured on the score of form.

But with regard to its being now considered as if upon a motion to amend, I contend that it is not the light it should be considered in; it does not follow that because the court would have amended, that the verdict would cure, for I trust I have already shown that if the verdict had such effect the motion to amend would be in all cases useless. Then, this not being matter of form, but really of substance, is not cured by

the verdict, unless the court are left to presume that what is omitted was proven on the trial. In the whole course of the trial no question is made as to the making the lease, the defendant takes the plaintiff according to his own statement. No proof in such case could be received, and in truth the jury are never impaneled upon the demise. We, surely then, are not left at liberty to presume that (581) which never could have happened. From an inspection of the proceedings, it appears judicially to the court that such proof could not have happened, and, therefore, you cannot presume it. The first cases wherein such verdicts cure the declaration, that suggests itself to me, is the case of a declaration for a cheat which must be laid with a *scienter*, when a verdict has passed on a declaration not laid in that manner, the court will not disturb it, because they will presume that the *scienter* was proven, otherwise the plaintiff could not have obtained a verdict.

John Williams for plaintiff. The objections are: 1st. That there is no existing lease. 2d. No date to the demise.

There is on the face of the declaration an unexpired term. The declaration is after the form of one by original, and mentions that Hogg demised the premises for the term of ten years, unexpired and to come.

The verdict shows that a sufficient existing lease was admitted, or the plaintiff could not have obtained it. The term is a mere fiction, for the court compels the defendant to admit it. If any defect had been discovered, it would have been amended. After verdict the court overlooks the exception.

The court will intend anything to make good the verdict—it will presume a sufficient demise admitted to the jury.

The date is immaterial, if no date it would take effect from the delivery, and this will be presumed. No particular day of the entry or ouster need be mentioned. The date of demise seems, therefore, immaterial. 2 Stra., 1011, 1109, 1012; 2 Bur., 1160; Esp., 444, 445; 2 Bur., 665, 1159, 1161, 1162; 16 and 17 Car., ch. 8.

By the Court. There is no title whatever stated in the plaintiff's declaration, no ground whereon the court can presume an entry after the lease, and an ouster after the entry, or an unexpired term at the commencement of the lease. Therefore, the judgment is arrested.

NOTE.—See *Brown v. Lutterloh, ante*, 556.

(582)

WILLIAM JOHNSTON AND WIFE v. ABNER PASTEUR.—Conf., 464.

1. Husband and wife must join in detinue for her slave detained before and at the time of the marriage.
2. Detinue lies in every case where the property is detained and no regard is had to the manner in which the defendant acquired possession.

This was an action of detinue, brought in New Bern Superior Court to recover a negro. On the trial the jury found a verdict for the plaintiff, subject to the opinion of this Court on this point, "Whether husband can be joined in detinue for the property of the *feme* detained before and at the time of the marriage."

This case was argued by *Mr. Woods* for the plaintiff, and by *Mr. Haywood* for the defendant.

By the Court: MACAY, TAYLOR, HALL, and LOCKE, JJ. Few questions have been more frequently agitated in this State than that concerning the extent of a husband's property in slaves belonging to the wife, but not reduced into possession during the coverture. Though the opinions of the Judges on this subject have been different under the former judiciary establishment, and no judgment of sufficient authority was then given so as to settle the law, yet several recent decisions of this Court have distinctly expressed the sentiments of all its members. In this Court it has been unanimously agreed in each particular case, that slaves to which the wife has title, but of which the enjoyment was prevented during the coverture by an adverse possession, do not, upon the wife's death, devolve upon the husband, by virtue of her marital rights. Should it be thought expedient to reconsider the determination, it may save the trouble of some investigation to those who succeed us, to state the progress of this opinion, and to bring into one view the various cases that have occurred. The first published account of the question is in the case of *Whitbie, Administrator, v. Frazier,* 2 N. C., 275, where a woman entitled to the remainder in a slave, after an estate for life,
married and died before the particular tenant. The husband
(583) then died without administering upon his wife's effects, and the
plaintiffs, as administrators of the wife, recovered the negro in an action of detinue. It appears that the action had before been brought by the husband's administrator, and the case coming on before three Judges, two were of opinion that it was misconceived, and the third, though he then thought that the administrator of the husband was the proper person to sue, yet afterwards changed his opinion and concurred in the judgment rendered for the administrator of the wife.

This, then, may be considered as a decision of all the Judges of the State, so lately as the year 1796, affirming the proposition, that to entitle the husband as such, he must reduce the negroes of the wife into possession during the coverture. If he does not, and survive the wife, he can recover only as her administrator, to which character founding his right as her next of kin, he may recover her choses in action. The next is *Hynes v. Lewis, ante,* 131, where a woman entitled under a testament to a remainder in a slave, married and her husband died before the particular tenant for life; the widow then married again, and after the termination of the life estate, the contest arose between the executors of the first husband, and the second husband. *Mr. Haywood,* in his report of this case, states that he was informed that two Judges decided in favor of the executors of the first husband. An opinion to that effect might have been given, but the case was pending afterwards, and came on before three Judges in 1799. Upon the supposition that it was so decided, the reporter questions its propriety, and introduces the following pertinent remarks: "The authorities upon which the decision is grounded will not support it. Neither will H. Bl., 538 (the authority now relied upon), for though a vested interest in remainder, was there held to vest in the husband, that was the case of a chattel real; and 2 Atkyns, 124, and the authorities cited in *Whitbie v. Frazier, supra,* prove that vested interests in the wife, not reduced into possession, do not go to the husband as such, but as next of kin to the wife, where he survives her; whereas, if they went to him as husband, because vested interests in the wife, there would be no occasion to claim (584) them, nor indeed could he claim them as administrator of the wife. These negroes were but choses in action of the wife of the first husband, which he had never reduced into possession." When the same case was afterwards argued before three Judges, it appears that no judgment was given in consequence of one Judge not agreeing with the other two, who were clearly of opinion that the second husband was entitled to recover; and the reasons of their opinion appear to be in exact consonance with the quotation just made. Taylor's Reports, 44. The difficulty which has ever embarrassed the question, consists in ascertaining the true definition of a chose in action. For if slaves, of which the right is in the wife, although separated from the possession during the coverture may be considered as things in action, then it is conceded, and indeed cannot be doubted, that they do not survive to the husband as such. On the other hand, if they are not choses in action, then they belong to the husband, who may, after his wife's death, sue for and recover them, as well as during her lifetime. In 2 Black., 430, chattels personal (or choses) in possession, are contra distinguished from chattels personal (or choses) in action. As examples of the former, the author enumer-

ates, not only money, but jewels, household goods, and the like. If these chattels, or any others that are the subject of property, are kept from the owner by an adversary possession, they must equally come within the definition of things in action, as debts upon bond, contract, and the like. Is there any rational ground of distinction between a bond due to the wife and a chattel detained from her? Can a plausible reason be assigned why the husband should be deprived of one, if he fails to reduce it into possession during the coverture, and be entitled to the other? As the law confers upon him a power of obtaining an exclusive property in both, it seems most proper that he should be deprived of both, if he fail to exert such power. Such has been the opinion of this Court on every case where the question has come forward. The administrators of *Neale v. Haddock,* 3 N. C., 183, is a direct decision to that
(585) effect, as well as a case from Wilmington, *M'Callop v. Blount, ante,* 314.

The law may therefore be considered as settled, so far as the decisions of this Court have any weight in that respect; and as the property is peculiar to this country, it is impossible to acquire additional information from the books to which we usually resort. But since the decision of the cases in this Court, the report of a case in Virginia has been published, part of which is so applicable, as well to the general principle as to the particular question made in this case, that we are desirous to state it at some length, for the satisfaction of those who have not the book to refer to.

William Rowley made his will in 1774, devising to Lettice Wishart and Catharine Taylor sundry slaves, together with the residue of his estate, subject to the payment of his debts and legacies. John Wishart and Richard Taylor, husbands of the legatees, were appointed executors, both of whom qualified, but Wishart principally acted, and worked the slaves on the testator's land. After the testator's death, Wishart made his will in 1774, and gave all his slaves to be equally divided between his two sons, William and Sidney, and his daughter, the plaintiff; but the property was not to be enjoyed until his sons came of age. After the death of Wishart, the slaves of Rowley were divided between the defendants, Lettice and Catharine Taylor, according to Rowley's will. Lettice Wishart, after the death of her first husband, John, intermarried with the defendant, Michael Wallace. The bill was brought by the daughter of John Wishart, claiming a proportion of the slaves under the testament. From this summary of the case, it appears that the very same question of law arises out of the facts which has been so frequently litigated in this State; and it will appear in the sequel that the application of the same principles which governed the decisions of this Court produced the same result in the midst of the Judges in Virginia, all of

whom are persons of more experience than we pretend to be, and possess more leisure and a better opportunity to investigate abstract principles of law. There is in that state an Act of the Legisla- (586) ture, the 4th clause of which is in the following words: "And that where any slave or slaves have been or shall be conveyed, given, or bequeathed, and have or shall descend to any *feme covert,* the absolute right, property, and interest of such slave or slaves is hereby vested, and shall accrue to, and vested in, the husband of such *feme covert;* and that where any *feme sole* is or shall be possessed of any slave or slaves, the same shall accrue to and be absolutely vested in the husband of such *feme* when she shall marry. Upon a superficial view of this clause it might appear that the slaves of the wife were meant to be vested in the husband without taking possession of them. This was one of the grounds of argument employed by the counsel claiming in behalf of the legatees under the will of John Wishart. But the Court overruled the doctrine, and decided it as a point resting on common law principles. One of the Judges, after quoting at length the observations of Judge Blackstone, 2 v., 433, proceeds thus: "This passage I shall hereafter refer to as giving the most modern and perspicuous explication of the doctrine on this subject, at present I only wished it to be remarked, that the personal property of a wife is said to be absolutely vested in the husband, at the same instant, that it is declared, that if he does not reduce them into possession during the coverture, they shall remain to the wife if she survives him. Here, then, is a decisive quotation, from an eminent and accurate writer on the common law, showing that the words 'absolute property in the husband' are not to be construed as dispensing with possession in the case of chattels." Another argument in support of the first husband's right was, that by the rules of the common law, the gift of personal things to the wife during coverture, vests them absolutely in the husband, for which were cited 2 Com. Dig., 82; Bunbury, 188; 1 Roll. Rep., 134; 1 H. Bl., 109; 3 Lev., 803. This, however, was received by the President of the Court with much surprise, who declared that it was contrary to every idea he had entertained on the subject, and that on revising the cases cited, he could not dis- cover the smallest reason to doubt but that they prove a contrary (587) doctrine. That they lay down the general position, that such a legacy devised to the wife, vests in the husband; but immediately explain how it vests; that is, subject to the conditions of his reducing it into possession, or making a disposition thereof in his lifetime, or surviving his wife; otherwise that it will survive to the wife. The same Judge observes, that in his long experience, he does not recollect an instance where the slaves of a *feme covert* or *sole,* when the right came to her, if they were not taken possession of by the husband during the coverture,

and she survived, were not yielded to her. The case before the Court at present depends upon the question, Whether the wife can be joined with the husband in an action of detinue, instituted to recover a negro of the wife's detained before and at the time of the coverture. The property has never been possessed by the husband, and consequently would, upon his death, have survived the wife. It is a chose in action, which belongs to him only in the event of his converting it into a chose in possession. If the wife die before this is done, the husband can entitle himself, not in the virtue of his marital rights, but in the character of her administrator.

Supposing these principles to be clear and sanctioned by authority, an analogy arises out of them which must be applied to the remedy. There is a system to be followed, and a harmony which cannot be disturbed without introducing confusion and injury to the rights of the citizens. It is laid down in all the books, as an universal principle, that where a chose in action of the wife is to be reduced into possession, and an action is necessary for that purpose, it must be brought in the names of the husband and wife. For as the right would survive to the wife, she ought to be joined in the remedy in order that she may prosecute the suit to judgment, in the event of her husband's dying before or, if after judgment, that she may bring a *scire facias* thereon. 3 Term Rep., 627. And if the cause of action will survive to the wife, then although it arise during the coverture, she ought to join. 1 Role., 347; 1, 49. (588) But if the wife cannot have an action for the same cause, if she survive her husband, the action shall be by the husband alone. 2 Comyn. Dig., 107. To yield to the objection made to the wife's being joined in the present suit, would, it is conceived, overturn these principles. (1) Because it is manifest that if her husband died before he obtained possession, or at least judgment for slave, the right to recover it would survive to her; (2) Because, to say that the husband was competent to sue alone, would be to defeat her right without any consent or laches on her part; and by the lapse of time, to take away a privilege which the act of limitation has secured to *feme coverts*. Some dicta have been shown from the books which seem to countenance the idea that the action of detinue for the wife's goods must be brought by the husband alone. But it is probable that if the original cases could be examined, it would appear that such actions by the husband alone were sustained only where the goods had been in his possession during the coverture, either actual or constructive. In that case the property is completely his own, and the right would devolve to his representatives upon his death, and would not survive to the wife. This is rendered likely by what is said in Viner, Title Beson & Ferne, 30. That the husband and wife may join in detinue for the wife's goods, bailed by the

wife before the coverture. And so it is said with respect to replevin for her goods taken when she was *sole.*

In addition to this, it is to be remarked that the action of the detinue has, at least in this State, taken a range very wide of its original design, and been applied to transactions which were only formerly conceived to fall within its reach. It is defined in the old books as a remedy founded upon the delivery of goods by the owner to another to keep, who will not afterwards deliver them back again. Fitz. N. B., 323, and 2 Bl., 152, it is said that to ground an action of detinue which is only for detaining it, is a necessary point, among others, that the defendant came lawfully into the possession of the goods, as either by delivery to him, or by finding them. Hence it was that the wager of law was permitted in this action, and which grew out of the confidence reposed in the (589) bailee by the bailor. At present, however, the action is applied to every case where the owner prefers recovering the specific property to damages for its conversion, and no regard is had to the manner in which the defendant acquired the possession. Viewing the primitive use of the action, it is possible that a defendant claiming a chattel under the bailment of a wife when *sole,* might be considered as becoming on the marriage, a trustee for the husband; that the possession of the bailee was the possession of the husband, who therefore had a complete and exclusive right to bring the action. All this, however, fails in its application when the defendant claims an adverse possession under an adverse title, which happens in almost every instance. Then the husband is in pursuit of possession, the very thing which forms an indispensable ingredient in his title, and as he claims it in right of his wife, her name should be used in the action. For if brought by him alone, his representatives cannot revive it; for how can they recover that which their testator or intestate had no right in his lifetime?

We shall conclude with the statement of a case made by the President of the Court of Appeals in delivering his opinion on the case above cited. The material circumstances correspond entirely with the principal case: "Mrs. Harrison, when *sole,* was entitled to slaves which then lived with her mother, who, upon one of them, a woman, misbehaving, sold her to Valentine, just before the daughter married. Harrison some years after the marriage brought detinue, in the names of himself and wife, to recover the woman and her children from Valentine, who pleaded the act of limitations. More than five years had elapsed from the marriage, but Mrs. Harrison was an infant at the sale, and the suit was within time after her coming of age. It was insisted for Valentine that the act vested the right in the husband on his marriage; that he had improperly joined the wife; and that her infancy did not prevent his being barred. It was answered that the act only vested it as a chattel,

(590) that it was still the wife's personal interest, which would survive to her if not reduced into possession during the coverture, and therefore that she was properly made a party; and that the true question was whether she was barred. The court was of opinion in favor of the plaintiffs and gave judgment against Valentine, deciding, in fact, that the right would survive to the wife, if not reduced to possession in the husband's lifetime. ' The very case now before the Court. I believe there is no instance of an husband's suing under either part of this clause, in his own name, for his wife's slaves without joining her, except *Bronaugh v. Cocke,* and there the omission was made an objection."

For these reasons, we are of opinion that the wife was properly joined with the husband in an action of detinue brought to recover her slaves, which had not been possessed by him.

Judgment for plaintiff.

NOTE.—On the first point, see *Norfleet v. Harris, post,* 627; *Walker v. Mebane,* 5 N. C., 41; *Spiers v. Alexander,* 8 N. C., 67, and *Neale v. Haddock,* 3 N. C., 183, and the cases referred to in the note thereto.

On the second point, see *Charles v. Elliott,* 20 N. C., 606.

Cited: Norfleet v. Harris, post, 627; *Armstrong v. Simonton,* 6 N. C., 352; *Weeks v. Weeks,* 40 N. C., 120.

(591)

JUNE TERM, 1804

STATE v. GEORGE WILLIAMS.—Conf., 474.

Where there was an indictment for perjury on an affidavit to *continue a cause* and the defendant found not guilty, and then an indictment on the same affidavit *with intention to procure an attachment to issue;* it was held that the proceedings on the first indictment did not support the plea of "former acquittal" to the second.

The defendant was indicted in Salisbury Superior Court at September Term, 1801, for perjury committed by swearing to an affidavit, "with intention to continue a suit the said George Williams then had pending in the Court of Equity for the said district, wherein he, the said George Williams, was plaintiff and a certain John Simmons defendant." The defendant, being charged on this indictment, pleaded not guilty; and on the trial of the issue was found not guilty.

The defendant was immediately indicted for perjury, in swearing to the same affidavit, "with intention to procure an attachment to issue against one Richard Pearson, Esq., from the Court of Equity for the District of Salisbury, for contempt." To this indictment the defendant pleaded "former acquittal for the same offense." To which the Solicitor-General replied, *nul tiel record.*

HALL, J. One of the circumstances requisite to constitute the offense of perjury is that the oath must be taken in a judicial proceeding. 4 Black. Com., 137. If this requisite is wanting—if it is not taken in some proceedings relative to a civil suit, or criminal prosecution, it does not amount to perjury. If an oath or affidavit is made in one suit, but is used in another suit, in which, when made, it was not intended to be used, it cannot in the suit in which it was used be considered as such an oath or affidavit, as that, if false, it would amount to perjury, because it was not made in that suit or proceeding; but it would (592) be otherwise if the indictment set forth truly the suit or proceeding in which it was made. So, it appears to me, that upon the same principle, if an oath or affidavit is made for one purpose in a judicial proceeding, but is used for another purpose, for which it was not taken, although in the same suit or proceeding, that an indictment for perjury, stating that the affidavit was made with the intention of being used for the purpose for which it really was used, cannot be sustained. So, in the present case, if the defendant's affidavit was made for the purpose of procuring an attachment to issue, etc., and not for the purpose of con-

tinuing the suit, the indictment which states that it was made for the purpose of continuing the suit cannot be sustained, because it does not set forth truly that particular proceeding in which the affidavit was made; consequently, there would be a variance between the true proceeding in which it was made and the one stated in the indictment. Very material facts may be inserted in an affidavit as to the purpose for which the affidavit may be made; but may become very material as to some purposes for which the affidavit was not made, but to which it may be applied as occasion may require.

MACAY, TAYLOR, and LOCKE, JJ., concurred with HALL, J., in opinion that there was no such record of a former acquittal for the same offense.

NOTE.—See *State v. Ingles*, 3 N. C., 4; *State v. Williamson*, 7 N. C., 216; *State v. Lewis*, 9 N. C., 98; *State v. Jesse*, 20 N. C., 98.

(593)

BUCHANNAN, DUNLAP & CO. v. KENNON.—Conf., 476.

A writ must be attested as well as signed by the clerk of the court from which it issues.

By the Court: The question for the consideration of the Court in this case is whether a writ, attested in the name of National Lane, who was not clerk of the court, but which was signed by Simon Turner, who was the clerk, can be sustained. The defendant, by his attorney, having pleaded this defect in abatement, and the plaintiffs, by their attorney, having demurred to said plea.

The Court are of opinion that the thirty-sixth section of the Constitution of this State, which states "that all commissions and grants shall run in the name of the State of North Carolina, and bear test, and be signed by the Governor; and all writs in the same manner, and bear test, and be signed by the clerks of the respective courts," governs the present question. That this attestation is so substantiated and material a part of each and every writ as to render all those abatable which do not contain such attestation. They are, therefore, of opinion that the demurrer to the plea be overruled, and the writ abated.

NOTE.—See *Dudley v. Carmolt*, 5 N. C., 339; *Shepherd v. Lane*, 13 N. C., 148; *Worthington v. Arnold, ibid*, 363; *Gardner v. Lane*, 14 N. C., 53.

Cited: McLeod v. Pearson, 208 N. C., 540.

HOGG v. BLOODWORTH.—Conf., 477.

On a *sci. fa.* against a sheriff, issued on an amercement *nisi*, for not returning a writ to which the sheriff appears and pleads, the plaintiff is entitled to a trial at the return term of the *sci. fa.*

Sci. fa. against the defendant as sheriff of the county of New Hanover, on an amercement *nisi*, made at April Term, 1803, for not returning a writ directed to him against James Richards and others, returnable to April Term, 1803. This *sci. fa.* issued, returnable to (594) October Term, 1803, to show cause why the conditional judgment, on the amercement of April Term, should not be made absolute. At October Term, 1803, the *sci. fa.* was returned, "made known," and the defendant, by his attorney, appeared and pleaded, "That he, the said Bloodworth, was prevented by sickness from returning said writ," and moved the court for a general continuance, without showing any cause, which was overruled by the court, and a jury impaneled to try the issue on the plea, which, being found against the defendant, the court gave judgment for the plaintiff.

The question is whether, under the act of Assembly respecting *scire facias* on amercements against sheriffs, the defendant is entitled to a general continuance on pleading as a matter of course, without showing any cause therefor.

HALL, J. For every failure in a sheriff like the one now complained of, the court, by their order, may direct £..... to be paid to the party grieved, unless, says the act of Assembly, such sheriff can show sufficient cause to the court, at the next succeeding term after such order. It is contended for the defendant that if the sheriff, being called in by *sci. fa.*, enters his plea thereto, that he has, as a matter of right, till the next court to procure testimony to support it. I cannot agree with that construction of the act; it expressly says he shall have till the succeeding court after the order is made to show cause. Act of 1777, ch. 8, sec. 5. If he was not to show cause, or make any defense at that court, the order would become absolute; that, and no other, is the court assigned him to make his defense. If he could not procure testimony, and was to make out a proper case for a continuance, the court would grant it. It is not like the case of a plea entered in a common suit; there time is expressly given till the next court by the act of Assembly, but that is not the case in the act that governs this question. He must either show cause at the

first court or make out a proper case for a continuance till the next; but he cannot have that indulgence as a matter of course.

(595) MACAY, TAYLOR, and LOCKE, JJ., concurred in opinion with HALL, J., that the verdict was regularly taken and ought to stand.

McLELLAN'S ADM'R. v. HILL'S EX'R.—Conf., 479.

The Act of 1715 (1 Rev. Stat., ch. 65, sec. 11), will bar a debt due on a bond, though there be no person entitled to sue.

This suit was brought to recover money due on bond executed before the war; and among other pleas, the Act of 1715, ch. 48, sec. 9, was pleaded in bar.

By the Court: The testator was bound to pay a debt to the intestate at a future day, before which both parties died, and no administration was taken on McLellan's estate till many years after the debt became due. The plaintiff now brings his action within seven years after administration obtained. The defendant pleads the Act of 1715, ch. 48, sec. 9; the plaintiff replies, and the defendant demurs.

The plaintiff insists that the term of seven years limited in the act should only run from the time that he obtained letters of administration; that before that time there was no creditor in existence, so that there was nothing for the statute to operate against; and that a creditor could not be barred before he existed, and relied on the case *Curry et ux. v. Stephenson,* 4 Mod., 376, and *Cary et uxor,* probably the same case, 2 Salk., 421, and *Joliffe v. Pitt,* 2 Vern., 695, comparing this to a case where the act of limitation is pleaded.

In the case of *Curry v. Stephenson, supra,* it is said the Judges were of opinion that the statute would not bar the recovery on the reasoning in *Saffyn's case,* nor on the decision; for, in that case, the judgment of three Judges against two was that the statute was a bar; but the case of *Curry v. Stephenson, supra,* went off on another point.

In the case of *Saffyn v. Adams,* 2 Cro., 60, the case of *Sanders* (596) *v. Stanford* is cited, and as there stated is this: "It appears that there was a lease to commence on the expiration of a lease then existing; he who had the future interest died; the first lease expired; the lessor enters and levies a fine with proclamations before any administration committed; the five years passed; and after administration was

granted, the question was whether the administrator should have five years. And it was resolved that he should, "for none had a right to enter before." The same case is stated in the case of *Coates v. Atkinson,* Goldsborough, 171, somewhat different, as follows: *"Stanford's case* was a lease to commence at a day future, and then a fine and non-claim before the commencement shall not bar the right of that lease; but a fine after the day of commencement, although before any entry of lessee, shall bind," and cites *Saffyn's case.* The case of *Sanders v. Stanford* is said to have been decided 21 Eliz.; but we have diligently searched all the reporters of that day, with a view to find a true state of it, without being able to find it. The case, however, of an executor differs materially from all the cases cited. In the case, *Curry v. Stephenson,* first cited, the defendant actually recovered the money, and held it to his own benefit, without any legal right. It was a debt, in consequence, subject to the recovery of any person who could show a legal claim; and he was under no obligation to part with it to any other person, therefore suffered no hardship by the recovery of the administrator.

In the case of *Sanders v. Stanford,* the lessor sustained no injury by the entry of the administrator; the lease was his own act, of which he could not be ignorant, and he was bound in conscience to admit. An executor is only a trustee, and bound to deliver up the property with which he is intrusted, after the expiration of one year; being then divested of the property, he is no longer bound in conscience to pay any debt chargeable on that property; but notwithstanding this, the law obliges him to be accountable to creditors for seven years, and empowers him to demand security from the legatees, or next of kin, before he makes distribution or payment of legacies, to indemnify him (597) against any legal recovery. This law, however, after seven years, bars the creditor from any recovery against him; therefore, it would appear to a common observer that no legal recovery could be had against an executor after the expiration of that term; more especially, as if after that time he holds any of the estate, not recovered by the next of kin of legatees or creditors, he is bound to pay it to the church wardens and vestry, for the use of the parish; and by a late act, passed April, 1784, ch. 23, the administrator, as soon as he has finished his administration, and no creditor makes any further demand, is bound to pay what remains in his hands into the public treasury; where it is to remain subject to the claims of creditors, etc., and the treasurer is empowered to compel payment of such *residuum.* This last act is called a supplement to the first, for the purpose of substituting the public treasurer in place of the church wardens and vestry, which no longer existed; and to

charge the public treasurer, instead of the executor, with any demands against the estate which remained unsatisfied; so that it seems to be understood that after a limited time the executor was to be exonerated, though the demand was not extinguished, but transferred to the public treasurer, to whom the executor was accountable. It is true no time is limited by the last act, but as it refers to the first, the presumption is that the Legislature had in view the time limited in the first. If he had anything in his hands, he was subject to a recovery by the treasurer, and not by the creditor. If he had delivered over the property to the legatees or next of kin, he was answerable to no one, after the expiration of seven years; and it seems to have been the intention of the Legislature, from the tenor of these acts, that the executor should have a *quietus* with respect to creditors; for it could not be intended that he should be subject to the suits of the treasurer and creditor at one and the same time. In the case of *Joliffe v. Pitt* it is said that the *Lord Chancellor* inclined to be of opinion that the statute of limitation was not to take place; but the case was decided on the saving in the statute, 4 (598) and 5 Anne, in favor of the plaintiff, where the defendant is beyond sea. Though we can find no decision directly in point, yet we believe the law has been generally understood that the act of limitation will not run but from the time that administration was obtained, nor does this impose any hardship or injustice on the defendant, on whom there is a moral obligation to pay, notwithstanding any length of time that the debt might have become due; in case of an executor it is otherwise, for the moral obligation on him to pay ceases whenever the assets are taken out of his hands, or when he is bound by law to deliver them to another. The laws are positive, without any saving in favor of this case.

Upon the whole, we are of opinion that judgment in this case should be entered for the defendant.

NOTE.—See *Jones v. Brodie*, 7 N. C., 594; *M'Kidder v. Littlejohn*, 23 N. C., 66; *Armistead v. Bozman*, 36 N. C., 120—which seems to overrule this case.

Cited: Neil v. Hosmer, 5 N. C., 206; *Raynor v. Watford*, 13 N. C., 340; *Godley v. Taylor*, 14 N. C., 181.

(599)

RIDGE'S ORPHANS, BY JONATHAN HAINES, v. WILLIAM T. LEWIS ET AL.—Conf., 483.

1. Where the notice was "at the house of Capt. A. *Gordoner*, on the 13th and 14th days of March next, to take the deposition of said A. *Gardner;*" on the commission was "to cause A. *Gordan* to come before you"—between *Ridge's Orphans, by their next friend, J. Haines, complainants, and W. T. Lewis, and other defendants;* and the preamble of the deposition recited "to take the deposition of A. *Gordon*—wherein *J. Haines as the next friend of the orphans of W. Ridge is plaintiff, and W. T. Lewis and W. Corch and others,* are the defendants, at the house of the said A. *Gordon,*" it was held that the deposition might be read.

2. If the notice be "at the courthouse in Jefferson, in the county of Jefferson"; and the commission is directed to "G. D., P. T., and H. B., Esquires"; and the deposition appears to be sworn to "before us, two of the acting justices of the peace for Jefferson County, at the courthouse for said county," it may be read.

3. A deposition taken under a commission directed to A. and B., Esquires, who certify it under their names with "J. P." annexed, may be read.

4. Where a notice is to take a deposition at the "dwelling house" of a witness, and the certificate states that the deposition of the witness was taken at "his own house," it is sufficient.

Exceptions taken to the reading several depositions, filed in this suit, while pending in the Court of Equity at Salisbury District.

Notice.—"At the house of Capt. Alexander Gordoner, on the 13th and 14th days of March next, in Oglethorpe County and State of Georgia, to take the deposition of said Alexander Gardner, Capt. John Fielder and others . . ."

Commission.—"To cause Alexander Gordan to come before you—between Ridge's orphans, by their next friend, Jonathan Haines, complainants, and Wm. T. Lewis and others, defendants."

Preamble of Deposition.—"To take the deposition of Alexander Gordon, . . . wherein Jonathan Haines as the next friend of the orphans of Wm. Ridge is plaintiff, and Wm. T. Lewis and Wm. Corch and others are defendants, at the house of the said Alexander Gordon."

Exceptions.—"1st. The house at which it was taken is described Gordon's own house, not dwelling house, and is not said in what county.

"2d. The notice is to take Gardner's deposition, and the deposition taken is Gordon's. (600)

"3d. The notice is for two days.

"4th. The suit is not the same in the commission and in the commission cited."

Commission.—"To George Doherty, Permenus Taylor and Henry Bradford, Esquires, State of Tennessee and Jefferson County."

Notice.—"At the courthouse in Jefferson, in the county of Jefferson, on the 22d and 23d days of February next."

Deposition.—"Sworn to before us, two of the acting justices of the peace for Jefferson County, at the courthouse for said county, this 22d day of February, . . ."

Exceptions.—"1st. Because the commission is not directed to justices of the peace, and the deposition appears to be taken by justices.

"2d. It does not appear that the deposition was taken at Jefferson courthouse, in Jefferson County.

"3d. The notice names two days, and the deposition was taken on the first."

Commission.—"To James Dickson, Robert Edmondson, and Samuel Bell, Esquires, of Davidson County and State of Tennessee. . . . Between Ridge's orphans, by their next friend, Jonathan Haines, complainants, and Wm. T. Lewis and others, defendants."

Notice.—"At the dwelling house of James Martin Lewis, Esquire, in the county of Davidson, . . on the 30th and 31st days of December next."

Deposition.—"Sworn to and subscribed before us, at the house of said James Martin Lewis, Esquire, this 31st day of December, 1801, in the county of Davidson . . ."

Certificate.—"We certify that we have taken the deposition of James Martin Lewis, Esquire, at his own house, in the county of Davidson and State of Tennessee, on the 31st day of December, 1801.

SAMUEL BELL, J. P.,
JAMES DICKSON, J. P."

(601) *Exceptions.*—"1st. That the commission is not directed to justices of the peace, nor the deposition taken by justices.

"2d. Two days are named in the notice, and so uncertain.

"3d. The notice is dwelling house, the deposition taken at his own house."

By the Court: The depositions are taken with sufficient certainty, and ought to be read; the exceptions, therefore, are overruled.

NOTE.—See *Kenedy v. Alexander*, 2 N. C., 25; *Ellmore v. Mills*, *ibid.*, 359; *Alston v. Taylor*, *ibid.*, 381; *Harris v. Peterson*, 4 N. C., 358; *Bedell v. State Bank*, 12 N. C., 483.

WADE v. WADE.—Conf., 486.

To an action of debt on the judgment of a court of record in a sister State, *nil debit* is a bad plea; it should be *nul tiel record.*

B. Wade brought an action of debt in Stokes County Court against J. Wade, on a judgment obtained in a court of record of another State in the Union. The defendant pleaded the "general issue." The issue was submitted to a jury, and a copy of the record, authenticated according to the act of Congress, being to read them, they found a verdict for the plaintiff, "that there was such a record"; and judgment was rendered by the court for the plaintiff accordingly.

J. Wade obtained a writ of error, and assigned for error that the general issue in this case is *nul tiel record,* which ought to have been decided by the court and not by the jury.

HALL, J. It is declared in the 4th article of the Constitution of the United States that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; and Congress may, by general laws, prescribe the manner in which the same shall be proved, and the effect thereof."

The act of the first Congress, 2d session, ch. 11, in conformity (602) thereto, after pointing out the manner in which records, etc., shall be authenticated, declares "that records, etc., so authenticated shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence they may be taken. The record of a judgment obtained in another state is plainly comprehended in the words and meaning of the Constitution and the before recited act of Congress. It was, therefore, clearly intended to place them on a different footing from that on which they stood, or from that on which they would stand, in case no such provision existed. The record of the judgment in question is entitled to the same faith and credit in the court as it is entitled to in the courts of the state from whence it came. In those courts I apprehend the plea of *nil debit* would not be admissible; if so, it is equally inadmissible here. This proves that such judgment cannot be considered in the light of a foreign judgment. This point appeared so plain in favor of the plaintiff, in the case of *Armstrong v. Carron's Ex'rs,* 2 Dallas Rep., 302, that the counsel for the defendant declined arguing it. See, also, *Phelps et al. v. Halker et al.,* 1 Dallas Rep., 261.

The judgment which the court gave in this case was a general judgment upon the verdict, not a direct one upon the record, which ought to have been the case. I therefore think the judgment must be reversed.

MACAY and TAYLOR, JJ., concurred in opinion with HALL, J., that the judgment of the county court be reversed.

LOCKE, J., having been concerned as counsel in the case, gave no opinion.

NOTE.—See, accordingly, *Carter v. Wilson*, 18 N. C., 362; *Knight v. Wall*, 19 N. C., 125.

(603)

CHARLES REID, SURVIVING PARTNER OF D. CAMPBELL & CO., v. ROBERT HESTER'S ADM'RS.—Conf., 488.

1. It is discretionary with the court to allow the plea of *plene administravit* to be entered after issue joined, or not, under the circumstances of the case.
2. The plea of the statute of limitations may be pleaded after issue joined, upon payment of full cost, under peculiar circumstances.

An action of debt brought by plaintiff, a British subject, returnable to Granville County Court, August sessions, 1798, to recover a debt due by bond executed to Duncan Campbell and Company by Robert Hester, on the 13th day of March, 1777. The defendants pleaded "payment at and after the day, and set-off." Whereupon, the cause was continued from term to term until May Term, 1800, when they moved for leave to plead the Act of 1715, they having qualified more than seven years before the commencement of the action. The motion was founded on an affidavit, which stated, "That it never was the intention of the defendants to abandon or relinquish any legal defense they had to this suit; that when they employed counsel they did not know that there was any statute of limitation in force in this State which would bar the plaintiff's action, or they would certainly have made use of it; and that they had, by order of the said court, paid out part of the assets to one of the distributees."

The motion was immediately argued and overruled, from which decision the defendants prayed an appeal, and moved the cause to Hillsborough Superior Court. The motion was again argued in that court at October Term, 1800, and overruled by Judge TAYLOR. At October Term, 1802, Judge TAYLOR again presiding in that court, the defendants moved for leave to add the plea of *plene administravit*, to which the Judge being dissatisfied with his former opinion, added the Act of 1715, and granted a rule on the plaintiff to show cause and ordered the rule to be transmitted to this Court for the opinion of all the Judges.

ERWIN *v.* ARTHUR.

By the Court: The plea of the statute of limitations in the (604) affidavit mentioned, having been overruled at October Term, 1800, this Court cannot take any cognizance of that plea; and as to the plea of *plene administravit,* the defendants having shown no good cause for their being permitted to enter that plea at this stage of the proceedings, this Court leaves them to make out such a case as may entitle them to such a plea, at the discretion of the Judge before whom the cause may be tried—and remanded the cause.

At October Term, 1803, the cause was put to the jury, and a verdict entered for the plaintiff. The counsel for the defendants then suggested that the opinion of the Court of Conference was founded on a mistake; the right of adding the plea of the Act of 1715 having never been decided on by that Court, as intended by Judge TAYLOR, when he granted the rule of October, 1802. It was therefore ordered that the same rule should be again transmitted to the Court of Conference, and that the verdict taken at this term should be subject to their opinion thereon.

By the Court: The Court considers that the question as to the plea of *plene administravit* has been settled in this cause in this Court heretofore. The plea of the statute of limitation is permitted to be entered, under the circumstances of the case, upon payment of full costs. 1 Wils., 177; 3 Term, 124; 1 Bofanq., 228.

NOTE.—See on the first point, *Woolford v. Simpson,* 3 N. C., 132, and the cases referred to in the note.

On the second point, see *Johnston v. Williams, post,* 628.

Cited: Hamilton v. Shepard, 4 N. C., 357.

(605)

ERWIN AND WIFE v. ARTHUR'S EX'RS.—Conf., 490.

Where upon the hearing of a cause by petition for an account in the county court, the court ordered an account to be taken by the auditor, upon the coming in of which exceptions were filed by the plaintiff, which being argued and overruled the plaintiff appealed, *it was held* that the Superior Court would begin with the exceptions and not to hear the cause first upon the petition, answers, and proofs, though possibly it should not stop with the hearing on the exceptions.

Petition to the County Court of Mecklenburg, for a residuary legacy, given to the plaintiff, Mrs. Erwin, by the last will of Robert Arthur, her deceased father.

The defendants put in their answers, to which the plaintiffs replied, and several depositions were taken; and on the hearing the county court ordered an account of the estate of the testator to be taken, by an auditor to be appointed by the court. The auditor took the account and made his report, whereby he stated a balance to be due to the defendants. The plaintiffs excepted to the report, and the exceptions were argued and overruled. And thereupon the plaintiffs appealed to the Superior Court.

The question is whether the Superior Court, acting on this appeal, shall proceed *de novo,* hear the petition, answers, and depositions, and, if necessary, refer the cause again to an auditor to take an account, as is contended by the counsel of the plaintiffs; or shall that court begin at the exceptions, have them argued, allow or disallow them, and overturn or confirm the report accordingly, as defendant's counsel contends.

If the court shall be of opinion to begin at the exceptions, then the plaintiff's counsel wish to add others; shall they be permitted to do so, with or without costs?

By the Court: The foundation of the appeal is the judgment rendered by the county court, in overruling the exceptions taken by the plaintiffs. This is the error he complains of, and the one for which he seeks a remedy in moving the cause up. The obvious and the natural course, therefore, is for the Superior Court to examine, in the first place, whether those exceptions are well founded, and, consequently, (606) whether the county court did right in overruling them. Though this is the point where they ought to begin, in the further progress of the cause, yet we cannot undertake to say that it is the one where they ought to stop; for the justice of the cause may require that they should proceed, and give such judgment as the county court ought to have given, in the event of the cause having remained there. We say "may require," because it would be equally impossible and improper to prescribe any rule for their ulterior decision.

NOTE.—See *Burton v. Sheppard,* 2 N. C., 399.

ROBERT RAY'S EX'RS v. GEORGE McCULLOCH.—Conf., 492.

1. When a person agreeing to sell lands had a good title, and was able to convey at the time of the bargain entered into, and no delay can be imputed to him in performing his part of the contract, the contract is considered in equity as *then* executed, the subsequent conveyance being only matter of form, the substance being the bargain.

RAY *v.* MCCULLOCH.

2. A person who has been one of the objects of the confiscation acts, is entitled, under the treaty of 1783, as a British subject, to recover the balance due on contracts made before the acts of confiscation.

Case agreed, filed in the Court of Equity for Hillsborough District for the purpose of settling the equitable rights of the parties concerned in this and similar cases.

The case states that Henry E. McCulloch, by his agent duly authorized, on the 6th day of February, 1767, contracted to sell and convey in fee simple two hundred acres of land, lying in Orange County, to Robert Ray, the testator; for which the said Robert agreed to pay the said Henry £72; and to secure the payment thereof gave the said Henry his bond, who at the same time executed to the said Robert a bond conditioned to convey to him the said land, when the aforesaid £72 should be paid, and put the said Robert into possession of the said land; who remained in possession of the same till his death, and his heirs have continued in possession thereof ever since. Nothing further (607) was done in execution of the contract before the passage of the act of confiscation, in which the said Henry was named. On the 14th day of October, 1792, George McCulloch, being duly authorized and empowered by the said Henry, executed to the said Robert a deed sufficient in legal form to convey to him the said land in fee simple; and at the same time delivered up to the said Robert his bond given as aforesaid; and the said Robert executed to him a bond for the penal sum of £222 2s. 3d., conditioned to be void on the payment of £111 1s. 1d., with interest from the date. The said Robert died soon afterwards; and the said George instituted an action of debt in Hillsborough Superior Court of Law against the complainants, on the bond executed to him as aforesaid, which is still pending. The trustees of the University, by virtue of several acts of the General Assembly, claim the said land, as escheated or confiscated, and have given notice to the complainants accordingly.

If the said George is entitled to the money mentioned in the condition of the last bond, he may proceed at law; but if he is not, an injunction absolute and perpetual is to issue.

By the Court: The question is, Will the court of equity interfere to prevent the defendant from recovering at law on this bond?

It is insisted by counsel for the plaintiffs that H. E. McCulloch's lands are confiscated by act of Assembly, therefore he cannot convey, and that the consideration of the bond has failed, therefore the plaintiffs are not bound to pay.

1st. It is to be considered whether the plaintiffs' interest, which he had acquired under the bond from H. E. McCulloch, was affected by the act declaring the lands of H. E. McCulloch confiscated and forfeited.

At the Revolution, the property of the land, within the bounds of the State, was vested in the community or citizens at large, saving the rights of individuals, thus the title and possession of the lands in this (608) State were irrevocably fixed, and so far as respected individuals, beyond the control of any future law, which the Legislature, then established, might thereafter enact; and a line was then drawn between the public and private property, never thereafter to be violated. By this instrument, then, Ray's possession to the lands, which he held under the contract aforesaid, was secured to him forever—what more was necessary for him? We are therefore of opinion that Ray's interest was not affected by any of the acts of Assembly.

2d. Is Ray bound to pay the money stipulated by him at the time of the sale; and if he is bound to pay it, who has a right to demand it? It is said that H. E. M. not having conveyed the legal title, as he had stipulated, he is not entitled to the consideration.

McCulloch was to convey when Ray paid or tendered the money; but it does not appear that Ray ever paid or tendered the money, as he might have done; therefore, there was no breach on the part of McCulloch. But it is said that McCulloch, by his own act, has disqualified himself to convey the estate. To this there are two answers:

1st. Nine years, or thereabouts, had elapsed before any inability was attached to McCulloch, in all which time Ray might have had a conveyance, on tendering or paying the money.

2d. It does not appear that McCulloch was disqualified by any act of his own, but by an act of the State, which he could not control; it is true that he might, within a limited time, by taking the oaths of allegiance to the State, become entitled to the privileges of a citizen; but as he was then resident in his native country, under the government of his lawful sovereign, then at war with this country, this measure might have been attended with difficulty, and a considerable degree of hazard; and his not having availed himself of this indulgence, was certainly no offense against the State, nor a breach of any law, either human or divine. We are therefore of opinion that H. E. McCulloch is not chargeable in equity of any breach of the contract on his part, and that Ray is bound at law, and as it appears to us, not less in equity, to pay the consideration. But it is contended that this payment should (609) be made to the State, in whom the legal estate is supposed to be vested, and who alone can convey it.

To this it is objected by the counsel for the defendant, and it appears to the Court that the objection is well supported. By the authority cited from 2 Powell, 70, on executory contracts, where, after citing a number of cases on the subject, he draws this conclusion: "But the true principle seems to be that, in equity, if the party agreeing to convey

have a good title, and be able so to do at the time of the bargain entered into, and be clear from the imputation of delay in performing his part of the agreement, the contract is there considered as then executed; the subsequent conveyance being only matter of form, the substance being the bargain." This appears to come fully up to the present case.

1st. McCulloch, the party agreeing to convey, had a good title, and was able to convey at the time of the bargain entered into.

2d. It does not appear that any delay was imputed to him in performing his part of the contract.

The 4th section of the treaty with Great Britain, respecting British creditors, is likewise relied on by the counsel for the defendants. This proves that whatever claim the State may have to the lands of British subjects, it can have none to the debts due to them. This appears to us to be a *bona fide* debt due to a British subject, contracted before the Revolution, on an equitable consideration; for we consider the new bond taken by George McCulloch in the same condition as that given to Henry Eustace McCulloch, it being founded on the original contract, and for the same consideration. We would ask, What has the State to give in return for this money? It must be answered, nothing which can be useful to Ray; any conveyance which the State can make to him will not put him in a better condition than he is at present; the State would, therefore, receive the money without any valuable consideration;
the most it can pretend to is a mere naked right without an (610) interest.

It might be observed that the claim of the University to the land is barred by the possession which Ray holds under the conveyance from George McCulloch, which is of more than seven years continuance.

Thus, it appears to us that Ray's right to the land is secured by the Constitution and act of limitation; McCulloch's right to recover the money is secured by the 4th article of the British treaty; that, therefore, the money must be paid to McCulloch, from whom the consideration was received—or to no one.

Upon the whole, we are of opinion that Ray, having on his part received the full benefit of his contract with McCulloch, he has no equitable claim on the interference of this Court to screen him from a discharge of his part of the contract, and that being in possession of the substance, he may remain indifferent with respect to the form or a shadow. Therefore, that no injunction issue, and the bill be dismissed with costs.

NOTE.—See on the second point, *McNair v. Ragland*, 16 N. C., 516.

DEN ON DEM. OF THE TRUSTEES OF THE UNIVERSITY v. THOMAS RICE.—Conf., 497.

Where a deed of trust of land was made to a firm, consisting of several partners, some of whom afterwards became subject to the confiscation laws, but one of them did not; *it was held* that this one was adequate and competent to hold the land and execute the trust.

This was an action of ejectment, brought to recover a tract of land lying in the county of Granville. On the trial the jury found a special verdict, in substance, so far as is material to the questions of law, intended to be submitted to the court, as follows:

James Currin, being seized in fee of the land in question, and indebted to Young, Miller & Co. in a large sum of money, on the first day (611) of December, 1772, in consideration of the said debt, and of the further sum of five shillings to him paid, conveyed the said land to Young, Miller & Co., in trust, to secure the said debt, and to be sold by them for the payment thereof. That the persons constituting the firm of Young, Miller & Co. were John Alston, James Young, James Morton, Alexander Grindley, Andrew Miller, William Littlejohn, and George Alston; that the said J. A., J. Y., J. M., and A. G. were, on the 4th day of July, 1776, subjects of his Britannic Majesty, and still are subjects of the King of Great Britain; that the said George Alston and Andrew Miller withdrew themselves from this State in the year 1774, and removed beyond the limits of the United States, and continued beyond the limits of the said States until after the year 1783; and that the said William Littlejohn is, and, always since the 4th day of July, 1776, has been a citizen of this State.

1st. Whether the land in question, or any part thereof, vested in the State of North Carolina by the Declaration of Independence and the event of war, or by the acts of confiscation.

2d. Whether the debt stated in the record is restored to Young, Miller & Co. by the treaty of 1783; if so, is the land, being the security for the payment of that debt, reverted in them to the uses mentioned in the deed?

3d. Whether a naked trust, on the failure of a trustee, vests in the State or in the *cestui que trust.*

4th. If, on failure of a trustee, a trust coupled with an interest vest in the State, and that interest is afterwards restored to the individual, will the legal title pass with it?

By the Court: This case coming up from a court of law, but the counsel concerned having consented that the Court shall judge of this

case in the same manner as they would do in a court of equity, they are therefore of opinion that, according to the principle which prevails in courts of equity, that the act of a trustee shall not prejudice the *cestui que trust,* who is in that court the owner of that estate; that no confiscation has been operated in the present instance. Although (612) the other trustees became disqualified, by the act of confiscation, in leaving the country, yet the competency of Littlejohn remained, and he was adequate to all the purposes for which the trust was created. Even had all the trustees become subject to the confiscation laws, yet, according to the principle established in the Moravian cause, the State would have taken the land encumbered with trust. We think that as trust estates are the mere creatures of the court of equity, and by them so molded as to obtain the ends of justice, any other construction in the present case would be irreconcilable with the general doctrine on that subject.

MILLISON, ADM'R. OF WILLIAM HOWELL, v. JAMES NICHOLSON.
Conf., 499.

1. A husband suing as administrator of another for slaves, is not estopped by the deed of his wife, made while *sole,* conveying the said slaves to the defendant.

2. A husband may show the insanity of his wife before coverture to avoid a deed made by her while in that state of incapacity.

Detinue for slaves. The case states that William Howell, the intestate, being possessed of the negroes in question, for the consideration of love and affection, made a bill of sale of them to Sarah Howell, his sister, which was attested by the defendant. Sarah Howell afterwards lived in the family of the defendant, and while there, being sole, in consideration of love and affection, made a deed of gift of the said negroes to the defendant, with warranty of the title, he being in no manner related to her. The plaintiff, some years after the said deed of gift was made, intermarried with Sarah Howell; obtained administration on the estate of William Howell, who died in the interim, and commenced this action. It was alleged, and proved by the plaintiff on the trial, that William Howell was an idiot; consequently, the deed made by him to his sister void; and his administrator entitled to recover the negroes. On the part of the defendant, it was objected that the plaintiff, (613) having intermarried with Sarah Howell, was bound and estopped by her warranty to the defendant. To which the plaintiff answered that he sued as administrator, and not in his own right, and that Sarah

Howell was also an idiot, and offered evidence to prove her insanity at the time she executed the said deed, and that the defendant had by cover and fraud obtained the same. The court rejected this evidence; the plaintiff was nonsuited, and obtained a rule on the defendant to show cause why the nonsuit should not be set aside and a new trial granted.

MACAY, TAYLOR, and LOCKE, JJ. The circumstances of this case are somewhat singular, and as the questions it involves have not formed the subject of any judicial decision that is recollected in this State, it may be useful to state the principles of law as we apprehend them with some degree of minuteness. For, when the grounds of a decision are precisely ascertained, there is less danger of misapplication of its authority as a precedent, or of its extension to cases which do not, according to just analogy, range within its influence.

It is a fact stated in the record that William Howell was an idiot. As such, he was incapable of giving that free and deliberate assent which forms the essence of a contract; and the law has declared that all deeds not of record made by persons laboring under this mental infirmity, with a view to transfer their property, real or personal, are absolutely void. The exception as to deeds of record can have no operation in this State, where there is no method of levying a fine or suffering a recovery. The plaintiff's right to show the incapacity of his intestate cannot be disputed, for privies in blood, as the heir, may show the disability of the ancestor, and privies in representation, as the administrator, that of the intestate. 4 Co., 124. The law will therefore permit the plaintiff's recovery, unless he is barred by the deed with warranty, executed by his wife, when *sole,* to the defendant. It is, however, an additional
(614) circumstance in the case that the wife of the plaintiff was under a similar disqualification with her brother to make a deed. The questions therefore to be considered are:

1st. Whether the husband may show the idiocy of his wife before coverture in order to avoid her deed.

2d. Whether the husband is barred by the warranty of the wife, under the circumstances of the case.

Previously to considering the first question, it may be premised that the terms "idiot" and "insanity" are indiscriminately applied to the wife, in the case sent up; though, if by the latter, he meant lunacy, a material legal difference exists between them. An idiot is one that has had no understanding from his infancy, and therefore is by law presumed never likely to attain any. 1 Bl., 302. A lunatic is one who has had understanding but, by disease, grief, or other accident, has lost the use of his reason. A lunatic is, indeed properly, one that has lucid intervals; sometimes enjoying his senses and sometimes not. *Ibid.,* 304. The

same writer lays down the principle that consent is absolutely necessary to matrimonial contracts, and neither idiots nor lunatics are capable of consenting to anything. *Ibid.*, 438. It is presumed, however, that the meaning of this passage is, that the former are incapable of consenting at all times, but that the latter may consent to in a lucid interval, and, consequently, can, in that state, contract matrimony; for the writer proceeds to observe, "And modern authorities have adhered to the reason of the civil law, by determining that the marriage of a lunatic not being in a lucid interval, was absolutely void." But as the validity of Sarah Howell's marriage is not made a question upon the record, and as the equivocal use of the terms preclude any precise inference, no opinion will be given on that point. These remarks are therefore made only with the view of showing that the circumstance has not been overlooked; and to explain what might, on a slight examination of the case, be construed as giving an implied sanction to the marriage of a person legally disqualified. With respect to the question itself, the maxim relied upon is, that no man shall be suffered to stultify himself, in support of which so many cases have been cited and referred to, as strongly (615) tend to create a belief that the current of authorities sets that way.

As a rule of law established by many adjudications, we do not mean to infringe it, but in our view of this case, it becomes necessary to examine the foundation on which it rests, in order to show that neither the authority of the cases nor the immutable principles of justice warrant its further extension or more rigorous application. No rule is more clearly deducible from natural justice than that an obligatory contract cannot be made by a person devoid of understanding to direct his actions. Freedom and intelligence constitute a moral agent, without which facilities a person is incapable of producing by his acts any moral effect. Infants, idiots, and madmen are equally unendowed with this moral agency, and are consequently alike incapable of making a valid contract. The principle is received into the code of all civilized nations. It is even admitted, in its full force, by our law, which, however, creates an artificial distinction between the modes in which the contracts of incompetent persons are to be nullified. An infant may allege and prove his infancy; a *non compos* cannot do so, because, say the books, great insecurity would arise to contracts, from counterfeit madness and folly; and, supposing it to be real, a man cannot know what he did in such a situation. Influenced alone by such reasoning, the law has continued to enforce the maxim, down to a late period, from the time of Edward 3d. Before the latter period, however, the adjudications were directly opposite. This is rendered manifest by the *Registrum Brevium,* in which there is a writ for the alienor to recover lands conveyed to him while he was of unsound mind; by the authority of Britton, who asserts

that a man might allege his own insanity; and by that of Fitzherbert in his *Natura Brevium,* whose words are so emphatical as to leave no doubt of his real opinion of the law at the time he composed his book. "It stands with reason that a man should show how he was visited by the act of God with infirmity, by which he lost his memory and discretion for a time. As, if an infant within the age of twenty-one
(616) years doth make a feoffment in fee or a lease for years, he himself shall avoid his feoffment or lease, as well within age, although he shall not have a *dum fuit infra ætatem* within age, because the writ doth suppose him to be of full age; but an infant of the age of fourteen years hath discretion, as hath been adjudged, at such age; and if he at such an age commit felony, he shall be hanged for the same, and yet his feoffment, lease, or grant shall not bind him before the age of twenty-one years, because he hath not perfect discretion or knowledge of what he ought to do, or what is to be his profit or advantage before such an age; and therefore he shall allege that he was within age at the time of the feoffment, grant, or lease made by him; by which it appeareth that he shall allege that he had not perfect discretion at that time, for that nonage is an infirmity of nature, and cometh by the act of God, and *a fortiorari,* then, he who is of nonsane memory shall allege that he was not of sane memory at the time of his feoffment or grant; for he who is of unsound memory hath not any manner of discretion," etc.

The degree of credit to which these books are entitled may be best estimated by considering what is their character and pretensions, and we can thus more fairly draw a comparison between them and the others by which they are contradicted. The first book cited is supposed by some writers to be the oldest in the law, and must at least be considered as containing true precedents of such writs as were used at the time of its publication. It was printed, probably for the first time, in the year 1531, about sixty years after the art of printing was introduced into England, and may perhaps be considered as good evidence of what the law then was, as the loose *dicta* to be collected from the year books. Britton is a writer highly esteemed, considering the period in which he wrote, and has the reputation of conveying the doctrines of the law in a precise and satisfactory manner. It is almost superfluous to remark of Fitzherbert that he was a profound and accurate judge, whose laborious and intelligent researches, in the time of Hen. VIII, imparted methodical arrangement and luminous order to many branches of
(617) the law. His work, from which the above extract is made, contains a selection of such writs from the *Registrum Brevium* as had not become obsolete in his time. For the particular doctrine he advances relative to this case, he is warranted by the authorities he cites; and although he has since been overruled in *Stroud v. Marshall,* Cro. Eliz.,

398, yet his reasoning still retains whatever cogency it originally possessed. Having been sanctioned by some of the greatest modern lawyers, it cannot be considered altogether inconclusive. *Judge Blackstone* observes thus: "And from these loose authorities, which Fitzherbert does not scruple to reject as contrary to reason, the maxim that a man shall not stultify himself hath been handed down as settled law; though later opinions, feeling the inconvenience of the rule, have in many points endeavored to restrain it." Vol. 1 Pa., 191. No direct judicial decision confirmatory of the maxim has occurred of a later date than Jac., 1, nor is it probable that it would now receive a deliberate sanction; indeed, there is a good ground to infer the contrary, from such indications as modern opinions furnish. For, in *Yates v. Boen,* Strange's Rep., 1104, in an action of debt upon articles, the defendant pleaded *non est factum,* and offered to give lunacy in evidence. The *Chief Justice* first thought it ought not to be admitted, upon the rule that a man shall not stultify for himself; but on the authority of *Smith v. Cau,* where *Chief Baron Penjelly* in the like case admitted it, and on considering the case of *Thompson v. Leach,* in 2 Ventris, 198 (reported also in 3 Mod., 301), he suffered it to be given in evidence, and the plaintiff, upon the evidence, was nonsuited. These cases completely justify the assertion of *Judge Blackstone.* The same sentiment is avowed by *Lord Mansfield* in the House of Lords, in discussing a question brought up on a writ of error to one of the inferior courts. His language is equally forcible and apposite: "It hath been said to be a maxim that no man can plead his being a lunatic to avoid a deed executed, or excuse an act done at that time, because it is said, if he were a lunatic, he could not remember any action he did during the period of his insanity. And this (618) was doctrine formerly laid down by some Judges; but I am glad to find it hath since been exploded; for the reason for it is, in my opinion, wholly insufficient to support it; because, though he could not remember what passed during his insanity, yet he might justly say, if he ever executed such a deed, or did such an action, it must have been during his confinement or lunacy; for he did not do it either before or since that time. As to the case in which a man's plea of insanity was actually set aside, it was nothing more than this: It was when they pleaded *ore tenus;* the man pleaded that at the time he was out of his senses. It was replied, How do you know you were out of your senses? No man that is so knows himself to be so. And, accordingly, upon this quibble, his plea was set aside, not because it was not a valid one, if he was out of his senses, but because they concluded he was not out of his senses. If he had alleged he was at that time confined, being apprehended to be out of his senses, no advantage could have been taken to his manner of expressing himself." Appen. Bl., 150.

Those who vindicate the maxim on the ground of public policy seem to consider that the success of the plea depends on the testimony of the party relying upon it. But as it must be established by indifferent testimony, like any other fact, the truth is equally capable of being ascertained. And how slight is this probability, either that men should feign lunacy, when they make contracts, in order to avoid them afterwards; or if they were so disposed, that they could do it so successfully as to impose on the bystanders. Supposing it to be assumed with a degree of plausibility calculated to deceive the witnesses, and to impress them with a belief of its reality, the party contracting must then entertain the same opinion; and, believing himself to be contracting with a person of unsound mind, he must have some dishonest views, and ought not to receive the assistance of the law in enforcing such a contract. But why enforce the contract of a real lunatic, lest men should be tempted to feign lunacy, when even the former may be set aside by his committee, from
(619) the time he is found to have been *non compos?* The fact upon the inquisition is not more deliberately examined, nor likely to be more accurately determined, than where it constitutes the defense of a suit, and must be tried by the jury. To ascertain the intentions of men, their actions must be resorted to in a multitude of instances; there is no other way of exploring the operations of the heart. Whether the understanding be vitiated seems to be a question upon which a jury may receive more complete satisfaction than on many others presented to them where they have to mark the fine discrimination of intentions. Insanity, it is true, may be assumed, while infancy and duress cannot; but the bare probability that the deception should succeed, throughout all its stages, does not form a reason strong enough to sanction a principle so repugnant to natural justice.

The maxim then stands supported by various authorities, yet opposed by some that are very respectable, contained in the elementary books, as a principle of law, but the subject of reprobation with those by whom it is taught, rejected by individual judges, before whom it has occurred, and treated with entire contempt by one of great eminence, in a most important judicial investigation. It may at least be drawn from this view of the subject that the maxim ought not to be strained beyond its proper limits to govern any case not falling within the latter. The case before the Court is apprehended to be of that description; for the husband does not seek to allege the incapacity of his wife when *sole,* in order to annul a contract by which he is personally bound, but one set up to repel a claim made by him as the representative of a deceased person. Such an act of the wife can bear no relation to the character in which the husband now appears, nor could insanity have been feigned

by her with a view to enable the husband to escape from the contract now opposed to him. In this respect, therefore, the husband ought to be allowed to make any objections to the contract of the wife which he might properly allege against those of a stranger. And there seems to be as much propriety in this as in a committee showing the insanity of a lunatic in order to avoid his contracts. From these (620) reasons we are induced to think that the evidence offered by the husband ought to have been received. As to the second question, it must be repeated that the husband sues in another right, and can therefore be repelled only by transactions which have proceeded from him in that character. It is for the sake of preventing circuity of action that the law will not allow the recovery of a plaintiff against whom the defendant might afterwards effect a similar recovery. Wherever this principle operates, there will be found these two circumstances in the case, equality with regard to the amount and identity in respect to the character. As if a man covenant that he will not sue without any limitation of time. This the law construes a defeasance or absolute release, in order to avoid circuity of action. For if, in such case, the party should, contrary to his covenant, sue, the other party would recover precisely the same damages which he sustained by the others suing. 4 Bac., 266. There the two circumstances concur; the covenant was given by the plaintiff in his proper character, in which also the suit was brought; and the recovery against him would have been measured by the amount of his against the covenantee. One of the ingredients occurs in the following case, which, however, being deficient in the other, was held for that reason not to amount to a bar. In an action of waste it is no bar that the plaintiff covenanted to repair; for, in waste, the plaintiff shall recover treble damages; in covenant, only single are recovered. Moore, 23. The principle is also illustrated in the following cases: If a *feme* obligee marries the obligor or one of the obligors; or if there be two *feme* obligees and one of them marries the obligor; these are releases in law. But if a woman, executrix of the obligee, take the debtor to husband, this is no release in law, because she hath the debt in another right. 8 Co., 136. So, in the present case, as the husband is suing for those negroes in another right, the acts of his wife before marriage ought not to prevent his recovery. It cannot, upon any principle of justice, be considered stronger against the husband than if it were a debt (621) of the wife's contracted before marriage. Yet, suing in the character of administrator, such a debt could not be set up as a bar to the action; nor could even a debt of the husband's own contracting. 3 Atkyns, 691. And although the law has established the general liability of the husband to the debts contracted by the wife when *sole,* yet there

must be some acknowledgment on his own part to render such debt a bar, even to an action brought in his own right, as the following case evinces: "This was an action of *assumpsit* for money, and goods sold and delivered. Plea, *non assumpsit,* with notice of set-offs. The articles contained in the set-offs were three several sums of money, which were stated to have been paid by the defendant for the plaintiff, and by his direction; one of them was a sum of six guineas, stated to have been paid to a Mrs. Grandy, which the plaintiff's wife, who was a sister of the defendant, owed her for lodging before her intermarriage with the plaintiff. The counsel for the plaintiff objected to the allowance of this sum in the present action, on the ground that this was an action by the husband alone, and the debt attempted to be set off was a debt due from the wife before marriage, for which the action should be against husband and wife. It was answered that the husband, having ordered the money to be paid, had thereby made the debt his own. *Eyre, C. J.,* said, 'That for a debt of the wife *dum sola,* the action must be against husband and wife, and therefore could not be set off against a claim made by the husband alone, and for which the action was brought; but if it appeared that after the marriage the husband had ordered the debt to be paid, he thereby made it his own, and it could be set off. The defendant proved that the husband had done so, and was allowed the sum in his set-off.'" 2 Esp. Cas., 594. The very principle employed to contest the plaintiff's recovery is the same which produced the several statutes relative to the set-off, which, it is generally allowed, have extended the doctrine as far as the claims of justice require. Yet, whatever reasoning and analogy they furnish is totally adverse to the grounds of defense set up in the present case.

(622) The law will not, upon slight motives, suffer the course of administration to be impeded, which must happen if the personal concerns of an administrator are taken into view, where he is collecting the property of his intestate, for the use of creditors and distributees. To countenance such a doctrine by a decision of this Court would lead to consequences of the most unjust and injurious kind, and overturn the settled and well digested system, which has been handed down to use. Upon the second question, therefore, our opinion is that the husband is not barred by the warranty of his wife, under the circumstances of this case.

HALL, J., *contra.* Two questions have been made in this case: (1) Is the plaintiff barred in this action by the warranty of his wife while *sole?* (2) Ought the plaintiff to have been permitted to prove, on the trial, that his wife was *non compos,* etc., at the time she made the deed of gift to the defendant?

On the trial the inclination of my mind was, and still is, on both the points, with the defendant; yet I am not clear of doubts as to the first point. *Whitehall v. Squire,* 2 Salk., 595. As to the second point, Powell on Contracts, 9, and the cases there cited.

NOTE.—See upon first point, *Hendricks v. Mendenhall,* 4 N. C., 371; *Yarborough v. Harris,* 14 N. C., 40; *Burnett v. Roberts,* 15 N. C., 81.

JECHONIAS YANCY, ADM'R., ETC., v. THOMAS MUTTER'S EX'RS.
Conf., 513.

A debt contracted and partly paid before the mode of applying payments and calculating interest was changed, is subject to the present rule of calculation.

In equity. The intestate, James Yancy, on the 14th day of November, 1780, executed to Thomas Mutter, the defendant's testator, a bond in the penalty of eighty-six thousand and thirty-six pounds of crop tobacco, to be inspected at Petersburg or Blandford, in Virginia; conditioned for the payment of 46,315 pounds of like tobacco— (623) 10,753 pounds, part thereof, on the 25th day of December, 1783, with legal interest thereon from the 18th day of May, 1779—and a like quantity annually, until the whole should be paid; with an agreement endorsed on the bond that the obligee would receive payment in tobacco, gold, or silver, at any time, and thereby stop the interest.

Sundry payments were made by the intestate to the testator to a large amount. Mutter, the testator, made a statement of the balance due him on the bond, thereby claiming only £169, Virginian money, in 1798, and offered to take the complainant's bond for that sum, and to deliver him the original bond. In his statement, Mutter had applied the payments to the discharge of the principal, and left the interest unsatisfied, according to the method of applying payments and calculating interest, then observed in the courts of justice. The complainant refused to give his bond for the balance, or in any other manner, to ascertain conclusively the amount then due to Mutter. Mutter died. His executors brought an action at law on the bond; and on the trial applied the payments in discharge of the interest in the first place, and calculated the interest according to the present rule, "of applying payments in discharge of the interest first, and calculating the interest on the balances in such manner as not to calculate interest on interest," and thereby recovered judgment for a much larger sum than £169, Virginia money. The bill

prayed, and the complainant had obtained an injunction for the difference.

This cause was several times argued by Duncan Cameron for the complainant, and Leonard Henderson for the defendants.

HALL, J. The principle upon which interest is calculated at this day is different from that which was in use at the time the bond in question was executed. This seems to be evidenced by the opinions entertained by the parties themselves, at the time they attempted to bring about a settlement. It is to be observed that the decisions in our courts, (624) which have fixed the rule by which interest is now calculated, took place on bonds executed when a different rule prevailed. It was not a good objection, in those cases, that the parties, at the time of making the contract, were presumed to have in view a different rule from that which was about to be established. This case must be decided on the same principle. If, indeed, the parties themselves had made a settlement, and an adjustment of their accounts, they would have been bound by it, and the principle adopted by them would be the one which would now govern the Court; but this they have not done. They attempted to make a settlement, but did not effect it. They then stood as if that attempt had not been made.

The covenant binds the covenanter to the delivery of tobacco only, and that at stated times. The endorsement, by enlarging the limits of the covenant, puts it in the power of the covenanter to pay the tobacco, or gold or silver in lieu thereof, whenever he might think proper. I cannot discover how the endorsement affects the present question. It has been properly tried at law, and I think on the proper principle. My opinion, therefore, is that the injunction shall be dissolved.

By the Court: It is the opinion of the Court that the injunction be dissolved, with costs.

NOTE.—See *Bunn v. Moore*, 2 N. C., 279, and the cases referred to in the note.

HOLBROOK AND WIFE v. JOHN MARTIN.—Conf., 515.

After a writ was issued, but before it was returned, the plaintiff, without any order for that purpose, took out a commission to take testimony, and a deposition was taken under it. *Held:* That it was irregularly taken and could not be read.

The plaintiff, after the writ issued and before it was returned, took out a commission to take testimony. This commission was issued by the

clerk, at the request of the plaintiff, without any order of court or of a Judge. After the writ had been served on the defendant; (625) plaintiff gave him due notice, and went on to examine a witness; the deposition was properly taken according to the notice, certified and returned. Afterwards issue was joined, and the cause came on for trial, when this deposition was offered in evidence. It was also offered to be proved that the witness, at the time of taking his deposition, was aged, infirm, and likely to die; and although living at the time of the trial, was unable to attend the court through infirmity; and that one of the witnesses mentioned in the notice had actually died by old age before the day appointed for taking the depositions.

It also appeared of record that the following order was made by the court of Salisbury District, long before the issuing the writ in this case, to wit: "That commissions to take testimony issue when required by either party, in all suits in this court, and that reasonable notice be given," etc.

The court rejected the parol evidence as inadmissible, and the deposition was refused to be read. In consequence of which, the plaintiff suffered a nonsuit.

The plaintiff moved to set aside the nonsuit, on the ground that the deposition was improper; rejected, and thereupon the case was ordered to this Court.

By the Court: The deposition was irregularly taken, and therefore properly rejected. Let the rule be discharged.

NOTE.—The Acts of 1777 and 1783 (1 Rev. Stat., ch. 31, sec. 70) prescribes the manner in which depositions shall be taken before the cause is put to issue, which see.

(626)

JACOB WAGGONER v. JOHN GROVE.—Conf., 516.

Where a suit was brought against a party who lived in another district, and a judgment by default taken, which was afterwards set aside on condition of the defendant's pleading to the merits of the cause only, and upon the trial the plaintiff recovered less than fifty pounds, *it was held* that a nonsuit must be rendered.

The writ in this suit was returned to Salisbury Superior Court, September Term, 1802, and judgment by default entered against the defendant. At March Term, 1803, he moved to set aside the default, and for leave to plead; which was granted on condition that he plead

to the merits of the cause only, and thereupon he pleaded the general issue and payment. At March Term, 1804, the cause came on for trial, and the amount of the plaintiff's demand being ascertained, appeared to be under fifty pounds. The parties live in different districts. The defendant's counsel moved that a nonsuit be entered, which was done. The plaintiff's counsel then moved to set aside the nonsuit, on the ground that the defendant was estopped to take that advantage by the condition annexed to the order setting aside the judgment by default; and, on motion, the case was ordered to this Court.

By the Court: The interlocutory judgment setting aside the default can have no influence on this question; neither the one or the other can give the District Court jurisdiction in a case where it otherwise had none. Let the rule for setting aside the nonsuit be discharged.

NOTE.—See *Hart v. Mallet*, 3 N. C., 136; *Dickens v. Ashe, ibid.*, 176.

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(627)

BENJAMIN NORFLEET v. WILLIAM HARRIS.—Conf., 517.

Husband and wife must join in detinue for the slaves of the wife detained before and at the time of the marriage.

Detinue for negroes. Pleas, *non detinet* and statute of limitations. On the trial in Edenton Superior Court, April Term, 1803, the jury found a special verdict, to wit: "That the defendant does not detain any of the negro slaves mentioned in the plaintiff's declaration, except John, George, and Oxford, etc. That the defendant, being possessed of these three negroes, made a gift of them to his daughter, the wife of the plaintiff, before her marriage, and while she was a child; that she afterwards married Samuel H. Jameson—after his death, John Cunningham—and after whose death she married the present plaintiff. That the said negroes, ever after the said gift, remained in possession of the defendant, who held and claimed them as his own property; and neither the plaintiff nor his wife, nor either of her said former husbands, ever claimed the said negroes until this suit was brought. Upon these facts, the jury being ignorant whether the plaintiff is entitled to maintain this action in his own name, submits the same to the judgment of the court; and if the court shall be of opinion that the law is for the plaintiff, then they find for him, etc.; but if otherwise, they find for the defendant.

By the Court: This case is governed by the authority of the case, *Wm. Johnston and Wife v. Abner Pasteur, ante,* 582.

Let judgment of nonsuit be entered.

NOTE.—See *Johnston v. Pasteur, ante,* 582, and the cases there cited in the note.

Cited: Weeks v. Weeks, 40 N. C., 120.

(628)

SAMUEL JOHNSTON v. GILES WILLIAMS.—Conf., 518.

The plea of the statute of limitations may be pleaded after issue joined, if it were omitted by the inadvertence of counsel, and appears to be a conscientious defense.

The plaintiff brought an action of detinue for slaves, returnable to Fayetteville Superior Court, April Term, 1803. At that term the defendant employed John Williams, Esq., to defend the suit, and informed him that he had purchased some of the slaves for a fair and valuable consideration, in the year 1791, and had been in possession of them, and their increase, continually after that time, and instructed his attorney to plead such pleas as were best adapted to his defense. The attorney, at that time, conceived that the act of limitation would be a proper plea, and intended, and would have pleaded the same, with the general issue, had he not accidentally omitted to plead at all. At October Term, 1803, the defendant's attorney moved for leave to plead the act of limitations; which being opposed, the case was ordered up to this Court.

HALL, J. It is not the fault of the defendant that the plea of the statute of limitations is not pleaded; he directed his counsel to do so, he omitted to do it, but that omission was not intentional. From the representation made of the defendant's situation, with respect to the property in question, he might rely upon that plea with a pure conscience, as it intended to protect property which he has been long in possession of, and which he honestly acquired for a fair and valuable consideration. I think he should have liberty to enter the plea; but on payment of costs from the time it should have been entered until the motion made. The plaintiff's title will be in the same situation it was in at the time the suit was brought.

By the Court: Leave shall be granted the defendant to enter the plea of stat. lim. on payment of costs from the time the plea
(629) ought to have been entered until the time the motion was made to add the plea.

NOTE.—See *Reid v. Hester, ante,* 603.

Cited: Hamilton v. Shepard, 4 N. C., 357.

RICHARD SINGLETON v. THOMAS KENNEDY.—Conf., 520.

When the verdict is for more than the damages laid in the writ, the variance is fatal on a writ of error, unless the plaintiff will enter a *remittitur* for the surplus. And leave will be given him to do so upon paying the costs of the writ of error.

Writ of error to Morgan Superior Court, to reverse a judgment obtained in an action of covenant, by the present defendant against the plaintiff in error, in Burke County Court. The only error of consequence assigned was, "That there is a material variance between the verdict of the jury and the writ; the verdict and judgment being for £102 5 0, besides the costs of suit, and the damages in the writ being laid at £50 only."

HALL, J. I think the error assigned in the proceeding below is such that the judgment thereupon given must be reversed, unless the defendant in error think proper to enter a remission of the excess above the sum laid in the writ, and also to pay the costs of the writ of error. 1 H. Bl. Rep., 643.

By the Court: Leave is given the plaintiff below to amend, by remitting all the damages in the verdict except the sum mentioned in the writ, on paying costs of the writ of error; otherwise, the judgment to be reversed *in toto,* with costs.

Cited: Boyett v. Vaughan, 79 N. C., 535.

(630)

CHRISTIAN L. BENZIEN ET AL. v. JOHN LOVELASS ET AL.—Conf., 520.

Where the complainants attempted to amend by making new defendants, but drew their amended bill in such a manner that it did not appear to have any relation to the original bill, they were permitted to amend further so as to connect the two bills, upon their paying all the costs incurred on the copies of the amended bill issued.

In equity. The complainants attempted to amend their bill by making many new defendants; but drew their amended bill in such a manner that it did not appear to have any relation to the original bill. Copies of the amended bill had been sent out and served on the defendants. The complainant's counsel having discovered the omission, moved the court for leave to amend their proceedings, by connecting the two bills together, so as to make up but one record; and the only contest was upon what terms the leave should be granted.

HALL, J. I think it but reasonable to grant the leave prayed; but surely it must be granted upon payment of the costs incurred by the copies of the amended bill which issued, and were served on persons whom they now chose to consider as strangers to the bill at that time. This was their own act; and although they may eventually succeed in the cause, yet it would be very reasonable to make the defendants pay the costs of those copies. I am clearly of opinion they must pay all costs which have arisen in consequence of the omission they now wish to amend, by making the same persons defendants.

By the Court: The complainants must pay the costs of the copies which issued improperly against the persons now prayed to be parties; but no attorney's fee.

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CYRUS SHARP v. JAMES MURPHEY.—Conf., 521.

A horse racing contract must be in writing; and parol evidence shall not be admitted to vary it.

The parties, by an agreement under their hands and seals, covenanted to run a race on the 5th day of March, 1802, between the hours of twelve and three o'clock in the afternoon. Having met at the time, they, by parol, agreed to postpone the running to a later hour; but, in all other

respects, to be governed by the articles of the race. The plaintiff brought an action of *assumpsit,* and, on the trial, had a verdict, subject to the opinion of the Court.

By the Court: Judgment that the verdict be set aside, and a nonsuit entered, on the authority of the act of Assembly.

NOTE.—See *Critcher v. Pannell,* 5 N. C., 32; *Moore v. Parker, ibid.,* 37; *Jackson v. Anderson, ibid.,* 137. The Act of 1801 (Rev. Stat., ch. 51) makes void all bets, contracts, etc., respecting horse racing.

MOSELY v. MOSELY.—Conf., 522.

1. A deposition will be rejected if the witness refuses to answer proper questions on a cross-examination.
2. So, also, if written by an attorney of the party who has taken the deposition.

In equity. The complainant offered to read the deposition of Mrs. Livingston. To which it was objected that she, on the examination, had behaved rudely to Mr. Watters, the guardian of the defendant, and had refused to answer some questions put to her by him relative, as the commissioner believed, to the subject matter of the suit. The complainant also offered the deposition of Mrs. Tucker, and to that the defendant objected that it was reduced to writing by Mr. Walker, a prac-
(632) ticing attorney then attending the examination on behalf of the complainant, but admitted that this was done under the view and control of the commissioner, in the presence of the defendant, and without any objection taken at the time.

HALL, J. The best mode of receiving testimony is certainly from the mouths of the witnesses themselves; and if any other mode is substituted in the room of that, it ought to be guarded with much precaution. It may sometimes be convenient, but it is not of necessity, that depositions should be written by counsel concerned in the cause. The best may sometimes feel a bias that inclines them too much to one side, without being sensible of it; but if the case were otherwise, those more relaxed in principle ought not to be trusted. This remark applies to mankind generally. Testimony is presumed to flow from disinterested sources; and the medium through which courts of justice receive it ought to be as

unexceptionable as the nature of the case will admit of. This idea corresponds with the regulations prescribed by Congress, for taking testimony to be read in the Federal Courts; and, although those regulations, as such, have no binding force in our courts, yet the reason on which they are founded should be duly appreciated.

By the Court: These depositions were properly rejected by the District Court, and ought to be suppressed.

STATE v. JOHN M'LELLAND.—Conf., 523.

If a defendant be acquitted in the county court and the State appeals, a bond need not be given; and it is sufficient if the appeal be filed in the Superior Court at any time before State's day.

Indictment for assault and battery. The defendant was indicted in the County Court of Rowan, and acquitted, and judgment in favor of the defendant; from which the attorney for the State appealed (633) to the Superior Court of Salisbury District. The cause came on for trial at September Term, 1803, when the counsel for the defendant moved to have the same dismissed, for two causes: (1st.) That no bond had been given by the State, or prosecutor, to prosecute said appeal with effect, or, in case of failure, to pay such costs as might be awarded, according to an act of the General Assembly respecting appeals. (2d.) That the appeal had not been brought up by the party praying it within the time prescribed by the aforesaid act of Assembly.

The court suspended judgment upon this motion, and directed a jury to be impaneled to try the issue. Upon the trial it appeared that the prosecutor had given the defendant great provocation and offense, and that the assault and battery which the defendant committed was very trifling, but not justified in law. The defendant was convicted.

The court reserved the consideration of the foregoing motion, and referred the same to this Court; and if the Court should be of opinion that the said appeal ought not to be dismissed, then that they give judgment against the defendant, upon the conviction aforesaid, and the affidavits accompanying the case.

By the Court: A bond, in case of an appeal on the part of the State, is not necessary. Recognizance is sufficient; and it is sufficient that such appeal and recognizance be filed in court at any time before State's day.

Judgment that defendant be fined two pounds, and costs.

NOTE.—The State is not entitled to an appeal from the county to the Superior Court, upon the acquittal of a defendant in a criminal prosecution. *State v. Jones*, 5 N. C., 257.

Cited: State v. Ostwalt, 118 N. C., 1220; *State v. Savery,* 126 N. C., 1087; *State v. Cole,* 132 N. C., 1090; *State v Ford,* 168 N. C., 166.

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DECEMBER TERM, 1804

SAMUEL HOLDING, EX'R., ETC., ET AL. v. FREDERIC HOLDING.
Conf., 525.

NOTE.—See same case reported in 5 N. C., 9.

Cited: Newsom v. Newsom, 26 N. C., 388; *Pass v. Lea,* 32 N. C., 417.

ALEXANDER WORKE v. THOMAS HUNTER.—Conf., 527.

Where a defendant was acquitted on an indictment, and the clerk, without any express judgment being given by the court, issued an execution against him for his witness fees, under which the sheriff sold his land, and the defendant in the execution afterwards sold to another, *it was held* in a suit by the purchaser at the sheriff's sale against the purchaser from the defendant, that the sheriff's sale bound the land, but the plaintiff must prove title in him against whom the execution issued.

Ejectment. On the trial the case appeared to be this. A bill of indictment had been found against one George Harkness for perjury; he appeared, pleaded not guilty, and was acquitted, at .....Term of Salisbury Superior Court. No express judgment was given by the court as to the costs of the prosecution. The clerk, however, under the general understanding and construction of the act passed in the year 1779, ch. 4, sec. 19, then entertained, issued an execution against the goods and chattels, lands and tenements of the defendant Harkness for the amount of the allowances to the witnesses on the part of the State for their attendance. The sheriff levied an execution on the land in question, Harkness being then in possession of it, and claiming it as his property, and sold the same to Worke, the plaintiff. Harkness afterwards sold the land to Hunter, the defendant, who had full (635) notice of the sale by the sheriff and purchase by Worke. The execution was not returned, the sheriff having died before the return day; nor was there any entry or memorandum of the issuing of the execution of record. The only evidence of that fact was the testimony of the clerk. The only evidence of the levying of the execution was acknowledgments of Harkness and of Hunter, the defendant. The only evidence offered by the plaintiff of title in Harkness at the time the

execution issued was his acknowledgment, possession, and claim. On this ground the defendant's counsel moved for a nonsuit.

Two questions were submitted to this Court:

1. Whether a sale, under these circumstances, can bind the land in dispute.

2. Whether the court did right in submitting the case to the jury, or ought to have nonsuited the plaintiff.

By the Court: The sheriff's sale, under the circumstances of this case, did bind the land; but they also deem it regular that the plaintiff in ejectment, who claims under a sheriff's sale, shall establish a title in him against whom the execution issued. A new trial was therefore awarded.

NOTE.—See *King v. Featherston*, 20 N. C., 259; *Gorham v. Brenon*, 13 N. C., 174; *Phelps v. Blount*, *ibid.*, 177; *Sikes v. Basnight*, 19 N. C., 157, and *Quære*.

WILCOX ADM'R. v. WILKINSON'S EX'R.—Conf., 528.

NOTE.—See same case reported, 5 N. C., 11.

JOHN C. STANLEY v. THOMAS TURNER.—Conf., 533.

NOTE.—See same case reported, 5 N. C., 14.

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JAMES CRITCHER v. WILLIAM PANNELL.—Conf., 545.

NOTE.—See same case reported, 5 N. C., 32.

JAMES MOORE v. RICHARD SIMPSON.—Conf., 548.

NOTE.—See same case reported, 5 N. C., 33.

THOMAS ORMOND v. KINCHIN FAIRCLOTH.—Conf., 550.

NOTE.—See same case reported, 5 N. C., 35.

Cited: Avery v. Rose, 15 N. C., 554; *McLeod v. McCall*, 48 N. C., 89.

JACOB BLOUNT'S ADM'R. v. CHARLES JOHNSTON'S EX'R.—Conf., 551.

NOTE.—See same case reported, 5 N. C., 36.

JOHN MOORE v. DANIEL PARKER.—Conf., 553.

NOTE.—See same case reported, 5 N. C., 37.

ELIZABETH WYNNE v. MISHAW ALWAYS.—Conf., 554.

NOTE.—See same case reported, 5 N. C., 38.

CHURCHILL & LAMOTHE v. ABRAHAM COMRON'S ADM'R.—Conf., 555.

NOTE.—See same case reported, 5 N. C., 39.

Cited: Hall v. Gulley, 26 N. C., 347.

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ELISHA STOCKSTILL v. JOHN SHUFORD ET AL.—Conf., 556.

NOTE.—See same case reported, 5 N. C., 39.

Cited: Sharpe v. Jones, 7 N. C., 311; *McNamara v. Kerns,* 24 N. C., 70.

COMMISSIONERS OF FAYETTEVILLE v. WILLIAM JAMES.—Conf., 556.

NOTE.—See same case reported, 5 N. C., 40.

CASES ADJUDGED

IN THE

U. S. CIRCUIT COURT

FOR NORTH CAROLINA

(2 MART.)

IN THE U. S. CIRCUIT COURT,

JUNE TERM, 1796.

HAMILTON v. EATON.—2 Mart., 1.

1. Debts contracted with an alien are not extinguished by a war with his nation.
2. Debts due to British subjects paid into the public treasury compulsory by an act of Assembly, may notwithstanding be recovered of the debtor by the creditor under the provisions of the treaty of peace with Great Britain in 1783.
3. The confiscation acts, so far as they interfere with the treaty of peace with Great Britain, were annulled by the treaty.
4. A statute may be annulled by a treaty where there is an interference, the treaty being the last expression of the public will.
5. Besides, the treaty of 1783 was declared by an Act of Assembly of this State passed in 1787, to be law in this State, and this State by adopting the Constitution of the United States in 1789, declared the treaty to be the supreme law of the land.

DECLARATION.

U. S. Southern Circuit, N. Carolina District. } { Circuit Court, June Term, 1792.

Archibald Hamilton and John Hamilton, merchants, of Great Britain, and copartners in trade, under the firm of Archibald Hamilton and Company, complain of John Eaton, surviving obligor of Gabriel Long, dec'd, citizen of and resident within the State and district of North Carolina, and within the jurisdiction of this honorable court, in custody of the Marshal of the said district, etc., of a plea that he render to them eight hundred pounds, proclamation money, of the value of 2,000 dollars, money of the United States, which to them he owes, (642)

and from them unjustly detains: for that, whereas the said defendant, on the eleventh day of August, in the year 1777, at the county of Halifax aforesaid, in the province and district aforesaid, one of the United States of America, in the southern circuit, and now within the jurisdiction of this honorable court, made his certain writing obligatory, sealed with his seal and to the court shown here thereon, and the date whereof is on the same day and year aforesaid, whereby the said defendant did bind and oblige himself to pay to them, the said Archibald and John, the aforesaid sum of 800 pounds of the value aforesaid, whenever afterwards he should be thereto required.

Nevertheless the said defendant did not, nor hath not paid to them, the said Archibald and John, the aforesaid sum of eight hundred pounds of the value aforesaid, although often required, and particularly on the tenth day of May, in the year 1789, at the county aforesaid, within the State and district aforesaid, and within the jurisdiction of this honorable court, but the same to them to pay, has hitherto altogether refused and still does refuse to pay, and detain the same, to the damage of the said plaintiffs five hundred dollars, and therefore they bring suit, etc.

W. R. DAVIE, *pro Quær.*

John Doe *and* Richard Roe, *pledges.*

PLEAS IN BAR.

I. And the said John Eaton, by John Haywood, his attorney, comes and defends the force and injury, when, etc., and craves oyer of the writing obligatory aforesaid: and it is read to him in these words, to wit:

Know all men by these presents, that we, John Eaton and Gabriel Long, of the county of Halifax and province of North Carolina, are held and firmly bound unto Archibald Hamilton & Co., of the county and province aforesaid, in the just and full sum of eight hundred pounds, proclamation money, to be paid unto the said Archibald Hamilton & Co., their certain attorney, their heirs, executors, administrators, or
(643) assigns: To which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this eleventh day of August, Anno. Dom. 1777.

And he likewise craves oyer of the condition of the said writing obligatory, and it is read to him in these words, to wit:

The condition of the above obligation is such, that if the above bound John Eaton and Gabriel Long do and shall well and truly pay, or cause to be paid, unto the said Archibald Hamilton & Co., their certain attorney, their executors, administrators, or assigns, the just sum of four hundred pounds like money, on or before the first day of August next,

with lawful interest from the date, then the above obligation to be void: or else to remain in full force and virtue.

Which being read and heard, the said John Eaton saith, that the said plaintiffs ought not to have or maintain their said action against him, because he saith, that on the 4th day of July, in the year of our Lord 1776, and from thence continually afterwards unto the thirtieth day of November, in the year of our Lord 1782, there was an open war between the King of Great Britain and the United States of America, and that on the said fourth day of July, in the said year of our Lord 1776, the aforesaid plaintiffs, and each of them, were residents and inhabitants of this State, and continued to reside and inhabit within the same, until the twentieth day of October, in the year of our Lord 1777; on which said twentieth day of October the said plaintiffs withdrew themselves, and each of them withdrew himself from this State, and from the United States of America, to wit, at the county of Halifax in this State; and continually afterwards, from the day last aforesaid until the termination of said war, the said plaintiffs and each of them resided beyond the limits of the said United States, under the sovereignty and jurisdiction of the said king, owning and acknowledging their allegiance to him, and during all the time last aforesaid the said plaintiffs, or either of them, did not return into this State to be admitted as a citizen or citizens thereof; and that during the time of the said war between (644) the said King of Great Britain and the said United States of America, by a certain act of the General Assembly, held at Halifax on the 18th day of Oct. in the year of our Lord 1779, entitled "An act to carry into effect an act passed at New Bern in the year 1777, entitled an act for confiscating the property of all such persons as are inimical to this or the United States, and of such persons as shall not within a certain time therein mentioned appear and submit to the State, whether they shall be received as citizens thereof, and of such persons as shall so appear, and shall not be admitted as citizens, and for other purposes therein mentioned," reciting that whereas it is enacted by the aforesaid act passed at New Bern, in November, one thousand seven hundred and seventy-seven, that all the lands, tenements, and hereditaments, and movable property within this State, and all and every right, title, and interest therein of which any person was seized or possessed, or to which any person had title, on the 4th day of July, in the year 1776, who, on the said day was absent from this State, and every part of the United States, or who has withdrawn himself from this or any of the United States, after the day aforesaid, and still resides beyond the limits of the United States, shall and are hereby declared to be confiscated to the use of this State, unless such person shall, at the next General Assembly, which should be held after the first day of November, in the year 1777,

appear and be admitted to the privilege of a citizen of this State, and restored to the possession or property which to him once belonged within the same; and whereas, divers persons who come within the descriptions of the aforesaid recited act, had failed or neglected to appear before the said General Assembly as last mentioned, or at any General Assembly since, and submit to the State whether they should be admitted as citizens thereof, and restored to the possessions which to them once belonged, whereby such certain persons thereinafter mentioned had clearly incurred and become liable to the penalties of the aforesaid
(645) first recited act, in consideration thereof, by the authority of the same General Assembly, it was therein enacted, that all the lands, tenements, hereditaments, and personal property within this State, of divers persons therein particularly named, and among others of John Hamilton and Archibald Hamilton, by the names of John Hamilton and Archibald Hamilton, late of Halifax, and of all others coming within the meaning of the said confiscation act, and of that act passed at Halifax, and all and every the right, title, and interest, which all, or each of the persons aforesaid, may have had therein on the said fourth day of July, in the year 1776, or at any time since, should be and were thereby declared to be confiscated fully and absolutely forfeited to this State, and should be vested in the hands of commissioners as in the said act directed to be appointed for the purposes thereinafter mentioned. And by the authority of the same General Assembly, it was further therein enacted that commissioners should be appointed by the County Court in each county, who in their respective counties should have full power and authority to take possession of all lands, tenements, hereditaments, moneys, debts, whether due by judgment, bond, bill, note, account, or otherwise, and all other personal property of the persons aforesaid, in the name and for the use of the State, which thereby were declared to be forfeited to the said State, and give receipts and discharges which should forever indemnify all persons delivering or paying the same, their heirs, executors, or administrators, against any future claim for the articles or money mentioned in such receipts or discharges. And by the authority of the same General Assembly, it was therein further enacted, that the said commissioners might order the several constables to summon any of the inhabitants in their respective counties to appear before them, at convenient times and places, to render on oath an account of such forfeited property, and that they, or a majority of them being present, should administer on oath or affirmation to the inhabitants so appearing, whereby each inhabitant, rendering an account, should swear or affirm that the account by him rendered contained a true and full
(646) account to the best of his knowledge, of all the lands, tenements, hereditaments, debts, moneys, and all personal property in the

county or elsewhere, which belonged on the fourth day of July, in the year of our Lord 1776, to any of the (therein) before mentioned person or persons, or at any time since, who came within or are included by the descriptions, or either of them recited in the said act or the confiscation act, passed at New Bern, in the year 1777, and that he had not disposed or parted with the same, or any part thereof, to elude or evade the intent and meaning of the confiscation act, or of that act passed at Halifax; and further, that the said account contained, to the best of his recollection, the full amount of all and every sum and sums of money which then were by him due and owing to any such person or persons, including interest, if any due, by bond, note, or account, or by virtue of any trust whatever; and if any person summoned as aforesaid should fail to appear, or, appearing, should fail to render an account as above mentioned, on oath or affirmation, as the case might be, in such case the said commissioners, or a majority of them, should have power to commit such person, if present, to close gaol until he or she could comply with the law; and if absent, should issue a warrant, directed to any sheriff or constable, to apprehend and bring such absent person before them, at any place, on a future day, when, if he or she should refuse to render an account on oath or affirmation as aforesaid, he or she should also be committed to close gaol, until he or she should render an account on oath as aforesaid; and the said commissioners were thereby invested with power to administer the oath, issue warrants, and make commitments, in manner aforesaid. And the said commissioners were thereby invested with full power and authority to demand, make distress for, and receive all sums of money due and owing by the inhabitants of their respective counties, and declared forfeited by the said act, and were thereby made liable to account for the same to the public treasurer of this State. And the said John Eaton further saith, that on the day of the making of the aforesaid act, passed at Halifax, and also from the day of the date of the said (647) writing obligatory, and from thence continually afterwards, until this present day, he, the said John, hath been an inhabitant of the said State, being and residing within the same, to wit, at the county of Halifax aforesaid, and that after the making of the aforesaid act passed at Halifax, the Court of Pleas and Quarter Sessions for the said county, held for the said county, at the town of Halifax, in the said county, on the .....day of ....., in the year of our Lord 1780, duly appointed Samuel Weldon, William Wooting, and William Montfort to be commissioners for the purposes aforesaid, in the said act expressed, for the said county of Halifax, who then and there accepted the appointment, and having duly qualified themselves for the same, by performing and complying with the several requisitions by law prescribed in such case, then and there took upon themselves the exercise thereof; and that the said

commissioners, after their appointment and qualification as aforesaid, caused the said John Eaton to be summoned according to the directions of the aforesaid act, to appear before them on the fifteenth day of April, in the year of our Lord 1780, in the county aforesaid, to give in on oath an account, among other things, of all and every the sum and sums of money as aforesaid, by him due and owing to the persons aforesaid; whereupon the said John Eaton then and there appeared before the said commissioners and rendered to them, on oath, an account of the sum of £460, being the principal and interest then due, in the said writing obligatory above specified, and that afterwards, to wit, on the same day and year last aforesaid, in the county aforesaid, that he, the said John Eaton, by the commissioners aforesaid was required to pay them the said sum of four hundred and sixty pounds, according to the directions and intent of the act aforesaid; and that he, the said John Eaton, thereupon, then and there, paid to the said commissioners the aforesaid sum of £460, being the whole sum mentioned in the condition aforesaid, and all the interest therefore then due; and that thereupon the said commissioners, then and there, made and delivered to him, the said John
(648) Eaton, a receipt and discharge of and for the sum aforesaid, by him paid as aforesaid, according to directions of the act aforesaid; and this he is ready to verify. Wherefore, he prays judgment, whether the said plaintiffs ought to have or maintain their said action against him; together with this, that he is ready to verify that the said John Hamilton and Archibald Hamilton, above named in the said declaration, and the said John Hamilton and Archibald Hamilton, in the aforesaid act of the said General Assembly, likewise named, are the same and not different persons.

II. And the said John Eaton further saith, that the said John Hamilton and Archibald Hamilton ought not to have and maintain their said action against him, because he saith that on the fourth day of July, in the year of our Lord 1776, and continually afterwards until the third day of September, in the year of our Lord 1782, a war was prosecuted and carried on against the United States of America by the King of Great Britain; and that in the time of the continuance thereof, by a certain act of the General Assembly of the State of North Carolina, held at New Bern on the fifteenth day of November, in the year of our Lord 1777, it was, among other things, enacted by the authority of the same General Assembly, that all the lands, tenements, hereditaments, and movable property, within this said State, and all and every right, title, and interest therein, of which any person was seized, or to which any person had title on the fourth day of July, in the year of our Lord 1776, who, on the aforesaid day, was absent from the said State and every part of the United States, and who then was still absent from the same,

and then at any time during the war had attached himself to or aided or abetted the enemies of the said United States; or who then had withdrawn himself from the said State, or any of the United States, and who then resided beyond the limits of the said United States, should be and are thereby declared to be confiscated to the use of the said State, unless such persons should, at the next General Assembly, which should be held after the first day of October, in the year 1778, appear and be by the said Assembly admitted to the privilege of a citizen of (649) this said State, and restored to the possession and property which to him once belonged within the same. And the said John Eaton further saith, that afterwards, by one other act of the General Assembly of this State aforesaid, held at Halifax on the eighteenth day of October, in the year of our Lord 1779, reciting the act last aforesaid, and that whereas divers persons, who come within the description of the aforesaid recited act, had failed or neglected to appear before the said General Assembly as therein mentioned, or at any General Assembly (then) since, and submit to the State whether they should be admitted as citizens thereof, and restored to the possessions which to them once belonged, whereby such certain persons in the said last mentioned act thereinafter mentioned, had clearly incurred and became liable to the penalties of the aforesaid first recited act, in consideration thereof, it was enacted by the authority of the same General Assembly, held at Halifax as aforesaid, amongst other things, that all the lands, tenements, hereditaments, and personal property within the said State, of divers persons in the said last mentioned act named, and among others, of John Hamilton and Archibald Hamilton, then late of Halifax, and of all others who then came within the meaning of the aforesaid act first above mentioned, and of the said last mentioned act, and all and every the right, title, and interest, which all or each of the persons aforesaid may have had therein on the said fourth day of July, 1776, or at any time (then) since, should be, and thereby are declared to be confiscated, fully and absolutely forfeited to the said State, and should be vested in the hands of commissioners as therein directed to be appointed for the purpose thereinafter mentioned; and it was thereby further enacted, that commissioners should be appointed by the County Court in each county, who should have full power and authority to take possession of all lands, tenements, hereditaments, moneys, debts, whether due by judgment, bond, bill, note, account, or otherwise, and other personal property of the persons aforesaid, in the name and for the use of the said State, which by (650) the said act were declared to be forfeited to the said State, and should give receipts and discharges which should forever indemnify and acquit the persons delivering or paying the same, their heirs, executors, and administrators, against any further claim for the articles or money

mentioned in such receipts or discharges. And the said John Eaton further saith, that in the time when the said war was yet continuing, and upon the said fourth day of July, in the year of our Lord 1776, and continually afterwards, until the time of their departure from this State, hereinafter mentioned, the said plaintiffs, in the said declaration named, were residents, and each of them was a resident, inhabiting and residing within the limits of the said State of North Carolina, to wit, in the county of Halifax, and that they, the said plaintiffs, while the said war was yet continuing, and after the said fourth day of July, in the year of our Lord 1776, and before the making of the said acts hereinbefore mentioned, or either of them, that is to say, on the first day of September, in the year of our Lord 1777, at the county of Halifax aforesaid, did withdraw themselves, and each of them did withdraw himself, from this said State; and that they, the said plaintiffs, and each of them, at the time of the making of the said first mentioned act, and also at the time of the said last mentioned act, and each of them, resided beyond the limits of the United States of America, and that they, the said plaintiffs, or either of them, at the time of the making of the aforesaid last mentioned act, had not, nor had either of them, appeared before any General Assembly of the said State, to be admitted a citizen or citizens thereof, and to be restored to the possession and property which to them once belonged within the same; nor had the said plaintiffs, or either of them, after their departure from this State as aforesaid, ever at any time thereafter, been admitted as citizens thereof, and restored to the possession and property which to them once belonged as aforesaid. And the said John Eaton saith, that at the time of passing the acts hereinbefore mentioned, and each of them, and long before that time, that is to (651) say, from the day of the date of the writing obligatory aforesaid until the present day, that he, the said John Eaton, hath been continually an inhabitant and resident of this State, dwelling and residing within the same, to wit, at the county of Halifax aforesaid. And so the said John Eaton saith, that by reason of the premises, and by force of the acts of the General Assembly in such case made and provided, the debt aforesaid in the declaration aforesaid, and in the writing obligatory aforesaid, above specified, hath been and is now confiscated and fully and absolutely forfeited to and vested in the said State; and this he is ready to verify.

Wherefore he prays judgment, whether the said John Hamilton and Archibald Hamilton ought to have or maintain their said action against him, together with this, that he, the said John Eaton, is ready to verify that the said John Hamilton and Archibald Hamilton in the said declaration, and the said John Hamilton and Archibald Hamilton, like-

wise above named herein, and also in the act aforesaid, passed at Halifax, are the same and not different persons.

III. And the said John Eaton, for further plea in bar saith, that by the aforesaid act, passed at Halifax, reciting that whereas many persons, who before that time refused to take the oath of allegiance to the State, and were compelled to leave the same in consequence thereof, by virtue of an act of Assembly, passed at New Bern, in April, in the year of our Lord 1777, entitled an act for declaring what crimes and practices against the State shall be treason, and what shall be misprision of treason, and providing punishments adequate to crimes of both classes, and for preventing the dangers which may arise from persons disaffected to the State; and of another act passed at New Bern, in November, in the year 1777, to amend the aforesaid act, had failed or neglected to sell or convey their real estates, agreeable to the said acts, and to appoint lawful agents and attorneys to receive and give discharges for debts due and owing by the inhabitants of the said State, to persons who so departed therefrom, whereby many lands of the persons last described were then yet undisposed of, and still continued to be and (652) remain to the use of the same, and many well meaning people were defeated of an opportunity to discharge such debts due as aforesaid; in consideration thereof, it was enacted, that all such lands of the persons described in these said last recited acts, which had not then been sold and disposed of *bona fide*, for a valuable consideration, actually paid, and all debts, money, and personal property belonging to the same, then not yet collected and appropriated, according to the directions of the said acts therein recited, should be and thereby were declared to be forfeited to the aforesaid State, and the commissioners aforesaid were thereby directed to proceed on such real and personal estate, in like manner as on the estate of the persons therein first mentioned, anything contained in the said recited acts to the contrary notwithstanding. And the said John Eaton further saith, that the said plaintiffs, and each of them, before the making of the said acts, passed at Halifax, had refused, and each of them had refused, to take the oath of allegiance in the said first recited acts prescribed, that is to say, on the.....day of....., in the year of our Lord 1777, in the State aforesaid, at the county of Halifax; and that therefore they, the said plaintiffs, were compelled, and each of them was compelled, to leave the said State, by virtue of and in pursuance of the first of the said recited acts; that is to say, at the county of Halifax aforesaid; and that they, the said plaintiffs, at the time of the making of the said act, passed at Halifax, had not appointed any lawful agents or attorneys to receive and give discharges for the debts due and owing to them from the inhabitants of the State aforesaid. And the said John Eaton further saith, that he, the said John Eaton, at the time of the

making of the aforesaid act, passed at Halifax, and continually before that time, from the day of the date of the writing obligatory aforesaid, had been an inhabitant of the aforesaid State, living and residing within the same, to wit, at the county of Halifax aforesaid. And so the said John Eaton saith, that by means of the premises, and by force of (653) the acts of the General Assembly of the State aforesaid, in such cases made and provided, that the debt aforesaid in the declaration aforesaid, by the said John and Archibald Hamilton demanded of him was, and is, confiscated and fully and absolutely forfeited to the aforesaid State of North Carolina, and this he is ready to verify. Wherefore, he prays judgment, whether the said John Hamilton and Archibald Hamilton ought to have or maintain their said action against him.

IV. And the said John Eaton, for further plea in bar, saith that by the aforesaid act, passed at Halifax, reciting that whereas many persons who, before that time, refused to take the oath of allegiance to this State, and were compelled to leave the same, in consequence thereof, by virtue of an act of Assmbly passed at New Bern, in April, in the year of our Lord 1777, entitled an act for declaring what crimes and practices against the State shall be treason, and what misprision of treason, and providing punishment adequate to crimes of both classes, and for preventing the dangers which may arise from persons disaffected to the State; and of another act, passed at New Bern, in November, in the year 1777, to amend the aforesaid act, had failed or neglected to sell or convey their real estates, agreeable to the said acts, and to appoint lawful agents and attorneys to receive and give discharges for debts due and owing by the inhabitants of the said State, to persons who so departed therefrom, whereby many lands of the persons last described were then yet undisposed of, and still continued to be and remain to the use of the same, and many well meaning people were defeated of an opportunity to discharge such debts due as aforesaid; in consideration thereof, it was enacted that all such lands of the persons described in these said last mentioned acts which had not then been sold and disposed of *bona fide* for a valuable consideration actually paid, and all debts, money, and personal property belonging to the same, then not yet collected and appropriated, according to the directions of the said acts therein recited, should be and thereby were declared to be forfeited to the aforesaid State, and the commissioners aforesaid were thereby directed to (654) proceed on such real and personal estate, in like manner as on the estate of the persons therein first mentioned; anything contained in the said recited acts to the contrary notwithstanding. And the said John Eaton further saith, that the said plaintiffs, and each of them, before the making of the said acts, passed at Halifax, had refused and each of them had refused to take the oath of allegiance in the said first

recited acts prescribed; that is to say, on the ..... day of ....., in the year of our Lord 1777, in the State aforesaid, at the county of Halifax, and that therefore they, the said plaintiffs, were compelled, and each of them was compelled to leave the said State, by virtue of and in pursuance of the first of the said recited acts; that is to say, at the county of Halifax aforesaid, and that they, the said plaintiffs, at the time of the making of the said act, passed at Halifax, had not appointed any lawful agents or attorneys to receive and give discharges for the debts due and owing to them from the inhabitants of the State aforesaid; and the said John Eaton further saith, that he, the said John Eaton, at the time of the making of the aforesaid act, passed at Halifax, and continually before that time, from the day of the date of the writing obligatory aforesaid, had been an inhabitant of the aforesaid State, living and residing within the same, to wit, at the county of Halifax aforesaid. And so the said John Eaton saith, that by means of the premises and by force of the acts of the General Assembly of the State aforesaid, in such cases made and provided, that the debt aforesaid, in the declaration aforesaid, by the said John Hamilton and Archibald Hamilton demanded of him, was, and is confiscated, and fully and absolutely forfeited to the aforesaid State of North Carolina; and this he is ready to verify. Wherefore, he prays judgment, whether the said John Hamilton and Archibald Hamilton ought to have or maintain their said action against him. JOHN HAYWOOD, *pro Def.*

REPLICATIONS. (655)

I. And the said Archibald and John Hamilton, as to the plea of the said John Eaton, by him first above pleaded in bar, say that they, by reason of anything in that plea alleged, ought not to be barred from having or maintaining their said action thereof against him. Because, protesting that, that plea and the matters therein contained are not sufficient in law to bar the said Archibald and John Hamilton from having or maintaining their said action against the said John Eaton for replication, they, the said Archibald and John Hamilton, say that true it is, that on the said fourth day of July, in the said year 1776, and from thence continually afterwards until the said thirtieth day of November, in the said year 1782, there was an open war between the said King of Great Britain and the United States of America aforesaid; and that on the said fourth day of July, in the said year 1776, the said Archibald and John Hamilton were residents and inhabitants, and each of them was a resident and inhabitant, of this State, and continued to reside and inhabit within the same until the said twentieth day of October, in the year 1777, aforesaid. Yet the said Archibald and John Hamilton

further say, that by an act made and provided in a General Assembly of the State of North Carolina, begun and held at New Bern aforesaid, in the said State of North Carolina, and now in the district of North Carolina, and within the jurisdiction of this Court, after the said fourth day of July, in the year 1776 aforesaid, and before the time of making the said writing obligatory, to wit, on the eighth day of April, in the year 1777 aforesaid, entitled "An act declaring what crimes and practices against the State shall be treason, and what shall be misprision of treason, and providing punishments adequate to crimes of both classes, and for preventing the dangers which may arise from persons disaffected to the State" (among other things), it is enacted, by the authority of the same General Assembly, that all the then late officers of the King of Great Britain, and all persons (Quakers excepted) being subjects (656) of the said State, and then living therein, or who should thereafter come to live therein, who had traded immediately to Great Britain or Ireland, within ten years then last passed, in their own right, or acted as storekeepers, factors, or agents here, or in any of the United States of America, for merchants residing in Great Britain or Ireland, should take a certain oath of abjuration and allegiance therein mentioned, or depart out of the said State; and it is by the same act provided that all and every such person and persons should have liberty, and that they might also nominate and appoint an attorney or attorneys, to sell and dispose of his or their estate for his or their own use and benefit, as by the same act (among other things) may more fully appear. And the said Archibald and John Hamilton further say that they, on the said eighth day of April, in the year 1777 aforesaid, and long before then, were, and from the time of their nativities, respectively, continually hitherto have been, and still are, subjects of and owing allegiance to, the said King of Great Britain; and that they, the said Archibald and John Hamilton, on the same day and year last aforesaid, and for a long time, to wit, the space of ten years before the making of the same, and until the said twentieth day of October in the said year 1777, were merchants and copartners, living in the then State, and formerly province of North Carolina aforesaid, and had within, and during the said space of ten years last past, before the making of the same act, traded immediately to Great Britain, to wit, at.....in their own right; that is to say, at the State of North Carolina aforesaid, and now in the district of North Carolina aforesaid, and within the jurisdiction of this Court. And after the said eighth day of April, in the year 1777 aforesaid, and before the said twentieth day of October, in the said year 1777, to wit, on the same.....day of....., in the said year 1777, at North Carolina aforesaid, now in the said district of North Carolina and within the jurisdiction of this Court, the said John Eaton made his said writing

obligatory in the said declaration mentioned, and by the same writing obligatory he, the said John Eaton, then and there *bona fide* contracted the said debt in the said declaration mentioned. And the (657) said Archibald and John Hamilton further say, that after the said eighth day of April, in the said year 1777, and after the making of the said writing obligatory, to wit, on the said twentieth day of October, in the year 1777 aforesaid, they, the said Archibald and John Hamilton, then being merchants and copartners as aforesaid, and having lived, resided, and inhabited, and then living, residing, and inhabiting in the State of North Carolina aforesaid, in the manner hereinbefore mentioned, and having traded immediately to Great Britain aforesaid, within and during ten years last past before the making of the same act as aforesaid, and then being the subjects of and owing allegiance to the said King of Great Britain as aforesaid. And the said John Eaton, having contracted the said debt *bona fide* with the said Archibald and John Hamilton aforesaid; and the said Archibald and John Hamilton, being creditors in that respect as aforesaid, did withdraw themselves from the said State, and from the United States of America aforesaid, and they, and each of them, did remove and depart out of the said State, to wit, to Europe, in conformity to the tenor, true intent, and meaning of, and in obedience to, the same last mentioned act of the General Assembly; and continually afterwards from the said twentieth day of October, in the said year 1777, until the termination of the said war, the said Archibald and John Hamilton resided beyond the limits of the said United States, under the sovereignty and jurisdiction of the said King, owing and acknowledging their allegiance to him; and during all the time last aforesaid, they, the said Archibald and John Hamilton, did not, nor did either of them, return unto the said State to be admitted as citizens or a citizen thereof. And the said Archibald and John Hamilton further say, that afterwards such act of the General Assembly held at Halifax, on the eighteenth day of October, in the year 1779 aforesaid, entitled "An act to carry into effect an act passed at New Bern in the year 1777, entitled an act for confiscating the property of all such persons as are inimical to this or the United States, and of such persons as shall not within a certain time therein mentioned (658) appear and submit to the State whether they shall be received as citizens thereof, and of such persons as shall so appear and shall not be admitted as citizens, and for other purposes therein mentioned, and for other purposes," was made as in the same plea alleged, and that on the day of the making of the aforesaid act at Halifax, and also from the day of the date of the said writing obligatory and from thence continually afterwards, until the day of pleading the same in bar, the said John Eaton hath been an inhabitant of the said State, being and resid-

ing within the same, to wit, at the county of Halifax aforesaid, and that after the making of the said act passed at Halifax, the Court of Pleas and Quarter Sessions for the said county, held for the said county, at the town of Halifax in the said county, on the.....day of ....., in the said year 1780, duly appointed the said Samuel Weldon, William Wooting, and William Montfort to be commissioners for the purpose aforesaid, in the said act expressed, for the said county of Halifax, who then and there accepted the said appointment, and having duly qualified themselves for the same, by performing and complying with the several requisites by law prescribed in such case, then and there took upon themselves the exercise thereof; and that the said commissioners, after their said appointments and qualifications aforesaid, caused the said John Eaton to be summoned, according to the directions of the aforesaid act, in the same plea in bar mentioned, to appear before them, on the said fifteenth day of April, in the said year 1780, in the county aforesaid, to give in on oath an account (among other things) of all and every the sum and sums of money aforesaid, by him due and owing to the persons aforesaid; whereupon the said John Eaton then and there appeared before the said commissioners, and rendered to them on oath an account of the sum of four hundred and sixty pounds, being the principal and interest then due on the said writing obligatory above specified; and that afterwards, to wit, on the same day and year last aforesaid, in the county aforesaid, he, the said John Eaton, by the commissioners
(659) aforesaid, was required to pay them the said sum of £460, according to the directions and intent of the act aforesaid in the same plea in bar mentioned; and that he, the said John Eaton, thereupon then and there paid to the said commissioners the aforesaid sum of four hundred and sixty pounds, being the whole sum mentioned in the condition aforesaid, and all the interest thereupon then due; and that upon the said commissioners, then and there made and delivered to him, the said John Eaton, a receipt and discharge of and for the sum aforesaid by him paid as aforesaid, according to the direction of the act aforesaid in the same plea in bar mentioned. Yet the said Archibald and John Hamilton further say, that by the definitive treaty of peace between the United States of America aforesaid and his Britannic Majesty aforesaid, made and done at Paris, after the said fourth day of July, in the said year 1776, and after the time of making of the said writing obligatory, and after the departure of the said Archibald and John Hamilton, in conformity and obedience to the act of the General Assembly hereinbefore pleaded, and after the passing of the said act of the said General Assembly in the same plea in bar pleaded, to wit, on the third day of September, in the year of our Lord 1783, it is (among other things) stipulated and agreed that creditors on either side should meet with no lawful

impediment to the recovery of the full value, in sterling money, of all *bona fide* debts theretofore contracted, as by the same treaty (among other things) may more fully appear. And the said Archibald and John Hamilton further in fact say, that they, at the time of the making of the said definitive treaty, and for a long time before then, to wit, on the said.....day of....., in the said year 1777, were, and from that same day continually hitherto, have been, and still are, creditors of the said John Eaton, by virtue of the writing obligatory in the said declaration mentioned, in manner and form as therein is declared, and on the side of his said Brittanic Majesty, within the true intent and meaning of the said definitive treaty (that is to say), at the State of North Carolina aforesaid, now in the district of North Carolina, and (660) within the jurisdiction of this Court, and that they, the said Archibald and John Hamilton, at the time of the making of the said definitive treaty, at and before the passing of the said act of the General Assembly in the same plea in bar pleaded, and at and before the departing of the said Archibald and John Hamilton, in conformity to the act of the General Assembly hereinbefore pleaded, by way of reply, and at and before the time of the making of the said writing obligatory in the said declaration mentioned, and at and before the time of the making of the said act hereinbefore pleaded, by way of reply, and on the said fourth day of July, in the said year 1776, and long before, then and from the times of their nativities respectively, were, and from thence continually hitherto have been, and still are, subjects of his said Britannic Majesty, owing and acknowledging their allegiance and obedience to him. And that the said debt, in the said declaration mentioned, was contracted, and the said writing obligatory therein also mentioned made and executed by the said John Eaton, *bona fide*, before the time of the making of the said definitive treaty (to wit), on the said..... day of ....., in the said year 1777, and the same debt still remains wholly due and owing from the said John Eaton to the said Archibald and John Hamilton, and hath not, nor hath any part thereof been paid or satisfied to them, or either of them (that is to say), at the State of North Carolina aforesaid, and in the said district of North Carolina, and within the jurisdiction of this Court. And the said Archibald and John Hamilton further say, that by the Constitution ordained and established by the people of the United States, for the United States of America, done in convention after the said third day of September, in the said year 1783 (to wit), on the seventeenth day of September, in the year of our Lord 1787, it is (among other things) expressly declared that all treaties which were then made, or which should be made under the authority of the United States, should be the supreme law of the land, anything in the said Constitution or laws of any state to the contrary

notwithstanding, as by the same Constitution more fully appears.
(661) And the said Archibald and John Hamilton further say, that, by an act made and provided in a General Assembly of the State of North Carolina, begun and held at Tarboro, now in the district of North Carolina aforesaid, and within the jurisdiction of this Court, after the said third day of September, in the said year one thousand seven hundred and eighty-three, and after the said seventeenth day of September, in the said year 1787 (to wit), on the eighteenth day of November, in the year of our Lord 1787, and in the twelfth year of the independence of the said State, entitled an act declaring the treaty of peace between the United States of America and the King of Great Britain to be part of the law of the land, it is enacted by the authority of the same General Assembly that the articles of the definitive treaty between the United States of America and the King of Great Britain were thereby declared to be part of the law of the land. And it was also thereby further enacted by the same authority, that the courts of law and equity were thereby declared in all cases and questions cognizable by them, respecting the said treaty, to judge accordingly; as by the same act more fully appears. Wherefore, for that the said Archibald and John Hamilton were merchants, and were and are subjects of the said King of Great Britain, and creditors on his side as aforesaid; and the said debt was *bona fide* contracted before the making of the said definitive treaty, and the ordaining and establishing of the said Constitution, and the passing of the said act declaring the said definitive treaty to be part of the law of the land; they, the said Archibald and John Hamilton, pray judgment and their said debt, together with their damages, occasioned by the detaining of the same, to be adjudged to them, etc.

II. And the said Archibald and John Hamilton, as to the said plea of the said John Eaton, by him secondly above pleaded in bar, say that they, by reason of anything in that same plea alleged, ought not to be barred from having or maintaining their said action thereof against him; because, protesting that, that same plea and the matters therein contained are not sufficient in law to bar the said Archibald and John
(662) Hamilton from having or maintaining their said action against the said John Eaton; for replication they, the said Archibald and John Hamilton, say that true it is that on the said fourth day of July, in the year 1776, and continually afterwards, until the said third day of September, in the said year 1782, a war was prosecuted and carried on against the United States of America by the King of Great Britain; and that, in the time of the continuance thereof, such act was made and passed by and at a General Assembly of the State of North Carolina, held at New Bern aforesaid, on the said fifteenth day of November, in the year 1777 aforesaid, as in the same plea in bar that behalf is alleged;

and that afterwards the said other act was made and passed by and at the General Assembly of North Carolina, held at Halifax aforesaid, on the said eighteenth day of October, in the year 1779 aforesaid, as in the same plea in bar in that behalf is also alleged; and that in the time when the said war was continuing, and upon the said fourth day of July, in the said year 1776, and continually afterwards, until the time of the departure of the said Archibald and John Hamilton from the said State hereinafter mentioned, they, the said Archibald and John Hamilton were residents, and each of them was a resident, inhabiting and residing within the limits of the said State (to wit), in the county of Halifax, and that the said John Eaton, at the times of the passing the acts in the same plea in bar mentioned, and each of them, and long before that time (to wit) from the day of the date of the said writing obligatory until the day of pleading the same plea in bar, hath been continually an inhabitant and resident of this State, dwelling and residing within the same (to wit), at the county of Halifax aforesaid. Yet the said Archibald and John Hamilton further say, that by an act made and provided in a General Assembly of the State of North Carolina, begun and held at New Bern aforesaid, in the said State of North Carolina, and now in the district of North Carolina, and within the jurisdiction of this Court, whilst the war was continuing, and after the said fourth day of July, in the year 1776 aforesaid, and before the said eighteenth day of October, in the said year 1779, and before the said fifteenth (663) day of November, in the said year 1777, and before the time of the making of the said writing obligatory (to wit), on the eighth day of April, in the said year 1777, entitled an act declaring what crimes and practices against the State shall be treason and what shall be misprision of treason, and providing punishments adequate to crimes of both classes, and for preventing the dangers which may arise from persons disaffected to the State (among other things), it is enacted by the authority of the same General Assembly that all the then late officers of the King of Great Britain, and all persons (Quakers excepted) being subjects of the said State, then living therein, or who should thereafter come to live therein, who had traded immediately to Great Britain or Ireland, within ten years then last past, in their own right, or acted as factors, storekeepers, or agents here, or in any of the United States of America, for merchants residing in Great Britain or Ireland, should take a certain oath of abjuration and allegiance therein mentioned, or depart out of the said State. And it is by the same act provided, that all and every such person and persons should have liberty, and that they might also nominate and appoint an attorney or attorneys, to sell and dispose of his or their estate for his or their use and benefit, as by the same act (among other things) may more fully appear. And the said Archibald and John

Hamilton further say, that they, on the said eighth day of April, in the year one thousand seven hundred and seventy-seven, aforesaid, and long before then, were, and from the time of their nativities respectively, continually hitherto have been, and still are, subjects of, and owing allegiance to, the said King of Great Britain. And that they, on the same day and year last aforesaid, and for a long time, to wit, for the space of ten years before the making of the same act last mentioned, and until the said first day of September, in the said year one thousand seven hundred and seventy-seven, were merchants and copartners, living in the then State, and formerly province of North Carolina afore-
(664) said, and had within and during the said space of ten years last past, before the making of the same last mentioned act, traded immediately to Great Britain, in their own right; that is to say, at the State of North Carolina aforesaid, and now in the district of North Carolina aforesaid, and within the jurisdiction of this Court; and after the said eighth day of April, in the said year 1777, and before the said first day of September, in the same year, to wit, on the said.....day of ....., in the same year, at North Carolina aforesaid, and now in the district of North Carolina aforesaid, and within the jurisdiction of this Court, he, the said John Eaton, made his said writing obligatory, sealed with the seal of the said John Eaton, and the date whereof is the same day and year; and by the same writing, he, the said John Eaton, then and there *bona fide* contracted the said debt, in the said declaration mentioned. And the said Archibald and John Hamilton further say, that whilst the said war was continuing, and after the said fourth day of July, in the said year 1776, and after the said eighth day of April, in the said year 1777, and after the making of the said writing obligatory, and before the said fifteenth day of October, in the said year 1779, and before the said fifteenth day of November, in the said year 1777, to wit, on the said first day of September, in the said year 1777, they, the said Archibald and John Hamilton, then being merchants and copartners as aforesaid, and having lived, resided, and inhabited, and then living, residing, and inhabiting in North Carolina aforesaid, in the manner hereinbefore alleged, and having traded immediately to Great Britain aforesaid, within and during ten years last past, before the making of the same last mentioned act, as hereinbefore alleged, and then being the subjects of, and owning and acknowledging allegiance to, the said King of Great Britain as aforesaid, and the said John Eaton having contracted the said debt *bona fide* with the said Archibald and John Hamilton as aforesaid, and the said Archibald and John Hamilton being creditors in that respect as aforesaid, did withdraw themselves, and each of them did withdraw himself from the said State, and remove and depart
(665) out of the said State, to wit, to Europe, in conformity to the

tenor, true intent, and meaning of, and in obedience to, the same last mentioned act of the General Assembly; and continually afterwards, from the said first day of September, in the said year 1777, and at the time of making of the said act, in the same plea secondly above pleaded in bar first mentioned, and also at the time of making of the said act in the same plea secondly above pleaded in bar last mentioned, and at the respective times of the making of each of them, they, the said Archibald and John Hamilton, resided beyond the limits of the United States of America, under the sovereignty and jurisdiction of the said king, owning and acknowledging their allegiance to him, and they, the said Archibald and John Hamilton, had not, nor had either of them, at the time of the making the said act in the same plea secondly above pleaded in bar last mentioned, appeared before any General Assembly of the said State, to be, nor had they or either of them after their departure from the said State as aforesaid ever at any time after been admitted a citizen or citizens thereof. And they, the said Archibald and John Hamilton, further say, that by the definitive treaty of peace between the United States of America aforesaid and his Britannic Majesty aforesaid, made and done at Paris, after the said fourth day of July, in the year 1776, and after the time of the making of the said writing obligatory, and after the departure of the said Archibald and John Hamilton, in conformity and obedience to the act of the General Assembly hereinbefore pleaded, and after the passing of the act of the General Assembly in the same plea in bar secondly above pleaded first mentioned, and after the passing of the act of the General Assembly in the same plea in bar secondly above pleaded last mentioned, to wit, on the third day of September, in the year of our Lord one thousand seven hundred and eighty-three, it is (among other things) stipulated and agreed that creditors on either side should meet with no lawful impediment to the recovery of the full value in sterling money of all *bona fide* debts theretofore contracted, as by the same treaty (among other things) may more fully appear. And the said Archibald and John Hamilton fur- (666) ther in fact say, that they, at the time of the making of the said definitive treaty, and for a long time before then, to wit, on the said .....day of ....., in the said year 1777, were, and from that same day, continually hitherto have been, and still are, creditors of the said John Eaton, by virtue of the said writing obligatory, in the said declaration mentioned, in manner and form as therein is declared; and on the side of his said Britannic Majesty, within the true intent and meaning of the said definitive treaty; that is to say, at the State of North Carolina aforesaid, and now in the said district of North Carolina, and within the jurisdiction of this Court; and that they, the said Archibald and John Hamilton, at the time of the making of the said definitive treaty,

and at and before the passing of the said act of the General Assembly, in the same plea in bar secondly above pleaded last mentioned, and at and before the passing of the said act of the General Assembly in the said plea in bar second above pleaded first mentioned, and at and before the departing of the said Archibald and John Hamilton, in conformity to the said act of the General Assembly hereinbefore pleaded by way of reply, and at and before the time of the making of the said writing obligatory in the said declaration mentioned, and at and before the time of the making of the said act of the General Assembly hereinbefore pleaded by way of reply, and on the said fourth day of July, in the said year 1776, and long before then, and from the times of their nativities respectively were, and from thence continually hitherto have been, and still are subjects of his Britannic Majesty, owing and acknowledging their allegiance to him. And that the said debt in the said declaration mentioned was contracted, and the said writing obligatory therein mentioned was executed by the said John Eaton, *bona fide,* before the time of the making of the said definitive treaty, to wit, on the said.....day of ....., in the said year 1777, and the same debt still remains wholly due and owing from the said John Eaton to the said Archibald (667) and John Hamilton, and hath not, nor hath any part thereof been paid or satisfied to them, or either of them; that is to say, at the State of North Carolina aforesaid, and now in the said district of North Carolina, and within the jurisdiction of this Court. And the said Archibald and John Hamilton further say that by the Constitution ordained and established by the people of the United States of America, done in convention after the said third day of September, in the said year 1783, to wit, on the seventeenth day of September, in the year of our Lord 1787, it is (among other things) expressly declared that all treaties which were then made, or which should be made under the authority of the United States, should be the supreme law of the land, anything in the said Constitution or laws of any state to the contrary notwithstanding; as by the same Constitution more fully appears. And the said Archibald and John Hamilton further say that by an act made and provided in a General Assembly of the State of North Carolina begun and held at Tarboro, now in the district of North Carolina aforesaid, and within the jurisdiction of this Court, after the said third day of September, in the said year one thousand seven hundred and eighty-three, and after the said seventeenth day of September, in the said year 1787, to wit, on the eighteenth day of November, in the year of our Lord 1787, and in the twelfth year of the independence of the said State, entitled an act declaring the treaty of peace between the United States of America and the King of Great Britain to be part of the law of the land, it is enacted by the authority of the same General Assembly

that the articles of the definitive treaty between the United States of America and the King of Great Britain were thereby declared to be part of the law of the land. And it was also thereby further enacted by the same authority that the courts of law and equity were thereby declared in all cases and questions cognizable by them, respecting the said treaty, to judge accordingly; as by the same act more fully appears. Wherefore, for that the said Archibald and John Hamilton were merchants, and were and are subjects of the said King of Great Britain, and creditors on his side as aforesaid; and the said debt was *bona fide* (668) contracted before the making of the said definitive treaty, and the ordaining and establishing of the said Constitution, and the passing of the said act declaring the said definitive treaty to be part of the law of the land; they, the said Archibald and John Hamilton, pray judgment and their said debt, together with their damages, occasioned by the detaining of the same, to be adjudged to them, etc.

III. And the said Archibald and John Hamilton, as to the plea of the said John Eaton by him thirdly above pleaded in bar; say that they, by reason of anything in that plea alleged, ought not to be barred from having or maintaining their said action thereof against him. Because, protesting that, that plea and the matters therein contained are not sufficient in law to bar the said Archibald and John Hamilton from having or maintaining their said action against the said John Eaton, for replication they, the said Archibald and John Hamilton, say that true it is that the said John Eaton, at the time of making of the said act at Halifax in the same plea in bar thirdly above pleaded, and at the time of making of the said act passed at New Bern, in November in the year 1777, and the said act passed at Halifax as aforementioned, and continually before the said times respectively from the day of the date of the writing obligatory aforesaid, was, and had been an inhabitant of the said State, living and residing within the same (to wit), at the county of Halifax aforesaid. Yet the said Archibald and John Hamilton further say that, by an act made and provided in a General Assembly of the State of North Carolina, begun and held at New Bern aforesaid, in the said State of North Carolina, and now in the district of North Carolina, and within the jurisdiction of this Court, after the said fourth day of July, in the year 1776 aforesaid, and before the time of making the said writing obligatory, and before the passing of the said act of the General Assembly at Halifax, on the eighteenth day of October, in the year of our Lord one thousand seven hundred and seventy-nine, in the same plea mentioned, to wit, on the eighth day of April, in the year 1777 aforesaid, entitled "An act declaring what crimes and (669) practices against the State shall be treason and what shall be misprision of treason, and providing punishments adequate to crimes of

both classes, and for preventing the dangers which may arise from persons disaffected to the State" (among other things), it is enacted, by the authority of the same General Assembly, that all the then late officers of the King of Great Britain, and all persons (Quakers excepted) being subjects of the said State, and then living therein, or who should thereafter come to live therein, who had traded immediately to Great Britain or Ireland, within ten years then last past, in their own right, or acted as storekeepers, factors, or agents here, or in any of the United States of America, for merchants residing in Great Britain or Ireland, should take a certain oath of abjuration and allegiance therein mentioned, or depart out of the said State; and it is by the same act provided that all and every such person and persons should have liberty, and that they might also nominate and appoint an attorney or attorneys, to sell and dispose of his or their estates for his or their own use and benefit, as by the same act (among other things) may more fully appear. And the said Archibald and John Hamilton further say that they, on the said eighth day of April, in the year 1777 aforesaid, and long before then, were, and from the time of their nativities respectively continually hitherto have been and still are, subjects of, and owing allegiance to, the said King of Great Britain; and that they, the said Archibald and John Hamilton, on the same day and year last aforesaid, and for a long time (to wit), the space of ten years before the making of the same act, and until the time hereinafter mentioned, were merchants and copartners, living in the then State, and formerly province of North Carolina aforesaid, and had within and during the said space of ten years last past, before the making of the same act, traded immediately to Great Britain (to wit), at ....., in their own right (that is to say), at the State of North Carolina aforesaid, and now in the district of North Carolina aforesaid, and within the jurisdictoin of this Court. And after (670) the said eighth day of April, in the year one thousand seven hundred and seventy-seven aforesaid, and before the time of the departure of the said Archibald and John Hamilton, hereinafter mentioned (to wit), on the same..... day of....., in the said year 1777, at North Carolina aforesaid, now in the said district of North Carolina and within the jurisdiction of this Court, the said John Eaton made his said writing obligatory in the said declaration mentioned; and by the same writing obligatory, he, the said John Eaton, then and there *bona fide* contracted the said debt in the said declaration mentioned. And the said Archibald and John Hamilton further say, that, after the said eighth day of April, in the said year 1777, and after the making of the said writing obligatory (to wit), on the .....day of....., in the year 1777 aforesaid, they, the said Archibald and John Hamilton, then being merchants and copartners as aforesaid, and having lived, resided, and

inhabited, and then living, residing, and inhabiting in the State of North Carolina aforesaid, in the manner hereinbefore mentioned, and having traded immediately to Great Britain aforesaid, within and during ten years last past before the making of the same act as aforesaid, and then being the subjects of, and owing allegiance to the said King of Great Britain as aforesaid, and the said John Eaton having contracted the said debt *bona fide* with the said Archibald and John Hamilton aforesaid; and the said Archibald and John Hamilton, being creditors in that respect as aforesaid, they and each of them did refuse to take the oath of allegiance to the said State in the said act prescribed, and did withdraw themselves from the said State and from the United States of America aforesaid, and they and each of them did remove and depart out of the said State (to wit), to Europe, in conformity to the tenor, true intent, and meaning of, and in obedience to, the same last mentioned act of the General Assembly. And they, the said Archibald and John Hamilton, further say, that by the definitive treaty of peace between the United States of America aforesaid and his Britannic Majesty aforesaid, made and done at Paris, after the said fourth day of July, in the said year 1776, and after the time of making of the said writ- (671) ing obligatory, and after the departure of the said Archibald and John Hamilton, in conformity and obedience to the act of the General Assembly hereinbefore pleaded, and after the passing of the said act of the said General Assembly in the same plea in bar pleaded (to wit), on the third day of September, in the year of our Lord 1783, it is (among other things) stipulated and agreed that creditors on either side should meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bona fide* debts theretofore contracted, as by the same treaty (among other things), may more fully appear. And the said Archibald and John Hamilton further in fact say, that they, at the time of the making of the said definitive treaty, and for a long time before then, to wit, on the said.....day of....., in the said year 1777, were, and from that same day continually hitherto have been, and still are creditors of the said John Eaton, by virtue of the writing obligatory in the said declaration mentioned, in manner and form as therein is declared, and on the side of his said Britannic Majesty, within the true intent and meaning of the said definitive treaty (that is to say), at the State of North Carolina aforesaid, now in the district of North Carolina, and within the jurisdiction of this Court, and that they, the said Archibald and John Hamilton, at the time of the making of the said definitive treaty, at and before the passing of the said act of the General Assembly in the same plea in bar pleaded, and at and before the departing of the said Archibald and John Hamilton, in conformity to the act of the General Assembly hereinbefore pleaded, by way of

reply, and at and before the time of the making of the said writing obligatory in the said declaration mentioned, and at and before the time of the making of the said act hereinbefore pleaded, by way of reply, and on the said fourth day of July, in the said year 1776, and long before, then and from the times of their nativities respectively, were, and from thence continually hitherto have been, and still are, subjects of his said Britannic Majesty, owing and acknowledging their allegiance and
(672) obedience to him. And that the said debt, in the said declaration mentioned, was contracted, and the said writing obligatory therein also mentioned, made and executed by the said John Eaton *bona fide,* before the time of the making of the said definitive treaty, to wit, on the said.....day of....., in the said year 1777, and the same debt still remains wholly due and owing from the said John Eaton to the said Archibald and John Hamilton, and hath not, nor hath any part thereof, been paid or satisfied to them, or either of them; that is to say, at the State of North Carolina aforesaid, and in the said district of North Carolina, and within the jurisdiction of this Court. And the said Archibald and John Hamilton further say, that by the Constitution ordained and established by the people of the United States for the United States of America, done in convention after the said third day of September, in the said year 1783, to wit, on the seventeenth day of September, in the year of our Lord 1787, it is (among other things) expressly declared that all treaties which were then made, or which should be made, under the authority of the United States, should be the supreme law of the land, anything in the said Constitution or laws of any state to the contrary notwithstanding, as by the same Constitution more fully appears. And the said Archibald and John Hamilton further say, that by an act made and provided in a General Assembly of the State of North Carolina, begun and held at Tarboro, now in the district of North Carolina aforesaid, and within the jurisdiction of this Court, after the said third day of September, in the said year one thousand seven hundred and eighty-three, and after the said seventeenth day of September, in the said year 1787, to wit, on the eighteenth day of November, in the year of our Lord 1787, and in the twelfth year of the independence of the said State, entitled an act declaring the treaty of peace between the United States of America and the King of Great Britain to be part of the law of the land, it is enacted by the authority of the same General Assembly, that the articles of the definitive treaty between the United States of America and the King of Great Britain, were thereby
(673) declared to be part of the law of the land. And it was also thereby further enacted by the same authority, that the Courts of Law and Equity were thereby declared in all cases and questions cognizable by them, respecting the said treaty, to judge accordingly; as by the

same act more fully appears. Wherefore, for that the said Archibald and John Hamilton were merchants, and were and are subjects of the said King of Great Britain, and creditors on his side as aforesaid; and the said debt was *bona fide* contracted before the making of the said definitive treaty, and the ordaining and establishing of the said Constitution, and the passing of the said act declaring the said definitive treaty to be part of the law of the land; they, the said Archibald and John Hamilton, pray judgment, and their said debt, together with their damages, occasioned by the detaining of the same, to be adjudged to them, etc.

IV. And the said Archibald and John Hamilton, as to the said plea of the said John Eaton, by him fourthly above pleaded in bar, say that they, by reason of anything in that same plea alleged, ought not to be barred from having or maintaining their said action thereof against him; because, protesting that, that same plea and the matters therein contained are not sufficient in law to bar the said Archibald and John Hamilton from having or maintaining their said action against the said John Eaton; for replication, they, the said Archibald and John Hamilton, say that true it is that on the said fourth day of July, in the year 1776, and continually afterwards, until the said thirtieth day of November, in the said year 1782, there was an open war between the said King of Great Britain and the United States of America aforesaid, and that on the said fourth day of July, in the said year 1776, the said Archibald and John Hamilton were residents and inhabitants, and each of them was a resident and inhabitant of this State, and continued to reside and inhabit within the same until the said 20th day of October, in the said year 1777. Yet the said Archibald and John Hamilton further say, that by an act made and provided in a General Assembly of the State of North Carolina, begun and held at New Bern aforesaid, in the (674) said State of North Carolina, and now in the district of North Carolina, and within the jurisdiction of this Court, after the said fourth day of July, in the year one thousand seven hundred and seventy-six aforesaid, and before the time of the making of the said writing obligatory, to wit, on the eighth day of April, in the said year 1777, entitled an act declaring what crimes and practices against the State shall be treason and what shall be misprision of treason, and providing punishments adequate to crimes of both classes, and for preventing the dangers which may arise from persons disaffected to the State (among other things), it is enacted by the authority of the same General Assembly, that all the then late officers of the King of Great Britain, and all persons (Quakers excepted) being subjects of the said State, then living therein, or who should thereafter come to live therein, who had traded immediately to Great Britain or Ireland, within ten years then last past,

in their own right, or acted as factors, storekeepers, or agents here, or in any of the United States of America, for merchants residing in Great Britain or Ireland, should take a certain oath of abjuration and allegiance therein mentioned, or depart out of the said State. And it is by the same act provided, that all and every such person and persons should have liberty, and that they might also nominate and appoint an attorney or attorneys to sell and dispose of his or their estate for his or their use and benefit, as by the same act (among other things) may more fully appear. And the said Archibald and John Hamilton further say, that they, on the said eighth day of April, in the year one thousand seven hundred and seventy-seven aforesaid, and long before then, were, and from the time of their nativities respectively, continually hitherto have been, and still are, subjects of, and owing allegiance to, the said King of Great Britain. And that they, on the same day and year last aforesaid, and for a long time, to wit, for the space of ten years before the making of the same act last mentioned, and until the said first day of September, in the said year one thousand seven hundred and
(675) seventy-seven, were merchants and copartners, living in the then State, and formerly province of North Carolina aforesaid, and had within and during the said space of ten years last past, before the making of the same last mentioned act, traded immediately to Great Britain, in their own right; that is to say, at the State of North Carolina aforesaid, and now in the district of North Carolina aforesaid, and within the jurisdiction of this Court; and after the said eighth day of April, in the said year 1777, and before the said twentieth day of October, in the said year one thousand seven hundred and seventy-seven, to wit, on the same.....day of....., in the said year one thousand seven hundred and seventy-seven, at North Carolina aforesaid, now in the said district of North Carolina, and within the jurisdiction of this Court, he, the said John Eaton, made his said writing obligatory in the said declaration mentioned, and by the same writing, he, the said John Eaton, then and there *bona fide* contracted the said debt in the said declaration mentioned. And the said Archibald and John Hamilton further say, that after the said eighth day of April, in the said year 1777, and after the making of the said writing obligatory, to wit, on the said twentieth day of October, in the year 1777 aforesaid, they, the said Archibald and John Hamilton, then being merchants and copartners as aforesaid, and having lived, resided, and inhabited, and then living, residing, and inhabiting in the State of North Carolina aforesaid, in the manner hereinbefore mentioned, and having traded immediately to Great Britain aforesaid, within and during ten years last past before the making of the same act as aforesaid, and then being the subject of, and owing allegiance to, the said King of Great Britain as aforesaid, and

the said John Eaton having contracted the said debt *bona fide* with the said Archibald and John Hamilton aforesaid; and the said Archibald and John Hamilton, being creditors in that respect as aforesaid, did withdraw themselves from the said State and from the United States of America aforesaid, and they and each of them did remove and depart out of the said State (to wit), to Europe, in conformity to the tenor, true intent, and meaning of, and in obedience to, the same (676) last mentioned act of the General Assembly, and continually afterwards, from the said twentieth day of October, in the said year 1777, until the termination of the said war, the said Archibald and John Hamilton resided beyond the limits of the said United States, under the sovereignty and jurisdiction of the said king, owing and acknowledging their allegiance to him, and during all the time last aforesaid, they, the said Archibald and John Hamilton, did not, nor did either of them, return into the said State, to be admitted citizens or a citizen thereof; and the said Archibald and John Hamilton further say, that true it is, that afterwards, such act of the General Assembly of this State, held at Halifax, on the eighteenth day of October, in the year 1779 aforesaid, was made as in the same plea in bar, fourthly above pleaded, is alleged. Yet they, the said Archibald and John Hamilton, further say, that by the definitive treaty of peace between the United States of America aforesaid and his Britannic Majesty aforesaid, made and done at Paris, after the said fourth day of July, in the said year 1776, and after the time of making of the said writing obligatory, and after the departure of the said Archibald and John Hamilton, in conformity and obedience to the act of the General Assembly hereinbefore pleaded, and after the passing of the said act of the said General Assembly in the same plea in bar pleaded (to wit), on the third day of September, in the year of our Lord 1783, it is (among other things) stipulated and agreed that creditors on either side should meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bona fide* debts theretofore contracted, as by the same treaty (among other things) may more fully appear. And the said Archibald and John Hamilton further in fact say, that they, at the time of the making of the said definitive treaty, and for a long time before then (to wit), on the said.....day of....., in the said year 1777, were, and from that same day continually hitherto have been, and still are, creditors of the said John Eaton, by virtue of the writing obligatory in the said declaration mentioned, in manner and form as therein is declared, and on the side of his said (677) Britannic Majesty, within the true intent and meaning of the said definitive treaty (that is to say), at the State of North Carolina aforesaid, now in the district of North Carolina, and within the jurisdiction

of this Court; and that they, the said Archibald and John Hamilton, at the time of the making of the said definitive treaty, at and before the passing of the said act of the General Assembly in the same plea in bar pleaded, and at and before the departing of the said Archibald and John Hamilton, in conformity to the act of the General Assembly hereinbefore pleaded, by way of reply, and at and before the time of the making of the said writing obligatory in the said declaration mentioned, and at and before the time of the making of the said act hereinbefore pleaded, by way of reply, and on the said fourth day of July, in the said year 1776, and long before, then and from the times of their nativities respectively, were, and from thence continually hitherto have been, and still are, subjects of his said Britannic Majesty, owing and acknowledging their allegiance and obedience to him. And that the said debt, in the said declaration mentioned, was contracted, and the said writing obligatory therein also mentioned, made, and executed by the said John Eaton *bona fide, before the time of the making of the said definitive treaty* (to wit), on the said.....day of....., in the said year 1777, and the same debt still remains wholly due and owing from the said John Eaton to the said Archibald and John Hamilton, nor hath any part thereof been paid or satisfied to them or either of them; that is to say, at the State of North Carolina aforesaid, *now in the said district of North Carolina, and within the* jurisdiction of this Court. And the said Archibald and John Hamilton further say that by the Constitution ordained and established by the people of the United States for the United States of America, done in convention after the said third day of September, in the said year 1783 (to wit), on the seventeenth day of September, in the year of our Lord 1783, it is (among other things) expressly declared that all treaties which were then (678) made, or which should be made, under the authority of the United States, should be the supreme law of the land, anything in the said Constitution or laws of any State to the contrary notwithstanding; as by the same Constitution more fully appears. And the said Archibald and John Hamilton further say, that, by an act made and provided in a General Assembly of the State of North Carolina, begun and held at Tarboro, now in the district of North Carolina aforesaid, and within the jurisdiction of this Court, after the said third day of September, in the said year one thousand seven hundred and eighty-three, and after the said seventeenth day of September, in the said year 1787, to wit, on the eighteenth day of November, in the year of our Lord 1787, and in the twelfth year of the independence of the said State, entitled an act declaring the treaty of peace between the United States of America and the King of Great Britain to be part of the law of the land, it is enacted by the authority of the same General Assembly, that the articles of the definitive treaty between the United States of America and the

King of Great Britain, were thereby declared to be part of the law of the land.

And it was also thereby further enacted by the same authority, that the courts of law and equity were thereby declared in all cases and questions cognizable by them, respecting the said treaty, to judge accordingly; as by the same act more fully appears. Wherefore, for that the said Archibald and John Hamilton were merchants, and were and are subjects of the said King of Great Britain, and creditors on his side as aforesaid; and the said debt was *bona fide* contracted before the making of the said definitive treaty, and the ordaining and establishing of the said Constitution, and the passing of the said act declaring the said definitive treaty to be part of the law of the land; they, the said Archibald and John Hamilton, pray judgment and their said debt, together with their damages, occasioned by the detaining of the same, to be adjudged to them, etc. W. R. DAVIE, *pro Quær.*

DEMURRERS. (679)

I. And the said John Eaton says that the plea aforesaid, by the said Archibald and John Hamilton, above in replying first pleaded, and the matters therein contained, are not sufficient in law to compel the said John Eaton to answer to the aforesaid declaration of said Archibald and John Hamilton, to which the said John Eaton has no necessity, nor is he, by the law of the land bound in any manner to answer, and this he is ready to verify. Wherefore, for default of a sufficient replication of the said Archibald and John Hamilton in this behalf, the said John Eaton, as before, prays judgment, whether the said Archibald and John Hamilton ought to have and maintain their said action against him, etc.

II. And the said John Eaton says that the plea aforesaid, by the said Archibald and John Hamilton, above in replying secondly pleaded, etc., as above.

III. And the said John Eaton says that the plea aforesaid, by the said Archibald and John Hamilton, above in replying thirdly pleaded, etc., as above.

IV. And the said John Eaton says that the plea aforesaid, by the said Archibald and John Hamilton, above in replying fourthly pleaded, etc., as above.

JOHN HAYWOOD, *pro Def.*

JOINDERS IN DEMURRER.

I. And the said Archibald and John Hamilton say that the plea aforesaid by them, the said Archibald and John Hamilton, in manner and form aforesaid first above in replying pleaded, and the matter therein

contained, are good and sufficient in law to compel the said John Eaton to answer to the declaration of them, the said Archibald and John Hamilton; which said plea and the matter therein contained the said Archibald and John Hamilton are ready to verify and prove, as the court, etc. And because the said John Eaton to that plea doth not answer, nor has hitherto any way denied it, the said Archibald and John Hamilton pray judgment, etc.

(680) II. And the said Archibald and John Hamilton say that the plea aforesaid by them, the said Archibald and John Hamilton, in manner and form aforesaid secondly above in replying pleaded, etc., as above.

III. And the said Archibald and John Hamilton say, that the plea aforesaid by them, the said Archibald and John Hamilton, in manner and form aforesaid thirdly above in reply pleaded, etc., as above.

IV. And the said Archibald and John Hamilton say that the plea aforesaid by them, the said Archibald and John Hamilton, in manner and form aforesaid fourthly above in replying pleaded, etc., as above.

W. R. DAVIE, *pro Quær.*

At June Term, 1796, this cause was argued.

*Baker** for the demurrer. I rise to enter into the argument of this important question with all the diffidence which the importance of the subject, and the shortness of the time allotted to me for the consideration of it, are naturally calculated to inspire; and my diffidence is increased when I consider that the investigation necessarily involves in it an inquiry into the constitutional powers and authorities of the late confederation and of our own State government; an inquiry which cannot be other than an important one at any time. Yet, when I take a review of the subject, and deliberately consider the arguments which may be properly offered on both sides, I derive much confidence from a conviction that my client's defense is a substantial one; and flatter myself it will so appear to your Honors, if I can have the happiness to make myself intelligible in the manner I wish.

In examining this question, although the right of making the confiscation by our State Legislature is not denied by the pleadings, yet, with the view to show the extent of that right and to give the greater force to arguments which I shall draw from it, I beg the indulgence of this Court while I take a summary view of the doctrine, as explained by the most respectable writers on the laws of nations, and as recognized by the laws

**Mr. Attorney-General Haywood*, the defendant's former counsel, while this cause was pending, was promoted to a seat on the bench of the Superior Courts of the State.

of England. I then contend that a sovereign state may rightfully confiscate debts due from its citizens to the subjects of its enemy.

To prove this I will consider, first, the nature of war.

Vattel, page 519, sec. 138, says: "The business of a just war being to suppress violence and injustice, it gives a right to compel by force him who is deaf to the voice of justice; it gives a right of doing against the enemy whatever is necessary for weakening him, or disabling him from making any further resistance in support of his injustice; and the most proper methods may be chosen, provided they have nothing odious, be not unlawful in themselves, or exploded by the law of nature." If this is the case, it follows, of course, I humbly conceive, that a debt may be confiscated; for by that the State deprives the enemy of one great means of supporting the war against her. The amount of debts due to British subjects in the several states at the commencement of the war with Great Britain would have made no inconsiderable sum to be carried into the opposite scale; by depriving the enemy of this, which we do by withholding it from his subjects, we lessen his strength and add to our own; or, at least, we prevent the diminution of our own very considerably. For how would it have weakened and distressed us to have paid up debts to such a large amount, at that particular time, in specie (which was the only money that the creditors would receive), which would immediately have been carried out of the country, and we deprived of any benefit arising from the circulation of it among us? I presume that such a collection, could it have been made, would have taken every penny of the specie then in circulation; and it is unnecessary for me to dwell on the inconveniences and distresses the carrying it out of the country would have put our government to at that time; everybody knows the difficulties under which we had to struggle for the want of specie; although we were not drained of it as we should have been had these debts have been paid up. By withholding these debts, many whose greatest property consisted in them might, from motives of interest, remain among us and join in the defense of our liberties; and the enemy, from the cries and importunities of the creditors who deserted and left their debts unpaid, might be the more readily brought to a sense of justice towards us; which, the elegant author I have quoted says, we have a right to compel him to, by any just means in our power. If the right to confiscate debts is denied, what would not be the inconvenience and injustice of it? We should have to defend the property of our very enemy; for the property of the debtor to the amount of the debt, in fact, belongs to the creditor. It is, at least, the fund out of which it is to be paid, and upon which it is secured; the debtor protects and insures that fund against the creditor, who contributes nothing to its protection; but, on the contrary, by his conduct makes that protection and insurance more difficult and expen-

sive. In fact, it is against him alone that any exertion for that protection is necessary to be made. It cannot be denied but that property of every description, other than debts, may be confiscated; and, if so, it is surely just that debts also should be; otherwise, one party, whose property in the enemy's country consisted of debts, would have a material advantage over the other, who had property of other kind in the enemy's country, which might and would be confiscated.

Having observed this much, with the view to show that the right of confiscating debts is a right which every nation may lawfully exercise against its enemy, on the breaking out of a war, in conformity to those general rules before mentioned from Vattel, I will now trouble the Court with a few cases to prove more particularly that debts may be confiscated.

Vattel, p. 484, sec. 77, says: "Among the things belonging to the enemy are likewise incorporeal things; and all his rights, titles, and debts, excepting, however, those kind of rights granted by a third person, and in which he is so far concerned that it is not a matter of indifference to him by whom they are possessed. Such, for instance, are the rights of commerce. But, as debts are not of this number, war gives us the same right over any sum of money due by neutral nations to our enemy as it can give over his other goods." The same doctrine is laid down 3d Grotius, 143, and goes to show beyond question that, by the law of nations, a debt may be confiscated as well as anything else; even if that debt is due by a neutral nation to the enemy. And if so, much more ought it to be the case, when due by one of our own citizens, who is in our own country, and himself and property subject to no other power but the laws of our own government.

This right of confiscating debts is recognized by the law of England, which must also be the law here. Parker's Reports of Exchequer Cases, 27; *"Attorney-General v. Weeden and Shales.* In this case, upon long debate, it was resolved: 1. That choses in action, which belonged to an alien enemy, were forfeitable to the crown; Maynard's Edward 2, *inter memorand. scaccar,* 41.

"2. That this ought to be found by inquisition to make a title to the king, and that this was an inquisition of entitling and not of instruction. *Page's case,* 5 Co., 52.

"3. That the peace, being concluded before the inquisition was taken, discharged the cause of forfeiture.

"4. That the inquisition, taken afterwards, did not relate to set up their forfeiture; for the cause was but temporary, and that cause being removed before the king's title was found, the finding after should not relate." Here the doctrine, contended for by the defendant, is fully established; for it shows the right to make confiscations, although it was considered not to have been made in this case; because the requisites

were not performed until the peace, when the right ceased. But, in our case, I apprehend every necessary requisite was performed. The act of Assembly naming the party, and what property should be confiscated, of itself was equal to an inquest of entitling—and any further inquest that might possibly be necessary for any purpose in the case could not be considered in any other light than that of an inquest of instruction, which could not affect the right, and is only had for the purpose of assisting the officers of the revenue. This was answered in our case by the commissioners, who were appointed by the act to collect the debts, etc., especially, as the debt was actually paid into the hands of those commissioners.

In the courts of law of England, it is a good bar of the plaintiff's action to plead that he is an alien enemy. 1 Hale, 95; 1 Bacon's Abridgt., 84, 85; Cro. Eliz., 182. And every bar is perpetual. 6 Rep., 7; *Ferrar's case, ibid.*, 46; *Higgins' case.*

This also shows that a debt may be confiscated; for if this is a good bar to the action and that bar is perpetual, it must be on the principle that it is unlawful for the defendant to pay the debt to one who is an enemy, and who will use it to the injury of the State, whose subject he is; but it surely does not discharge the debtor, for that would operate as a benefit to the individual, and not to the community at large; for which there is no reason, and therefore the debt must belong to the State, which is placed in the shoes of the original creditor, and then he is properly barred from a recovery.

But this right of a sovereign state is recognized by the present judges of England. H. Black. Rep., 135, 149; 3 Term Rep., 731.

This right of a sovereign state is not usually exercised in England, because their *Magna Charta* provides in another manner for them. That is, by putting them in sequestration until it should be known how their merchants are treated in the enemy's country, and that if they were well treated, these should be so, too. This *Magna Charta* is a kind of constitutional act, and therefore cannot be considered to extend in its operation to this country, as we have a written Constitution of our own; and as we have not thought proper to introduce such a principle as this into the Constitution, it follows that the sense of the people was against it.

This is a regulation calculated to suit a mercantile country like that of Great Britain, being instituted for the convenience and protection of their merchants and the support of their trade; that trade from which they themselves derive such national support, and without which their fame as a nation would not, perhaps, even at this day, have far extended beyond the limits of their own little island. Even this regulation proves that the right I contend for may be exercised, if the government think

proper, and that it did exist before *Magna Charta.* If so, it must now exist here. This regulation is not used in England now, because by treaties with the European powers the merchants, on the breaking out of a war, are allowed a certain number of days to withdraw themselves and their effects, etc. Sullivan's Lectures, 527. But no such treaties are opposed to the right in our case; and in our case the right remains, therefore, as it was originally, cleared of all objections of this sort. If it is said to be unjust, and that it affects the sacred obligation of contracts, I answer that there is no more injustice in the state seizing on one kind of property than another. In either case, the person whose property is seized has an equal claim on his own sovereign for compensation for his loss; and, as to its affecting private contracts, the creditor having by his own conduct put himself out of the protection of the law which made the legal obligation of the contract, he is no more deprived of his right in the case of a debt than in the case of any other property which is taken from him. For, in either case, he is disabled to sue for redress; and, if the law did not provide in some manner for the case of the debtor, he would be the sufferer instead of the creditor; as there would be no one to whom he could lawfully pay his debt; and it is just and right that he should be authorized by some competent authority to discharge his contract when it became due, as the right to pay it to the original creditor is taken away. This mode of affecting the right to choses in action, by acts of the Legislature, is frequently exercised in England.

1. It is done by acts of attainder. 4 Bac. Abr., 214.

2. It is also done on conviction for treason or felony. 2 Bac. Abr., 577.

3. Also, by outlawry. 3 Bac. Abr., 754; 4 Ib., 214.

4. By bankruptcy, by force of the acts, although the debt be due in a foreign country. 4 Term Rep., 182; H. Blackst. Rep., 131, *in notis.*

5. It was also done, *ipso facto,* by the fourth sea act; which vested the whole estate of the directors in the hands of commissioners for the payment of their debts. 1 P. Williams, 895.

In these cases of forfeiture, the debt is so completely vested that the assignee of the king may sue in his own name. 4 Bacon, 214.

Having now established, unquestionably as I humbly conceive, the right of the State to confiscate the debt, I will proceed to show in the next place that they have made such confiscation, fully and absolutely. But the only parts of the confiscation acts which I shall beg the attention of the court to, at present, are the 2d section of the Act of 1779, entitled *"An act to carry into effect a former confiscation act, etc.,"* in which it is enacted: "That all the lands, tenements, and personal property, within the State, of a number of persons by name, and among the rest the

present plaintiffs, and of all others who come within the meaning of the confiscation and this act, and all and every the right, title, and interest which all or each of the said persons may have had therein, on the 4th day of July, 1776, or at any time since, shall be and hereby are declared to be confiscated, fully and absolutely forfeited to this State; and shall be vested in the hands of commissioners, as in this act directed, to be appointed for the purpose hereinafter mentioned;" and the 3d section of the same act, which, among other things, says: "The commissioners shall have full power and authority to take possession of all lands, tenements, hereditaments, moneys, debts, whether due by judgment, bond, bill, note, or otherwise, and all other personal property of the persons aforesaid, in the name and for the use of the State; and shall give receipts and discharges, which shall forever indemnify and acquit the persons delivering or paying the same, their heirs, executors, and administrators, against any future claim for the article or money mentioned in such receipt and discharge." This act is sufficiently full and explicit to vest the property of this debt in the State; and I feel satisfied that I have now established both the right to make the confiscation and the legal exercise of that right, in the manner set forth in the defendant's pleas. Here I might rest the case until the counsel for the plaintiff should show some legal ground upon which this debt, which was thus legally divested, has become since revested in his client, so as to entitle him to recover notwithstanding this act. But in this case the debt was actually received by the State, and thereby became extinct, as between the original creditor and debtor. To prove this it is only necessary, I conceive, to state again what I have already proved, that is, that the State had the right of confiscation, and that they exercised that right. For then it follows necessarily that the State, having taken the creditor's right to herself, has lawfully a right to receive the debt of the debtor; and, therefore, the debt was lawfully paid. And, if once lawfully paid, it is surely entirely discharged as much as it could be in case of a payment to the creditor himself, or any assignee of his, or any other person lawfully authorized to receive, whether under authority from him or any other competent authority; the contract was entirely at an end, there being, after this payment, neither debt, debtor, nor creditor. This appears to me to be such a necessary and clear conclusion that it would not need the aid of authority. I shall therefore adduce only one in support of it, and that is Bynk. 2, J. P. L., 1, c. 7, who says: "What I have said of things in action being rightly confiscated holds thus: If the prince really exacts from his subjects what they owed to our enemies. If he shall have exacted it, it is rightfully paid. If he shall not have exacted it, peace being made, the former right of the creditor revives accordingly. It is for the most part agreed among nations that things

in action, being confiscated in war, the peace being made, those which are paid are deemed to have perished, and remain extinct. But those not paid revive, and are restored to their true creditors." After having shown the confiscation and discharge of the debt in this manner, I shall proceed to consider the operation of the 4th article of the treaty of peace, relied on in the replication as a repeal of the confiscation acts.

1. This 4th article may be considered as standing alone, and unconnected with any other article of the treaty.

2. As connected with the two following clauses.

As standing alone, whether it be a repeal of the Act of 1779 or not, depends upon what ought to be considered the meaning of the word *creditors,* which is of doubtful signification as used in this place. It may mean those who were creditors at the time of the treaty, their debts not being transferred from them by confiscation to the State, and then remaining unpaid; or it may mean those who had been creditors and were then unpaid, although their debts might have been transferred to the State by confiscation.

To give to this clause the meaning first mentioned will entitle creditors of the first class only to recover. But to give it the other, those of each class, and, of course, the present plaintiffs, will be entitled to recover; if the payment to the State does not alter the case, which it undoubtedly does, for surely it is not reconcilable to our understandings to call those *creditors* whose debts have been once legally discharged. Which of those two meanings is to prevail must depend upon the true rules of sound construction.

1. I conceive, then, that the State, having lawfully acquired those debts by a clear title, is entitled to retain that acquisition until as clear a relinquishment be shown. Vatt., 645, sec. 21.

2. Where a treaty will admit of two different constructions, that which changes the present state of things is to be rejected; and that in favor of the possession to be received; this is the clear opinion of Vattel, 399, sec. 305.

If the present plaintiffs can recover, under the authority of the treaty, the state of things in our country is changed in this respect. At least, the money which the plaintiffs seek a recovery of was legally and absolutely in our possession; as much so as property of this kind could be in any case. The very money was in our treasury; and, if they are now to recover it of the defendant, it must be taken out again to reimburse him. If this is not changing the state of things as they existed at the time of the treaty, I confess I am ignorant of what would.

3. In cases of doubt, the construction ought to be against the proposer of the article. Vattel, 651, sec. 32; Gro., ch. 20, sec. 26. This is a clause inserted, beyond doubt, at the instance and for the benefit of the

other party; it is not reasonable to suppose that we should voluntarily propose such a one, which is thus calculated to confer such a benefit on them at our expense. If it was incumbent on them to express themselves more explicitly, and they have not done so, it is their own fault, and not ours. Is it fair or just to extend this construction the length contended for, to the advantage of the proposer of the article, when it will lead to such absurdities, and when, if that had been the real intention of the parties, they might and ought to have expressed themselves in such a manner as to have left no room for doubt? How easy would it have been to have said that these recoveries should be effected, in all cases of a debt due at the commencement of the war, notwithstanding the confiscation laws, etc. That would have put the business, so far as it regarded the intention, at least beyond doubt. Surely, if their meaning had been what is contended for, the words I have mentioned, or some other more fully to express that meaning, would have been used. But our commissioners never would have acceded to such an article; they knew too well the limits of their authority to agree to anything of the kind, as will plainly be seen when the following clauses of the treaty are considered. I say our commissioners had no authority to enter into a treaty that would have the extensive operation which it is pretended this 4th article ought to have. Some of the states could not pass retrospective laws; and, of course, Congress, their deputies or delegates, could not do any act which would have such an operation on rights legally acquired under the laws of any state; nor could a majority of the states exercise such a right. How, then, could Congress, which is a representation of the states and for a particular limited purpose? Congress had the right to make treaties for the United States, beyond doubt. But those treaties were to operate as compacts, and the faith of the several states stood pledged for the performance of them, so far as Congress acted with good faith and within the limits assigned to them by the spirit of the confederation. If they, by their treaties, interfered with the internal police of a particular state, as they were only chosen to manage the general concerns of the Union and not of a particular state, that state was not bound until she passed an act to adopt the treaty as a part of her laws; Congress, knowing this, would not stipulate positively to do anything which should interfere with the laws of any state; but, in such cases, would only agree to recommend to the several states what they wished done; which, in most cases, would have the same effect. But it would not in all; nor could it in any, without the consent of the states, explicitly given by passing laws in conformity to it. This it will be seen is the part Congress, or their commissioners, did act with regard to this very business, in that part of the 5th article of the treaty, which is recommendatory. And this leads me to consider the 4th article,

2. As connected with the two subsequent articles, the 5th and 6th.

This appears to me to be the true way to consider it; and this will be the more necessary when we consider the short, vague terms of this 4th article, and give to the other two the construction that is reasonable when compared with the 4th. By a different mode of construction one article might militate directly against another; and it would be impossible to account for the true meaning of every part of the treaty satisfactorily. The propriety of this mode of construction is so self-evident that I shall produce but a single authority to support it. Vattel, 383, sec. 285: "We ought to consider the whole discourse together in order perfectly to conceive the sense of it, and to give to each expression not so much the signification it may receive in itself as that which it ought to have from the thread and spirit of the discourse."

Viewing these three articles together, then, as they all relate to one general subject, it is plain that they import a full confirmation of all our confiscation laws. It is not stipulated that one of them shall be repealed or impaired in the least, only so far as the recommendation might have such an effect. How is it, then, that a debt legally confiscated and vested in the State by an actual payment into the treasury can be considered as given up, or the Act of 1779 repealed?

If the fourth article is considered to stand alone, then such a construction as is contended for would appear more reasonable. But why should we resort to this article alone to be informed of the intention of the contracting parties? Were the other two inserted for no purpose? They, in my opinion, fully explain the 4th, because they show that it was not the intention of our commissioners to do anything which should repeal an act of the Legislature of any state, and that they only intended to give a right to recover such debts as were then due and unpaid; not being claimed by any state as her property, which would take in the debts in most of the states (for few of them, I believe, actually confiscated those debts, although most of them passed laws for their sequestration), which, not affecting the original creditor's right absolutely, would of course be properly the subject of a treaty, and come under the operation of this 4th article. If this was not what our commissioners intended, why do they stipulate for recommendation to the several state legislatures for repeal of the confiscation laws? Why do they require Congress earnestly to recommend to the state legislatures to provide for restitution, etc.? Why do they agree that other persons than those particularly described should have leave to go to any part of the United States, to remain twelve months unmolested, in their endeavors to recover their estates, rights, and properties? Why was it necessary to stipulate that this class of persons should pay the *bona fide* price for which their property sold on the same being delivered up by the legisla-

ture? And why was it necessary to state in the 6th article that there should be no further confiscation, and no further loss, etc.? If the confiscation laws were repealed, there could not be any further loss, and in fact there had been none, as the creditor was to recover the full value of his debt, and if the commissioners had a right to repeal a law of the state, why have they not done so positively in the cases where they have agreed to recommend only? For they have in that case equally shown their willingness to restore the property as in the case of debts; but so far from that, where any part of the contract of our commissioners was likely to affect existing laws of any of the states, they have only stipulated that Congress should recommend a repeal of those laws so as to make them conformable to such agreement; which is all they have done or had the right to do. Our commissioners knew that it would not do to go further than this, if they had the right, even. The states never would have consented to such a thing in the then situation of their affairs, and the people would have revolted at the very mention of a thing so shocking to their feelings, at that particular period, when the sufferings and miseries of the war were fresh in their minds. If any other than real British subjects were intended to be benefited by the 4th article, it could only mean that no further impediments than those already created by the acts of the legislatures should be imposed. If this is not what was intended, and, on the contrary, they intended by these general words to repeal every law of the states, which raised such an impediment, they must surely have acted on the supposition that they were clothed with authority to effect such a repeal, or they were not acting with good faith, and if this were the case, how can we account for their stipulating to recommend only in every case where a repeal is mentioned? If they had a right to repeal our laws in one case, so they had in another; and there was as much reason for their doing it in one case as in the other, if we suppose a complete restitution was desired and intended as far as they were enabled to make it. If this idea that our laws were confirmed by the treaty itself, the commissioners having gone on the principle of their not possessing authority to effect a repeal of them absolutely, is not made already sufficiently plain and evident, other proofs of it are not wanting.

1. The commissioner, on the part of Great Britain, himself so understood it; he attempted to get something more done for this class of people; but our commissioners, for the reasons already mentioned, refused to go any greater lengths to favor them. As a proof of this, I beg leave to refer to the correspondence on the subject between the commissioners on both sides, as it is stated by Mr. Jefferson, when Secretary of State, in his correspondence with Mr. Hammond, the British minister, p. 71, Nos. 8, 9, 73, 10, 76, 11.

2. It was also so understood by the ministry and members of Parliament in Great Britain, in the year 1783, when the preliminary articles were under consideration. *Ibid.*, 32, 33.

And these proofs are of such a nature as to carry entire conviction to my mind. Can any reasonable man suppose that our commissioners intended by this 4th article to repeal every law of the states which confiscated these debts, when they all join in declaring that they have no right to repeal any one of those laws, because Congress, from whom they derived their authority, had no such right? And when the British commissioner, on that declaration being persisted in, at length agreed to accept such terms, and such alone, with respect to the refugees, as our commissioners professed they had a right to agree to; and when the British ministry and the Parliament, who, we must suppose, would judge full favorably for themselves, declared they were satisfied that our commissioners had gone the full length of their authority, and did not pretend to require anything more of us, with respect to confiscations, than what the recommendations would probably effect. It is clear, then, they treated with us on this principle; and if we act up to that, although possibly the commissioners might have possessed greater powers than they thought, and declared they did, yet we are surely not bound to extend the contract further than it was originally intended by the parties on both sides, when acting on this principle, thus fairly declared and understood at the time. But the true meaning of this 4th article is, I humbly conceive, this: Those who were real British subjects, residing in Great Britain when the war commenced, should meet with no legal impediment to the recovery of their just debts, etc., that is, such debts as then existed, not forfeited and vested in the state by any act of the legislature, although the right to recover them had been taken away during the war, by the creditors becoming an alien enemy, or by some positive statute, disabling him to sue, or sequestering his property; nor were they to be impeded in their recoveries by the operation of tender or pine barren laws, or paid off with depreciated paper money, at its nominal value. These were the impediments that opposed themselves to the recovery, and these it was necessary to remove, and in the manner they have been removed by this 4th article, in order to give that full recovery which was had in view, and in fact it is nothing more than saying, we will be friends, hostilities shall cease, and courts of justice shall be opened for all just recoveries on both sides. And although this might seem unnecessary in some degree, yet it is usual in such treaties, and serves to ascertain to the creditor beyond doubt the right to sue on the return of peace; which right it is necessary should be declared by some public act of the government before it could be noticed in the courts

of law, although it should be otherwise ever so well known. But nothing of all this goes to show what shall be recovered; that, I apprehend, would have been expressed in stronger and more explicit terms had it been the intention of the parties to regulate it in this clause. That was an office left, however, for the 5th article to perform, which says, with regard to persons of the description of the present plaintiffs, for they cannot be considered real British subjects, I conceive that they shall have leave to remain among us twelve months, endeavoring to recover their estates, rights, and properties, under the recommendation of Congress. These words of themselves are so full and expressive as to take in debts and every other species of property to which they might set up a claim; and, if so, they are doubly provided for in the case of debts if they are also to be included in the 4th article. But this cannot be the case, for why was it necessary to make any distinction at all if every description of subjects were equally alike to be benefited? To construe the treaty in such a manner as to work a repeal of the act of Assembly would be derogatory to the independence of the state, and productive of injustice and oppression. On the other hand, to preserve the independence of the state, and say that the treaty does not repeal any of her acts, and yet a very numerous class of creditors will be provided for, in the 4th article, which thus removes the impediment to the recovery of those debts which had never actually been confiscated. To construe the treaty as is contended on the other side, those who have paid must pay again; for in this sense of the word *creditors,* as much as any other persons the plaintiffs must be creditors.

But every treaty ought to be according to the fundamental laws and constitution of the country for which it is made.

Vattel, 352, sec. 228: "Thus, also, an oath cannot render a treaty valid that is not so, justify a treaty that is unjust in itself, nor lay an obligation to fulfill a treaty lawfully concluded when a case is pretended where its observation would be unlawful. As, for instance, if the ally, to whom succors have been promised, undertakes a war that is manifesty unjust. In short, every treaty prejudicial to the state, every treaty made for a dishonest cause, *or contrary to the fundamental laws,* being null in its own nature; the oath that may have been added to such a treaty is also null, and falls with the act it was intended to strengthen." The same doctrine is laid down in p. 192, sec. 265; p. 296, sec. 154; p. 297, sec. 156.

And in p. 637, part of sec. 10, this author says: "When a limited power is authorized to make peace, as he cannot of himself grant every condition, in order to treat on sure grounds with him, it must be required that the treaty of peace be approved by the nation or power which can make good the conditions. As, for instance, in treating of a peace with

Sweden, if a defensive alliance and a guarantee be required for the condition, this stipulation will be of no effect unless approved and accepted by the diet, which alone has the power of imparting validity to it. The kings of England conclude treaties of peace and alliance, but by these treaties they cannot alienate any of the possessions of the crown without the consent of Parliament, neither can they, without the concurrence of the same body, raise any money in the kingdom. Therefore, when they negotiate any treaty of subsidies, it is their constant rule to communicate the treaty to Parliament, that they may be certain of its concurrence, to make good such agreement."

If, therefore, of two constructions, the one be against the fundamental law and the other consistent with it, that which is repugnant to the fundamental law must be abandoned, and the other received; otherwise, the treaty itself must be abandoned. And the construction contended for here seems to be against our Constitution.

1. The General Assembly have no power but what is given to them by the people, declared in the Constitution. In limiting this power they have said "that no man shall be deprived of his property but by the law of the land." Bill of Rights, sec. 12.

2. From the nature of a debt, being a thing which becomes obligatory only by the expressed consent of the individual to be charged, you cannot say that a man shall be a debtor and pay the debt who is not a debtor.

3. By the law of nature, the Legislature is under an obligation to perform what it has promised; and the person promised has a right to that performance; therefore, it has no right to make void what it has engaged to support. And we have already seen that it has engaged to support the payment here pleaded as an extinguishment of the debt. Can the Legislature now, after the debt is extinguished upon its own principle, pass a law to revive that debt, nullify the obligation of its promise, upon the faith of which the debtor has parted with his money? That it has no such right might be proved, and the impropriety of exercising it made evident, by stating to your Honors the numberless instances of the most horrid injustice and hardship that it would be productive of; but I conceive it to be too plain to admit of doubt, and therefore I shall take it for granted that such a right does not exist in the Legislature; and, if so, much less was it in Congress or their commissioners. Congress was a mere executive body, possessing no other powers but such as are generally exercised by the executive branch of a government. This is the light in which the commissioners viewed it, as I have before shown; this is the light in which the British government viewed it, as I have also before shown; and it is further manifested by their long detention of the Western Posts, because those acts of Assembly which opposed the opera-

tion of the 4th article of the treaty were not repealed. This is the light in which Congress uniformly viewed it when they required of the states, at different periods, to repeal those laws which opposed the treaty. And this is the light in which I conceive every candid mind must view it, when he deliberately examines and considers the articles of confederation. As to the 6th article of the Constitution of the United States, it surely never intended to give greater efficacy to the treaty than it had before. What reason was there for making it more binding on the states under the new government than it was under the old? We had received no new consideration from the other party for such an extension of the obligation on our part. Could it have been suspected at the time the Constitution was adopted in our state that it would have this operation; that single article would have raised from every quarter the most insurmountable obstacles to its adoption; the fact is, this article was inserted as one of course, to put the treaties that had been made under the old government *in statu quo*. For, without such an article, it would have been very questionable how far those treaties would be binding upon us under the new government. And as to the act of Assembly of 1787, making the treaty the law of the land, I have always understood that this act was passed in conformity to a requisition of Congress, to afford a proper pretext for demanding a surrender of the Western Posts, which were withheld on the pretense that the treaty had not become the law of the land, not having been ratified by the several state legislatures, but that it by no means was intended to extend the length contended for by the plaintiffs. Had that been the intention of the Legislature, can it be doubted but that something more would have been expressed in the act as to that part of the treaty, at least, which is recommendatory only; it would have been necessary, I humbly conceive, to have framed a law entirely different from that which passed, both as to the title and substance of it; and this the journals of that Assembly show us was attempted (not that I know or believe that it was the wish of a single member), but it does appear that the first bill introduced on the subject was entitled "A bill to repeal such laws as militate against the treaty of peace made with Great Britain," p. 8 of the Senate Journals, and 9 and 17 of the Commons. This bill, it seems, was dropped after one or two readings, and the other was afterwards brought in and passed; which sufficiently shows the intention of the Assembly, and which has been further manifested at various times since by their proceeding further to carry the confiscation laws into effect and to bring suits under them; one of which is now pending in Newbern Superior Court. But, in fact, this act could not be a repeal of the confiscation laws only in such cases where the treaty contains an absolute stipulation; and that, I have attempted

to show, was not intended in the case of the present plaintiffs; for, as to them, it was only recommendatory; and I rest satisfied that this act, making the treaty the law of the land, has done nothing for them. But suppose it should be considered as a repeal, yet it cannot be extended to the reobligation of the defendant. For

1. A subsequent law repugnant to the former cannot be so construed as to do away a right lawfully acquired under the former law. In proof of this, I shall read 2 Bacon, 75, the substance of a case reported in 2 Mod., 310, determined upon the statute of frauds and perjuries in England: "That the clause which enacts that no action shall be brought, etc., to charge an executor, etc., extends not to promises made before, though to be performed after, the making of the statute; for it would be against natural justice that a promise made upon good consideration should be destroyed by the retrospect of a law which none could divine would be made."

2. It has been always held that everything which was done under a law while it was in force was valid, although the law should be afterwards repealed, 4 Bacon, 638. "If a statute be repealed, all acts done under it, while it was in force, are good." Jenk. Cent., 233, Pl. 6. Then, here is at once an insurmountable objection to the plaintiffs' recovery. It is admitted that the state had the right to confiscate and direct the payment of the debt into the treasury, and the money is paid in accordingly, before the repeal takes place; this payment, then, was something done under the law of confiscation while it was in force, and is valid agreeably to the principle which I have established; therefore, the repeal cannot affect it.

3. If the statute of repeal is against common right and reason, it is void. 4 Bacon, 635; 8 Rep., 118. This repeal, if it is one in reality, is surely against common right and reason. When the debtor paid his money to the State, it was in consequence of the Legislature declaring to him that he should be discharged from paying again to the plaintiffs; and, relying on that, he makes the payment and has a right to the discharge; for it is admitted that the Legislature was competent to pass a law of this kind, transferring the right to receive the debt to the State, and, if so, the payment was as good as if it had been made to the plaintiffs themselves; and it would be equally unjust to make the defendant pay it again. If he is compelled to do so, it may much distress him now, when the sum is very considerably increased by the accumulation of interest and costs. I therefore do conceive that on this principle also the plaintiffs ought to be barred of a recovery; and upon these grounds, as I have occupied so much of the time of the Court, I will submit my client's case to the consideration of your Honors, as to you any recapitulation of them might appear to be more tedious than necessary.

Davie, contra. It is acknowledged that the bond in question represents a debt *bona fide* contracted before the ratification of the treaty of peace; that the defendant is a citizen of the United States; and that the plaintiffs are subjects of the King of Great Britain.

The obligation of contracts is not only founded on moral principles, but that necessity of individual confidence, so essential to the well being of man, and indispensable to the existence of human society. Thus, one of the first objects of government in every country has been to establish some civil or judicial mode of deciding controversies, and enforcing the performance of contracts. So that, between individuals of the same community, the moral is scarcely distinguishable from the legal obligation; and the collected power of the society immediately follows to enforce it.

By the law of nations, contracts between individuals of different communities shall meet with no legal impediment to their execution in time of peace, and shall have the benefit of the constituted authorities of those communities to enforce them; and it is considered, at present, as a maxim uncontroverted, that a war of itself does not extinguish the rights or dissolve the obligations which existed before the commencement of it, between members of the different belligerent societies; although, during the continuance of the war, the right of bringing suit is suspended. Thus, if this case stood upon the common or general ground, there would certainly be no objection to the recovery of the plaintiffs, raised upon the relation of the parties or the intervention of a war.

But to this action the defendant has pleaded four several pleas in bar, grounded upon the confiscation laws of this State.

1. A payment to the commissioners, under the act of October, 1779, with their receipt and discharge.

2. The act of November, 1777, and the two first sections of the act of Assembly of 1779; alleging that thereby the debt was confiscated, and absolutely forfeited to the State of North Carolina.

3. The third plea rests on the fourteenth section of the act of October, 1779, alleging that the plaintiffs refused to take the oath of allegiance, and were compelled to leave the State by virtue of the acts of 1777; and that they had not *appointed* any *lawful attorneys* or agents, etc., to *receive* and *give discharges* for debts; that, therefore, etc.

4. The fourth plea is in substance the same with the second, though in a different form.

To these pleas the plaintiffs have replied: The act of Assembly of April, 1777; averring that they were then, and had been from their respective nativities, subjects of the King of Great Britain, and that they were at that time merchants within the meaning of said act, and that they departed out of the State, in conformity to the said act of

Assembly. To this is also added the fourth article of the treaty of 1783, saying that they were creditors on the side of his Britannic Majesty; and, therefore, etc.

Although the case made in the pleadings appears to be generally that of an open and solemn war between two independent nations, yet I admit that the following important facts also appear, and that recourse must be had to them as the key of explanation to the confiscation laws, viz., that the colonies, now United States, were formerly a part of the British Empire. That they, being disgusted with the government, remonstrated to the common sovereign on the conduct of the British Parliament; that their injuries remained unredressed, and Great Britain proceeded to enforce her usurpations by arms; and these measures produced defensive operations on the part of America, until the fourth of July, 1776, when Congress thought proper to declare the colonies free and independent states. This again produced a new order of things. The states immediately proceeded to form constitutions, and afterwards to enact laws. The commercial and political dependence of the colonies upon Great Britain, as the mother country, had connected the interests of numbers with the old government; these, of course, had determined to remain under it, and the fourth of July became the epoch of discrimination. As these people had interest, by which they might naturally be influenced, so they had *rights* which were not to be violated. There could be no question on principle as to the right of remaining under the old government; the great question was the *right* of *change*. Such was the state of things when North Carolina began to legislate on the subject of confiscation.

The whole case may be safely considered as reduced to two general heads.

1. Whether the debt in question is within the purview and operation of the confiscation laws.

2. If this debt is within the operation of those laws, whether the pleas of the defendant are among the *impediments removed* by the treaty of peace?

In order to form a satisfactory judgment on the first point, it will be necessary to take a general view of the system of the confiscation laws, that their policy and relation may be properly understood; so that, when those pleas come to be considered on detached parts of the acts, we may be furnished with some rule of construction which, being formed from the whole law, will equally apply to all its parts. I shall pursue this part of the inquiry with a pleasure derived not only from the discharge of my duty as a lawyer, but from the hope that I shall be able to show that even amidst the conflict of political opinions, and the violence

of a revolutionary war, the Legislature of this country acted with dignified moderation and an inviolable attachment to the principles of natural justice.

The first legislative act on this subject, passed April, 1777,* the 5th, 6th, 7th, and 8th sections respect the present question (*they were read*). These parts of the act arose out of the peculiar circumstances of this country, and were dictated by the wisest policy, and are perfectly conformable to the principles of natural law. The writers on this subject say† that a nation has a right to form and to perfect its constitution; that it may reform its government, and even change its constitution; but the rights of the dissenting citizens are reserved to them, "viz., to retire elsewhere, to sell their lands, and take with them their effects."

1. The Court will observe that by the act of Assembly persons of the description of the plaintiffs have their election to remain as members of the new state or retire into the bosom of the old government.

2. They may dispose of their estates.

3. They may export the amount of them in produce.

4. They may appoint attorneys to sell, after their departure, etc.

These form the outlines of the terms of the separation, and may be considered as a full expression of the mind of the sovereign power; but neither the debts created before, nor even by those sales, are within the purview of the act.

The debts are not mentioned, much less are they required to collect them before their departure, etc.

All compulsory collection was impracticable. No courts existed to enforce the demand of the creditor, etc.

The Legislature met again the same year and, in November, passed another act‡ nearly to the same effect.

The clauses remarked upon in the Act of April, 1777, are reënacted *in toto,* with the addition of section 9, imposing certain disabilities on persons suffered to remain in the State, and enacting a new discrimination between those who departed within the time allowed and those who remained after that time; the latter could not depart without leave of the executive, under the severe penalty of confiscation. The penalty was not inflicted for *departure,* but departure *without permission.*

The 7th and 10th sections repeal the penalties for returning.

The proviso of the 6th section is again a solemn recognition of the law of nations, and the immutable principles of justice.

Here the same remarks recur which have been already made on the same sections in the Act of April, 1777; and let it be noted that the right to sell is expressly to the parties, and their attorneys after their depart-

*1, 1777, 3, 284. †Vattel, 30. ‡2, 1777, 6, 321.

ure, that this admits a subsisting debt, either due by the vendee or the agent. That old or previous debts are not mentioned, that the attorneys are neither authorized nor required to collect the debts; that as the debts are neither mentioned nor contemplated, no time was fixed for their collection.

It was before mentioned, no courts existed. Courts were now erected, but those persons and their agents were excluded from the benefit of those courts, as will appear by the 101st sec. of the court law.† The next act,‡ in order, on this subject, was passed the same session; this act has been emphatically styled in subsequent acts "The Confiscation Act"; it is indeed the basis of all the subsequent confiscation laws. (*Here the law was read.*)

It may be remarked that the descriptions contained in the preamble do not include the case of those *compelled* to *remove under* the laws of the State. The expressions, "withdrawn to attach," "withdrawn to avoid, etc.," "beyond the bounds, at the beginning, etc.," are not intended to include them.

The reasons stated in the latter part of the preamble show clearly that those persons were not contemplated.

The enacting clause, sec. 2, makes a like distinction between withdrawing voluntarily and a compulsory departure, *that is to say,* the case of merchants expressly called upon, and that of a common citizen or subject, independent of the several cases expressly made, which are those of a voluntary withdrawing or absence; the provisionary clause of the same section, requiring them to appear at the next Assembly, *proves* beyond dispute the meaning and extent of the law. Not availing themselves of this means of restoration was to be the ground and criterion of confiscation.

This shows the whole aspect of the act, and limits the sphere of its operation.

The fourth section makes them and their case an express exception to the act. This act was not necessary to complete both justice and policy with regard to them; all real estates unsold after three months were to be considered as confiscated and forfeited to the State. The debts, as I have *shown,* were not contemplated.

This act evidently intended to include all those cases which had not been *acted* upon by former and existing statutes.

While this act forms the basis, it also furnishes a rule of explanation to all the subsequent acts, as will appear not only by the established rules of construction but the plain tenor of those laws.

†2, 1777, 2, 101, 318. ‡2, 1777, 17, 341.

The next act,* which operated upon confiscated property, by being acted upon, passed in October, 1779, and is the act alluded to in the second and third pleas of the defendant. The Court will observe, on the reading of this act, that it has proceeded on the Acts of April, 1777, and the act of November, 1777, chapter 17, clearly distinguishing the two cases I have stated to the court. (*Here the 1st, 2d, and 3d sections were read.*)

The fourteenth section is intended to operate on the case of the persons who separated from the new community, under the Acts of April, 1777. (*Here the law was read.*)

The preamble shows the purview and intended operation of the 2d and 3d sections, clearly limiting them to the objects of the act, chapter 17, November, 1777.

It is a rule of law that all acts or statutes relating to the same subjects are to be construed as one act, and a consistent construction, if possible, given to every part of them. Thus, the whole confiscation laws must be considered as one legislative act, making one consistent system.

The construction authorized by this rule, and the only consistent construction that can be given to this part of the act, I take to be this: That the real estates of those persons therein named, who had been compelled to leave the State, under the Acts of 1777, and which they had neglected to sell, should be sold with those confiscated, under the act of November; and that their being named here should operate as an office sound as to those lands formerly owned by these persons.

It does not include their debts, because the State had required them to *sell* and depart.

It could not proceed on their adherence to the old government, because they had made it high treason to return to the new State.

Thus, a compliance with the act of November was impossible—and the case of debts, it will be observed, is intended to be provided for in the fourteenth section.

The real estates unsold were already confiscated; something in the nature of an office was all that remained necessary.

It follows, then, by fair and legal inference, that where the words, debts, and moneys occur, it must be supposed to refer to persons under different descriptions, of which there were many named in the act.

The fourteenth section† has taken for its basis the provisos of the expulsion acts, as they are usually called, of 1777, and assigns two causes of confiscation as requisitions of the former act, viz.:

1. Not disposing of their real estates.
2. Not appointing any attorneys to collect their debts, etc.

*3, 1779, 2, 379. †3, 1779, 2, 383.

The first is perfectly consistent with the provisos in both acts of Assembly.

The other is evidently founded on mistake. The act gives them leave to appoint attorneys to sell and dispose of their estates, but not a word is said about receiving and giving discharges for debts—the following, or latter part of the provisional clauses, saying that if any *real estate* shall remain unsold, "the same shall be forfeited, etc.," shows clearly the reason and object of appointing these agents; and they were only allowed three months after the departure of the principal to sell lands.

The enacting clause is expressly limited by the purview of the proviso it recites; the legal and true construction of it must follow the object and tenor of the Act of 1777, and the rights secured under the proviso are sacred from the operation of this clause.

Let me only add, that the 20th section† promises an indemnity. The Legislature certainly had in view the possibility of its being otherwise settled by treaty.

These are the several acts of Assembly relied upon by the defendant; we will now consider the first plea, on the case made in the pleadings, independent of the treaty of peace.

I. It will be recollected that the plaintiffs were persons within the very letter of the Act of April, 1777, being "merchants who then traded, and had traded, etc." Sound policy and the safety of the State required that these people should be separated from us; and the principles of natural justice required, also, that, although they might be personally inconvenienced, their natural rights should not be violated.

The proviso contained in the 6th section is a solemn recognition of the principles of natural law,‡ and this act of national justice reflects the highest honor upon the Legislature of this country.

As soon as these people made their election, and signified their intention to remain under the old government, by refusing to take the oath of allegiance prescribed by the Acts of 1777, they became immediately aliens to the new government, and their real estates were subjected *instanter* to all the consequences of alienage. In order to prevent this mischief, which would have been attended with such glaring injustice, agreeably to the principles laid down by Vattel, their personal rights were respected by the Legislature, they are authorized to sell, etc., etc., that is the right of citizenship, is *pro hac vice* continued. They have liberty to export the whole amount in produce (naval stores excepted). This very justly assumes the appearance of liberality and moderation, while the measure was dictated by the wisest policy. The exportation of money or specie might have been a serious injury, before the extent

†3, 1779, 2, 384. ‡Vattel, 30.

of paper credit was known; the other mode, in many instances, enabled our citizens to pay for their purchases, while it furnished a marker for their produce, which had already accumulated on the hands of the planter, and threatened him with an entire loss.

It may be important to mention here the motive which doubly influenced the Legislature to be entirely silent on the subject of *debts*. The effects of the war were already felt; the citizen would not have been in a condition to pay—and even a partial collection must have drained the country of all the specie it possessed. It is but a justice due, however, to the Legislature to show that this regulation was extremely beneficial to the merchant. Money must have been raised with difficulty, in so short a period, the exportation of produce was in the line of his business, and might enable him to fulfill his foreign engagements; the case of the merchant appears to have been particularly considered, and those mischiefs, naturally the consequence of political revolution, and so destructive to trade, and so distressing to this useful description of men, were averted and alleviated as much as possible.

In this analysis of the clause, the collection of their debts is never brought into view, nor does the expression, or anything tantamount, occur. The words, "and after satisfying all just demands," "to export the amount, etc.," evidently relate to the sales of their estates, and is to be considered in the light I have already stated it, as an act of policy and justice; nor will they be considered as obliged to export the whole amount, although that privilege was granted.

This construction, in addition to the weight it acquires, from being consistent with reason and natural justice, on which the Assembly appears to have acted, is warranted by the whole latter part of the clause, "if any real estate should remain unsold, etc." This operated by way of penalty in this instance, and is a full expression of the legislative mind; and the penal part of the act will not, on any principle, be carried beyond the letter, or what is much stronger, the particular case stated by the Legislature itself.

These observations are made to show the true ground on which these people stood, and their rights, as recognized by the Legislature and sovereignty of this country.

The result is, they departed with all the rights of alien enemies, according to the laws of nations, with the following additional rights and privileges.

Their persons were protected from military arrest during their stay.

Their property from capture on exportation.

Their real estates from escheats, by the privilege of sale.

Their personal estates to be managed by their attorneys or agents, and under the implied protection of the government.

Their debts not being mentioned, may be considered as untouched, and are clearly included under the situation of their personal estate.

It remains now to be shown that the debts of persons thus situated are not within the purview of those sections of the Act of October, 1779,* relied upon in this plea. (*Here the clauses were read.*)

1. It has been observed that the first part of this act, that is, these clauses, have taken for their ground the Act of November, 1777, chapter 17.†

2. That the descriptions mentioned in the preamble and enacting clause do not include the case of persons compelled to depart under the act of April.

3. That this law evidently operated only on those cases which had not been before acted upon.

4. That these persons are expressly excepted from the benefit of that act, and of course from its penalties, which were made the express consequence of noncompliance; and this was the case whether they removed themselves or were removed by the compulsory authority of the magistracy.

The clauses of the act immediately under consideration expressly refer to the act, chapter 17, and are built upon it. They are therefore, by every rule of law to be considered together as one act. That the only consistent, and of course legal, construction that can be put upon the 2d and 3d sections, as they may regard the plaintiffs, is the construction I before submitted to the Court, viz., that they operated as an office found as to the real estate unsold. That where the words "debts" or "moneys" occur, they must refer to the cases of persons differently situated.

Again, the fourteenth section expressly contemplates the debts and case of the plaintiffs, which shows that the Legislature considered them as two distinct subjects or cases, and that the plaintiffs were not within the purview of the 3d and 5th clauses.

However general the expressions may be, it is clear they cannot cover the case of the plaintiffs, while the act of November forms the rule of construction, and a rational consistency is required in the several parts of the same act. To argue otherwise would be to turn the Acts of 1777, those acts of justice and beneficence, into a snare to these people, and to attribute to the Legislature a species of speculative policy, equally unworthy and unmerited; while they themselves were asserting the rights of man, and solemnly avowing their reverence for the principles of natural justice.

*3, 1779, 2, 379. †Page 341.

II. If, however, this point should be adjudged against the plaintiffs, it remains to be considered whether the payment made to the public commissioners is not among the impediments removed by the treaty of peace.

Before we enter upon the examination of this part of the case, it may be proper to consider some general objections made by the counsel for the defendant to the authority of the treaty. It is alleged that Congress were a mere executive body, a sort of council who could only recommend; that the articles of confederation conferred no absolute powers, and that the validity of the treaty depended upon the sanction of the individual states. It follows from the very nature of a confederacy, which is formed by an association of sovereignties, that there must be a certain distribution of the sovereign power between the constituent states and the confederacy. Thus, the individual states retain those portions of sovereignty which are necessary for their internal government and police; and Congress became the exclusive deposit of those powers which were necessary for the preservation of the Union, their common defense, and the regulation of their affairs with other nations; and it will clearly appear by the instrument itself that the power of making treaties was exclusively lodged in the Congress of the United States. By the 2d article, each state retains every power, jurisdiction, and right which is not, by this confederation, expressly delegated to the United States, in Congress assembled, and by the 9th article, the Congress of the United States in Congress assembled, have the *sole* and *exclusive* right and power of determining on peace and war, of sending and receiving ambassadors, and of entering into *treaties* and alliances. Congress, then, had the sole and exclusive power of making this treaty, on the part of the United States; and were alone competent to this act of sovereignty; no power of this kind remained with the states. From what *data* is it then inferred that treaties of this kind depended upon the sanction of the states for their legal validity? The means of carrying treaties into effect, it is true, remained, in many instances, at that time with the states. Congress had full power to make such contracts, but they had not the same degree of power over the means of execution. Thus, in 1787, there existed no federal judiciary, and the comparative authority of laws and treaties depended upon the sense or judgment of the state courts; and hence resulted the necessity of those repeated applications from Congress to the states, requiring them to carry the treaty into complete effect, which had then become the supreme and positive law of the land.

It is also contended that if Congress had power to bind the states by a treaty as to some things, it was acknowledged and understood by them and their agents that they had no power to repeal or otherwise affect the confiscation laws; and *Mr. Baker* relied upon some resolutions of Congress, the journals and correspondence of the negotiators, and the

opinion of members of the British Parliament as satisfactory evidence of their assertion. It would perhaps be a sufficient answer to all this to say that these documents relate to the object of the 5th article, which, as will be shown presently, never contemplated debts. But, without drawing into question such evidence as the progress of a negotiation, where simulation and secrecy must always act a considerable part, I beg leave at once to oppose to all this the letter addressed by Congress to the states in April, 1787, in which they declared and demonstrated that Congress alone possessed the right, not only of making, but of interpreting, restraining, or counteracting the operation or execution of treaties, "which, on being constitutionally made, became by the confederation a part of the law of the land, and, as such, independent of the will and power of the legislatures."

To this the Court will permit me to add the opinion of Mr. Jefferson: "It results," says he,† "from the instrument of confederation, among the states, that treaties made by Congress, according to the confederation, are superior to the laws of the states." This is not offered as an authority by which the Court are positively bound, but as the opinion of a respectable civilian, delivered upon an occasion of great importance, and where the present question was directly under consideration; and this opinion, he asserts, was supported by the general sense of the states and of those gentlemen who were of the profession of the law.

Whatever doubts may have been entertained by some men, respectable for their learning and talents, whether the treaty could have been executed by the vigor of its own authority, it appears to be generally admitted that, by the instrument of confederation among the states, the treaties made according to that confederation became superior to the laws of the individual states.

Treaties derive their authority as law from being the act of the sovereign power. The safety and prosperity of the nation are involved in this high act of sovereignty, and thus, from necessity, treaties have always been considered as paramount to ordinary laws. Every community possessing sovereign power may enact laws to bind its own members, but rightfully they have no authority to bind others. Thus, treaties acquire their authority from the joint assent of the sovereign power of those nations making such treaties, and to the citizens or subjects of those nations they become *positive law,* a law of the most sacred obligation, and of the highest importance to the tranquillity, the happiness, and security of the human race. Vattel, pp. 11, 12, secs. 24, 27; Vattel, 2, b. c. 12, sec. 163; Burl., 2 vol., c. 9, sec. 6; *Ibid.,* c. 14, sec. 3.

†Jefferson's Corr., p. 48, sec. 40.

Thus, a treaty partakes both of the supremacy of a law and the obligation of a contract. The act of Assembly mentioned in the pleadings and the Constitution of the United States have left no doubt on the subject of the treaty being *now* the supreme law of the land.

It is upon this double ground of its supremacy as a law and its operation as a compact, I contend, that all acts of the state and its own members, with respect to debts of this description, were not only repealed, but even to be considered as a nullity, and as if they never had existed with respect to the creditor.

The words of the 4th‡ article of the treaty are: "It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bona fide* debts heretofore contracted."

This article, the counsel opposed to me has thought proper to consider, in two points of view, viz., as standing alone, and 2d, as connected with the 5th and 6th articles. And it is alleged that the true operation of this article depends upon the sound construction of the word *"creditor,"* which is said should be confined to the creditor of such debts as were due at the time of making the treaty. The word "creditor" is indeed a relative term, and must suppose an existing debt. Those debts of which a person would be a creditor under the treaty received, however, a precise and definite description, by the latter part of the article, in the words, "all *bona fide* debts heretofore contracted." If the article had been drawn up in the words mentioned by the Attorney-General, doubts might have arisen with regard to the effect of confiscation, or sequestration and payment. But the phraseology adopted by the commissioners has excluded all doubt, the sole designation being the creditor of a debt heretofore *bona fide* contracted.

It has also been observed "that the words 'legal impediment' should be restricted to disabilities to sue, the right of bringing suit, not the right of recovery." This is an unfortunate criticism, as the very tenor of the article imports the recovery of the full value in sterling money, and embraces immediately the *right* of recovery, and the attainment of substantial satisfaction, for all debts *bona fide* contracted. The law of nations restored the right of suit, and the treaty expressly gives the right of recovery, notwithstanding any impediments enacted during the war.

To illustrate the construction imposed by *Mr. Baker,* he infers that the words "either side" mean on one side, creditors resident in Great Britain at the commencement of the war. There is certainly nothing connected with the expression that will warrant such an inference. The phrase creditors on "either side" appears to have been selected because

‡Iredell's Rev., 648.

it drew a plain and clear line between the creditor and debtor, contemplated by the treaty. All distinctions of British subjects taken from their residence are blended in the common designation of a creditor on the side of his Britannic Majesty. It is no longer a question whether the creditor resided in Europe or the West Indies, or in the districts in the possession of his Majesty's arms in America. Some reliance is also placed upon the words "sterling money" as evidence that the debts contemplated were such as were due to merchants or others resident in Great Britain, that the debts now in question are proclamation money. This objection is easily answered, the colonies had emitted paper money of different denominations, and proclamation money had no particular value but the current rate of exchange. The United States had issued paper money, which had depreciated to nothing; hence, it became necessary to have reference to some established standard of value to avoid the misfortune of mere nominal recoveries in the paper money of the states.

These remarks were concluded by an assertion that the article was vague and uncertain, and that its application to any case should therefore be attended with great caution. As this was not shown, I can only answer that it appears to me the terms used in this article are the most comprehensive and unequivocal that could possibly be adopted, both the contracting parties appear to have been desirous to exclude all ambiguity and the possibility of misconstruction: "All debts heretofore contracted" avoids all distinction that might create disputes and entangle justice, and entirely excludes every inquiry relative to confiscation or forfeiture in any form or shape whatever, the sole description being that of "*bona fide debts* heretofore contracted."

Thus, therefore, this article operates equally on all contracts which had originated before that time, and all the impediments to their recovery which had arisen out of the war; there is no exception as to the nature of those impediments, whether they depended upon the act of the state itself, as a mere act of confiscation, or upon the state and one of its members, as a payment with a receipt and discharge; and when an act, says Vattel,* "is conceived in clear and precise terms, there can be no reason to refuse the sense which the treaty naturally presents."

Some rules of interpretation have been applied to this article, which I will take proper notice of while I examine this article, by those maxims laid down by the most eminent writers. But I hope this will not be taken as an admission that there is anything doubtful or equivocal in the text, or that the Court are at liberty to depart from the rule last mentioned.

*P. 269, sec. 363.

The impediments contemplated by the treaty varied in the different states, and even in the same state. Some cases were only acts of sequestration, in others mere declarations of confiscation, in some they amounted to confiscation and collection or payment. This latter impediment existed in the principal debtor states, the payment which had been made to the public was merely nominal, and if it had been otherwise, the creditor had no certain relief against the states; these circumstances must have been known and considered by the commissioners; indeed, they had every reason to believe that this would be the principal existing impediment in Virginia and this state. Is there any reasonable ground to infer that this impediment, the most prominent feature in the group, should have passed unnoticed, and considered as an exception? If, says the same author,† "there is an obscurity, we should seek for what was probably in the thoughts of those who drew it up, and interpret it accordingly."

It is also objected that the state stood as assignee of the creditor, that the payment to the state was as good as to the original creditor, and, the debt being so paid, is extinguished, and there was neither debt, debtor, nor creditor at the time of making the treaty. This jingle of words imposes for a moment on the ear; but, when examined, is found to be no more than a conclusion drawn from premises neither proved nor granted. If the state had really been the assignee of the original creditor, a payment to her would certainly have been good against my clients; but she only assumes the authority to receive without the consent of the obligee, and a payment to her is no more than a payment to an officious stranger, which depends for its validity on the subsequent assent of the creditor; it may be said that this assumption of power to collect debts is among the rights of war. To which I answer, that the rights of war, when exercised, always depend, as to their final validity, on the state of things as settled by the treaty of peace. Thus, perhaps, if the debts had never been mentioned, and certainly if those payments had been sanctioned by the treaty, as in the cases which arose out of the treaty between England and Denmark, anno ———, as appears by the cases of *Weymburg v. Touch,* 21 Car., 2, in Canc., and *Trower v. Haffold,* 1 Ca. in Ch., 173, the payment would eventually have been sustained in this Court as a legal payment; but when the contrary is expressly stipulated, the payment becomes of no validity, and it follows, of course, that there is now both debt, debtor, and creditor. It appears from the authorities I have read, and the nature and obligation of treaties, that the commissioners of America had power to bind the nation collectively and individually. The payment under the act of Assembly was a trans-

†B. 2, c. 17, sec. 278.

action between the state and one of its own members, *that is to say,* between the defendant and the defendant, represented in a moral capacity, who, as to this question, should be *considered as one person.* That in the treaty the state and its member hold this honest language: We agree there should be no lawful impediment, or, in plain language, the manner of payment and discharge we had fixed, upon during the war, without your consent, shall be considered as a nullity, whatever form it may assume. Thus, the treaty works not only as a repealing law, operating a repeal *eo tempore* of all existing laws to the contrary, but by way of compact also, wherein one of the contracting parties does agree that the things done under *those laws* should be considered as void; or in the language of the treaty, "no *impediment.*" The result is no more than this: The state remains under a moral obligation to reimburse the citizen, as it expressly agreed by the law of 1779, what it really received; and the individual is *in statu quo* with respect to his creditors. Treaties are considered as the voice of necessity; the state and its member admit the payment was originally more matter of form than substance; a mere family accommodation, which could be easily again adjusted in the same manner. Trifling circumstances like these would never be seriously opposed to the obligations of private faith, the claims of natural justice, and the peace and safety of the United States.

It is objected that this construction involves a sacrifice of private rights; and, therefore, this construction should not be extended to include this case. Let it be observed that the construction we contend for is not what is understood as the extensive, that it is the natural and common import of the words* with regard to a natural and necessary object; it is not bringing an unexpected case within the mere meaning of the contract, it is not a reliance upon anything so uncertain and evanescent as the spirit of the article, which may depend entirely upon the ideas of the commentator of the meaning of the enactor; we rely on the plain and common import of the words.

Let it also be remembered that these rights, if they may be so termed, were certain rights acquired by the war, and therefore properly the subject of treaty. That the real rights of individuals, properly acquired, may be sacrificed by the public on such occasions, is testified by numerous examples and authorities. And as this sacrifice was merely nominal as to the American citizen, should he never be reimbursed agreeable to public faith, it is not to be presumed that this matter was considered by the commissioners as a thing of any consequence, or an exception. On what ground of justice could they make an exception of it? It must also be remembered that this was a part of the price of peace, and the independence of America. No humiliating terms. It is only in affirma-

*Vattel, sec. 283.

tion of the law of nature, and of nations, that individuals should honestly pay their debts, that the inconvenience of wars should cease with them, and that both governments should mutually contribute to the establishment of justice and moral order.

And again, if in general the rules of construction of treaties confine the expression used by the parties to the object meant to be acted upon, then, in treaties of peace, the war, and the affairs and transactions arising out of it, are the natural and certain objects upon which the treaty is intended to operate, unless the contrary clearly and expressly appears; then, from the rule, it must follow that impediments created *during the war* must have been the peculiar and immediate objects of this article.* This is according to the rule "giving the expressions the sense most suitable to the subject."

Another ground taken by the counsel for the defendant was this: "That at most the treaty was a mere repeal of the existing laws, that it could not effect the payment, that being already done, under the law was certainly valid." The doctrine that a simple repeal of a law does not nullify the acts done in consequence and by virtue of the act is admitted; but the Court will recollect that I rely not alone on the supremacy of the treaty as a law, but upon its operation as a compact, the nature of which I have already illustrated. I suppose it was intended to be inferred from the remainder of this objection, and the observations made upon it, that this clause would be satisfied by limiting its operation to any impediment arising from any law then in being, or hereafter to be passed to the prejudice of the creditor's right. This is giving the objection its whole force, and perhaps more than was intended.

It is answered that obstacles *existing,* not those which might probably exist hereafter, acts of war and violence, not of policy and peace, are the subjects upon which this article is to operate. It is not to be fairly inferred that they would pass over an existing mischief or impediment, to provide against a possible or eventual one; that they would feudously insert an article to nullify acts of the Legislature, which were thenceforward at all events to be a dead letter. To repeal a law which not only already had its effect, and was by the general operation of the treaty, arrested as to all future operation, instead of doing away the impediment it had produced; to a matter past, instead of a thing existing; to a thing of no consequence, abstracted from the effect it had produced, and leaving that effect to exist, in all its vigor and consequences. This interpretation, drawn from the natural connection and relation of things and existing circumstances, forces itself irresistably upon the mind, and is agreeable to the most approved authorities.†

*Vattel, p. 378, sec. 280. †Vattel, p. 2, c. 17, secs. 270, 271, 280, 282, 283.

It is also asserted that this construction of the article is contrary to the maxim contained in Vattel, sec. 305, as it would change the present state of things. That enlightened writer there says, that "in case of a doubt, the presumption is in favor of the possession," but here, may it please your Honors, is no doubt, a clear, precise, and express stipulation. In the same section it is stated: "That the case of him who seeks to avoid a loss, is more favorable than that of him who desires to acquire a gain!" The case of my clients might rest on these lines alone. Shall the plaintiffs lose a debt *bona fide* contracted, for which the defendant had real value, or shall the defendant gain the advantage of discharging that debt by the nominal process of paying it to the public in depreciated dollar bills?

If the leading object in treaties of peace is to heal the wounds inflicted by the wars, and where it is practicable not only to effectuate justice, but to restore things to their ancient order and the former conditions of peace, then it must have been an important object with the plenipotentiaries to place individuals *in statu quo* with regard to each other, to put the attainment of justice in the power of the creditor; and to restore private confidence so essential to the happiness of mankind, and the prosperity of an infant country like the United States.

The writer to which I have so often referred also says that "as soon as we know certainly the reason which has determined the will of him who speaks, we ought so to interpret his words as to apply them in a manner suitable to that reason." Now the reason in this case is evident. The Americans were largely indebted, particularly in Virginia and this State, to the British merchants. The states had attempted to confiscate and collect those debts, even in money depreciated to nothing. Justice was to be done to the *bona fide* creditor, and this was completely effected by removing those impediments which had arisen by the interference of the state, during the war, and this rule goes the full length of the present case.

An authority has been produced to show that a statute against right and reason is void. And it is alleged that the treaty must operate this injustice; and it is against right and reason that a man should pay twice, with interest and costs. There is nothing either unreasonable or unjust in the present case. The creditor trusts upon the reasonable expectation of being fully and punctually paid, and every honest man deems it mere justice to pay his debts; therefore, between the creditor and debtor, this is surely "right and reason."

As to the payment made to the public.

The State foresaw that this debt might become the subject of treaty or negotiation, in which the right of the creditor would be saved, and

expressly engaged by the 20th section of the Act of 1779,* to reimburse the debtor. Take this act and the treaty of peace together, consider them as one act; the result is, if you will pay these debts into our treasury, if by the treaty of peace you should be obliged to pay them to your creditor, we will indemnify you, and thus complete justice is done to all parties.

An objection is also stated on the authority of Vatt., p. 651, sec. 32, alleging "that Great Britain must have been the proposer of this article, being for her benefit, and the terms upon which she granted our independence." It should be observed that these observations are not perfectly correct; the article itself is mutual, and may be said to move from both, and made for the benefit of "creditors on either side." But the authority is this: That in *case of doubt,* the interpretation goes against him who gave law in the treaty. If the documents, adduced by the Attorney-General on Saturday, are entitled to credit, then the United States, not Great Britain, gave the law on making of the treaty, and the interpretation, of course, should be against the citizens of the United States upon his own doctrine. But the fact is, that either, when plaintiff has the right to claim the full benefit of this article, for it is mutual, and it is a maxim of the common law, as well as common sense, that the words of a grant shall be construed most strongly against the grantor, and that a promise shall be construed in that sense, which the promisor had reason to believe it was received. Thus America may be conceived to have said: "Relinquish all claim to the sovereignty of the United States, and acknowledge our independence; we ask no more. All debts shall be honestly paid. We are contending for the establishment of our political rights, not for the destruction of moral obligations."

It is also a maxim in the construction of treaties,† "that if he, who can and ought to explain himself, has not done it, it is his own loss; he cannot be allowed to introduce *subsequent restrictions,* which he has not expressed." Although this article is obligatory on both sides, this promise was known to proceed from the side of America. If her commissioners intended to make this case an exception, why did they not say, "provided this article shall not extend to payments of this kind." The import of the words is general, and as I have shown, plainly covered every case. If this were to be an exception, the necessity of its being expressed was glaring and evident. It was therefore certainly necessary; otherwise, in the language of Vattel, "there can be no sure convention, no firm and solid concession, if they may be rendered vain by subsequent unmentioned limitations."‡

*3, 1779, 4, 384. †Vattel, b. 2, 6, 17, sec. 264.
‡Vattel, as before, sec. 266.

On every occasion where a person has and ought to have shown his intentions, it is a rule that we must take that for true against him which he has sufficiently declared. I have already submitted my observations on the plain and natural import of the words: they certainly contain a sufficient declaration of the intention of the contracting parties.

There are some common law rules which will also apply to this case. There that construction is always sustained which insures the greatest simplicity and certainty, and that construction is always rejected which would be predicated upon indefinite and undescribed wrongs. Thus, when one party gives a general warranty, the common law will not extend the warranty to make the warrantor answerable for illegal claims or tortious acts. Upon this rule he is not supposed to warrant against the lawless acts of individuals, nor will the law presume that such acts will be committed. Thus, the existing impediments, the effects of a violent war, were the objects upon which this treaty were to operate, the commissioners would not presume, nor will the Court now, that upon the return of the blessings of peace, such acts of violence would ever again take place.

Again, to suppose that Congress meant by this treaty, couched in such general language, that an existing impediment should remain, would be supposing them to act with that kind of subtle and knavish duplicity which the law will neither presume nor admit. Nations, says Vattel,† are not less obliged than individuals, to act with candor and rectitude, and have regard to equity in their transactions with each other. It is true, he admits, "that the powerful sometimes openly abandons the honest, for what appears to be the useful; but it frequently happens for the happiness of the human race that this pretended utility becomes fatal to them, and they are severely punished for such mockery of morality and justice."

The ancient and intimate connection between the United States and the British government, as one great family, connected by the ties of blood, impressions of interest, and habits of intercourse, must have formed strong and powerful inducements to the members of both governments to heal the wounds of the war, to obliterate all past differences, so as to reëstablish that good understanding and friendship that would insure perpetual peace and harmony. These are the objects so strongly expressed in the preamble of the treaty; they are not a mere *formula,* as in common cases, but a natural, sincere, and honest expression of the public mind and sentiment. These important and interesting circumstances also furnish a rule of construction recognized by the law I have already read, and requires of us to determine any question arising upon this treaty, upon the most liberal principles of equity and reciprocity.

†B. 12, c. 12.

I have only to add on this part of the case, that if treaties are to be construed favorably, as writers term it, surely it is the dictate of equity and more consonant to justice, that the State should reimburse the debtor, who is its own member, the nominal sum he paid, than that a *bona fide* creditor should lose his whole debt; that private faith should not be affected by political wars, that individuals should not suffer by the lawful exercise of their natural and political rights. Certainly nothing can be more repugnant to justice than that the strongest moral obligations should be dissolved by a nominal process, a process that resembles magic, more than reality; that a mere assumption of power should annihilate obligations, which in a moral sense are immutable.

2. Thus far the article has been considered as if it stood alone. The Court will permit me now to make a few remarks on the doctrine held by the other side, considering this article connected with the 5th and 6th; and this mode, the counsel infers, is proper on that rule of interpretation, founded upon the connection of the discourse. Where articles or clauses relate to the same subject, they must and ought to be construed together. Their operation should be consistent, and their construction governed by the same principle, but the 4th article is a special provision for debts, has a single aspect, and stands simply by itself. The 5th and 6th articles have quite different objects, as will be seen by looking into them. It is said that the words "provide for the restoration of all *estates, rights, and properties,*" admit the right of confiscation and include debts. This expression occurs four times in the 5th article. The last affixes a precise meaning to these terms, viz.: "Congress shall also earnestly recommend that the *estates, rights, and properties* of such last mentioned persons shall be restored to them, they refunding to any person who may be now in possession, the *bona fide* price, when any has been given, which such persons may have paid *on purchasing* any of the said *lands, rights, or properties* since the confiscation." Thus the estates, rights, or properties here meant were clearly such as could have been sold by the public, and possessed by some individuals at the peace, for which he might have paid valuable consideration. No man will surely pretend to say that this could be the case of a debt under the laws of this State, or any of the United States. It is plain that this whole article contemplated the lands, slaves, and other property which had been sold by the commissioners. The debts had been already fully provided for in the preceding article.

It is said there is no difference between debts and other property. There are many important differences, besides the striking one stated in the treaty, the debts were attempted to be collected by the public; the lands were sold to individuals for valuable consideration. They had probably passed through various hands and become the subject of im-

provements and, of course, of attachments. Justice, as well as policy, forbid that such property should ever be returned. It was said that this property was of trifling value compared with the debts. This is a great mistake. The lands alone in this State were equal in value to ten times the amount of debts due to British subjects, and this property Congress had clearly no power to dispose of, the sovereignty of the soil being vested exclusively in the respective states.

It is also said that this article makes three descriptions of men, with different rights. That the plaintiffs are in the third and most unfavored class, that the Court are bound to regard a distinction made by the treaty itself. This conclusion is the most strained and incorrect that has been made on the part of the defendant. It is first recommended that they shall provide for the restitution of all estates belonging to real British subjects; second, for the restitution of the estates of *persons* resident in districts, in the possession of his majesty's arms, and *who have not borne arms against the United States.*

3. And that persons of any other description shall have free liberty, etc.

The first description plainly includes all persons born in the allegiance of the King of Great Britain, and who had not abjured the same, and taken the oath of allegiance to the States.

As to the second class: It was known that the enemy's principal posts commanded considerable districts of country, beyond the immediate works of the place, as at Charleston and New York; that in these, numbers of inoffensive citizens were suddenly involved in their country's misfortunes, without the means of escape or removal; that many were chained to the spot by the claims of a helpless or suffering family who depended upon them for sustainance. They had not borne arms, and only yielded a passive submission to the chance of war. Reason appeared to impute no crime to people of this description, and they certainly merited some consideration, and in the treaty are placed on a footing with real British subjects. A certain delicacy seems to have dictated the terms used in describing the third class, "persons of any other description." This, without using mortifying or disagreeable terms, included the fugitive from justice and the blood-stained traitor, or in other words, the citizen who had borne arms against the United States, in contradistinction to the citizens of the second class who had not. The plaintiffs never were citizens of the United States, no crime attached upon them, they were born in the allegiance of the King of Great Britain, and when called upon by the laws of the State to make their election, they solemnly refused to abjure the same. Thus they were and continued to be real British subjects, and are plainly neither included in the second nor third classes of the fifth article.

The sixth article is a common and necessary stipulation of reciprocal amnesty, and predicated upon the spirit and policy of conciliation, and the justice of shielding individuals from suits and prosecutions, for the common violence of the war. Such a stipulation was proper and necessary, whether the treaty stood with or without the fourth article, and has, indeed, no connection with it.

We will now proceed to consider the second, third, and fourth pleas, as standing upon the Acts of Assembly.

The second plea is grounded on the Act of November, 1777, ch. 17, and the two first sections of the Act of October, 1779, alleging that thereby the above debt was confiscated and fully forfeited to the State, that therefore, etc.

It has been already observed that the Act of November, 1777, c. 17,† does not contemplate the case of the plaintiffs. "All persons who had removed themselves or had been removed under the compulsory authority of the laws, or who had removed to avoid taking the oath of allegiance," are expressly excepted, and are clearly out of the purview of the act.

The people of the above description had been solemnly called upon to make their election. That election was irrevocable; they were obliged to depart, and it was made death by the same law to return. While this law remained unrepealed, if they returned, they forfeited their lives and fortunes; and supposing the other act to comprise them, if they remained in foreign parts, they forfeited their estates. To avoid this injustice and absurdity, the proviso of the fourth section excludes them positively from the purview and operation of the act.

This construction must govern the operation of the Act of October, 1779. The clauses relied upon in this plea are expressly grounded upon this act.* This is clearly shown by the preamble. The plaintiffs, with a number of others, are named in the second section of that act as having incurred the penalties of the Act of 1777. The fact was notoriously otherwise, and so it stands upon the pleadings, and the only rational construction that can be put upon this part of the act, as it regards the plaintiffs, is the one I have already submitted to the Court, in the argument on the first plea, of which I beg leave to avail myself, only mentioning that the conclusions were that the act could not comprehend this debt.

That the Legislature had rendered a compliance with the Act of November impossible.

That this act could only operate as an office found, with respect to the lands unsold.

†Page 341. *3, 1779, 2, 379.

And that where the words "debts or monies" occurred, they must be applied to the case of *others.*

It is only necessary to repeat what has already been proved in the argument, viz.: That it could not mean the money owing to them, because it required them to *sell* and *depart.*

It could not proceed on their adherence to the old government, because they had made it high treason to return to the new community.

All compliance with the Act of November, 1777, was rendered impossible. Their real estates unsold, were already forfeited or confiscated; nothing more was necessary except directing a sale, and this was ordered in this Act of October, 1779. This construction gives it operation with regard to them, and the only consistent and legal operation it can have, where the words "monies and debts" occur in this act, it must be supposed to apply to some of the others named in the act who were in a different situation, of whom there were many, and this satisfies the act without inconsistency or absurdity.

Again, to have required of these people to have collected their debts would have been demanding of them to perform what the laws had rendered impossible. The courts of justice were shut or suspended from 1773 until November, 1777, and the first act that established them excluded the plaintiffs from the benefit of the coercive authority of the laws. Thus, there were no courts at the time of their departure, and none afterwards in which they could sue. On what grounds will it then be argued that these people were to collect their debts before their departure, or how will it be shown that their agents could effect it afterwards?

The 14th section of the same act,* intending to provide for the case of the plaintiffs, shows clearly that they were not included in the former part.

III. The third plea of the defendant rests on the 14th section of the same law; averring that the plaintiffs refused to take the oath of allegiance, and were compelled to leave the State by virtue of the Act of 1777, and that they had not appointed any lawful agents to receive and give discharges for debts, that therefore, etc.

[*The section alluded to was read.*] The provisos of the expulsion laws of 1777, are the express ground of this section, and the preamble assigns two causes of confiscation, "failure to sell their real estates, and the omission to appoint attorneys or agents to receive and give discharges for debts."

The first reason is perfectly consistent with the provisos in both of the acts of Assembly. The other is evidently founded on mistake. The act

*3, 1779, 2, 14, 383.

gives them leave to appoint an attorney to sell and dispose of their estates; but not a word is said about "receiving and giving discharges for debts." The object of appointing those attorneys and their duty are already pointed out by the final part of the clause, viz., "and if any real estate" remains, etc.

The enacting part of this clause, even detachedly considered, upon its own letter, admits of no other construction. (1) "The lands not *bona fide* sold for valuable consideration *actually paid.*" This part of the clause has received a fixed construction in our courts, in the suits of *N. Long, Commissioner, v. Hill,* in Halifax Superior Court. The counsel for the State relied upon this part of the act; it being in evidence that Hill gave a bond to M'Clellan, for the consideration money, which was unpaid before M'Clellan's departure, who was the original owner, and one of the persons named in the confiscation act of 1779: The Court said the act would not warrant such a construction; that the said bond was a payment, and that it was not necessary the money should be paid upon the bond; it therefore follows if it was not necessary to pay it was not necessary to receive.

This might give a rule of construction for the remaining part of the clause, were it necessary. But this part of the law has such a pointed and express reference to the acts of Assembly of April and November, 1777,* that it must necessarily be expounded and controlled by them; the words are, "That all debts not yet collected and appropriated according to the directions of the said acts shall be confiscated"; then limit the operation to the requisitions of those preceding acts, and it follows, "If those acts required debts to be collected, and they were not collected, then were they confiscated; if the moneys were to be particularly appropriated, and they were not so appropriated, then was the money confiscated." Wherever the party contravened the direction of the act, he incurred confiscation, but not otherwise; the acts† will speak for themselves. *(Here the acts were read.)*

The honor of this country is greatly indebted to that correct and enlightened mind that drafted the first confiscation laws, and formed them so perfectly upon the principles of natural justice that their influence was felt through the whole system afterwards, whatever shape or form these law assumed; so that even in the present case, where it was plainly attempted, the arm of confiscation seems to have been palsied when it attempted to violate property confided to the faith of our government.

It has been shown in the argument on the first plea that the principal could not collect because there were no courts to enforce payment, and

*1, 1777, 2, 286; 2, 1777, 6, 324. †1, 1777, 3, 284.

it becomes necessary to observe more particularly here, whereby the 101st section of the court law, the same act which opened the courts, excluded the plaintiffs from the benefit of it;† thus, the collection became impossible. The State shut the courts against the agents, also, of these people, declaring they should not have the benefit of the laws to enforce payment. Shall she then be made to say, "You shall forfeit these debts, because you did not collect them?" This would be imputing a degree of absurdity and injustice to the Legislature that cannot be admitted.

I take it to be the same thing to refuse them the assistance of the laws, and to say they should not collect. When the law requires anything to be done, it supposes all the ordinary means in the power of the party, and particularly that its own assistance is not to be refused.

If the Legislature intended that their agents should collect, they would certainly have so expressed it in the same clause which they enforced the sale of lands, where, if it had been the intention of the Legislature, it would certainly have appeared; the law and usage of nations preserved the obligations of their contracts, although they suspended suit and collection; the merchants were not to presume anything contrary to the usage of nations, where, in a case like this, it was not otherwise declared.

The plain import of this clause‡ is this, their attorney may dispose and sell their estates, but there is no attorney to collect their debts, nor can it be implied from any part of the act while every reason militates against it.

The law of nations suspended the right of suit.

The act of April could not require it, because at that time there were no means of collection.

The act of November could not require it, for the same session suspended that right by law.

Collection of debts is not an act of mere volition: Time and means are both necessary. It is plain that debts were not contemplated, that they were not within the purview of this law; therefore, out of the operation of the 14th section in question, which is plainly bottomed upon the Acts of 1777, by which it is expressly directed and controlled.

IV. The 4th plea is in substance the same with the second, though in a different form. The arguments submitted upon that will therefore apply to this plea, and I shall not trouble the Court with a repetition of them.

Second point:

If, however, these pleas are sustainable by the act of Assembly, it remains to be considered whether those matters pleaded in bar are not among the impediments removed by the treaty of peace.

†Page 318. ‡Page 364.

Much has already been said on the import of the 4th article of the treaty, the precision of the terms in which it is couched, and the latitude of their operation, and it is only necessary to narrow their aspect to show that they include the matters stated in the 2d, 3d, and 4th pleas of the defendant.

This treaty, which all agree was binding before in a moral sense, is now to be executed by the vigor of its own authority, and being the supreme law of the land, all laws that contravene this treaty are thereby repealed.

A mere repeal of the confiscation laws would have altered the situation of the debtor and original creditor very little, and must have fallen greatly short of the purposes of justice and the objects of the treaty; thus, it became necessary to go further and remove "all impediments to the recovery of the debts."

If this expression should be limited to impediments created by laws existing at the peace, it would follow that in all instances where there was a bare legislative act of confiscation, unattended by collection, payment, or discharge, that the impediment of confiscation being removed, the debtor and original creditor were again *in statu quo*. This is expressly conformable to the doctrine laid down by Bynk., 2 J. P. Lib., 1, c. 7. "If the prince really exacts from his subjects what they owed to our enemies; if he shall have exacted it, it is rightfully paid. If he shall not have exacted it, peace being made, the *former* right of the *creditor revives.*" Thus, according to this celebrated jurist, in all cases where the money was not actually paid, the original right of the creditor would be revived, had the treaty contained no stipulation to that effect.

If this expression embraces all impediments created during the war, then every existing obstacle, every lawful impediment, enacted as created by the individual states, or the United States, are swept away. The impediment created by payment to the public commissioners was, in fact, the only one that rendered such a stipulation absolutely necessary; the acknowledged law of nations would have been competent to give relief to the creditor against the case made by the defendant in the 2d, 3d, and 4th pleas.

Again, if in cases of payment and discharge, this construction should be held to operate a sacrifice of individual rights, and this should be considered as an objection in that case, no such difficulty occurs here; the sovereign power might rightfully relinquish its own claims to the debt. It appears to me that no question can be made; but that the treaty does away [with] all impediments arising from any law then existing to the prejudice of the creditor's right. This is no more than a stipulation on the part of the states that they would relinquish all claims to debts due before the war to *British creditors.* This, as I have said,

they would rightfully do, if they could do anything; they were competent, at least, to restore what they had taken, and to stipulate that no future law should be made to affect their recovery.

It has been said, in the argument on the first plea, that the terms used in the treaty are clear, precise, and unequivocal; comprehending every case in which justice could be interested. The mode of expression is the most happy that could be conceived, by which a few words answer all the purpose of as many sentences in other cases. If it were a mere sequestration, then the subject sequestered is restored; if it were such an act of confiscation as might be said to divest the right of the creditor, the public claim is relinquished: The original right of the creditor is revived and recognized. Whatever the public right or claim was, or by whatever means it was acquired, it shall be no bar to the creditor's recovery of the full value of his debt; and thus the creditor, with regard to his debtor, is put perfectly in the situation he was before the war.

Having considered the merits of those pleas severally, there are some general views of this subject which, as they appertain to all the pleas I have postponed to this stage of the argument, viz., whether the Acts of 1777 and the compliance of the plaintiffs ought not to be considered in the nature of a compact, and how far the State of North Carolina was bound by the existing law of nations.

The propositions of the Legislature, in the Laws of 1777, and the consequent acts of the plaintiff, should be considered as creating a solemn compact, *indissoluble* but by the consent of both parties.

The natural, and even civil, rights of persons, on a separation or dissolution of the community, are in many respects different from those of alien enemies, as will be shown presently; these rights appear to have been considered and respected by the sovereignty of this country.

The 5th and 6th sections of the Acts of 1777 contain the stipulations and terms of the State. They are shortly these:

You may become a member of the *new* community, if you will solemnly and publicly abjure your allegiance to our former sovereign, and take an oath of allegiance to the new government.

If you elect to continue under the old government, you must depart within 60 days.

You shall have liberty to sell and dispose of your estates while you stay.

You may export the amount in produce.

It is expected that you will honestly pay your debts.

You must not export naval stores or provisions; they are contraband.

If 60 days should be too short a time to sell and dispose of your estates, you may appoint attorneys to sell and dispose of them after your departure.

But if any real estate remains unsold for more than three months after your departure, the same shall be forfeited to and for the use of the public.

And if ever you return, you shall be adjudged guilty of treason, and shall suffer accordingly.

If you will neither take the oath nor peaceably remove yourself, in conformity with the act, the county court shall send you by force to the West Indies, at your own expense.

The election of the party, under this act, made it at the same moment binding upon himself and the State, in the nature of a firm, solemn compact, irrevocable in its very nature but by mutual consent; decided and immutable in its consequences as to him, and certainly reciprocally so as to the State.

Then, by taking the oath, the State conferred the rights of citizenship, and *he* subjected himself to the obligations of a citizen; obligations he could not dispense with afterwards.

If he once departed, his election was made forever, for anything that appeared; and it became death to return.

In this case, the State, on her part, entered into several stipulations.

Those that are express I have already mentioned; there are others that are necessarily implied, for example:

It is expressed that they shall depart in sixty days; it is also implied that they shall not be made prisoners of war during their stay or departure.

It is expressed that they may export the amount of their sales in produce; this also includes an exemption from seizure on the high seas, although not expressed.

Naval stores and provisions are excepted; these were therefore to be considered contraband; and it follows from this exception that all other produce might be freely and lawfully exported.

In like manner, in the clauses contemplating the property of the merchant, it is said: If your *real estates* remain unsold for more than three months, it shall be forfeited. This case being stated, is to be taken as a full expression of the mind of both parties as to the extent of forfeiture, and it is then clearly inferred that all other property, and particularly their debts, remained untouched, because unmentioned. No other conclusion could have been formed, and they must have made their election and departed under this impression, that their debts were confided to the protection and faith of our government and laws; and in this light it becomes binding and obligatory on the public. This is agreeable to Mr. Paley's maxim: "A promise," says he,* "is to be per-

*Page 95.

formed in that sense in which the promisor apprehended it was received by the promisee at the time such promise was made."

This act was passed after the Declaration of Independence, when this State had fully assumed the faculties of a moral person or a body politic; when she was fully capable of binding herself and her citizens; when she had taken her place and rank among the nations of the earth; when she claimed those rights which appertained to nations from others and became subject to similar obligations. These engagements required no particular diplomatic ceremony; they were an immediate act of the supreme authority itself, and must therefore be considered as an explicit and solemn pact between those people and the sovereignty of this country. A mutual compact, in which these people having performed their part by removing themselves out of the State, the Legislature or the State could not retract its consent or discharge itself from the obligation she had voluntarily entered into without the violation of every sentiment and principle of good faith.

This statement receives great weight from an act of the Legislature of November, 1777, in the 101st section of the court law. This act, describing these people, declares they shall not have the benefit of that law, but that all right of commencing and prosecuting suits shall be and is thereby *suspended,* and shall *remain suspended* until the Legislature shall make further provision therein. To prohibit the recovery of a debt presupposes the existence of a debt. The rights of the creditor are here solemnly recognized, as well as those principles and usages of the law of nations I have so often mentioned. This furnishes a strong and incontrovertible evidence of the sense of the Legislature at that time of the nature and effect of the compact with these people.

Again, as the Legislature, in stating the terms of their separation, was silent on the subject of their debts. The fair construction is, they were to be considered under the protection of those laws, that were equally obligatory on both, viz., the law of nations. Some writers lay it down as a positive rule of law that the right of bringing suit is only suspended during the war. Vattel, indeed, mentions it as a usage introduced among nations, with the progress and extension of commerce.* We may be indebted for the observance and general introduction of this rule among nations,† to modern commerce, with many other blessings, attendant on improved society and civlized life; but it has certainly a higher sanction in its conformity to the eternal and immutable principles of justice.

The moral ground stated by Vattel is, that strangers might trust foreign subjects only from a firm persuasion that the general custom would be preserved. How much stronger is the case of the plaintiffs!

*B. 3, c. 5, sec. 77. †Ld. Raym., 282.

The dissolution of a government is never to be presumed; they were members of the same community; their contracts were bottomed on the strongest ground of private and public confidence; when they parted, it was fairly and necessarily implied from the terms of separation that their contracts, independent of the law of nations, were to be held sacred from all the consequences of the war. *A fortiori,* they were at least to be left on the foot of the prevailing usage of civilized nations, at the time that the United States assumed their place among those nations.

According to Grotius,‡ the debts of individuals are not discharged by war. These are not acquired by the right of war. The right of collection or demand is only suspended. This doctrine is also sanctioned by the opinion of Barbeyrac,‖ whom Vattel respects, as of himself a good authority. These writers consider war in the language of the treaty, as a *mere temporary impediment,* which being removed, the debts retain their full force and obligation. This was without doubt the idea of the parties; it corresponded with the state of things at the time, and the conduct of the Legislature at that period appears to have been expressly predicated upon the acknowledged law of nations. When the first act passed, there were no courts in which these debts could be demanded. When the *second* passed, the courts were erected, but the same act expressly excluded the plaintiffs from the benefit of those courts; very justly and doubtless on the principles above stated from Grotius.

In addition to these, I beg leave to add one more authority, not of so much celebrity as those I have already quoted, only because it is not so ancient. This authority is the opinion of *Chancellor Wythe,* in the suit, *Page's Ex'rs v. Pendleton et al.,* and although it may want the rust of time, it acquires additional weight from being given in a case arising out of the same war, and under circumstances nearly similar to the case at the bar.

This great man, so celebrated for his learning and judgment, holds this clear and decided doctrine; that the rights of laws of war and peace now established among nations were as vigorous between the United States and Great Britain, after the Declaration of Independence, as they could be between nations who had never been dependent upon each other; that upon their becoming distinct politic bodies, the rights and laws of nations immediately attached upon them. Indeed, it would be difficult to show any reason why a community who claimed the rights of nations from all others, both for herself and her citizens, should hold herself discharged of *all obligations* to them and their subjects. *Mr. Wythe* has considered the war as a temporary impediment, in the same

‡B. 3, c. 20, sec. 16 and p. 1. ‖2 Barb., sec. 265.

light that Grotius and Barbeyrac have done, as merely suspending the *forensic* assertion of the rights of alien enemies.

It should also be remembered that the late war between Great Britain and America must be considered as a civil war. These wars, originating in different causes with particular objects, have been considered by all writers in a light widely different from those usually denominated solemn wars.

This position draws several important consequences after it. The revolt of America, however laudable in the attempt, and glorious in the event, was a rising of a certain portion of the people against the established supreme authority of the nation; thus, every revolt supposes a superior during the revolt. The political connection is still supposed to exist, it would be a solecism to say that the inferior dissenting power could make laws to bind the superior. Again, during a revolt, all power is, of course, assumed or usurped. This usurpation or assumption can never constitute a right; hence, it is clear that until the treaty of peace the American states could not rightfully legislate for themselves, much less for the British Empire, and this was the reason that the first article of the treaty, acknowledging the sovereignty and independence of the United States, and expressly relinquishing all claim to the government and territorial rights of the same, became an object of vast importance to America.

Lastly, it is a prejudice too common with us to connect the departure of these people in 1777, who only exercised their natural rights, with the subsequent conduct of those who became citizens, and afterwards basely deserted us in the gloomy periods of the war; but no two cases can be more widely different.

All writers on the subject of government* agree that a nation may change its constitution by a majority of votes, whenever there is nothing in that change contrary to the fundamental principles of the original act of civil association; and, in this case, all are bound to conform to the resolution of the majority. But when the question is to quit one form of government and adopt another fundamentally different, as, for instance, to change that of monarchy for a republic, although the majority may rightfully effect the change as to themselves, the minority are under no obligation to submit to the new government, but may retire with their property and effects. These distinctions are founded on the broad basis of the rights of man, and the great policy of public peace and safety.

Thus stood the rights of my clients had no compact, no treaty ever existed. But, in addition to the act of the Legislature, which I have stated to the Court, it must also be noticed that the final separation of

*Vattel, b. 1, c. 3, sec. 33.

Great Britain and the United States into two distinct and independent nations was by mutual agreement. The basis, or rather preliminary, of this national compact was the Declaration of Independence; the consummation was the treaty of peace. These, taken together and not separately, form the real act of separation; and in construction by a settled rule of law are to be considered together. In the one, the great national rights are asserted, and ceded and acknowledged in the other. Here, also, the rights of the citizens and subjects of the two nations are recognized and confirmed. Viewing this compact as a law, it is only declaratory or in affirmance of the law of nations and the universal principles of natural justice. Viewing it as a convention, it is adding the guarantee of the United States to the legal claims of my clients.

SITGREAVES, J. This is an action of debt, brought by the plaintiffs to recover of the defendant on an obligation made in the year 1776. The defendant has pleaded four several pleas in bar, which are now for the decision of the Court by demurrer.

I shall consider of the case as it appears by the first plea which places the defendant on the most advantageous ground, as a decision on that will probably govern all the cases arising out of the subsequent pleas.

The case, it appears by the first plea, is as follows: The plaintiffs were merchants, residents of North Carolina, before and at the time of the Declaration of Independence. By an act of the Legislature of North Carolina, passed in April, 1777, it was, among other things, enacted, "That all persons, being subjects of this State, and now living therein, or who shall hereafter come to live therein, who have traded immediately to Great Britain or Ireland, within ten years last past, in their own right, or acted as factors, storekeepers, or agents here, or in any of the United States of America, for merchants residing in Great Britain or Ireland, shall take an oath of abjuration and allegiance, or depart out of the State." By the same act, such persons were per- (681) mitted to sell their estates, to export the amount thereof in produce, and to appoint attorneys to sell and dispose of their estates for their use and benefit. The plaintiffs, falling within the description of persons contemplated by this act, and refusing to take the oath, departed the State; the debt which is the subject of the present suit then existing. By subsequent acts of the Legislature, all the estates, rights, properties, and debts of certain persons, among which the plaintiffs are specially named, are declared to be confiscated; and the debts due to such persons are directed to be paid to certain commissioners, to be appointed by the county courts for that purpose, by all persons within the State, owing the same, under pain of imprisonment; which payment it is declared shall forever indemnify and acquit the persons paying the same, their

heirs, etc., against any future claim for the money mentioned in the receipts or discharges of such commissioners. In obedience to those acts, the defendant paid the debt in question to the commissioners authorized to receive it, and relies on that payment as legal, and a full and sufficient discharge. The plaintiffs, admitting the fact of payment, rely on the construction of the treaty of peace; the law of the State declaring that treaty to be part of the law of the land; and the Constitution of the United States. The counsel for the plaintiffs, in support of their claim has, in the course of his argument, presented to the view a doubt whether the debt in the present question has been confiscated in a strictly legal sense, by any of the acts called confiscation acts, and has urged that doubt strenuously and with much force of argument; contemplating them as a body of penal law, and, of course, subject to the legal rules of construction in such cases. The observations on that point would merit much attention; but I deem it not absolutely necessary to investigate that question in forming an opinion upon the present case; and shall confine my observations solely to the law and the facts, as they arise out of the pleadings, in the first plea of the defendant, which admits alone of this question, viz.:

Are the plaintiffs barred of recovery?

(682) It would appear quite unnecessary to inquire whether Congress, under whose authority the treaty was negotiated, was vested by the states with a power competent to enter into such a contract, had not part of the arguments of the defendant's counsel seemed to require it. No one will doubt, if they had the power, the treaty consequently became obligatory on the people of the United States, when made and duly ratified.

Whatever agreement the states may have entered into, at the Declaration of Independence, and to what purposes and extent that agreement may or may not have bound them, as a confederated body, it is clear that at a subsequent period, and previous to the negotiation of this treaty, they, by their delegates in Congress, formed and entered into a solemn compact, by which they plight and engage the faith of their constituents, to abide by the determination of the United States in Congress assembled, *on all questions* which by the confederation are submitted to them; and that the articles thereof shall be *inviolably* observed by the states. Among many other portions of sovereignty which the states thought proper to deposit in that confederated head was the *sole* and *exclusive* right and power of determining on peace and war (except in certain cases specially enumerated), of sending and receiving ambassadors, entering into treaties and alliances. No words can be more comprehensive or express, relative to the point in question; nor is there offered to my mind the least room for doubt. Admitting for argu-

ment's sake what has been contended, that the ministers, who negotiated the treaty, exceeded the powers granted them, certainly the ratification of that instrument, by Congress confirmed and legalized all that had been done by them; and if it could be supposed, as has been said, that Congress in the ratification of it exceeded the powers vested in them by the states, the act of Assembly of this State, passed in 1787, must have extinguished every scintilla of doubt as to its validity and obligatory force on their citizens. The act is a perfect recognition of the whole treaty, declares it to be part of the law of the land, and directs the judges to decide accordingly. The last mentioned act must surely be sufficient to satisfy the mind of the most scrupulous and skepti- (683) cal. For myself, I do not hesitate to declare that it adds nothing to the validity or legality of the treaty; that its ratification by Congress was alone sufficient, and that the act of Assembly of the State was superfluous.

The counsel for the defendant has contended that, by the operation of the acts of confiscation, and the payment into the treasury, the plaintiffs were wholly divested of their right; and the same, if existing at all, was vested in the State. This forms a material part of his defense, and if it had been clearly evinced that the right of the plaintiffs was wholly extinguished by the operation of the confiscation acts, and could not possibly be revived or restored by any subsequent act of the State, or the nation, it would follow, of course, that they could have no demand against the defendant. In support of this argument it is said, 4 Bacon, 637, that all acts done under a statute while in force are good, notwithstanding a subsequent repeal. I am ready to admit the principle in its fullest extent, in the exposition of a statute or municipal law of any particular state. It is consonant with reason, and is justified by the necessity of the case; it prevents much confusion and embarrassment and insures a ready submission to the laws, by a confidence in the security impliedly promised to such obedience. If the treaty was now to be considered as an act of the State, and emanating from the same authority only that produced the acts of confiscation, this reasoning might be solid. But that instrument cannot be subject to the ordinary rules of construction, which govern in the exposition of statutes of a particular state. These have for their object the regulation of the rights of a distinct community or society only, whose interests, being similar, are equally affected by a uniform regulation of their rights; who are alike united by the allegiance due to and protection from the same government; that is a compact formed between two separate and distinct nations, relative to certain specified subjects which involve interests of their respective citizens or people, unavoidably clashing with each other.

(684) The one is an act of a State, but a component part of the nation, providing for the benefit of its own citizens. The other a compact of the whole nation (of which that State is but a part) with another nation, which must necessarily control all acts issuing from the inferior authority which might contravene it. This is evinced by that plain and strong expression in the Constitution of the United States, which declares, "That all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." Taking it for granted, then, that the treaty is not to be governed, when in opposition to particular laws, by the rigid rules of the common law, nor to be restrained in its operation by any statute or any particular state, but that "it ought to be interpreted in such manner as that it may have its effect, and not be found vain and illusive," I will proceed to consider of the operation of the 4th article.

Art. 4th. "It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money of all *bona fide* debts heretofore contracted."

This article appears to me so clear, precise, and definite that one would be at some loss to select other words to render it more so. But it has been contended by the defendant's counsel that, by a true construction of this article, it will appear much less general than the expressions would warrant; that it is a provision for real British subjects only; that is, persons resident in Great Britain at the commencement of the war; a term used in contradiction to many other descriptions of people, who, in the course of the war, took part with that nation, and that this construction is justified by the term sterling money. In order to support this exposition, a reference has been had to the 5th and 6th articles.

The 4th article contains the only stipulation with respect to debts. In the whole instrument it is mutual and general in its expression, not limited or restrained by any particular words, to any description (685) of persons, as is evident in the 5th article. If that had been in the contemplation of the parties, they could not have overlooked the necessity for these distinctions; nor are we at liberty to presume it. In the next article, the distinction is made with great accuracy, with regard to those who may endeavor to procure a restitution of their lands and other property. With respect to the expression "sterling money," it appears to me that was probably concluded on as a standard whereby to estimate the value of money due; it being, no doubt, apprehended that a depreciated paper medium circulated in many states of the Union, the nominal sum in which might not produce intrinsic value of the debt due.

Another construction has been placed on this article, equally, in my opinion, unfounded, with the foregoing. It has been said, the article was only intended to take off from British subjects their disability as alien enemies to sue. Everyone knows that disability can only exist during the continuance of a war, it would have been therefore unnecessary to provide for it in a treaty of peace, when it is obvious the peace itself, agreeably to the long established principles of law, removed all such disability without any special stipulation. The word *recovery* admits not of such an idea. The terms *sue* and *recover* have very different import, in practice. The difference is daily exemplified in our courts, and the distinction appears evident, in the body of that instrument; in the latter part of the 5th article it is stipulated that certain persons shall meet with no lawful impediment in the *prosecution* of their just rights. In the 4th article the words are no lawful impediment to the *recovery* of their debts. The distinction is obvious, and the terms aptly applied in each case. In the former, relative to lands and other property which had been confiscated, and a restoration of which entirely depended on the liberality of the legislatures, the term *recovery* would have been improper; in the latter, in which a payment to the creditor was positively stipulated, the expression is correct.

Vattel says, p. 369: "When an act is conceived in clear and precise terms, when the sense is manifest, and leads to nothing absurd, there can be no reason to refuse the sense which this treaty nat- (686) urally presents, to go elsewhere in search of conjectures in order to extinguish or restrain it, is to endeavor to elude it."

It is therefore my opinion that this article does control the operation of the acts of confiscation, relative to debts; that the plaintiffs in this case are entitled to recover on the first demurrer; the plea in that case being the strongest ground of defense made by the defendant; that therefore judgment be given by the plaintiffs on each of the demurrers.

The State, who has compelled the payment from the creditor by a threat of severe punishment, will certainly feel bound by every principle of moral obligation to reimburse, in the most ample manner, all those who have made such payments. In addition to the moral tie that it is bound by, a solemn promise so to do is clearly expressed by an act of the Legislature.

I have only to observe that I have considered this case as of the utmost importance; that I have given it all the attention and consideration in my power to bestow at this time and place; that if my opinion is founded in error, which is possibly the case, happily for the defendant, there is a higher tribunal where the error may be corrected.

ELLSWORTH, C. J. It is admitted that the bond on which this suit is brought was executed by the defendant to the plaintiffs; and that the plaintiffs have not been paid. But the defendant pleaded that since the execution of the bond a war has existed, in which the plaintiffs were enemies; and that during the war this debt was confiscated and the money paid into the treasury of the State. And the plaintiffs reply that by the treaty which terminated the war, it was stipulated that "creditors on either side should meet with no lawful impediment to the recovery of *bona fide* debts heretofore contracted."

Debts contracted to an alien are not extinguished by the intervention of a war with his nation. His remedy is suspended while the war lasts, because it would be dangerous to admit him into the country, or (687) to correspond with agents in it; and also because a transfer of treasure from the country to his nation would diminish the ability of the former, and increase that of the latter, to prosecute the war. But with the termination of hostilities, these reasons and the suspension of the remedy cease.

As to the confiscation here alleged, it is doubtless true that enemy's debts, so far as consists in barring the creditor and compelling payment from the debtors for the use of the public, can be confiscated; and that on principles of equity, though perhaps not of policy, they may be. For their confiscation, as well as that of property of any kind, may serve as an indemnity for the expenses of war, and as a security against future aggression. That such confiscations have fallen into disuse, has resulted not from the duty which one nation, independent of treaties, owes to another, but from commercial policy, which European nations have found a common, and indeed a strong interest, in supporting. Civil war, which terminates in a severance of empire, does, perhaps, less than any other, justify the confiscation of debts; because of the special relation and confidence subsisting at the time they were contracted, and it may have been owing to this consideration, as well as others, that the American States, in the late Revolution, so generally forbore to confiscate the debts of British subjects. In Virginia they were only sequestered; in South Carolina all debts, to whomsoever due, were excepted from confiscation; as were in Georgia, those of "British merchants and others residing in Great Britain." And in the other states, except this, I do not recollect that British debts were touched. Certain it is, that the recommendation of Congress on the subject of confiscation did not extend to them. North Carolina, however, judging for herself, in a moment of severe pressure, exercised the sovereign power of passing an act of confiscation, which extended, among others, to the debts of the plaintiffs. Providing, however, at the same time, as to all debts which

should be paid into the treasury under that act, that the State would indemnify the debtors should they be obliged to pay again.

Allowing, then, that the debt in question was in fact and of (688) right confiscated, can the plaintiffs recover by the treaty of 1783?

The 4th article of that treaty is in the following words: "It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money of all *bona fide* debts heretofore contracted."

There is no doubt but the debt in question was a *"bona fide"* debt, and *theretofore* contracted, *i.e.,* prior to the treaty. To bring it within the article, it is also requisite that the debtor and creditor should have been on different sides, with reference to the parties to the treaty, and as the defendant was confessedly a citizen of the United States, it must appear that the plaintiffs were subjects of the King of Great Britain; and it is pretty clear, from the pleadings and the laws of the State, that they were so. It is true that on the 4th of July, 1776, when North Carolina became an independent State, they were inhabitants thereof, though natives of Great Britain; and they might have been claimed and holden as citizens, whatever were their sentiments or inclinations. But the State afterwards, in 1777, liberally gave to them, with others similarly circumstanced, the option of taking an oath of allegiance, or of departing the State under a prohibition to return, with the indulgence of a time to sell their estates, and collect and remove their effects. They chose the latter; and ever after adhered to the King of Great Britain, and must therefore be regarded as on the British side.

It is also pertinent to the inquiry, whether the debt in question be within the before recited article, to notice an objection which has been stated by the defendant's counsel, viz., that at the date of the treaty, what is now sued for as a debt was not a *debt,* but a nonentity; payment having been made, and a discharge effected, under the act of confiscation; and therefore that the stipulation concerning *debts* did not reach it.

In the first place, it is not true that in this case there was no debt at the date of the treaty. A debt is created by contract, and exists till the contract is performed. Legislative interference, to exonerate a debtor from the performance of his contract, whether upon or (689) without conditions, or to take from the creditor the protection of law, does not in strictness destroy the debt, though it may, locally, the remedy for it. The debt remains, and in a foreign country payment is frequently enforced.

Secondly, it was manifestly the design of the stipulation that where debts had been *theretofore contracted,* there should be no bar to their recovery from the operation of laws passed subsequent to the contracts.

And to adopt a narrower construction would be to leave creditors to a harder fate than they have been left to by any modern treaty.

Upon a view, then, of all the circumstances of this case, it must be considered as one within the stipulation that there should be "no lawful impediment to a recovery." And it is not to be doubted that impediments created by the act of confiscation are *lawful* impediments. They must therefore be disregarded, if the treaty is a rule of decision. Whether it is so or not remains to be considered.

Here it is contended by the defendant's counsel that the confiscation act has not been repealed by the State; that the treaty could not repeal or annul it; and therefore that it remains in force and secures the defendant.

And further, that a repeal of it would not take from him a right vested to stand discharged.

As to the opinion that a treaty does not annul a statute, so far as there is an interference, it is unsound. A statute is a declaration of the public will, and of high authority; but it is controllable by the public will subsequently declared. Hence the maxim, that when two statutes are opposed to each other, the latter abrogates the former. Nor is it material, as to the effect of the public will, what organ it is declared by, provided it be an organ constitutionally authorized to make the declaration. A treaty, when it is in fact made, is, with regard to each nation that is a party to it, a national act, an expression of the national will, as much so as a statute can be. And it does, therefore, of necessity, annul any prior statute, so far as there is an interference. The supposition that the public can have two wills at the same time, repugnant to (690) each other, one expressed by a statute, and another by a treaty, is absurd.

The treaty now under consideration was made, on the part of the United States, by a Congress composed of deputies from each state, to whom were delegated by the articles of confederation, expressly, "the sole and exclusive right and power of entering into treaties and alliances"; and being ratified and made by them, it became a complete national act, and the act and law of every state.

If, however, a subsequent sanction of this State was at all necessary to make the treaty law here, it has been had and repeated. By a statute passed in 1787, the treaty was declared to be law in this State, and the courts of law and equity were enjoined to govern their decisions accordingly. And in 1789 was adopted here the present Constitution of the United States, which declared that all treaties made, or which should be made under the authority of the United States, should be the supreme law of the land; and that the judges in every state should be bound thereby; anything in the Constitution or laws of any state to the con-

trary notwithstanding. Surely, then, the treaty is now law in this State, and the confiscation act, so far as the treaty interferes with it, is annulled.

Still it is urged that annulling the confiscation act cannot annul the defendant's right of discharge, acquired while the act was in force.

It is true that the repeal of a law does not make void what has been well done under it. But it is also true, admitting the right here claimed by the defendant to be as substantial as a right of property can be, that he may be deprived of it, if the treaty so requires. It is justifiable and frequent, in the adjustment of national differences, to concede for the safety of the state the rights of individuals. And they are afterwards indemnified or not, according to circumstances. What is most material to be here noted is, that the right or obstacle in question, whatever it may amount to, has been created by law, and not by the creditors. It comes within the description of "lawful impediments"; all of which, in this case, the treaty, as I apprehend, removes. (691)

Let judgment be for the plaintiffs.

Cited: McNair v. Ragland, 16 N. C., 536.

JUNE TERM, 1791.

GUION v. M'CULLOUGH ET AL.—2 Mart. 78.

Action on a bond. The writ was filled up, *"that they answer unto him of a plea of debt of 1000 dollars"* (the penalty of the bond); plea in abatement, because the writ did not run in the usual form, "in the *debet* and *detinet"*; general demurrer.

Graham for the plaintiff.
Slade for defendant.

IREDELL, J., and SITGREAVES, J., notwithstanding the pointed authority produced by *Slade,* overruled the plea. They held the writ was deemed sufficient, because it agreed with the *ac etiam* clauses, inserted in actions of debt, in the bill of Middlesex, according to the English practice.

JUNE TERM, 1792.

PALYART v. GOULDING.—2 Mart., 78.

A firm in Maryland gave its promissory note to A. signed in the name of the firm, and A. sued one of the partners alone, relying on the Act of 1789 (see 1 Rev. Stat., ch. 31, sec. 89). *Held:* That he might do so, as that act did not affect the contract, but only extended the remedy.

The defendant and his two brothers carried on business as merchants in the State of Maryland, under the firm of John Goulding and Brothers, and in the year 1791 gave the plaintiff the promissory note on which this action was brought for a debt of the said partnership, signed John Goulding & Brothers, the style of the firm. The defendant (being the only partner in this State) was sued alone; he pleaded in abatement to the action that this contract was entered into in the State of Maryland, and that the other partners who were living, and not named, ought to be made defendants. To this plea there was a general demurrer.

Graham, in support of the demurrer, relied wholly on the fifth section of the act of Assembly of this State. 1789, 57, 688.

Woods and *Martin* contended that this case came within the rule of *lex loci,* and that to allow this act the operation insisted on for the plaintiff would substantially alter the contract.

But PATTERSON, J., took a distinction between the contract and the remedy; and observed that the contract remained the same, notwithstanding this act; and that the remedy only was extended.

And SITGREAVES, J., *accordante.*

A *respondeas ouster* was awarded.

JUNE TERM, 1792.

UNITED STATES v. MAUNIER.—2 Mart., 79.

Murder on the high seas. Mr. Attorney of the U. S., *Hill,* offered to give in evidence the examination of the prisoner before his commitment.

Martin, for the prisoner, objected to this:

1. Because the prisoner, at the time of his examination, was *under impressions of fear.*

2. Because the examination was *not subscribed by the prisoner.*

I. The prisoner was a French sailor, and the murder with which he stood charged had been committed upon the high seas; on his landing in North Carolina, he was taken up and committed to jail; from thence he was taken on the next day, brought into court in irons, and examined,

without being informed that he was then under an examination, and not on his trial. He understood not the English language, and no one informed him of what was passing. There was room to believe that he thought when he was remanded to jail that he had been tried, convicted, and condemned. For he asked a person who understood the French language on what day he was to be executed.

The counsel said, although in the case of a person who had resided some time in this country, or in others in which the proceedings are carried on by a jury, the objection would be frivolous; yet it must have weight in the case of a foreigner, unacquainted with our laws and our language. That what the prisoner had seen in court, except perhaps the confrontation of witnesses, was all that in similar circumstances he would have seen in his country, had he been tried there, where sentence of death is not pronounced in court in presence of the prisoner, but read to him afterwards by the clerk, in the dungeon.

II. The examination and confession *subscribed by an offender,* before a justice of the peace, is good and sufficient evidence against such offender. Gilb. L. E., 140.

The examination of Sterne and Boroski by the Chief Justice was refused to be read at their trial. See St. Tr., Vol. III, p. 470. And Sergeant Wilson, in his edition of Hales' Pleas of the Crown, Vol. II, p. 585, *in notis,* adds a *quære,* whether the Chief Justice was not right in such refusal. For, by the opinion of some judges now living, the statute does not extend to the examination of the party accused, *unless he signed his examination,* but only to the witnesses or persons accusing.

In *Vaughan's case, Mr. Crauley* having *made oath* that the examination was taken before *Sir Charles Hedges* and *signed by the prisoner,* it was read. 5 St. Tr., 229.

In *Harrison's case,* the Attorney-General desired that the defendant's examination, taken before the *Lord Chief Justice Brampton,* might be read, and the defendant having *acknowledged the hand be his* that was subscribed to it, it was read accordingly. 7 Sta. Tr., 118.

In *Layer's case* the prisoner's counsel said, and the Chief Justice granted that his examination could not be read, unless it was *signed* by him. 8 St. Tr., 474; 8 Mod., 89.

PATTERSON, J., thought the examination ought to have been signed by the prisoner.

SITGREAVES, J., said the first objection had much weight with him, and Mr. Attorney of the U. S. withdrew his motion.

The prisoner was found guilty upon other evidence.

And it was moved in arrest of judgment, on the ground that the length and depth of the wound were not mentioned in the indictment.

The prisoner's counsel cited 4 Co., 42; *Haydon's case.*

The Court did not intimate that they had any doubt, but said if they had they would direct a copy of the indictment and reasons to be transmitted to the Supreme Court.

Curia advisare vult.

The Court directed the prisoner to be arraigned on another indictment, which had been found against him.

Whereupon, he pleaded *not guilty,* and the Court ordered the trial to be proceeded on instantly:

And with some difficulty was prevailed on to adjourn it to the succeeding Monday, it being Saturday.

An order was then made that the marshal send expresses to the grand jury (who had been discharged) commanding their immediate return.

On the Monday following, the prisoner was brought to the bar as he and his counsel expected, to be tried on the second indictment.

But the Court informed the bar they would take up the motion in arrest of judgment.

On the part of the United States, several precedents of indictments were read out of West, in which the length and depth of the wound are not mentioned.

Martin observed that in all the indictments (but one) in which the length and depth of the wound were not mentioned, the instrument had gone through the body of the person killed, some limb had been cut off, or the wound had been given with a blunt weapon. In this case the mortal wound was stated to have been given with an axe, on the head. That the authority in Coke was not only unshaken, but frequently recognized.

The Court, however, overruled the motion without making any observation, and passed

Sentence of death.

***At the same time sentence was passed on three other men who had been included in the same indictment, and they were soon after executed. This is the first time that judgment of death was given under the authority of the United States.

NOVEMBER TERM, 1796.

JONES v. NEALE & BLOUNT.—2 Mart., 81.

Debt on bond. To prove the execution of the bond, the plaintiff's counsel offered a deposition of the subscribing witness, who resided at Newbern, about 130 miles from Raleigh. It appeared that the witness

had been subpœnaed by the plaintiff, but did not attend, and that he was at home in good health.

The deposition was offered as one taken in pursuance of the 30th section of the act of Congress, entitled *"An act to establish the Judicial Courts of the United States,"* approved the 24th September, 1789; which provides for the taking depositions *de bene esse* in certain cases, one of which is where the witness shall live at a greater distance from the place of trial than 100 miles.

Two objections were made by the defendant's counsel to the reading this deposition.

1. That it was taken *de bene esse* only, and therefore could not be read, unless the party offering it first proved that the personal attendance of the witness could not be obtained. But here it appeared that he was within reach of the process of the Court, and in sufficient health to attend.

2. That the certificate of the magistrate who took the deposition did not set forth the reasons of taking it, which is made necessary by the act of Congress.

To the first objection it was answered by the plaintiff's counsel that the manifest intention of the act is that those circumstances which authorize the taking of a deposition *de bene esse* should, if they exist at the time of trial, entitle it to be read. That the residence of the witness at a greater distance from the place of trial than 100 miles is, by the act, placed on the same footing with his age, infirmity, going to sea, etc., and is equally a good cause for taking his deposition *de bene esse*. But the age or infirmity of a witness would without doubt excuse his nonattendance, and entitle his deposition to be read; and there is good ground to infer the same of his residence at a greater distance from the place of trial than 100 miles.

This construction is greatly corroborated by that clause of the act which defines the evidence admissible on appeals; but if a contrary construction should prevail, it appeared that the plaintiff had caused the witness to be subpœnaed, which was all that could be required to enforce his attendance, and if that proved ineffectual, the deposition ought to be read.

To the second objection—that the act of Congress requires the magistrate taking a deposition to certify the reasons of taking it, in order to save the party at whose instance it is taken the trouble and expense of bringing witnesses from a great distance to prove the age, infirmity, etc., of the witness examined; but it left the party at liberty to incur this trouble and expense if he thought proper, as in taking depositions under commissions, issued from the state courts of this State, the party at whose instance the deposition is taken may procure the commissioner to

certify that notice of the time and place of caption was given to the adverse party; and such certificate is received by the court as conclusive evidence as to that point; but if the commissioner fail to certify, the party must establish the fact.

By the Court, PATTERSON, J., and SITGREAVES, J. It appears to be the true construction of the act of Congress that those circumstances which will warrant the taking of a deposition *de bene esse* should, if they exist at the time of trial, authorize the reading of it. But as this act is made in derogation of the common law, it must be strictly construed and literally observed. To fail in one iota of the ceremonies prescribed by it is to fail in the whole.

The act requires that the deposition shall be retained by the magistrate taking it until he deliver the same with his own hand into the court for which it is taken, or shall, together with the reasons of its being taken, and of notice, etc., be by him sealed up and directed to such court. This part of the act has not been observed; therefore, the deposition cannot be read.

Badger and Taylor for the plaintiff.
Woods for the defendants.

NOVEMBER TERM, 1796.

BOND v. ALLEN ET AL., EX'RS., ETC.—2 Mart., 83.

On exception taken to the defendants' plea, grounded on the 4th section of 1789, 23, 677, respecting the limitation of time for bringing suit against administrators and executors.

The Court, PATTERSON, J., and SITGREAVES, J., held that the 4th and 5th sections of that act must be taken together; that the defendant ought to have entitled himself to the benefit of the 4th section by showing he had complied with the requisites in the 5th; and as this was not set forth, The plea was overruled.

Badger for the complainant.
Baker for the defendants.

APPENDIX

LATCH'S REPORTS

CASES

DETERMINED IN THE

COURT OF KING'S BENCH

DURING THE

I, II AND III YEARS OF CHARLES I

COLLECTED BY

JOHN LATCH, OF THE MIDDLE TEMPLE, ESQUIRE.

FIRST PUBLISHED IN NORMAN-FRENCH [1661], BY

EDWARD WALPOOLE, OF GRAY'S INN, ESQUIRE.

TRANSLATED INTO THE ENGLISH LANGUAGE BY

FRANCOIS-XAVIER MARTIN.

NEW BERN:

FROM THE TRANSLATOR'S PRESS,

1793

These Reports are all of Mr. Latch's hand; but, as we conceive, not originally taken by him, but excerpted out of some other manuscript; but, being a person of great learning in his profession, he would not have taken this pain if he had not thought them worthy of his transcribing; and because the Reports of these years in the King's Bench are wanting in Mr. Justice Crook's Reports of that Court (he being in those times a Judge of the Court of Common Pleas), we think them fit to be printed, as a supplement thereunto.

ORLANDO BRIDGEMAN.
MATTHEW HALE.
THOMAS MALET.
ROBERT HIDE.
EDWARD ATKINS.
THOMAS TWISDEN.
THOMAS TYRRIL.
CHRISTOPHER TURNOR.
SAMUEL BROWN.
WADHAM WYNDHAM.

NOTE OF THE TRANSLATOR.

A desire of preventing the waste of a few leisure hours alone induced me to undertake the publication of these cases in modern language. Much credit could not be derived from it. I was not stimulated by the prospect of direct benefit; neither did I think myself better qualified than any other person of the profession.

The appearance of this work in its new dress will, I have flattered myself, save some time and labor to gentlemen who can, less conveniently than I, bestow either. To them it is offered with deference. May they receive it with candor!

Latch's Reports, as they were not published during his life, suffer much from not having been corrected by the parental hand. The want of the finishing touch is, in many parts, glaringly conspicuous. This deficiency few publishers presume to correct. I dared not do it.

I translated rather servilely. Elegance of style, even in my native language, is without my reach. An attempt to it in another would have been madness. It was not within my ambition.

I omitted the cases relating to spiritual matters. These are seldom wanted on this side of the Atlantic. The only alteration I permitted myself, in the body of the work, was to separate into distinct paragraphs the statements of the cases, the arguments, and the decisions; and to substitute the use of the first to that of the third person.

At the end of most cases are references, which were not in the old edition. I took them from a manuscript of the late Judge Dewey, of this State, a gentleman of much reading and studiousness, and their ordinary concomitants, learning and accuracy.

In a number of places reference is made by the page to the Collection of Statutes I published last year.

After the name of every case I placed that of the term at which it came before the Court. In the old edition it was to be sought for in the table. With this, I took more liberty than with the rest of the work. I arranged the names of the cases in a manner more strictly alphabetical, and I introduced those of the parties, both in the common and the inversed order.

I substitute an index, entirely new, to the former.

F. X. MARTIN.

NEW BERN, NORTH CAROLINA, December 1, 1793.

READER.

Things which by their native excellencies commend themselves, like good wine, need no Bush: by that logic this book would not need so much as the Reporter's name; or, having that, can need no more. However, to have omitted that, would have been an high ingratitude in me; and to have left that under the suspect of spurious, which had so worthy a parent, had been no less an indignity to the work than injustice to his memory. Reader, the testimonial of many sages of the law, the judges, his contemporaries, give you an assurance above all that I can express that the original of this impression was all written by that worthy person's own hand; wherein (as I apprehend) it received as much the stamp of his approbation, and judgment, as if he had composed it. The years,* as it falls out, title not every page, but are inserted in the alphabet of the cases, which, though less usual, is not less useful; and that, I hope, will excuse it. The Errata may be many, not important, or úneasy to be corrected in the reading: wherein, if you be intent, you may find a reasonable reciprocation; your judgment may correct the Errata of the book, and the book perchance correct somewhat in your judgment: and then have you acted mutual kindness each to other; and in both much obliged.

Your servant,
EDWARD WALPOOLE.

*See the Translator's note, before.

THE
REPORTS
OF
JOHN LATCH, OF THE MIDDLE TEMPLE, ESQUIRE.

SIR SIMON CLARK'S CASE.—Term. Paschæ 1 Car. K. B.

Sir Simon Clark brought an action on the case against S. for saying of him the following words, viz., Sir Simon Clark *kept* Faulkner, *the Jesuit, in his house a week, knowing him to be a Jesuit,* etc., and a verdict was found for the plaintiff, with £100 damages—and now

Davenport, Serj., moved in arrest of judgment:

1. Because it is not averred *when* these words were spoken. As they may have been spoken before the 27 El., 2, which makes it penal to receive priests and Jesuits: For then it was not penal to receive them, but by that statute it is made felony.

*2. Because it is not averred that the Jesuit was born within the realm, as the statute requires it.

Crew, Serj., *contra,* showed an express precedent. Hill. 9 Jac. rot. 10484. *Splint v. Smith. Thou hast harbored a seminary priest,* the other answered: *it may be so, and I not know it:* the other replied: *thy father, thy mother, and thyself did harbor him, and did know him to be a priest:* and an action on the case was brought upon those words, and adjudged that it lies, on account of the last words, *knowing him to be a priest;* and it is the same here, *knowing him to be a Jesuit.* And the record was read, and rule shown to proceed to judgment.

On view of which precedent it was adjudged *per totam curiam* that the action does lie.

CREW, C. J. There is a strong presumption that Faulkner, the Jesuit, in this case, is born in England, as the statute requires it; inasmuch as Faulkner is an English name.

And *per totam curiam,* the first exception was disallowed, because it shall not be intended that the words were spoken so long ago.

JONES, J. I confess that when words are dubious, they shall be taken *in mitiori sensu.* As if one says: *I. S. hath the pox,* it shall be understood the *smallpox;* but as to words in which there is a strong presumption that the party intended a scandal, the action lies; and thus it was

adjudged in this Court, in *Sydnam's case,* that an action lies for these words, *I. S. is laid of the pox. Quod nota.* Here there is a strong presumption that the defendant intended to scandalize Sir Simon Clark.

DODERIDGE, J. And if the Jesuit was not born in England, still the action would lie for the scandal. The statute makes it felony to receive Jesuits born in England. Though it is not felony nor treason, yet it is a discredit to receive a foreign Jesuit. And it is sufficient, because if one says of I. S. that he harbors Swary, the Jesuit, in his house, it is well known that Swary is a Spaniard, and was not born in England. Still the action would be in this case, because I. S. is scandalized by this means. Judgment for the plaintiff. See Jones, 68; Rol., 69; Palm., 410; 2 Cr., 300; Bulst., 181; 1 Rol., 69. *Postea,* p. 690.

SANDAL'S CASE.—Pasch. 1 Car.

The words in the last clause of the last statute, 21 Jac., 16, are: *In all actions upon the case for slanderous words to be sued, or prosecuted in any court, after the end of that Parliament, if the damages be assessed *under 40s., then the plaintiff shall recover only so much costs.* Now, in this case, the action was brought *before* the Parliament and prosecuted *afterwards,* and as the commencement was before the Parliament, it is within the statute by the word (in the statute) *prosecute.* Rol., 486; *Postea, Hale v. Huggins,* p. 671.

BLACKSTON'S CASE.—Pasch. 1 Car.

It was agreed in this case that when a suit is at issue in chancery, as that court cannot call a jury to its bar to try it, the Chancellor ought to deliver the issue *propria manu* in the King's Bench, who are to try it by a jury, and on the verdict ought to give judgment and make return thereof to the chancery afterwards. And if the issue ought to be tried in Durham, or other franchise, then the usage is that the King's Bench write to such place to have the issue tried, and make return to them, whereupon they are to give judgment; and the Chancellor cannot write to such a place to have an issue tried, because the chancery has nothing to do with verdicts, which are common law trials. And, therefore, in this case, where the Chancellor wrote to the Bishop of Durham to try an issue in *Audita querela,* all is bad. *Nota,* that in this respect the power of the King's Bench is above that of the Chancery, and it was ordered by the court that the verdict be quashed, and that there be a new trial.

JONES, J., said that although in such cases the Chancery had nothing to do with verdicts, and could not have any such issue tried, if in Chancery an issue was joined, which is not triable by a jury, the Chancellor might write, nay, pray the assistance of the King's Bench. As if *ne unques accouple en loyal matrimony* was in issue in Chancery, the Chancellor might write to a Bishop to certify it.

And DODERIDGE, J., said that he had never heard nor seen that the Chancellor had written to any county palatine to try an issue; but the court of King's Bench can do it.

And it was also said in this case that the return of a trial in Chancery cannot be in the Common Bench (although there is a precedent to that effect in Novel Entry, p. 305). But ought to be in the King's Bench alone. *Same case, Postea,* pp. 709, 816; Jones, 82 and 90; 3 Bulst., 305; Bendl., 161; Palm., 410.

ANONYMOUS.—Trin. 1 Car.

In an action on the case for words (as in all other actions), if the defendant demurs to part of the words and pleads to the other, it has been the subject of much debate whether the judges ought to give judgment presently on the part demurred to, or to stay till the issue be tried on the other, for they at times have done so, and at others otherways, as *Crew,* Serj., said. But in the case at bar the judges gave judgment on the demurrer, because as DODERIDGE, J., said, it is the best way, as when the issue comes to be tried, the jury may assess the damages upon the whole. 28 E., 3, 10; *Pheasant's case.*

WARD'S CASE.—Pasch. 1 Car.

In debt, the plaintiff declared on a bill bearing date in *paroch. sanctæ Mariæ de arcubus* in London; and upon *oyer* of the deed, it bore date at Hamburgh, and the writ was in the *Detinet tantum.*

Bridgeman, Serj., objected that although it is usual to lay such actions in a certain place, as in Kent, London, etc., yet, as this case is, it cannot be, because when any place is named, it shall be understood *prima facie* that it is a town and not a particular place, as a house, as appears by 3 E., 3, 68, and Breve, 638. Then he said that Hamburgh shall be intended to be a *town,* which cannot be in London. Therefore, the declaration is faulty for not having said Hamburgh in London.

But it was argued *contra* by *Barnes.* I confess that a place named shall be understood to be a vill or town, as the Serjeant has said, but nevertheless the date of the deed shall be understood to be of a particular place or house. And if there be an obligation bearing date at Antwerp or Callis-Sands, it shall be understood to be in some of the taverns in London that are so called, and not of places beyond the seas. 21 E., 4, 26. And in the case of *Higin v. Flower,* 2 Jac. B. R., the date of an obligation was at Athlone in Ireland, therefore the action could not lie here, as England cannot be in Ireland, but if it had been at Athlone simply, then it was agreed that it might have been sued here, because Athlone may be alleged to be in England. And in this case, if the date had been at Hamburgh *in partibus transmarinis,* it could not have been sued here, as it could not be in London; but being at Hamburgh simply, it might be alleged to be in England.

WHITLOCK, J., agreed to this. Brook Faits, 9; 10 Jac. An obligation, given at Elvin, was sued upon in this Court, and the action laid in Kent, although Elvin be in Poland.

DODERIDGE, J., said, I agree also that if a deed bears date in Little Britain or in Scotland, it shall be understood to be in those places, although it should be said in London. We, the judges, ought to maintain the jurisdiction of our Court, if the case does not appear plainly and evidently to be without it, and therefore we ought to intend that Hamburgh is in London to maintain the action. For *aliter* it would be out of our jurisdiction. And if in truth we knew the date to be at Hamburgh, beyond the seas, we ought not to take notice of it as judges. It has also been moved, on the other part, that this action ought to be in the *debet et detinet,* and not in *detinet* only; but I conceive it is well brought in the *detinet* only, being brought not for a certain sum of money, but for 6 *li.* Hamburgh money, which are in English coin 40 s.; therefore, in this case, the value of Hamburgh money not being known here by common intendment, it ought to be demanded in the *detinet* only. As when one demands bullion, plate, or jewels (the value of which is not apparent), the action ought to be in the *detinet* only, and not in the *debet et detinet.*

JONES, J., concurred in both points.

CREW, C. J., concurred on the last point, but doubted with respect to the first. He said that the demand being for Hamburgh money, it shall be intended that Hamburgh beyond the seas is the place where the obligation was given. But as the other three judges thought differently, he

consented that judgment be entered for the plaintiff according to their opinion, unless something further be said to the contrary on the Monday following. *Postea,* pp. 686, 690; Jones, 69; Bendl., 149; Palm., 407; 22 H., 6, 57; 8 H., 6, 14; *Highman v. Flower,* 2 Cr., 76.

TOPLIN'S CASE.—Pasch. 1 Car.

One Toplin, an attorney, was indicted for common barratry, but acquitted by the jury. Whereupon he threatened the witnesses with a prosecution in the Star Chamber, and it appearing to the Court that he was a notable knave, he was bound to his good behavior.

*ANONYMOUS.—Trin. 2 Car.

Note, that it is the usage of the Court that a prohibition is never granted on the last day of the term; when such a motion ought not to be made. But, on motion, a rule may be made to stay proceedings until the next term.

*ANONYMOUS.—Trin. 2 Car.

Memorandum. A man was arrested in an action of debt, and presently made a warrant to an attorney, to confess judgment for him, whereupon he was discharged. But afterwards he revoked the power of attorney, before judgment was confessed. And the Court, observing this cunning practice, ordered the attorney to plead *non sum informatus,* that judgment might be entered; and they said they would protect the attorney, in case a suit should be brought against him for so doing.

Memorandum. Michaelmas term was adjourned at Reading on account of the plague.

*DANIEL v. UPLEY.—Hill. 1 Car.

In *ejectione firmæ,* on a special verdict, the case appeared to be this:

John Upley, being seized in fee of a house, on the 26th of May, 25 Eliz., by his last will and testament, disposed of it in this manner: *Item, I give and bequeath my house to Ann, my wife, to dispose at her will and pleasure, and to give it to any of my sons, which she pleases.*

Jermyn argued that, by these words, the wife had a fee, and is liable to no one; but may dispose of the house to whom she pleases. And there

is a great difference between a conveyance and a will. In this case, Litt., 586; Bro. Devise, 33, Litt. leaves out assignees, and this leaves a doubt. But 7 E., 6; Br., 432, renders our case quite plain. And it is clear that by the first words *to dispose at her will and pleasure,* she has a fee; but the doubt is whether the last words are a limitation, viz., *to any of my children,* which alter the fee, and clog it with a condition. *Wellock's case,* 3 Rep., 21; 6 Rep., 16. But here these words do not import a fair condition, for if this be a condition, then the heir shall enter in due time, in case it be not performed. And then the intention of the will is contradicted, inasmuch as the wife has not the house *at her will and pleasure,* as the will requires it; neither can she give it *to any whom she pleases,* as the will gives her power to do.

Henden, Serj., *contra.* I confess that the fee passes by these words, because it has been adjudged that if one devise that I. S. shall be his heir, it is sufficient. But I conceive that here, by the devise, the wife has only a power to dispose; and has no sort of interest or estate by the devise; or, if she has, it is only a conditional estate, clogged and limited, with a condition *to give it to the children.* 33 H., 8; Br. Devise, 37. A man devised that an executor should make an estate tail to I. S., it is only an authority, the devisee has an estate tail, the other has only an authority. Dyer, 323. *Lingin's case* is like this. If one devises that I. S. shall make feoffment of the testator's lands, I. S. has an interest, because he ought to enter before he can give livery. But if he devises that I. S. shall bargain and sell the land, then I. S. has no interest in the land, but only an authority to sell. If one devises that I. S. shall let his lands and receive the profits, during the minority of his son, and dispose, etc., there I. S. has no interest, and cannot make a lease in his own name, and has only an authority, as was adjudged in this Court, Tr., 41; *El. Piggott and Garnish. And, therefore, I conceive that these cases will prove that the wife in this has only an authority, but no interest. But, admitting that she has an estate by the devise: Yet, I conceive that it is clogged and limited with the conditional power. 34 E., 3; *Cui in Vita,* 19. If lands be given to a woman to dispose of, etc., and she marries, still she may sell, and has an estate, and a power annexed. It is to be observed that this disposing power and authority is collateral to the estate, and therefore may stay and remain, notwithstanding that the wife, in this case, after the death of the testator, took another husband, and she may dispose of the land notwithstanding the coverture, as it is a collateral power. 13 H., 7; Kell., 40. If a man devises that his executors shall sell the land, and dies seized, and the heir enters and makes a feoffment, after which a stranger disseizes him, and dies seized, and other feoffments be made of this land, still the devise remains effectual, and the authority of the executors being collateral,

cannot be impaired by any intervenient act. If a man devises that his feoffee may sell the reversion, he may sell without attornment, inasmuch as it passes by the will.

DODERIDGE, J. If I devise land to *I. S. to give and dispose to I. D.,* he must dispose of it to *I. D.* But here it is given *to dispose at her will and pleasure,* which perhaps may make a difference.

Sed per curiam. If the wife dies without feoffment, the heir shall have the land.

Afterwards other matters were moved in this case, but it depends on the above point.

And *Henden* moved this case. A wife is disseized and the husband releases all demands, and the wife levies a fine—the husband may enter. And he said, if a wife levies a fine as a *feme sole,* if the husband enter, it shall be void; otherwise, the wife is barred. 16 Aff., 17. A release of all demands releases the right of entry, and the entry itself. 8 Rep., 147. And the husband in the above case cannot enter, and therefore the wife is barred. 11 H., 4, 24. *Per Green.* If a wife delivers goods, trespass lies, but otherwise in the case of an infant, if he delivers goods with his own hands. Pas. 32; El. Rot., 1017, *adjudged to this purpose. See this case continued, postea, pp. 656, 726.* 1 Cr., 678, 734.

*JOHNSON'S CASE.—Hill. 1 Car.

DODERIDGE, J., said that in wills the Ecclesiastical Court takes notice of the year of the Lord, but the Common Law of the year of the reign of the King.

GODFREY'S CASE.—Hill. 1 Car.

The court said that it is usual in the Court of Admiralty to allege in the libel and to surmise that the contract was made *super altum mare.* But a prohibition shall be granted if the surmise be not true. And DODERIDGE, J., said that if a vessel lay at anchor, etc., wanting provisions, and sends I. S. ashore to bring them, and the contract is made in the vessel, the contract shall be held to be at sea, and therefore shall be tried in the Admiralty. Otherwise if the contract be entirely made ashore, and afterwards the provisions sent aboard.

RAMSEY v. MICHEL.—Hill. 1 Car.

In a writ of error, *Banks* moved that the writ bore *teste* 21 July, and the return *Tres Trin.* Thus, the *teste* was after the term, and this was alleged for error. The court agreed that if it is alleged for error in the record, it is error.

But JONES, J., said that the court is not obliged to take notice of it, as Trinity term *may* possibly be on 21 July.

DODERIDGE, J. Original processes may bear *teste* out of term, because they issue out of Chancery, which is always open. But judicial processes issue out of other courts, which are open in term time only, therefore they ought to bear date in term time. *Postea,* p. 713.

*HERBERT v. VAUGHAN.—Hill. 1 Car.

In the court of Montgomery, seventeen persons were indicted for murder, in a quarrel between Herbert and Vaughan, and they were imprisoned. They were persons of such power and influence in the country that a jury could not be got to try them; whereupon *Master Littleton* moved for a *certiorari* to have them tried in Shropshire, and alleged precedents in like cases. The court granted a *certiorari,* and the indictments being removed in the King's Bench, at Trinity term, he moved for an *habeas corpora* to remove their bodies also, which was granted. And at Michaelmas term afterwards the prisoners were bailed, although they were indicted for murder, which is contrary to the statute; which it was held is capable of a favorable construction at the discretion of the Judges, as in this case, because the prisoners were in danger of starving in gaol, and the trial could not be had soon. Pp. 118 and 166.

CONSTABLE v. CLOVERY.—Trin. 2 Car.

In covenant. The case was this. The master of a vessel covenanted to sail with his freight by the first fair wind, and the other party to pay the freight. The master brought his action for his wages, and alleged that he had performed the voyage. The other traversed that he did not sail with the first wind; the plaintiff demurred, and the defendant joined in the demurrer.

Stone argued that it is a bad traverse, because he has performed the covenant if he sailed within a convenient time. It is not necessary that

he should sail with the first wind. It is a rule that the traverse ought always to be of the material matter of the plea alone, as appears by 15 E., 4, 2; 19 H., 8, 7; 32 H., 6, 16; 2 H., 5, 2; 3 H., 6, 33; 7 Rep. *Ughtree's case,* and the 44 E., 3, there cited, prove this plainly.

DODERIDGE, J. The traverse cannot be maintained clearly, because the wind may blow fair for a quarter of an hour, and the vessel may spring a leak while the wind is fair.

Curia assented, and

JONES, J., said, most clearly, an action of covenant lies for not sailing with the first wind: For thereby the market may be lost. *Postea,* p. 664; Poph., 161; Bendl., 146; Noy, 75; Palm., 397.

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*MILLEN v. HARVEY.—Pasch. 2 Car.

Trespass was brought for chasing his sheep, with a dog, on his own land. The defendant justified that the plaintiff's land is joining a common, and that the plaintiff's sheep were strayed on the defendant's lands, and that he, with a dog, chased the sheep out of his own land, and the dog, in pursuit of the sheep, contrary to the defendant's will, followed the sheep on the plaintiff's land; and thereupon there was a demurrer.

Littleton argued that it is a good justification. For a man has not such a command over his dog as to prevent him from entering his neighbor's land—especially when he pleads that it was against his will; as 22 E., 4, 8. In trespass for plowing the plaintiff's land, the defendant says that the plaintiff's land is contiguous to his; and while he was plowing his own land his horses became unruly, and violently carried the plow on the plaintiff's land, *contra voluntatem suam.* And this was held a good justification. It is so likewise in this case. To this same point is also 21 E., 4, 64; 43 E., 3, 8. If a man does a lawful act, which afterwards becomes unlawful, it is *damnum sine injuria.* 21 H., 7, 28. If my sheep are mixed with others, I may chase them all to sever mine; and this is no trespass. And it was thus adjudged in *Jermyn's case,* 18 Jac.

CREW, C. J. The justification here is good. He might chase the sheep that were on his ground. 4 Rep. *Tyrringham's case,* and if the dog pursues the sheep on their owner's land, *contra voluntatem* of the other, it is no trespass. 38 E., 3, 10 b. I. S. found a pheasant on his ground, and let a falcon fly at him, and the hawk took the pheasant on the land of I. D., who brought trespass for the entry of I. S. Held that it lies. The same in 6 F., 4, 7. One cuts trees on his own land, they

fall on his neighbor's, he goes there and takes them, trespass lies; otherwise if they had been blown down by the wind. But *this* case differs from those.

DODERIDGE, J. Clearly: Trespass does not lie here, inasmuch as the rule is, that in all trespasses there ought to be a voluntary act, and also a damage; otherwise trespass does not lie. And in 22 E., 4, 8. If cattle graze the grass. The same if one drives sheep in the highway, and they escape on your land, against the will of the driver, trespass does not lie, because it was *contra voluntatem,* 12 H., 8. I may drive cattle out of my own land, but no one else can.

JONES, J. It is a good justification.

And judgment was entered accordingly.

*He said perhaps it will make a difference when the driver drives the cattle in the land of the owner, or in that of a stranger. Also there is a difference when a man chases cattle out of his own land himself, or causes them to be chased by his dog, or whether he chases them out of his ground in a common, or in the highway. *Quære* of these. *Postea,* p. 714; Poph., 161; Bendl., 171; Jones, 131; 2 Cr., 568.

ANONYMOUS.—Mich. 2 Car.

DODERIDGE, J., said, if one enters into an obligation on the 10th of May, to stand by the arbitration of I. S. If I. S. makes arbitration on the same day, or has made an arbitration and award before, and publishes it afterwards, it is sufficient. It was adjudged that an award made the same day that the obligation was given is good. It is the same as a bargain and sale enrolled on the same day. 4 El. Dallison's Reports.

NEWMAN v. MARSH.—Pasch. 2 Car.

A lease was pleaded to have been made by a Dean and Chapter, but the declaration did not show that they were seized *jure collegii,* nor what estate they had in the land; and *Jermyn* took exception to this.

DODERIDGE, J. It ought, clearly, to be pleaded what estate they have in the premises, for it may be an estate *pur auter vie. Postea,* 716 and 783; Poph., 163; Bendl., 159; 1 Roll., 672.

JOHNSON'S CASE.—Pasch. 2 Car.

It seemed that if a copyholder did not come to perform the services, although often requested, and still delayed, although he did not absolutely refuse, still he forfeited the land, 42 E., 3, 25. But *Ashley,* Serj., said that at P. 26 Eliz. this point was settled in a case, on a demand of services, when the tenant said: *These services that you do require, it is doubtful whether you have a right to them or no. And until it be resolved by the law whether *they be due or no, I will not pay them.* And it was adjudged that such a refusal does not occasion a forfeiture; because it would be a very great inconvenience if the lord could allege any service to be due which he pleased, and thus compel a tenant to forfeit the land by a refusal.

HODGES v. MOORE.—Pasch. 2 Car.

A man, in consideration that I. S. would marry his daughter, promised him £1400 after the marriage, upon request. The plaintiff in an action brought on the promise alleged a request, without any notice of the marriage.

Noy argued that notice of the marriage ought to be alleged. He took the distinction where an act is done by a stranger, there the plaintiff ought to take notice as well as the defendant. But it is otherwise where one may take notice, and not the other. This distinction is elucidated in 8 E., 4, 1. And he said, if one bargains and sells a reversion, the bargainee shall have the rent without attornment, or notice; but it is otherwise of a pœnalty, of which there ought to be notice, as appears 5 Rep. *Mallorie's case;* 8 Rep., 90, *Francis' case.* It was adjudged in the case of *Stephen Gurney* that when a lease for years was made to I. S. rendering rent, and a future lease for years made to I. D. to commence at the expiration, forfeiture, or surrender of the first lease, and I. S. surrender to the lessor, I. D., if he has no notice of this surrender, shall not forfeit his lease for nonpayment of rent.

DODERIDGE, J. If one contracts with I. S. that if he goes to Rome and returns safe, he will pay him £20 two months after his return, then I. S. ought to give notice. Otherwise, a great inconvenience would ensue. For he might return in some port in this country and conceal himself, so that the other could not take notice of his return.

JONES, J., agreed on the main question. But he said that in this case the plea is that the party *fuit ad hoc requisitus,* and the request implies

notice of the marriage, because he demands the money on account of the marriage.

And the court agreed that the request was a sufficient notice, and *adjournatur*. *Postea,* 696; Poph., 164; 3 Cr., 90; Roll., 461 and 468.

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*ANONYMOUS.—Mich. 2 Car.

Each county has two sorts of gaols. A gaol for the prisoners which are taken by the sheriff, for debt; and this gaol the sheriff may appoint in any house, or wherever he pleases. The other gaol is for the breakers of the peace and matters of the crown, which is the county gaol.

The gaol in York is in the castle, and the keeper of the castle claimed the custody of the gaol within it. And when *Sir Guy Holmes* was sheriff of Yorkshire, he claimed the prisoners in this gaol, whereupon the keeper of the castle complained. But there could be no remedy, inasmuch as the gaol is the gaol of the sheriff, and he is answerable for the escapes. It would therefore be hard if he had not the appointment of the keeper.

WILKINSON'S CASE.—Pasch. 2 Car.

If a man is bound to give all the money in his purse, or enfeoff another of all his lands, he cannot plead that he has given all his money or lands. But he must show, with certainty, what money or lands he had, and that he has given it. 10 E., 4, 2; 9 E., 4, 15; 10 H., 7, 19.

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*WALDEN v. VESSEY.—Pasch. 2 Car.

In debt, on the statute of 29 El., 4, the words of which are: *"Upon extents and executions, the sheriff shall take 12d. of and for every 20s. where the same exceeds not £100, and 6d. of and for every 20s. being over and above the said sum of £100.* Provided, *that this act shall not extend to any fees to be taken for any execution to be had within any city or town corporate."* The execution in this case was for £180, and the question was whether the sheriff shall have only 6d. for every pound when it exceeds £100, or 12d. in the pound for £100, and 6d. for each pound over.

Whitwick argued that in this case the sheriff shall have 12d. for £100, and 6d. for the £80: Because the greater the sum is, the greater is the sheriff's labor. Therefore it is not reasonable that his wages should be less for £180 than for £100; and it was so adjudged in *Proby and*

Runley's case. Pasch. 14 Jac. Rot., 531, on an execution of £400, £12 were demanded, viz., £5 for the first £100, and 6d. afterwards. And there was judgment *pro quærente.*

The second point in this case was this. The proviso says that these fees shall not be taken for every execution *had in any town corporate.* And the sheriff of the county, in this case, entered a corporation and did execution, the question now was whether he should have the fees or be out of the proviso.

And *Whitwick* argued that he should have the fee, notwithstanding the proviso. First, because no man will say that if he had taken the prisoner near the walls of the town he should not have had the fee, and why should he not have it for having taken him in the town. It is clear that the words of the proviso are to be understood of judgments *given* in the corporation. There it is not reasonable that the sheriff or bailiff should have the same fees for taking a prisoner, who perhaps lives in the next house, as the sheriff, who perhaps will have many miles to travel after him. No doubt if a foreign sheriff was to have no fees for executions done in corporations, two great inconveniences would follow. First, the sheriff having no fee, would be tardy and slow in doing executions in corporations, and hence justice and the execution of justice, which is much favored in the law, would be delayed. Secondly, corporations would become the refuge and asylum of persons in debt; and for these reasons he prayed *judgment *pro quærente.*

Jermyn, contra, said that if execution be for above £100, then he shall have only 6d. in the pound: Because, first, this statute ought to be taken strictly, being in the negative. *No fees shall be taken,* etc., according to the rule laid down in 3 Rep. *Heydon's case.* And he said that the sheriff at common law ought to do his office freely, without a fee. He remembered that it had been lately adjudged so in *Salter's case.* One came to the sheriff with an execution against I. S. and told him: *In consideration that you shall take I. S., I promise you so much,* to wit, a greater sum by much than the statute allowed him for his fee. The sheriff took I. S. and sued the other upon the promise. But it was held that the action does not lie, because there is no consideration. For the service of the execution was no consideration, inasmuch as by the common law he ought to do it freely without a fee. He argued that if the sheriff, at common law, ought to execute his office without a fee, it is reasonable to construe the statute for the least reward. With regard to *Proby's case,* cited by the defendant, he said the question there was simply whether the sheriff should have an action of debt for his fee allowed by that statute. It being doubted that he could not, as he might have had his fee before he had performed his duty. But it was adjudged that an action of debt lies for his fee, on account of the words in the

statute, which limit such a fee *to be had, received, or taken.* With regard to the second point, he insisted only on the words of the proviso, and prayed judgment for the defendant.

DODERIDGE, J. The common law gave no fee to sheriffs. Consequently, they were tardy and slow in executing writs, on account of the danger. For there was danger in arresting desperate fellows, who often made resistance; and there was also some danger in detaining them, for fear of escapes. The sheriffs were backward, demanded great reward, or refused to act. Parliament thought it proper to stint their fees in the manner expressed in this statute. The question now before us is how it shall be expounded, and it seems to me in the manner *Whitwick* has explained it. For otherwise the sheriff shall have only £5 for an execution of £200, and £5 for one of £100, and for an execution of £180 he shall have less than for one of £100, which would be hard. With regard to the second question, I hold that the proviso extends only to judgments in suits commenced in the corporation, inasmuch as the execution then is easy. But, if a foreign sheriff comes into the corporation to levy an *execution, it is not reasonable he should be excluded of his fee, as he has the same pains, labor, and trouble in this as in other cases.

JONES, J., concurred. He said: Three questions rise on this statute: (1) Whether debt lies for the sheriff's fee, and it has been determined that it does, inasmuch that when a statute does not express what remedy one shall have for a fee or forfeiture, etc., an action of debt lies.

(2) Whether (when a sheriff makes a covenant to the bailiff of a liberty to levy an execution) the sheriff or the bailiff shall have the fee? Also, when a sheriff makes an extent and another makes a *liberate,* which of them shall have the fee, or shall be said to have made execution?

(3) The question in the present case. It was argued also in the Common Bench. I have a note of it, but do not recollect their decision, for the present.

With regard to the second point, he said it made a very great difference whether the corporation be a county of itself or not. Because, when the corporation is a county, there the sheriff is an officer of this court, and shall be charged with the prisoners here at Westminster. Therefore, as his charge and his risk are equal to those of the other sheriffs, it is but reasonable he should have the same fees. But the bailiff of a corporation, which is not a county, has neither the same trouble nor the same danger.

The Judges not being prepared for a solemn argument, the case was adjourned.

For example. If I deliver a writ to the sheriff to arrest I. S., and afterwards I forbid him to arrest him, and I desire him to return the

writ, and he arrests I. S., *quære,* whether I. S. may have false imprisonment. It seems not. Secondly, *quære,* whether I may have an action on the case against the sheriff or no, and it seems I may. For, perhaps, I may be prejudiced. Thirdly, *quære,* whether the sheriff shall have an action on the case against me for his fees? *Postea, Walden v. Ursy,* p. 665; Bendl., 191; Palmer, 399; Noy, 75; Poph., 173; 2 Cr., 287; Proby and Limbey, mo. 853.

*EMPSON'S CASE.—Pasch. 2 Car.

This case was on a statute acknowledged and an extent sued. The sheriff took a bond of £20 for the payment of £10, which was his fee; and this was before the *liberate.* Adjudged:

First. That the bond is void, inasmuch that the statute 28 H., 8, gives him an action of debt for his fees; and he shall not have a double reward.

Secondly. It is void, as it was taken before the *liberate,* so that the sheriff took his fee before he had done his work. *Postea,* p. 665; 3 Cro., 150 and 287; bin. 20 and 50.

COB'S CASE.

Adjudged that a condition to avoid an estate shall be taken strictly. 32 Eliz. A man gave lands to his wife during the minority of her son, on condition that she should not make waste. She took husband, and *he* made waste. It is not a breach of the condition. Dy., 46 and 6.

HALL v. GERRARD.—Pasch. 2 Car.

Assault and *battery.* The defendant pleaded in bar that it was in defense of the possession of his house. The plaintiff replied that it was *de injuria sua propria.*

Noy said that the action is brought for wounding and battery; and a man cannot justify the *wounding* of another in defense of his house or goods; but may only stay the party with his hands in defense of his possession. See 720, 792, 816, *postea.*

DAWBURN v. MARTIN.—Pasch. 2 Car.

The plaintiff, an attorney of the court, brought a suit against the defendant for saying these words of him: *Thou art *a knave upon record, a forgering knave,* and he was found guilty, and £6 damages were given. And

Jermyn moved in arrest of judgment, that the words are not actionable. If he had said: *Thou art a forging attorney,* no doubt the action would lie, as if a man says of a Judge: *Thou art a corrupt Judge,* an action lies. But here it does not appear that there was any communication or any discourse of the plaintiff as an attorney. And the word *knave* is no slander; for I have heard *Lord Coke* say that *knave* in the Saxon language signifies merely *an evil child.* 18 Jac. *Sir William Broker* alleged that he was nobly born, and I. S. said of him: *Thou art a cousener, and dost live by cousening:* held not actionable. And he said, there is no such a word as *forgering.* If one says to another: *Thou art an outfooter,* which in *Cumberland* signifies a *thief,* it is not actionable here.

The parties made the matter up; so the court did not speak to it. But JONES, J., said, 28 El.: *Judge Francis'* brother said: *Thou hast forged my father's will to deceive me.* Held actionable. Palmer, 441; Poph., 177; 2 Cr., 427.

STONE v. WITHIPOOL.—Pasch. 2 Car.

The executor of an infant promised to pay the debt of the infant, in consideration that the other would surcease his suit until Michaelmas. (*Nota* that the debt of the infant was for apparel and stuff taken from a merchant.) And it was argued that it is not a good consideration, as every consideration ought to be an inconvenience to one of the parties or a benefit to the other, 17 E., 4, 5. Where there is no cause of action, the surceasing the suit is not a good consideration; and it was adjudged that the consideration is not good, because the contract of the infant was void.

And afterwards the court said: It is a good law that where an infant commits trespass and submits to an arbitration, he shall be bound when he comes of age; because he is chargeable for the trespass and shall pay damages, but not so in this case. 9 Rep., 94. It is alleged as a common rule that everything which would be the ground of a suit in equity is a sufficient consideration. But here this rule fails—for the equity of this case is with the defendant. If an infant trader contracts debts in the

way of his trade, he is not liable; because it is only a benefit to him, and not a matter of necessity. *Nota.* An infant took silks and velvets, and it appeared that they were above his rank, and he was adjudged not liable, because they were things of superfluity, and *not of necessity. *Nota,* also, that the defendant pleaded that his executor (*testator, I suppose*) was within age, whereupon the plaintiff demurred, *quære.* And also an executor shall not pay costs for a rule of court. If goods be bailed to an infant to return, and he dies, and his executor promises to return them, it is a good consideration. Upon this *Gawdy* said that if the executor promises to satisfy a simple contract of his testator, he shall be liable—but this does not seem to be law. *Postea,* 731 and 780. 1 Cr., 126; Ow., 94; 1 Leo., 113; Poph., 112; 6 Rep., 13, 14; Dyer., 135.

BOSTON'S CASE.—Pasch. 2 Car.

Parson Boston was sentenced in the spiritual court for adultery, and deposed; then a general pardon came out, pardoning the crime of adultery. It was adjudged that the crime being pardoned, the judgment thereupon shall be pardoned and destroyed, and his deposition void. It was on the last day of the sitting that the pardon was granted by Parliament; therefore it could reverse the judgment, but it is otherwise of an act of grace, which is merely out of the grace and favor of the King.

Curia. A general pardon of Parliament, although it be granted on the last day, and at the end of the Parliament, shall relate as an act to the first day of the session. But a pardon of grace, as a special pardon, relates only to the sealing and date of it. Therefore, if one makes an usurious contract, and the Parliament sits, then judgment is given on an information on the statute of usury, and afterwards a general pardon is granted, this pardon relates to the first day of the session, and consequently, the usurious contract being pardoned, the judgment on it falls to the ground. But it is otherwise if, after a judgment in such a case, a special pardon for usurious contracts be procured. See 36 H., 2, 5. A charter of pardon shall have relation to the time of its date and not to that of the delivery, because it is a matter of record; otherwise of a matter of fact. A special pardon shall be taken in favor of the King, because it comes at the suit of the party; but a general pardon shall be taken more to the advantage of the party, because it comes from the King, and of his special grace and *ex mero motu.*

*ELWORTHY v. GEORGE REYNEL.—Pasch. 2 Car.

Elworthy was in execution at the suit of one Short, and he entered into an obligation to the marshal, *Sir George Reynel,* to be a true prisoner and not to escape. Elworthy, after this, escaped, and the marshal put the obligation in suit. Elworthy pleaded that the obligation was made for care and favor, and therefore is void, by 23 H. 6, p. 147. *Sir George Reynel* replied that the obligation was in these words: *To be a true prisoner and not to make escape;* and that there were no words *for ease and favor;* and the jury found it so.

Davenport, Serj., argued for *Sir George* that the obligation is not void, according to that statute, because it appeared to him that a marshal is not an officer within that statute. And he said further, that a person imprisoned is in the custody of the law, and it is against his allegiance to escape. 3 Rep., 44, and 52b. And the obligation in this case is for a lawful thing, because he ought to have been a true prisoner, according to law, and therefore an obligation for his true imprisonment is good. I confess that if it had been for ease and favor it would be void by this statute; for ease to the prisoner is contrary to law, which requires him to be kept in *salva et arcta custodia,* that he may be sooner induced to pay his debts. But the jury have discharged us of this, because they have found it was not for ease and favor, but for his true imprisonment; and there is no case against us, but one expressly for us. H. 19; Jac., B. R., rot., 1202. *Sir Thomas Periot's case,* which is exactly like this, and H., 20; Jac., 706; and H., 17; Jac., 1276, 576, are also in point, and prove that all obligations taken by sheriffs, etc., are not void. 23 H., 6. See 10 Rep., 99; 21 H., 7, 16; Dyer, 323, 324. Observe that the books which say that the sheriff cannot take an obligation for ease and favor, refer only to such cases where one is arrested on a *mesne* process, and therefore bailable by law, and not of such where one is imprisoned under an execution. See more of this case, *postea,* p. 733; Poph., 165.

*BARRY v. STILE.—Pasch. 2 Car.

One granted a rent charge to Stiles for his life out of B. acre. The grantor made a lease of this land to Barry, and it seemed that the land was really not worth so much by the year as the rent amounted to; and Stiles, to have the rent, sued in the Court of Request, and surmised in his bill, that he had lost the benefit of his grant, because he could not avow and sue for it at common law. The Court of Request decreed that

Barry should pay the rent during his life, and thus by the decree, Barry, who is the termor per chance, shall be charged after the expiration of the term. Therefore a prohibition was granted.

And the court said that it is the usual practice, in case of bonds, etc., to surmise in Chancery and in the Court of Request that the deeds are lost, when in fact it is not so.

JONES, J. It is not right, for if one surmises in Chancery that he has lost his deed, the court in Chancery ought not, in conscience, to help him, for he ought to have taken better care of it. But if the defendant has it, it is conscionable to help the plaintiff, *aliter* if a stranger had it.

DODERIDGE, J. Yet it is the practice, and always allowed in Chancery.

JONES, J. The Chancery may do as they please. But we ought not to permit the Court of Request, who is under our power, to do so.

DODERIDGE, J. In my remembrance, the Chancery compelled a man to attorn. But it will not compel a man to give seizin of a rent seck granted to him. *Postea,* p. 736.

HARDING v. WARNER.

William Shelly made a feoffment to divers feoffees, to the use of the feoffor for life, with divers *remainders over. *Provided always, that if the feoffor, during his life, tender a ring or a pair of gloves, or any sum of money to any of the feoffees, or any of their heirs (ipso Gulielmo declarante* that his intention is to alter the use, and make those uses void), then these uses would be void. Afterwards the said Shelly was attainted of treason, and it was enacted by a special act of Parliament, 28 El., that all his lands, tenements, hereditaments, rights, conditions, etc., should be forfeited to the Queen. And afterwards the Queen, by her letters patent reciting the premises, authorized *Sir John Fortescue* to tender a ring accordingly, who did so and certified it in the Exchequer. Afterwards Harding obtained a lease of the land, etc.

The question was whether the power of tendering a ring, etc., was forfeited to the Queen by the above attainder, or whether it was annexed to the person of Shelly, because there is a declaration of the intention annexed to the person of Gulielm Shelly.

WHITLOCK, J. It seems to me that it was forfeited to the Queen by the attainder, by force of the general statute of 23 H., 8, and also by force of the special statute above referred to; and that the Queen may tender, etc., and therefore the lease is good. The main objection against it is this—that the condition is that if Shelly tender, etc., and declare his intention, etc. Therefore, as it is said that Shelly shall declare his intention and the use, *ergo,* it is objected, no one else can. Consequently,

as it is annexed to his person, it shall not be forfeited to the Queen. To this objection, I answer that it is a rule in law. *Expressio eorum, quætacite sunt, nihil operatur:* the words of the party are void when the law itself speaks. And thus it is in Litt., 331. If a man leases land rendering rent, and if the rent be behind on the day of payment, that then the lessor may distrain; the last clause, respecting the distress, is idle, inasmuch that the law says so. And therefore, if the clause had been that if the rent be behind for ten or twenty days, it seems that he may distrain the next day after the rent becomes due, for this circumstance does not vary the case. Thus, 30 Ass., 8. And in this case it was held by one of the Justices that the Queen may show the reason for tendering the ring and gloves, etc., and that her intent, etc. Forasmuch as he has bound himself by the proviso, to no more than the law had bound him to, it operates as nothing; and then another may tender for him and declare the intention. And in order to prove that he is bound by the law to show the intention of his tendering the ring or the gloves, observe that the tender has two effects, one proper (*direct*) or the gift of the ring, gloves, etc.; the other improper (*indirect*), which respects the conveyance. Now I say that an act that has an improper (*indirect*) effect, ought to be express. Plow., 93. If one makes entry on land, a casual entry, viz., to hunt on the *land, etc., it operates as nothing. 43 E., 3; Feoffment, 51; 6 Rep., *Shop's case.* The delivery of a deed of feoffment on the land makes it a deed, which is the proper effect; but it does not make it absolute, which is the improper effect, without expressing something which amounts to a livery. In this case the tender of the ring operates only to the proper, but not to the improper effect (which is the alteration of the conveyance) without an express mention of the intention. And the law requires that the intention should be made to appear.

2. The second reason to prove that according to law the intention ought to be expressed, is that if it be not said to what intent the ring, etc., are tendered, the feoffee cannot take notice of it, and it is not reasonable that the use should pass without notice, as appear in Dyer, 359; 8 Rep., *Francis' case;* 3 Rep., *Pennant's case.* For as the ring, gloves, or money might be given by way of gift, *ex amore,* or kindness, it is not reasonable that the use be altered without expressing that they are given for that purpose. Then, when he bound himself by the proviso to express the motives of the tender, he bound himself to nothing more than the law did bind him to—*ergo,* his words are to no purpose.

3. It is a very uncertain condition. First, with regard to the *time;* for the tender may be at any time during his life. Secondly, with regard to the *person* the tender is uncertain, because it may be to any of the feoffees. Thirdly, because it is uncertain, with regard to the

thing to be tendered, which may be a ring, gloves, or money. Fourthly, the *place* is uncertain, for there is no express place fixed where the tender shall be. I say, that on account of these many uncertainties, it is reasonable, and the law requires that the intention be expressed. And as he is bound by law to express it, it is to no purpose that he should bind himself to do it by the proviso. Consequently, one may do it for him, notwithstanding the above objection.

4. In all these cases except two, I conceive that a condition may be forfeited to the Crown. The first is when the act is annexed to the *mind* of a man; there it cannot be forfeited to the King, because the mind of one man cannot be transferred to another. *Englefield's case,* 7 Rep. If the condition had been that if the feoffor, in his discretion, should conceive that his nephew had become vicious, etc., that then on tender, etc., there, in case of attainder, it would not have been forfeited to the Crown, because it is annexed to the judgment and discretion of Englefield, and therefore could not be transferred to any other; for the discretion and *mind of no other man is his. The other case is when the condition is annexed to the *person* of a man, as in the *Duke of Norfolk's case,* cited in *Englefield's,* the proviso then was that if the Duke signified under his hand and seal, etc., there another man could not signify with the hand and seal of the Duke. I conceive that all other conditions are forfeited to the King by attainder. Consequently, as in this case, the condition is not annexed to the *mind* or *person* of Shelly, inasmuch as he has spoken nothing, except what the law speaks, and consequently is not bound by it (*his speech*).

5. The tender of the ring in this case is the principal act; the declaration is only the *accessory.* And it cannot be denied that the power of tendering may be forfeited to the Crown, and consequently the declaration also. *Quia accessorium sequitur suum principale.* And it seems to me plain, that the declaration follows the tender, and not the *person* of Shelly. Wherefore I conclude that this condition is forfeited to the Queen, and there ought to be judgment for the defendant.

JONES, J., concurring. I confess that all conditions are not given to the Crown by attainder, as those *which are to be performed by a stranger,* and not by the feoffor. Such are not given to the Crown by the attainder of the feoffor. Also, conditions which are annexed to the *person* cannot be forfeited to the Crown. Consequently in this case, if the proviso and condition had been that *if William Shelly in his person tender and declare,* etc., perhaps it would not have been forfeited by attainder. My Brother DAVENPORT has made these objections: (1) Shelly, notwithstanding his attainder, *may* perform the condition, *ergo* the Queen *cannot;* (2) His intention *cannot* be that of another, *ergo* another may *not* tender; (3) The proviso is, if Shelly tender, *ergo*

he cannot tender by another, and the tender cannot be forfeited. With regard to the *first,* I conceive that Shelly cannot tender, because the tender is transferred to the Queen by the statute; and it would make a difference if the tender was annexed to his *person.* As, if it had been provided that if Shelly travels to Rome, that then, etc., there if he traveled, the condition would be performed, and the Queen could not travel for him, for it is required that *he* should travel; and it is a personal act. But it is on the payment of a ring or pair of gloves which the Queen *may* tender for him. But, admitting that **Shelly may* tender, yet I conceive that the Queen *may also* tender. Litt., 336. If a feoffment be made on condition to pay to the feoffor £10 on such a day, and the feoffee enfeoffs another, *either* the first or the second feoffee may tender the money. With regard to the second objection, I answer as my brother WHITLOCK has argued, that it is *no more* than the law has said: viz., that he should express his intention. 13 Jac.; *Gulielm's case.* Rent was reserved on a lease for years, on condition that it should be lawfully demanded with a clause of reëntry, the reversion being in the Crown. The expression does not *alter* the case; for the King *may* enter without a demand. With regard to the third objection, I say that the ring, gloves, or money *may* be paid by *another,* because the main point is that the thing *be* tendered, it matters not by *whom,* so that it be *paid.* 16 Eliz., Dyer, 337. When a rent was forfeited to the King, by 1 E., 6, I conclude that the condition in this case is given to the King, and therefore the lease to Harding is good.

DODERIDGE, J. This case has been argued in all the common law courts, and has been adjudged for the plaintiff in the Exchequer and the Common Bench. I have much reverence for these decisions, although they have been slighted by the opposite party; and I find sufficient matters in the proviso to lead me to conclude for the plaintiff. I am willing to agree to all that has been said on the other side. I agree that the law requires that *on* the tender of the ring, gloves, etc., there should be a *general* declaration of the intention with which they are tendered, for otherwise, as my brother WHITLOCK has said, it would be *only* a dumb show. But in this case, there is in the proviso more than a tender, viz., a *special* declaration is annexed to the person of Gulielm Shelly, for the proviso is that William Shelly shall tender, during his life, etc., a ring, etc., *ipso Gulielmo tunc declarante* his intention to alter the use, and then it shall be void. I say that it is apparent that there is a *personal* declaration annexed to the person of Shelly, which is more than a *general* declaration. I grant that the law requires a *general* declaration, and that if the proviso required no more, inasmuch as it would only speak what the law says, it would not, as it has been said, operate at all. But it goes further than the law, for there is here a *special* declaration, as it

says *ipso Gulielmo declarante and expressing. Englefield's case* differs from this. There it is said, if *Englefield, or any other* tender and declare and not *ipso declarante* as in the present *case. There the declaration was indefinite, and he who tendered *might declare.* But the present case differs no more from the *Duke of Norfolk's* than a tongue does from a pen. There it is said, if the Duke, who was the feoffor, *signs* and seals; and here if the feoffor *speaks* his intention to alter the use; for it is said *ipso declarante* and expressing his intention. I subscribe to the objection, that if one speaks what the law says, it does not alter the point; and that if the lease be made rendering rent, with a proviso that if the rent be behind, it shall be lawful to distrain, the proviso is idle and vain. But if there was a special clause in the proviso, viz., that if the rent be behind it shall be lawful for the Chief Justice to distrain, there as the law does not say so, this is not idle. Likewise in this case there is a *special* declaration, *ipso Gulielmo declarante,* which is more than the law does require. This clause, therefore, is not idle, and, as it is annexed to the person of Shelly, it shall not be forfeited. I own that a *personal* authority may be transferred to another in some cases, as appears by a most excellent case. 11 El., Dyer., 283. *Quia qui facit per alium, per ipsum facere videtur;* also by 33 E., 3. *Annuity* 50. I. S. granted an annuity to a clerk, until he should prefer him to a living. I. S.'s mother preferred the clerk to a living, *at the request of I. S.,* and it was held that the annuity was *extinct, quia qui per alium, etc.* Likewise in 8 Rep., *Cook's case.* A copyholder may surrender by attorney in court, because the case speaks of a *general* custom; but it is said that if it was a *special* custom to surrender to the lord, out of court, this *special* custom *could not* be transferred to another. It is like *this* case. If the proviso had been *general,* another *might* have tendered and declared the intention; but it being *special* (*ipso Gulielmo declarante*), another cannot tender. It is annexed to the *person* and *cannot* be forfeited. I conceive that these words, *ipso declarante* in the *present* tense, shall be taken for the *future.* It is provided that *when the said money he shall tender, and shall declare,* that when, etc., as in 27 H., 8, 26. If I lease land to you on condition that my wife, being a widow and wishing to have it, your estate shall cease; it is as if I had said *that when my wife shall be a widow she shall have it if she will.* The second point, which is much relied upon, is that there is here an election to be made by Gulielm Shelly. My brother WHITLOCK has objected to the uncertainty of the thing to be tendered, but I conceive it supports my opinion. It is uncertain whether a ring, gloves, or money will be tendered, and therefore it is in the election of Shelly. It is uncertain whether it shall be tendered to *one* of the feoffees, or to *many,* or to *which* of them; *thus it is proper that Shelly should choose. For who

may say whether he will choose to tender the ring, the gloves, *or* the money. Nothing can be said more properly to be annexed to one's person than his *election,* and it *cannot* be transferred. Election is thus defined in Dyer., 281. *Electio est interna, libera, et spontanea separatio unius rei ab alia, sine compulsione, consistens in animo et voluntate.* Every word in this definition *annexes* it to the *person, est interna, consistens in animo. My* mind is not the mind of *another* man. Every man's mind is *his own.* What *can* be more personal? He, who is not privy, *cannot* make an election for another. The heir cannot make an election if his father neglects it. Dyer., 281. If a man gives I. S. P. acre and W. acre to I. D., *habendum,* the one for life, the other in fee. I. S. can make his election, but if he be attainted, the Queen *shall not.* For the election is here *personal* and cannot be forfeited. 3 Rep. In the *Marquis of Winchester's case,* it is said that a writ of error *cannot* be forfeited; yet it is not so *personal* as an election. A feoffee in some cases shall have a writ of error. Dyer, 1. In the above case, if I. S. had made a feoffment of both acres, his feoffee shall not make election, because he is a stranger. But *one* acre shall be forfeited, and the lessor (*or grantor*) being privy, shall make his election to enter on which acre he pleases. My brother WHITLOCK has said, p. 27, the tender is the *principal,* and the declaration is the *accessory.* But I think the declaration *is the principal, the chief, and special* matter of *this* case, as the tender may be made by *anybody,* but *Shelly himself* ought to make the declaration. I conclude with the authorities of the Exchequer and the Common Bench: conceiving that much reverence is due to their opinion; although a person at the bar has boldly scandalized them, saying that judgment was confessed by the King's attorney, for a good fee, on behalf of his client. I regard not this scandal: It is well known that the King's attorney (*Hobart*) is a learned and honest man. The Judges would not permit an attorney to confess judgment if they did not think him warranted by law in doing so. In this Court, lately, one Bridges, doubting his title in a forest, procured the attorney to sue him in a *quo warranto,* in order to obtain a judgment by confession; and as he only produced an old deed in the time of E., 2, and could not say much for himself, they did not permit the attorney to confess judgment, and Bridges went without the forest. With regard to the *judgment in the Common Bench—of the Judges that sat on this case, *one alone* is alive; it is my brother HATTON. I have talked to him, and he informs me that the judgment was according to law and the opinion of the court, for it was not passed hastily. I have examined the record and there were twelve continuances before judgment. I think, therefore, that there ought to be judgment *for the plaintiff.*

CREW, C. J. I concur in the opinion of my brother DODERIDGE. I did argue this case for the defendant at the bar of the Common Bench. Hence, I have in some manner espoused *that* side of the cause. Still, I think we ought to confirm the former judgment. *Englefield's case* differs from this. It is said there that if his nephew becomes vicious, etc., if at any time he tenders a ring, etc., it is only a flourish, for when he comes to the proviso, he does not limit the declaration to *himself,* as in this case.

[He argued in the same manner as DODERIDGE, J.; therefore, I do not repeat his argument.]

And thus the Court was *divided.*

[*Sir Henry Yelverton,* in arguing this case at the bar, appeared to slight the decision of the Exchequer and the Common Bench, for reasons which it was not thought convenient to communicate to the Court, in public. In effect, I have lately learned, that *Hobart* confessed judgment in the Exchequer for his client, and when he became afterwards Chief Justice of the Common Bench, and the case was argued before him, he was loath to contradict his former opinion. At the same time, the Judges were advised (*fuer' counsel*) to regard the Crown's prerogative—and without argument in Court, gave judgment *for the plaintiff. Post.,* 680, 700; Jones, 134; Noy, 79; Bendl., 139; Roll., 393.]

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*HUNGERFORD v. HAVILAND.—Trin. 2 Car.

In this case it is said that relief may be by tenure, and distress is incident thereto. But it may also be by custom, but then without custom, one cannot distrain for it. Therefore, if one pleads relief due by custom and does not allege also that distress is due by custom, it is bad—as in this case. 10 Rep., *Godfrey's case* allows this.

JONES, J. Reliefs are ancient. Glanvil. Rel., 9. Reliefs are by tenure and by custom. 3 E., 3, 13, per Hern. Reliefs reserved on grants are not properly reliefs, but services. 31 Ass., 12. In Wales there is a custom to pay 10s. for a mortuary and 10s. for alienation by relief and distress, when the land is worth £40.

DODERIDGE, J. Before the statute *quia emptores terrarum,* one might reserve a sum of money on each alienation by name of relief, and this is tenure and the relief if distrainable. But usually such matter of relief is by custom. Thus relief may be by tenure or custom. *Bracton* lib., 2, fol. 83, defines a relief, *Hæredibus fact, post mortem antecessoris.* For it is said, p. 3, H., 4, Pl., 7; Relief 14, that the successor pays the relief. But in our books both sorts of relief are confused. 18 E., 3, 26.

Avowry, 99; Brook relief, 13 or 3. It appears that relief by custom may be distrained. 3 E., 3, 13; Relief, 14; 5 E., 4, 72; 2 Assise, 3; 17 E., 3, *5; Avowry, 124; Bracton tenure, 17; Avowry, 225; Relief. It is not a tenure, but a fruit fallen from the tree, and an executor shall have debt for it, which could not be if it were a rent. 7 H., 6, 13; Br. debt, 194; Rep., 66.

CREW, C. J. I take this distinction. For a *Heriot custom,* one cannot distrain, for the lord has the best beast, by the death of the tenant, and if anyone takes it, he shall have trespass. But it is otherwise of a relief due by custom. *Postea,* pp. 694, 721; Jones, 132; Bendl., 180; 3 Bulstr., 323; 2 Keb., 677.

ANONYMOUS.

Action on the 5 El., 9, p. 304, against I. S. and counted that I. S. came to Rich, a master in Chancery, *habentem authoritatem,* to take affidavits, etc., and made a *false* affidavit *but did not allege that the affidavit was in Chancery, *in Cur. Cancellar,* as he ought to.

PER CURIAM. Otherwise, it is not perjury within the statute. And WHITLOCK, J., said that matters in Chancery are only *clerici primi ordinis* and used in ancient times to frame the writs and rank now with the cursitors. Therefore, an affidavit taken before them is not within the statute unless it be pleaded to be in *Cur. Cancellar.* Masters in Chancery heretofore were Priests. Hence they are called *Masters.* And the Lord Chancellor had the disposition of the livings of 20 marks, that he might prefer the masters in Chancery to them. *Postea, Luther v. Holland,* p. 724.

DANIEL v. UPLEY.—Trin. 2 Car. Antea p. 635.

This case came now to be argued again by the Justices.

WHITLOCK, J. There is only *one* main point in this case, viz.: What estate is given by this devise: *I devise my house to Ann, my wife, to dispose at her pleasure, and to give it to one of my sons, to which she pleases?* And I conceive the wife has here an interest, an estate for life, a trust, and an authority to dispose of it to one of the sons in fee; either by *suffering* it to *descend* to the eldest, or by *giving* it to any other son, as if there was a feoffment. Dyer says that a will is like an act of Parliament; the testator is the lawmaker, the devise is the law, and the Judges the expositors. There is a rule laid down in *Pownd's case,* in Plowden and Dyer, 357, that a will ought to be expounded in such a manner that *all* the words of it may stand if possible. My exposition

tallies with this rule. 41 Eliz., *Pigot's case:* one devised that the executors of his will should have the letting of his lands, during the minority of his heir, and it was resolved they had only an authority, and could not make a lease to try the title. Dyer, 136.

JONES, J. I grant that the wife by this devise has an estate for life, with *liberty* to dispose of it afterwards, as if the testator had devised the house to his wife for life, with *power* to dispose of the reversion to such of his sons as she pleased. It is a general rule to expound a will according to the intention of the testator, and to find that intention, there are two rules: (1) The intention ought to be taken out of *the words of the will, and not upon an averment. 5 Rep., *Cheny's case;* (2) If the intention be not apparent out of the words, they are to be expounded according to the rules of the common law. 22 E., 3. If one devises lands to I. S. without defining any estate, it is dubious what estate it meant, whether for life, for years, or in fee; therefore, it is left to the exposition of the law, which likens it to the case of a common conveyance, that makes it an estate for life. 28 Eliz., *Eras. Cook's case.* There were two coparceners, and one of them devised *all* her part to I. S. without expressing what estate he should have; now it was dubious inasmuch as her estate was a fee simple, and it was therefore left to the interpretation of the law, which made it an estate for the life of I. S., and it was so adjudged. Likewise in Popham's time in *Dixon's case.* One had two sons, and devised his lands to them equally to be divided. And as it did not express his intention with regard to the estate they should have, it was left to the decision of the law, and the court resolved that the eldest son should have a fee, and the younger an estate for life. 3 Rep., 39b. For the law says that if a man devises land to his youngest sons, it is only an estate for life, but if he devises it to the eldest, although strictly, it is only an estate for life; yet as it meets the reversion, it becomes a fee, and this is the reason of the judgment of the court in the above case. 24 H., 8, in the Common Bench, it was held that if I devise lands to *I. S. habend. to him, and his, or to do what he will with it,* it is a fee. I have seen the case, in the handwriting of Justice WARBURTON. But in this case it is the addition that makes the difference. If the case had been barely: *I devise lands to dispose at will and pleasure,* as my brother WHITLOCK has said, it is a fee. Yet I doubt it, and incline to think it is merely an estate for life. For if one devises land without expressing what estate, it is only for life, and the words: *to dispose at her will and pleasure,* shall relate *only to the profits.* This case differs from the one in Petit. Br., 532; Br. Devise, 38, for there it is said to dispose *at her will and pleasure* as in our case, but it is also added *and to sell,* which is not in *this* case, and this last clause makes *that* a fee simple. M., 19; Jac., B. R. rot., 12, 72; *Townsend's case.*

One devises that his executor shall dispose of his land, he shall dispose of the reversion. And in this Court it has been adjudged that if I dispose of land to I. S. in tail, or condition of granting a rent charge in fee, this shall bind the issue in tail, and the remainderman, inasmuch as the estate was made on this condition. If I devise land to my wife for life, and to give it to some of my sons, it is very clear, and the law is on my side. *I agree with my brother WHITLOCK on the exposition of the words of the will. It has been further objected that the woman was *covert* at the time she made the feoffment. Still I think it is a good one. For although generally a *feme covert* cannot make feoffment and give livery (for if she gives livery the feoffee is not disseised without the entry of the husband), still circumstanced as this case is, the wife might well make the enfeoffment. She has the estate with the trust as first, and she shall not take advantage of her coverture, as in the case cited before, when one devises in tail, with condition to grant a rent charge in fee. 10 H., 7, 20. A *feme covert* executrix may sell to her husband. 34 E., 3. *Cui in vita,* 19. Land was given to a woman, on condition that she should sell it and distribute the proceeds for the soul of the feoffor. Afterwards, she married, sold, and distributed and her husband died; she shall not have a *Cui in vita* for the taking a husband was her own act. Therefore I say that that if a *feme sole* levies a fine of her land, and marry, she shall not have five years after her husband's death.

DODERIDGE, J. There are two questions in this case. The first, whether the wife has a fee, or an estate absolute, with *power* to alien. The second, whether she has a fee, with an implied *condition* to alien, or a fee with *power* to alien but on *condition* that *if she does alien,* then *she shall alien to one of the children, which she pleases.* My brothers, who have spoken before me, conceive that she has, by this will, an estate for life, with *power* to alien the reversion. I cannot see the reason of this conclusion. The will does not imply that she is to have an estate for life, for by the first words, *I give it to her to give and dispose at her pleasure* (if she had it not by the subsequent ones) I hold it clear that he has a fee simple. Therefore, I conceive that by this devise the wife has a fee, with power to alien *conditionally* that she alien to one of the children. In this I agree that she *may* alien, as my brothers have said, and I concur with them that judgment be entered for the defendant. But I differ from them in respect to the quality of the wife's estate. They hold that it is an estate for life, with *power* to alien the remainder; and I conceive it to be a fee with a *condition,* that *if she does alien,* she shall alien to one of the children which she pleases. It is a common rule that all conveyances, but especially testaments, ought to be construed according to the intention of their makers, *ex vi vocabuli.* For

a testament is *testatio mentis.* Plowden, 343, 179. And it is a just observation that all words ending in *ment* are to be *expounded according to the intention, as *parliament, testament, arbitrament,* etc.

2. A testament is defined thus: *testamentum est voluntatis justa sententia. Ergo* the intention ought to be observed, otherwise we cannot judge what was his *will.* Bracton says that a will is *donatio ex causa mortis,* and it is a rule *de mortibus nil nisi bonum,* and to speak best, the intention ought to be regarded.

3. A will ought to be taken according to the intention, inasmuch as parties, at the time of their death are in trouble. *Put thine house in order, for thou must die,* is a good sentence. It instructs men that their actions and will thus made ought to have a favorable construction, being made in haste. And *jacentes in extremis* ought to be pitied and their actions favored.

4. A will is taken according to the intention, inasmuch as the party is *inops consilii.* Lawyers are not always at hand, and it is often made *without* advice. Plowd., *Scholastica's case.* Those reasons show that a will ought to be taken according to the intention of the testator. But this rule admits of the following exceptions:

(1) A will shall not be allowed, or favored, where it is repugnant to itself. 1 Rep., 58.

(2) It shall not be permitted to thwart the rules of the law. Plowd., *Bret's case.*

(3) The intention shall be construed by the words of the will and not by anything *out* of it. 3 Rep., *Cheny's case,* 68.

Except in these restrictive instances, Judges construe wills favorably. In certain cases a will is good, though a conveyance would be bad. A devise *habend., forever* is a good fee. 18 H., 8, 9; 34 H., 6, 7, and *ibidem* it is said: devise to I. S. and *assignatis suis* is a fee simple. But it is otherwise in a conveyance. Thus a devise to *two* and *hered.,* with a clause of warranty to them and their heirs, is a good fee by devise, but not by conveyance. 19 H., 6, 23. If a man devises land to I. S. after the death of his wife, she has an estate for life. 13 H., 7, 1, 29; H., 8. *Br. devise,* 48; otherwise in a conveyance. Thus, if I. S. has issue a daughter who has issue a son; if one gives lands to I. S. and his heirs male, of his body, it is no entail (*to the son, I suppose*) for the son ought to derive his estate *through* a son; it is otherwise in a will. 28 H., 8; Devise, 18; Bro. devise, 32. All those cases prove that Judges have always expounded wills according to the intention of the testator.

The words here are to give and dispose, etc.; the word *dispose* gives no *interest,* but only an *authority* to *ordain.* 28 H., 8. *Dyer, 26, and one may dispose of that, the right whereof is another's. There are two judgments which prove that one may have the *disposal* of a thing where-

in he has *no* property. 4 E., 2; Waste, 11, 17; E., 3, 7. And the same case proves that when one has license to use a thing at his pleasure, still he ought to use it *legally* and not *abuse* it. The wife, in this case, has not the fee with a *condition* to alien, for a condition is *compulsive;* and here she is not *compelled* to do *any* thing, she is not *compelled to alien* the land. If she suffers the land to *descend* to the eldest son, the will is performed. But this estate is a fee, with *liberty* to alien if she *pleases,* but with this *condition:* that if she aliens, she *ought* to alien to one of the children. With regard to the other doubt that has been started, whether a feoffment made by a *feme covert* be good, generally an infant and a *feme covert cannot* make a feoffment—the one is disabled by nature, the other has submitted herself to her husband. 13 H., 7. But in cases like *this,* a *feme covert can* make a feoffment and it shall bind her, her husband, and their heirs.

1. In case of an authority, she may enfeoff her husband. 10 H., 7, 20, *by the court.*

2. In case of a *condition,* which is made for the benefit of the wife, it shall bind her. E., 1; Voucher, 289; *Cui in vita,* 19. It is clear *per Perkins* title *Feoffments.* One makes a feoffment to I. S. and a letter of attorney to the wife of I. D. to make livery, it is good. It is said in 18 E., 3, 131, a woman made a feoffment and married, and directed her feoffees, on her deathbed, to make a title to her husband; it is not good, neither in law nor in conscience; and there is an express reason for it. Because a *feme covert* cannot make a will. 19 H., 6. One devised that his executors should convey his lands by a fine: they have not the land; yet they may convey it by a fine, and the conusee shall be in *by the will.* A distinction is taken in 9 H., 6, 25; 11 H., 6, 12; 21 H., 4, 24. If I devise lands to my executors to sell, they have *both* an *interest* and an *authority* to sell. But if I devise that my executors shall sell, etc., they have *only* an authority; still they may enter and sell, and it will be good to avoid incumbrances, and the *heir* and *vendee* shall be in *by the will.*

CREW, C. J. I concur with my brother DODERIDGE. To *dispose* and to *give* are synonymous expressions. The *usual* question after a man's death is: How has he *disposed* of his estate? 15 H., 7. One devised lands to *I. S. *forever habend. for life,* it is only a life estate. It has been so adjudged. One devised the fee of his land to his wife, remainder to *B.* for life, remainder to *C.* for life; the wife has an estate for life, with a remainder expectant, and her husband shall *not* be tenant by curtesy. With regard to the other point, I remember that Mr. Butcher, my cousin, suffered a recovery of certain lands to the use of himself for life, remainder to the county of Leicester (merely for countenance) with power to give, limit, and dispose of the lands to his wife for life; afterwards, by deed, he granted the lands to his wife for life, and after great

deliberation, it was adjudged that the wife shall have it by the gift of the husband. But the estate rises out of the *interest* of the recoverers.

Per totam curiam: judgment for the defendant.

Then, with regard to the quality of the wife's estate, WHITLOCK and JONES, JJ., were of one opinion, and CREW, C. J., and DODERIDGE, J., of another. But they all agreed on the main question, that the wife *may* alien. *Postea,* p. 726; *antea,* p. 635; Jones, 137; Noy, 80; Bendl., 178; 1 Cr., 678, 330; Institutes fol., 9, 6; Rol., 329.

SURRY v. COLE.—Trin. 2 Car.

I. S. made a lease for years, rendering rent to him *durante vita et assignatis suis. Bear* argued that no rent shall be paid after I. S.'s death. 27 H., 8, 19, per Audley. The reservation is your own creature; you may direct it to go, as you please, but it shall not go in any other manner than you direct it. The reservation being to his *assigns* does not operate, because the law says *as much;* according to the common rule, that the addition of such things as the law *includes* does *not* operate. 31 Assize, 20. A reservation shall be taken strictly *against* the reserver. Plowd., 171; Tr. 15, Jac.; Com. Bench, rot., 3077; *Wotton's case, postea,* p. 817. One made a lease to himself, rendering rent to himself *and his assigns durante vita;* adjudged that the lessor's death avoids it. P., 33 El.; C. B., 10116, rot.; *Butcher's case; postea,* 799 and 807; Bendl., 188; Palm., 481; Noy, 96.

*THOMPSON'S CASE.—Trin. 2 Car.

Two coparceners in tail, the husband of one of them being tenant by the curtesy, joined with the other in a lease rendering rent to both, and their heirs; it is not a good lease by 32 H., 8, 28, p. 225 of estates tail; as it is not reserved to the donee and his heirs, but to the tenant by the curtesy, jointly with the other, to whom the rent goes strictly, as reserved by the lessor and not otherwise. *Postea,* p. 799.

*ADAM'S CASE.

JONES, J., said if one says of I. S.: *He is a thievish knave,* it is not actionable; but a *thievish pirate* is actionable; and he added a pirate is triable in the Court of Admiralty for restitution of goods, but for his life he is triable by commission of Oyer, etc. 4 Rep., 19.

CLIMSON v. POOLE.—Trin. 2 Car.

The condition of the obligation was that the plaintiff should have free egress, ingress, and regress in the house of I. S. The defendant pleaded that he *had* egress, ingress, and regress, without saying *free* ingress, etc.

WHITLOCK, J. It is a bad *bar.*

The plaintiff replied that he had shut *all* the *outward* gates. In this case the plaintiff has a right to *part* of the house, viz., to the chambers; therefore he ought not to be barred of his entry.

DODERIDGE, J., assented. If one is obliged to permit I. S. to have ingress in his house, he ought to have it at the *usual* entry door. He is not to come through a hole, a back door, or down the chimney. And if the other leaves the entry door *open* and digs a ditch before it, so that he may not come in without skipping, the condition is broken. In 18 E., 4, it is said, if I am obliged to suffer I. S. to have his way over my land and he comes to go over, and I take him by the sleeve and tell him: *Come not here; for if you do, I will pull you by the ears,* the condition is broken.

JONES, J., *contra.* I am not obliged to suffer my house to be left open at midnight for the ease of I. S., for thereby it may be *robbed, and I in danger of my life. But on request he ought to be permitted to come in at midnight. 5 Rep., 91, 93, *Seman's case.*

DODERIDGE, J. It has been pleaded that he shut the doors continually; otherwise it would be as my brother JONES has said. If I am obliged to let I. S. have a way over my land and I lock my gates, the condition is broken, for I cannot compel him to go over the fences or send to me for the keys. It seems to me there is a difference between the case of a field and that of a house, as a house is the owner's castle and ought to be kept with more caution than a field, as appears by 5 Rep.

Sed the parties agreed, postea, p. 736; Bendl., 172.

ANONYMOUS.—Pasch. 1 Car.

JONES, J., said in a plea in the spiritual court where a custom is alleged, it may be traversed there, if the parties consent to it. But if the custom be denied, a prohibition shall be awarded and the spiritual court ousted of its jurisdiction.

HODGES v. MOORE.—Pasch. 2 Car.

Moore, having a Parliament protection, procured the speaker, Henry Finch, to write a letter, in the name of the Parliament, to the King's Bench, to stay judgment. And the court was much offended at this, and would have returned a sharp answer if the Parliament had not been dissolved; for it is against the oath of the Judges to stay judgment, either by the great or the petit seal. But the way, in such a case, is to procure a *supersedeas,* which is a special writ, appointed in such cases, which is allowed in a legal course. But the letter was not regarded. See Mich., 12; E., 4, in a matter of privilege of Parliament, where one was held answerable to an action of account, notwithstanding the privilege of Parliament. *Postea,* 739; Bendl., 184; Noy, 83; *postea,* p. 740.

*BUTTON'S CASE.—Trin. 2 Car.

One said of Button, a justice of the peace: *Mr. Button, five or six years ago, had two servants prosecuted for stealing of sheep, and he desired me not to prosecute them.*

CREW moved in arrest of judgment that these words are not actionable, for an honest man may be prosecuted. Besides, it is not averred that *there were* any sheep stolen. T., 36; El. B. R., *Ball's case. He is a cunning knave, and acquainted with cut-purses; and there has not been a purse cut in Nottinghamshire these many years, but he hath had a part.* These words are general and not actionable, unless it be alleged that there was a purse cut, specially. 45 El. B. R. rot., 119. He keeps *thieves and traitors,* not actionable, without alleging the very fact.

JONES, J. Perhaps it is not necessary in this case, to aver that the sheep were stolen, for a man may be prosecuted unjustly. A justice of the peace ought to suffer the law to have its course, which will give a remedy to the party grieved, and not to stay the proceedings privately. It is not his duty. Therefore, it is a scandal to Mr. Button to say of him, as a justice of the peace: *he desired me not to prosecute,* etc. But here, for another reason, it seems to me the *words* are not actionable, as it is not averred that Mr. Button was a justice of the peace of the county *in which* those words were spoken; inasmuch as it is not against his office to endeavor to stay proceedings in a county in which he has nothing to do—as a justice of the peace. P. El., 6, B. rot., 833, *Novel's case;* Poph., 180; 1 Cr., 308, 342.

CONSTABLE v. CLOVERY.—Trin. 2 Car.

Covenant, viz., the plaintiff freighted his vessel to the defendant, and by a charter party indented, he covenanted with the defendant and *A.* that his vessel would sail with the first fair wind for Cadiz. And the defendant and *A.* jointly and severally covenanted with the plaintiff that if the vessel should go the intended voyage, and return to the Downs, he should have from them so much for the freight; but in case she went to Amsterdam, they would pay him so much more. He alleges *that the vessel went to Cadiz and returned to the Downs, and the defendant did not pay the sum agreed upon for freight, primage, etc.

The defendant pleaded a special plea, and traversed *absque hoc* that the vessel sailed with the first wind; and the plaintiff demurred, and the defendant joined.

STONE, J. It is not a good traverse. For the substance of the covenant is, that the vessel shall *go,* and not that she shall sail with the *first* wind; which may vary and change every hour, and this construction is supported by the covenant, which is to give him so much for the freight, that is to say, for the voyage, and not to sail with the first wind. *Ughtree's case,* 7 Rep.; 3 H., 3, 33; 48 E., 3, 34. A man covenanted to go to the war, with another, and the other covenanted to give him so much therefor. Covenant lies, and the man may have his action, whether he goes to the war or not, at his election.

And *per Curiam,* the first point was held bad, but

JONES, J., said that if the defendant had covenanted that if the plaintiff would go to Cadiz with the first fair wind, he would pay, etc., there the plaintiff ought to aver that he went with the first wind.

DODERIDGE, J. The wind is uncertain; therefore, it cannot be the substance of the covenant.

2. The plaintiff declares that by indenture between the plaintiff and defendant, it was covenanted, etc., and on oyer there were three parties, the defendant, *A.,* and *B.* This is bad. *Fitz v. Executors,* 80. 15 E., 3. If two be bound and one of them dies, in an action against the survivor, the plaintiff ought to aver the death of the other in his declaration, which JONES, J., assented to.

3. The covenant is to pay primage, etc., and it is averred that he did not pay it, but he ought to have averred in his declaration what the primage is; for it is uncertain.

DODERIDGE and JONES, JJ. It is according to the covenant, and it is well—

4. The covenant is by three jointly and severally, that they pay, and the breach is assigned that the defendant did not pay; he ought to have gone further and say, nor any of the others.

CURIA. The distinction is, that when the action is brought against *all,* the nonpayment of all shall be alleged. But where the suit is against one *only,* it is sufficient to say that *he* did not pay. And if any one *has* paid, it is proper for the defendant to *plead* it. It is the same when two are bound jointly and severally; in a suit against *one,* it is sufficient to say *he* did not pay, otherwise when against *both.*

And *Davenport* (the King's attorney) took another exception. There the declaration is, that it was covenanted *inter parties predictas, per inœnturam fact. tali die;* but he does not say that it was *covenanted,* *agreed, or witnessed that he would sail with the first wind.

And, after argument, it was adjudged for the plaintiff. *Antea,* p. 638; Poph., 161; Bendl., 146; Noy, 75; Palm., 397.

WALDEN AND GESNER v. URSY AND URSY.—Pasch. 1 Car.

Walden and Gesner, sheriffs of Coventry and Lichfield, brought debt against Ursy and Ursy for £7 0 6d. for fees for apprehending T., who was condemned to pay the defendant £181, on a writ to them directed *out* of this court. They pleaded that by 28 El. no sheriff, etc., shall take for serving any execution more than is limited in the statute, viz., 1s. for every 20s. where the sum does not exceed £100, and 6d. for every 20s. over and above the said sum of £100. The defendant pleaded the proviso in the statute, *that this act shall not extend to fees to be taken within any city,* etc., and prayed judgment, as it appears by the declaration, that the execution was levied in the city of Coventry.

Jermyn for the defendant. The sheriff ought to have only £4 6d. for the whole execution; inasmuch as at common law he had no fee of common right, and he cannot maintain an action of contract for his fee, and he cited *Batho v. Salter;* as the statute is *introductio novi juris,* it ought to be taken strictly—and it may be expounded here both ways.

CREW, C. J., assented: It is not inconvenient that he should have more fees for £100 than £199, inasmuch as when the sum is large, he shall be well paid, although he has only 1s. for every 20s. of the first £100.

DODERIDGE, J. The statute admits of two constructions, therefore it is proper to inquire into its *true* meaning. The mischief was, that sheriffs used to be slack in doing executions, for there was *much* danger and *no* profit; as if the party escaped an action on the case laid against the sheriffs, besides the trouble of conveying and keeping him in prison.

Therefore, this statute was intended to constitute a medium between the oppression of the suitors and the avarice of the officers. And as the danger is greater where the sum is larger, it would be hard that the fee should be less.

JONES, J., concurred. The statute gives rise to three questions.

1. The *nature* of the action. Whether *debt* lies, and it is adjudged that it *does*. For when a sum is given by a statute and no remedy is pointed out, debt lies. *Proby and Lunley's case.* Mo., 883.

*2. The words of the statute being: *He that makes execution,* etc., shall have the fee: When the sheriff makes his warrant to the bailiff of a liberty, who makes execution; and one of them makes the extent and the other the *liberate,* which of them shall have the fee?

3. With regard to the *sum* in question, I concur with DODERIDGE, for the reason he has given.

WHITLOCK, J. So do I. In *Lunley's case,* it was adjudged that the sheriff may refuse to do execution until his fee be paid.

The question is here out of the proviso; whether it extends to executions done in cities on a writ out of *this* court; or only when a judgment is given *there,* and execution made on a warrant from this court.

CREW, C. J., DODERIDGE, JONES, and WHITLOCK, JJ., agreed that in this case the sheriff is out of the proviso.

DODERIDGE, J., said, when a bailiff in a city makes execution on a warrant, he has not so much trouble and care. But the sheriff's labor is the same, when he makes execution there; therefore, he is out of the proviso. When the city is a county of itself, if the sheriff or bailiff makes execution, perhaps he shall not have the fees limited in the statute.

JONES, J. I agree to the main question. But I would make it a question, if an execution was to issue out of *this* court, to take a defendant in a city, and the sheriff makes a warrant to a bailiff there, whether he is entitled to the fees in this statute. But if the town be a county of itself, on execution out of this court, he ought to have the fees.

DODERIDGE and WHITLOCK, JJ., assented.

And afterwards judgment was given for the plaintiff. DODERIDGE, JONES, and WHITLOCK, JJ., being of an opinion, and CREW, C. J., of another. JONES, J., cited a case in 19 Jac., *Empson v. Bathurst,* in the Common Bench, on the same question, where the court was divided. But he was of the same opinion *there* as *here,* and it was adjudged that the sheriff cannot take a double obligation for his fee, inasmuch as the statute gives him his fee but no penalty. *Antea,* p. 642; *Postea,* p. 668; Palm., 397; Bendl., 191; Poph., 173; Noy, 75; Cr. 287; Vin., 20 and 50.

*GERRARD v. NORRIS.—Pasch. 1 Car.

In trespass, on not guilty, there was a special verdict: That the plaintiff was in under an *elegit,* by which the land was extended; judgment being Crastin. Trin. 15 Jac., which was the 20th of June, etc. The defendant claimed under a statute acknowledged the same term, but *before* the judgment, viz., the 2d of June. I have heard that it was adjudged that the plaintiff had the best right, for he claimed under a judgment, and all the term is, in law, but *one* day.

JONES, J., said that if lessee at will makes a lease for years, and enters, it is a disseizin at the election of him who has the free tenement. 3 Cro., 102.

JONES v. OWEN.—Pasch. 1 Car.

Debt against lessee for years for rent. He pleaded that the lessor, before the action, made I. S. bailiff of the manor, of which the premises were part, and gave him power to receive the rent from the lessees, etc., and also to make demises for years; and it was agreed between the defendant and the said bailiff that he should surrender him his lease to the use of the lord, and pay him 100s. to the use of the lord, and that then he should be discharged of the rent. The plaintiff demurred and a peremptory day was given.

But the parties made it up, *ut audivi.* Palm., 402.

*WARRINGTON'S CASE.—Pasch. 1 Car.

Warrington had execution out of this court by *fieri facias* of a term which was sold by the bailiff of a liberty; after which, on *another* judgment, the bailiff delivered the term to another, pretending that the former judgment and execution were *fraudulent.* And in trespass he justified.

PER CURIAM. He is *no* judge of the fraud. The court will not give such opportunities to sheriffs and their officers.

PLUMLEY'S CASE.—Pasch. 1 Car.

In debt, the defendant pleaded an accord with the plaintiff, but did not plead any satisfaction. Issue joined on the *accord* and found for the plaintiff. JONES, J. He shall have judgment. But if it had been

found for the defendant there should have been a *repleader. Quære,* whether now, after the statute, the plaintiff should not be barred.

There were only 33 jurors returned, and it did not appear that a *tales* was awarded. JONES, J., held this did not differ from *Gardner's case;* 5 Rep., and it is well.

BATHO v. SALTER.—Pasch. 1 Car.

Action on the case for a promise. The plaintiff counted that one John Green was indebted to the defendant in £30, that the defendant sued him, etc., so that he was outlawed; and at Trin. 18 Jac. took a *cap. utlagat.* against him, and directed it to the sheriff. Then he shows that there was a conversation between him and the defendant respecting the arrest of John Green; and the defendant assumed that in consideration that the plaintiff would procure a special warrant from the sheriff and arrest John Green, that he would pay him 40s., and he shows how and when he procured the warrant, and arrested John Green, etc. On *non assumpsit* pleaded, there was a verdict for the plaintiff.

It was moved in arrest of judgment that the action does not lie: (1) Because the consideration is against the statute *23 H., 6, 20, p. 147, and if it were *out* of the statute, yet it would be void at common law. For it is an extortion to take a larger fee than the law allows the sheriff or his officers.

Littleton, e contra. The words of the statute refer to bonds made by the party arrested, or to be arrested; but *here* the promise is made by the defendant and not by him who was to be arrested. In *Audley's case,* 7 Jac., it was resolved that a bond made by him who *prosecutes* the arrest is not within the statute. But there it was resolved that if the sheriff *himself* took such a bond, it is void at common law. For he is an *appointed* minister, and the people are obliged to go to him; therefore, no sort of extortion shall be permitted him. 21 H., 7, 19. Bare fees may be enlarged by custom or by the direction of the courts. H. 13 Jac. *Sherley and Packer's case.* If a sheriff takes more than he is allowed, it is extortion, and a promise to pay it is void. But *this* case differs for two reasons.

1. Because the sheriff ought to execute *virtute officii;* and one of the articles in *eyre in Fleta* was to inquire *de vicecomitibus qui munera capiunt.* Also it was ordained that no officer of the King should take rewards.

(2) The sheriff and his officers in the country are persons to whom all are compelled to come; and of necessity *must* be employed to do execution. If, then, such promises were tolerated, no execution would

be made without. But in this case the plaintiff is not an officer, and the retainer of *him* was *voluntary*. As if the defendant had requested me to go with the sheriff and assist him to do execution, and in consideration that I would go, promised to pay me; I have my action. In this case it cannot be extortion, for the request was *voluntary*. The defendant *begged* him, and at the time of the request he was *no* officer, but afterwards procured a warrant. And this is not like 2 H., 4, 9, and Dyer, 324 and 355.

Trotman. The action does not lie. 29 El., 4., prohibits sheriffs or any of their officers to take, etc., for serving an extent or other execution. And this is an execution, for judgment is given before the coroners that the defendant be outlawed. Although it be not within the words, it is within the equity of the statute; as an obligation to save the sheriff harmless is within the equity of 23 H., 6, and this is a promise *within* the statute by the equity of it *10 Rep., *Bewsage's case; Onesby's case,* 19 El.; 42 E., 3, 6.

WHITLOCK, J. It is void at common law, and it is the same respecting the sheriff or his officers. 13 Jac., *Sherley and Packer's case*. A promise to give to the sheriff or his officers more than the fees is void, being contrary to the common and statute law. There is no difference in this case. The plaintiff arrested John Green, as the sheriff's deputy; it was the sheriff's act. It is a *sale* of justice.

JONES, J. There is no difference in this case. Yet I do not agree that it is the same in the case of a promise to a mere stranger, in case he would go to the sheriff and procure him to arrest I. S. it is a good consideration. As if I promise £10 to I. S. for procuring the sheriff to arrest another; whereupon the sheriff makes his warrant to another to arrest I. D. I. S. has a good cause of action, as it was by his procurement, and he is *no* officer of the sheriff, but in this case the plaintiff *was,* and the sheriff shall be charged for the escape. Much mischief would ensue if it were not so, and statutes would be eluded. It is also void at common law.

DODERIDGE, J. I concur. He made arrest as a servant of the sheriff. This court has no other immediate officer in temporal matters, except the sheriff, and in spiritual affairs, the ordinary; and everyone who does service in this court acts under *his* authority. Although the promise was made to him *before* he was an officer, still it is an act that *belongs* to the *office* of sheriff. I agree with JONES, J., and my brother LITTLETON in the case put by them, in case of *assistance* given to the sheriff, for it is not to perform anything *belonging* to the sheriff's office, but merely to *assist* him, although everyone is bound to assist the sheriff; but in this case *it is* the sheriff's act. It is void both by statute and at common law.

CREW, C. J. I grant it. But I doubt the last case of *assistance* given to the sheriff.

It was also doubted whether it is contrary to common law, because it is for the furtherance of justice, and at this day, if common fees *only* were given, executions would be made *ad Græcas Calendas.*

Quærens nil cap. per billam. Jones, 65; Bendl., 138, 147; Noy, 76; 1 Rol., 16; Roll. rep., 313.

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*CROUCH v. HAIN.—Pasch. 1 Car.

Ejectione firmæ. The plaintiff had judgment in the Common Bench, and the defendant brought error in the King's Bench, where it was affirmed. Error was brought in Parliament, and the Chief Justice, as the practice is, carried the record there. Now, by the death of King James, the Parliament was dissolved, and the plaintiff prayed execution.

Davenport. The writ of error is abated by the act of God, and not that of the party. There is a difference when it abates by the act of the party, for then it is not a *supersedeas;* and when it drops by the act of God, it is. I pray that execution be stayed till the next Parliament.

Noy, contra. The party may have a new writ of error in Parliament, but it shall not be a *supersedeas.* And it is doubtful whether error in Parliament be a *supersedeas omnino,* for the record remains here, 1 H., 7, 19. If one be in execution under a judgment in the King's Bench, and brings error in Parliament, he shall *not* be bailed; but if he be in execution in the Common Bench, and he brings error in the King's Bench, he *shall be* bailed. In this case there has been much delay. The plaintiff brought error in Parliament, and on the writ of error in this court did not assign error till a *scire facias* was sued against him, and he has not yet assigned error in Parliament. In 8 Eliz.; 6 H., 7, 15; 3 E., 4, 3; 7 H., 6; Execut., 15; 19 H., 6, 8, where delay will prevent a writ of error from serving as a *supersedeas.* The Parliament and writ of error *ended* together, 22 E., 3, 3; 1 H., 7, 19; 15 R., 2; and he may have *another* writ. If the writ of error is determined, surely the *supersedeas* is. *Godsave and Sir Richard Heyden's case* proves this. In an assize of *Novel disseizin,* judgment was given in the assizes, and error was brought and the record delivered by *Sir Edward Coke* in Parliament. 10 Jac., and Parliament was dissolved the 11 Jac., adjudged that the plaintiff shall have execution. We know not whether he *will* bring a writ of error to the *next* Parliament; and if he does, it will not be a *supersedeas.*

JONES, J. If he gets a *new* writ of error, there may be a *doubt* whether we ought to award execution. A distinction is taken in the

books, when the writ abates by the *act* or *fault* of the *party;* there the second writ shall not be a *supersedeas.* Otherwise when it abates by the act *of *God,* or without any *act* or *fault* of the *party,* as want of form. But here there is *no* writ depending, and there is no reason to stay execution.

DODERIDGE, J., and CREW, C. J., assented. Although we do award execution, he may bring error to the *next* Parliament. Here is no writ depending. We are not to know whether he wishes for a *new* writ or not. Therefore, *Fiat executio.*

DODERIDGE, J., cited 8 H., 6., *tit. error.* Error brought in Parliament. The plaintiff prayed a *scire facias* to *next* Parliament, and denied that it works any delay. It is so in this case. *Postea,* 739; Noy, 76; Rol., 765; Jones, 66; 2 Cr., 241; Mo., 834.

TODMAN v. WARD.—Pasch. 1 Car.

Ejectione firmæ. After verdict for the plaintiff, the defendant moved that there is a variance between the writ in the file (which was M. 22) and the declaration, viz., 10 acres of land more in the declaration; and there were other variances. For which judgment was arrested. But it was amended afterwards. See *postea,* p. 691.

HALE v. HUGGINS.—Pasch. 1 Car.

Resolved, that where the words of the statute were that the plaintiff shall have no more costs than damages, etc., in an action, etc., *begun and prosecuted,* etc., and the action was *commenced before* the Parliament and *prosecuted afterwards.* The plaintiff shall have no more costs; although a man is said to *prosecute* an original writ when he *begins.* But it was answered that the *prosecution* is *after* the commencement. Therefore, etc. *Sandal's case, antea,* p. 632.

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*HOPKINS v. OFFAL.—Pasch. 1 Car.

In account the defendant pleaded that he had accounted before with the plaintiff in Cumberland, etc., and this plea being rejected, there was judgment, *quod computed.*

Banks moved that it was a good plea, and prayed that it might be allowed. 45 E., 3, 24; 34 H., 6, 23.

Brooner, the secondary, showed to the court that it was refused, being a foreign plea.

JONES, J. A foreign plea is not receivable, unless it be upon oath, and is transitory. As here *that he accounted* is not receivable unless upon oath.

DODERIDGE, J. There is no inconvenience in suffering the judgment to stay. For that *he heretofore accounted with the plaintiff* is a good plea before the auditors.

Whereupon, by CREW, C. J., and DODERIDGE and JONES, JJ., let the judgment remain.

BISHOP OF NORWICH v. CORNWALLIS.—Pasch. 1 Car.

Debt on an obligation for £1000. The plaintiff declared on a deed bearing date the 30th of November. 20 Jac. The defendant had *oyer* and it was entered *in hæc verba.* It was to stand to the award of Mr. Rich, in all controversies between the plaintiff and the defendant on the first day of June. The defendant replied that it was true he did *write* such a deed, bearing date as the plaintiff has counted, but that *sigillavit, signavit et deliberavit* it on the 28th of April, 21 Jac., *after* which day and *before* the 1st of June next *ensuing,* no award was made; *absque hoc, quod cognovit se teneri et firmiter obligari, mode et forma, prout* the plaintiff has counted. Whereupon the plaintiff demurred specially.

Calthrop, for the plaintiff. The traverse is *bad,* on account of its *repugnancy.* He confessed the *writing* and *delivery* of the deed, and denied that it was *modo et forma;* which is repugnant. For if he had not said *modo et forma* it would *most clearly* be repugnant, and his saying so does not mend it; for it goes only to a *circumstantial* part of the plea, and not to the *material* one. Littleton, 483, on a *cui in vita;* 19 H., 6, 47; 20 H., 6, 14. The defendant pleaded not guilty *modo et forma;* he may be found guilty on *another* day or place that the plaintiff has counted. So the date of the deed is not a *material,* but a *circumstantial* part, and therefore it is as if *modo et forma* had *been out, and then, if the traverse is *repugnant,* the plea is *bad.* 3 E., 6, 65; 2 M., 121; and 41 Eliz.; *Sands and Leigh.* In trespass for taking beasts in D., the defendant justifies *quia* damage feasant in the frank tenement of S., and afterwards he carried them from S. to the pound of D. and impounded them there, and that is the same taking, etc., *absque hoc,* that he took them at D. and it was adjudged repugnant, for the driving them from D. to the pound was a continuance of the taking.

2. Admitting that the *modo et forma* helps the repugnancy, still the plea is bad, 36 H., 8, 13. Where a traverse is *modo et forma* it is as

if all had been particularly expressed. And if it had been particularly expressed, *absque hoc cognovit se deliberare,* 30 Nov. 20 Jac. it is not well; for notwithstanding that this traverse be good, still we have a cause of action, for perhaps it was on the 10th of July. 18 H., 7; Kell., 50, in a *quare impedit.*

3. In the allegation, viz., that no award was made *after* the 28th of April and *before* the 10th of June, they have not *excluded* the 28th of April, and perhaps the award was done on *that* day, and is to be performed. 4 Rep., 14, *Buckley's case;* 22 El.; 4 El., Dallison's reports. In 31 Eliz. it was resolved, that where the statute is, that a deed shall be enrolled within six months after the date, if it be enrolled on the day of the date, it is well enough.

4. He has not performed the words of the condition, which were to perform an award made before Whitsunday, being the 1st of June, and perhaps Whitsunday was on another day, in which case, *utile per inutile non vitiatur.* But Whitsunday shall be the day, in the performance of the condition.

Damport. In a case where the deed bears date on a certain day, and if it be done on the same day, the plaintiff has a cause of action, and otherwise he has not, the *day* becomes material and traversable. But it is not material in this case; if it were, still the form is not here, *absque hoc quod cognovit se debere et teneri modo et forma,* as the deed itself.

Athow, contra. The words are to perform an award respecting all matters of controversy *then* depending. And there may be matters depending on the 28th of April which did not exist on the 20th of November, so that the *date* and *time* are *material* here.

JONES, J. I agree that if the award be made on the *same* day as that of the date of the *bond, although the words be that the award is to be made *after* the date, still it is well, and 5 Rep., *Clayton's case,* has been often overruled (*he did not particularize any case*). I have seen a case adjudged where an act was to be done within eleven days after the date, and the other pleaded that it was not done within eleven days, after the *day* of the date, and the plea was adjudged bad, and the traverse repugnant.

DODERIDGE, J. A traverse ought to be of the thing in dispute, between the parties. Here they agree on the *fact;* the dispute is on the *date* of the traverse: *absque hoc, quod cognovit* goes to the *fact.* Two are bound jointly and severally in an obligation, delivered by one of them on the 1st of *May,* and the other on the 1st of *July;* in debt against both, one pleads that he delivered it on the 1st of July, *absque hoc,* that he was jointly bound; it is bad. For after the delivery it is a joint obligation, and the deed *prima facie* shall be intended to have been delivered on the day of the date. With respect to the exclusion of the 28th of April, I

agree with my brother JONES. An assize may be on the day of the disseisin. It has been objected that the bar is good to common intent, but that cannot supply the place of a special matter, and it ought to have been said that after the confection no award was made.

CREW, C. J. The traverse is not good. For a traverse of circumstances is bad, and the *date* is not material. For a deed may have an *impossible* date, as the 30th of February, and still be good. As to the second point *ut supra*. Jones, 66; Bendl., 146; 1 Cr., 705; 1 Cr., 667.

HEMS v. STROUD OR STROMER.—Pasch. 1 Car.

Ejectione firmæ of the *manor* of *Feifeld,* and he declared on a demise of Dr. Stewart, of the *manor* of *Feifield* and showed an ejectment of the manor, and the jury found the defendant *culp. quoad messuag. curtilag.* parcel *maner. predict.* The ejectment was brought against husband and wife, and the wife *alone* found *culp.* And it was well enough, for if *any one* be found *culp.* it is sufficient. But it was moved in arrest of judgment, that the *ejectione firmæ* was brought of a *manor* and the defendant pleaded *non culp.,* and the jury found him *culp. quoad messuag. unum curtilag.,* and for the rest *non culp.,* and they are found *culp.* only of a *parcel* of the *manor,* and the action is only for the manor and not of any acres. But if the *ejectione firmæ* had been for *so many* *acres of the manor, and the defendant had been found *culp.* of *any* number of acres, it would have been a good verdict, upon which judgment might have been given. But when the demand is of *a manor,* if he be not found *culp.* of the *manor,* he is not guilty at all. In the Common Bench, p. 10, Jac., in evidence to the jury on a writ of entry *sur disseisin, Delabar v. Huldson.* The demand was of a *manor,* and *non disseisivit* was pleaded by the tenant. The demandant gave in evidence that the tenant had entered on the demesne of the *manor,* and had ousted him. The tenant's counsel required the demandant to prove that it *was* a manor, and that the tenant had received attornment of the tenants, for without *tenants* it could not be a *manor;* and the demandant failing to prove it to be a *manor,* was nonsuited. And *per Finch,* Recorder of London, who moved in arrest of judgment: This case was an *ejectione firmæ* of a rectory, and *non culp.* pleaded; it was shown in evidence that the defendant took the dismes, but the plaintiff could not prove that the defendant entered in the glebe lands, and it was resolved that the taking the dismes was not an ejectment of the rectory; and the plaintiff was nonsuited. Here when it is said that he is *not culp.,* it is meant of the manor and not of the messuage or curtilage.

Noy. The ejectment is of a *manor;* the verdict *culp.* of a messuage and curtilage *parcel of the said manor.* There is a vast difference between a writ of entry *sur disseisin,* and an *ejectione firmæ;* in the one the land is *demanded;* in the other only, *consequently,* recovered. It has been said that a man cannot have an *ejectione firmæ de uno domo, et pomer.,* because *domus* may be a barn, or a mill, and *pomer.* a garden (*orchard, I believe*). With regard to the case of the dismes, if it be law, it does not come up to *this.* For perhaps he had right to *part* of the dismes only, and therefore when he brought *ejectione firmæ,* it was wrong, because a part of the dismes is of another nature and name. If a man brings debt on the statute 2 E., 6, as proprietor of a rectory and he proves *only* that he has a right to *part* of the tithes, he shall not recover. But here it is found parcel of the *manor. Allen and Hay's case,* 34 or 32 Eliz., on a writ of entry *sur disseisin de uno messagio cum pertinentiis,* it was found that the tenant was seized of a house, and purchased another adjoining it of the father-in-law of the demandant; and the tenant pulled down both houses and built another on the land he had purchased, and added to it six feet, so that the house he bought contained only ten feet and now it had sixteen; so that the demandant had only title to *part* *of the house. Yet the judgment was, that he should recover *the house,* and on a writ of error it was affirmed. The nature of a *manor* is to contain houses with lands which are the demesnes and services, and if the defendant be found *culp.* of *any* of *these* it is well; but it would be otherwise if it were *not* a *manor.* As in 1 H., 7, 29. There one pleaded a gift in tail of the land, remainder to the King, E., 4, and showed a deed of office with the land, and prayed the help of the King; but he shall not have it, for the land is not part of the office, and is of another nature. But, in this case, the verdict has found that it was a messuage, *part of the manor;* that it was devised; that entry was made and the plaintiff ousted. A manor contains all these things, and it matters not whether the parcels be expressed or implied. I pray judgment for the plaintiff.

The Recorder. The case I have put was *not* for part of the dismes, but of a rectory with the dismes. The case of *Allen and Hays* differs. If I be disseised of a manor, and the disseisor severs the rent from the services as in 9 E., 4, I ought to make demand, *according to my right,* and in respect to me it is a *manor adhuc.* A man demands a manor and so many acres *part* thereof, it is well demanded.

DODERIDGE, J. Nothing resembles more a *manor* than a *rectory;* one is entire, so is the other. The glebe lands resemble the demesnes, and the dismes the services.

The case was not resolved by the Justices.

It was said that the case would be stronger for the defendant if the particulars of it had been found. For the manor in question is only a manor by reputation, and a manor by reputation cannot be demanded by the name of a manor; but it may pass in a conveyance by that name. And *nota* to compel the plaintiff to prove attornment of the tenants, for otherwise a manor does not pass. Palm., 413; Bendl., 148; Cr., 234; And., 265; Poph., 13; Co. Entr., 642.

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*SAUL v. CLARK AND ELIZABETH.—Pasch. 1 Car.

Ejectione firmæ. It was shown that one Povise was seized in his demesne, as of fee, and being so seized on the 7th of October, 20 Jac., made a lease to the plaintiff of the lands for which the ejectment is brought, for three years; that he entered and was possessed until the defendant ousted him. The defendant pleaded *non culp.,* and a special verdict was found: That a long time before the supposed trespass and ejectment, John Sydenham was seized in fee of the premises, and gave them to his youngest son, Alexander, and the heirs male of his body. That John, the father, died, and Alexander being seized, etc., on the 10th of November, 5 E., 6, demised the premises to G. Archer and Maud, his wife, for their lives, remainder to John, the son, for life, with warranty against all persons. After this, Alexander levied a fine to certain persons, to the use of John Taylor and his heirs, by force of which he was seized of the remainder. John Taylor, for a valuable consideration, bargained and sold the land to I. Mallet and his heirs, by force of which he was seized of the reversion. They find that the tenants for life are alive; that Mallet granted the reversion to Napper, on which grant the tenants attorned; and Napper demised the land to one Clark, under whom the defendants claim, for 90 years, by force of which he was possessed of the future interest, and afterwards granted it to Nicholas Clark and Elizabeth, his wife, the present defendants. They further find that Alexander Sydenham had issue Joan (who married Sir Robert Povise) and died without issue male. John Sydenham (the eldest son), died without issue; that Joan, the daughter of Alexander, died; that Robert Povise is her son and heir; they also find the death of all the tenants for life, and that Robert Povise entered and was seized; and being so seized, made a lease to the plaintiff, who entered, etc. The case is this. John, the father, had two sons, John and Alexander, and granted the land to his youngest son and his heirs male of his body, and died. The grantee in tail devised the land to three for life. Alexander, the grantee in tail, and his wife levied a fine to the use of T. and his heirs, with proclamation and warranty. Alexander had a daughter,

Joan, who married Povise, and he (Alexander) died without issue male, etc. After the death of the tenants for life, Robert Povise, the son and heir of Joan, entered. It was argued that the plaintiff has no title to the land.

1. The first question is: whether there be a discontinuance of the fee, for if there is, the entry of the heir of the daughter is not lawful, and *the *ejectione firmæ* does not lie. In this case, it is thus: A man had issue two sons and gave lands to the youngest and the heirs male of his body, and died. The donee made a lease for their lives, not warrantable by 32 H., 8, and granted the reversion by fine with proclamation and warranty, and died, leaving issue a daughter, all the tenants for life being dead. Where, then, is the discontinuance of the fee? With regard to his warranty, it shall not be a discontinuance except the warranty and the right descend to the same issue. Litt. Pl., 737. If tenant in tail has issue two sisters by different venters, and die, and they enter and are disseized by a stranger, and one of them demises to the disseizor by deed with warranty, and dies without issue, the surviving sister may enter and oust the disseizor, because *she* is no heir to the warranty; *ergo* there is no descent. So here, the right of the reversion goes to John, and the warranty, coming from Alexander to the daughter is no bar of record, to the other.

2. The fine is no discontinuance, for it takes effect by way of grant. If lease for life be made with warranty by the donee in tail, and after the donee grants the reversion by fine with proclamation, the warranty of itself is no discontinuance. But if the daughter had brought her formedon, it would be a bar. 28 H., 6; Br. Discontinuance, 15, and here there is no discontinuance, for it is not executed during the life of the grantor. Tenant in tail leases for life, levies a fine of the reversion and dies; and afterwards the lessee dies, it is no discontinuance, because it is not executed during the life of the grantor. It is clear that if the tenant in tail leases for life and after grants the reversion, and dies before the tenant for life, it is no discontinuance; likewise, in the case of a fine, Litt. Pl., 18; 21 H., 6, 53, per Paston. Tenant in tail died during the life of the tenant for life, it is no discontinuance, although it be by fine, for it is not executed during the life of the grantor, and a fine with proclamation shall not have more effect or discontinuance than a fine at common law. But a fine with proclamation is a bar to the estate tail; yet a fine with warranty will not be a bar to the claim of the land, as heir to his uncle. Therefore the case is this: (1) A man had issue two sons, and gave lands to the youngest and the heirs male of his body; then granted the reversion by fine with proclamation, had issue a daughter, and died, and the right of a reversion descended to the daughter of his uncle, and whether this be *a bar to the claim of the reversion, was

the question. It is no estoppel, for the entry of Robert determines the estate on the fine, and an estoppel shall not continue longer than the estate, as in *Seymour's case.* (2) Because the daughter does not claim the land from him who levied the fine, although she may be his heir of other lands, as in 19 H., 8; Dyer, 3. As if my uncle disseizes my father and levies a fine with proclamation, and my father dies and my uncle afterwards dies within five years, this does not bar me from claiming the land, although I am heir to him who levied the fine, but not as *his* heir, but as my father's. 2 El. Dallison's reports. One gave land to the eldest son of I. S. in tail, remainder to the father in fee or in tail. If the eldest son levies a fine and dies without issue, and the father dies, the fine is *no* bar to the second son. For although he be privy and ought to make his conveyance of the land, still he is not privy in the estate, and does not claim it through him. So here the daughter does not claim the estate through her father, but through her uncle; therefore, the fine shall be no estoppel to her. 24 E., 4, 47. If there be grandfather, father, and son, the father makes feoffment in fee of certain lands with warranty, and dies, afterwards other lands descend from the grandfather to the son, he shall not return the value, if he be vouched; for he does not claim through his father, although mention be made of him in the conveyance of his title. But if Alexander had survived his brother, then the right would continue. 8 H., 5, 7. If the son disseizes the father and levies a fine, after the father dies, and then the son, the land shall not descend to the second son; but if the eldest son had died in his father's life time, it would have been otherwise. T., 21 Jac., in *M'Williams' case,* it was resolved that if tenant in tail has issue two sons, and the eldest levies a fine during the life of his father and dies without issue, the second son shall inherit, as heir to the father. Justice JONES has put another case: that if tenant in fee tail has issue two sons and the eldest disseizes him, levies a fine and dies without issue, and the father dies, it is no bar to the second son. But Justice JONES says that his case was mistaken, for he put the case that the eldest son levying the fine in the lifetime of his father, is no disseizin in alteration of the possession, for he is not heir to him of this land, although he may be so to him of other lands, and therefore the fine is no bar. Here is a new right, which comes after the death of the tenants for life, from the other ancestor. For there was here *only* a discontinuance for life, and the entry of the lessor, after the death of the tenants for life, tolls the discontinuance.

Lastly. The fine and warranty shall be no bar, because when the fine is *levied, the warranty descends from the son to a *feme covert.* 1 Rep., *Archer's case,* 140; *Chadley's case.* If a warranty descends from a *feme covert,* it shall not bar the entry; here the entry is for the life of the

tenants, but after their deaths the entry is lawful. 44 Ass. Admitting that it shall be a bar by the warranty at common law, the statute of Westminster, 2, will help him, because he claims through him who had the reversion and not through him who levied the fine. A brother was tenant in tail to him and the heirs male of his body, made a lease for life with warranty, and died without heirs, leaving a daughter, and the eldest brother died without issue, the daughter may claim the land under the statute of Westminster, 2, notwithstanding the warranty. Litt. Pl., 706. A reversion in fee expectant on an estate tail is helped by the statute; if tenant in tail makes a feoffment in fee with warranty and dies without issue, and the warranty descends on the reversioner, it is no bar, for the tenant in tail cannot prejudice the lessee by deed or feoffment, but the remainder is not helped. If a gift in tail be made to the eldest son by the father, and he makes a feoffment in fee with warranty and dies without issue, and the father dies, this warranty is no bar to the youngest son. As it is a reversion and he claims through him in reversion, and the reversion came from another ancestor, the reversion is not barred. 7 E., 3, 48; 6 E., 3, 5. The statute does not speak of him in remainder. I conclude by saying that there is no discontinuance of the fee, condition, or estoppel; and that if there be any estoppel, it is helped by the statute of Westminster, 2; therefore, the title of Robert Povise is the best in this case. *Postea,* p. 683; 2 Cr., 156 and 525; Jones, 208; Bendl., 174; *M'Williams' case,* Hobart, 532.

MAYOW'S CASE.—Pasch. 1 Car.

Gulielm Tumplin, being possessed of divers chattels, died intestate, and administration was committed to Mayow, who was his maternal uncle; afterwards, Thomas Tumplin endeavored to obtain a revocation of the administration in the arches, but it was there confirmed. Afterwards, he appealed to the King in Chancery, who referred it to the Commissioners Delegates; and the reason which *Serj. Ashley* gave to obtain a prohibition was: that if the ordinary commits administration to one who is not of kin to the intestate, a prohibition ought to be granted, according to the statute 31 E., 3, 11, p. 399, which ordains that administration shall be granted to the lawful friends of the intestate: *If the ordinary grant administration to any other, as persons outlawed or attainted, who are not *legales,* a prohibition lies; otherwise, there would be no remedy. The statute 21 H., 8, 5, p. 185, does not differ from the other, except in the penalty of £10 to which it inflicts. *Duke of Suffolk's case,* 5 E., 6. Administration may be granted to one of the half-blood, but if one of the whole-blood comes, he shall have a prohibition.

M., 21 Jac.; a prohibition was granted on the 21 H., 8, on privity of blood, and it depended on a demurrer. But the matter was compromised.

Noy, e contra. Mayow was charged before the Delegates, that he administered falsely and had suppressed a will, and in this case the ordinary is a competent judge, and the statute does not say that the administration shall be granted to the next of blood, otherwise it shall be void; but that it shall be granted under a penalty. On the 31 E., 3, no prohibition was yet moved, because it is a law which directs the ordinaries. And the 21 H., 8, adds a penalty. The ordinaries act judicially, and as the statute is in the affirmative and not in the negative, and under a penalty, they are competent judges, and a prohibition does not lie. When one is a judge at common law, and a statute comes in the affirmative, it does not take away the cognizance. At common law the ordinary might commit the administration, before 31 E., 3, which is only in affirmance of the common law. It is left to be judged by the ordinary whether one be a fit person to administer. As Mayow obtained administration surreptitiously, endeavoring to suppress a will, and no law takes cognizance of the administration of the ecclesiastical judges, I pray that a prohibition may be denied.

DODERIDGE, J. [to the counsel of Mayow.] You have had administration granted to you, and the other party, J. F., appeals because, he says, you suppress a will; and the matter remains undiscussed, and perhaps you are a proper person to be administrator or executor here. If the eldest son ousts his mother at the time of the death of his ancestor, and the youngest son enter, he is not accounted a disseizor, for the law presumes that he preserves the possession for his brother. But if, when the eldest brother returns, he keeps possession, the law will not have so good an opinion of him, and he is a disseizor. No prohibition was granted. Palm., 416; Bulst., 314.

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*WARNER v. HARDING.—*Antea*, p. 649.

Hedley, Serj. The condition is given to the Queen, and is well performed; she has gained the fee simple, and the lease is good. The reasons to the contrary are that by act of Parliament he forfeited all his lands, etc., and that *all* conditions are not given to the Queen. The *Templars' case,* 17 E., 2. Provisions given to the Hospitaliers to be held in the same manner as the Templars, etc. Still frankalmoign is not transferred by these general words. So by the general words of all the hereditaments, etc., an action is not given, as in the *Marquis of Winchester's case.* I agree that in all these cases in which use is made of general words containing *diversa genera, everything* does not pass. But

the statute is to be construed reasonably, and shall be expounded as the King's patents are. Therefore, if the King grant by his letters patent, under the great seal, *all* mines, the patentee shall not have *royal* mines. Then when all possessions are given, there is a right of entry and a right of action, but the right of action is not given by the general words of an act of Parliament. Now the word *condition* is a *species* and not a *genus;* and the 26 H., 8, enacting that such persons shall forfeit all the lands, tenements, and hereditaments, in which the offender shall have any estate of inheritance, there is not a difference between an inheritance in fee or in tail, while there are but these two estates of inheritance, and the statute says that he shall forfeit all the lands in which he has an estate of inheritance; and a condition is as simple as an inheritance. There are conditions which are incident to the reversion, and conditions in gross; and there are conditions to be performed by the feoffor, and others by the feoffee, which are accidental. Feoffment on condition that if the Chief Justice does such a thing, he shall enter; and afterwards the feoffor is attainted of treason and the condition given to the King, he (the King) cannot perform it. But if the Chief Justice does, the land shall go to the King. Feoffment on condition that, if the feoffor goes to Rome, he may enter; and afterwards he is attainted of treason, then perform the condition, the King shall have the land, although he could not have performed the condition. So the word *condition* is a species, given to the King by the statute. Therefore, in the *Duke of Norfolk's *case,* the condition was not given to the King, and admitting that the condition *was* given, he had *not* the *power* of performing it. But in this case it was not a *condition,* but a *power* of revoking the use, and such a power is not given to the King by the attainder of the party. For if the power of revoking the uses was given, that of making a new declaration of the uses must follow. But, as the case is, the power of performing the condition is given to the King, for the substance of the condition is not the tender and delivery of the ring.

Bridgeman, Serj. The declaration of the intention with which the ring ought to be tendered ought to be made by William Shelley, because the words are: *ipso Gulielmo Shelley tunc declarante.* And if these words are superfluous and idle, then the rule is *expressio earum,* etc., for if those words *ipso Gulielmo Shelley tunc declarante* were not in the conveyance, still he ought to declare his intention when he makes the tender. As the King has power to tender the ring, he has also power to declare his intention, as in *Englefield's case.* The statute gives the condition to the King to tender the ring; therefore, he may declare his intention in tendering it. He who pays the money in performance of the condition, has power to declare the intention; and it is not personal, for it may be made by attorney, and the statute made the King an

attorney to do that which the person attainted might have done by attorney. Feoffment on condition that if the feoffee does not give a ring on such a day, declaring that it is in performance of the condition, the feoffor shall reënter, the assignee of the feoffee may tender. Here the King is the assignee, by act of Parliament. *Englefield's case* is still stronger.

DODERIDGE, J. There are two points in the proviso: The *tender* of the ring, and the *declaration* of the reason of its being tendered. And whether the declaration be the *principal* or the *accessory* is the question. No man can make a tender unless he shows to what purpose it is made. An attorney who has a warrant to deliver seizin ought to *declare* that he deliver the clod in the name of the seizin. Attornment is a *personal* act, and therefore in a *quod juris clamat* one cannot appear by attorney. Yet attornment may be made by a stranger, with the consent of the lessee. So if one be seized of lands in fee, and a letter of attorney is made to give livery, and the attorney puts the lessee out of possession: in this case, if the lessee commands his servant to enter on the land, and he does so, it is as good an attornment as if the lessee himself had entered. In the present case the principal act is the tender; then, if the *statute gives the tender of the ring, it *also* gives the power of declaring. *Englefield's case* is still stronger; for there it was expressed that he was his nephew and likely to be his heir, etc. But all this is only a flourish. And the *Duke of Norfolk's case* has no affinity to this; for I may convey another man's lands, but I cannot write with his *hand.*

JONES, J. The condition is given to the King. In every condition there is something to be done or abstained from, which makes the breach or performance of it; and sometimes a penalty, which is the entry. When a condition is given to the King, he has both parts. The payment is not *personal* here, and may be made by attorney, and the tender of the ring is nothing more. 4 Rep., 72, 73; *Burrough's case,* and another adjudged in the Exchequer. A lease for years was made by the Abbot of Strata Mercel, rendering rent, and if the rent be behind, and be lawfully demanded, it shall be lawful for him to reënter: the reversion fell to the Crown; and it was adjudged that the demand was not necessary. *Adjournatur* to be argued by the Justices, *postea,* p. 700. Jones, 134; Noy, 79; Bendl., 139; Roll., 393.

LADY ARGOT v. CHENEY.—Pasch. 1 Car.

In *ejectione firmæ,* in evidence to the jury: there were three several parcels of land lying in one county, and Lady Argot having right thereto (as she supposes), leased them to the plaintiffs, who brought the action,

and the land was in the hands of three several lessees of Cheney. Lady Argot made a lease and delivered it as an escrow to I. S., and made a letter of attorney to him to enter on the premises in her name and deliver the deed to the lessees as her deed. It appeared he entered on one of the lessees in the name of all the parcels.

JONES, J. It seems well; for if the frank tenements be in one, although there be several lessees for years, entry on an acre in the names of the whole is well.

Bridgeman. Still he ought to prove the entry of the lessees in all the parcels.

But at last they were able to prove the entry of the attorney, and the lessees in all the parcels. *Postea,* p. 689; Palm., 402, 405; Noy, 77.

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*ANONYMOUS.—Pasch. 1 Car.

In *replevin,* the plaintiff was nonsuited, the defendant had a writ *de return* and inquiry of damages, etc. The plaintiff brought a second *delivery.*

PER CURIAM. It is a *supersedeas* to the return, but not to the writ of inquiry. Palm., 405.

GULIELM'S CASE.—Pasch. 1 Car.

Nota per JONES, J., that if the girl consents to the ravisher, and the next heir enters and she dies, the heir is in by descent. Palm., 405.

THOMAS SAUL v. NICHOLAS CLARK.

Mason. The first question was what estate Alexander had on the fine. John, the father, gave lands to Alexander, and the heirs of his body, the reversion *prout lex postulat,* and I conceive that Alexander has an estate tail, and therefore the fine shall inure by grant of the reversion. When anything passes by way of grant, it cannot be to the use of anyone, for the grant implies a use, and therefore A. being tenant in tail before the fine, the reversion passes, and there would be an end to this case if the reversion did not pass.

The second question is, What is the operation of the second fine? The doubt is not, as it has been urged, when tenant in tail makes a lease for life, and then grants the reversion, whether this is *a discontinuance, as it is not executed during the life of the tenant in tail. But whether the fine be a bar.

And the question comes on the 4 H., 7, 24, p. 164, the case being this: Alexander, being tenant in tail to himself and the heirs male of his body, the reversion to John, his brother, discontinued for life, and then granted the reversion by fine, with proclamation and warranty, and died without issue male, leaving a daughter. John died, the daughter of Alexander being the next cousin and heir, *quære.* Whether she is barred of this fine. It seems to me she is. (1) The preamble of the statute says that fines ought to be of the greatest strength to avoid strifes and debates, and be a favorer of the new, and an enemy of the old title. The purview concludes both strangers and privies. In 19 H., 8, 6, 7, it was resolved that no privy can avoid the fine of his ancestor. The words are general, the exception is of a *feme covert,* and the saving extends to strangers. Then, if the daughter be any way privy to him who levied the fine, she is within the general purview, and not within the saving, and it is granted that she is a privy. If a son and heir be outlawed during the life of his father, and purchase a pardon of felony, and the father dies, the land shall escheat after the death of the son. But in 32 H. 8; Dyer, 48, if the eldest son be attainted of felony during the life of his father and died, after the father dies seized in fee of the land, it will descend to the younger son, because he does not derive the land from his brother. 10 Eliz.; Dyer, 241. And here, though the daughter does not claim anything from her father, she must make her title *through* him, viz., as daughter to her father and heir to her uncle. 41 Eliz., in *Hobby's case* in the Exchequer. A man had issue, a son and daughter; the father was attainted; the son purchased land and died; resolved, that the daughter shall inherit; for no mention is made of the father in the conveyance. As the statute of *Magna Charta,* c. 34, p. 1, bars the mother from having an appeal so the statute of 4 H., 7, c. 24, p. 164, bars anyone from avoiding a fine as privy. 19 H., 8; Dyer, 3. Grandfather, father, and son, the father disseized the grandfather and levied a fine, and died; the son is barred, for he must derive his title through his father. But if my uncle disseizes my father, and levies a fine in my father's lifetime, this shall not bar me, for *I do not make my title *through* him; but if my father had died, and *then* my uncle levied a fine, I shall be barred. *McWilliams' case.* Here the daughter, being privy in blood, shall be in the purview of the statute, and consequently barred. But admitting that she was a stranger, then the question is whether she came in due time. It seems not. Alexander, tenant in tail to him and his heirs male, etc., made a lease for life, which is a discontinuance, and then levied a fine with proclamation, and died without issue male, and five years are elapsed; she ought to have prosecuted within the five years after the death of the tenant in tail without issue. Com., 734. Tenant for life, remainder in fee, if the tenant makes a feoffment in fee, and the

feoffee levies a fine, he in remainder shall not have five years after the death of the lessee for life; because the right first accrued by the forfeiture. But 3 Rep., 78, *Francis' case,* was objected. But here there is no covin nor any other land, etc., and then it was argued that the exposition was contrary to the letter of the statute, and here the heir of the donor has not availed herself of the opportunity within the five years. With regard to the warranty, the case is: Alexander, tenant in tail, levied a fine with warranty, and it descended to the remainderman: whether he shall be barred. This rests on the statute of Westminster 2. For all warranties except by disseizin were bars at common law, but by the statute of Gloucester, a warranty by will is no bar, without assets. Afterwards came the statute of Westminster, 2, which restrained the power which the donee had to alien; and on the construction of it the issue is not barred by the warranty of the father without assets. And, I conceive, this case is out of the statute 11 E., 2, *title Warranty.* A lineal warranty is no bar to the issue in tail, without assets, because the statute gives a formedon, where before the statute the remedy was by assize of *mort d'auncestor;* and a formedon in descender comes in lieu of it; and the son cannot be barred by his brother, because he claims merely *through* his father, but *per forman doni,* etc. He may have a formedon in *reverter* at common law, and therefore is not within the limitation of the law. 41 E., 3; Fitz. War., 16. In our case, it is as before the statute, *scil.* strangers only and not privies may avoid. And in 41 E., 3; War., 27, it is doubted, 7 E., 3, 43. Whether in such a case the warranty shall not bar without assets: still the heir of the donor is put to his action, for he shall not enter against the fine and warranty of his ancestor. 21 H., 7, 11. Tenant in tail died, living the lessee, if the grantee takes advantage of the warranty he shall take it by action. Although the heir of the donor shall not be barred, without assets, still he shall be put to his *action. But it has been objected that the warranty descended to the *feme covert,* and still she is barred, because the entry of the *feme* was not congeable, and as her entry was not lawful, the warranty descending to her shall bar her. I conclude that Alexander has the reversion, and therefore power to make the conveyance; that if he has not the reversion, still the daughter claiming as privy shall be barred by the fine; and if she is not barred, she has slipped her opportunity; and if she has not, yet she is barred by the warranty and the statute of Westminster, 2., and if she is not barred without assets, she is put to her action; so that upon the whole the defendant has the best right.

**Nota.* Judgment was entered *concessum est* that A. D. shall recover, instead of *consideratum est;* and therefore it was reversed.

*WARD v. KEDSWIN.—Pasch. 1 Car.

Ward brought an action against Kedswin, in the *detinet,* and counted that on such a day and year the defendant *apud London, in parochia sanct. Mariæ de arcubus, in Warda de Cheap,* confessed *se obligari* to the plaintiff by his writing obligatory, *quod reddat* so much Hamburgh money, equal to so much English money, etc. The defendant prayed *oyer* of the obligation and had it. It bore date at Hamburgh, and the defendant demurred; for the plaintiff had counted that it was at London, while the date is at Hamburgh, a place beyond the sea. Many books were read to show that he could not declare so. It was answered that notwithstanding a deed bears date of one place, it may be sealed and delivered in another. 31 H., 6; Faits., 104; 21 E., 4, 26, the *Abbot of St. Alband's case.* Here the deed is well, being dated at Hamburgh; but *aliter* if it had been *apud Hamburgh in Germany.* It was objected on the other side that Hamburgh shall not be taken to be a place, but a *town,* as in 3 E., 3, 68, where *Ponte fracto* is intended to be a *town,* and not a place; and in this case it shall be intended to be a *town* and beyond the sea, and therefore no action, etc. 3 H., 4, 4. Obligation dated *apud London, apud Clarken-well, in Middlesex,* although Clarken-well was in Middlesex, yet the declaration was held bad, because it said in London. So here, while he declares that defendant *per quoddam scriptum suum, in Warden de Cheap,* etc., *concessit se teneri,* etc., and upon *oyer* the obligation appears to bear date at Hamburgh. But it has been answered that Hamburgh shall not be intended to be a *town,* but a place; for there is a tavern in London called Antwerpe; yet if in Cheap-Ward there was a place called Hamburgh, in pleadings it shall be intended to be a *town.* Another exception was taken, that the debt for Hamburgh money was in *detinet* only; when for money it ought to be in *debet et detinet.* 38 H., 6, 19; 9 E., 4, 9. But the plaintiff's counsel answered that there is a difference between domestic and foreign coin. When a suit is brought for domestic coin, or foreign current coin, it ought to be in the *debet et detinet;* but when the demand is for foreign coin, as in bullion, the demand ought to be as here in the *detinet;* for the court knows not foreign coins. And it was resolved on the first exception that the action lies; and on the second, that it is well brought in the *detinet* only; and judgment was *accordingly entered for the plaintiff.

DODERIDGE, J. Two questions have been made here: (1) At what place the deed shall be intended to have been made? (2) Whether an action for foreign coin ought to be in *detinet* alone?

If one lays a deed to have been done in any place which is beyond the sea, but this does not appear on the face of the deed, it may be

averred to have been done in any place in England. Here the declaration is that the defendant by his deed became bound, in *Warda de Cheap,* etc., and, on *oyer,* the date is at Hamburgh, but it does not appear that Hamburgh is a place beyond the sea, and there may be a place of that name in London, which everybody knows. The Chief Justice has said: "That the trial shall be at the place where the deed bears date, and not where it is *supposed* to have been delivered; that in this case the deed *cannot* be intended to have been made in London, while it bears date at Hamburgh, which is beyond the sea, and is payable in coin of that place." But we ought to support the jurisdiction of our court; and Hamburgh money may be contracted for in London.

With regard to the second point: There is an express authority in 34 H., 6, 12. When the action was brougt in *detinet;* and it was held to be well, 9 E., 4, 46, and 6 E., 3 F. Account. It was argued by all that Flemish money ought to be declared in English value. One may be charged for money as receiver; and as bailiff for goods or Hamburgh coin, although it be not current here, as for a horse, a box, etc., and the suit shall be in the *detinet,* unless it be for English coin, or foreign coin, made current by proclamation.

JONES, J. The action is well brought in the *detinet,* for Hamburgh money, which has no known value here, as if it were for a piece of plate. *Antea,* p. 633; Jones, 69; Bendl., 149; Palm., 407.

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*SMITH v. CHRASHAW, SPEAT, AND WARD.—Pasch. 1 Car.

Conspiracy for indicting the plaintiff for high treason. He declared that he was one of the good subjects of the King, and the defendants falsely and maliciously conspired to indict him for speaking treasonable words against the King; and that they falsely accused him before a justice of the peace of the said county, and obtained a warrant from the said justice to a constable to apprehend him; whereupon he was apprehended and brought before the justice, who committed him to the prison of Norwich. And by this conspiracy an indictment was preferred to the grand inquest, and an *ignoramus* was found, whereupon he was discharged. He declared to his great damage, etc. Ward and Speat pleaded not guilty and were found guilty. Chrashaw pleaded that Speat told him the plaintiff had spoken these words, and to avoid the imputation of concealing a treason, he accused him before a justice and arrested him; *absque hoc, quod falso conspir.,* etc., and this plea was found against him by the jury. It was said that if a man be indicted of felony falsely, conspiracy lies, after acquittal; and an action on the case in

nature of conspiracy, after *ignoramus* found. *A fortiori* when one is indicted for treason which is a more heinous crime. T. 3 Jac. rot. 246, where the court was for indicting a woman for witchcraft; and *ignoramus found.* 6 Jac. rot., 921, in this court, in an action on the case for indicting one of rape, and *ignoramus* found; it was adjudged that the action lies against both. 19 Jac. rot., 1633, in this court for conspiracy for stealing feathers, on *ignoramus* found, the action lies. It was objected that an action on the case does not lie in cases of treason; for if the action was maintainable, it would be a terror to the subject, and he would not dare to prosecute another for treason, and if he conceal it, he is in danger of being prosecuted himself as a traitor. With regard to this, when one charges another with treason *colorably,* by way of doing justice, it is a tender case; but if he charge him falsely and maliciously, it is a wrong done to the King to bring the life of his subjects into danger without reason; and the King shall have an indictment against the conspirator, who shall receive the villainous judgment, and the party shall *also* have *his* remedy. It was argued for the defendant that no judgment *ought to be given; for there is a vast difference between cases of treason and those of felony. As soon as one hears of a treason he ought to make it known to a magistrate; otherwise he becomes a traitor. Chrashaw has done no more than a subject ought to. (2) Treason concerns the King and the public, but felony concerns only a private person; therefore, in case of felony, the law permits the party to have an action, in order to remedy his *injury;* but it is not so in case of treason. M. 11 Jac. rot., 264; *Falkner's case.* There was judgment in a case of treason on *nihil dicit* and a writ of inquiry for the damages; but no judgment was given for the damages, because no precedent could be found, and, therefore, by the opinion of the court an action lies not, while an *ignoramus* is found; for he *may be* guilty; as the counsel for the defendant said the case was, and judgment was given *quod quærens nihil capiat per billam;* for if there had been an indictment, trial, and acquittal, the action would have lain. But where an indictment is preferred and an *ignoramus* is found, *he may* still be guilty and the action on the case does not lie. As to the case of Falkner, the word *falso* was there wanting, and therefore the declaration was bad; but here the words *falso et malitiose* are in the declaration, and the jury have found that he acted *falso et malitiose,* of his own head and without ground. As to the case where one was indicted of felony, and an appeal was brought and the defendant was acquitted, but could not have a writ of conspiracy: the reason is that *there* there was an indictment to ground the appeal upon; but *here* there is no such thing; all was done *falso et malitiose.* In 28 Ass., it is laid down that if there be a conspiracy or confederacy, although no action be brought, still it is inquirable and

punishable, and in 18 Ed., 6, 12, malicious prosecuting of an indictment of felony is joined to treason.

A day was given until next term to have the resolution of the Judges; and

At the term at Reading, it was adjudged that the action is maintainable. 3 Cr., 15; Bendl., 138, 152; Jones, 93, 2; Bulst., 271; Palm., 315; Roll., 113.

*ARGOT v. CHENEY.—Pasch. 1 Car.

Father tenant for life, remainder to the son in tail; *præcipe* brought against the father, who vouched the son, and common recovery had; the indenture reciting that the recovery was made between the father and others. But as no proof was made of the consent of the son, and he was not a party to the indenture, the court directed the jury to find the uses according to the estate that he had at the time of the recovery. It was said that if two joint tenants suffer a recovery, and one declares, the uses of the whole, it will only be well for the one-half, unless the consent of the other be proved. *Antea,* p. 682; Palm., 402, 405; Noy, 77.

CALY v. SIR WILLIAM FISHER.—Pasch. 1 Car.

Ejectione firmæ. The case appeared to be this, on evidence: One had several closes, some arable, other of pasture, and others of meadow; and he who pretended to have right to them entered in them all, and made a lease. Afterwards some of the defendant's servants came with his carts in *one* of the closes, and there was no other proof. CREW, C. J., DODERIDGE and JONES, JJ., directed the jury to find the ejectment of the *whole,* although no command of the defendant was proved, for any *actual* entry in the other closes. An ejectment of *part* of a great close is an ejectment of the *whole.* Wherefore, etc. *Antea,* p. 682; Noy, 77.

*HERN v. WARDEN.—Pasch. 1 Car.

On a return of a writ of false judgment in an action on the case, brought in an inferior court, the judgment was *concessum* instead of *consideratum est per curiam;* and it was reversed. *Antea,* p. 685; *Postea,* pp. 759, 767; Noy, 77.

SIR SIMON CLARK'S CASE.—Pasch. 1 Car.

Sir Simon brought an action on the case for these words: *You have talked with a Jesuit, in your house a week, knowing him to be a Jesuit.* It was objected that *before* the 27 Eliz. this was *no* offense; and an indictment for harboring a Jesuit ought to contain that the defendant harbored him *after* the statute, and 40 days *after;* and if the Jesuit was sick, so that he could not travel, he might remain here, and it is not felony to receive or assist him.

JONES, J. A man may maintain a Jesuit without being within the statute, for it ought to be a Jesuit born here, for if it be a French or Spanish Jesuit, it is not felony to harbor him.

Adjournatur. It was replied that the words are actionable, for, although it is not felony, it is a scandal to be charged with harboring Zuares or Greg. de Valencia. Jones, 68; Roll., 69.

MARSHALL v. ALLEN.—Pasch. 1 Car.

The defendant imparled in an *ejectione firmæ,* and afterwards pleaded: That the land is of ancient *demesne,* etc., *unde intend. quod curia non vult cognosc.,* etc., prayed judgment *si actio.* The plaintiff demurred.

SIR THOMAS CREW, C. J. I take two exceptions in this case. (1) He cannot plead ancient *demesne after* imparlance; this was adjudged in 4 Jac. *inter Clark and Hampton,* in this court. I was of counsel in the case and the plea of ancient *demesne* was disallowed after imparlance. (2) The plea concludes to the action.

DODERIDGE, J. The *distinction is right, except in case of ancient *demesne;* which is pleadable *after* imparlance. For if judgment be given here, it may be reversed for deceit.

JONES, J. It is so.

With regard to the second, DODERIDGE, JONES, and WHITLOCK, JJ., thought the conclusion was right. 7 E., 3; 49 M., 22; Jac. rot., 224. Pierce brought trespass against Atwood *quare clausum,* ancient *demesne* pleaded: *adjourn.* whether the plea in this personal action shall be as in *ejectione firmæ.* 2 Cr., 6; Palm., 406.

WARD v. KEDSWIN.—Pasch. 1 Car.

Debt was brought for a certain sum of Hamburgh money, of the value of, etc., English money, and it was in *detinet, pro eo quod defendens cognovit se teneri* to the plaintiff in the parish *de St. Mariæ de arcubus,*

in Cheap. On *oyer* it appeared that the deed was dated at Hamburgh. Thereupon the plaintiff demurred: (1) For money it ought to be in *debet et detinet,* and he cited a judgment, 3 Jac., in *Harle and Diaper's case,* which was in *debet* and *detinet* for £99 English, and he declared for £99 Flemish, averring that they were the same, and he recovered. 38 H., 6, 13; 9 E., 4, 5.

But it was answered and resolved by the court that it is well enough in *detinet.* 46 E., 3, 15. One does not declare *ad valenciam* when it is for English money; but here it is well enough, for the value of one is known, but not of the other.

DODERIDGE, J. It might be in *debet et detinet;* but the practice is in *detinet* alone; it is not like bullion. I remember well the case in T. 3 Jac.

JONES, J. If the action be for French money, current by proclamation, then it lies clearly in *debet et detinet;* and if a man is bound to pay £100 in French crowns, he may tender the whole in English money, and *e converso.*

DODERIDGE, J. Usage has made the other action a good one. 34 H., 6, 12; 9 E., 4, 49. If the suit be brought for English money, it shall be in the *debet et detinet,* but for foreign money it shall be in the *detinet.* 6 E., 3 F., *account* 103. In such a case a suit may be against a man either as bailiff or receiver, and for any money not current by proclamation, the suit shall be in *detinet.*

CREW, C. J. In such a case the judgment shall be conditional, 38 El. Rep., *Shaw and Payne.* Debt was brought in **detinet* for foreign money, and because the judgment was not conditional, it was reversed.

The second point is, that the action is laid in London, and the obligation appears to be dated at Hamburgh, beyond the seas. But *Jermyn* took a distinction, because the date of the deed may be intended not to be in a *town,* but in some place in London. It would be otherwise if it *appeared* to be in *partibus transmarinis;* then the action would not lie. Jones, 69; Bendl., 149; 2 Keble., 463; *Antea,* pp. 633, 686.

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*ANONYMOUS.—Trin. 2 Car.

Ejectione firmæ. The paper book was right, viz., *acram terræ,* but the bill on the file was *clausum terræ,* and the bill was amended from the paper book, and other variances were amended; and a distinction was taken where there is a paper book in the office, and it is right, all will be amended thereby; but if there be no paper book in the office, and the bill on the file be wrong, it shall not be amended.

PER CURIAM. The amendment shall be according to the paper book that was with the plaintiff's attorney. For there was no declaration with the clerk of the papers. Whereupon, the attorney of the plaintiff and that of the defendant were examined in court, whether it had been altered since the defendant's attorney left it, and on being answered in the negative, ordered the amendment to take place. *Antea, Todman v. Ward,* p. 671; Palm., 404, 405.

GULIELM'S CASE.—Pasch. 1 Car.

Nota, in this case it was said by DODERIDGE, J., that if a passenger lodges three days in an inn successively, the hostler is not answerable for his goods if they be stolen out of his room. By the ancient law a *traveler* was so called the first day; for it is not known from whence he came; the second day he is called *Hogen Hinde,* and the third day a menial servant; and a hostler was heretofore answerable for him as for his menial servant in the leet. *Postea,* p. 719.

*SIR AMBROSE FARNELL v. TIPPER.—R. 1 Car.

In this case it was shown to the court that the defendant was dead, and one who was counsel for the defendant prayed judgment *nunc pro tunc,* and it was said by the court that if the continuances were entered on the rolls, then no judgment could be given, but if no continuance were entered the party could have judgment; and if anyone, as *amicus curiæ,* will inform that the party is dead, it ought to be shown to the court by plea and not by verbal information.

SHERMAN v. BRAMPTON.—Pasch. 1 Car.

Trespass. The defendant pleaded in bar, that such a one was seized of the place where, etc., and leased it for ten years to the defendant, and gives color to the plaintiff, and justifies by this demise. The plaintiff replies, that *after* this demise and *before* the trespass, the defendant assigned the place, etc., for years to the plaintiff, and on such a day the defendant comes and maintains the bar, and traverses *absque hoc* that he assigned on such a day and at such a place *modo et forma,* as is alleged, and thereupon the plaintiff demurred in law generally.

It was argued by the defendant's counsel that the rejoinder is bad and out of the statute of 27 El., 5, p. 332, and the demurrer is well, for

he ought not to traverse the time and place, for it is not material *when* or *where* the assignment was made; and in this case, if the issue had been joined and found for the plaintiff, it would have been aided by the statute of Jeoffails, for there is no necessity of any place, but the addition of such a place and time is not requisite; for every issue ought to be upon something material. But in certain cases the place *is* material, as *Plowd. Patridge's case,* the declaration mistook the place and day of the sitting of the Parliament, and it was not helped by the statute of Jeoffails. *Dr. Leyfield's case,* 10 Rep., 88, 94. So here the time and place are not matter of substance, but of form, as in 30 E., 3, 5. And in 33 H., 6, there was an information against A. B. for buying lambs *inter* sheering time, and he pleaded that *tali anno* he did not buy of S. D. *contra forman statuti, prout,* etc. It is no issue, for the substance is not whether he bought of S. D. or any other.

The court agreed that if the parties had come *to issue, notwithstanding that the jury had found that the defendant had demised the land on another day; still if it had been *before* the trespass, it would have been well. But in an *ejectione firmæ,* if the plaintiff declares on a demise made such a day, and it is found that the demise was made on another day, but *before* the ejectment, it is bad.

DODERIDGE, J. The parties have not joined issue, but the defendant pleaded a lease made on such a day and at such a place by the defendant, who traverses that he did not do it *on* such a day and and at such a place. Now he has made the time and place matters of substance; for a lease made on another day is not the same lease. And you *may* make the time and place material. As in trespass, a release of all actions discharges all trespasses *before* the date, but not those committed after; and there the *day* is material. *Adjournatur.* Bendl., 159.

PECK v. COLE.—Pasch. 1 Car.

Error on a judgment of the Common Bench, in an action on the case *sur assumpsit* on delivery of a bond on request (the money being paid), and *non ass.* pleaded. The error insisted upon was that the request is laid *generally: licet sæpius requisitum fuisset,* without showing when, where, or by whom the request was made; and the question was whether this was not cured by the verdict. It was objected by the defendant that the showing the place is only for the venue; and here the request comes in question, and the plea of *non ass.* denies the request; and there ought to be a request, inasmuch as it is part of the contract, and *licet sæpius requisitus* is not sufficient. But if the plaintiff in fact alleges a

request, and omits the place where it was made, and issue is upon *non ass.*, he waives the request; and when the defendant promises to deliver a thing on request, the plaintiff, if he does not request, has no cause of action, for the request is the consideration; and by his own showing it appears that he has no cause of action. The judgment was reversed.

WHITLOCK, J. If the defendant had pleaded a release of the *assumpsit,* and the plaintiff had pleaded a request, which had been found for him, the declaration would have been well, by admission. Still the declaration is the ground of the suit, and if it is bad, no subsequent plea will make it well. But in debt a *licet sæpius requisitus* is sufficient, for it is not traversable, because the delivering of the declaration, which is a *præcipe,* is a *sufficient demand. 30 El. rot., 464; *Old and Eastgrew's case;* Tr. 16 Jac. rot., 268. A special request ought to have been laid. Jones, 86; 3 Bulst., 297; Bendl., 157, 162; Poph., 160; Vin., 112; Hut., 73; Roll., 476; 3 Cr., 386; 3 Leon., 200.

HUNGERFORD v. HAVILAND.—Pasch. 1 Car.

Case. The plaintiff declared that he was seized of the manor of *Williamson,* in *Comitatu Gloucester,* in which there is a custom; that on every alienation made by every frank tenant who holds the frank tenement of the manor a relief is due. And after 30 M. 13 Jac., one S. T. was seized of such land, and held it of this manor, as of the manor of *Windsor,* in *free soccage,* viz., *per fealty* and suit of court 5s. rent and relief *quando acciderit* according to the custom of the manor. Afterwards he shows that being lord of the said manor the 3d of July, 20 Jac., he had a conference with the defendant respecting the arrearages of rent and the reliefs, when the defendant, in consideration that the plaintiff would abstain from suing him till the next court to be held for the said manor, and would make it appear to him and the other tenants, who were chargeable, that the reliefs were due. The defendant promised and assumed to pay the said reliefs and arrearages. The plaintiff avers that the next court was held on such a day, when he made it appear that, etc., are due, viz., by homage that the rent was in arrears; and showed that the reliefs were due by the court rolls, and avers that the defendant did not pay, etc. The defendant confessed the action and judgment given upon it, and a writ of inquiry of damages awarded and a second judgment given. But in arrest of judgment divers exceptions were taken: (1) It is impossible that the plaintiff ought to have relief. (2) The alienation is a new form of alienation, and cannot be part of the custom; for it comes by the *statute 23 and 24 H., 8, but an alienation

by will is within the statute; and it was compared to a common recovery, or any new form of alienation as by deed indented. But these two objections were overruled. (3) The plaintiff cannot have a remedy for this relief, unless it be averred that he prescribes to distrain for it. 11 Rep., 44, *Godfrey's case.*

Bridgeman argued that he may distrain for this relief; for, as he had declared that it is part of the tenure, and the tenure is by custom, he may distrain for it. 14 H., 4, 2. And he compared this relief to a fine for alienation. (2) Admitting that he cannot have a remedy for the relief, yet he has a remedy for the rent; and the forbearance of suing for *that* is a sufficient consideration.

The last exception was that he did not make it *sufficiently* appear to the tenants that, etc., the words are *quod ipse fecit apparere,* that the tenants are charged with them, and this by the presentment of the homage, upon their oaths: *et ipse fecit apparere per rot. cur. Lord Lisle's case* was cited 22 E., 4. There the defendant ought to show his charge, for it is the substance of the bar. 41 El., *Washington's case.* Action on the case on promise: the plaintiff declared that the defendant promised to pay him so much if he would assure such lands to him; that he assured, etc., without showing by what conveyance: Held that it is well enough, for the kind of conveyance is not the point in question. On the other side it was argued that there is no relief here; for it is contrary to the nature of a relief to be due on alienation; and this being a relief by custom, and the prescription of a remedy not being shown, as for a heriot custom, there is no distress unless the custom gives it.

WHITLOCK, J. The first question here is whether this relief be a duty. There is a remedy, for it is expressly said the relief is due upon every alienation; and for what is due by custom (as it is by tenure) distress lies. As in 11 H., 4. There is no doubt but a relief may be levied by distress, for it is a part of the tenure, and, admitting the contrary, yet there is a sufficient consideration. And if there be two considerations, and one of them be meritorious, it is well enough. With regard to the last exception, viz., the *means* of making it appear that, etc. (1) Respecting the rent, etc., he makes it appear by presentment; and the tenants are the proper inquisitors to ascertain what is due to the lord. (2) As to the relief, *rotuli curiæ* are the proper evidence. And this is not due by law, but by tenure and the custom *of the manor. I do not know how he could have made it appear more plainly. Besides, if this was not sufficient, the other ought to have demurred; but he has confessed the action.

JONES, J. This is not properly a relief, for *that* ought to be on the death of the party. But *there* the relief is something growing due by custom or the reservation of the party. 11 H., 4. In *Wales and Corn-*

wall it is due by custom; and if it be due by custom distress lies; for the custom ought to maintain the remedy. *Mantlies case* in *Plowden.* In the book of 14 H., 4, there is no resolution in point; for heriot custom distress does not lie without custom; but seizure only. In this case both lie. He says that the land was held of him, etc., by fealty, etc., relief *quando acciderit secundum consuetud. manerii;* so there is a remedy, for there is a tenure. But he ought to prove both that the land is charged and that the relief is due, viz., in point of tenure. With regard to the other point: he has made it appear well enough; besides the other has confessed it.

DODERIDGE, J. All the books agree that relief is no part of the tenure, but an incident thereto; therefore, debt lies for it. And the question now is whether it be alleged as an incident to the tenure or something due by custom, and this cannot be resolved on the face of the declaration. If it be a custom, he ought to allege the means of recovering it; as for a heriot by tenure he may distrain or seize, but for a custom he cannot distrain without distress be given also by custom, as in *Godfrey's case;* and here the remedy ought to be alleged. There are two considerations, and if he fails in one (as he fails here in the relief) you cannot expect the performance of the promise, which is made in consideration of both. 10 Eliz.; Dyer; 6 H., 7, 10. An accord is entire. In this case, although the defendant has confessed the action, yet he may show to the court, in arrest of judgment, the defects of the declaration to prevent error, and we are not barred. In respect to the manner in which he makes it appear that the rent and relief are due, it is in his imagination only; and the court rolls are no proof to us.

CREW, C. J. I take this distinction: If the words be that he ought to make it appear to the man; then he makes him the judge, whether relief be due or not; and it is sufficient if he makes it appear to his brothers, viz., the tenants. And this is the best means to do it. But if the words be that he ought to prove that the land is chargeable with the rent, and that relief is due, the proof ought to be by action. 7 H., 2; Fitz. Barr., 241; 19 and 15 E., 4; *Sed adjournatur, postea,* p. 721; Jones, 132; Bendl., 180; 3 Bulstr., 323; Roll., 370; 1 Cr., 681.

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*ALLFRIGHT v. BLACKMORE.—Hill. 1 Car.

Case. The plaintiff counted, that in consideration that he would marry the defendant's daughter, the defendant assumed and promised to pay him £40 *at diem maritagii, aut infra decem dies post maritagium;* and shows that, giving faith to the said promise, he married her 28 *Junii,* 19 Jac. Yet the defendant, not minding his promise, etc., *licet*

(*Scil.*), 15 July, he was requested, he has not paid the £40 on the 28 *Junii* on which, etc., or any time afterwards. Now the question was whether notice ought to be given of the marriage to the defendant before the plaintiff could bring his action, or whether he was bound to take notice of it. When a man is bound to pay money on request, there ought to be a request before the action is brought, for the request is part of the promise. But the notice of the marriage is something collateral to the contract, and is no part of the *assumpsit*, and the request itself implies the notice and all other requisites. If issue be joined on the notice, and there is no request, it is insufficient. In this case the request is only made to show that the marriage has taken place, wherefore, etc.

A distinction was taken at the bar, when a stranger promises to pay, etc., if the plaintiff marries such a woman; there notice ought to be given, for it is something between strangers, but it is otherwise if the father promises. Another distinction was taken when a day is appointed. 8 E., 4, where notice ought to be given of an arbitration.

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*ANONYMOUS.—Trin. 1 Car.

DODERIDGE, J. If two have a manor in common, before partition, one is said to have *dimidium manerii;* but after partition he is said to have *medietatem manerii.* So, if *after* partition one of them is ousted by force, the indictment shall be for entry *in medietatem manerii.*

LISLE v. MARTIN.—Hill. 1 Car.

One leased a farm for years, except all trees growing or that would grow on the premises. The lessor covenanted for himself, his executors, administrators, or assigns, to find sufficient house-bote and hay-bote. The lessee made his executor and died. The executor assigned the term to another; and the house being out of repair, he cut down two pines and an oak to mend it, and the question on a demurrer was whether trespass lies against the assignee. It was said that whatever interest the lessee had in the trees, he ought to request the lessor to assign what trees he should have for the repairs, and a question is made whether on such a request and a denial he is not put to his action on the covenant; or whether he may of his own head cut what trees he pleases. *Nota.* The word *dedi* was not in the deed.

The case was not argued, because judgment was given on a defect in the pleadings. The trespass was supposed to have been committed the

25th of March, 20 Jac. The defendant justified *quod ante predict. tempus quo,* etc. (*Scil.*), *ultimum die Martii,* the executor assigned the land to him, to have and to hold from Lady-day (before which is the day on which the trespass is supposed to have been committed) for five years. It was said that if it had not been for the *habendum* the (*Scil.*) would have been void.

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*R. SURY v. BROWN.—Hill. 1 Car.

Debt for rent. The plaintiff counted that John Sury leased lands to the defendant for twenty-five years; rendering and paying *pro inde annuatim, durante dicto termine prefato Johan Surry, et assignatis suis,* so much rent. John levied a fine of all the lands demised to the defendant to another, to whom the defendant attorned, and the other granted them to the plaintiff, to whom the defendant also attorned; and for rent arrears, the plaintiff brings this suit. The defendant pleads an assignment of the lease by deed indented, bearing date, etc. Whereupon, the plaintiff demurred. The first exception to the declaration was that the life of the lessor is not averred, and a question raised whether the rent shall continue after his death. Otherwise, it shall be intended by the declaration that the lessor is dead; and then there is no cause of action. It was objected that by the lessor's death the rent is gone. 11 E., 3; Ass., 86; H., 33; Eliz. rot., 1316. *Butcher* and *Richman's cases* in C. B., in *replevin,* etc. Where there was a lease for years of certain lands rendering rent, during the term to the lessor, his executors and assigns; and it was adjudged that the heir shall not have the rent. It was further urged that the reservation shall be taken more strongly against the lessor. But if the reservation had been rendering rent during the term, it should have been by construction extended to the whole term; for the rent is incident to the reversion. If two tenants in common grant 20s. rent to another, he shall have 40s., but if they had joined in a lease for years rendering rent 20s. they shall have no more. 10 E., 4, 1; 10 Rep., *Clum's case.* The rent shall go according to the words of the reservation strictly taken; but in 5 Rep., *Mallorie's case,* the disjunctive is taken for copulative; a feoffment to have and to hold to the feoffee or his heirs is not an estate for life.

2. The lease is of the land with common of pasture for ten sheep; and he has pleaded that it is *not* by deed; then, if the demise be void, the reversion is so likewise. On this it was resolved that the rent issues out of land. Respecting the defendant's bar, exception was taken to the want of averment of the place where the assignment was made. It was argued that it shall be intended to have been done on the land. 21 H., 7, 23. The defendant avowed for homage. The plaintiff said he had

tendered homage, and no place specified. Yet it was held well, because the defendant may rejoin if the place is traversable. (1) There is a difference between a transitory *thing, when a place ought to be alleged, as in an arbitration, where the thing is local. 5 H., 4, 24. *Per cur.* "It is not now the way to allege the place in a rejoinder, although heretofore it was;" and there it was overruled. As to the reservation, it was argued by *Bridgeman* for the plaintiff that the rent continues after the death of the lessor, and shall descend to the heir, if no assignment is made of the reversion. Here the assignee shall have it, as in 27 H., 8, 19; 10 E., 4, 18; Dyer, 45. Rent reserved as long as the lease continues shall be paid to the heir, although no mention be made of him in the lease. Plowd., 171, 177. The heir shall not have the rent, for it appears that it was not the intention of the lessor he should. *Mallorie's case,* 5 Rep., 112. When the reservation is rendering rent *annually* during the term, it is plain that the heir shall have the rent; then the subsequent words to the lessor and his assigns do not restrain the precedent ones, but demonstrate that the rent is to be paid.

The Judges gave briefly their opinions.

WHITLOCK, J. The rent shall continue; for a lease for years is a contract, and the law favors a recompense in every contract; it is natural equity and *de jure communi;* therefore, without consideration by feoffment the land only passes to the use of the feoffer. Thus, when a man makes a lease for years, without reservation, still the law reserves his attendance; it requires a *quid pro quo.* Dyer, 45; 5 Rep., *Mallorie's case.* Conformity is to be observed in constructions. 10 Rep., *Dr. Leyfield's case:* Words shall be taken largely in a reservation. In this case the reservation is rendering rent annually *during* the term; it is plain that the contract is that the rent shall continue during the term; and the intention was not that it should continue *only* for life. But if the reservation had been to the lessor only, it would be otherwise. Here it is reserved to the lessor and *his assigns.* 14 H., 6, 26, is an express authority that the heir shall have the rent.

JONES, J., concurred. A number of various discordant adjudications on this point are to be found in the books; and the line betwixt express and implied reservations is not yet precisely drawn. The first case is 11 E., 3; Ass., 6; 10 E., 4, 18, *per Littleton.* If I lease land for years, rendering rent to me, without mentioning my heirs, still they shall have it; for it is annexed to the reversion. Mayle denies this, 27 H., 8, 19, *per Audly.* If rent be reserved on a lease for years to the lessor, without saying during the term, or to the heirs, they shall not have it, for the reservation is the source of the rent; and it may be reserved *determinable for life. Dyer, 45, is like this. But there is a very narrow distinction, viz., where rent is reserved *generally,* it shall go to the heir;

but when it is *to the lessor,* the heir shall not have it. Yet this is only when the words *during the term* are omitted. Here it is reserved *annuatim during the term* to the lessor. 8 Rep., 70, *Whitlock's case.* The other words are only to show to whom and how the rent is to be paid. In *Mallorie's case,* if the rent had been to be paid to the Abbot or his successors, it would have been bad; for it shall be only to the Abbot *himself.* But when he reserves it *annuatim* it is otherwise. I am therefore for the plaintiff.

DODERIDGE, J., cited 11 E., 3, *Browning and Boston's case,* Commentaries 21 H., 7; 10 H., 7. I think that the rent does not continue after the lessor's death. The words of the demise are the words of the lessor; therefore he shall have recompense; but the reservation is his act; and it shall be taken strictly against him. He has limited the rent to be paid to *himself:* the law shall not extend it beyond him; for he has abridged and curbed its limitation. *Mallorie's and Whitlock's case* cannot govern this. There the lessee had not his election to pay to the Abbot or his successors; and it seems that even if he had, he should pay to his successors. I rather deliver now my present opinion than give a judicial decision.

CREW, C. J. The rent ought to be paid *annually* to the lessor *and his assigns.*

On another day, *absente* DODERIDGE, J. Judgment was entered for the plaintiff.

Dyer, 114; Placit., 60. Covenant to pay quit rents during the term, without mentioning his heirs or executors; the executors are not bound to pay. *Nota.* It was agreed by all, that no costs are payable in a *scire facias.* 3 Bulstr., 326; Bendl., 188, 159; 3 Rol., 1, 451.

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*WARNER v. HARDING.—Hill. 1 Car.

Noy. The case is this: Gulielm Shelley conveyed lands to the use of himself for life, remainder to John Shelley and the heirs of his body, etc., provided that if the said Gulielm Shelley, at any time during his life, shall give, tender, pay, or offer to the covenantees, or the survivors of them, or the heir of the survivor, a ring, or pair of gloves of the value of 12d. or 12d. in money, the said Gulielm Shelley then expressing and declaring that the ring or gloves, etc., are tendered to the end of avoiding the uses, that then the uses shall cease and be void, and the covenantees and their heirs shall stand seized to the use of Gulielm Shelley, and his heirs forever. Afterwards the said Gulielm was attainted of high treason, etc. The attainder was confirmed by statute, 28 El., which enacted that he should forfeit all his lands, tenements, etc.,

rights, conditions, and all other his hereditaments. Two years after the said Gulielm Shelley brought the conveyance into the Exchequer and had it enrolled. The Queen reciting the attainder of Gulielm Shelley, and the conveyance gave power to Sir John Foscue to deliver a ring, or a pair of gloves, etc., to the covenantees or their heirs in order to avoid the uses, and to certify the same into the Exchequer. Sir John Foscue, for and in the name of the Queen, declaring the contents of the letters patent, delivered a ring to Sir John Hungerford, son and heir to Sir Anthony Hungerford, one of the covenantees, declaring it to be given with an intention to avoid the uses in the indenture of covenants; and Sir John Hungerford accepted the ring. Sir John Foscue certified the matter into the Exchequer.

The question now is whether the condition is given to the Crown by the statute.

I contend it is not. Because it ought to be performed in person and not by attorney, for there ought to be a declaration of the intention with which the ring, etc., is tendered. Notwithstanding the attainder, Gulielm Shelley may perform the condition; but he cannot make an attorney to perform it in his name, as in the case of the Templars and their tenure in frankalmoign. As to the objection made, that, if such assurances in which none may perform the consideration except the party were permitted, there would be a great defect in the law; for in an attainder for treason, the King should not have the land, but it would go to the heir: *I answer that, according to law, no condition can be performed except by proviso, as on a feoffment or condition that if he tenders a sum of money, etc., afterwards the feoffor is attainted, the King shall not have the condition by the common law: then there is no mischief in the common law, which was careful that such condition should not be forfeited. Here is a tender of something of value, and to make it Gulielm Shelley is to do a special act, viz., a declaration, etc. Littleton says that attornment is by express signification or implied means; yet a man shall not lawfully make attornment by attorney. In 32 H., 6, 22, one was admitted to attorn by attorney; but this was in the case of a rent charge, where no corporal service is due. But in a *quid juris clamat,* after plea pleaded, the defendant may make an attorney when the judgment is not to be that the defendant attorn, as if tenant for life claims a fee simple; but it is otherwise when there is to be judgment that the defendant attorn. For in a *quod juris clamat et per quæ servitia,* the defendant shall do corporal service, viz., fealty and homage. Dyer, 136. So if the attornment which is only an assent cannot be done by attorney, *ergo* the tender here, etc., and to do a corporal act *Scil.* to declare, etc., Gulielm Shelley ought to do this in the time limited, etc. If the declaration had limited a special posture, as fitting or standing, he ought so to have

done it. So if I command one to make a deed of feoffment in Latin, according to such a copy, and he does it in the same words, but in French or English, he has not performed his authority. Gulielm Shelley may do such a corporal thing, notwithstanding the attainder, and *then* the Queen may have the benefit of the condition.

There are two parts in the condition, viz., a natural part; and this an attainted person may do; but he cannot have the consequence of the performance of the condition. I do not see how this case differs from that of the *Duke of Norfolk*. There the proviso was, if he makes a revocation in writing of his own hand, and it was resolved that the Queen should not have the condition. In this case there ought to be a declaration by Gulielm Shelley, as was adjudged in the Common Bench in a *montrans de droit, etc.*

The second question is, whether the condition is well performed. The sum at the end of the sentence shows that 12d. shall be the smallest value of the ring. The third particular refers to the *two antecedents. Lessee for life, remainder for life, remainder to the lessor, at 20s. rent; it is a rent reserved to the lessee for life and remainder for life; but if he makes a lease for life, without impeachment of waste, remainder for life, this remainderman shall not have the privilege. Dyer, 347. There the time refers to both the things before recited. Here in the certificate, nothing is said about the price, and it is not certain in law, for it does not appear that the tender was well made. Another question is on the performance of the condition, whether there be such a certificate of record, whereby it may appear judicially that the condition is well performed. There ought to be a record of the performance, otherwise the Queen will have no title to the land. *Englefield's case,* 7 Rep. When the condition is a matter of fact, and the performance *in pais,* to entitle the Queen, there ought to be an inquisition of record, and it ought to be certified; whereupon the party may have a traverse. The fine in the present case was of record, but in it no condition appears; and the indenture, although it is recorded, yet is no record. There the performance of the condition being a matter of *pais* and the indenture a matter of fact, if there be no particular record whereby it may appear that the condition is performed, the Queen has no title. It is not certified that the tender was made to any of the parties to the covenant or the heirs of any of them, but to the son and heir of one of them. If the tender was made in this manner, it was not done according to the proviso. For the eldest son is *son and heir apparent* during the life of the father, and it is not certified that the father was dead. P. 35, Eliz. rot., 242, C. B. Audley brought debt against Newdigate, son and heir apparent to Newdigate, and he counted on an obligation by R. Newdigate, the father, and on *rien per discent* pleaded, there was judgment *pro quær.* But on

a writ of error, the judgment was reversed, because by such an appellation it is intended that the father is alive.

Hitcham, pro defendente. As to the objection to the value of 12d., this was not the intention of the parties. But as to the main question for the attainder, the condition is given to the Queen by the statute 32 H., 8, by which all conditions are forfeited. *Marquis of Winchester's case.* And *ipso declarante* makes no difference.

DODERIDGE, J. As to the exception to the value of 12d., nothing appears, *non refert.* As to the matter of record. The Queen may seize lands without any record. If return be made into the Exchequer that a man is beyond the sea and will not return, being commanded so to do, the Crown may seize his lands. And although the son cannot be heir during the life of his father, *the father may have an action *de filio et hærede.*

Noy. The record ought to certify that the father is dead; otherwise the son is not in the covenant.

[On another day in T. T., the case was argued by *Sir George Crooke, pro. Quær.,* and *Sir Thomas Crew, pro defendente.* H., 1., Car. *Noy pro Quær.,* and *Serj. Hitcham pro defendente.* P. 2, Car. *Davenport pro Quær.,* and *Crew, pro quærante,* and]

Now it was argued by the court, viz., WHITLOCK, J., and JONES, J., *pro defendente,* and DODERIDGE, J., and ..... *pro quærente.*

As to the exception taken by *Noy,* that the ring may be of less value than 12d., and his case of the lessee for life, remainder for life, without impeachment of waste, it goes to both the estates. T., 3 Jac. rot., 1619. *Brackenbury and Brack.* One covenanted to make a conveyance in fee within two years, and that he should be bound in an obligation of £200 *rationable premonition inde habita;* it refers to both the clauses. Dyer, 347, pl. 10; 5 E., 4, 127. There if there be to be given a horse and an ox of the value of 40s., it refers to both. But this objection was in a manner overruled by the court.

DODERIDGE, J. There is a difference in the cases, for a horse or an ox hath no fixed value. But it cannot be intended that a ring should be of so small value as 12d., for it has a value in itself.

And the rest of the court assented.

As to the other exception taken by *Noy,* that Sir John Foscue returned that he gave a ring to Sir A. H. *filio et hæred. apparenti,* one of the feoffees, etc., it is bad, for he may be heir *apparent,* but not heir as appears by Littleton, p. 35; El. rot., 242. Audley brought debt against R. Newdigate, son and heir apparent to R. Newdigate, and counted on an obligation that the said R. Newdigate bound himself and his heirs. The defendant pleaded *rien per discent,* and it was found against him. The plaintiff had judgment in the Common Bench which was reversed in

this court. Although he comes in the pleadings and the special verdict, and at the time of the tender he *was heir,* it matters not, for this verdict does not amend the certificate. It ought to be certain and supply the wants of an inquest of office, and a traverse cannot be taken upon it.

DODERIDGE, J. If any record finds the title, the Crown is in, and it is well for the Crown.

JONES, J. But it cannot, in this case, make the lease good.

CREW, C. J. Certainly not. For to make the lease good, there ought to be a title in the Crown *before* the lease.

Damport, Serj. The proviso is *dare deliberare vel offerre.* The Queen made a patent to Sir John Foscue *deliberare,* but it is not said *dare et deliberare,* and a thing may be delivered without being given. For the delivery of a *thing does not alter the property; it may be countermanded; one may have *detinue* after it.

Sed non allocatur. For a delivery in this case is a gift.

In respect to the exception taken by *Noy,* that it is a personal act as homage, or attornment, and cannot be made by attorney, because there is a personal act to be done. 32 H., 6; 22 H., 7, 27; 39 E., 3, 20; 50 Ed., 3, 6; 21 E., 3, 9; 43 E., 3, 30. In case of a person recluse by necessity, an attorney is to be admitted; likewise in the case of a woman pregnant. 4 and 3 P. M. But there it was *ad placit. mater. pred.,* which was mentioned in the writ. But if a man makes a letter of attorney to a man to attorn for him, it is an attornment.

WHITLOCK, J. The question is not so much about the tender, as whether the condition be forfeited. The *ipso declarante* is no more than the law implies, for a tender without a declaration does not operate. The tender is *actus corporis et mutus actus;* the declaration is the soul, the life of this corporal act. *Verba sunt indices animi. Et expressio corum quæ naturaliter insunt vacua et inutil.* In the case of a distress annexed to rent service, lease for years rendering rent at Michaelmas, and if be in arrear twenty days after and lawfully demanded or personally, the lessor may distrain; yet the lessor may distrain before the 20 days are out. To this purpose the counsel for the defendant have cited the case of *Cladon and Arrowsmith.* Lessee for life (provided that he should not lease, except determinably on his death), made a lease for 21 years, without expressing that it should determine on his death; it is a good lease. 45 E., 3, proviso, that if rent be arrear, the King's bailiff shall distrain, it is void for he shall distrain as my servant. Dyer, 331; 4 Rep., 72; 8 Rep., *Damport's case;* 1 Rep., *Shelley's case,* limited to heirs male and the heirs male of such heir male. There is this difference: when a thing is vested with an interest it may be done by attorney, but not when it is a nude interest. *Comb's case,* 9 Rep., 33 E., 3; F. Trespass, 333.

2. It is a rule that when a corporal act has two effects, the one proper (*direct*) and natural, the other improper (*indirect*), and legal, the act will not enure to the improper effect without a declaration. Bract. lib., 2, cap., 17. In speaking of corporal acts and their effects, they have three parts: *actus corporis,* which is here the tender of the ring, *actus animi* the declaration and intention of avoiding the uses, *adminiculum juris,* the revocation of the uses, by the operation of the law on the tender. *Therefore riding on the land in hawking or hunting is not a possession of it. *Naturalis possessio est pedis possessio,* but it is not *civilis possessio,* for it lacks *actus animi.* 43 E., 3. A delivery of the deed of feoffment on the land, without saying any thing, has no operation, but if he had said that it is to such a purpose, etc., or proviso, etc., it would have been well. *Thoroughgood's case.* And it is so here, especially as the rent rises without entry, to the Queen and her heirs. [*Nota* that a springing use may be to a man attainted, and the attainder does not countermand a springing use, which was unanimously agreed to.]

3. This case turns on the general ground of the notice. For if here no declaration is made on the tender, the feoffee cannot know why it is made; perhaps the money is due to him. An estate shall not be defeated without notice. Dyer, 354. Provided that if the feoffor tenders to the feoffees during his life, etc., tender without notice is not good. The bargainee of the reversion shall not enter on lessee without notice. 3 Rep. The lessor accepts rent without notice of the assignee; yet he may enter. So it seems to me the tender is the *principal,* the declaration the *accessory. Et accessorium sequitur, suum principale.* The proviso of the tender of the ring is so forfeited. *Ergo,* so must be the declaration of the intention of the tender, *Quid quis per seipsum, per alium potest* in civil acts, but not in natural ones. The tender is a civil act. *Comb's case,* 9 Rep. Here, without a declaration, the *time* is uncertain; the *thing,* a ring, *or* etc., the *person* the feoffees *or* their heirs. *Ergo* there is a great necessity that a declaration should accompany the act. There are but two cases in which the conditions are *inseparable* from the person, and cannot be forfeited by statute. In *Englefield's case* the condition was not forfeited because the proviso then was that if his nephew becomes prodigal or vicious, etc., as CREW, C. J., said, *Jura civilia non dirimunt naturalia:* the other case is when the act is *individually annexed to the person,* as to write with one's own hand, as in the *Duke of Norfolk's case,* 7 Rep. But here the tender of the ring is not such.

JONES, J. Heir apparent, etc., in the return is well enough, for it is *secundum formam.* The sheriff returned two garnishees, which ought to have several garnishments; yet as he said *secundum exigentiam brevis,* it was held well enough. But to the main point: The first part of the

condition may be limited to a stranger, but the benefit of the penalty to none but the feoffor. *33* H., 8. The entry upon condition is given to the Crown, why should not the rent follow? *5 Rep., *Mallorie's case.* The conusee of a fine, before attornment bargained and sold; the bargainee shall not distrain without attornment, because the conusee could not. So if the tender be limited to the Chief Justice, the King shall not have it, but on performance he shall have the advantage of it by entry. If there be lessee for life, on condition to have the fee or tender of a ring, and he be attainted of treason, this shall not be forfeited to the King, because it is annexed to the privity of the estate.

To the forfeiture of the condition in this case, these objections have been made. (1) Because it is, *if he the said Shelley do tender.* Clearly if it is only a tender, it shall be forfeited. As to *Comb's case,* that he cannot make a lease of land by attorney, I agree. But here it is not a lease of the land, but a declaration of the first use, and the lessee is in by the original agreement, or the first feoffment, as in *Whitlock's case,* 8 Rep.

(2) The second objection is, that after the attainder, Gulielm Shelley might have performed the condition. I admit this, but the King also may, as in Littleton. Feoffment on condition, that if the feoffee pay, the first or second feoffee may pay. But I say that the condition is forfeited, and Gulielm Shelley cannot perform it, because it is transferred from him, *aliter* when the condition is personal.

(3) The third objection (*ipso declarante*) is no more than the law implies. 22 Eliz., *Gresham's case.* 3 Jac., in *Scaccario, Clinch, Church and Williams' case,* the case was: the Abbot of Strata Marcel made a lease, rendering rent on condition that if the rent be in arrear and faithfully demanded, etc., the lessor may reënter the reversion came to the Crown, the rent being in arrear, the King entered, and adjudged well; because the demand is no more than the law implies, and the judgment was affirmed on a writ of error in the Exchequer. But if in this case it had been that in case the said Gulielm Shelley should declare, perhaps it would not have been forfeited, because it would have been annexed to the person.

DODERIDGE, J., *e contra.* I grant that if the act were not personal, it shall be forfeited to the King, and that a declaration ought to accompany every tender, but here is a special declaration, annexed in another manner than the law annexes it. In *Englefield's case,* Englefield allowed that anyone might tender for him, for there it is, if he *or anyone* for him. But here it is *ipso declarante* which is personal. If the lessor annexes a special circumstance in the clause or distress, it ought to be observed. Justice JONES allows it, if he had said that he *himself* should declare; and here *participium presentis temporis indicativi modi dis-*

solvitur in verbum presentis subjunctivi. 27 H., 8. **Dockray's case.* If a lease be on condition that B., *being his son and heir, and he shall declare,* it is the same as if he had had *when B. shall be my son and heir.* Likewise, on condition that my wife being a widow, is like when my wife shall be a widow. There is a difference between individual and general acts. *Comb's case.* If a copyholder surrenders in court, it may be done by attorney, but not if out of court, for out of court it is a particular act. 33 E., 3; F. Annuity, 5. Annuity granted until he be preferred to a benefice by the grantor, is a general act.

2. Election is a personal thing. As WHITLOCK, J., has said, the mind of every man is annexed to his person. Dyer, 28. Here Gulielm Shelley had an election of the *thing* to be tendered, and of the *person* to whom it was to be tendered. If I give B. acre and W. acre to I. S., *habendum,* the one for life and the other in fee, and he be attainted of treason, the King shall not make his election. Further, if Gulielm Shelley had given the ring in the hand of another and had declared to what intention he (the other) should tender it, it would have been as well.

CREW, C. J. I agree with my brother DODERIDGE, J. When the limitation is *generally* that it shall be declared, the law implies it. But when the party *himself* is to declare, it is otherwise. It has been adjudged that if an Abbot make a lease on condition that the lessee shall not ..... without the assent of the Abbot, this condition shall not go to the Crown by the dissolution. Here the performance of the condition ought to be by Gulielm Shelley *himself,* and *both* parts must be done at *one* time. I conclude for the plaintiff, *antea,* 649, 680; Jones, 134; Bendl., 139; Noy, 20, 79; Roll., 393; 7 Co., 11, 6; Ow., 1, 119; 1 Sand., 60; Poph., 105; 1 Cr., 461.

ANONYMOUS.—Mich. 1 Car.

An indictment of forcible entry was avoided, because it said the defendant entered such land or house *existens liberum tenementum* of such a one, instead of *tunc existens,* etc.

It was said that an indictment was avoided because the person indicted had no addition.

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*COLE'S CASE.—Hill. 1 Car.

It was said that a writ of error is a suit, and the party may be nonsuited, and by a release of *all* suits, the writ goes; and if it be returned, it is not discontinued by the King's death.

HARRISON v. PECK.

Case. The plaintiff declared that he was seized in his demesne of a house and meadow, and he and they whose estate he had in the house, had, time out of memory, etc., had a way from the house to the meadow, and that he had also a way from the house to the King's highway, adjoining the said house, and over the defendant's close, the defendant obstructed him therein. The defendant pleaded that he holds the close free of such a way, and traverses that the plaintiff had such a way, and there was a verdict *pro quærente*. It was moved now in arrest of judgment.

1. That the plaintiff prescribes for a way to his house, without saying an ancient house; for in prescribing in a city, one ought to say *quia est antiqua civitas*. Dyer, 70. He ought to say an ancient park, so in this case he ought to have alleged that it was an ancient house, whereupon the defendant might have taken issue, and the declaration ought to be certain to all intents.

2. On account of the uncertainty of the way. It is said a way from the house to the highway, without saying where the highway is or leads.

But on the other side, it was answered that there is a difference between a prescription which is personal and a custom which is local. Therefore, it is sufficient in a prescription to say time out of memory he had such a way, which implies that it is an ancient house. 3 H., 6, 31; 20 H., 6, 7. And a prescription being found in a verdict, it is well enough. 37 H., 6, 3; 39 H., 6, 6; 20 Ass., 18; Ancient Book of entry, 492. It shall be intended that the highway is on the same street or near to it.

DODERIDGE, J. The declaration might have been better, and the only question now is, whether the verdict has not cured *the defect, for otherwise it will not do. Dyer, 70; 7 H., 6, 32; 7 E., 4, 2; 15 E., 4, 29; 22 H., 6. It seems to me the verdict has cured it.

CREW, C. J. I think so.

JONES and WHITLOCK, JJ., gave their opinions at Reading last Mich. Term.

And now judgment was entered for the plaintiff. 3 Bulstr., 334; Bendl., 160; Poph., 168; Palmer, 420.

BEAMONT'S CASE.—Hill. 1 Car.

Debt against an executor. He pleaded several judgments in bar. The plaintiff replied that those judgments were satisfied and kept *a foot* by covin to deceive him. The defendant traversed the satisfaction of the

judgments, whereupon the plaintiff demurred, for the satisfaction is only an inducement to the fraud and covin. In an action on the case *sur assumpsit,* the defendant cannot traverse the consideration, but may the *assumpsit.* Dyer, 361. *Merrial and Tresham's case,* 9 Rep., and *Turner's,* 8 Rep. Where the fraud is not traversable, but the principal thing, etc., as to the exception of the replication, the double rejoinder has cured it. It was urged on the other part that he might have taken issue on the fraud and covin, generally, if it had been so pleaded; but he waves this and offers another plea; therefore, the issue is well on the payment and the rest is only consequential, etc. In *Turner's case,* the recovery is on good ground, but the subsequent agreement made it covinous; the judgment is for £40, and £20 are given in satisfaction of it. It is no satisfaction, but the recovery is absolute until satisfaction be acknowledged on the record. Here the fraud should be alleged specially and not generally. But it was said that if he had averred it generally, the fraud and covin ought to have been traversed. But here he has barred himself by a particular allegation.

DODERIDGE, J. If the judgments were had by covin, he may traverse generally; but perhaps they were rightly obtained, and afterwards an agreement made to pay so much per month in satisfaction, etc.; in the meantime the judgments were kept on foot. In this case the keeping the judgments on foot is traversable, and the payment is only an inducement, and a matter of inducement is not traversable. Judgment was accordingly given for the plaintiff. Jones, 171; Bendl., 166.

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*BLACKSTON v. MARTIN.—Hill. 1 Car.

On a *scire facias* in nature of an *audita quærela issue* was joined in Chancery, and sent from there to the county palatine of Durham to be tried, and a verdict given for the plaintiff; and afterwards the record came to the King's Bench, and the defendant's counsel took exception that the issue was not first sent here, that the Judges of this court might write to the Bishop of Durham to try the issue and afterwards make return here, that judgment might be given; and for this reason judgment was reversed. Afterwards, on an *audita quærela,* a trial was had, and a verdict had by the plaintiff, and exception was taken that the plaintiff shows that *suit tenens unius messuagii* in Durham, and that Sir William Blackston was seized of a messuage in Durham, and of divers other lands, and 30 El. acknowledged a statute, and afterwards the conusee had only extended the land in Durham, which the defendant had and not the other land which the conusees had; *ad grave damnum* and desired restitution of the mesne profits. The defendant came in and

said that Sir William Blackston was not seized of any other lands at the time the statute was acknowledged, and at any time after, whereupon a verdict was found for the plaintiff. Whereupon it was moved in arrest of judgment that it does not appear at what time the plaintiff became tenant of the land at the time of the extent or afterwards. But it shall be intended for the plaintiff, viz., at the time the *liberate* was delivered, for it is a writ *ad nomen propter brevitatem,* and then he concludes *ad grave damnum;* the law understands that he was tenant at the time of the *liberate,* otherwise it is not *ad grave damnum,* and if it was not so, the defendant ought to have pleaded it; and as he has pleaded other matter, etc., and it is found against him, it is well enough, and a number of precedents were shown. T. 6 H., 4. rot. 505, 101; M, 16, 17; Eliz. rot., 1313; C. B. On the other part it was alleged that this writ is in lieu of a declaration. 32 H., 6, 14. And in this case it is not alleged when Sir W. B. parted with the possession, but it is alleged that he was seized, etc., which shall be understood to be the case, unless the contrary be shown.

WHITLOCK, J. The nature of a *scire facias* is to put everything upon the defendant, for there is judgment for the plaintiff.

JONES, J., assenting. It is sufficient that he is *tenens messuagii.* A *scire facias* is in the nature of a bill in Chancery, therefore that certainty which the *common law requires is not expected in it—all *scire facias'* are alike. If it be otherwise, it ought to be shown by the other party. And this is the constant practice. I am for the plaintiff.

DODERIDGE, J., And I also.

CREW, C. J. So am I. The defendant by his plea admits him to be tenant, and pleads this matter, viz., that Sir William Blackston was not seized of any of these lands, whereby he waves the advantage, he might have taken, and he shall not have it now, for it is the practice in *scire facias'* now, and so it was in the time of King James; but it was otherwise in Queen Elizabeth's time. 33 El., *Novel's case; postea,* p. 816; 3 Bulstr., 305; Bendl., 161; Jones, 82, 90.

Nota. Corporations may have certain things by prescription and others by charter, and therefore may use both titles.

JASON v. AYLIFF.—Pasch. 2 Car.

Jermyn moved the court they would give the plaintiff a day to show cause why he should not acknowledge satisfaction of a judgment he had obtained against the defendant, he having received the money and promised to acknowledge satisfaction, and an affidavit being made thereof. *Ayliff* was ready to release errors and the court granted the motion.

Nota. On an allowance of an *audita quœrela,* it was said by *Brown,* secondary, that in an *audita quœrela* bail shall be put in court before the Judges themselves. Palm., 422.

*HILL'S CASE.—Pasch. 2 Car.

Case for these words: *Hill is a base broken rascal, and hath broken twice already, and I will make him break a third time.* It was moved in arrest of judgment that the action does not lie, because he did not say that he was a bankrupt. *Johnston's case. Johnston is broke,* the question was, whether an action lies with an innuendo that he is a bankrupt. But the parties made it up. But here the words do not go so far, and he has not said that he was a tradesman, but only that he is an honest subject and gets his living by buying and selling; and all the court thought that judgment ought to be arrested. It would have been otherwise if he had been a tradesman.

DODERIDGE, J. The words are not actionable. Perhaps he meant that his belly bursted open. To say that *he has broken twice* is not actionable, for many persons who have been bankrupts heretofore are now able.

JONES, J. *He will break shortly* may be actionable, but *I will make him break shortly* is not.

CREW, C. J., agreed.

And a day was given to show cause why judgment should not be arrested. *Marshall v. Allen,* Noy, 77; *Hutton v. Boreman,* Bendl., 170.

WATKIN'S CASE.—Pasch. 2 Car.

Executor of an executor was sued for legacies and pleaded *non assets.* The plea was rejected in the spiritual court, and a prohibition out of the King's Bench was awarded in King James' time.

PER CURIAM. It is discontinued. They took a distinction where a prohibition is awarded out of the Common Bench, or out of the King's Bench. No prohibition issues out of the Common Bench without a suggestion of record, and therefore it is the suit of the party. But if it is awarded without any suggestion of record, in such a case it is only a prohibitory commission. There is also this other difference, when a prohibition issues out of the King's Bench, if there be no other process, it is discontinued by the demise of the King. But if attachment issues and is returned, or the party appears and puts in bail, then it becomes

*the suit of the party and is not discontinued by the King's desire. But here there is no process, but only a prohibition awarded.

Athoe. A prohibition is a suit, for the party may be nonsuited.

DODERIDGE, J. It has been adjudged that an action upon the statute *de seandalis magnatum,* although it be *tam pro domino rege quam pro se ipso* is not discontinued by the King's demise. For the contempt of the King is collateral. But when the King recovers part, then it is discontinued by the demise of the King. One cannot be nonsuited on a prohibition if there be no other process, etc.

JONES, J., assented. Palm., 422; Bendl., 163, 170; Noy, 70; 3 Bulst., 314.

*TRELAWNY v. REYNEL.—Pasch. 2 Car.

In debt *sur accompt,* and judgment in the King's Bench, the original writ had Devon and the declaration and subsequent process Exon, which is another county. On diminution alleged, the writ of Devon was certified, and it was now prayed that judgment be therefore reversed.

JONES, J. In the Common Bench, if the original be bad, it is amendable by statute. But I doubt how this can be taken to be the same writ; and if it is not, then it is no writ at all. But in this court, there can be no doubt, for now it is certified and it appears to be the same writ; and therefore it is not amendable.

DODERIDGE, J., concurred.

Nevertheless a day was given over. *Postea,* pp. 795, 803.

Rolls cited *Pollard's and Blyth's case* to Jac., supporting Justice JONES' opinion. CREW, C. J., and WHITLOCK, J., absent. 2 Cr., 479, 674; Palm., 428.

*DIXON'S CASE.—Pasch. 2 Car.

The sheriff having seized goods on a *scire facias sur a venditioni exponas* returned *non inven. emptor;* then his office determined, and he retained the goods. He who recovered prayed an attachment.

DODERIDGE and JONES, JJ. We cannot grant it. You may have the small issues returned. And there is no other remedy.

BELLAMY v. ALDEN.—Pasch. 2 Car.

An administrator accounted before the Ordinary, and a creditor took exception that he did not pay as much as he ought to; and a prohibition was prayed, because he proved it by his own testimony and he was excommunicated for default of proof.

DODERIDGE and JONES, JJ., awarded a prohibition and said: The Ordinary cannot hold plea of account, nor try payment or nonpayment, nor administer interrogatories to the witnesses. But he must take such accounts as are offered to him.

CREW, C. J., and WHITLOCK, J., were absent.

And on another day, DODERIDGE, J., being asent, *Ashley,* Serj., prayed that prohibition might be stayed. Otherwise a legatee cannot have his remedy.

JONES, J. You have your remedy here.

CREW, C. J. It is proper for the Ordinary to examine the accounts.

JONES, J. There payment proved by *one* witness is not allowed.

And a prohibition was awarded because proof by *one* witness was disallowed.

WHITLOCK, J. The jurisdiction of the court is not taken away, but their proceedings stayed. 13 E., 3; F. Ex., 19; Bendl., 171; Noy, 178.

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*MICHEL v. RAMSEY.—Pasch. 2 Car.

Banks took exception that the *pluries cap.* on which the defendant appeared, was dated the 21 *Julii* and returned *Tres Trin.* So the return was before the *cap.,* and the *alias cap.* was returned 10 *Julii.* Now Trinity term is appointed by Parliament, and there is no such term on 21 *Julii.* So it was awarded *out* of term.

JONES and DODERIDGE, JJ. Trin. and Easter terms commence on moveable feasts, and are guided by the change of the moon. Therefore, unless it be alleged *de facto* that the term ended *before* 21 *Julii,* we shall not intend it although it be assigned for error.

CREW, C. J. It is impossible that the term should continue until 21 *Julii;* therefore it seems to me, etc.

Banks. We have alleged it *de facto,* and on oyer of the record it appears that the defendant comes in on the exigent.

JONES and DODERIDGE, JJ. Appearance has cured all defects. For the end of the process was to make the defendant appear. The test of the judicial writ ought to be in term time, and if it is on a Sunday, it is error, for Sunday is not *dies juridicus, antea,* p. 638.

ANONYMOUS.—Pasch. 2 Car.

Littleton prayed a *certiorari* to remove an indictment for murder in Montgomery, in Wales, of one Cadwallader, who was killed in removing a force by order of the President of the Marches. He said that on

account of the great influence of the persons concerned, judgment could not be had there, and he had a day given him.

JONES, J., asked to *Littleton,* how it could be tried? *Littleton* and *Fanshaw,* one of the clerks of the Crown, said in an adjacent county. *Littleton* produced two precedents; one in a riot, the other in a misdemeanor.

Fanshaw said that it had been granted also in a case of felony.

It was granted accordingly. *Antea,* p. 638.

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*MILLEN v. FAWDRY.—Pasch. 2 Car.

Trespass for chasing sixteen sheep with a dog in a place called Bessils, in such a vill. The defendant pleads *non culp.,* and afterwards as to the chasing, says that the sheep were on his own land, damage feasant, that his land his close Bessils, without being separated by any fence or hedge, and that with a small dog he chased the sheep out of his own land, in said Bessils, and the dog, *contrary to his will and inclination,* chased them *on* Bessils *per paululum tempus. Et quam cito id vidisset,* he called his dog back and caused him to cease chasing the sheep, *quæ est eadem transgressio, etc.* The plaintiff demurred, and the demurrer was adjudged for the defendant.

Whistler. There are three sorts of trespasses with dogs: (1) When a dog is in the habit of killing sheep, and the master has notice and keeps him, and afterwards the dog kills sheep; (2) When the master sets on the dog himself; (3) When the dog, without any usual bad quality and without being set on, assaults a man. And this is not punishable. *Tyrringham's case,* 4 Co., 38. It is lawful to chase cattle out of one's own land, but not on other persons. Here the commencement was on the defendant's own land, but when the dog went over and did not desist, because he had been set on, trespass lies. He said he recalled him, *quam cito id vidisset, etc.* But perhaps the dog had much time to chase the sheep, and the master turned away; but if the beasts escaped in another's land, I ought to pursue them freshly. 10 H., 7; 7 H., 7, 1; 25 H., 7. But here he does not say that he did so.

Littleton. The law does not presume that a man shall have so much command over his dog as to be able to recall him suddenly, and there is a difference between a dog and cattle. If a dog goes on your land, you shall have no action. This case resembles that of *molliter manus imposuit* on a man to put him out of one's own house, and when one does a lawful act, and necessarily something ensues which he could not prevent, trespass does not lie. 21 E., 4, 64. Justification for retaking cattle out of another's land, on their escaping while they were going to

the pound. 28 E., 4, 8. Trespass for ploughing another man's land: Justification that he was ploughing his own land, and the horses became unruly and carried the plough on the plaintiff's land, and the horses ate a mouthful of corn. 33 E., 3, 8. Cattle come from the woods on my land; I chase them out with my dog and recall him; yet he pursues them in the forest and kills them, I shall be excused. *21 H., 7, 8. In this court M. 18 Jac., *Jennings and Morsan.* Driving other sheep which could not be separated from his own.

CREW, C. J., assented, and cited *Knivet's* opinion in the case of the pursuit of a pheasant, and 6 E., 4, that putting thorns on one's land so that they fall on another's, is not justifiable. But those are not like this case, for it is impossible to recall a dog or a horse if he will not obey, and in the 6 E., 4, if it were impossible that the thorns should not fall on the other's ground, he shall be excused; and the opinion in the last case that trespass lies, seems hard, because thorns fall *ipso nutu,* and there is a difference between a dog and other animals.

DODERIDGE, J. No doubt. No action lies. I may chase cattle out of my land, though a stranger cannot. 12 H., 8. In this court in Popham's time, one justified the pursuing of a fox on another's land, which he started on his land; for it is a noisome animal. Likewise of a wolf. Bracton says that a man outlawed *caput lupinum gerit,* that is to say, anyone may pursue him. 9 E., 4. If trees grow close to my hedge and the fruit hangs over my neighbor's land and falls there, I may justify the taking it up, provided I do not make a too long stay, and do not destroy his hedges. For fruit naturally falls, and necessity justifies me.

JONES, J. Certainly; one may chase cattle out of his own land with a dog, so may a commoner; and if my dog chases them on another's land contrary to my will, trespass does not lie, and the party may chase cattle out of his land on that of the owner of the cattle, but not if it be sown with corn; and yet in cases of necessity, he may chase them on the owner's corn land. Yet, it still seems that the owner of the cattle may have trespass in such cases, for it is not lawful to procure an easement to one's self, to the injury of another.

DODERIDGE, J. Here is a damage to the owner of the cattle, but no injury, and there cannot be a trespass unless there be *both* an *injury* and a *damage.*

Judgment for the plaintiff.

DODERIDGE, J. If a butcher drives sheep in the streets of London and they run into the house of a stranger, the butcher may justify taking them out of the house. *Antea,* p. 639; Poph., 161; Bendl., 171.

*WOOD AND NEWMAN v. MARSH.—Pasch. 2 Car.

Replevin. The defendant avowed that the Dean and Chapter of Westminster were seized in *jure collegii* (without saying of what estate), and being seized, made a lease of 99 years to one Wade, who leased it to the plaintiff for part of the term, rendering rent. Wade made his wife executrix and died, and she for rent arrear after his death avowed, and Newman as her bailiff made a cognizance, whereupon the plaintiff demurred generally.

1. It does not appear of what estate the Dean and Chapter were seized, for they may be seized *pur auter vie* and then the life of the *cestui que vie* ought to be alleged. And although as it is given to an aggregate body, it may be understood to be a fee; yet the plea shall be taken more strongly against the pleader.

CURIA. CREW, C. J., DODERIDGE and JONES, JJ. Granted that an avowry is like an action and a declaration. But

JONES, J. There is a difference between an aggregate and a single corporation. But this not now in the case of a purchase, but in pleadings. If he had said that I. S. being seized in fee, gave it to the Dean and Chapter, and they were seized, perhaps it would have been understood to be a fee.

DODERIDGE, J. If he had pleaded that the Dean and Chapter were seized *jure collegii* to them and their successors, it would be understood to be a fee.

So the court were of opinion that this was badly pleaded. But as it appeared to them that the right was in Mrs. Wade, they proposed an agreement.

Another exception taken was that there is no *prosert literar. testamentar.* But the court overruled it.

JONES, J. The general demurrer cures this, for the testament is not traversable.

CREW, C. J. An avowry is in lieu of an action; therefore, he ought to show the letters testamentary.

The last exception was, that she avows for rent due to her and her husband, without showing when he died.

And this was also overruled. And a peremptory day was given. *Antea,* p. 640; *postea,* p. 783; Poph., 163; Bendl., 159.

*TANTON v. HARRIS.—Pasch. 2 Car.

Case. The plaintiff said *quod cum* the plaintiff had retained the defendant, being an attorney and clerk of the King's Bench, in an action of debt for £40, *versus, etc.* And *eadem causa* delivered him an obligation, in which one Johnston *cognovit se debere* to the now plaintiff and another, etc., *salvo custodiend. et ad narr.* thereupon and *prosequi* the same till judgment, or till the matter should be otherwise determined, and then redeliver it to the plaintiff, and he had paid him his fees for prosecuting the said suit, and *predictus tamen* Harris *fiduciam suam minime curans, sed machinans, etc., impedire quærentem, non prosectus est placitum predictum,* nor did redeliver the said deed, *licet sæpius requisit. sed prædictum factum tali loco et die, sine licentiam quærentis, et sine licito warranto, fraudulenter tradidit,* to the obligor *ad cancellandum.* It was objected that this action is brought by one only of the obligees.

CURIA. It is well enough, for the delivery was by one only. Judgment for the plaintiff.

Towse. The defendant is liable to the action of the other obligee.

CREW, C. J., and JONES, J. No; this action is pleadable in bar to it.

*JERMYN v. RANDALL.—Pasch. 2 Car.

The condition of the obligation was to pay 10s. weekly, *secundum ordinem factum per justiciar., etc.,* for keeping a bastard. The defendant on oyer pleaded *nulum talem ordinem fecere.* The plaintiff had judgment. It would have been otherwise if it had been *secundum ordinem faciendum.* Dyer, 196; Noy, 79.

BAKER'S CASE.—Pasch. 2 Car.

Debt against Sir George Baker, executor of S. B., on a bond executed by the testator, *defendit vim et injuriam, etc., et dicit quod scriptum predictum non est factum suum.*

Henden. This is bad. For *suum* refers to the defendant, and the deed is alleged to be his deed; and no mention is made of S. B.

CREW, C. J., DODERIDGE and JONES, JJ., *contra.* But

WHITLOCK, J., doubted.

Intrat. T., 1 Car. rot., 280. Judgment for the plaintiff.

DODERIDGE, J. Husband and wife in action of trespass *de bona sua* is well, for the reference shall be *singula singulie*. What *Henden* has moved is after a verdict. Issue was taken on it, and it is found to be *his* deed, which is well.

CURIA. *His* shall relate here to that which it may reasonably relate to, to make the plea good. Noy, 79.

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*BASSAGE'S CASE.—Pasch. 2 Car.

One Bassage was appealed by a woman, for the murder of her husband with a quart pot.

Goldsmith. If he is not found guilty of murder, the jury cannot find him guilty of manslaughter.

Jermyn, contra. They may. *Sir Christopher Blunt's case.* Bendl., 142.

DODERIDGE, J. The reason is plain: An appeal of manslaughter lies, and murder includes manslaughter.

But he was acquitted.

The court told the jury there was sufficient proof to find him guilty of manslaughter. Bendl., 172; *Cosset's case.*

NEWMAN v. CHENEY.—Pasch. 2 Car.

Trover and conversion was brought against husband and wife, and after verdict:

Stone moved that the action does not lie against the wife.

JONES, J. It does. For although she is not chargeable for any contract during her coverture, she may convert goods.

WHITLOCK and DODERIDGE, JJ., concurred.

CREW, C. J., doubted. Noy, 79.

LUCAS v. WARREN.—Pasch. 2 Car.

Covenant to convey lands to I. S. in fee. The defendant pleaded that the plaintiff has not shown what sort of conveyance he wanted. On demurrer, *Jermyn* prayed and had judgment.

DROPE v. THAIRE.—Pasch. 2 Car.

A master brought his action and declared *quod consuetudo regnis fuit* that hosts should keep the goods of their guests *ubi hujusmodi hospitii tenentur transeuntes* and showed that one Rowly, his servant, lodged in the inn of the defendant, who was a common hostler, and had with him certain goods of the plaintiff, his master, which through negligence were stolen: *Verdict for the plaintiff. *Boulstred* moved in arrest of judgment.

1. It is not alleged that the servant was transient, viz., traveling, according to Reg., 154. *Kelly and Clark's case,* P. 4, Jac. rot., 244. One came to an inn and left his goods there, and said he would return in two or three days and went away; the goods were stolen; no action lies. It would have been otherwise if he had said that he would return at night; and before night the goods had been stolen, as in *Sir William Sand's case.* T. 7, Jac. rot., 1535. *Bendle and Morris.* The master brought his action for his goods stolen from his servant lodging in an inn; but there the custom was alleged that an hostler ought to keep not only, as here, the goods of his guests, but also *other* goods left in his possession. So is the precedent in Coke's entries, fol. 347. *Ita quod damnum non adveniat hospitibus nec aliquibus aliis,* etc.

CREW, C. J., DODERIDGE and JONES, JJ., thought the action lies for the master.

JONES, J. In 29 El., and many other cases, it has been adjudged that if the servant be robbed of the goods of his master, he shall have his action against the hundred, upon the statute of Winchester. And this is a stronger case.

DODERIDGE, J. Both the master and servant have an action. 18 E., 2, F. Coron. If a servant be robbed, the master or the servant shall have an appeal, and he who will first bring it shall recover, and preclude the other.

JONES, J. The servant may also have his action.

DODERIDGE, J. Two merchants are joint tenants of goods; one is robbed of them; both may have an action or appeal. The coming to the inn does not show that he meant to take it for his inn. If one comes to an inn and leaves his horse there, and goes about his business, and in the meanwhile the horse is stolen, he shall have an action, although he came not to lodge there. And as to the objection that it is not alleged that he was *transiens,* it does not signify anything; perhaps he was at the end of his journey. If clothiers come to London to sell cloth, and stay a week or two, they shall have their action against the host if he be a common innkeeper.

JONES, J., concurred. Otherwise if they were to stay half a year and board there. But if they were to stay half a year without making any agreement for board; they would be within the custom.

DODERIDGE, J. The misrecital of the custom is nothing, for this is the common law.

Judgment for the plaintiff. *Antea,* p. 692; 2 Cr., 188; Mo., 877; Noy, 126; Yelv., 162; 2 Cr., 164, 224; Co. Ent., 347; Poph., 179; Noy, 79; Bendl., 163.

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*HALL v. GERRARD AND OTHERS.—Pasch. 2 Car.

Trespass, assault and battery in London. The defendants said that they were possessed of a house for divers years past; and the plaintiff came there; and they *molliter manus imposuerunt* to put him out, and he assaulted them, and the injury he received was *de son assault demesne;* the plaintiff replied that it was *de injuria sua propria absque tali causa,* and verdict for the plaintiff.

Noy. The replication is well, for the battery is justified by reason of the assault, and therefore is not the cause of it. This is a mixed case, partly in defense of their possession, and *de son tort demesne* is a good reply. The plaintiff had judgment. *Antea,* p. 645; *Postea,* pp. 792, 816.

BAYLY v. BAXTER.—Pasch. 2 Car.

A lease was made of a manor, rendering rent £10 *per annum,* and 100 couple of conies, to be delivered weekly, between St. Bartholomew's and St. James' feasts, so many and in such a manner as the lessor may appoint. He brought debt for the rent in *debet* and 49 *conies* in the *detinet;* and on a plea of the general issue, it was found for the plaintiff, and several damages were given. It was now objected that it is not alleged that the lessor had appointed in what manner they should be delivered.

JONES, J. If rent be reserved, as £40 per annum, payable weekly, as the lessor will require, although the lessor does not require it, he shall have debt for the rent at the year's end. Likewise, if a certain quantity of corn or hay be reserved. But it would in this case be a very great inconvenience; the warren may thereby be destroyed.

DODERIDGE, J. If one grant estovers to be taken yearly, and none be taken for one year, they shall not be taken the next. In this case it

would destroy the warren if all were delivered at one time He ought to show a particular request, with certainty.

WHITLOCK, J. It is a *rent* here.

CREW, C. J., concurred with WHITLOCK, J.

So the court was divided—*ideo adjournatur.*

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*T. 2 Car.

Brown said that the usual practice of the court is that if the defendant pleads in bar the same term, the plaintiff cannot be compelled to enter his replication; but at the next term he may, on motion; for if a day be given to him to reply in, and he does not, a nonsuit shall be entered.

HUNGERFORD v. HAVILAND.—Trin. 2 Car.

In case, the plaintiff declared: *Quod cum fuit tali die,* etc., *et adhuc est* seized of the manor of Winston, *et quod infra manerium predict. talis habebatur consuetud.,* etc., *quod quilibet tenens liber manerii predicti* should pay such a sum on every alienation *pro relevio,* as the annual amount of his land should amount to, etc., and one Smith being tenant, and seized of such land, and holding it of the plaintiff, as of his manor of Winston, *per fidelitatem sectæ cur. ad 5s. rent per ann. et pro relevio secundum consuetud. manerii quando acciderit:* the said Smith devised this land to one Haviland and his heirs, who entered and was seized, and the said Haviland enfeoffed the now defendant, etc., and afterwards, at such time and place, there was a conference between the plaintiff and the defendant; and the plaintiff showed the defendant that there were two reliefs due him, on the alienations aforesaid, and 20 years rent; and he told him that if he would not pay them he would sue him *per debitum legis cursum;* whereupon the defendant, *ad tunc et ibidem,* etc., took upon himself to pay the said reliefs and rents, if the plaintiff would make it appear to such a one, and such a one of his brethren, at the next court of said manor, that the land was charged with the rent, and that the reliefs were due; and that if the plaintiff would forbear suing him in the meanwhile, he would pay, etc. And the plaintiff further says that, at the next court, etc., *presentatum fuit per homagium,* etc., that the said land was charged with the said rent, that it was 20 years in arrears; and he showed to the brethren of the defendant, etc. *Et quod fecit apparere fratribus predictis per ostentionem rot. cur.,* etc., that the reliefs were due, yet the defendant, *promisionem suam minime curans,*

etc., has not paid. On a *nihil dicit* a *writ of inquiry was awarded. *Calthrop* moved in arrest of judgment.

1. *Et quilibet tenens* had used to pay time out of mind, which cannot be, for every tenant is mortal, and did not exist time out of mind. *Sed non allocatur.*

2. He alleged that he made it appear to the defendant's brethren that the reliefs were due *per rotulos cur.,* and does not show the rolls. 22 E., 4; *Lite's case.* Obligation to make sufficient discharge; it is not well to say that he made sufficient discharge.

CURIA. This has been heretofore overruled. *Non allocatur.*

3. It is here a relief by custom, and it is not alleged that distress is incident to it; and therefore one cannot distrain for it, no more than for an heriot custom, for which there is no distress unless by custom. 11 Rep., *Godfrey's case.* And if there be no distress for it, the relief due on the first alienation cannot by any means be demandable from the second alienee; and a custom shall not be extended further than it is alleged.

CURIA. This is the point on which we advised last term.

WHITLOCK, J. Relief is properly on the death of the tenant, and is no service, but something incident to it, which the lord cannot bar himself of by any special custom. And we improperly call that a relief which is due on alienation. And this is in two manners. (1) By custom, and then without a custom, distress is not incident thereto. (2) By reservation, and then it is a service, and distress is incident to it *de communi jure.* And although it is called a relief it is *revera* a service, and it is by relief because it is due on a death. 3 E., 3, 13.

Herle. As to the pleadings. It is particularly alleged that Smith holds by fealty, suit, rent, and relief *cum acciderit;* and the words *secundum consuetued.* refer to the words *cum acciderit.* The statute of *Magna Charta,* in speaking of reliefs, says *secundum consuetued. feodi;* but this is not to be understood of the particular custom of each fee. Yet if it were insufficiently pleaded, the defect is cured by the *nihil dicit,* which is confessing in law that he made it appear that it was due.

JONES, J. A relief properly is not a service, but a casual entry by reason of the service, due only on the death of the tenant by the heir; *because it is not due by a successor on the death of the predecessor, without special custom, and relief is incident thereto. But this is something else, which is called, though it be not, a relief, and it is due by reservation or custom, and may be on succession, alienation, greater or smaller, according as the custom or reservation make it; and not absolutely proportionable to the annual rent, as a proper relief is. *Mantel and Redsal's case,* Plowd., 91. When relief is by custom upon alienation, no distress shall be intended, unless it be alleged as for a heriot

custom or for a court leet, 11 Rep., between which and this sort of relief no distinction can be made. For a man cannot have a distress by relief for custom, if he has not it by custom. Then the action fails. For a duty without a remedy is no duty, as a remediless right is no right.

It seems to me this ought to be intended a relief by tenure, as my brother WHITLOCK has said; and the words *secundum consuetud. manerii* refer to the other tenants who pay by custom. But if it is not shown here, we cannot take it by the averment that he made it appear to his brethren, for he ought to make it appear to us. As to the exception that he does not show the rolls, perhaps it would be attended with infinite difficulty; and in such cases the law dispenses with precise certainty. As in the case of a bond from the sheriff to the under sheriff to discharge him of all estreats, etc., he shall not show all the estreats, etc., on account of their great number. The consideration to forbear the suit is good, as if he had a rent seck without seizin.

DODERIDGE, J. The question is whether it shall be taken to be by tenure or by custom. It seems to me by custom and not by tenure. Yet on the other parts of the declaration the plaintiff ought to have judgment. The plaintiff first alleges a custom in the manor *quod quidlibet tenens,* etc., and then Smith holds of this manor *per fidelitatem sect. cur. et reddit* 5s. this is an uncertainty of service, and when he says further *et relevium cum acciderit secundum consuetud. manerii,* this refers to the custom before alleged. *Relevium,* as Bracton defines it, *est quœdam prœfatio ab hæredibus;* it is not due by the successor *facta super mortem antecessoris.* It is not due by alienation and the lord *de communi jure* may distrain, and his executor shall have debt. For relief by custom distress is not necessary to be alleged; the books are express on this point. *8 H., 2, *title Relief;* 13 E., 3, 13; 5 E., 4, 72; 22 Ass., 3; 20 E., 3; T. Avowry, 124; Bracton tenure, 77. In these books no distress is alleged. Yet there is a relief by custom, as by succession, etc. But here it is not a relief, but a fine for alienation; it has only the name of relief. But a relief by custom shall be intended with the same incidents as a relief by tenure. And the question now is whether the fine be by tenure or by custom. And, as I have already said, it is by custom. Yet the plaintiff shall recover in an action on the case in which the right does not come in question. The consideration is not to forbear the distress, but only to forbear suing him *per debitum legis cursum;* therefore, when he avers that he made it appear to his brethren that it was due, in an action on the case in which the right does not come in question, we shall take it that it is due, and the plaintiff shall have judgment.

CREW, C. J. If there is no means to come at the relief, then it is not due, then there is no consideration, and the action fails. But here a distress shall be intended. Avowry, 124; 3 H., 4, 7; 8 R., 2, *title Relief.*

This case differs from that of a heriot custom, for there the property vests in the lord presently, and if any stranger takes it before him he shall have trespass, as a parson shall have for tithes set out, if a stranger takes them. The case of the court, 10 Rep., 14 H., 4, *e contra.* But here the custom and the tenure are jumbled up together; and in this case distress shall be understood for both.

Judgment for the plaintiff. *Antea,* pp. 655, 694; Jones, 132; Bendl., 180; 3 Bulstr., 323; Roll., 370.

LUTHER v. HOLLAND.—Trin. 2 Car.

The plaintiff brought debt on the statute, 5 El., 9, p. 304, for perjury, and declared that Sir Robert Rich was one of the Masters in Chancery, and had power to administer oaths, and showed that there was a suit between him and I. S. in the King's Bench, in *ejectione firmæ,* and the defendant came before Sir Robert Rich and made affidavit that the plaintiff had made a lease by grant to I. S., whereupon it was decreed that I. S. should have possession.

Bramton, Serj. This action lies, because the affidavit is not here upon the process, but on the main point in question, the establishment of the possession, and we allege that Sir Robert Rich had power to take oaths.

Goldsmith, e contra. *(1) It is on an affidavit. (2) It is not alleged to be in court. He cited a case where an action was brought upon an affidavit, before Mr. Myles, in the Star-Chamber; yet, as it was not said to have been made in court, it was held no action laid.

DODERIDGE, J. The plaintiff ought to have shown it in the declaration. Masters in Chancery in ancient times were clerks of the court, and their office was and is now to sign writs. Hence, now all original writs are signed by them. The statute in speaking of clerks intends them. It is but lately they have had commissions of Judges.

WHITLOCK, J. They were called *Magistri* because they were priests. The Lord Chancellor had the disposition of small benefices, in order to prefer the clerks to them.

DODERIDGE, J. This is the reason why they could not marry, till they were enabled so to do by the statute of 14 H., 8, 8.

CURIA. *Quærens nihil capiat per bill. Antea,* p. 656; Noy, 80.

COLOMORE v. HOBS.—Trin. 2 Car.

The plaintiff, in *replevin* in the Common Bench, had judgment, and a writ of inquiry of damages issued. The defendant brought a writ of error, then the writ of inquiry was returned in the Common Bench and judgment given. The plaintiff in the Common Bench moved here that he might proceed on to execution, and so proceeded.

Broome. It is the course, when error is brought on an interlocutory judgment, to obtain a rule of the court here, to proceed below, notwithstanding the writ of error.

Afterwards the writ of error was returned into the King's Bench, and both judgments, viz., all the record removed; and the defendant, in the Common Bench, brought here a new writ.

DODERIDGE, J. The writ of error will lie before judgment, for the words are *si judicium inde redditum sit.*

But *Richardson* thought that it ought to be returned after judgment; otherwise, *the record shall not be removed.

MORGAN v. MOOR.—Trin. 2 Car.

Debt in Bristol on *concessit solvere secundum consuetudinem civitatis.* Judgment given, error assigned in the King's Bench, that it does not appear what this custom is, it being only said *secundum consuetudinem,* etc. The defendant in error pleaded in *nullo est erratum.*

Crew, pro defendente, prayed that he might be allowed to supply the defect, that is, by an averment of the custom.

DODERIDGE and JONES, JJ. It ought to be put in the declaration, in Bristol, or may be alleged here before the plea in *nullo est erratum.* But now it cannot be made part of the record.

Crew. I will allege it and leave the other party to demur.

DODERIDGE and JONES, JJ. We doubt that it may be made part of the record. We think it cannot. But we will take time to think on it.

JONES, J. Before he pleads *in nullo est erratum* the defendant may allege the custom and conclude, so, *in nullo est erratum.*

DODERIDGE, J. The custom ought to appear in the record below, and not in the pleadings in error. 2 R., 3, 9. How a man is to take advantage of a custom to affirm his judgment.

DANIEL v. UPLEY.—Trin. 2 Car.

On a special verdict, the case was this: John Upley, the grandfather, was seized in free soccage of lands and a house, lying in Cobham in Surry, etc., had issue John and William. In 25 El., he made his will in writing in the words following: *Item, I give and bequeath my house, to Agnes, my wife, to dispose at her will and pleasure, and to give it to which of my sons she pleases;* and died. The wife entered, and afterwards married Roger Sheeres, and afterwards she, without her husband, reciting the devise and the power which she had thereby, by a deed indented, enfeoffed William, the youngest son, and gave him livery. But the jury find that nevertheless the husband and wife continued in possession. The son of John, the eldest son, released to William, the youngest son, all his right of *action, etc., with warranty. The husband of Agnes released also all his demands, etc., Agnes, alone and without her husband, levied a fine *sur conisans de droit, etc.* But no proclamation of any indenture to lead the uses were found. Roger entered, etc., the plaintiff claimed under John, the eldest son, Agnes being dead, and the defendant claimed under William, the youngest son. The case was argued, but, on a manifest error, was discontinued, T. 21 Jac. rot., 1067, and a new action was brought, P. 2 Car., which was argued by *Jermyn pro quærente* and *Henden pro defendente.* It was moved whether a *feme covert* levying a fine, with proclamation of her land, her husband will be barred by his nonclaim, and to what use the fine shall be; but the court did not touch those points.

1. The first point argued was on the words of the devise to the wife, *to dispose at her will and pleasure, and to give to which of her sons she pleases.* Whether she has an estate for life, with power to dispose of the reversion, or an absolute fee, on the confidence of the testator that she will give it to one of his sons, or an absolute fee, with a power of alienation restricted, viz., that if she chose to alien, she should alien to one of his sons.

WHITLOCK, J. It seems to me she has an estate for life by the first words, and the last words give her a power to dispose of the reversion. *I give to my wife, to dispose at her will and pleasure,* constitutes a fee simple. Bracton devise, 38, 39. But here, by the copulation of the last clause, his intention appears to be that she shall give it to one of his sons. But this shall not be understood of the estate given to the wife, but of the reversion. Therefore, in this case, they shall have an estate for life with power to dispose of the reversion. *To dispose* goes to the order of the gift, *Et cujus est dare, ejus est disponere,* viz., whether it shall be conditionally or absolutely. *Dispositio est collatio rerum in*

ordine. 28 H., 8; Dyer, 26. *Cestui que use* devised that I. S. should have *gubernationem puerorum* and ordering of the land; he gave him no interest. *Paget and Bremish's case,* 41 El. One devised that the overseers of his will should have the *letting* and *selling* of the land, during the minority of his son; this was a trust and an authority, but no interest; therefore they could not make a lease to try the title. *Henden,* Serjeant, has cited a case, T. 43 El., B. R. On the general ground that the intention of the will shall be taken. It is like an act of Parliament, the devisor is said to be the legislator, the devise the law, and the Judges the expositors. Here the intention of the will was that she should have an estate for life; and the second clause gave her a power to *give the reversion to any of the sons.

JONES, J. The wife shall have an estate absolute, with power to dispose of the reversion, to any of the sons she pleases. True is the rule that the intention of the testator shall be followed, but it admits of three exceptions. (1) Such an estate ought to be created as the testator could have given in his lifetime. (2) The intention ought to appear in the will; it shall not be taken by averment out of it. 5 Rep., *Cheney's case.* (3) The intention ought to lean more one way than the other. For if it stands even, the rule of conveyance shall govern. 22 E., 3.

One devises to his wife and a stranger; it is only an estate for life, for no particular estate is expressed. 28 El. Parcener devises her *part,* without saying to him and his heirs: the case was argued both by the bar and the bench; and it was resolved that the devisee had only an estate for life, because it does not clearly appear that more was intended, although it was objected that she had devised *her part.* I was present when it was so adjudged in the case of *Dixon and Marsh.* A man devised to his two sons *equally to be divided between them,* and it was ruled that the youngest son had not a fee by this devise. Yet it was objected that the eldest son has a fee by descent, and if the younger son has not a fee, there shall be no *equal* division. Yet it was ruled differently. It was also objected there that if he took only an estate for life, the estate of the eldest son will be drowned in the descent, yet as in the will the intention did not appear clearly that the youngest should have more than an estate for life, the rules of the common law ought to be pursued. If the will contained no other words but these: *I give to my wife, to dispose at her will and pleasure,* she shall have only an estate for life; but if he had said, *I give,* etc., *to sell at her will and pleasure,* she should have had a fee; because it must be understood such an estate as would enable her to sell; but *to dispose* relates only to the profits of the land. Afterwards the testator goes on and says: *and to give to which of my sons she pleases;* this shall not refer to the estate for life, because she has power to *dispose* of it *at her will and pleasure;* it must then

relate to the reversion. It is as if he had said: *I give it to my wife for life, to dispose at her will and pleasure,* and to give it to any one of my sons. *Townsend and Hall,* M., 38; 39 El. rot., 1247. Where one *devised that his executors should dispose of his lands, while he had only a reversion. It was ruled they might dispose of the reversion, under the word *lands.* So, in this case, under the word *house,* shall be understood the reversion of the house.

DODERIDGE, J. I hold that the wife has a fee simple, joined to a power to alien to one of the sons. Of all conveyances, wills ought to be construed most strongly according to the intention of the maker. (1) *Ex etymologia et vi termini testament, quasi testatio mentis.* Thereupon it has been ingeniously observed that in all legal words ending in *ment,* the mind and intention shall be closely attended to, as Parliament, Testament, Arbitrament, etc. (2) Bracton says that a will is *donatio causa mortis et est define, justa sententia voluntatis nostræ de eo quod quis post mortem suam de rebus suis fieri voluit, et de mortuis nil nini bonum.* (3) Because then one is disabled: *et suprema voluntas, quod mandat fierique jubet, parere necesse est.* (4) Because then one is *inops consilii,* and the law supplies this and becomes his counsel. And Bracton says: *Nihil tam conveniens naturali æquitati quam voluntatem donatis rem suam ratum habere.* But yet this rule is not so general as not to admit of some exceptions. Therefore, if the intention be repugnant to the rules of law it is void. 1 Rep., 85, *Corbet's case.* A man devised to I. S. and his heirs. I. S. died during the life of the devisee; the devise is void. For the word *heirs* is a word of limitation and not of purchase; and although his intention was that the heir should have it, he shall not. (2) A will may be void for its uncertainty. 5 Rep., 64. (3) The intention shall be taken out of the words in the will, and not by *external* averment. *Cheney's case,* 5 Rep. In this case the word *dispose* is synonymous with the word *ordain,* as in 28 H., 8, 26; 1 R., 3, 27; H., 8. The feoffees to use shall have the *dominion,* and the *cestui que* use the disposition. 4 E., 2; F. West., 11; 17 E., 3, 7. Lease for life, with a grant to do for the best advantage, the lessee cannot commit waste. But in this case words of interest are added: *I give to my wife to dispose.* Hereby an interest passes, and if the will ended there, she should have an absolute fee to her own use. But the second clause corrects the first, so that she will have a fee, but with power to alien to one of the sons. For this is the clearest way of maintaining the will. It shall not be said that this is intended of the reversion. *(4) The words of the will import this. Here it cannot be a condition and there are no words of restraint. A condition is a clause inserted in a conveyance, by which the party is bound to do something under the penalty of losing or increasing an estate. Here it is not compulsory, for it is to be done *at her*

pleasure. She has both an interest and an authority, as in the case of a devise to an executor to sell. But if the devise is that the executor shall sell, he has only an authority. But if it is devised that the executor shall levy a fine to I. S., he has also an interest, for none can levy a fine unless he has an interest. 16 H., 6. The vendee under such an authority of the executor is in under the testator, and shall avoid all grants, fines, and feoffments of the heir, and shall enter, notwithstanding a descent suffered by the heir. 9 H., 6, 25; 11 H., 6, 12; 21 E., 4, 24. Yet, admitting that it is a condition, it is well performed by the wife.

All the court agreed that it was.

WHITLOCK, J. If it is *hæreditas* it is not *pura* but *fides commissar.* And here, when the sale is made, the vendee or feoffee is in under the testator. 34 E., 3; *F. Cui in vita,* 19; 10 H., 7, 20.

JONES, J. If it be an authority only in the wife, none will deny that she may exert it notwithstanding the coverture, and if it is a condition annexed to the fee, the coverture does not disable her from performing it. The reason why an infant and a *feme covert* are disabled from making a feoffment is because the one has not the power and the other has not the discretion. *Goldswell's case,* or *Brickvell's case.* One devised lands in tail, remainder in fee, on condition that the tenant in tail should grant a rent; and it was adjudged that the remainderman should be charged with the rent, at the determination of the estate tail. 23 E., 3; 11 H., 7.

DODERIDGE, J. A *feme covert* may make a feoffment, in two cases, to the prejudice of her husband: (1) When she does it in pursuance of an authority, (2) or in compliance with a condition. And in both cases the feoffment is good. A wife may give livery to her husband, as attorney, and *e converso.* 18 E., 4, 11. A *feme sole* made a feoffment to the use of herself and her heirs, and took husband; and on her deathbed called the feoffees and told them her *will* was that they should enfeoff her husband; and died. The husband sued the feoffees by *subpœna,* but was denied. For in *law,* a *feme covert* cannot make a will, and in *conscience* (*equity*) the heir ought not to be disinherited, as is argued in all the books. A wife shall in no case have anything done to her advantage. 45 E., 3, 11; 31 E., 1; Voucher, 289. Husband and wife were *enfeoffed until marriage, and enfeoffed the feoffor of other lands in return; she shall be barred of her dower. The wife may well perform either a condition or an authority, and so she has done here.

CREW, C. J. It is a *power,* and as such may well be performed by the wife. A feoffment and livery ensuing as a feoffment would be void. But here it ensues as a nomination, or appointment, and she may give

part or the whole of the estate. *Lady Russel's case* was this: She was seized of sundry lands and manors, and suffered a recovery with power reserved to her (being *covert*) to dispose of any of the manors, and she made a disposition during the coverture. In the time of Queen Elizabeth, Butler levied a fine to the use of himself, remainder in fee, to Lord Leicester, with power to give part of it to his wife; which he accordingly did; and it was held well. I do not conceive, like my brother DODERIDGE, that where one devises that his executor shall levy a fine, etc., this gives him a fee. 34 E., 3. *Cui in vita,* 19. It seems to me that the wife has not a conditional estate, and then it may be objected that she is disabled by the coverture. But I do not deliver an opinion how it would be if it was a condition. But admitting the feoffment and deed to be void, still they will serve to lead the uses of the fine levied by the wife; and in this case she might, by the authority given to her, give the estate to one of the sons by will in extremes.

JONES, J. If the youngest son had had possession, and then the *feme covert* had levied a fine to him, before the entry of the husband and wife, and those claiming under them, the husband could not enter to avoid the fine. But this point did not come in question here.

Et ex assensu totius curiæ, CREW, C. J., gave judgment *quod quær. nil capiat,* etc. They all agreeing that the wife had a power, and that she could, notwithstanding the coverture, execute it; and that the son was not in by the fine, but by the devise. *Antea,* pp. 635, 656; Jones, 137; Noy, 80; Bendl., 178; 1 Roll., 329; 2 Cr., 336; 1 Cr., 638, 734; Mo., 594; Golds., 182; 2 And., 59; Ro., 151; Poph., 131.

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*PASTAL v. WARDS.—Trin. 2 Car.

One had judgment on an obligation, as administrator of I. S., and died intestate; administration of his goods was granted to Pastal, who sued out a *fieri facias* on this judgment against the first obligor, and on two *nihil* returned had judgment and execution. Now *Jermyn* moved the money being brought into court should be delivered to the administrator. For all thought he ought not to have execution, yet there being a judgment, there is no remedy, except by writ of error.

Bramston, Serj., *e contra.* He ought not to have execution. But the administrator of the first obligee shall have a new action of debt, for now the judgment is ineffectual. But as long as the judgment may be executed, the party cannot resort to a new action upon the bond.

JONES, J. Debt now lies on the first bond, but here judgment is given, which cannot be remedied on motion.

And on another day the court gave further time to the party to show further cause why the money should not be delivered to the administrator, according to the motion of *Jermyn*.

Quære. Whether, if the administrator of the first obligee should bring debt, whether this execution could be pleaded in bar. It seems not. Noy, 81; Palm., 443.

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*DAVY'S CASE.—Trin. 2 Car.

John Davy was indicted at Windsor, on the statute of usury, for having taken 12d. for the use of 20s. from 21 *Junii* to the 21 *Julii*. Whereupon judgment was given and the record removed by *certiorari*. The defendant pleaded the coronation pardon of the present King, by which all usurious takings and contracts are pardoned; and the question was whether the *judgment* was pardoned.

Calthrop. It is. For although it is said in 6 Rep., 13, that a pardon of felony does not aid him who is *attaint* of felony, yet when, as in this case, a pardon has express relation to the time before which the act was committed, although judgment intervenes between the fact and the pardon, the pardon shall avail. As in the case of *Parson Burton,* 6 Rep., 13. He was deposed, for adultery, after which a general pardon came out: He shall be restored, for the pardon was of all adulteries committed before the 14th of February, 13, and the offense was 12 Eliz., and judgment on 13. I agree to the case, 36 H., 6, 25. Fine for a trespass, and after the trespass is forgiven the fine is not discharged, for the pardon has relation to no certain time in particular, and so does not operate before.

JONES and DODERIDGE, JJ. The coronation pardon is only in the nature of a particular pardon, and differ from general pardons, which do avail. Parson Burton was deposed *before* the pardon.

CREW, C. J. This does not appear. I incline to think the defendant is within the pardon.

DODERIDGE, J. This is only a pardon when sued out, and not like a general pardon.

Curia advisare vult. Dyer, 235; Palmer, 412.

GOODWIN v. WILLOUGHBY.—Trin. 2 Car.

Case. The plaintiff declared that the defendant's husband *super computum inter eos indebitat.,* etc., to the plaintiff, and assumed to pay him; and afterwards died. And the defendant being his wife, having notice of such a promise, and after having notice that the plaintiff

intended to sue and molest her on the said promise, came to the plaintiff and requested him not to sue her until, etc., and told him she was to receive of I. S., etc., and promised the plaintiff that in consideration that he would not sue nor molest her on this promise, etc., if she received the said sum of *I. S., she would pay him; and alleges that at her request he forbore suing or molesting the defendant until, etc., and that she received the said sum of I. S., and yet did not pay, etc. On *non assumpsit,* there was a verdict for the plaintiff, and *Stone* moved in arrest of judgment: (1) Because the account between the plaintiff and the defendant's husband is not shown.

CURIA, P. 2 Car. It was resolved that this is well enough, for it is only an inducement.

DODERIDGE, J. It would be an endless labor to show all the accounts. It is sufficient to say: *Quod cum indebitatus existit, assumpsit,* etc.

(2) He does not show on what ground the wife was suable, or that she is executrix, or chargeable with the debt. It is no more than if I. S. told I. D. that he is going to sue him, who promises that if I. S. will not sue him, etc. This is no ground of action. If it were, this would open a door to barrators to vex honest men. He who has no debt due to him has no occasion to forbear suing.

JONES, J. This was settled in *Whitpool's case.* An infant made a contract and, when of full age, promised that in consideration that he should not be sued for a while, he would pay. Held that an action lies on this promise.

CREW, C. J. *Assumpsit* in consideration of the forbearance of a suit is a strong presumption of a debt.

DODERIDGE, J. I well recollect *Whitpool's case.* An infant bought velvets and silks, and died. The merchant came to his wife, who was the executrix, and told her if she would not pay him he would sue her; the wife promised, in consideration of forbearance, to pay. It was held a good consideration. But she was executrix, and there was some pretext for suing her. There is no such a thing here.

Stone. The *assumpsit* of an infant is only voidable.

JONES, J. It is clearly void; he may plead *non assumpsit.*

At Trin. 2 Car., *Jermyn* prayed judgment *pro quærente,* for there was a request of the defendant to forbear, and cited 10 El.; Dyer, 272. Promise in consideration that one had been bail for the defendant's servant held bad; *aliter* if it had been requested.

A further day was given. But I heard no more of it. *Antea,* 646; Noy, 81; Poph., 177; Palm., 441; 1 Cr., 126.

*SIR GEORGE REYNEL v. ELWORTHY.—Trin. 2 Car.

Sir George Reynel had Elworthy in execution, he being a marshal; and on an *habeas corpus* suffered him to go in the country, and took an obligation of him to be a true prisoner, and he had a keeper with him as far as Charing-Cross; and afterwards he parted from his keeper, which was adjudged to be an escape against Sir George; whereupon Sir George brought debt on the said obligation against Elworthy, who pleaded the statute of 23 H., 6, c. 10, p. 147, and said the obligation was made for ease; whereupon Sir George took issue, etc., it was found for the plaintiff.

Hedley, Serj., *e contra.* This case does not differ from *Manningham's case,* Com., 60, except that there the obligation was given to a *sheriff,* and here it is to a *marshal.* This statute consists of two parts; and there is *major ratio,* that the marshal should be within the statute than the sheriff. For the sheriff has to carry about his prisoner afar, and the marshal has only to keep him in prison. The preamble has the words *keeper of prisons,* and such is the marshal: The proviso is: The said *sheriffs, ministers, or officers,* and the intention of the statute was to prevent *gaolers* from giving ease to their prisoners, which is an inducement to them to withhold the payment of their debts.

Damport, Serj., *e contra.* I conclude that an obligation made for favor or ease to the *marshal* is void, although it be under color of pretense to be a true prisoner. But it is lawful to take an obligation from a prisoner to be a true prisoner to the marshal; and the sheriff, notwithstanding the statute, may take an obligation for a true debt. If the sheriff has an execution against a man who is indebted to him, if he takes an obligation from him that he shall pay his debt and that he shall be a true prisoner, and it is for ease and favor, the illegal consideration shall make the *whole* obligation void. And though the obligation be made to the sheriff without constraint, and to a good end, as it does not pursue the statute, it shall be void; as appears in 10 Rep., 99, *Skinner and Sir George Reynel.* H., 17; Jac. rot., 1276, *vel* 576, B. R. A prisoner made an obligation to Sir George Reynel for arrest money, and it was held good. In *Sir Thomas Perriam and Rodes' case,* H., 19, Jac. rot., 1201, this very point was adjudged.

Jermyn. I grant that every obligation which is not within the words (as our case is) is not within the meaning. *Bewsage's case* *and 21 H., 7, 16, 17. Where it was held that if a marshal brings one here, who is *utlagatus* to sue error, he may charge for his labor.

DODERIDGE, J., agreed to the distinction taken by *Damport.* *Antea,* p. 648; Poph., 165.

MARKHAM v. COB.—Trin. 2 Car.

Trespass for breaking the plaintiff's house in D. in Nottinghamshire, and taking and carrying away £3000 in divers bags of money, etc. The defendant pleaded *quod coram domino Hubbard* and the Justices of Assize of said county, he was indicted by the procurement of the plaintiff for the same offense, for breaking the house *burglariter,* and carrying away the said £3000, and he put himself upon the country, and one, etc., was found guilty as principal, and he as accessory; whereupon he prayed and was allowed his clergy, etc. And the question was whether trespass lies.

Calthrop. It lies not. When the plaintiff has made his election to proceed criminally, he shall not afterwards resort to a civil prosecution, as in 4 Rep., 43. It is a good bar in an appeal of mayhem that the plaintiff has recovered in trespass for the same battery. 2 R., 3, 14 (2) The rule is *nemo debet bis puniri pro uno delicto,* 4 Rep., 39. *Auterfois convict* is a good plea to an indictment, 4 Rep., 40 a. Indictee of murder pleaded that he had been convicted and had his clergy; and it was held well. (3) When the party was indicted and convicted, there was no remedy at the common law to regain his goods, as appears by 8 E., 3, 11; 22 E., 3; Coron., 460; Stamford's Placit. de Corone, 167; 12 E., 2; Corone, 379; Stamf., 165. But now restitution is only given to the party by writ of restitution.

JONES, J. If he be discharged on an *ignoramus* on an indictment at the suit of the party, he shall not be liable to action. The statute of 21 H., 8, 11, p. 189, gives restitution in case of goods or money. But then what shall be done if the party has neither the money nor the goods *stolen?*

CREW, C. J. The other shall have as much money as the goods were worth.

JONES, J. It is so, because the statute giving restitution gives an action therefor.

WHITLOCK, J. *Concessit.*

JONES, J. Bracton says that the party has his election to sue in trespass or to proceed criminally. But it is not just that the King should take away the action of the party, who perhaps was compelled to prosecute, having been bound in a recognizance to prosecute the felon.

Sed adjournatur. And on another *day the case was moved again.

DODERIDGE, J. The action well lies. And the conviction on the indictment has not taken away the action of trespass. 6 E., 4, 4. One condemned and imprisoned on redisseizin was *utlagatus* for felony, and pardoned; he remained in prison at the suit of the party, yet for the

outlawry all his goods were forfeited to the King, and after the pardon the party sued him. 3 M. Sir Peter Carew was indebted to the King and afterwards convicted of treason and pardoned, yet he paid all his debts to the King, although he had forfeited all his goods before the pardon. One Trushel procured himself to be convicted of felony, and afterwards pardoned, yet his debts remained and he had to satisfy his creditors. 1 R., 3, 1; 11 H., 7, 22. Felony presentable in a leet is made petit treason; it cannot be presented there as petit treason, but as felony it may. When a statute gives a new remedy, it does not take away the common law remedy. (2) The averment in the bar, that it is the same *offense* is bad, for by the indictment it is found to be a burglary, and here it is only a trespass; but he might have averred that it is the same *taking*.

To which WHITLOCK and JONES, JJ., assented.

(3) JONES, DODERIDGE, and WHITLOCK, JJ., held the plea in bar bad, for another reason, for it is said that the plaintiff procured himself to be indicted and was convicted, and that the plaintiff may have restitution on such a conviction. But the statute relates only to cases in which the offender is convicted by the evidence of the party; and it is not pleaded here, wherefor judgment was given.

And on another day:

JONES, J. In point of law, it seems to me the action does not lie. I deny none of the cases put by my brother DODERIDGE, but this case differs from those. There were several acts; here is but one. I agree that the party has his election to have trespass or appeal. But here, when the jury have found the other guilty of felony, the party shall not be admitted to contradict what they have said upon their oaths, and say it is only a trespass. I rely strongly on this, 45 E., 3; F. Coron., 100. A man brings an appeal and it appears that the offense was only a trespass; yet he shall not be received, in the face of his own writ, to bring trespass. Trespass is *invito homine*. Felony is *invito domino* and also *animo furandi*, which is of a higher nature.

DODERIDGE, J. I remain of the same opinion still.

JONES, J. In 3 E., 3, Tit. Corone and 8, 3, Tit. Corone. If one takes my horse and waves it in the manor of the lord, and afterwards it is found by a verdict that he *stole* it, the party shall not have trespass.

WHITLOCK and DODERIDGE, JJ., thought the indictment does not take away the action of the party, and the plaintiff here is not to have restitution under the statute. For the statute precisely says *attaint per evidence:* *But here he is not attainted. Judgment was given on the third point. Noy, 82; Roll., 557; Bendl., 185; Jones, 147; Entr., 248, 246; 1 Cr., 213, 216; 3 Inst., 215; 2 And., 45; Ow., 69; 1 Leon., 326.

ABDEE'S CASE.—Trin. 2 Car.

Tenant in fee granted a rent for life, and made a lease for years of the land; the grantee supposing that he had lost the *deed* and that it had fallen into the hands of the lessee, sued him for the rent.

DODERIDGE, J. If the lessee for twenty-one years grants a rent for life, it is good during the term, and it is a chattel.

CREW, C. J. I would not trust it in the court of requests. . . .

JONES, J. . . . to sue for the rent, on the supposition that the deed is lost. For it is contrary to a main principle of law. And when the lessee, as here, denies the truth of the fact, they ought not to proceed over.

CREW, C. J., concurred. It is an encroachment on the Court of Chancery, to give remedy when the deed is lost.

Per totam curiam. A suit may be brought there for the deeds, but not for the rent or annuity.

DODERIDGE, J. I knew a bill thrown out of court brought by the devisee of a rent seck. M. 3, Car. B. R. Miller sued in the Court of Requests because he had lost his bond, and a prohibition was granted although it was said at the bar that the grantee of the rent seck, who had lost his bond, was relieved in Chancery.

JONES, J. There is a great difference between the Court of Chancery and that of Requests. C. L., 147.

CLIMSON v. POOLE.—Trin. 2 Car.

Debt on an obligation. The condition was that whereas the plaintiff had leased to the defendant a house, except an inner parlor, etc., with free ingress, egress, and regress thereto, the defendant disturbed the possession of the plaintiff, *una cum free ingress.* The defendant pleaded that he did not disturb the ingress, etc., *secundum formam conditionis prædict.,* but did not say *liberum* ingress. The plaintiff assigned a breach, that on such a day the defendant *clausit exteriores januas* (*anglice* gates) *et quod non potuit intrare.* Whereupon the defendant demurred and the following exceptions were taken:

1. The variance: he did not disturb the ingress of the *plaintiff without saying *liberum ingressum,* which is not a good plea.

2. In the replication, *clausit exteriores januas,* without saying that he could enter nowhere else.

DODERIDGE and JONES, JJ. This shall be shown by the plaintiff, for it is alleged that he could not enter freely; as to the other part the defendant (*plaintiff, I suppose*) ought to show a request to open the doors, for otherwise there is no breach. Therefore, the bar and replication are both bad.

DODERIDGE, J. Therefore there ought to be a repleader.

JONES, J. There is no necessity of a request where no breach. Perhaps he came in the night, and the lessee is not obliged to keep his house forever open. There ought to be no repleader *after* a demurrer.

On another day, *Hitcham* for the plaintiff. The bar is bad. For the condition is, that he shall have *liberum ingressum,* etc., and the defendant says that he had *liberum ingressum,* and the replication is well for it shows a disturbance *quod defendens clausit exteriores januas* and kept them shut from the first of March to the first of April of the same year, so that he could not have free ingress, etc. There is no necessity for a request, for the defendant has bound himself to more than the law requires. *Seaman's case,* 5 Rep., 93. If the sheriff has an execution to serve for the Queen, he cannot break the house without a previous request to open the door. If the bar and the replication are *both* bad, the plaintiff shall have judgment, if the replication does not contradict the count; and there shall be no repleader after a demurrer.

Richardson, Serj., *e contra. Liberum ingressum* is no more than the law implies, for when he reserves to himself an ingress, it shall be understood to be a *free ingress;* the replication is bad, for it does not show that he might not enter elsewhere, nor shows any request to open the door; therefore, there ought to be a repleader. For although *generally after* a demurrer, there ought to be *no* repleader; this is restrained to the plea *only* the demurrer was upon. But on any precedent plea, there *may* be a repleader.

WHITLOCK, J. The writ is insufficient, for he does not plead that he disturbed the plaintiff, *de libero ingressu,* etc., but he omits *liberum.* 2 H., 4. Condition that he shall not put the plaintiff out of possession and the breach is assigned that he keep the door shut, it is well enough. Yet it appears that he *never* had possession. So the replication is good and the breach well alleged, and he disturbed him. Wherefore there shall be judgment for the plaintiff.

JONES, J., *e contra.* (1) The bar is good, for *liberum ingressum* is no more than *ingressum* in the condition, it shall be *understood from time to time and *libere.* Also, it is said here that he did not disturb him in the *ingresse,* etc., *secundum formam et effectum conditionis prædict.*

(2) The replication (which ought to be to every point) is bad, for it assigns no breach, for by intendment there may be other gates. The defendant is not to leave his house open at midnight, but only at reason-

able hours. Perhaps the gates were only shut until it should be requested that they might be opened; they are not to be always open, and it is not shown how long they remained *shut.*

(3) There shall be *no* repleader *after* a demurrer; and if the count, the bar, and the replication are all good, the plaintiff shall have judgment. If the bar is bad in substance, or only in matter of form, and the replication be bad, the defendant shall have judgment. This distinction is taken in *Ridgeway's case.*

DODERIDGE, J. The bar is bad, for it omits *liberum,* for a man may have ingress, etc., with disturbance. 20 E., 4. One was bound not to obstruct or hinder possession, and threatened the party *out* of the land. It is no breach, for it is no hindrance out of the land. This differs from *Seaman's case, quia modus et conventio* here *vincunt leges.*

JONES, J. (4) There *never* shall be a repleader after a demurrer, although there are precedents *e contra* in the books of entries. For these were not entered by rule of court.

Bendl., 172; Co. Ent., 137.

BRIGHTMAN'S CASE.—Trin. 2 Car.

An annuity was granted to the youngest son by the father, and he delivered the deed to be kept to one of his eldest brothers, who went to Ireland; and in the removal of sundry papers this deed was lost. Now the youngest son sued the eldest brother, in the Council of York, for the annuity, and grounded his action on the equity of the case.

DODERIDGE, J. He shall not be relieved here. It was his own folly to deliver the writing to a person who took so little care of it. Perhaps there was some condition or limitation in the deed on which the annuity ended, and he now pretends to have lost the deed, in order to charge his brother *absolutely.* But if the deed had been *casually* lost, as by fire, etc., he might have relief in equity, as in the case *of *Vincent and Beverly.*

And it was referred to Justice *Hutton.* In this case it was held by DODERIDGE, J., *et non fuit negatum,* that where the lessor enters on the lessee and suspends the rent, he shall not have relief in equity, for it is against law. Poph., 205, 206; Noy, 82; 3 Bulstr., 315; 1 Roll., 378; *Barry v. Stile, antea,* p. 648.

CALF v. BINGLEY.—Trin. 2 Car.

Calf recovered in debt here against I. S. A *scire facias* issued out of the court against Bingley, as bail of I. S. who pleaded that after the judgment on such a day and year, the said I. S. brought error in the Exchequer Chamber; whereupon the transcript of the record was removed, and pending the writ of error, I. S. surrendered himself a prisoner in *custodia marescalli,* and died while the writ of error was still depending; which he is ready to verify, and therefore prayed judgment. On which plea, *Calthrop* for the plaintiff.

1. The surrender ought to be tried by record; therefore he ought to have concluded, *et hoc paratus est verificare per recordum.*

2. The plea is double, the surrender is triable by the record and the death by the country, and different answers ought to be given; and if the plaintiff takes issue or pleads to the one, the other remains unanswered.

3. The bringing a writ of error is a *supersedeas* to the execution, although the *transcript* of the record alone be removed. In M. 12 Jac., there was a case in this court between *Heyden and Sheppard,* on a judgment in Norfolk; error was brought in this court, and in 12 Jac., judgment being given, error was brought in the Parliament, and although the transcript of the record only was removed, yet the whole court was of opinion that the writ of error was a *supersedeas.* In 20 Jac., *Crouch v. Hain,* the court said that error in the principal case is a *supersedeas* to the execution.

Jermyn. Then if the execution is suspended by the writ of error, during this suspension the bail cannot bring in the principal. In H., 20, Jac., *Cadner and Anderson,* error was brought to reverse a judgment here, and it was ruled that the principal cannot be brought in pending the error, so in this case the surrender is nothing, but the death is the *only* matter of the plea, and traversable.

JONES, J. The bail may bring the principal in *before* judgment.

Jermyn. But then he ought to be in execution, and not here when the execution is stayed by the writ of error.

Quod CREW, C. J., and JONES, J., *concesserunt.* But the bail may bring him as soon as they can.

Jermyn. Then the execution being suspended *by the writ of error, and the principal dying before the determination of the writ of error, the bail are discharged. In *Hobbs and Tadcastle's case,* the clerks of the court said that the bail may bring the defendant in, *before* the *scire facias* and *after* the *capias.*

JONES, J. *De rigore juris* they ought to bring him in before; but *per gratiam curiæ,* it is well enough at any time before the *scire facias* is awarded.

And he said to *Calthrop.* The opinion of the court is *against* you, for you do not speak of any *capias* awarded in your plea, and although the surrender in the plea is void for want of averment by the record, yet the death is a discharge of the bail. *Causo qua supra.* Jones, 138; 3 Bulstr., 331; Poph., 185; Bendl., 184; Noy, 82; 2 Roll., 491; 1 Roll., 450; 1 Cr., 597.

HODGES v. MOORE.—Trin. 2 Car.

The defendant being a burgess of the Parliament, brought in a letter from the Prolocutor to stay, etc.

PER TOTAM CURIAM. It is disallowed. He ought to have brought a writ of privilege, and might be relieved that way. When Thorpe was Speaker of the Parliament, he had a *supersedeas* for *all* actions; it was held bad. He ought to have had a *supersedeas* for *every* action.

CREW, C. J. Let him throw himself on the justice of the court; and as Parliament stand to their privileges, so do we to ours. In any case they may restrain the parties or their counsels, but *never* the court, who are not bound to take notice of it without special writ. And the parties who prosecute do it at their peril.

Noy said that in M. 12, E., 4, in the pleas of the Exchequer, there is an excellent precedent, on the learning respecting the privilege of Parliament. *Antea,* p. 663; Bendl., 184; Noy, 83.

HOWLET'S CASE.—Trin. 2 Car.

The plaintiff declared that on such a day, 21 Jac., he sold to the defendant a quantity of barley, part of which he delivered presently, and agreed to deliver the remainder afterwards, and afterwards on the same day, the defendant promised to pay him the sum of, etc., on such a day.

Hitcham, Serj. Here the *promise is made *after* the sale, and being on a consideration *executed,* is bad.

PER CURIAM. It is well enough being on the *same* day, of which no division shall be made in this case.

SHARP v. ROLT.—Trin. 2 Car.

One promised that in consideration that he would deliver such a thing to the plaintiff's daughter, he would pay for them.

CURIA. Payment shall be intended to the plaintiff, although it ought to have been averred more plainly in the declaration. Yet it is well enough. 40 E., 3, 20; 4 E., 2; *obligat.*, 16; 2 E., 4, 21; Plea, 140; *postea,* p. 814; 2 Cr., 77; Poph., 181; Noy, 83.

COWLIN v. COOK.—Trin. 2 Car.

In case. The plaintiff declared *quod cum,* the defendant was indebted to the plaintiff on an obligation in so much, and he intended to sue him, the defendant, in consideration that the plaintiff would *deferre solutionem denariorum prædict,* and not implead the defendant, he would pay him; and on this promise the action was brought.

Littleton. This is not a good consideration, for he may forbear to sue him for an hour and sue him the next, or a day, etc. In M. 19, Jac., *Keeble's case,* it was determined that a lease *at will* is not a good consideration to ground an *assumpsit* to the lessor, for he may determine the lease presently.

CURIA. CREW, C. J., DODERIDGE, JONES, and WHITLOCK, JJ. By the words *non implacitaret* he has waived the *benefit* of the obligation; but yet this promise does not *take away* the *force* of the obligation, for he *may* sue the obligor presently, and the other may have his action on the promise *quod non implacitaret,* which shall not be intended for an hour, or a day, but for his *whole life.* In *Bracham's case,* it was resolved that a consideration that he would forbear shall be intended for his *whole life.* But if it be *paululum tempus,* it is a bad consideration. Poph., 183; Noy, 83; Hobb, 219; 2 Cr., 683.

*FELTON v. WEAVER.—Trin. 2 Car.

In error, after errors assigned, the defendant pleaded *in nullo est erratum.* The record not being fully removed, it was agreed that the plaintiff and the defendant are now estopped from alleging a diminution of record, and no *certiorari* can be awarded at the suit of the parties. But on the view of *Bishop's case,* and other precedents, it was agreed

per curiam that the court may award a *certiorari, ex officio, ad informand. conscientiam;* and then what is so certified shall be annexed to the record and called a *rider.*

But WHITLOCK, J., thought differently.

And by the advice of DODERIDGE, J., the party took such a *certiorari ex officio,* and the judgment was reversed.

Novel Entry, 254, 263, 267; *Gage's case,* 5 Rep., *quod intratur,* M. 39, 40 Eliz., and *Bishop's case,* 5 Rep., *quod rotulat;* P., 33 Eliz. *rot.,* 361, which was after a *nihil dicit,* and not after an *in nullo est erratum,* as the book says. T., 13 Jac., *rot.,* 52. *Bishop of Rochester's case,* and *Young's case.*

JONES, J. The entry here shall not be as the party requires, but as awarded by the court. *Novel Entry,* 242, 266; 1 Roll., 764, 765; Jones, 139; Noy, 83.

HARMAN v. WHITCHLOW, *vel* HAMMOND v. WHITE.—Trin. 2 Car.

Two tenants in common had common in law. Whitchlow ploughed the land, Harman, one of the tenants in common, brought his action upon the case, and declared that thereby his cattle were in great danger of starving and perishing, and on *non culp.,* it was found for the plaintiff.

Whistler. There ought to be no judgment, for this action does not lie for a tenant in common; and by the declaration it appears that he had a companion who is not joined with him.

Dorrel, e contra. Here it is alleged that there was a particular damage to the beasts of the plaintiff, in which he had a special property.

Whistler cited 13 H., 7, 26; 35 H., 6, 36.

DODERIDGE, J. If the tenant of the land, or a stranger, chases the cattle of a tenant in common, who has common there, he alone may have an action. But it is not so here, and the difference is grounded on this rule. Where the injury is equally great to one tenant in common as to the other, there they shall *join* in a personal action.

JONES, J., concurred. But if a joint tenant or tenant in common brings an *action *alone,* and the defendant pleads *non culp.,* and by the verdict it appears that they were tenants in common, the plaintiff shall have judgment. For it ought to have been pleaded in abatement at first. But here it appears by the declaration and in the knowledge of the plaintiff himself.

WHITLOCK, J., concurred.

And judgment was arrested. The distinction taken is that where the tort is an injury to both, they ought to *join;* but if the injury be private,

as chasing the cattle of one, he shall have the action alone. 1 H., 5. One brought an action for removing a boundary, *et non allocatur*. 47 E., 3; Jones, 142; Noy, 84.

SURREY v. PIGGOT.—Trin. 2 Car.

In case. The plaintiff declared that on the 11th of October, 22 Jac., he was possessed of a term depending of the Rectory of Markham in Barks, of which a curtilage was a parcel, in which curtilage there has been a watering place, time, etc., where all those who were seized of the rectory, their tenants and lessees used to water their cattle, etc., and that the water flows from such a stream and runs over the hop yard of the defendant to the watering place in the curtilage aforesaid, and that the defendant, knowing this, filled and stopped the aqueduct with dirt and stones, and erected a wall thereon, to the damage of the plaintiff. The defendant says that 38 H., 8, the King was seized of the manor of M. and of this rectory, as well as of this hop yard, and being so seized, granted it to one Box, viz., the hop yard, in fee; and that Box being so seized, one Seal entered and enfeoffed the said Piggot, the now defendant, who being so seized, erected the said wall in the hop yard, as well he might, etc. Whereupon the plaintiff demurred. The question was, whether, by this unity of possession, the water course was extinct.

Bucksdale held it was not, for it is a thing of necessity. He cited 4 Rep., 26. *Benedicta est expositio quando res redimitur a destructione.* Rent shall be extinct by unity, and so shall be a way. 14 H., 7. For they have no existence during the unity, and therefore they are gone. But it is otherwise of a thing which exists notwithstanding the unity. 12 H., 7, 4. *Præcipe* of a water course ought to be *pro una acra aqua coopert.* In 6 Jac., B. R., *Chaloner and Moor.* It was adjudged that an *ejectione firmæ* does not lie for a water course, for it is not a thing stable, but always moving; *and is also a thing of necessity. Here it is a thing distinct from the land, as in 12 H., 7, in the case of a gutter. The other exception was that the action is brought against Piggot and two others, who justify by the command of Piggot; but there is no answer by Piggot. To which it was replied that the commander is a trespasser. Piggot has no title to the water course, for a grant from H. 8 to Box is pleaded, whereby Box was seized, and being so seized, one Seal entered and enfeoffed Piggot and two others, and he does not say that Seal ousted Box, so for anything that appears here, Box is yet seized and the feoffment does not imply an ouster. There was a case in the Common Bench, *Cook v. Cook,* in dower: the defendant pleaded

entry since the last continuance, and because he did not plead ouster of the tenant, it was held to be no plea.

On another day WHITLOCK, J., concurred. But

DODERIDGE, J. It is not material whether the defendant has a title to the hop yard or not.

CREW, C. J., assented. 21 E., 3. Way extinct. 36 El. *rot.*, 1332. Two were seized of two acres, one joining the other; one made an enclosure towards the other, one person purchased *both* acres and made *several* leases; and the question was whether the enclosure was extinct, and it was resolved in the affirmative. There is a difference where something rises out of the land, as a custom of Gavelkind, by purchase, the custom remains. But prescription goes to the estate. I take also an exception to this declaration, in which a prescription to the tenants in fee is not alleged, as it ought to be. 33 H., 6, 26. As to the point in law, we *all* think that the water course is not extinct.

DODERIDGE, J. A way shall be extinct. But *distinguendum est,* whether it is a way of ease. If it is, it shall be extinct; but otherwise if it is of necessity. A fence shall be extinct, for it is not of necessity, because in the beginning there were *no* fences. 11 H., 7, 25; 4 Rep., *Terringham's case;* 22 E., 2; *Br. Extinguishment;* 11 Dyer, 295; Jones, 145; 3 Bulstr., 339; Noy, 84; Poph., 166; Bendl., 188; 1 Roll., 936; Palm., 444; Hut., 110; Vin., 90; Vin. Entr., 355.

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*LAMB'S CASE.—Trin. 2 Car.

Lamb was indicted for sorcery and witchcraft. *Athow,* Serj., took this exception to the indictment, that it was *quod execuit quasdam malas, execrabiles et diabolicas artes* (*anglice*) witchcraft; which cannot be, for there is no Latin word signifying witchcraft—and the law of indictments is curious (*nice*).

WHITLOCK, J. By the statute of 36 E., 3, all pleas of the Crown ought to be in Latin; then those *general* words extend not to witchcraft in *particular; ergo* it is bad.

JONES, J., concurred. If a man be indicted *quod murdravit quendam hominem* (*viz.*), I. S., it is bad. There is no Latin word here signifying in English, witchcraft.

DODERIDGE, J., assented. If there be no Latin word signifying witchcraft, one shall be framed, as *tenementum, anglice,* a *gun.* But incantation, etc., are proper words.

And the indictment was quashed. Kel., 3, *plac.,* 13; Jones, 143; Noy, 85; Bendl., 185.

DELAVAL v. CLARE.—Trin. 2 Car.

Case against an infant, because he put cloth at the shop of the plaintiff, who was a tailor, to make a suit of clothes, and promised to give him, etc., as well for making it as for providing the trimmings, etc., as he really ought to have. On this promise the plaintiff brought an action on the case. The defendant comes in and says that it is true that he made such a promise, but he was then under the government of A., and he made such a promise for him, *absque hoc* that he made such a promise; and after a verdict for the plaintiff, *exception was taken to the declaration, that an action on the case lies not against an infant, for in it damages are recovered; and if an infant be bound in a pœnal obligation, it is bad, although it be for eating and drinking. Hutchins, etc., M. 17, Jac., B. R. *rot.*, 1574. *Blackston's case.* A brewer of London brought an action on the case against an infant for drink which he sold him for so much, and it was adjudged maintainable. Here the plea of the infant is repugnant, for he confesses the promise and traverses the consideration.

CURIA assented to both points.

There is no necessity here for an averment, that the apparel was convenient and suitable to the rank of the infant, for the plaintiff did not provide the materials for the suit, but only the lining, etc., and made it up. M. 3, Jac., C. B. If there be a guardian in soccage, and a copyhold escheat to the infant, the guardian may grant it over. F. N. B., 143. Guardian in soccage may grant the ward over. *Novel Entry,* 125, 126; Jones, 146; Roll., 729; Noy, 85; Bendl., 186.

HALL v. DEW.—Trin. 2 Car.

Debt on a lease for years, *habend. et tenend. per* £38 yearly, payable every half-year; afterwards the lessor bargained and sold the reversion to the plaintiff, who for a half-year's rent brought an action of debt and counted upon this, averring that the deed was enrolled within the six months, according to the statute; and the deed bore date before the rent day, but the rent day came in *before* the six months were expired. Exception was taken to the declaration that it does not show whether the enrollment was *before* or *after* the rent day.

CURIA. It is well enough. He says it was according to the statute, and if the deed was not enrolled before the rent day, the other party should show it. 4 Rep., *Hind's case.* It would be wrong if the bargainee was not to have the rent incurred before the enrollment. The

law has always been so understood, and it has been so adjudged on solemn argument. 5 Jac., *Alsop's case.* Tr., 20 Car. *rot.*, 1420. One declared on a lease of the 24th of March, *habend., abinde per ann.* rendering rent at *Michaelmas,* and the Annunciation; objected that the last Annunciation is not within the year. *Sed non allocatur, quia abinde* shall be taken exclusive of the day. 3 Roll., 521; Bendl., 187.

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*READ v. BULLINGTON.—Trin. 2 Car.

Debt on an obligation, which was that the obligor should pay £300, in consideration of a marriage between the plaintiff and his daughter, which £300 was to be paid within three months after he should arrive at the age of eighteen years, or after eighteen days after the marriage, and notice given, which of them should first happen.

CURIA. The notice shall relate to both, for it is uncertain which of them should first happen. Although it was said *ad proximum antecedens fiat relatio, nisi impedit sententia;* and here the age ought to be certified; and of this it is not necessary to have notice. So the notice shall relate to the last antecedent only, viz., the marriage.

Yet the court *ut supra.* 5 E., 4, 127, *directe.*

GIBBONS v. PURCHASE.—Trin. 2 Car.

Debt on an obligation, the condition of which was to pay £100 on the 31st of September. The defendant pleaded payment *at* the day whereupon issue was joined, and there was a verdict for the plaintiff. *Andrews* moved in arrest of judgment, because every issue ought to be such that it may possibly be found either for the plaintiff or the defendant. But here it could not be found for the defendant, there being no such a day as the 31st of September.

DODERIDGE, J. The payment being on an impossible day, shall be presently. 31 E., 4, 36. And where payment is not found *at* the day, it shall be understood that it was not made on the day on which it was due.

JONES, J.. Here is a good action and a good declaration. The fault is only in the issue, and this is cured after verdict by the statute. 18 Eliz., 14, p. 326.

WHITLOCK, J., concurred.

Noy afterwards moved the court in the same manner as *Andrews* had done, but they would not arrest the judgment, but said *ut supra.* 5 E., 4, 32; 5 Rep., *Nichol's case;* 3 Cr., 287; Jones, 140; Noy, 85.

*WILDE v. DOWSE.—Trin. 2 Car.

Error on a judgment given in the Cheney Court at Winchester. The case was this: A distress (warrant) issued out of the Cheney Court to one A. (who was not a regular officer), to distrain the cattle of B. until he should find pledges for his appearance at the next court. A. distrained the cattle of B., whereupon the plaintiff paid him the usual fee, and he, without taking sufficient security from B., returned the cattle. B. did not appear. Upon this, an action on the case was brought.

1. It was adjudged that the general parlance, that he had not found sufficient pledges, was well enough, being in the negative.

2. That to say that he paid him *vada usualia,* without showing what those fees were, is well. *Aliter* on an action brought to demand the fees.

3. That this was a receipt, on which an action upon the case lies against A., although he be not a regular officer, but an officer *pro hac vice,* for this purpose.

KEYMER v. CLARK *vel* HALLEY.—Trin. 2 Car.

Action on the case for these words: Keymer *is a base gentleman, and has had four or five children by* Ann, *his own housemaid; and hath either killed them or procured them to be killed.*

Jermyn. The first words, that *he is a base gentleman, and has had four or five children* are not actionable, for perhaps that Ann was his wife; nor the last words, for he does not say that he killed them *feloniously;* perhaps it was *lawfully,* as a Minister of Justice. Tr., 21 Jac., *Wheeler's case: Thou hast stolen my piece, and I will charge thee with that felony.* Piece may be a gun or a piece of gold, and for this uncertainty it was adjudged that the action does not lie, and so here.

Ashley, Serj. *Ex causa dicendi,* and by induction the words shall be taken in *pejorem partem,* for he intended to disgrace him: He is a *base gentleman.* Therefore, the last words shall be taken in *pejorem partem.*

DODERIDGE, J. Join *all* the words *together* and the action lies. Yet had they been spoken separately, no action would have lain. But here it is alleged that Ann was the wife of another, at the time those words were spoken, *so it is a scandal; and the other words, *killing,* etc., shall be understood killing *unlawfully.*

JONES, J., concurred. When the intention of the party appears to be to disgrace the other, as here by the first words, the subsequent ones shall be taken in *pejorem partem.*

WHITLOCK, J., assented.

4 Rep., 16; *Snag's case;* Jones, 141; 1 Roll., 75; Poph., 187; Roll., 342; Bendl., 126; Godb., 6, 434.

ALEXANDER PARKER v. NEWSHAM.—Hill 2 Car.

Action on the case for stopping a way, which the plaintiff had from such a place, over B. acre, where the nuisance was made *usque ad talem campum.* It is not necessary to show what interest he had in the field, for it shall be intended a common field. *Aliter* if it had been *usque ad talem clausum.* There he ought to show what interest he had in the close. *Per curiam.* Noy, 86.

PALMER v. LITHERLAND.—Trin. 2 Car.

JONES, J. When I was in the Common Bench, a question came before us, whether an administrator *durante minore ætate, who wastes the goods,* shall be charged after the infant comes of age. In 6 Rep., *Packman's case,* it is agreed that he shall be charged without saying how; and afterwards in the Common Bench, that he shall be charged as *executor de son tort.*

DODERIDGE, J. I deny this. For at all times he had a lawful power to administer.

JONES, J. I think like my brother DODERIDGE. He ought to be charged on the special matter. *Postea,* 810; Noy, 86; 6 Co., 18.

JOBSON'S CASE.—Trin. 2 Car.

An *habeas corpus* was directed to the Bishop of Durham, to bring a prisoner into this court. He made no return. *Noy* applied for another writ, under pain, etc. For in 43 E., 3, an *habeas corpus* was returned from Bourdeaux. 5 R., 2, 1.

It was said by one of the clerks of the Crown that oftentimes a *certiorari* had been returned from Durham. But the Bishop, before he would make a return on the writ, wanted to have his privilege recited thereon.

*CURIA. We will not change the ancient course, forms, and usages.

JENKINS' CASE.—Trin. 2 Car.

One prescribed that all the occupiers of B. *habuere et habere consuevere* common, in such a place in Cornwall, *ratione vicinagii,* and whether this was well pleaded without alleging time out, etc., was the question.

Rolls. It is not necessary here, because as much is implied. 21 H., 7, 25. One justified raising, etc., which stopped the common way, it is not necessary to show that it was the common way, time, etc., for it is implied.

CURIA (CREW, C. J., *absente*) *e contra.* For the prescription is the ground of a common by vicinage. *Aliter* when one claims a common appendant. Poph., 201.

MERRITON'S CASE.—Trin. 2 Car.

Debt on an obligation. Two made a lease for years, by indenture, and covenanted that the lessee should not be disturbed, nor any incumbrance made by them; one of the lessors made a lease to a stranger, who disturbed, etc. The condition was to perform covenants.

CURIA [*absente* CREW, C. J.] It is a breach. For *them* shall not be taken jointly. But if *either* of them disturbs the lessee, the condition is broken. 2 R., 3, 12. A release to two inures in joint or several actions. Judgment for the plaintiff. Noy, 86; Poph., 200.

PETTY v. HOBSTON.—Trin. 2 Car.

A commission of *nisi prius* was directed to *Francis Harvey, Armiger,* one of the Justices of the King's Bench, and the return was that the trial was *coram Francis Harvey, Milite,* one of the Justices, etc. Yet it was held well enough on a writ of error in K. B., for perhaps he was *Armiger* at the time the commission *issued and was made a *Miles* before the trial. It was said that otherwise all the trials in the circuit would be overset. Bendl., 193.

FOSTER v. TAYLOR.—Trin. 2 Car.

An *ejectione firmæ* was brought in the Common Bench, judgment given, and error brought here. The error assigned was a variance between the plea roll and the imparlance roll. The last being of an ejectment 10 *Junii,* 22 Jac., and the plea roll 12 *Junii,* 22 Jac. But the truth was that the plea roll was entered 10 *Junii,* but was erased and made 12 *Junii.* *Bramston* moved for leave to amend the writ, and the court (*absente* CREW, C. J.) granted it, notwithstanding that the record was removed here, and error assigned thereon. Poph., 196; Bendl., 186.

CRASS, *vel* CRAB, v. TOOKER.—Trin. 2 Car.

Crab's daughter being to be married to Tooker's son, it was agreed between them by indenture *tripartite,* viz., John Tooker, the father; John Tooker, the son; and Jane Crab, that John Tooker, the father, should find sufficient meat and drink to John Tooker, the son, and Jane, his wife, and their children, during their lives, and that they should dwell with him in his own house; and it was provided that if John, the father, and John, the son, and Jane, his wife, should dislike to live together, they should have such lands and cattle from the father, and should live elsewhere. John, the son, died, and Jane took another husband; afterwards she and John, the father, disagreed, and the second husband demanded the lands and cattle, and on refusal brought an action of covenant. *Taylor* said that the disagreement of the wife, after the death of John, the son, is a disagreement *within* the proviso.

The indenture is *tripartite;* therefore, the disagreement of the wife cannot be in John (the son's) lifetime, for during the coverture she cannot agree or disagree, and therefore it shall necessarily be intended afterwards. In the first covenant, the father is to find meat and drink for the wife after the death of his son, and this comes in lieu of it.

Contra. The disagreement ought to be by all jointly. If it had been a disagreement between the father and the son, it would not have been a *disagreement within the covenant.

But all agreed that the wife should have for herself and the son of John, meat and drink for life, and judgment was given accordingly by the court.

It was said by the court that the power of disagreeing does not survive, any more than a devise that the feoffees shall sell, and one of them dies, as *Bray's case* in Dyer. Covenant that the son shall marry such a person, as A., B., and C. shall appoint, and A. dies; it is a joint act. 5 Rep., *Brudnel's case.* Noy, 86; Bendl., 186; Poph., 204.

SACHEVERIL v. DAY.—Trin. 2 Car.

In trespass. The case was this: A., seized in fee, covenanted to levy a fine to the use of himself for life, without impeachment of waste, with power of granting the trees on the land and power to make leases for three lives, or 21 years, remainder to John, his son, without impeachment of waste, and with the same power, with divers remainders over. Accordingly, a fine was levied to the uses aforesaid. A., tenant for life, made a lease for three lives, excepting the trees that grew or might grow afterwards, and died. And the question before the court was, whether the

remainderman could exercise his power of selling, taking, and disposing of the trees during the lease for three lives. They all held that the exception of the trees was well enough, and he may take them at his pleasure at any time during his life. But his executor, or no one after his death can, for it is a power annexed to his estate, which ought to be exercised during its continuance. They all agreed, also, that the lease for three lives issued of the fine and indenture; and it is well, not only against him who made it, but all those in reversion, and the rent reserved goes to those in remainder. *Richardson. Quære,* whether such a power of making leases is good to the son, in remainder. Poph., 1 Rep., 193. What cannot go to the lessee for life cannot go when a feoffment is to the use of one for life, remainder over. *Postea,* p. 811; Poph., 193.

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*SIR FRANCIS WORSLEY'S CASE.—Trin. 2 Car.

He brought an action for assault and battery against Lord Savel and Mountain, to his damage £5,000, and on *non culp.* pleaded by Mountain, and *son assault demesne* by Lord Savel, the jury at the bar of Westminster found in both points for the plaintiff, and £3,000 damages. And on the same day, a day was asked by the defendants to move in arrest of judgment. Whereupon their attorneys examined the record and found that in the imparlance roll no day or year was entered, but blanks were left for them; and it was alleged *contra pacem regis nunc,* and the issue roll was perfect. Wherefore they spoke to the Prothonotary to have a *recordatum* sealed the next day. But the plaintiff's attorney having knowledge of this, with one Cook and others, obtained the key of the office, under pretence of entering judgment *multo mane,* and four of them went with a lanthorn and candle, at about eleven o'clock at night, and filled up the blanks and made the record perfect; which being discovered, the court was moved on behalf of the defendant that the roll should be altered and made as it was before, and that all what the plaintiff's attorney and others had written, should be erased; and the motion was depending during the whole Michaelmas term, and argued six times at the bar, and many books were cited.

1. The declaration, having been entered two terms ago, cannot be amended.

2. The issue roll may sometimes be amended by the imparlance roll, but in no case *e converso,* because the imparlance is the roll of the court and the ground of all their proceedings, and the issue roll is made from it.

3. This is a matter of substance, *ergo* out of all the statutes of amendment.

4. It was no laches of the clerk, but ought to have been done by the party itself.

5. It was done in an *undue* time, and in an *undue* manner. Wherefore the defendant prayed that the record should be made as it was before, and that those who had altered it should be punished. After much inquiry and the examination of *Brownlow,* Chief Prothonotary, which was permitted in this case, although there was no precedent of any such examination before, it was argued by *Henden* and *Crew,* Serjeants, that the amendment was well.

*The usage of every court is the law of that court, and therefore this amendment in the *matter* (although perhaps not in the *manner*), being warranted by the usage of this court, is well.

And it was said by the clerks that the custom is to enter the declarations in transient actions *with blanks,* and on the issue to agree from time to time how to fill them up, and then *sometimes* before verdict, and *sæpe* after, to make the roll perfect.

In a common recovery, although no original be filed, yet it is the common practice of the court to file it within the year, and this is a case of more importance, for the original is the ground of all subsequent proceedings. In the case of *Parker v. Parker,* the day and year were omitted, and the *recordatur* entered; yet the plaintiff had judgment. Dyer, 24; 7 H., 6, 22. In trespass, in the count *succidit* was amended. 7 H., 4, 27. In an appeal. 10 H., 7, 25. *Per Bryan.*

And now, on examination, it appears that the clerk had perfect instructions from the commencement of the suit, and this, by statute 8 H., 6, 12, p. 130, is amendable. 33 H., 6, 2. Omission in the court. 37 H., 6, 12. Omission of three jurors. Tr. 15 Jac., *Gibson v. West,* in *ejectione firmæ,* the number of acres was omitted and amended. 1 Car., *inter Granfield et Cromer et alios,* in the *ven. fac.* the name of one of the defendants was omitted, but all the rest of the proceedings were right; and a *supersedeas* being awarded to the execution, a *supersedeas* was awarded to the *supersedeas.* 2 R., 3, 12. Besides, until the *recordatur* be made, the roll is in the power of the clerks, and they may amend it, and make it perfect in obscure times (*out of court*) provided they do not alter the ground of the action. But when a *recordatur* is made, it has so much force that it puts it out of the clerk's power to amend it, without the direction of the court. And the *recordatur* may be obtained either by rule of court or writ of error. Notwithstanding the exception taken to the roll, until the *recordatur* be entered and sealed, the clerk may amend. 5 H., 5, 5; 22 H., 6, 58; 35 H., 6, 40, in *replevin* with blanks *per Prisot.* 5 E., 4, *per Danby.* In many cases, although the record be imperfect at first, it may be amended afterwards, as in an *habere fac. seisinam.* If anyone be in a secret part of the

house, unknown to the sheriff, he may have another *habere facias seisinam* and another execution. This was adjudged in the case of *Brown and Evisam.* 22 H. Br. Stat. Merchant, 40.

Afterwards, at Hill. term, this case was argued *by all the Justices of the Bench, and they *unanimiter* resolved that the clerks might well amend it until the *recordatur* was entered; yet this does not bind the court, who may have it amended, if they see cause. They say this was only a matter of form, and if it had not been amended, the court would have seen it done. For the writ being at first *anno regis nunc, et contra pacem regis nunc,* it shall be intended to have been done before the writ was brought, and here the clerk had perfect instructions. Judgment was given *pro quærente.*

Nota. Finch, Serj., moved the court that all the depositions which had been taken in this case might be recorded, as before they were only in paper. But the court denied this. It was thought his intention was, if he could have had them recorded he would have had them removed in Chancery, and therefrom transferred to the King's Bench, or other court, to have them reëxamined there. Poph., 207; 3 Bulstr., 311; Bendl., 156.

ANONYMOUS.—Hill. 2 Car.

Littleton took divers exceptions to an indictment before the coroners of Montgomery, which was removed here by *certiorari.*

1. The inquisition ought to be *super visum corporis.* This appears in *Britton de coroners* and the statute *de officio coronatoris.* 4 Ed., 1 St., p. 13, and *F. Coronæ,* 107; 21 E., 4, 70; 2 R., 3, 2. Therefore, if a man be drowned and his body cannot be found, the coroner *cannot* inquire, but the justices of the peace ought to do so. Here it *appears* that it was not *super visum,* for it is *inquisitio capta apud D. super corpus I. S. mortis jacentis apud L.* If it was in *one* town, a view could not be had of it in *another.*

DODERIDGE, J., having view of the body at L., and afterwards taking the inquisition at D., is well enough.

2. The inquisition is *per sacramentum duodecim proborum et legalium hominum com. præd.* And this is bad, for the inquisition ought to be by men of the same vill, before the coroners, or four of them, and four of the next vill.

3. *Sagitavit et tormentum,* and killed him, etc., *it ought to be *sagitavit in tormento.*

Adjournatur and a day was given to the attorney to maintain the inquisition. Poph., 209; Noy, 87; Bendl., 202.

MASON v. DAVY.—Trin. 2 Car.

The question was whether an action on the case lies against a sheriff for escape, in the life of the testator: the escape being on a *mesne* process, viz., *a latitat.* It was said it does not lie, *quia actio personalis moritur cum persona.* Dyer, 271 *a* and 322 *a.* The heir shall not be charged for an escape suffered by his ancestor, and 32 H., 8. Waste does not lie against the executor. But where the thing is to be recovered, such actions go to the executor. *Ejectione firmæ* lies for an executor where the testator was ejected. But here the thing itself is not to be recovered, and therefore the case is not within the equity of the statute, *de bonis asportatis in vita testatoris.* 4 Ed., 3, 7, p. 63. But the other matter makes this point much stronger, for it was by *mesne* process; and if the party himself dies before the imprisonment, the defendant being imprisoned upon *mesne* process shall be discharged; but it is otherwise when he is imprisoned on a *capias ad satisfaciendum.* Also, the declaration is that the testator took out a *latitat* against I. S. in order to charge him on an obligation, etc., which cannot be known or traversed.

Jermyn, e contra. An executor shall not be charged for an escape, although he may have an action upon it. So an account lies for, but not against, him. Although it is a personal action, and it died with the person of the testator at common law, yet it is otherwise now, for it is within the statute *de bonis asportatis.* As *replevin* lies for an executor for a taking in the life of the testator. F. Executor, 106, and F. account, 257; 7 H., 4, 25. But he cannot have an action of trespass unless within the equity of the statute. If tenant by *elegit* recovers in assize, and dies, and his executor be ousted, under the statute he may have a redisseizin, 7 H., 4, 7. *Ejectione firmæ* is within the equity of the statute. Dyer, 201. Attaint lies against an executor, although the statute speaks only of the party. So in 6 Rep., 8, *Phitton's case.* The statute pardons the party; the executor shall have the benefit of it. *In this case the taking of the body is in the nature of a pledge. 5 Rep., 27. Trover and conversion lies by an executor on a conversion in the lifetime of the testator.

Calthrop [on the same side]. F. N. B., 121. If a man recovers a debt and damages, and the party is imprisoned and escapes, and the plaintiff dies, his executor shall have an action, for the sheriff, by the escape, is instantly become the debtor.

DODERIDGE, J. The tort continues to the testator during his life, and after his death his testament cannot be so well performed.

JONES, J. This seems to me to be a mere personal tort, for which there is no remedy; for it cannot be within the statute *de bonis aspor-*

tatis; and at common law the executor cannot have trespass. But *replevin* or detinue, the executor may have: for the property still continues. He could not have *ejectione firmæ,* at common law, for the thing itself was not recoverable. But he may have covenant, or *quare ejecit infra terminum.* But by the equity of the statute now he shall have *ejectione firmæ,* ravishment of ward, and *quare impedit.* It was so adjudged in 32 and 33 El., in C. B., in the case of the *Bishop of Lichfield,* that the executor shall have a *quare impedit* of a disturbance to the testator, and in 40, 41 El., in C. B., and afterwards on a writ of error here, it was adjudged that trover and conversion lies on an act in the life of the testator. This case at common law was a mere tort, and the executor cannot have trespass. It seems that the statute does not reach this case, for the arrest and imprisonment cannot be said to be *de bonis* or *catallis* of the testator.

WHITLOCK, J. This is a personal tort, and may be considered in two points of view; either as a crime to be punished, in which case *moritur cum persona;* or as an injury to the party, in which case it is reasonable that the executor should have a remedy.

Adjournatur; and afterwards it was argued by the court.

DODERIDGE and WHITLOCK, JJ., *pro quærente.* It is not injury to the *person* of the testator, but to his *estate;* and as action lies for the executor, who, as to the personal estate, represents the person of the testator. Therefore the action well lies, under the equity of the statute.

CREW, C. J., and JONES, J., *e contra.* The action did not lie at common law, and this is not *de bonis et catallis,* within the statute.

JONES, J. But I will not say it would be so if the escape was after a *capias ad satisfaciend.*

DODERIDGE and WHITLOCK, JJ. *Bona et catalla* are properly *personal chattels,* but *by equity this has been extended to the *realty,* as ravishment of ward, *ejectione firmæ, quare impedit,* trover, and conversion.

The court say they would determine the point, one way or the other, in the course of the term.

Nota. The statute extends to a tort, to the *personal estate,* but not to an injury to the *person,* or inheritance, as waste, etc. 1 Roll., 913; Noy, 87; Jones, 173; Poph., 189; Bendl., 200; 3 Car., 297; 1 Car., 141, 207.

SIR RICHARD LUCY'S CASE.—Trin. 2 Car.

He was indicted for not repairing a highway, etc. *Thinn* took exception that it is not mentioned of what place Sir Richard was, and for this the indictment was quashed. Noy, 87; Bendl., 198.

WOOD v. WHITERICK.—Trin. 2 Car.

The plaintiff declared on an *assumpsit* on an *insimul computaver*. The defendant pleaded infancy; the plaintiff replied it was for necessaries.

Mason. An action on the case does not lie against an infant, for in it damages are to be recovered; but debt only.

Sed non allocatur, because it has been otherwise adjudged.

2. This action is grounded on an account, in which the infant may be mistaken, and here evidence shall not be given of the value of the goods, but of the account only. And it was so adjudged 19 Jac. B. R., in the case of *Stirrel and Homeday,* and the reason given was that the infant may be mistaken. Noy, 87; Bendl., 203; Palm., 528.

*MOLLINEUX' CASE.—Mich. 2 Car.

One promised Rutland Mollineux that in consideration of, etc., he would make assurance of certain lands, which he refused to do. And Mollineux sued him in the Court of Requests for a special performance. In order to obtain a prohibition he alleged:

1. That the plaintiff has an action on the case at common law. To which it was answered that in it he would only recover damages, but here the suit is for a specific performance, to obtain which there is no action at common law. And this is the ordinary course in Courts of Chancery.

JONES, J. Yet we will not suffer the Court of Requests to go on, though the Chancery may.

2. It appears by the bill that the plaintiff is a recusant convict, who by the statute is an excommunicated person, and therefore cannot sue.

DODERIDGE, J. The defendant has admitted the plaintiff to be able to sue.

The court refused the prohibition.

DODERIDGE, J. The court will do justice to a recusant convict. Noy, 88.

*ANONYMOUS.—Hill. 2 Car.

An infant brought an appeal of murder *per guardianum suum,* and it was moved for him that the guardian's attendance might be dispensed with, for he was sick, and that the court might give a day or two over.

CURIA. This cannot be in an appeal, for the court cannot make laws. Noy, 88.

WILLOW'S CASE.—Mich. 2 Car.

He was indicted before a justice of the peace in the county for that being of evil fame, and *minus honestis conversationis fuit nocte vagrans* and that on such a day, etc., he frequented a bawdy house. The indictment was removed in the King's Bench, and

Crawley, Serj., moved that it be quashed. For the last part of the indictment being bad, it is as if he had been indicted for night walking only, which is not a crime, for one may have occasion to go out at night. 4 H., 7, 12. Any man may arrest a night walker and keep him until day, to be examined, *ergo,* a man may lawfully go out at night. But in the leet, it is to be inquired of those who *vigilant nocte et interdiu dormiunt. Rastal title Robberies;* (2) Watchmen may arrest a stranger going out at night, and if nothing suspicious appear, may let him go.

DODERIDGE, J. The indictment is well on that part, for it is said that Willow, being of evil fame, etc., *fuit nocte vagrans;* and this is to be intended *communis nocte vagrans.* At common law, every man may arrest a night walker, and Rastal says that the statute of Winton is the common law; but he shall be dismissed if nothing suspicious appear, but it is otherwise here. Even if the indictment were good in part and bad in *part, it would not be quashed.

WHITLOCK, J., assented.

Whereupon Willow was fined 40s.

SHERWOOD'S CASE.—Mich. 2 Car.

Trespass for taking a load of fetches, etc. The defendant pleaded that part of them were on B. acre and part of them on W. acre; and that one I. S. and Pots, in right of Lady Ursula, his wife, had title to B. acre, and justified the taking by the command of I. S., Pots, and Ursula. The plaintiff made a bad replication. Whereupon the defendant demurred, and the plaintiff took two exceptions to the bar.

1. A *gentleman* cannot have a *lady* for his wife.

CURIA, viz., DODERIDGE, J., and WHITLOCK, J. This would have been a good exception to the writ, but it is too late now.

2. It does not appear on what land the fetches grew.

The court allowed this exception, and there was a rule for judgment *nisi causa,* etc. Noy, 88; Poph., 208; Bendl., 198.

*RISSY v. HAYNS.—Mich. 2 Car.

Case on several *assumpsits* of nine particular sums, *qua quidem separales summæ attingunt* at £52, which was more than the total sum really was. On a plea of the general issue, there was a verdict for the plaintiff. And

Andrews moved in arrest of judgment, this matter *ut supra* and also *quod sæpius requisitus non solvit* the £52. *Nota* that the jury only found £40 damage; which was less than the aggregate sum; and cited 5 E., 3, 14.

JONES, J. It was a surplusage to cast up the particular sums. But if the request had been necessary, the declaration would have been bad.

WHITLOCK, J., concurred. The declaration would have been bad if the jury had given more damages than the particular sums amount to.

One Kent sued another in the inferior court of Redding, on a contract to pay him for twenty barrels of, etc., at 10s. per barrel, and to prevent a removal by *habeas corpus,* he brought several suits for several sums, all under £5, and after the general issue pleaded, the defendant preferred an English bill of this matter, in the nature of a bill of exception, which was sealed by the court. *Nota.* The court cannot hold pleas, unless the matter be under £5. and this was suggested to the Court of King's Bench. Now Sanders showed this to the court, and prayed an attachment, and was asked by the court whether he had an affidavit of the matter, which he answered in the negative, but produced the bill of exception.

DODERIDGE, J., and WHITLOCK, J. It is usual to have the bill of exceptions at the assizes, let an attachment be granted unless cause shown. Noy, 88; Bendl., 201; Poph., 209.

ROBERT KING'S CASE.—Mich. 2 Car.

He brought an action on the case against Merick for saying of him: *I charge you, King, with felony, and you, Constable (innuendo one Noscot), to take him,* and the words were said to have been spoken in London, and on *non culp. pleaded,* there was a verdict for the plaintiff. The defendant moved in arrest of judgment, because

(1) Here the words are not directly affirmative, that the plaintiff was a felon, and are unaccompanied with any act. *To which

DODERIDGE and JONES, JJ., assented.

DODERIDGE, J. He may say *ut supra, I charge you,* etc., and it is not actionable. This differs from *Hext's case* in 4 Rep. *I doubt not, but within two days to arrest* Hext, *of suspicion of felony.*

(2) Felony may be intended mayhem.

DODERIDGE and JONES, JJ., assented. For the count in mayhem is *ut felo domini regis.* Therefore the action does not lie. It is not like when a man says to another: *thou art a felon.*

JONES, J. The words admit of a two-fold construction, the one actionable, the other not. There is nothing either before or after which may render an interpretation more probable than another, then *verba sunt accipienda in mitiori sensu.* As if one says: *Thou hast stolen my corn.* No action lies, for it may be understood to be out of the field. But if he had said: *Thou art a thief, and hast stolen my corn,* it would be otherwise, on account of the preceding words; and the judgment was arrested. Bendl., 202; Poph., 210; 3 Cr., 277; 1 Roll., 43.

ANONYMOUS.—Hill. 2 Car.

Judgment was given in this court. A *capias* issued to the late sheriff, the plaintiff paid the fee for the execution, and the sheriff received the *capias* from the plaintiff, who showed him the defendant. The sheriff saw him, but turned about and said: *I cannot see him,* and returned *non est inventus.* The plaintiff made an affidavit, and prayed for an attachment against the late sheriff.

JONES, J. He is *no* officer *now.*

To which it was answered that it was a contempt while he *was* an officer.

Whereupon by DODERIDGE and JONES, JJ. Let an attachment issue. Noy, 89.

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*GOOD v. LAWRENCE.—Mich. 2 Car.

Error on a judgment in an action on the case, in which the judgment, after a verdict for the plaintiff, was entered thus: *Ideo ad petit. quœnt. considerat. est adjudicat. et assess. per cur. quod quœrens recuper. damna* by the jurors taxed, *necnon ex incremento dam.,* etc. *Jermyn* assigned errors.

1. It ought to have been only *consideratum.*

And the court ruled that this was error. The judgment is the act of the court, and the shortest is the best. If the form was not strictly adhered to, there would be no end of new and senseless words; and by and

by, it would require to have a new judgment in order to expound a former one.

2. Damages are increased without the assent of the parties, or the request of the plaintiff, and the request is not well alleged, because it is not necessary to have a request for judgment of damages assessed by the jurors.

DODERIDGE, J. A request in an improper time is like *no* request, as an averment at an undue time. *Walsingham's case.* Plowd.

JONES and WHITLOCK, JJ., concurred. *Ideo judicium reversatur.* Noy, 89; Bendl., 198; 1 Roll., 771; Poph., 212; *antea,* pp. 685, 689; *postea,* p. 767.

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*GLYN v. OWEN.—Mich., 2 Car.

Error brought on a fine levied in the time of Queen Mary, and at Mich. term last, ruled that the judgment be reversed *nisi,* and now, rule not having been shown, judgment was entered as of that term, and on the next day a *certiorari* was had to perfect the record. And the court did order that judgment should be entered as of this term, so that it might remain *in pectore judicis* to have it reversed or amended.

GUNTON v. GUNTON.—Mich. 2 Car.

Error on a judgment in Ely. (1) In the style of the court, *Placita coram Thoma Athow, justiciario assignato ad placita coram rege, infra insulam Eliensem tenenda;* without showing what authority they had to hold pleas there; whether by patent or prescription.

Jermyn. All their pleas and precedents are so. It is a notorious jurisdiction, as in London.

JONES, J. It is not a county palatine; we know not, as Judges, what jurisdiction they have. And this is error, unless it is helped by some precedent in this court. It is not enough that the precedents in *their* court should have that style, but it ought to be supported by some precedent of *this* court. For when they certify the record here, they show by what authority they hold pleas; and although our books show their jurisdiction, we are not bound as Judges, to take notice of it. But we may help this by alleging a *diminution of record, and send a *certiorari* to have the record made more full.

WHITLOCK, J., concurred. (*Absente* DODERIDGE, J.)

(2) The action is not shown to have arisen within the jurisdiction of the court.

Jermyn. The court knows that the whole island is within their jurisdiction. The style is *infra insulam,* and the matter is alleged *infra jurisdictionem.*

JONES and WHITLOCK, JJ., *ut supra.*

The case was: An action was brought there on a promise. Whereupon the plaintiff counted that his father, the defendant, endeavored to prevail on him to marry such a woman, which, at his request, he did; and in consideration of it, his father promised to assure him B. acre in D. and W. acre in S. *necnon diversa alia tenementa proxime adjacentia terræ* of the plaintiff, which the defendant neglected to do. The plaintiff sued him in Chancery, and then *verbatim* showed the bill in Chancery, and that the bill was depending there 19 Jac., and that on such a day, 20 Jac., the defendant, in consideration that the plaintiff would surcease the suit in Chancery, promised to give him so much money, and also B. acre in D. and W. acre in S. *necnon diversa alia tenementa proxime adjacentia* to the land of the plaintiff; and alleged a breach in the whole. The defendant pleaded an insufficient bar, whereupon they took issue, and it was found for the plaintiff, and damages assessed and judgment given, and now the father brought a writ of error.

(3) The bill is alleged to be depending, 19 Jac., and there is no averment that it was still depending, 20 Jac., when the promise was made.

JONES, J. It shall be intended that the suit continued depending.

(4) The damages are given for a breach of promise, and part of the promise is to assure divers customary tenements, and in that there is no certainty. It is immaterial in what vill the land is, or who the adjoining ground belongs to.

Jermyn. We have pursued the words of the promise, and we could do not otherwise.

JONES and WHITLOCK, JJ., *e contra,* for the reasons *ut supra.* Entire damages are given. You could have made the matter certain by an averment in the declaration, as by saying that he was seized of such lands in such a place, etc.

Jermyn. The matter is made certain by the bar.

Adjournatur. Afterwards. 3 Car., it was moved again.

Jermyn. As the land is not to be recovered in this action the certainty is not material, as in Dyer, 355. *Onesby's case.*

Hedley. I agree to this case. It is as *quod cum indebitatus existit pro diversis mercimoniis;* which is well, because it is only matter of inducement. But here it is the principal scope of the promise, whereupon damages are given.

But the *court did not speak to this point.

Jermyn. As to the second exception, Ely is in the margin, which is enough.

For this and the first exception, judgment was reversed.

CREW C. J., and JONES, J. It is not necessary that inferior courts should mark on their own records, by what authority they hold pleas. But it is otherwise when their records are certified here. Except in the case of a county palatine as Chester, or a court erected by Parliament. But here it is a court of particular jurisdiction. Noy, 90; Godb., 380.

WIDOW STACY'S CASE.—Mich. 2 Car.

One was indicted on the statute 21 Jac., 1, 25, p. 373, for entering into a house at Cobham, in the county of Oxon, *ad tunc existens liberum tenementum* of such a woman, *ad voluntatem domini, secundum consuetudinem manerii,* etc. The party came into court, and being put out of possession on this indictment by a justice of the peace, prayed that the court would grant him restitution, and it was granted by WHITLOCK and DODERIDGE, JJ. (*absente* JONES, J.). The reason was because the words of the statute give power to a justice of the peace, or a Judge to make restitution to a lessor for years, guardian in chivalry, or tenant by copy of court roll, at will, etc. But for anything alleged here, the wife may be tenant at will by the verge and not by copy. But the statute shall be construed strictly, and he who applies for restitution under that statute must be within the words of it.

On another day, DODERIDGE and WHITLOCK, JJ., persisted in their opinion.

DODERIDGE, J. If a woman has a widow's estate by custom after her husband's death, she is within the statute, for her estate is immediately by copy. A copyholder has an interest in the rolls of the court, as well as the lord, because there is the evidence of his title; and the lord cannot deny him access to the rolls. Bendl., 208, 197; Poph., 205.

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*HALSEY'S CASE.—Mich. 2 Car.

Halsey was indicted: *quod apud Kensington, cum quodam muro coctili, obstupavit altam viam regiam ducentem de* London, *ad* Kensington; and the indictment was quashed by JONES and WHITLOCK, JJ. (*absente* DODERIDGE, J.) For the stopping is alleged at Kensington, and the way is alleged to be from London to Kensington; thus Kensington is excluded, as a lease for three years from Michaelmas, excludes Michaelmas.

On another day another indictment was reversed for the same reason by DODERIDGE and WHITLOCK, JJ.

Halsey was indicted on another indictment, and the stopping was alleged to be in *alta via regis* in K., but without alleging any abuttals, as from such a town to such a town.

JONES, J. It is well enough in the case of an indictment for stopping *de alta via.* But if it had been for stopping a common way, they ought to have said *ducentem,* from such a vill to such a vill.

WHITLOCK, J., *e contra.* For it cannot appear what the nuisance is.

And on another day, WHITLOCK and DODERIDGE, JJ., concurred with JONES, J., because a highway leads from the sea through all England.

In another indictment he was named *Gulielm Halsey, de Fleet street,* London, *Plummer;* and exception was taken that it does not appear from what ward.

WHITLOCK, J. It is well, and it would have been sufficient to have said of London, Plummer. Noy, 90; 2 Roll., 81.

ANONYMOUS.—Hill. 2 Car.

A *latitat* was taken against two for conspiring to indict. They were both taken; one of them put in bail to the action at Mich. term last, and the other this term. Now the plaintiff moved that the bail of the first be taken out of the file of Mich. term, and put into that of this term; for otherwise it would be error. For we cannot proceed in a joint action upon bail put in at several terms by two; which Clinch, deputy secondary, affirmed. And JONES, J., referred the matter to him to be so done, in case it should be the rule of the court. Noy, 90.

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*ANONYMOUS.—Hill. 2 Car.

A rescous was returned by the sheriff, thus: *Cepi corpus, prædict. A. et ut idom A. fuit in custodia mea virtuti brevis præd. quousque B. C. et D. vi et armis* on such a day and year, and at such a place, in *E. et F. ballivos meos insultum fecere, vulneravere, et male tractavere, et A. de custodia mea ad tunc et ibidem rescussere.*

Rolls said that this is not a good return, for he does not show any warrant made to his bailiffs.

JONES and WHITLOCK, JJ. The prisoner is alleged to be in *custodia* of the sheriff, and they rescued him out of it; it is unnecessary to mention the warrant. The mentioning the bailiffs is surplusage and idle.

Rolls. Then the rescous is not well returned, for the battery of the bailiffs is alleged *vi et armis;* and if this be surplusage, the rescous is not returned to have been *vi et armis.*

JONES, J. On may rescue himself. A rescue may be returned without the words *vi et armis.*

Rolls. Begging your pardon, I think not. *Adjournatur, intratum* H., 22; Jac. rot., 102.

BELLAMY v. BALTHROP.—Mich. 2 Car.

Trover for certain loads of fetches, and other grains in Warda de Cheap, London. The defendant pleads that the parish of E. in ....., is an ancient parish, and the rectory of E. an ancient rectory, and that time out of mind it has been impropriated, and that John Earl of Clare was, etc., *et adhuc est* seized of the dismes of all the grain in this parish in fee, and on such a day, in April, 1 Car., leased to the defendant all the dismes of grain for one year next coming, and that the load of fetches and that the fetches in the declaration were growing in the said parish in that year, and that he took them being severed of the nine other parts for tithes, and was possessed of them, and at E. aforesaid lost them, and I. found them and delivered them to the plaintiff, *secure custodire,* whereby the plaintiff was thereof possessed, until in *Warda de Cheap* he lost them and the defendant found them and converted them to his own use. The plaintiff demurs because this plea amounts to the general issue.

Jermyn, pro defendente. (1) I agree that the lease for years here is void, but it appears that the title is *confessed to be in Lord Clarke, so that the plaintiff has no cause of action; (2) It appears also that the action was not brought in the proper county.

JONES, J. There is no confession here, for it is a bad plea.

Secondly, if the lease had been pleaded by deed, then this special plea would have been well to bring the trial into the proper county. As in 38 El., *Piggot and Hele,* in trover and conversion. Likewise in a case between my father and Lord St. Johns, who brought such an action against my father in Suffolk, for hay growing in Wales. There was a case this term, *Styles v. Snellgrave,* in C. B., where one brought an action of trover, for two calves, declaring that he was possessed of them as of his own goods, and lost them, etc. The defendant justified, because one Serjeant was possessed of them, as of his own goods; and on such a day and year died, and made the defendant his executor, and gives color to the plaintiff, and so justifies. On this plea there was a demurrer, for it amounts to the general issue. When it is alleged in the declaration that the plaintiff was possessed of them as of his own goods, etc., and the defendant says that another was possessed as of his own goods, this amounts to a plea of *non culp.* And in all actions of trover,

every special plea, with color, amounts only to the general issue, unless it is something concerning the title to the land. But as here the title to the land is not in question, but the matter is only a trespass for goods carried away; it is otherwise, and the special plea with color, as it does not concern the title, is a good plea.

Quod, JONES, J., *concessit.* But

WHITLOCK, J. I hold that the plea is not good. In as much as it concerns the title to the land, yet as he has not conveyed a good title, the lease is void, and then it is all one with *Styles' case* above cited. *Adjournatur.*

Afterwards, P. 3, Car. The case was moved again, the *court being full, and on the same reason as above, a day was given to the defendant to show further cause, otherwise judgment would be given against him.

DODERIDGE, J. If in trover, a title is derived from a stranger, it amounts only to the general issue, *aliter,* if from the plaintiff.

And on the next day, the defendant having not shown cause, etc. Per totam curiam, judgment for the plaintiff. Godb., 462, 373; Bendl., 202, 203; Noy, 89; 1 Cr., 599; Mo., 483; 2 Co., 45.

TINDAL'S CASE.—Mich. 2 Car.

Debt on a bond conditioned to perform covenants. Breach assigned that the bargainor, being obligor, covenanted that he, his assigns, or any other having right to the land, at any time within seven years, at the request and cost of the obligee *faceret, cognosceret, et exequeretur vel causare fieri,* etc., *omnia ulterius factum vel facta, pro meliori assurantia,, sit per finem, vel fines, feoffamentum vel recuperationem,* or any ways whatever, which by him or his counsel should be advised, and required. The plaintiff shows the advice and request of a fine, by his counsel, and shows a *dedimus potestatem* to *A.* and *B.* to receive the cognizance, and that the obligor being requested, etc., refused.

Jermyn. He does not show that there was any writ of covenant depending.

DODERIDGE, J. The *dedimus potestatem* may have been sued before the covenant.

JONES, J. The covenant is not to levy a fine, but to do such acts as will be required.

Jermyn. He does not show that the writ was delivered to the commissioners. It appears also by the fine pleaded that it was with warranty; and if I covenant on request to levy a fine, I may refuse to levy it with warranty.

Yet the court was against him, for the reason given by JONES and DODERIDGE, JJ., that there is a difference between a covenant *cognoscere finem* and one *levare finem*. Godb., 485.

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*LAICOCK'S CASE.—Mich. 2 Car.

Laicock brought a special action on the case, against Wilshire, and counted that he took a *latitat* out of the King's Bench to arrest one Wilmot, at the suit of himself and wife, directed to the sheriff of Wilts, who had appointed the defendant his undersheriff, which office he executed before and afterwards (the said Wilmot, *ad tunc et ibidem* being in the presence, view, and company of the said Wilshire), *quibus non-obstantibus*. The defendant returned on the same writ *non est inventus*, etc. It appears that the return was in the name of the sheriff. Judgment was given against the defendant upon a *nihil dicit*, and a writ of inquiry awarded and returned, but not filed.

Jermyn moved in arrest of judgment, because by the very delivery of the writ to the undersheriff, the party, being present, was immediately in the custody of the sheriff. Therefore an action lies against the sheriff himself, for an escape, and not against the undersheriff.

Ashley, Serj., *e contra*. It is true that an action lies against the sheriff only for an escape. But here the suit is upon the fraud and falsity of the undersheriff, which is personal to him. I have a precedent of a similar action against the undersheriff.

DODERIDGE, J. It lies against the sheriff, and not against the undersheriff, for the sheriff is an officer of the court, and the undersheriff is not, although he be allowed, by different statutes. For every default in the execution of the office, although it be by the neglect or fraud of the undersheriff, the sheriff shall be amerced here and in the Exchequer.

JONES, J., concurred. But there is a distinction to be taken, for the sheriff shall not be imprisoned for the act of the undersheriff; nor does an indictment lie against him for the act of his deputy. But for all matters of damage to the party, he shall answer to the subjects of the King, and not the undersheriff.

WHITLOCK, J. The sheriff and not the undersheriff shall be charged, for it is a misdemeanor in office, and the sheriff is the only officer of this court. *Adjournatur.*

*DEAN v. STEEL.—Hill. 2 Car.

Case. The plaintiff declared that for two years past he had used the trade of *sheering and dressing* wool, and that the defendant, to injure him in his trade, said the following words to him: *Thou openedst my pack and didst put in wet wool;* and DODERIDGE and WHITLOCK, JJ., were of opinion that the action lies, because it is a deceit in trade to put in wet wool, which is heavier than dry wool. And so to say of a silk dyer, that he puts pindust in his salt, which renders the silk heavier, whereby he may subtract part of it. 24 Eliz., *Sandford makes such good cloth* (he being an eminent clothier) *that everyone will give more for the cloth that has his mark than any other.* Another man made bad cloth and put Sandford's mark to it, wherefore he sued him and recovered. Likewise, if one says of a fuller, that he stops holes made in filling, with flocks, an action lies. Godb., 435.

COOK v. WILLIAMS.—Hill. 2 Car.

Judgment was reversed for this cause, *quia fuit concessum, pro consideratum est.* Noy, 77; *antea,* 685, 689, 759.

CREAMER v. TOKELY.—Hill. 2 Car.

Trespass for breaking a vessel and carrying away her sails. The defendant justified under a warrant from the Admiralty Court, to arrest the vessel and *in salvo custodire,* by force of which he entered the vessel and carried away the sails, which is the same trespass.

Athow, Serj. The breaking the vessel is not answered; therefore, he had no authority to carry away anything.

CURIA. The plea is well enough, for the entry in the vessel is a *breaking* in law, as *clausum fregit,* etc.

2. He may carry the sails away, for that is the usual manner of proceeding, which is supported by reason, for he cannot *salvo custodire* her without taking the sails away. Godb., 385.

*ANONYMOUS.—Pasch. 2 Car.

One who owed money to Alderman Cripps, paid it after his death to his wife, with the consent of his son, to whom administration belonged at that time, he being dead intestate. The money was spent *circa funeralia,* and for the maintenance of his family during the great plague; afterwards a stranger took the administration in due course of law, and sued the man in the Mayor and Alderman's Court. The debtor, on the equity of the case, removed the suit in the Mayor's Court, who decreed that as he had paid the money to one who was not administrator or executor, he ought to pay it over; but as in this case the money was paid to those in whose power it was to have the administration, and *as the money was spent for the benefit of the estate, he denied to give the administrator the decree. Whereupon the administrator sued a *procedendo ad judic. et alias procedendo vel causam significes.* Whereupon the cause was returned, as here, but with a custom that the mayor had power to examine.

SIR NICHOLAS HYDE, C. J., JONES and WHITLOCK, JJ., said that without some precedent they would not examine the equity. They thought that the case ought to be decided according to the conscience of the mayor alone, and it does not belong to the King's Bench to examine whether his decree be equitable or not; no more than in case of a Spiritual Court, this court does not examine, whether they proceed according to the spiritual law or not. It will only take care that they do not transgress any of the fundamental rules of the common law. They asked of *Stone,* one of the city counsels, whether he ever knew any case in which the equity was inquired into in this court. He answered in the negative. Then it was said that the words *vel causam nobis significes* are to no purpose in the *procedendo.* But the court took no notice of this.

*ANONYMOUS.—Pasch. 2 Car.

An action was brought in London, in the sheriff's court there, on the statute 3 and 4 Ed., 6, for buying and selling cattle. The court held it bad, and the party being removed here by *habeas corpus,* was discharged. The suit being on a pœnal statute, ought to have been in the Court of Sessions of the justices of the peace.

It was held by DODERIDGE, J. (and WHITLOCK and JONES, JJ., seemed to incline thereto) that the statute 21 Jac., 1 c. 4, p. 365, does not restrain suits on pœnal statutes in the King's Bench, because that court is not named in it.

SIR WILLIAM FISH v. WISEMAN.—Pasch. 2 Car.

Wiseman had judgment in debt, in C. B., against Sir William Fish, and after the year, without a *scire facias,* took a *capias* against him, and arrested him, whereupon Wiseman brought error here, and the judgment was affirmed, but the execution reversed and Sir William discharged. Wiseman took him up again by an *alias capias ad satisfaciendum,* without any *scire facias,* out of the King's Bench, and the sheriff returned a *cepi,* and *Crawley,* Serj., and *Banks* moved that he be discharged.

1. Sir William, being once taken in execution in the C. B. and let at large on security, upon the writ of error, no new execution can issue, if he refuses to surrender himself in discharge of his securities. 16 H., 7, 2. 2 Ed., 4, 8. One condemned in London is sued by another in B., and comes to London *to attend to his suit, and is arrested on an execution and discharged by writ of privilege in the C. B. He cannot be taken again in London on the execution.

DODERIDGE and JONES, JJ., *e contra.* There is a difference where one is legally taken on an execution and afterwards discharged by a writ of error, and afterwards judgment is affirmed. A new *capias* does not lie against him, but execution shall be awarded against his securities, if he does not surrender himself. But here he never was legally in execution, for the execution was reversed; therefore, he may be taken again.

HYDE, C. J. It is like the case where one recovers on a simple contract. If, after the judgment is reversed, he may sue again on the contract, though the action did not lie while the judgment was in force.

Richardson. The same distinction was taken in 2 E., 4, 16, in a case of mainprize. In the first, execution lies against the securities. But in the last, no execution can be against them.

DODERIDGE, J., Dyer, 60. One taken in execution is discharged by privilege of Parliament: when they rise, he may be taken again.

2. This was an *al. capias* where there was no *capias* before, but to this no answer was given.

3. The *capias* was in another county, and the judgment was in London.

4. He was taken on a *capias,* after the year, and in another court.

The court agreed to the resolutions in *Garnon's case,* 5 Rep., 88. The Common Bench cannot award a *capias* after the year, and the clerks said that the precedents were *e contra;* that he may be taken without a *scire facias.*

Banks moved that there was error, and the court ought to supercede the *capias,* as in 35 H., 6, 45. *Supersedeas quia erronice et improvide.*

Marget and Harvey. Action on the case in an inferior court, the first process was a *capias* and therefore the judgment was reversed. T., 2 Car. rot., 1478; Palm., 447, 445; Godb., 371.

*MAN'S CASE.—Pasch. 2 Car.

He was indicted for being a common barretor, *per quod* divers suits, etc., between his neighbors, he stirred and promoted, etc., and the indictment was quashed for no place was laid in which he was a barretor, nor where he stirred the suits. At first, DODERIDGE, J., said it was well, for a barretor is he who stirs suits among his neighbors, and if he is a barretor in one place, it is so in the whole county. But here, if it be traversed, no *venire facias* can be awarded, and therefore it was quashed. Godb., 383; Palmer, 450; Bendl., 133.

TAYLOR v. TOLWIN.—Trin. 2 Car.

In an action on the case in C. B. for words in Haswel, in Suffolk, on the general issue, it was found for the plaintiff and judgment was given, and error was brought here, *eo quod* the plaintiff being within age, appeared by attorney. The defendant in error and the plaintiff in C. B. replied that he was of full age at the time of the appearance, etc., and on a *venire facias,* from Haswel, it was found that the plaintiff was of age. Now it was said that it was a mistrial, not being aided by any statute.

DODERIDGE and WHITLOCK, JJ., concurred. The statute 21 Jac., c. 13, p. 372, does not help this, for it aids only where the *venire facias* is of one place, where it should be of both, or *e converso.* But here is no place from which the *venire* is to be.

DODERIDGE, J. The statutes of Jeoffails have always been construed liberally.

Adjournatur, the other Judges being absent.

And afterwards the court, being full, was of the same opinion.

Hitcham, Serj., prayed and obtained a repleader, for there could be no new trial. But if there had been an issue made, and a mistrial, they would have awarded a new *venire,* and not a repleader. Godb., 469, 382; *Bayneham's case;* 5 Coke, 36.

*HOLMES v. WINEGREEN.—Hill. 2 Car.

Case, for taking and detaining a box of charters, viz., *quare cepit et detinuit unam pixidem, una cum diversis chartis et minumentis,* concerning the land of the plaintiff, *quousque,* the plaintiff, in order to obtain them, gave to the defendant a note of £40. It was brought in Lincoln, and on judgment, error was brought here. Because

1. He says *pixidem,* without saying *suam,* or that he had it in possession.

2. He does not show what charters were taken away, which is not well. For if he brings detinue, he ought to show what they were. 2 H., 7, 6. If an heir pleads in bar detinue of charters, he ought to show what sort of charters. 5 Rep., *Playter's case.* Trespass *quare pisces, suos cepit* without showing what kind; held ill. So here, for perhaps they do not belong to him. It would be otherwise if the charters had been locked in the box, but as it is, it is bad. Therefore entire damages being given, it is error. To which it was answered that the damages are not given for the *chartas,* but for the detention of them until the note was given.

3. The action is *quare cepit et detinet quousque,* etc., and the jury gave their verdict, that the defendant is *culp. transgressionis prædict.,* and they cannot find the issue by implication. *Loveday's case,* 8 Rep.

DODERIDGE and WHITLOCK, JJ. (*aliis absentibus*), inclined on those three points, in favor of the plaintiff, and a peremptory day was given to the defendant to maintain his judgment.

4. Another error was assigned: *Prescriptum est ballivo quod caperet* instead of *capiat.* In the replication *quod quærens dixit tunc,* instead of *dicit,* and the verdict is *quod juratores dixerunt,* instead of *dicunt.* The mistake of the tense vitiates the plea. Dyer, 156, 221; 10 H., 7, 12; 35 H., 6, 15; Dyer, 268; 9 H., 5, 12. But the court did not say anything respecting this.

5. A special action on the case does not lie here, but a writ of detinue or trespass. 18 E., 4, 23. An action on the case does not lie where the identical thing may be recovered as here. But the court did not speak on this point.

Calthrop, on another day, moved the court again, and now

DODERIDGE and JONES, JJ., *e contra.* *The declaration *de prixide una cum diversis chartis,* concerning the plaintiff's land, is well enough. For the charters carry with them the property of the box, whether it be sealed or locked, if they are in it. Also, it is certain enough, for damages given for the detention until the note was given, do not interfere with the recovery of the charters. So the issue being tantamount to the

general issue, when the jury find the general issue it is well enough, but DODERIDGE, J., agreed to a case put by *Calthrop, thus:* Issue is an avowry, whethere there be a special custom, and the jury find a special verdict, if the court think that the defendant, etc., that he is guilty, and if the court, etc., which is bad. *Et adjournatur,* on the 4th point *ut supra.* Godb., 460, 373.

GREEN v. MOODY.—Hill. 2 Car.

Debt on a lease for years, to commence in *futuro; virtute cujus,* the lessors entered, and the lease was rendering rent, after verdict.

Thin, Serj., moved in arrest of judgment. The declaration is bad, for it does not show when the defendant entered. Therefore, it shall be taken more strongly against him, viz., that the lessee entered before the lease commenced.

CURIA. It cannot be intended here, for it is said *virtute cujus* the lessor entered. He could not enter by force of the demise until after the day.

Thin. 7 E., 6; Dyer, 89. *Clifford's case* is exactly in point.

JONES, J. There is a difference between an *ejectione firmæ* by a lessee against a stranger, and debt by the lessor against the lessee for the rent. For an *ejectione firmæ* is not maintainable unless on the possession of the lessee. But debt against him lies on the privity of the contract, because he cannot plead that he did not occupy the land *virtute dismissionis.* Therefore, even if it should be intended that he entered before the day and was a disseizor, and so remained after the year, yet debt lies against him for the rent, on the contract.

Thin. The implication does not go to the declaration; therefore, the *virtute cujus* does not serve. And if he be a disseizor, debt does not lie against him any more than in *Rushden's case,* 24 H., 8; Dyer, 4. Lessee for years made a feoffment, debt does not lie against him for the rent.

All the court was against the Serjeant; and afterwards, being informed that the defendant had taken out a chancery process against the plaintiff, gave judgment for the plaintiff, and told to *Thin,* Serj., he might bring error if he pleased. Godb., 384.

*SMITH v. WAYT.—Hill. 2 Car.

A lease was made in London of land in Middlesex, the lessee assigned; the lessor died, the rent being an arrear, and the administrator of the lessor brought debt in London against the assignee; and *Stone* moved

whether the action should be brought in London or Middlesex, where the land lies.

JONES, J. Where debt is brought on a lease for years, on the contract, it may be brought anywhere. But where it is brought on the privity of the estate, as here, it ought only to be brought where the land is. It has been so adjudged both in the K. B. and C. B. *Trethorn and Cleebrook's case.* Let the plaintiff pay costs, and then *per favorem curiæ,* he may amend his declaration. Godb., 385; vin., 26, 69; Hut., 68; Jones, 44; *postea,* p. 813.

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*DUN v. THE DEAN AND THE CHAPTER OF CARLISLE.—Hill. 2 Car.

Error on a judgment of an inferior court of the King, obtained by the plaintiff. The judgment was given in the time of King James, and the writ of error to remove the judgment obtained in the time of King Charles. Now *Damport,* the King's Serjeant, prayed that the inferior court might proceed to execution, notwithstanding the writ of error.

JONES, J. It seems to me they should not. The distinction is taken in F. N. B., 71: if a record be removed out of the court of a private man, the King's court shall not hold plea of it; but if a plea in the county be removed by such a bad writ, the court shall proceed on the record *quod coram illis residet.*

DODERIDGE, J. I concur. Where the writ is once well, and abates by the party, or by death, and the record is removed, the inferior court cannot proceed, but the superior court shall. But it is otherwise when the writ is to remove other records, as here. For the record is in the time of King James, and the writ of error speaks of a record in the time of the *present* King.

HYDE, C. J., and WHITLOCK, J., concurred.

Damport. They have had twice execution on imprisonment of the plaintiff, upon the writ of error. 3 El.; Dyer, 206, in point.

And he at last obtained what he had moved for.

ANONYMOUS.—Trin. 2 Car.

Andrews showed to the court that in such a place in a leet, holden there for the King, one of the jurors of the King's inquest was arrested by an officer of the Marches of Wales, whereby the King's court was disturbed; and inasmuch as the King's Bench is the fountain of all leets, he prayed the interposition of this court to punish this offense. He read an affidavit of this matter, and moved for an attachment; but it was

denied. The court said that if it had been done by one of their officers, there would have been sufficient ground to support the motion. They advised him to put in an information against the officer in the leet for this disturbance; which he said he would do.

*ASHFIELD v. ASHFIELD.—Hill. 2 Car.

On demurrer, the case was: An infant copyholder in fee, without license of his lord, made a fee for years rendering rent, and when of full age accepted the rent, and afterwards ousted his lessee. *Crawley,* Serj., said he might well do so, although it is true that the lease of an infant rendering rent is only voidable, yet in the case of a copyholder it is otherwise, for the lease is a disseizin of the lord, and a forfeiture of his estate. And the grant of anything by an infant is absolutely void unless it be by livery with his own hands, or for his benefit. But, *e contra,* it was said that this is a good lease until it be avoided. If a copyholder makes a lease, it is a forfeiture. H., 37, *East and Harding's case,* rot., 49. Copyholder makes a lease for years, to commence *in futuro,* it is a good lease, but no forfeiture in case of an infant. For if the lord enters upon him he may reënter, as in 8 Rep. Infant tenant for life made a feoffment, the lord enters, the infant may reënter.

The court agreed that it was no disseizin, viz., that the least of a copyholder, without license, is no disseizin to the lord. But the counsel were directed to argue the question whether it should be void in respect of the forfeiture. Afterwards it was debated afresh, and held that the lease was not void; but judgment given against the infant. JONES, J., said on the first day, in the C. B. leave without license had been adjudged no disseizin. *Nota* that the plea was adjudged vicious in form, as well as the bar, replication, and declaration. Jones, 157; Noy, 92; Godb., 456, 364; 1 Cr., 498; Mo., 392; 1 Roll., 507, 508; Ow., 63; Godb., 456.

ANONYMOUS.—Trin. 3 Car.

Sir Francis Evers made his wife and his son executors, and divided all his goods, and for a breach of trust (*misapplication*), the son being the Queen's attorney, sued the wife in the Marches of Wales, and a prohibition was prayed, because it was not in their instructions to sue there for legacies.

But HYDE, C. J., and DODERIDGE, J., *e contra.* Because for this breach of trust there is no other remedy at law.

JONES, J., concurred.

Secondly, it was further objected against the prohibition that the plaintiff is the Queen's attorney there, and is bound to his *attendance, and therefore shall have his privilege.

PER CURIAM. He shall not have his privilege in this case, for he sues as executor.

JONES, J. He shall not have his privilege *omnino*. Godb., 431.

HARVEY v. SIR GEORGE REYNEL.—Pasch. 2 Car.

Debt on an escape. The plaintiff declared that he had a judgment against J. B. for £600 in London, and on such a day and year imprisoned him, until he was removed by *habeas corpus*, before the Chief Justice, who committed him again, remanding him to jail, under the care of the defendant, who permitted him to escape. The defendant pleaded in bar, confessing the said J. B. to be in execution *prout*, etc., but that the said J. B., before the action brought, broke jail, and escaped against the will of the defendant, who thereupon made fresh suit, from town to town, and from county to county, until he retook him on fresh suit; and alleged the retaking before the exhibition of the bill, viz., the 8th of May, which in truth was after an imparlance, but before plea pleaded.

The first question was whether the retaking him on fresh suit, before plea pleaded pending the action, is well.

DODERIDGE and WHITLOCK, JJ. It is not: on the authorities of 34 E., 3, 1; F. det., 162; 13 E., 4, 9; 3 Rep., *Ridgeway's case;* F. Barre, 253; 3 E., 6; Brait. Escape, 43, 45. Likewise, in waste, reparation before the writ is a good plea, but not pending the suit.

JONES, J. The bringing the suit was a lawful act and charge, and the escape is a tort. It is not reasonable that, having once a cause of action, he should delay his suit for seven years in order to see whether the defendant would retake the prisoner; and that he should pay costs on the retaking, being barred of his action. Yet certain things happening pending the suit shall be pleaded in bar; as in *Wroth and Wig's case,* 4 Rep., 45, 47. Conviction, pending the appeal, pleaded in bar of it. 3 Rep., 90, *Purslow's case.* Pending the formedon, proclamation passes; it is a bar.

The opinion of the court upon this point was with the plaintiff.

2. The plaintiff pleads the retaking *before* the exhibition of the bill, *viz.,* 8 May, 10 Jac., which in truth was *after* the bill. Therefore the *viz.* shall be void.

DODERIDGE, J. When a *viz.* is contrary to what is alleged before, it is void.

JONES, J. The *viz.* here vitiates the plea. For the plea is bad unless the day of the reprisal is shown, because the time is *material; as if it be *before* the bill, it makes for the defendant. But where that which comes under the *viz.* is not material, there, if it be contrary to what precedes, the *viz.* is void, as in H. 43 El., *Drake and Young.* In trover, the plaintiff shows that he was possessed, and *postea* lost the thing, and it came to the plaintiff's hands. The *postea, viz. tali die,* which in truth was before the time of the possession: there the *viz.* is void, and the declaration good.

3. The plaintiff declares on a voluntary escape, and the defendant shows a negligent one, without traverse, which is bad.

JONES and DODERIDGE, JJ., *e contra.* It is well without a traverse.

WHITLOCK, J. Clearly, it is.

3. The judgment was 18 Ann. H. term, the *cap.* awarded T. 19 Jac. to the sheriff of London, who arrested the party 24 Jun., 19 Jac., and it is alleged that 21 Jun. Ann., 10, *supradict. habeas corpus* was awarded to the mayor, and the party committed to the Marshalsea, which cannot be. Therefore, he not being well committed to the marshal, the latter cannot well be charged with an escape, for the day is out of the term and the year mistaken.

JONES, J. The *habeas corpus,* although it issues out of term, ought to be dated in term time. Therefore, notwithstanding the party was arrested after the date of the *habeas corpus,* to wit, the date of the term, and the imprisonment was after the term, yet it is well, by the usage of the court.

Richardson. This answers the objection about the day, but the *year* is also mistaken.

Andrews. The bill on the file is Ann. 19 Jac., although the declaration is 10. So it is only a mistake of the clerk.

And the court was thereupon adjourned; and afterwards the plaintiff had judgment.

Justification of an escape in London, retaking in Surry; it is well traversed, averring that it is *eadem escapia.* And it was objected that the law says that *est culp. d'escape.* Plowd., 36, *Plat's case;* 13 H., 7, 1; 10 E., 4, 10.

As to the matter of the *viz.* A case was put between *Bigrave and Short,* P. 5 Jac. In *ejectione firmæ,* the plaintiff declares of a term 10 Jac. *et quod postea tali die.* Ann., 3, the defendant ejected him, and this was held no reason to arrest the judgment. Jones, 144; Noy, 93; Bendl., 185; Godb., 493; 1 Roll., 809; 2 Cr., 96, 428.

*MANNERS v. VESEY.—Hill. 2 Car.

A lessee covenanted to do all reasonable cartings for his lessor, with his carts, carriages, *and* otherwise, as it would be required. The plaintiff alleged as a breach of covenant that he requested the defendant to carry three loads of coal, which he refused to carry, and did not carry, etc. The defendant pleads that, at the time, he had no cart nor carriage. The plaintiff demurred.

Jermyn. The lessee is not obliged to keep carts to serve the lessor; but when he has them, if the lessor requires it, he must, etc. If a man binds himself to give all the money in his purse, it is a good plea that he has not any.

JONES, J., seemed to incline to that opinion.

SERLESTED'S CASE.—Trin. 3 Car.

He was indicted for cozenage *eo quod* one Proud, *existens miles sub* one Hammond, his captain, etc. Serlested, pretending that he had power to discharge soldiers, took of the said Proud, as well for discharging him, etc.

The first exception was that it is said *existens miles,* without saying how, or where. But it was held well enough.

WHITLOCK, J. It is well enough under the statute, 11 H., 7.

2. It is said he pretended to have power to discharge soldiers, which is impossible, for it appears by the statute that he had no such power, but the captain or general has. Therefore, the indictment is bad.

CURIA. It is this that makes the deceit. He pretending to have a power which he had not.

3. It is said that he did not discharge him at *tunc et ibidem,* viz., the time and place where the money was taken; perhaps he discharged him at some other time.

CURIA, pleads this, if you please. The indictment is well enough.

*ANONYMOUS.—Trin. 3 Car.

Debt against the heir of the obligee, who had bound himself and his heirs, and the bill on the file was in *debet et detinet,* but the declaration on the roll was in *detinet tantum,* and verdict for the plaintiff. Afterwards it was moved that the declaration and the rest of the proceedings

might be amended, for it was a neglect of the clerk. Whereupon, the clerk was examined and said that he was directed so to do, and that the declaration being against the heir, ought to be in *detinet tantum.* And as it was proved to have been done *consulto,* the court would not permit the amendment.

Now *Calthrop.* Let me have leave to declare on the old bill, which was entered in Michaelmas term last, and this being within three terms, may be done. Otherwise, our debt is lost, because the heir has since Michaelmas aliened all the land he had by descent.

And the court, after deliberation, granted the motion.

ANONYMOUS.—Trin. 3 Car.

The parish of Bingley levied a tax on all the lands in it; so much for every acre; and they excepted from the said tax 900 acres of wood, belonging to the Bishop of London, pretending that they were discharged by custom. A parishioner was sued, and judgment was given against him in Pauls, and the judgment was affirmed upon an appeal. And now he prayed a prohibition.

Crew, Serj. The custom is against law.

CURIA. Make your suggestion, and you shall have a prohibition. Poph., 197.

ALMOT v. PICKTON.—Trin. 3 Car.

I. S. promised with his daughter a certain sum in marriage, and afterwards the plaintiff, intending to sue him on this promise (having married his daughter), the said I. S. told him he would leave him as much as he would give to any of his other children. The plaintiff alleged that I. S. gave to his daughter such a sum, but that he did not leave him so much; that he did not sue him during his life, and that I. S. *made the defendant his executor, and died, etc. *Non assumpsit* was pleaded, and there was a verdict for the plaintiff. Now *Ashley,* the King's Serjeant, prayed judgment.

Finch, Serj. and Recorder. The judgment ought to be arrested.

1. There are *two* promises alleged here, and *non assumpsit* is pleaded; it does not appear to which of them it relates.

CURIA. It refers to the promise on which the action is brought.

2. That he would leave the plaintiff as great a portion as he would give to any of his children, and there is an averment that I. S. gave more to such one of his children than to the plaintiff, without showing

when; perhaps it was before the promise made to the plaintiff, and then the promise *quod daret* does not extend to it.

WHITLOCK, J. It may be so intended.

JONES and DODERIDGE, JJ. A declaration shall not be taken by intendment.

Ashley. There is a precedent in 42 El. One having beaten and wounded another, promised, in consideration of a forbearance of a suit, to pay him as much money as he would expend in getting cured; and on an averment in the declaration that he spent so much, it was held well enough. I do not recollect the name of the case.

JONES and DODERIDGE, JJ., remained of the same opinion.

DODERIDGE, J. It seems to me that there may be some difference in the cases, for the wound remains.

JONES, J. There is no difference.

To which DODERIDGE, J., seemed to assent. Poph., 183.

*ANONYMOUS.—Trin. 3 Car.

One was sued in the Court-Christian, and the libel was that he called the plaintiff a *Quean,* or words to that effect, or importing *eundem sensum,* and a prohibition was awarded: (1) Because no action lies for the word *quean;* (2) for the uncertainty.

DICKER v. MOLLAND.—Trin. 3 Car.

In a second deliverance the defendant avowed, and showed a feoffment to A. B., etc., to the use of his father, for life, remainder to himself, and on this feoffment conveyed a title to himself. The plaintiff conveyed a title to himself and traversed the feoffment to A., B., and C. The jury found a feoffment to A., B., C., and D. The court resolved that this was a finding for the defendant, for, it being a feoffment to the use alleged, the number of the feoffees was not material. 21 Assize, 28; 21 H., 6. Other exceptions were taken, but I did not hear them well. Poph., 200; Palm., 508; Noy, 93; 2 Roll., 9.

*DALE v. PENHALERICK.—Trin. 3 Car.

In *replevin* the defendant made *conisans en droit* the tenant for life, and prayed a return; then the plaintiff came and pleaded that the tenant for life died since the last continuance.

Jermyn. It is no plea, for although the defendant now shall not perhaps have a return of his cattle, yet he ought to have a remedy for the unjust vexation by a suit without cause. 3 E., 4, 50. In ward, the death of the ward pending the writ is no plea, nor the expiration of the term in an *ejectione firmæ*. Yelv., 112.

ANONYMOUS.—Trin. 3 Car.

In an indictment for not repairing a way, which he ought to, *ratione tenuræ* of certain lands in Ashton, without saying *ratione tenuræ suæ;* if another has the land, there is no room to indict the defendant; of which opinion was the court, on *motione* Athow. *Sed recordo inspectu, fuit tenuræ suæ; Ideo non allocatur.*

LEGAT'S CASE.—Trin. 3 Car.

The defendant promised to the plaintiff's attorney *ex parte quærentis (anglice)*, on behalf of the plaintiff that he should pay him, etc., in consideration, etc. The plaintiff brought an action on the case, and declared specially as here, but not generally of a promise made to himself. It was adjudged well. It was said it would be well *either way.*

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*STONE v. KNIGHT.—Trin. 3 Car.

There being divers matters of controversy between the father and Margaret, his daughter, of the one part, and Knight, of the other part, the father and daughter of the one part, and Knight of the other, submitted themselves to an arbitration of all quarrels. The girl being within age, the father bound himself to Knight, that he and she would perform the award on their part. The arbitrators awarded that Knight should pay so much to the girl, who would release all actions to him, and that the father and daughter should afterwards release all actions to Knight. Knight did not pay the money at the day, and the daughter brought debt on the obligation.

Banks moved: (1) Whether the submission is void. For, if so, the arbitration is void; and if the arbitration is void, then Knight is not bound; for an obligation to perform a void award is void. 8 E., 4, 1; 8 E., 4, 22; 19 E., 4, 1; 10 Rep., 31.

And the whole court, viz., DODERIDGE, JONES, and WHITLOCK, JJ., assented.

(2) The arbitration is void, for the submission of the infant is void. The father and daughter are here *one* party, and as *one* person in the submission. Where two persons submit themselves on *one* side; *one* alone cannot revoke it, *ergo* if it be void as to the infant, it is so as to the father also. Because the intention of the parties is that all controversies between the parties should be terminated; which cannot be if the infant is not bound. An arbitration is to be expounded according to the intention, 10 Rep., 57. But the submission of the infant is void; then the arbitration is of something not submitted to the arbitrators.

Noy, e contra. The submission of the infant is good, for it is for his benefit. Otherwise an infant would be *in pejore casu,* than a person of full age, who may terminate his controversies by arbitration, and so avoid the charge of a suit; while he (the infant) would be compelled to endure the extreme rigor of the law. True it is that if an infant binds himself to perform an award the *obligation* is *void,* but the *submission* is *good.* 13 H., 4, 12; 10 H., 6, 14.

DODERIDGE, J. An infant of 18 years of age may *submit* to an *arbitration,* but may *not* bind himself by a *penalty.* He may be administrator.

JONES, J., concurred, but it would be otherwise if he were to show that it is to his disadvantage. But here it appears to be to his advantage.

WHITLOCK, J. The submission is not *void,* but *voidable,* by the infant, and his election to avoid it is reserved to him during his infancy. He who submits himself to an award takes upon himself to choose his own judges, and *an infant cannot make an attorney in court, and although judgment be given for him in such a case, it is *erroneous.* So that, while he is under age, nothing can make the submission good. But if, when he arrives at full age, he does any act amounting to an agreement to the award, he is bound.

JONES, J. Perhaps, as my brother WHITLOCK has said, when the infant comes to be of full age, he may disagree to the award.

DODERIDGE, J. The reason why an infant cannot appear by attorney is because he cannot make a warrant.

JONES, J. In this case the infant cannot have error. If an infant commits a mayhem, he cannot submit to an arbitration therefor.

(3) The award here to the daughter *alone* is bad., viz., that Knight shall pay so much to her. The father and daughter are only *one* person in this declaration. It is distributory to *all* those of *one* party against the *other.* Jones, 164; Noy, 83; March, 140, 142.

HERN v. STUBBERS.—Trin. 3 Car.

In detinue, the plaintiff declared that he had delivered the goods to be redelivered *quando requisitus,* and that the defendant did not deliver them, *licet sæpius requisitus,* etc. The defendant pleaded a custom of suing by attachment, and that thereby they were recovered of him. Whereupon the plaintiff demurred.

1. Because the cause of the debt on which the attachment was is not shown; neither is it averred expressly that there was any debt.

Stone. The cause of the debt is not to be shown, for it is only a matter of inducement, and it is not traversable. 5 H., 7, 1; 9 E., 4, 45, *vel.* 43; 39 E., 6, 12.

2. The custom is, if he swears that his debt is just, and here it is alleged *quod jurat debitum,* without saying *esse verum.*

Stone. This shall be understood.

3. It is not shown that the infant was within the age at the time.

4. The custom is, that the sheriff shall return that the debtor has nothing, whereby he may be summoned, and cannot be found within the city; and that he be called at the next court, and if he does not appear, a foreign attachment may issue. But in this case it is not averred that *any* of these requisites were complied with.

Stone. It is true, and therefore the judgment is erroneous. But we could not take advantage of this. 21 E., 4, 3. A stranger cannot allege a discontinuance in the record. *Dr. Druries' case,* 8 Rep., 142. A sheriff, charged with *an escape, shall not take advantage of an error in the record.

Also here the declaration is bad, for the rebailment is to be upon a *request,* which ought to be specially alleged. To which it was answered that there is a difference between this and an action on the case.

DODERIDGE, J. I am not satisfied as to this exception. The seizure is a request. But here the request ought to precede the suit, and is part of the contract.

JONES, J. The difference between an action upon the case and this is that here the action is a sufficient request; and this is no prejudice to the defendant, for he may come on the first day and excuse himself, and he shall not be damnified. This distinction has been taken in this court, between an action of debt and an action on the case.

DODERIDGE, J. The request is no part of the debt, but here it is part of the contract.

So the opinion of the court was against *Stone,* in all points. *Sed adjournatur.* Godb., 483.

ALCOCK v. BLOFIELD.—Trin. 3 Car.

Alcock had judgment in an action on the case, against Blofield. The case was: Alcock brought an action against Bate, and Blofield promised him that if he would forbear the suit he would pay him £200 at the feast of St. John the Baptist, and £100 at any time afterwards, when he should be thereto required. The plaintiff alleged nonpayment of said £100, *licet postea,* 18 Oct., of such a year; which in truth was before the day of the first payment, and this was assigned for error.

1. It was agreed by the court the request is issuable, and therefore ought to be specially and certainly alleged. For there is no duty *before* the request, it being on the contract of a stranger. But when it is for the party's own debt, *licet sæpius requisit.,* is sufficient as the debt is due without a promise.

2. The *scilicet* is merely void, being contrary to the premises.

DODERIDGE, JONES, and WHITLOCK, JJ. *Ideo* judgment is affirmed, *puto. irrot.* P. 3 Car. rot., 213. *Vide* where the *postea* shall be void. P. 2 Jac. rot., 539; Noy, 95.

*PLUME'S CASE.—Trin. 3 Car.

He was indicted for murder in the county of Essex, and outlawed thereupon; the outlawry was certified here. But the certificate was erroneous, for the *exactus* is *ad comitat.* without saying *meum.* The King's attorney now came in court, and showed that the King had seized his lands, and to assure the estate to the King, and prevent the reversal of the outlawry, he prayed that the court would award a *certiorari* to the coroners to certify where *exactus fuit, ad comitat.,* etc., and so that on their return the matter might be amended. There was a precedent in the time of E., 4., where one Stanly was indicted, and his name was written in some places *Stanely.*

And a *certiorari* was awarded. Palm., 480.

*WADE v. MARSH.—Trin. 3 Car.

Lessee for 99 years made a lease for 40 years, rendering rent; made his executor, and died. A. proved the will, and made B. his executor; the rent became due, and A. died. B. proved the will and avowed for this rent *in jure proprio.*

1. It was resolved *per cur.* that by the common law he may distrain for this rent, by reason of the reversion which creates a privity; although it was objected that for rent in the life of the testator he shall have debt, but not distress.

2. That the avowry is well, notwithstanding it is *in jure proprio,* by the executor.

Exception was taken that he does not say that the first executor died, *inde possessionatus.* 1 Roll., 672; Poph., 163; Bendl., 159; *Antea,* pp. 640, 716.

STRAND v. BLUNDEN.—Trin. 3 Car.

In case. The judgment was *ideo consideratum est quod quœrens recuperaret;* and reversed; it ought to have been *quod recuperet.* H. 2 Car. rot., 121, *vel* 122; Bendl., 193.

BROOK v. WOOD.—Trin. 3 Car.

Case. The plaintiff declared that the defendant, being indebted to him in an account £60, in consideration that the plaintiff would forbear suing him, assumed to pay, etc., and declared to his damage, etc. On *nihil dicit* the judgment was *quod recuperet damna sua prœdict,* and there being no writ of inquiry awarded, the judgment was reversed. It was a judgment in an inferior court. *Postea,* p. 785; Noy, 96.

*WALTER v. HAYES.—Pasch. 3 Car.

Case, by husband and wife, as administrators, and the declaration was *ad respondendum,* such a one and his wife, *cui administratio honorum,* etc., and this was alleged as error; but it was held well, for *cui* shall be understood to relate to the wife, who is last named.

SMITH v. AMYS.—Pasch. 3 Car.

Judgment being given in an *ejectione firmæ,* a writ of error was sued before the writ of inquiry was awarded or returned.

DODERIDGE, J. It seems to me it does not lie, because before the writ of inquiry the judgment is not perfect, as in *Metcalf's case,* 11 Co., p. 38, in account or partition. Error does not lie before final judgment.

JONES, J., and *Clerici curiæ, e contra.* For the judgment is *quod quærens recuperet terminum;* and on this judgment the plaintiff may maintain an *hab. fac. poss.* If the writ of error did not lie in this stage of the suit, the plaintiff, after obtaining possession under an erroneous judgment, would *never* get a writ of inquiry, and the injured party would be *without* a remedy. See next case, 7 E., 3, 19, 20, 21 a, 32 l, 34 l; 22 E., 3, 6, 7.

TERRY v. NEWSON.—Pasch. 3 Car.

In *ejectione firmæ* on *non sum informatus* the plaintiff had judgment, *quod recuperet terminum,* and the writ of inquiry was awarded; and before the return of it, a writ of error was brought in K. B.

JONES, J. The writ of error is well brought; for here is presently a judgment for the land; but it is otherwise when damages only are to be recovered.

WHITLOCK and DODERIDGE, JJ., concurred.

JONES, J. If he does not take judgment, but enters on the land, the other will be remediless.

He may help himself by a special allegation.

JONES, J. In an entry *sur disseizin,* on demurrer, the demandant had judgment and a writ of inquiry. *Yet he cannot enter, and the other shall have a writ of error.

All the clerks agreed that the writ of error is well brought. *Noy,* at the bar, secretly concurred, and cited 17 E., 3, *Greenfield's case,* in a *quare impedit.* He was asked what remedy there is for the damage, when the record is removed. He answered that in an inferior court they may well proceed. Noy, 95. See the preceding case.

WOOD v. BROOK.—Pasch. 3 Car.

Case. The plaintiff declared to his damage £17, and there was judgment on demurrer for £17 and 10s. *pro damnis,* and the judgment was reversed for the damages being uncertain; the court cannot tax damages without a writ of inquiry. Otherwise in debt where the demand is certain. And the judgment was reversed *per totam curiam* (*absente* HYDE, C. J.).

ANDERSON v. SYMONDS.—Trin. 3 Car.

Debt on arbitration. The defendant waged his law, and was ousted of it, *per cur.* Noy, 96.

ANONYMOUS.—Mich. 3 Car.

In evidence, one of the jury asked the court whether, if the lord makes a lease to a copyholder by *parole,* this *confounds* the copyholder. *Cur.* viz. HYDE, C. J., and JONES, J. It does, if livery be given; otherwise by *deed.*

JONES, J. If it be a lease for life, the copyhold is gone, without livery thereon. *Quod non fuit negatum.*

*HUDSON v. HUDSON.—Mich. 3 Car.

Hudson brought an action in the nature of trover and conversion, as executor of Hudson against Hudson, and declared that Hudson, the testator, was possessed and made his will, appointing the plaintiff his executor, and after his death the goods came to the hands of the defendant, who converted them. *Non culp.* was pleaded, and there was a verdict for the plaintiff. It was now moved in arrest of judgment that no possession is alleged in the plaintiff, and no trover supposed *omnino* by the defendant, except *ut supra,* and it is not said that the goods came to the defendant's hands by finding. It was argued that the possession of the testator was surplusage, as well as the plaintiff's naming himself executor, when the goods came to the defendant's hands, after the testator's death: as was adjudged this term in *Worfield's case, postea,* p. 220, where a man brought trover and conversion, naming himself executor; and it was adjudged upon a nonsuit that he should pay costs; for the conversion was after the death of the testator, and the naming himself executor was surplusage; which was allowed, *per totam curiam.* Nevertheless, judgment was given for the plaintiff, because, although he has not alleged that he was possessed *actually,* yet on the matter expressed in the declaration the law implies as much. For the property draws of itself the possession of the goods, whereupon he may have trespass. As if one in London gives me his goods in York, and another takes them, I may have trespass. And as to this part of the declaration the verdict has found it so. Although there was no trover alleged, there was judgment, *pro quærente.* 7 E., 3, 11, 12; 8 E., 3, 32.

THAIR v. FOSSET.—Pasch. 3 Car.

Error is assigned on a judgment in the court of Verge, that the plaintiff declared on a trespass at St. Martin *infra jurisdictionem,* and on *non culp.* pleaded, there was a *venire facias* from St. Martin *prædict.*

without saying *infra jurisdictionem.* And this being a court which is removed with the King's residence, it may be that St. Martin was *within its jurisdiction at the time of the contract and the declaration, and *out* of it when the *venire facias* was awarded, which is two months after. Therefore they ought to have said *infra jurisdictionem,* as in the declaration.

DODERIDGE and JONES, JJ., held it was error. Noy, 96.

GREEWELL v. IRELAND.—Pasch. 3 Car.

Quare vi et armis in ipsum insultum fecit, etc., and declares on a battery. The defendant says *quoad venire vi et armis, non culp.* without saying *et de hoc ponit se super patriam, et quærens similiter; et quoad residuum transgress.* he justifies by a special plea *et paratus est verificare,* etc. The plaintiff replies, *quoad defendens prædict. vi et armis, in ipsum insultum fecit die et anno,* etc., *supradict. et verberavit, et hoc paratus est verificare.* Issue was taken on the justification and found for the plaintiff. Now it was moved in arrest of judgment, that there is a discontinuance; for the defendant says *quod quoad vi et armis, non culp.* and does not say, *et de hoc ponit se supra patriam,* and the plaintiff *similiter* as he ought, and without *vi et armis* there is no fine due to the King.

Boulstrod, e contra. The plaintiff in his declaration has averred that he came *vi et armis* and made an assault, and issue is taken on the special justification, which was *de son assault demesne,* and it is found for the plaintiff. Therefore, there *vi et armis* is averred *inclusive,* for he could not make a battery without *vi et armis.* There is an express precedent in the book of entries, *fol.* 666.

But on the other part: *Brook's case.* Where the action was brought in the county of Surry, and the defendant pleaded a special justification in London, *et quoad vi et armis, non culp.* and issue joined, and the special justification was found for the plaintiff in London, and afterwards he took out a *nisi prius,* in order to find the *venire vi et armis,* and it was found for him, and he had damages. To which case the court agreed.

Henden, Serj., showed other error. That the trespass is alleged 9 Jun. 21 Jac., which was before the general pardon, and judgment *pro quærente quod defendens capiatur,* while it should be *sed pardonatur.* To which it was answered that this is not part of the judgment. *Sed,* therefore, *adjournatur.*

*WALTER v. FARMER.—Mich. 3 Car.

The plaintiff showed in his declaration that there was a conversation between him and the defendant about the purchase of a certain quantity of herb for dying, called *woad,* viz., five loads, at the rate of 6d. for every 14 pounds thereof, and that the defendant, in consideration of 6d. in hand, promised to sell and deliver him the said five loads at the rate aforesaid. On *nihil dicit* the plaintiff had judgment. *Jermyn* moved in arrest of judgment: (1) That the declaration is for *quinque carucar* (*anglice cartloads*), and *caruca* does not signify a load, but a quantity of land. (2) It is not shown to what quantity the loads amount to. He ought to have said that the five loads weighed so many pounds, which at 6d. for every 14 pounds amount to so much. *Adjournatur.*

C. J. Perhaps the plaintiff could not show this, as they were not delivered.

Jermyn. M. 18 Jac. Trover and conversion were *de tribus ponderibus,* and the plaintiff could not have judgment; for this does not signify a certain weight. I was of counsel in the case.

STOKELAND'S CASE.—M. 3 Car.

Case. The plaintiff recovered only small damages, whereupon the defendant prayed that judgment might be entered against himself. The plaintiff prayed that judgment might not be entered, and *Beere* cited the case of *Taylor v. Somes,* where the plaintiff waived his judgment and began *de novo. Jermyn* observed that the defendant intended to take an advantage, as the *assumpsit* on which the promise was brought was to make payment at four several days, and the action is brought for the first breach, so that the plaintiff shall be barred of the whole by the present inconsiderable recovery. For if he has judgment on the first breach, he cannot have it for the others.

DODERIDGE, J. The defendant may, of course, enter a judgment against himself. Take a rule to show cause to the contrary.

On another day it was asked whether the *postea* was brought in, and *it appearing that it was, it was said that if the plaintiff may begin *de novo,* the defendant may be vexed forever.

Ruled, That the defendant may enter judgment, or compel the plaintiff to be nonsuited. But the nonsuit was entered disjunctively, either to pay costs or to begin *de novo.*

DOYLEY v. BROUGHTON.—Mich. 3 Car.

Broughton recovered in the Marshalsea against Doyley, and on this recovery brought debt in the C. B. The defendant pleaded there *nul tiel record,* and a *certiorari* was awarded out of the Chancery for a record between D. and B., and after the record came up and was sent by *mittimus* to the K. B., but the *mittimus* mistook the name of Doyley. *Bramston,* Serj., moved that judgment might be reversed, for there is no record between B. and D., but between B. and C., and an amendment cannot take place, for it would be altering the very judgment.

Jermyn, e contra, moved that the record should be first amended, it being a misprision in the *mittimus* alone, etc.

The court sent for the clerk of B. and examined him, on the amendment in the K. B., and

Per totam curiam. Let it be *amended here, and the judgment affirmed.

DODERIDGE, J. If the *certiorari* were bad, there would be no amendment.

TAYLOR v. TOLWIN.—Mich. 3 Car.

The plaintiff brought his action for the following words: *Will you cast away your daughter on* Taylor? To which the father of the girl replied, *Why?* And the defendant added: *It is as true as anything that he ravished* Frank's *wife, innuendo,* etc. *And you had better follow your daughter to the gallows, then bestow her on him.* The plaintiff declared that there was a communication between the father of the girl and himself touching a marriage between him and her, and then, on account of these words, he lost his marriage, to his damage, etc. The defendant pleaded *non culp.,* and there was a verdict for the plaintiff, with £200 damage. Now a motion was made in arrest of judgment.

1. A man *cannot* have an action for losing his marriage, as a woman *can.* For she *transit in familiam viri,* and is advanced thereby. But the man is the *head* of the family.

Sed non allocatur, for *he* is damaged by the loss of his marriage.

JONES, J. Let us divide the case: (1) Whether the words are actionable by *themselves.* (2) Admitting they are *not,* whether they are so, on account of the *consequence.*

Goldsmith, pro defendente. Words ought to be taken *civiliter,* and not *criminaliter,* and *in mitiori sensu,* as *thou hast burnt my barn;* it shall not be intended of a barn adjoining a house, and therefore the

action does not lie. A woman may be ravished without *carnal* knowledge; and it is no felony.

CURIA. The action lies.

2. It is not alleged that there was a *conclusion,* but only a *communication* of marriage, etc., and not with the *daughter,* but with the *father.*

Sed non allocatur. For the plaintiff says that by these words he lost his marriage.

The plaintiff had judgment *nisi,* etc.

The court insisted on this, for it is ravishment of the wife of another, which can but be felony. 4 Rep., p. 16. *Davies' case,* where there was only a *colloquium,* but no *conclusion* of marriage. Bendl., 128; Roll., 373; Palm., 385.

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*PRIOR v. COLBOLD, *vel* FRIER v. GABOLT.—Mich. 3 Car.

Case for these words. If Robert Prior would justify his answer, which he made to a bill preferred by Tinson against Tinson. I would prove him perjured upon his oath. The answer had been disallowed for insufficiency; all points in the bill not being answered.

Bulstrod. The action does not lie; for he is not directly charged with perjury. T. 17 Jac. B. R., *Sparkman's case. He is a thief, or* I. S. *is perjured;* held not actionable; the words not being *directly* affirmative. So 18 Jac. B. R., *Margaret v. Gibb.*

Goldsmith, e contra. The words import a scandal, as in *Hext's case,* 4 Co., 15. *If I find* I. S. *I wott in two days to arrest* Hext *of felony;* the action lies, although the words be conditional:

JONES, J. It is so, for they carry a scandal with them, and there is a certainty of person. *Aliter,* if the person was uncertain. *As one of you is a thief* no action lies. In Norfolk they found out a trick to scandalize men, by saying: *I dreamed,* etc., *that you stole a horse,* which is a devise to avoid an action. By this means, anyone may abuse another with impunity. The disallowance of the answer is nothing. For it is good for the residue.

WHITLOCK, J. I doubt whether an action lies in this case, for the words are contradictory. Inasmuch that if he *justifies* his answer, there is no scandal.

HYDE, C. J. I am clearly of the opinion of my brother JONES. To *justify* is to *affirm.*

Afterwards a doubt arose; as the plaintiff had not averred that he had justified his answer after the words spoken. But he had judgment. 1 Roll., 78, 2 Cr., 350.

PHUTER v. GUNDER, *vel* FULLER v. RANDAL.—Mich. 3 Car.

The plaintiff declared *quod cum* the defendant's husband was indebted to him £42, and made her executrix, and died; she proved the will, and the plaintiff having told her he meant to sue her, she, in consideration of forbearance until such a day, promised to pay him. He avers the forbearance, and says she did not pay. And although he did not show wherefore the testator was indebted to him, the declaration was adjudged *well. For here the debt is only an inducement. 5 H., 7, 1; 21 H., 7, 15; 9 E., 4, 41. *Aliter,* if the promise *creates* the debt.

2. It is not averred that no part of the debt is paid. *Sed non allocatur,* for the breach is alleged according to the promise, and judgment was given accordingly. Hob., 83.

TROWBRIDGE v. HARD.—Mich. 3 Car.

The plaintiff declares that he was a clerk, and the defendant in speaking of him, said: Robert's *attorney in this court purchased a latitat against the defendant,* whereupon the defendant added: *Go, tell your lawyer that he is a base rascal, and that I will make him lose his ears, and teach him or any lawyer of them all how they dare to serve a writ on me.* The plaintiff had judgment, for the words tend to disgrace him in his profession.

C. J. If he had said that he would *have* his ears, it might be intended that he meant by violence. But when he said that he would make him lose his ears, he meant for some crime.

DODERIDGE, J. If one threatens an attorney for prosecuting a suit in the King's court, he shall be fined and imprisoned by the court of which the party is attorney. 32 H., 8, 6. For the law protects a man in his possession.

The defendant for the last words was bound to his good behavior.

WORFIELD v. WORFIELD.—Mich. 3 Car.

Trover as executor, and the plaintiff declared of a trover and conversion, after his testator's death, and after issue was nonsuited. The defendant prayed and obtained costs.

CURIA. The naming himself executor is only surplusage. 24 E., 3, 13; 21 H., 6, 1; 2 H., 7, 15. *Taylor's case* in C. B. adjudged accordingly. *Antea,* p. 786.

*HALL v. GERRARD ET ALIOS.—Mich. 3 Car.

Action of battery for assaulting, beating, and wounding the plaintiff in London. They, the defendants, show that they were possessed of a house in Surry, for a term of years to come; that the plaintiff entered and put them out of possession; that they *moliter* put their hands on him to make him depart; that he would not, but assaulted them, and that they, in defense of their persons and possessions, assaulted, beat, and wounded him, which is the same trespass; *absque hoc,* that they are guilty in London. The plaintiff replied *de injuria sua propria, absque tali causa.* Whereupon the defendants demurred.

1. He ought to join issue with the defendants or maintain his writ, and the place is not material. 21 E., 4, 15; 9 H., 6, 62, 63; 10 H., 7, 27. If the local justification be in the same county, the plaintiff is not put to maintain his writ; for one cannot take a traverse upon a traverse, but he ought to join issue or maintain his writ.

2. The defendants justify by reason of the possession of a house which they have for a term of years unexpired, and the plaintiff ought not to reply generally *de son tort demesne,* except where the justification is personal and not real. Inasmuch as it is only upon a lease for years that they justify, this makes a difference. 16 E., 4, 46. Trespass for entering the plaintiff's land, the defendant justified by reason of a lease for years, the plaintiff shall not say *de son tort demesne.* But it may be objected that the justification goes to the possession and not to the person. Answer. When the justification is in two parts, the cause and the personal tort, the justification may go to the whole; and therefore the plaintiff shall not say generally *de son tort demesne.* 16 H., 7, 32; 8 Rep., 66; *Crogate's case.*

Noy, for the plaintiff. There is no cause of demurrer here. But where an estate for years comes in question, or a record, in such a case they ought to avoid the estate for years, and the record, by matter of as high a nature. In battery, the defendant justifies by a writ of the King, and warrant of the sheriff, there *injuria sua,* etc., is no plea, for there are two things, the record and the warrant, which is a matter of fact; the record cannot be tried by the jury. In trespass if the defendant justifies and draws a freehold in question, it is no replication, for he shall not put the freehold which is real with the rest that is personal. But when one alleges a freehold in excuse for a tort *de injuria,* etc., is a good plea. Here the defendant justifies by reason of a term, which does not go to the wounding, for he cannot *justify the wounding a man without an assault; *ergo,* the justification is by reason of a prior assault. If he deduces the plaintiff's lease, *de injuria sua* is no plea, but he ought

to answer to the lease. But this is in trespass and not in battery. Yet it is aided by the statute of 27 El., 5, p. 332, on a general demurrer. For the reason that the plea in 19 H., 6, was bad, was the double matters in issue.

On another day, judgment was given for the plaintiff. *Antea,* pp. 645, 720; *postea,* p. 816.

SIR AMBROSE TURVIL v. TIPPER.—Mich. 3 Car.

In trespass for taking goods, etc. The defendant pleaded that the Earl of Southampton was seized of the manor of St. Giles, and that in the said manor there was a complaint against one Bayton, and an attachment issued against him, and he (the defendant) being bailiff, attached him by his goods; which the plaintiff claiming by color of a fraudulent deed brought his action. The plaintiff joined issue that the deed was made *bona fide,* and it was found for the defendant. The plaintiff took divers exceptions in arrest of judgment to the plea in bar.

1. As to the statute of 13 El., 5, p. 317, that a fraudulent deed shall be void against a creditor. The defendant is not within the statute, for he is no *creditor,* but an officer, and he cannot justify under an allegation that the deed was done fraudulently; and this being a penal law, ought to be construed strictly.

It was objected that if the officers of justice were not to be protected, the statute would be of no avail. As to this the sheriff, in case of an execution, justifies that the gift was fraudulent, but not by pleading *non culp.* He says that he attached the goods *per consuetudin. manerii.* It does not appear that they were forfeited, for according to law there ought to be a summons before an attachment, and it is not shown that there was any custom of making attachments.

3. He does not say that he attached him to appear, for otherwise the party had no day on the rolls to have his goods.

4. He does not say that he returned the attachment, and this makes him a trespasser *ab initio.*

5. He attached W. Bayton by his goods, and impounded them as if there was no difference between an attachment and a distress.

6. The traverse is bad, for it is on the color.

E contra. If the statute did not help bailiffs, no mean process could be executed; and when the statute *gives the principal, it gives also the accessory. 22 Ass., 61.

As to the second exception, we have said that the attachment issued before the summons *secundum consuetudinem manerii.* If this be not the custom, it is the fault of the statute, and the bailiff cannot question

this. 6 Co., 52; *Countess of Rutland's case;* but *aliter* if the court awards a *capias* where it does not lie, as in 10 Rep., 68, *Marshalsea's case.* But here the steward had authority to award an attachment, but if he had awarded a *capias,* false imprisonment would lie. For he knew that such process did not lie. The execution of an attachment without alleging a summons is well. Book of Entries, 30 H., 8; Placito, 26.

As to the fourth exception. We have answered to all the pleas. The plaintiff declares not only on the taking but on the loss of his goods, and we have answered to the taking only; but at the end of the plea, we say *non culp. aliter vel alio modo.* He ought to have taken issue with us upon this matter.

The principal exception is that the attachment was not returned. If the sheriff does not return a *capias,* false imprisonment lies against him. For the *capias* is conditional and the attachment general. 16 H., 7, 14; per Keeble, 2. It is unnecessary to allege a return when a stranger is party.

As to the sixth point. The issue is not taken on the color but on the ground and substance of the plea; and if it is bad, it is helped by the statute, as *Nichol's case,* in Dyer, 238, *Hudson's case.*

JONES, J. There ought to be judgment for the defendant. If the attachment were not returned, it ought to be shown by the plaintiff.

WHITLOCK, J., concurred.

DODERIDGE, J. Let the matter be referred to another day, the C. J. being absent. Palm., 415; Palm., 493.

HOOPER v. POPE.—Mich. 3 Car.

Trespass for assault, battery, and wounding, on *non culp.,* there was a verdict *pro quærente,* and small damages given; and as the plaintiff had a mayhem in his hand, *Lenthal* moved that the damages might be increased on view of the mayhem, according to 3 H., 4, 4, and Petit Br., 466. The court directed the wound to be examined by the surgeon, who was to make oath, whether it was a mayhem, and that a certificate should be obtained from the Justices of Assize, who had tried the cause, that it is the same wounding on which the action was brought; which being had, **Calthrop* moved that the damages might not be increased, because the action is only for an assault, battery, and wounding, *generally,* and the *particular* mayhem does not appear in the declaration, nor is endorsed on the *postea* as in the case in Dyer, 105; 22 Ed., 3, 11; 8 H., 4, 22. But notwithstanding this objection, the court increased the damages.

ANONYMOUS.—Mich. 3 Car.

JONES, J., said that if husband and wife are arrested for the debt of the wife, and he finds bail for himself, he shall be detained until he find bail for her also. But it never was seen that the wife should be detained until the husband should find bail for himself. Whereupon an attachment was awarded against Cole, undersheriff of Dorset, who detained a woman for this reason.

BEVERLY'S CASE.—Trin. 3 Car.

He was indicted for a forcible entry in the moiety of a manor; and the first exception was, that it did not say that he entered *manu forti.* But it was overruled, for it is sufficient if the *extra tenuit* be *manu forti,* and with force.

2. He could not enter on the moiety of an entire thing, but it must be an entry in the whole, for an entry on an entire thing cannot be apportioned.

JONES, J. A man may enter in the moiety of a manor, and it will not be an entry in the *other.* But it is otherwise with *parceners.*

DODERIDGE, J. Before partition, one parcener has *dimidium manerii;* afterwards *medietatem.* For *dimidium* is of a thing *before* the division, as between tenants in common and joint tenants. But *medietas* is the half part divided and separated, and this distinction is taken in the commentaries. Yet as to the privileges of the manor, it is *one* manor, and not the *half* of a manor, *after* partition. It may be well alleged in such a case that the entry is in the moiety of the manor. The court held that the exception was vain.

*REYNEL v. KELLY.—Mich. 3 Car.

The original was in Devon, and the declaration in Exon, which is another county; it is error.

C. J. 14 Jac. rot., 340. *Pollard and White's case* was adjudged accordingly.

WHITLOCK, J. It is a fault in the original.

JONES and DODERIDGE, JJ., *e contra.* Here by the *custos brevium* it is certified that the declaration is on the writ. We cannot give judgment otherwise, for it does not appear to us. If it be certified, he may have an action on the case against the *custos brevium. Antea,* p. 712; *postea,* p. 803; 2 Cr., 674; 3 Cr., 287; Palm., 428; 2 Cr., 479.

BALLO AND GRIFFITH v. BRIARD.—Mich. 3 Car.

Debt against Briard, on a charter party between Briard, owner of a vessel, and Hill on the one part, and the plaintiff on the other, on a covenant that the owner should go to such a port in Spain (except two ports which they named), as they should appoint, and they appointed to sail to such a port, which he refused. Issue was taken on the refusal, and it was found for the plaintiff. Now it was moved in arrest of judgment.

1. The declaration is on a charter party between Briard and Hill, of the one part, and it is shown that Briard did not perform; while he ought to have declared that neither Briard nor Hill did perform. For if Hill did perform, it is sufficient. As in debt against an executor, the declaration ought to be that neither the executor nor the testator, etc. 9 Rep., 108, *Tresham's case.* But this was overruled on the authority of *Clovery's case.*

2. They ought to show that the place appointed was not one of those excepted. 8 E., 4, 7. *Sed non allocatur,* for this shall not be intended. Intrat., T. 3 Car. rot., 1038.

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*ANONYMOUS.—Mich. 3 Car.

Indenture to lead the uses of a subsequent recovery. The seals were torn off the deed. But as this was shown to have been done by a little boy, and that the seals were once annexed, and the clerks agreed, it was admitted to lead the uses, as if it had been perfect. Palm., 403.

CORNWALLIS v. HOSWOOD *vel* HAMOND.—Mich. 3 Car.

The plaintiff counted of a lease made to Anthony Hubard, whereupon he was possessed until the defendant ejected him. On *non culp.,* a special verdict was given, to wit: That Jacobus Hubard, being seized in fee of the manor, granted the nine acres whereof, etc., is a parcel, and devisable by custom, etc., and committed voluntary waste, etc. Jacobus Hubard died, and Anthony is his cousin and heir, but they do not find that Jacobus died seized, or the land descended to Anthony; and this they present to the court. Anthony entered on the nine acres, being seized of the manor, and leased to the plaintiff, and J. H. entered on him, and whether his entry was lawful or not, the jury doubt.

It was said that the heir shall take advantage of this forfeiture, for a right of action which is a mere foreign remedy, descends to the heir; a *fortiori* a title of entry. F. N. B., *149; 10 E., 4, 9; 38 E., 2, 39, 29; Ass., 32; 10 Ass., 20; 43 Ass., 45; 50 E., 3, 4; 19 E., 4, 15; 46 E., 3, 4; F. N. B., 144; 18 Eliz. Harper's reports. There was a lord, and two coparcener copyholders; one of them made a feoffment, and the lord made a lease of the manor. The lessee shall not take advantage of this forfeiture, for he is not privy to the title. But if the lessor dies, his heir shall take advantage of it. *E contra.* The heir in this case shall not take advantage of the forfeiture, in the life of the ancestor. The cases put are those of inheritance, which descends to the heir; here is a new right of entry, an estate at the will of the lord. But this is a personal misdemeanor, and *moritur cum persone.* It is not found that he died seized, and that A. is his cousin and heir; so he may be, and yet enter by force of a feoffment. It was said *e contra,* that the commission of waste gives a freehold, which is not personal, but is a forfeiture in respect to the tort done to the freehold. As to the point, where a seizin in fee is supposed in one, the law intends that it remains in him until his death. *Sed adjournatur.*

DODERIDGE, J. The cases cited where the heir shall have a right of action and entry are not like this. For here it is no forfeiture until the lord chooses to make it so. The heir of the reversion shall not have waste at common law, although Rastal, Waste, 7 stat. De Waste, 20 Ed., 1, p. 397, says he shall have it.

Hitcham, Serj. This action is rather in the personalty, and the damages are the principal object, and this has not yet been settled by any statute.

DODERIDGE, J. Can the lord, in this case, enter without a presentment by the homage?

Hitcham. The presentment is to *notify* the lord, not to *entitle* him. He may *take* notice if he pleases.

DODERIDGE, J. If tenant commits waste and repairs, can the lord enter?

Hitcham. It was once a forfeiture and remains so. It is not like waste at common law. For there, if he repaired before the jury had view, it was well enough; and if the condition was that the tenant should not commit waste, and he committed waste and repaired, the reversioner could not enter.

JONES, J. It is a very mischievous case if the lord is permitted to claim ancient forfeiture, after a long time and many descents. On the other part it is not reasonable that he should be abridged of his right. *Sed adjournatur.* Bendl., 148; 1 Roll., 699; Palm., 416.

*SCARBOROUGH v. JUSTUS LYRUS.—Mich. 3 Car.

Justus Lyrus brought suit against a vessel called *The Negro,* in the Admiralty Court. Scarborough came in and *pro interesse suo prætenso* bailed the vessel. The case was that Lording Berry *super altum mare* borrowed of Justus Lyrus £100 on bottomry, and bound the vessel. This bottomry is when money is borrowed on the keel of the vessel, and the vessel is bound for the payment of it, viz., if the money is not paid, the lender shall have the vessel. Scarborough bailed the vessel, and thereupon examined witnesses, and judgment was given against the vessel. Scarborough came into the King's Bench and suggested that the said Lording Berry was not an officer of, nor had anything to do with the vessel at the time of the supposed bottomry; but had before that time sold her to Scarborough in London, who afterwards sent her to sea, and Lording Berry pawned her, when he had nothing to do with her, but only happened to be where she was. Whereupon he prayed a prohibition. For he who has nothing to do with the vessel shall not bind her to the payment of bottomry money, as *Hitcham,* the King's Serj., said, but the bottomry is good and ought to be allowed when the master or factor pawns her for necessaries, and this binds the owner.

Talbot, Dr., showed the bill by which Lording Berry had become proprietor of the vessel, and will be *reputatus.*

Hitcham. This is the supposition of the libel, which you made for your own benefit.

JONES, J. I conceive it is agreed on both sides that if the master pawns the vessel beyond sea, in this manner, the owner is bound, provided that it be for things that come to the use of the vessel; but if the things do not come to the use of the vessel, the owner is not bound. This was adjudged in 39 El., *Watson v. Jackson.* Watson appointed a factor in Bayonne, and there the vessel was pawned for bottomry money, which was spent in repairs. The case was argued fully by civilians, and it was resolved that the owner was bound, and no prohibition was awarded. But if the factor had done that which he ought not to have done, the owner would not have been bound. But if the party does not plead this, but goes on and examines witnesses, as here, the default being in him, he shall not come here and make a suggestion of that which he might have pleaded in order to obtain a prohibition. For the libel is a good ground.

DODERIDGE, J. *If the master, purser, or factor, or he who on board of the vessel pretends to be the owner, borrows money for such a purpose, on bottomry, the owner is bound, although the money be not so employed. He has remedy against his factor, in whom he trusted. You cannot now allege that the property was in you before.

C. J., concurred.

JONES, J. If the suit be in the Admiralty Court, after sentence, you cannot have a prohibition on a suggestion that the matter did not happen *super altum mare.*

Hitcham. Where the court has jurisdiction, prohibition lies after sentence.

JONES, J., denied this. The prohibition was refused.

Talbot, Dr. They might have helped themselves by alleging that the property was in them, before the bottomry, and this they may yet do upon an appeal.

CURIA to *Hitcham.* Take your remedy against your factor, or him who pawned the vessel, in an action of trover.

Hitcham. We cannot, for he who pawned the vessel did not deliver her.

JONES, J. Then bring trover against Justus Lyrus. Noy, 95.

SURRY v. COLE.—Mich. 3 Car.

In replevin, the plaintiff declared on a taking in October 21 Jac., in G. The defendant avowed as bailiff of Thomas Surry, and showed that F. S. was seized of the premises in his demesne as of fee; and being so seized, gave them to Ed. Surry and the heirs male of his body, begotten on his wife; who had issue I. S. and died. I. S. made a lease for twenty-one years to Brown, *reddendo, et solvendo inde annuatim, durante termino prædicto,* to the said I. S. and his assigns, so much rent. The lessee entered; afterwards I. S. levied a fine to Yateman, to whom Brown, the lessee attorned, whereby he was seized, and afterwards, 11 Jac., one Heron brought a *præcipe* against Yateman, etc., and a common recovery passed. This recovery was found to be to the use of Yateman and his heirs. Afterwards Yateman granted a recovery to Thomas Surry, in whom the right, etc., for fourteen years, to which grant the lessee attorned; and for rent arrear after the grant, the taking, etc. On a demurrer three questions arose.

1. A man makes a lease for years, rendering rent, *durante termino prædicto* to the lessee and his assigns, 10s. The lessor assigns the reversion over and dies: Whether the rent is determined?

Backsdale. It is not. Reservation is restitution, and *reservare est acceptum restituere.* 10 Rep., 128, *Clun's case.* Restitutions have favorable constructions; *melius* than grants. *Advousons,* without express words, pass in case of restitutions; not in cases of grant. 41 E., 3, 5; M., 3 Jac., C. B., *inter Barker and Barret.* One made a lease for one year, from year to year, rendering rent therefore as long as the

lessee shall occupy. The lessee, after the first year, died; his administrator entered and occupied another year: adjudged that he shall be charged for the rent, although the words were *as long as the lessee shall occupy.* So the reservation is taken more widely than the words. 5 E., 4, 4. Two joint tenants leased for years rendering rent to one of them, it shall inure to both, *aliter,* if it were by indenture, as in Littleton, 346; Peck, 652. In a feoffment to the use of the feoffor, it is clear that the use shall revert to him in fee. P. 4, Jac. *B. R., 112; *Hill and Hill.* A husband made a lease for years rendering rent yearly, during his life and his wife's life, etc., and died. The wife (having free bench, by custom) brought debt. Adjudged that she shall recover the rent and have free bench. P. 21 Jac., *Hamson and Bert,* B. R. Lessee for years rendering rent *quolibet dimidio anni,* without saying *annuatim;* yet it shall be rendered during the whole term, *ut Com.* 23, and the words *to the lessor or his assigns* do not restrain it. For *during the term* is in the first place. 2 E., 3; feoffments, 54. Grant in frank-marriage, *habere* in fee is frank-marriage. 5 Rep., 111. Reservation to the lessor, or his successors during the term, is to *both, aliter,* if the words *during the term,* were left out. 28 H., 8, 19. Lease reserving his dwelling, his executor shall not have it, *aliter,* if it had been during the term. Secondly: The words here spoken are in the affirmative, and not in the negative. 28 H., 8, 19. Lease for years, the lessor covenants that the lessee shall have hedge-bote by assignment; he shall have it without. So here, as to the case of *Wotton v. Edwin,* C. B. Hill, 4 rot., 3017, *vel.* 3077; *postea,* p. 817. Lease for years rendering rent to the lessor and his assigns. It is determined by the death of the lessor, for the words *durante termino* are wanting. So *Butcher and Richmond's case,* C. B. Lease for years rendering rent to the lessor, his executors, and assigns. The lessor died; the heir distrained held bad *quia* the word executors *excludes* the heir.

2. Whether by pleading this, the lessor shall be intended to be dead? He shall not. For it is shown that he was once in life, and if he is dead since, the other party shall show it. Dyer, 329; 38 H., 6, 27; Com., 400. Although an avowry to any intent is a title, yet it is brought in bar, and shall be taken in common intent. Com., 430. Avowry, without averring the death of the husband; for an avowry is an excuse, as well as a title. But here are words which imply the life of the lessor; and it being admitted that the rent shall determine by the lessor's death, none can be in arrear after it. 12 Jac., B. R., *Arundel's case.* One avowed as heir, without showing the death of his ancestor, but only avowed for so much rent, *retro existens;* and this was held a sufficient averment, so in 10 Rep., 58, *Bishop of Sarum's case,* in a second deliverance, the defendant avows by a grant of the Bishop. The

plaintiff shows that the grant is well by 22 H., 8, *per quod concess. prædict. per A. nuper Episcopum* is void; which is a sufficient averment of the death of the Bishop.

*3. He shows a fine from I. S. to Yateman and his heirs, against whom a common recovery was had, etc., without showing to what uses: Then it shall be understood against the pleader, viz., that it was to the use of the conusor, and it is as if there were no use, etc.

E contra. By the fine the conusee has a fee, which shall be intended to continue until the contrary be shown. The estate does not alter the pleading. The distinction is, that where the use is to a stranger, it shall not be understood, unless it be shown; *aliter* when it is to the conusee. *Liber intrat,* 324, 2 Rep., 28. The pleading is accordingly.

Beere. If the lessee had said no more than *rendering* 10s., it had been as much and as effectual as if he had said *rendering rent during the whole term.* 31 Ass., 30, *tenend.,* made a tenure in fee, without any more. 636 Com., 137; 21 H., 7, 25; 27 H., 8, 19, in point. Then the addition of these words: *durante prædicto, non operatur,* for they were implied before. 4 Rep., 72, *Burrough's case;* 8 Rep., 144, *Davenport's case.* If a lease be made rendering rent to a stranger, it is void; the assignee being a stranger, the reservation is void. Here is an entire sentence, and shall not be divided. *Butcher's case,* H., 33 rot., 1316, is on the same point: resolved that it was only a reservation for life. Likewise in *Wotton's case, supra,* adjudged T. 3 Jac. rot., 377. Here it is *præfato Johanni.* A reservation is more strong against the lessor, *ut Boston's case,* Com., 139. Two tenants in common lease, rendering rent 10s., they shall have only 10s. 27 H., 8, 19; 11 E., 3; F. Ass., 84; *Stacy and Clark's case,* T. 36 E. rot., 987, in B. R. Tenant by curtesy and the heir in reversion in tail, made a lease, rendering rent to them and their heirs; on account of the generality of the reservation, the lease was not held good, under the statute. *Thompson's case, antea,* p. 45. As to *Mallorie's case,* 5 Co., 111, shall be taken copulatively. I deny the case, 5 E., 4, 1. The life of the lessor shall not be intended. For the avowant is to make out a good title. This differs from the case of an arbitration. He who is to have the benefit shall plead. In 38 H., 6, the action is maintained on the first possession. 9 E., 4, 6, 16. He who claims from the tenant in tail, by whose estate, ought to aver his life.

E contra. It is implied, for he says that *ei a retro,* etc.

This is only form and supposition; it is a conclusion which we could not traverse. The last point formerly moved, viz., that the use, where none is expressed, results to the conusor, is unanswered. *Postea,* p. 807.

CROSSMAN v. HUME.—Mich. 3 Car.

Action on the case, brought *in villa de Lanceston in comitatu Cumberland,* and judgment was given there, *pro quærente.* Error was brought here, because issue being joined there, the *venire facias* was awarded *de viceneto de Lanc.,* where it ought to have been *de Lanc.,* for the *visne de Lanc.,* extends over *Lanc.,* and the jurisdiction extended to the *vill de Lanc.* 8 H., 5, is a different case, for when issue is taken in the Superior Court, it is taken of something triable in *Lanc.* the *venire de vicineto de Lanc.,* it is well, for the court has power to award it. But it is otherwise here.

Rolls, e contra. When nothing is to the contrary in an appearance, it shall be understood to be well, and within the jurisdiction. *Proctor and Clifton's case,* 10 Jac. In an action brought in Coventry, and *venire facias* in C. B., where it was *de vicineto civitatis Ebor.* D. P. 3 Car. Which case was held bad. I was of counsel in a case wherein it was awarded so. It cannot be well, except by intendment. The case of 8 H., is much in point.

JONES, J. The *visne* ought to be of all the vills in the hundred.

Rolls insisted on *Proctor and Clifton's case.*

DODERIDGE, J. There the court had power.

JONES, J. The county of Coventry cannot, any more than a city, extend to other vills. This case was so adjudged in H., 5.

Rolls. There is no difference between 5 Jac., where in an action brought in *Lanc.,* the *venire* was *de vicineto* as here. [He asked the attorney of his client for the record, and he said secretly that he had inspected it and the judgment was reversed.]

Two other exceptions were taken to the same matter.

A. and B. were bound to C., and C. promised B. that if he would procure a legal process in a corporation, so that C. might arrest him on the bond, that then he would discharge B., and he alleges that he arrested him in a corporative, and shows that it was by stannery-process, etc. It was said it is no good consideration, for he does not show what process, nor that it was a legal process.

HYDE, C. J., and JONES, J. As to the first, it was well, for the plaintiff might, if he chose, have the benefit of it. As to the second, it is immaterial whether the process be legal or not, provided it be taken upon it. Noy, 96; 2 Roll., 623; Jones, 371; 2 Cr., 307; 1 Bulstr., 156; 2 Roll., 622.

*GRIFFITH v. LEA.—Mich. 3 Car.

Error brought in an *ejectione firmæ,* and judgment reversed, and a writ of inquiry awarded.

The sheriff returned *quod terra valet,* etc., and judgment thereon that the plaintiff be restored to the issues. It was moved that it was wrong, for the plaintiff in error shall not have restitution, but execution.

Littleton. This appears by the writ itself, which is that the plaintiff shall be restored to all he lost *virtute judicii* and M. 22 Jac. YELVERTON, J., made the same motion, and in that case it was allowed.

WHITLOCK, J., *e contra.*

The counsel on the other part said that the last term order was given, that restitution should be stayed; and the judgment was obtained surreptitiously contrary to this order.

DODERIDGE, J. If the judgment is of another term, you are without a remedy. But the party shall be punished for his contempt.

ANONYMOUS.—Mich. 3 Car. *Antea,* pp. 712, 795.

Jermyn. This cannot be the *same* original, and therefore is aided by the statute; for it is *no* original.

JONES, J. Your way is to have a new *certiorari* to the *custos brevium.*

DODERIDGE, J. . You should have a new certificate that there is no other original. In this case there is an omission of two terms, and a variance in the name of the party. Wherefore, it shall not be intended to be the same writ on which the plaintiff in C. B. declares.

And the opinion of the court was that there should be a new certificate.

Afterwards at M. 3 Car., *Rolls* prayed that the judgment might be reversed, for this shall be intended to be the same original: (1) Because it is certified; (2) At common law, until the statute 2 R., 2, 2, p. 92, one might have declared in another county that the original was from, and at this day, the original in debt is in one county and the count in another. This does not abate the writ *ipso facto,* but renders it *abatable* only. It is possible it is the same original on which the count is.

Jermyn. It cannot be tried by any means, whether the declaration be on the same original or not; for the averment that it is on the original cannot be tried, *and it is like *Brown's case,* where the original was in London and the declaration in Middlesex, and there was a verdict and judgment. But it was not reversed, but affirmed.

JONES, J. Here the certificate makes it appear to us that it is the same original.

WHITLOCK, J. But by law it appears that it is *not* the same original.

DODERIDGE, J. An *averment* that it is the same original, is nothing to the purpose, for it cannot be tried.

Which *tota curia concessit. Et adjournatur. Nota.* There was a variance between the writ and the continuances. The writ is Rich., executor of Thom., in the first, and in the other continuances Tho., executor of Thom. 2 Cr., 674; Palm., 428.

LANGLY v. STOKE.—Hill. 3 Car.

The plaintiff counted directly in the time of King James, *contra pacem domini regis nunc,* etc., and, after verdict *non allocatur* in arrest of judgment, *quia* matter of form, if the whole had been omitted, it would not have arrested the judgment after verdict.

DODERIDGE, J., agreed to the case put by *Davenport,* Serj., where a jury were had, at the bar to try the issue in the case of one Drake, and dismissed, because the exception was taken in time. So 2 E., 4, 23; Godb., 399; Noy, 97; Jones, 172.

IREMONGER v. NEWSAM.—Hill. 3 Car.

Lessee for years made his executor and died. The executor assigned over the term, and after the assignment, the rent was arrear, and the lessor brought debt against the executor.

Mason pro quærente. There are three sorts of privities: (1) Of estate; (2) of contract; (3) of estate and contract.

Where there is a privity of contract, it is not determined by the assignment over of the estate to another, as in the case of *Overt and Sidhal.* But in 3 Rep., 23, *Walker's case,* the very case is said to be adjudged, while *revera,* it was not adjudged, as appears by the book of entry.

Cook. As to *Turpin's case,* there also put, it never was adjudged, as appears by the roll. In this *case there is a privity of contract between the lessor and the executor of the lessee. For the executor represents the person of the testator. 28 H., 8; Dyer, 14. Termor covenants to build a new house, the term expires and the lessee dies, his executor shall be charged. 26 H., 7, 18. Lessee covenants to repair the house and dies, the executor is bound. 5 Rep., 17, *Spencer's case.* Lessee for a term of a flock of sheep covenants for him and his assigns; covenant does not lie against his assignee, for it is personal, but it binds his

executor. Com., 168. Lessor covenants to build a new house for the lessee, and his assigns, the executor is assignee. H., 15 Jac. C. B. rot., 3068. Sir Christopher Heydon brought debt against Hudson, executor of the lessee for years, for rent arrear; the executor pleaded that he had not agreed to take the term, but the plaintiff had judgment; for inasmuch as he has taken on himself the office of executor, he cannot refuse the term. P. 17 Jac. B. R. rot., 346, *Manly v. Moody.* Debt against executors, they plead *plene administrav.* all the goods, except a term, which they refused; and judgment against them. *Contra.* 21 H., 6, 24, *per Ascue.* Those cases prove that the executor is not in as assignee, for then he might avoid and wave the term; but that he is in by a privity of contract.

2. The executor does not plead that he has given notice of the assignment, and tendered the arrearages. 8 H., 6, 10; 8 E., 4, 12; 47 E., 3, 4, where the act of the party shall not change the avowry, without notice; *aliter,* the act of the law. The action of the lord is not altered by the feoffment of the tenant without notice. Bro. Avowry, 111. Parceners make partition without notice given, the avowry of the lord continues on them jointly. 2 E., 4, 6; 34 H., 6, 4, *e contra.* Otherwise, if the tenant, after feoffment, dies. 3 Rep., 14. There notice was pleaded and accepted accordingly. Also, the executor had not pleaded that he had no assets, for the personal estate is bound by the contract. 8 Rep., 133; 9 Rep., 90.

3. The executor has no power to change the action of the lessor by his assignment; otherwise great inconvenience would ensue, for by this means he might waste the land and make it barren, and then assign it to some indigent person. Perhaps there is a difference, if the lessee himself assigns; perhaps debt does not lie against an executor.

Minge, e contra, cited the cases of *Sidhal and Turpin, ut supra.*

Noy, quære? quia the executor represents the person of the testator. *Sir Thomas Waller's *case,* 10 Jac. B. R. A freeman of London imported goods, made his executor, and died; held, that the prisage shall not be paid by the executor.

DODERIDGE, J., assented.

JONES, J. It has been adjudged that the heir of the lessor, by reason of the privity, cannot maintain debt against the first lessee after the assignment of the term.

Noy. This differs from *Turpin's case,* for here is no acceptance; the lessor shall not have debt against the lessee after the acceptance of the assignee. *Sidhal's case* has never been resolved. Popham was always of a contrary opinion. The *prebend* lessor being a single corporation, the personal contract determined by his death; as a lease by Dean and Chapter, and the Dean died.

Noy. On a lease for years in London, of lands in Kent, the lessor shall have debt against the executor in London, for the privity of the contract remains.

DODERIDGE, J. If the lessee himself had assigned, the executor should be charged.

Noy. Perhaps so.

JONES, J. For arrearages in the life of the testator.

PENCAVIN v. TRAPPING.—Mich. 3 Car.

Case against two, in C. B., for procuring the plaintiff to be indicted of common barretry. He had judgment and error was brought here.

1. They ought not to be *joined* in one action; *quia* the procurement of one is not the procurement of the other. 7 Jac., *Stade v. Roper,* K. B. The court was divided on a question, whether an action may be brought against *many* for procuring a person to be put out of the commission of the peace. Intrat. T. 6, Jac. rot., 568.

Lane, e contra. M. 1 Jac., *Shorsby and Brendy and Walton,* in the Exchequer. Case was brought against two for procuring him to be outlawed in London, in order that he should forfeit his goods in Middlesex, and held well. 18 Entr., 123. Action against two for procurement, and the court was of the same opinion, as to this point, as in maintenance or trespass; yet the maintenance or trespass of the one is not the maintenance or trespass of the other.

2. Here is no plea alleged where the *procurement* was, but only where the *indictment* was. 35 H., 6, 15; 36 H., 6, 30.

DODERIDGE, J. *et al.,* argued that the place of the procurement ought to be shown, but he said that here it is not shown, *quia* it is no procurement until he be indicted, *aliter,* in a conspiracy, for if two conspire to indict one, it is no procurement until he be indicted.

Sed HYDE, C. J., JONES and WHITLOCK, JJ., *e contra* *and *adjournatur. Intrat. term P.,* for they continued opposed to DODERIDGE's, J., opinion: *quia* the indictment is no offense without a false procurement. *Ergo,* if two conspire that one should indict, the action lies against both for procurement. [*Quære de hoc?*]

Banks cited 27 Ass., 44, and Brief, 924, that the action lies, although there be no indictment, but not a *writ* of conspiracy. So conspiracy lies not, if the indictment be bad; but an action on the case lies, although the indictment be reversed. Yet the amercement remains. 8 E., 4, 25, and the costs. 28 H., 8, 2.

HYDE, C. J. The procurement is the imagination or agreement to indict.

HUDSON v. HUDSON.—Mich. 3 Car.

Thomas Hudson, executor of John Hudson, brought trover against Mary Hudson, and counted that the testator was possessed of the goods, and made him executor, and died; afterwards they came to the hands of the defendant, and the plaintiff *suscepit executionem testamenti;* afterwards the defendant converted the goods to her own use. The defendant demurred generally, *quia* the plaintiff does not show that he ever was *possessed* of them, and the trover and conversion is *after* the testator's death.

Jermyn, contra. The possession of the testator is sufficient to maintain trover. 5 Rep., 27, *Russel's case.* Executors shall have trover on a conversion, *in vita testatoris.* It was so resolved also in this court. T. 11 Jac., *Jermyn v. Beet.*

DODERIDGE, J. The naming himself executor is only surplusage; he had a possession in law, which is sufficient. If a man gives me goods which are at York, and before they come to my possession you commit trespass on them, I shall have trespass; *quia* the property carries the possession in personal chattels.

WHITLOCK, J., *e contra.* And a number of the clerks said that the usual form of the declaration in such cases is otherwise.

Adjournatur. Afterwards in the same time, judgment was given for the plaintiff. 1 Cr., 377.

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*SURRY'S CASE. *Antea*, p. 799. Mich. 3 Car.

Barksdale. "During the term" shall be taken for the *whole* term; *quia indefinitum universali æquipollet,* and the subsequent words *to the lessor and his assigns,* do not abridge it. When there is a repugnancy between words, the law regards those first spoken. 2 E., 2. Feoffments, 94. So that it seems that if one leases land, rendering annually during the term £10 to the lessor for 20 years, this, nevertheless, is a good reservation, during the *whole* term. So in 5 Rep., 19. Lease to two, *habend. jointly,* and *severally,* they are *joint* tenants. For the *first* words have the preëminence. Likewise in cases of reservation, Com., 171; 5 Rep., 111; 29 H., 8, 19, where it was said by *Audley,* if one makes a lease of a house reserving his dwelling, the reservation determines on his death. *Aliter,* if he had reserved it *during* the term. Palm., 481; Bendl., 182; 3 Cr., 288.

COLE v. SURRY.—Mich. 3 Car.

It was argued by the plaintiff that by the death of the lessor the rent is gone. In Dyer, 15, it is said that conditions and agreements are private laws between the parties, and resemble a private act of Parliament between them. Therefore, if by these agreements they have not sufficiently provided for themselves, the law will not help them. And every reservation has fixed things to be considered: (1) The thing reserved; (2) the place of payment; (3) the continuance of the payment; (4) the person to whom; (5) the terms of payment.

For all these the law provides, and if the party provides and does not follow the law, it will not extend his reservation. 21 H., 7, 25. Rent generally reserved goes with the reservation, and shall be paid at the end of the year. In 8 Rep., 71, *Whitlock's case,* it is said that the best reservation is general. So in a lease of two manors reserving rent, the law reserves it out of both; but the party may make several reservations. Dyer, 308; 5 Rep., 55; 14 H., 6, 26. But he cannot reserve contrary to law, as it would be *in our case. Therefore if a grant be in tail *tenend. capitalibus dominis,* this is a void *tenend.* 2 E., 45. So here. Grant by a husband *tenend.* of him and his wife, as to the wife. So he may reserve it to other persons than those the law limits it to; but not contrary to it and *out* of the privity. 4 Rep., 75. Reservation out of the land. So Avowry, 258. Grant in tail, remainder in tail, it shall issue out of the whole. But per Haughton, if the reservation intervenes, it shall only charge the precedent estate. As to the person to whom the reservation is made, which is the principal question here, he cited 10 E., 4, 18; Ass., 86, 27; H., 8, 19; Dyer, 45, and *Mallorie's case.* The reservation shall be taken strongly against the reservor, as 10 Rep., 127, rendering rent at usual feasts, or 20 days after, the twentieth day is the day of payment. So 10 Rep., 108. Two tenants in common reserve a horse, they shall have but *one;* but if they grant a horse annually there shall be *two.* True it is, if two joint tenants reserve rent to one, it shall go with the reversion to both. But if they make a feoffment rendering rent to one, it is not good to him alone, for it is not annexed to the reversion.

Jermyn cited the case of *Wotton v. Edwin, postea,* p. 817, 5 Jac. rot. 3777, C. B., where the reservation was to him, his executors and assigns, during the term, and it was adjudged that by the death it is gone. And P. 5 Jac., *Hill v. Hill,* rot. 112, where one seized of lands in custom of free bench, made a lease, reserving rent during life to himself and to his wife during the term: it was adjudged that by the death of her husband the rent is not determined. But *Cook and Warburton,* against the

other, there held that it shall be determined. *Barksdale* held it shall be continued, for the extent appears. 3 Jac., *Warmer and Agars.* The lessee granted his term to the lessor rendering rent during the term, etc. *Quod expressum facit cessare tacitum,* but *not facit cessare prius expressum.* B., 194. Grant in free marriage *habend.* in fee, the *habend.* is void. For the mind of a man is stronger at the beginning of his speech than at the end, when his intention languishes; and this is the reason of the transposition. Plowd., 164, and 5 Rep., 112. For otherwise if the rent is not payable to the successor, it shall not be paid during the whole term. 27 H., 8, 19, per Audley, is directly in point as to *Richmond's case,* 33 El., there was an express reservation to the executors; this being a *particular,* excludes all *other* particulars, as heirs. But *assignee* is a *general* word, and therefore shall not exclude the executor or the heir. But a special shall exclude another special, but a general shall not exclude a special. 3 Rep., 97. *Condition that he shall pay the heir, this excludes the executor, but a condition to pay to the assignee does not. As the executor is excluded by the reservation to the heir, so here shall the heir be excluded by a reservation to the executor.

2. The avowry is made by the heir, and it appears that the ancestor is dead. The lessor shall be intended to be living, for it is an avowry by the assignee *ut pro redditu existente insoluto.* Then, if after the death of the lessor, it is not due, it shall be intended that he is living; for he has averred that the rent is due to him, which implies all necessary circumstances. So it was adjudged in 12 Jac., *Arundel's case,* where the heir avowed without averring the death of his ancestor. For as he avers that the rent is arrear and unpaid to him, this implies that the father is dead, for otherwise nothing is due to *him.* So is 10 Rep., 59. Life is a natural thing, and therefore shall be presumed to continue. Dyer, 329. Condition of an obligation to pay so much yearly towards the education of A. B., and in debt the plaintiff did not aver the life of A. B.; yet held well. Attornment is not pleaded to be during the life of the parties. So is 10 E., 4, 18, 24, 30. The defendant avowed as holding in right of the lessee of husband and wife, without averring the life of the wife; yet held good. But an avowry is a bar, although to some purposes the avowant is an actor; for, as the defendant, he says *defendit vim,* etc. As to the exception of pleading the fine without saying to what use. By the common law the use was to the conusee, as the statute makes it, and the common law takes no notice of the uses; so the pleading, according to the common law, is well. Novel Entries, 344; 2 Rep., 88. There the fine is pleaded without saying to whose use. P., 477. Three feoffments are pleaded, without the uses. But there is a difference when one pleads a feoffment, or a fine of which the use is limited

to any other than the feoffee or the conusee; it ought to be pleaded, but if it is limited to the conusee, it is not necessary, for by the common law this is implied.

JONES, J. As to the fine, admitting that the use results, yet this does not make for the plaintiff. For then the case is this: Tenant in tail levies a fine to his use, and gets the conusee, who has nothing in the land, to suffer a common recovery, in which the tenant in tail is vouched, he being now tenant in fee, it is a recovery against the issue, for by the fine the tail was barred, and by the recovery he could not fail to say *quod partes finis nihil habuerint.* The law favors reservations; it has been so adjudged 27 Eliz. *Administrator of a term of 40 years makes a lease for 20 years, rendering rent, and dies intestate; the second administrator shall have the rent.

[Which was denied and marveled at.]

JONES, J. Yes, faith, it was so adjudged. This case was also adjudged: Tenant in fee made a fraudulent conveyance, and afterwards a lease for years rendering rent. Now this, notwithstanding the reservation, is good, and the lessee was held to pay it.

Quod DODERIDGE, J., *concessit.*

JONES, J. If one devise land to one for years, rendering rent, and devises the reservation, is this well?

DODERIDGE, J. It is.

JONES, J. It has been so adjudged; yet there is no privity between the lessee and him in the reversion in these cases.

DODERIDGE, J. It is an infallible and an undeniable ground that rent cannot be reserved to a stranger. Therefore, in *Cofield's case,* reservation to him who shall have the reversion is void.

And the Justices took time to advise. Palm., 481; Bendl., 182; 2 Cr., 288; Noy, 109; Godb., 146.

PALMER v. LITHERLAND.—Mich. 3 Car.

Debt against one as administrator, he pleaded that before the writ brought, he renounced the administration; and the ordinary received it. The plaintiff replied that before the renunciation he had administered, and the renunciation was by covin. The defendant rejoined by protestation, that without covin, for plea *ut supra,* he had renounced. Whereupon the plaintiff demurred.

CURIA. The administrator may renounce; and the ordinary *may* accept his resignation after administration; but he is not bound to do so. And if he grants a second administration, the first is determined. But the first cannot be charged as executor *de son tort,* for the administration

made it lawful for him to intermeddle; nor as administrator, for the administration is determined.

It was then argued, What remedy has the debtor of the intestate if the administrator releases and then refuses?

JONES, J. Before I came from the Common Bench, an administrator *durante minori ætate* wasted, the executor came of full age, and it was doubted what remedy there was. Some said that he shall be charged as *de son tort,* other, on the special matter. At last it was determined that if the executor wastes the goods, he cannot be charged, except on the *special matter; otherwise, it would be a very mischievous case. There would be no administrator but who would refuse, after having wasted the goods. *Packman's case,* 6 Rep., 18.

On another day, *Crew, Serj.* If administration is granted, and the administrator wastes the goods, and the administration is committed to another, the first administrator is chargeable. So, if one be made executor for one month, and afterwards another; if the first executor wastes, he is chargeable.

A peremptory day was given to the defendant.

SACHEVERIL v. DAY.—Mich. 3 Car.

Tenant for life, without impeachment of waste, with liberty to cut, carry, etc., and to make leases for 21 years or their lives, made a lease for life *excepting the woods and underwoods growing and to grow, excepting sufficient to keep in repair the rail and pale of the park, and 50 trees yearly to uphold the houses in the park, and the tops of all the trees;* and afterwards the lessor cut wood on the ground. It was contended that the lessee in this case may reserve the trees, because he has an interest in them; and it is not like *Ives* or *Sanders' case,* 4 Rep., for the lessee for years has no interest in the trees, as the lessee for life has.

2. The second exception is void because repugnant to the first. Like a lease of land reserving the profits, for he leases, except the woods and underwoods, except the tops of the trees. By the exception of the tops, he has in part frustrated the first exception. *Adjournatur.*

On another day, the case was put: The tenant in fee levies a fine to his own use for life, without impeachment of waste, with power to cut and sell the trees; remainder to another for life; remainder in fee with power to the tenants for life to make leases for twenty-one years or three lives. Lessee for life made a lease for three lives, excepting *all the wood growing or to grow, except sufficient to pale the park, and trees to repair the house in the park, and the tops of the trees, except for fire bote to*

the lessee for three lives, and dies; then he in the remainder for life enters and cuts the trees, and the lessee for life brings trespass.

It was first argued that the reservation of the trees is not *well. When there is lessee for life, without impeachment of waste, he had not thereby any *interest* in the trees, but only an *authority* to take them during his estate. And as this is but an authority, it is determinable with the estate. Therefore, when here he made a lease, he could not except his authority. 27 H., 6; Statham Waste, 47. Tenant for life without impeachment; a stranger cuts the trees, the tenant shall not have damages, for the property is in the lessor. In 3 H., 6, 45. Lessor reserved *quod liceret vendere et succidere;* it is not an interest in the trees, but only an *authority;* and the lessee may before cut the small branches, and this is not an exception of the trees or an interest in them. In 41 and 42 Eliz., *M. Leechford v. Sanders.* It was adjudged that if the lessor excepts *quod liceret succidere et vendere,* this is no *exception* of trees, nor an *interest* in them. Like in this case, his power over the land is gone into other hands; therefore, the exception is void. Another reason is that the estate of the lessee for three lives is derived out of the fine, and is paramount to the estate of the lessee for life. So he is not in, either by himself or his lessee; for otherwise, when the lessee for life dies, the estate for three lives is gone, which is not the case here; otherwise, there should be use upon use. 1 Rep., 134, 176. Another reason is that the privilege is annexed to the estate of the lessee; therefore, when he grants this, the privilege goes. 3 E., 3, 44. Lessee for years without impeachment accepts a confirmation; the estate being gone, the privilege is gone also. 3 H., 5, and Dyer, 10, accordingly.

Objected. Here he may make a lease rendering rent. The difference is to be taken when there is power to make a lease with reservation; or only a power to lease. In this case he cannot reserve, for the estate is paramount, as has been said. As in *Lea and Wroth's case,* 6 Rep., in *Fitz Williams' case.* The lessee had power to reserve rent. But in 10 Rep., *Hove's case,* he had not.

On the other part it was said: That the exception is good; for a lessee for life, without impeachment, has an *interest.* It is useless to argue this, for it was settled in 11 Rep., *Bowl's case.* And as in this case, the party has an interest, it is not like *Sanders and Ives' case,* as to the reservation of Ives by lessee for years. 5 Rep. The principal question, we conceive to be, whether the exception of the lops and tops of the trees is well; and it is void, as it is repugnant to the first exception, as a lease reserving the profits. 39 Assize, 11, *per Wick.* Grant a piscary, except *piscariam mean;* the exception is void. 33 H., 6, 28. Lease reserving the herbage; the reservation is void. So here, reserving the trees, *except the tops; the reservation is void. But here, except the lopping

and topping, this does not give to the lessee the tops, but only an authority to do the act. 12 H., 7, 25; 13 H., 7, 13. License to hunt and kill the deer, does not give the deer. 18 E., 4, 14.

DODERIDGE, J. By the words *without impeachment of waste,* the lessee has an *interest.* Clearly so; but it shall not endure any longer than his estate. When here a lease is made, it goes out of all the estates and binds them all. So when he reserves the trees, the reservation is well; for it was according to the intention of the parties, and it is not contrary to law. Otherwise it would be an absurdity, for the lessee has power to cut and sell the trees and make leases, and yet by making the lease he cannot reserve his interest. And this does not resemble the exception of the trees by lessee for life or years, without such an interest; or it was a trick devised to oust all the lessors of their action of waste. But now when the lessee dies, although the reversion comes to him in the remainder for life, with the same privileges, the question is whether the exception shall aid him, or whether during this term for three lives he may not cut the trees; for the exception out of the exception is determined by the death of the lessor, and the lessee is only to have the ordinary botes of a tenant for life.

JONES, J. I agree that by the words *without impeachment of waste* he has an *interest.* But if he does not use it during his estate, it is gone; for it is its concomitant. Therefore, if he grants his estate, reserving the trees; it is not well. But in this case he has not granted *every* thing away; and the reservation is good; for there is the possibility of the reversion after the three lives. Therefore, if a tenant after possibility grants his estate, reserving the trees, the estate is void; but if he leases for years with such a reservation, it is well. I say nothing as to the exception. As to the cutting by him in remainder, it is a question. I think that the estate of three lives operates partly out of the first estate, and partly out of that of the lessor. He shall hold it liable to the charges of the lessee for life.

WHITLOCK, J., concurred.

DODERIDGE, J., to *Noy.* You see on what point this case turns; what we agree upon, what we differ in, or are in doubt about, govern yourself accordingly. Poph., 193.

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*BAYLEY v. BUGS.—Mich. 3 Car.

Debt in London, on lease of a warren, rendering rent, and 100 couple of conies, to be paid from such to such a time weekly, *in such a number as the plaintiff should appoint.* The term was assigned to the defendant and for 96 couple of conies in arrear, the plaintiff brought this action.

Resolved, PER CURIAM: That without an oppointment it is not necessary to pay. For the request is here *part* of the *reservation* and *part* of the contract. Obligation to pay so much money, on request, between midsummer and Michaelmas. *Per Crew.* Without a request the obligation is gone forever.

JONES, J. It is not in the nature of a rent. If one reserves a rent of £40 annually, payable between midsummer and Michaelmas, in such weekly sums as the party shall require, he shall not lose his rent. But a distinction is to be taken in cases where the thing received may without damage be paid as well at one time as at any other. So in the case put just now of the rent, if it be not demanded weekly, it may be laid up until the last week, but if one leases a dairy, reserving 100 lbs. of butter, payable between May-day and Holy-mass, by such a quantity weekly, the lessee shall not be compelled to pay *all* the last week. If one reserves 100 couple of woodcocks, payable between, etc., and the last week is after the time of their departure beyond the sea, he is not bound to pay them. So, in case of a reservation of roses between midsummer and Christmas.

But exception was taken that the plaintiff brought his action in London, where the lease was made, and after the term was assigned over, while, it being against the assignee, it ought to [be] brought in the county where the warren lies. For where, as in this case, the action is maintainable only on the *real* contract, and not on the *personal,* it ought to be brought where the land is. *Treherus' case;* M. 17 Jac. rot., 600. C. B. *Waller's office adjudged,* viz. Lease for land in Surry, made in London, rendering rent, lessor devises the reversion and dies; the devisee brings rent in London; held bad.

Curia advisare vult. *Antea,* p. 720; Vin., 26, 69; Hut., 68; Jones, 41.

SHARP'S CASE.—Mich. 3 Car.

Assumpsit. In consideration that the plaintiff would deliver certain clothes, which the plaintiff had made for him, the defendant assumed payment for them, without saying to whom. Motion made in arrest of judgment.

Woolrich moved for judgment, for the *preceding* communication and agreement reduces this to a certainty, viz., that the payment should be to the plaintiff, with whom the agreement was made. A preceding communication will take away the uncertainty of *time, estate,* or *person.* As to *time,* Perkins, 496; Pack, 797. Where if one binds himself that if the obligee enfeoffs him of B. acre, he will pay him £10. No time

of payment being limited, it shall be *presently, after* the feoffment. As to *estate,* in *Sir Richard Pexal's case,* 8 Rep., 83. One devises that such a one shall be steward of his manors, and devises him a rent of so much without saying what estate he should have in the rent, it shall be taken to be such an estate as he has in the office; which was for life. As to the *thing,* Dyer, 42. One enfeoffs another of an acre of land, and was bound in a condition that whereas he had enfeoffed the plaintiff of this, he would warrant, without saying what. Yet it was intended to be the acre of land, about which the former communication was. As to the *person,* Dyer, 126; 4 E., 3, 4; Com., 108. Grant to one in the premises *habend.* to him and Alice Styles, in frank marriage; held good by reason of the preceding agreement. So a feoffment to I. S. and his heirs with warranty, without saying to whom the warranty shall be; held that it shall be as the preceding estate. 22 E., 4, 86; Vouch., 258, 262. And in 8 Rep., *Whitlock's case,* it is said that the surest reservation of a rent is to reserve it to no person, but leave it to the law. 14 H., 7. Devise that lands shall be sold to pay debts without saying by whom; held by the executors. For the communication of the debts show it. 4 E., 2; Obligation, 16; 40 E., 3, 5. One binds himself to A. and in the deed it is thus: *Et, admajorem hujus rei securitatem, inveni* A. and B. *fideijussores, qui se in toto et in solido obligant,* without saying what he binds himself to; held well. So in 2 E., 4, 22. One covenants to deliver barley to another, and binds himself thereto, under the penalty of £1000, without saying to whom; it shall be intended according to the former agreement. In Comment., 140, it was ruled that an agreement shall be taken according to the intention of the parties, and no *set of words is necessary.

And of this opinion was the court, for the said reason.

Whereupon, a rule was given that the plaintiff shall have judgment, *nisi,* etc. Afterwards *Hendley,* Serj., moved against it. *Sed non allocatur,* and judgment was given. 3 Cr., 77; Noy, 83; Poph., 181; *Antea,* p. 741.

EDSOL v. BENGOR.—Mich. 3 Car.

Trespass for a battery; verdict for the plaintiff. Motion in arrest of judgment, because no place is mentioned where the battery was. Wherefore judgment was arrested.

HALL v. GERRARD.—Mich. 3 Car.

Noy for the plaintiff. It has been objected that the traverse *de injurie* is not good, where the justification is by reason of a free tenement or lease for years. But yet the plaintiff ought to have judgment:

1. Because the justification here is not in the realty *alone,* but *mixed* with the personalty: And where it is mixed with the personalty, *de injuria sua propria* is a good traverse; and it is necessary to traverse the title, as the defendant pretends. 8 H., 6, 34. Also, the justification is not on the lease, but on the assault, by putting his hands *molliter* on him to put him out. So the realty is only an *inducement* to the justication.

2. Their title is not certain, nor traversable by reason of their lease *pro termino diversorum annorum;* and this uncertainty we cannot traverse, as they have shown *no* certain term.

3. By this demurrer our plea is confessed; that it was *de injuria sua propria,* and then, although the issue be not well tendered, yet the demurrer having confessed the tort, judgment ought to be according to the justice of the case, by 27 El., 5, p. 332.

The defendant not being ready, a day was given him.

Book of Entries, titles Assault, *Placito,* 17, p. 554. Afterwards judgment was given for the plaintiff. *Antea,* pp. 645, 720, 792.

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*BLACKSTON'S CASE.—Mich. 3 Car.

It was objected that the implication *quia fuit ad grave damnum* is not a sufficient implication that the plaintiff was tenant at the time; and that the declaration shall not be made good by implication. Com., 202, 206. In waste, he declared on the grant of a reversion, and it did not appear whether it was *before* or *after* the waste; held bad—although it concluded *ad exhæredationem,* which strongly implies that it was *before* the waste. The declaration, as was said in *Stradding's case,* ought to contain truth and certainty. So ought to a *scire facias,* which is in the lieu of it. And here, if it was not his land at the time the executor was sued, although it be tortiously charged, he shall hold it as the feoffor did. 15 E., 4, 24. Feoffee shall not have forgery in the time of his feoffor. *Penruddock's case,* 5 Rep., F. N. B., 149. Feoffee shall not have admeasurement of dower, but shall take the land in the same plight, as the feoffor did.

JONES, J. If the plaintiff was not tenant at the time this executor was sued, he cannot have this action; for he shall hold the land as the

feoffor did. It is said to have been adjudged that if an inquisition be found of my lands, my feoffee shall not avoid it, but if the feoffment be after extent, but before a *liberate* sued, the feoffee shall avoid it: For he is the party grieved thereby. If after the *liberate* the feoffment be made of part to the one and part to the other, the one shall not have contribution against the other. If a purchaser has cause of action, and makes a feoffment, his feoffor shall not have it.

Judgment was given for the plaintiff. *Antea,* pp. 632 and 709; 3 Bulstr., 305; Bendl., 161; Jones, 82, 92.

WOTTON v. EDWIN.—Mich. 3 Car.

The defendant avowed; whereupon the plaintiff demurred. The case was that William Hawse was seized in fee of a house and 55 acres of land, 5 acres of meadow, and 6 acres of pasture in F. in the county Hereford; and 7 *Junii,* 28 H., 8, by indenture demised the premises to Nicholas Trehern for 79 years, *reddendo inde annuatim Gulimo Hawse,* and *assignatis suis,* 26s. 8d. at the feasts of the Annunciation and St. Michael's in equal portions. Afterwards the lessor died and the reversion descended to *William, his son, under whom the defendant claimed. The only question was whether the rent shall go to the heir or is determined by the death of the lessor.

It was adjudged that it was determined by the death of the lessor. For he had reserved the rent to himself, without saying any more; and the word *assigns* cannot extend the rent further than the lessor himself was to have it. He had it only during his own life. 18 E., 7, tit. Ass., 86; 10 E., 4, 18; 27 H., 8, 19; *per Audley;* H. 33 El. rot., 1341. In this court in *replevin, Richmond v. Butcher.* The defendant avowed for rent, as heir to his father, on a devise made by his father of certain lands for 21 years, *reddendo et solvendo proinde, durante prædicto termino,* 21. *annorum præfato (patri) executoribus vel assignatis suis,* £10 *legalis moneti Angliæ,* etc., *ad festa,* etc. And adjudged that by this reservation the *heir* shall not have the rent, because the reservation was to the father, his executors and assigns, and not to him and his *heirs.* 3 Cr., 288; 12 Co., 36; Co. Lit., 47; 1 And., 291; 2 Cr., 217; 2 Leon., 27; *Antea,* pp. 661, 698, 799, 807.

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2. In *audita quœrela*, bail taken before the judges. *Blackston v. Martin*, 709.
3. Principal dying after judgment, pending a writ of error; bail discharged. *Calf v. Bingley*, 739.
4. In joint actions one cannot proceed on bail taken at several terms. *Anonymous*, Hill. 2 Car., 763.

See HUSBAND AND WIFE, 5.

BAR.

In assault and battery the wounding cannot be justified. *Hall v. Gerrard*, 645.

BARGAIN AND SALE.

Of a rent and reversion is incident; he shall have the rent after enrollment, if it be enrolled according to the statute. *Hall v. Dew*, 745.

CAPIAS.

Pluries capias, dated 21 Julii, and returned *tres trin.* So that the return is before the date the court will not take notice of it, unless it be alleged *de facto*. *Michel v. Ramsey*, 713.

CERTIORARI.

1. Indictment for murder removed by *certiorari* to be tried in different county. *Herbert v. Vaughan*, 638.
2. Outlawry for felony certified erroneously. *Certiorari* granted to have the fact returned as it was in reality and thereupon amended. *Plume's Case*, 783.
3. Record removed by *certiorari* in chancery and thence sent by *mittimus* to B. R. Misprision in the *mittimus* amended by order of court. If it had been in a *certiorari* it would have been amendable. *Doyley v. Broughton*, 789.

CHANCERY.

1. Annuity relievable in chancery if the deed be casually lost; *aliter* if by neglect. *Abdee's Case*, 736; *Brightman's Case*, 738.
2. Promise to convey lands relievable in specie. *Mollineux' Case*, 756.
3. Chancery cannot intermeddle with juries. *Blackston's Case*, 632.
4. Chancery cannot write to a county palatine or a franchise to have a trial by a jury; but may write to a Bishop to send a certificate. *Blackston's Case*, 632.

CONDITION.

To avoid an estate taken strictly. *Daniel v. Upley*, 635.

COPYHOLD.

1. If a copyholder, after request to perform services, refuses, it is a forfeiture if it be unquestionable that they be due. *Johnson's Case*, 641.
2. When nonfeasance or neglect of a copyholder works a forfeiture. *Wood v. Marsh*, 716.
3. Lease for life to a copyholder, without deed or livery. *Anonymous*, Mich. 3 Car., 786.
4. Tenant commits voluntary waste, the lord dies, his heir shall enter for the forfeiture. *Cornwallis v. Hoswood*, 796.

CORPORATION.

May have some things by prescription and others by charter and use both titles. *Blackston v. Martin*, 709.

COSTS AND DAMAGES.

1. In an action for words commenced before the statute, and prosecuted afterwards, no more costs than damages. *Hale v. Huggins*, 671.
2. No costs in a *scire facias*. *Sury v. Brown*, 698.

COVENANT.

1. Covenant by the master of a vessel to sail with the first wind. If he performs the voyage it is well enough. But if he does not sail with the first fair wind covenant lies, though it cannot be pleaded against him. *Constable v. Clovery*, 638, 664.
2. Covenant by three jointly and severally. Breach that the defendant did not, etc., good, *quia* brought against one severally. *Aliter* if brought against all. If one of the others has paid the defendant shall show it. *Constable v. Clovery*, 664.
3. Count on a covenant by indenture between the plaintiff and the defendant. On oyer it appeared to be between three; *held* bad though the third party was dead. *Constable v. Clovery*, 664.
4. Covenant to find house and fire bote. *Lisle v. Martin*, 697.
5. Covenant to convey in fee. Plea that the plaintiff did not show what conveyance he wanted *held* bad. *Lucas v. Warren*, 718.
6. In a lease made by two. Covenant against all encumbrances made by them it shall be intended *any* of them. *Merriton's Case*, 749.
7. On a release to two, shall serve for joint and several actions. *Merriton's Case*, 749.
8. Covenant that if the father and the son and his wife should dislike to live together, then, etc. The disagreement ought to be by all, and does not survive to any. *Crass v. Tooker*, 750.

COVENANT—*Continued.*

9. Difference between a covenant *cognoscere* or *levare finem*. *Bellamy v. Balthrop*, 764.
10. Covenant to levy a fine does not bind to do it with warranty. *Bellamy v. Balthrop*, 764.
11. Lessee covenants to do all reasonable cartings for his lessor with his carts and carriages. Good plea that he had *no* cart nor carriage on demurrer. *Manners v. Vesey*, 777.

COVIN AND COLLUSION.

Sheriff; no judge of. *Warrington's Case*, 667.

DAMAGES.

1. If there be demurrer to part and plea to rest, the jury, who try the issue, shall assess damages for the whole. *Anonymous*, Trin. 1 Car., 633.
2. Damages shall not be increased without the consent of the party or *ad petitionem quærentis*. *Good v. Lawrence*, 759.
3. In case the court cannot tax damages without a writ of inquiry. *Aliter* in debt. *Terry v. Newson*, 785.
4. Damages increased for a mayhem although the suit was only for a battery and wounding. *Hooper v. Pope*, 794.

DECLARATION.

1. Lease by Dean and Chapter ought to show what estate they have. *Newman v. Marsh*, 640.
2. Declaration filed three terms after the bill filed. *Anonymous*, Trin. 3 Car., 777.
3. Declaration on a promise of a defendant to give in marriage as much as he would give to any of his other daughters; showed that he gave, etc. Exception that it does not appear that such a giving was before the promise; yet *held* good. *Almot v. Pickton*, 778.
4. Action brought by husband and wife, *cui administratio*, etc., *held* good. *Cui* shall relate to the person last named, viz., the wife. *Walter v. Hayes*, 784.
5. *Caruca*, in a declaration for a cart load; moved in arrest of judgment that it signifies a quantity of land, and not a cart load. *Walter v. Farmer*, 788.
6. Where the *indebitatus* is only an inducement, it is sufficient to allege it generally. *Phuter v. Gunder*, 791.

See PLEAS AND PLEADINGS, 25, 26.

DEED.

Difference between the date and the day of the date. *Bishop v. Cornwallis*, 672.

DEMURRER.

On a special plea amounting to the general issue. *Bellamy v. Balthrop*, 764.

DESCENT.

If the girl consents to the ravisher and the heir enters, then she dies; the heir is by descent. *Gulielm's Case*, 683.

DEVISE.

See AUTHORITY, 2.

DISCONTINUANCE OF SUITS.

1. If a writ of error is returned, it is not discontinued by the King's death. *Cole's Case*, 707.
2. Prohibition in C. B. is not discontinued by the King's death. *Aliter* in K. B. if there be no other process. *Watkin's Case*, 711.

DISCONTINUANCE.

Reversion of an estate tail granted by fine and warranty, not executed during the life of the grantor; no discontinuance. *Saul v. Clark*, 676.

EJECTMENT.

1. Of a manor; the defendant found guilty for part, *quære;* if well. *Hems v. Stroud*, 674.
2. Of divers closes; entry proved in one, good for the whole. *Caly v. Fisher*, 689.
3. On demise the time and place are material. *Peck v. Cole*, 693.

ENTRY.

To prove ejectment of three several parcels in the tenure of three several persons; the entry ought to be several; though they be all in the same county. *Argot v. Cheney*, 682.

ERROR.

1. Writ brought after the term at which it was returnable; it is error, if it appears on the record. *Argot v. Cheney*, 682.
2. *Concessum est* instead of *consideratum est*, is error. *Hern v. Warden*, 689.
3. A writ of error is a suit; the party may be nonsuited and by the release of all suits the writ is gone. *Cole's Case*, 707.
4. On diminution alleged in a writ of error, the original was in *Devon* and the count in *Exon*. *Trelawny v. Reynel*, 712.
5. Error on an interlocutory judgment. *Colomore v. Hobs*, 725.
6. Debt in Bristol on *concessit solvere secundum consuetudinem;* error brought because the declaration did not show the custom; after *in nullo est erratum* pleaded this cannot be supplied by averment nor made part of the record. *Morgan v. Moor*, 725.
7. Writ of error in the Exchequer Chamber although the transcript alone is removed, is a *supersedeas* to the execution, either against the principal or the bail. *Calf v. Bingley*, 739.
8. After *in nullo est erratum* pleaded, the parties are estopped to allege diminution, and an *ideo certificari* may be awarded, *ex officio, ad informand. conscientiam*, but not at the suit of the party. *Felton v. Weaver*, 741.
9. Action for detaining charters until the defendant gives a bond; errors in the record. *Holmes v. Winegreen*, 771.
10. If a plea in an inferior court be removed by a bad writ of error, the Superior Court shall proceed on the record *coram illis resident. Dun v. Dean and Chapter of Carlisle*, 773.
11. Judgment *quod recuperaret* instead of *quod recuperet*, bad. *Strand v. Blunden*, 784.

ERROR—*Continued.*

12. Error lies on an eject. before writ of inquiry. *Smith v. Amys*, 784.
13. Error in a judgment in the verge, the count was in St. Martin, *infra jurisdictionem*, and the *venire* was of St. Martin *Prædict.* *Held* bad because it was not said *infra jurisdictionem.* *Thair v. Fosset*, 786.

ESTOPPEL.

On the condition of a bond. *Jermyn v. Randall*, 717.

EXECUTION.

1. Difference when a man is rightly taken into execution and when he is not. *Fish v. Wiseman*, 769.
2. Whether one may be taken after the year without *scire facias.* *Fish v. Wiseman*, 769.

EXECUTOR.

1. In debt on his testator's bond, pleads *non est factum suum:* well. *Baker's Case*, 717.
2. Lessee for 90 years makes a lease for 40 years, rendering rent and dies, his executor proves the will; the rent is in arrears, he makes his executor, and dies, his executor distrains for the rent arrear in his life, *in propria jure.* *Wade v. Marsh*, 783.

EXTENT.

The plaintiff claims by extent on a judgment and the defendant by a statute of the same term. The plaintiff has the best title. *Gerrard v. Norris*, 667.

EXTINGUISHMENT.

Rent and way are extinguished by unity of possession; but not so a water course, or a necessary way. *Surrey v. Piggot*, 743.

FINE OF LAND.

1. Tenant in tail, reversion to his brother, and having a daughter, his heir made a lease for life, then granted the reversion by fine and warranty, and died. Whether the daughter being heir to her uncle, is barred by this fine and warranty. *Saul v. Clark*, 676, 683.
2. Fine levied in the same term, is *in pectore judicis* to be reversed or amended. *Glyn v. Owen*, 760.
3. *Didimus pot.* suable before the writ of covenant. *Tindal's Case*, 765.

FORCIBLE ENTRY.

To whom a justice of the peace may make restitution on 12 Jac. by forcible entry. *Gunton v. Gunton*, 760.

FORFEITURE.

What powers and provisions are forfeitable by treason. *Harding v. Warner*, 649, 680, 700.

GAOL.

There are two sorts of gaols in every county; the one for debtors; the other for matters of the Crown; the first is the sheriff's gaol and removable where he pleases, the other is that of the county, and cannot be changed by him. *Anonymous*, Mich. 2 Car., 642.

HABEAS CORPUS.

Directed to the bishop of Durham, who refused to make return, unless his privileges were recited. *Jobson's Case*, 748.

HOSTLER AND INNKEEPER.

If one lodges three days in an inn, the keeper is not answerable for his goods. *Gulielm's Case*, 692.

HUSBAND AND WIFE.

1. The wife levies a fine as a *feme sole*, she shall be barred, if the husband does not avoid it. *Daniel v. Upley*, 635.
2. The wife delivers goods, trespass lies; *aliter*, in a case of an infant, who delivers them with his own hands. *Daniel v. Upley*, 635.
3. The wife is chargeable in trover and conversion, but not on a contract. *Newman v. Cheney*, 718.
4. The wife having an authority, may execute it without her husband. *Daniel v. Upley*, 656.
5. Husband and wife are arrested; the husband finds bail for himself; he may be detained until he find bail for her. But she shall not be detained, until he finds bail for himself. *Hudson v. Hudson*, 807.

INDICTMENT.

1. Of forcible entry avoided for want of the word (*tunc*) *existens*. *Anonymous*, Mich. 1 Car., 707.
2. Avoided for want of addition. *Anonymous*, Mich. 1 Car., 707.
3. Avoided for other reasons. *Anonymous*, Hill. 2 Car., 753; *Serlested's Case*, 777.
4. For stopping the way from Kensington to London. Bad. *Halsey's Case*, 762.
5. A. of Fleet Street, London, well, without saying from what ward. *Halsey's Case*, 762.
6. For barratry quashed, no place being mentioned. *Man's Case*, 770.
7. Exception to its not being alleged that he entered *manu forti*. *Held* well, it being said *quod extra tenuit manu forti*. *Beverly's Case*, 795.
8. *Quod exercuit quandam execrabiles, et diabolicas artes, anglice, witchcraft*, bad, *quia* no Latin word signifying *witchcraft*. *Lamb's Case*, 744.

INFANT.

1. Liable for a trespass or a tort; but not for a contract, unless for necessaries. *Stone v. Withipool*, 646.
2. What promise of the infant's executor is binding. *Stone v. Withipool*, 646.
3. Penal bond of an infant void, though for necessaries. *Sharp v. Rolt*, 741.
4. Action on the case against an infant for necessaries; but not on a *computasset*. *Wood v. Whiterick*, 756.
5. Infant copyholder makes a lease, it is no forfeiture; if the lord enters the infant shall reënter. But if the infant, at full age, accepts the rent, it is a good lease against him and shall work a forfeiture. *Ashfield v. Ashfield*, 774.
6. Submission to an award by an infant is good, but his bond is void. *Stone v. Knight*, 780.

INFORMATION.

Granted for arresting a juror in the leet court. *Anonymous*, Trin. 2 Car., 773.

JUDGMENT.

The plaintiff recovered small damages; the defendant prayed judgment which the plaintiff opposed: ruled that the plaintiff shall enter judgment or be nonsuited. *Walter v. Farmer*, 788.

See ERROR, 2, 5, 11.

JEOFAILS.

1. A faulty issue aided after verdict. *Gibbons v. Purchase*, 746.
2. When in the plea no place is mentioned, if a *venire* issues and verdict is had, this is not helped by any statute. *Taylor v. Tolwin*, 770.

LEASES.

1. Coparceners in tail, the husband of one of them being tenant in curtesy, joins the other in a lease reserving rent jointly, it is a good lease under 21 H., 8. *Thomson's Case*, 661.
2. Lease made the 25th of March *habend. abinde* rendering rent at Michelmas and Annunciation the first day is exclusive and the rent due on the last. *Hall v. Dew*, 745.
3. What interest the lessee has in the trees. *Sacheveril v. Day*, 811.

MURDER.

In an appeal of murder the jury may find manslaughter. *Bassage's Case*, 718.

See BAIL, 1; CERTIORARI, 12.

NOTICE.

1. Money to be paid after marriage on request; the request is sufficient notice. *Allfright v. Blackmore*, 696.
2. The father promised so much on the marriage of his daughter; notice not necessary; *aliter* if a stranger had promised. *Allfright v. Blackmore*, 696.
3. Promise to pay, etc., in three days after he came to the age of 18 years, or 18 days after his marriage; the notice shall relate to both. *Read v. Bullington*, 746.

OATH.

Debt on 5 Eliz. taken before a Master in Chancery, is not good. *Luther v. Holland*, 724.

OBLIGATION.

1. To the sheriff to be a true prisoner is not contrary to 23 H., 23. *Elworthy v. Reynel*, 648, 733.
2. To have free ingress and egress what is intended thereby. *Climson v. Poole*, 662.
3. Made in *partibus transmarinis* may be sued in England. *Ward v. Kedswin*, 686.

PARDON.

1. The King's pardon relates to the day of the date; that of Parliament to the first day of the session. *Boston's Case*, 647.

PARDON—*Continued.*

2. The right of the party is not remitted by the pardon of the King. *Smith v. Chrashaw*, 687.
3. Case when a pardon relates to a day before the offense. *Davy's Case*, 731.

PLACE.

A place generally named shall be intended to be a town; but the date of a deed shall be intended to be at a particular place or house. *Ward's Case*, 633.

PLEAS AND PLEADINGS.

1. If one obliges himself to give all the money in his pocket, he ought to plead how much he had, and that he had given all. *Wilkinson's Case*, 642.
2. Debt on an obligation dated 30th of November. Plea that the delivery was the 28th of April, *absque hoc.*, etc., repugnant and bad. *Bishop v. Cornwallis*, 672.
3. After imparlance, *ancient demesne* is a good plea. *Clark's Case*, 690.
4. When time and place are material. *Sherman v. Brampton*, 692.
5. When the request is part of the contract, the time and place ought to be mentioned. *Sherman v. Brampton*, 692.
6. A prescription badly pleaded helped by a verdict. *Harrison v. Peck*, 708.
7. The plaintiff is not obliged to reply in the term in which the plea is *entered.* T. 2 Car., 721.
8. When the plea and replication are bad, judgment shall be on the count. *Sherwood's Case*, 757.
9. *Ingressum* and *liberum ingressum* or the same thing in pleading. *Climson v. Poole*, 736.
10. No plea in abatement after a plea in chief. *Harman v. Whitchlow*, 742.
11. A negative generally alleged is well. *Read v. Bullington*, 746.
12. Plea bad, *quia* not distinct. *Sherwood's Case*, 757.
13. Case on several *assumpsits*, *quæ attingunt ad* £52 which is more than the real sum, surplusage; *licet sæpius requisitus non solvit* £52, if the request were necessary this would be bad. *Rissy v. Hayns*, 758.
14. Every special plea in trover with color amounts to the general issue. *Bellamy v. Balthrop*, 764.
15. Plea shall be taken *fortius contra proferentem. Green v. Moody*, 772.
16. Retaking is no plea in escape. *Harvey v. Reynel*, 775.
17. When the time or other circumstance is ascertained by a *viz.*, if it be not material it is void. *Anonymous*, Trin. 3 Car., 774.
18. In avowry, the avowant justified on a feoffment made to three, the jury found one, to four, yet well. *Dicker v. Molland*, 779.
19. Exceptions to pleadings in foreign attachment. *Hern v. Stubbers*, 782.
20. When the *scilicet* ascertains the time differently from the premises it is void. *Alcock v. Blofield*, 783.
21. Action *quare vi et armis insultum*, the defendant pleads *quoad venire vi et armis, non culp.* without saying any more, and to the rest *son assault demesne:* verdict for the plaintiff; *quære*, whether this is a discontinuance. *Greewell v. Ireland*, 787.
22. Pleading an *anglice* to a Latin word having a different signification is void. *Legat's Case*, 780.
23. When an estate or a matter of record is pleaded, *de injuria sua propria* is a bad reply. *Hall v. Gerrard*, 792.

PLEAS AND PLEADINGS—*Continued.*

24. Exception to a plea. *Turvil v. Tipper*, 793.
25. Exception to a declaration on a charter party. *Ballo v. Briard*, 796.
26. Declaration in *Exon* on a writ in Devon, bad. *Ballo v. Briard*, 796.
See DAMAGES, 1; DECLARATION, 14.

PRESCRIPTION.

1. Difference between a prescription and a custom. *Harrison v. Peck*, 708.
2. Prescription for a way traversing B. acre. *Usque ad talem campum*, good without showing any interest. *Aliter usque ad talem clausum. Parker v. Newsham*, 748.

PRIVILEGE.

1. One is bound to answer in an action of account, notwithstanding his privilege of Parliament. *Hodges v. Moore*, 663.
2. Privilege of Parliament not allowable except on a writ. *Hodges v. Moore*, 740.
3. Plaintiff suing as executor shall have no privilege. *Ashfield v. Ashfield*, 774; *Harvey v. Reynel*, 775.

PRIVITY.

The nature of it, on the assignment of a term, by an executor. *Dale v. Penhalerick*, 779.

PROCESS.

1. Original, but not judicial, process may bear date out of term. *Ramsey v. Michel*, 638.
2. All defects in the process cured by appearance. *Michel v. Ramsey*, 713.

PROHIBITION.

1. Not granted the last day of the term. *Anonymous*, Trin. 2 Car., 635.
2. Granted to the admiralty if the surmise be not true. *Godfrey's Case*, 637.
3. A custom may be tried by consent in the spiritual court. *Anonymous*, Pasch. 1 Car., 662.
4. Difference between a prohibition in K. B. and one in C. B. *Watkin's Case*, 711.
5. Prohibition to a spiritual court refusing proof by one witness. *Bellamy v. Alden*, 712.
6. Prohibition on a suit for calling a woman *quean*. *Anonymous*, Trin. 3 Car., 779.

RELEASE.

To two shall inure in joint and several actions. *Worsley's Case*, 751.

RENT.

1. Reserved to one *durante vita* and his assigns is only for life. *Surry v. Cole*, 661.
2. On a lease for years during the term to the lessor and his assigns, the heir shall have it. *Sury v. Brown*, 698.
3. Of £40 payable week as the lessor shall require, though he never required, he shall have the rent. *Aliter* corn, hay, etc. *Quære* of estovers, conies, etc. *Bayly v. Baxter*, 720.
4. What rent the heir shall have. *Wooton v. Edwin*, 817.
See RESERVATION.

REPLEADER.

Never had on a demurrer; at least on the plea demurred to. *Climson v. Poole*, 736.

REQUEST.

1. Action on a promise to return on request; the request should be shown before the suit brought; *aliter* in detinue. *Hern v. Stubbers*, 782.
2. A stranger assumes to pay on request; the request is issuable and ought to be specially alleged. *Alcock v. Blofield*, 783.

RESERVATION.

Rent reserved to the lessor and his assigns who were assigned and died. *Cornwallis v. Hoswood*, 796.

RESTITUTION.

On the reversal of a judgment in ejectment. *Griffith v. Lea*, 803.

RETURN.

Commission of *nisi prius* directed to H. Harvey, Armingero, and the return was of a writ before H. Harvey, Milite, *held* well. *Petty v. Hobston*, 749.

SCIRE FACIAS.

Puts everything on the defendant. *Blackston v. Martin*, 709.

SHERIFF.

1. His fee on extents or executions of £100 and above. *Walden v. Vessey*, 642; *Walden v. Ursy*, 665.
2. Bond for his fees, void. *Empson's Case*, 645; *Batho v. Salter*, 668.
3. On a *venditioni exponas*, returns *non inveni emptores*, and his office determines what proceedings against him. *Dixon's Case*, 712.
4. Shall answer *civiliter* but not *criminaliter* for his officers. *Laicock's Case*, 766.
5. His heir not answerable for escapes. *Mason v. Davy*, 754.

SUPERSEDEAS.

1. Parliament being dissolved writ of error there depending determines, *ideo* no *supersedeas*. *Crouch v. Hain*, 670.
2. Second deliverance on a return, awarded in replevin for the defendant, and damages, is a *supersedeas* for the return and not for the damages. *Anonymous*, Pasch. 1 Car., 683.
3. Of Parliament ought to be for every action and not for all generally against one. *Hodges v. Moore*, 740.

TENANT IN COMMON.

Where the tort is equally great to one tenant as to the other, they shall join in a personal action; but when the tort is only to one, he shall have his action alone. *Harman v. Whitchlow*, 742.

TRAVERSE.

A matter of inducement is not traversable. *Beamont's Case*, 708.

TRESPASS.

1. Ought to be voluntary and to the injury of another. *Millen v. Harvey*, 639.
2. One chased sheep out of his land with a dog, they ran on his neighbor's land, he recalled his dog, but the dog kept chasing them on the neighbor's land, *invito domino suo;* no trespass. *Millen v. Fawdry*, 714.
3. One is convicted of stealing goods; trespass lies. *Markham v. Cob*, 734.
4. Trespass for breaking into a vessel and carrying away her sails. The defendant justified the entry, etc. The entry is a breaking and the carrying away the sails is the usual way to keep her safe. *Creamer v. Tokely*, 767.
5. One in London gives me his goods in York, if another takes them, I shall have trespass. *Hudson v. Hudson*, 786.
6. When trespassers shall be joined in an action. *Pencavin v. Trapping*, 806.
7. In trespass and battery, *son assault de mesne* pleaded, *de injuria sua* is a good reply. *Stacy's Case*, 762.

TROVER AND CONVERSION.

1. By an executor, without any trover by the defendant alleged. *Hudson v. Hudson*, 786.
2. *De tribus ponderibus*, bad for uncertainty. *Walter v. Farmer*, 788; *Hudson v. Hudson*, 807.
3. By an executor for conversion in the lifetime of the testator the naming himself executor is surplusage. *Worfield v. Worfield*, 791.

VARIANCE.

Between the bill and the count, judgment arrested. *Todman v. Ward*, 671.

USES.

1. Several parties join in a recovery, and one declares the use. *Argot v. Cheney*, 689.
2. The seals of an indenture to lead the uses of a fine were torn by accident, yet it was allowed. *Anonymous*, Mich. 3 Car., 796.

WAGER OF LAW.

Refused in an action of debt on an arbitration. *Anderson v. Symonds*, 785.

WARD AND WARDSHIP.

1. Relief by custom is not distrainable without custom; *aliter* by tenure. *Hungerford v. Haviland*, 655.
2. The difference and remedy by relief. *Hungerford v. Haviland*, 721.

WARRANTY.

Does not bind the heir when he makes his title through another ancestor. *Saul v. Clark*, 676.

WASTE.

If waste be done and repaired before suit brought, it is well; *aliter* if the condition was that he should not commit waste. *Cornwallis v. Hoswood*, 796.

WRIT OF INQUIRY.

Case on an account for £16 on *nihil dicit*, judgment *quod recuperet damna sua prædicta*. Judgment reversed for want of a writ of inquiry. *Brook v. Wood*, 784.

AN ADDRESS

ON THE

HISTORY OF THE SUPREME COURT

DELIVERED IN THE

HALL OF THE HOUSE OF REPRESENTATIVES, 4 FEBRUARY, 1889, AT THE REQUEST OF THE MEMBERS OF THE COURT AND OF THE BAR, IN COMMEMORATION OF THE FIRST OCCUPANCY BY THE COURT OF THE NEW SUPREME COURT BUILDING, 5 MARCH, 1888.

BY HON. KEMP P. BATTLE, LL.D.,
President of the University of North Carolina.

[PUBLISHED BY REQUEST OF THE COURT.]

INTRODUCTION

By Hon. Thos. S. Kenan.

The people regard with favor every effort to preserve the history of the State, and of its separate civil and military departments of government. A notable illustration of this is the process of restoring the records of our Colonial times, which is now being conducted by the authority of an act of the Legislature, and under the wise and careful supervision of the Secretary of State.

Believing it to be desirable to present to the public, in an accessible form, the history of our Supreme Court, the members of the Bar, at a meeting held in this city not long since, invited the orator of this occasion to prepare an address to that end. His familiarity with the subject matter, and his ability to deal with it, warrant me in saying that their selection was an admirable one, and that the discharge of the duty thus imposed will meet with entire approval. I take pleasure in presenting to you, ladies and gentlemen, the Hon. Kemp P. Battle, President of the University.

ADDRESS

MR. BATTLE said:

Gentlemen of the Supreme Court Bench and Bar, Ladies and Gentlemen:—In tracing the history of the Supreme Court of North Carolina, we find that its origin is not the Act of 1818, which established it on its present basis, but that it properly begins with the first organized government in our State. I shall not attempt, however, to give in detail the successive struggles by which, from feeble beginnings, has been evolved this great tribunal, which controls so largely the peace and happiness of our people. I can attempt only a general review.

There are no records of any courts in the Provincial period under Governor Drummond, prior to the assumption of the government by the Lords Proprietors, and for some years after the grant of their charter. I have no doubt of there having been such, because English people, whenever and wherever they settled—in the forests of Germany before the dawn of history, in the lands wrested from the painted Britons, in the wilds of America and Australia, South Africa, and India—have never failed, moved by divinely implanted love of order, which has made them great, to have the germs of an executive, legislative, and judicial power; but the records of those courts have been, probably, forever lost.

It might have been expected that there would have been inaugurated for the judicial system a copy—at least a likeness—of the English system, but the grant of Carolina to the Lords Proprietors in 1663, enlarged in 1665, substituted for the king, as the fountain of all justice, eight sub-kings. They were vested with all the royalties, properties, jurisdiction, and privileges of a county palatine, as large and ample as the county palatine of Durham. The Bishop of Durham possessed in old times an *imperium in imperio*. He created barons, appointed judges, convoked Parliaments, levied taxes, coined money, granted pardons, erected corporations, and, although his powers had to some extent been curtailed by Edward I and Henry VIII, many of them survived even to the reign of William IV. The Proprietors claimed, in fullest extent, the exercise of these prerogatives. After four years of provisional government, with entire confidence of success, they proceeded, in 1669, to put into operation the extraordinary scheme called the Fundamental Constitutions of Carolina, fondly described by them as the "Grand Model." There could not possibly be a more striking proof of the truth that all good governments are slow growths, the product of the struggles and compromises of intelligent and well-meaning men, than this abortive produce of Locke's metaphysical brain. Locke was a learned philosopher, and most of the Lords Proprietors were men of large experience and ability in various fields of human activity, one of them Shaftesbury, of extraordinary genius, but their attempt at government was so unsuited to the people for whom it was intended that it met with their scorn and resistance, and the historian's ridicule.

These Fundamental Constitutions of Carolina were elaborately framed, on this principle, that the Proprietors had kingly authority, and were not subject to the Crown in the exercise of their government. The Supreme Courts created by that instrument were to be presided over by one of them in person or by deputy. Contrary to the statements of the historians of our State, this system was not entirely abrogated until the entire transfer of their jurisdictional rights to the Crown.

The Grand Model, which it would be an insult to Sir Thomas More to call Utopian, sought to organize eight grand courts, one of super-eminent greatness, consisting of the Proprietors themselves, presided over by the oldest, who was styled the Palatine, another name for king, as the word is derived from palatium, a royal residence. Each of the other seven proprietors had likewise a court of which he was the chief judge, with six counselors, as assistants, chosen in an elaborate manner, which I have not time to describe. It is interesting that these tribunals are copied after those which prevailed in the Roman Empire. Their names and functions were:

The Chief Justice's Court, having charge of appeals in civil and criminal cases; the Constable's Court, having charge of military matters; the Admiral's Court, having charge of maritime affairs; the Treasurer's Court, having charge of matters relating to the revenue and finances; the High Steward's Court, having charge of commerce and trade, external and internal, the Chamberlain's Court, having charge of matters of heraldry and ceremony, and matrimonial matters. There was to be no appeal from any of these courts. A quorum was to be the Proprietor and three counselors, but the Palatine Court could authorize special cases to be tried by any three.

There was likewise authorized a Chancellor's Court of one of the Proprietors and his six counselors. Its jurisdiction was terrific. It extended to all invasions of the law, of liberty, of conscience, and of the public peace under pretense of religion, and of the license of printing. It was evidently designed to have the terrible powers of the King and his Council, which, under the name of the "Star Chamber," did such bloody work in the effort to crush liberty in England.

The inferior courts were to be a county court of the sheriff and four justices, with general civil and criminal jurisdiction, and a precinct court of a steward and four justices, with criminal jurisdiction in cases other than capital, and in civil cases other than those concerning the nobility.

Trial by jury was authorized, but a majority carried the verdict.

Some curious provisions of a general nature were made: For example, it was provided, as among the Romans, that "it shall be a base and vile thing to plead for money or reward." "To avoid multiplicity of laws, which by degrees always change the right foundations of the original government," "all statutes were to be *ipso facto* null and void at the end of one hundred years after their passage." Further, it was enacted that "since multiplicity of comments as well as of laws have great inconvenience and serve only to obscure and perplex, all manner of comments and expositions on any part of the Fundamental Constitutions or any part of the common or statute laws of Carolina are absolutely prohibited." But among these and other like senseless provisions was found one in advance of the age. While Claverhouse was dispersing conventicles and John Bunyan and other brave spirits were languishing in prison, no man could be persecuted for his mode of worshiping God in Carolina.

The Proprietors met at the Cockpit on October 21, 1669, and organized themselves under the Grand Model. The aged George Monk, Duke of Albemarle, was by seniority the first Palatine, John, Lord Berkeley, Lord Lieutenant of Ireland, was chosen to be first Lord Chancellor, and Anthony Ashley Cooper, then Lord Ashley, afterwards Earl of Shaftesbury, was chosen the first Chief Justice of Carolina.

In the following year, 1670, Earl Clarendon being in banishment, and Sir Wm. Berkeley Governor in Virginia, six Proprietors met. The Duke of Albe-

marle had answered his final roll call, and Lord Berkeley was Palatine in his stead. Each appointed his deputy, Berkeley choosing Samuel Stephens, who thereupon became the first Governor under the Constitution. Shaftesbury, the Chief Justice, gave his appointment to Mr. John Willoughby, who thus became the first, so far as is known, of the learned and dignified line of Chief Justices in our State. The other deputies, including Willoughby, became the Council, which, besides having other functions, became the upper house of Assembly of Albemarle. The Proprietors, regretting that they could not put the Grand Model completely in operation for want of landgraves and caciques, instructed the Governor and Council to come as near to it as possible. The Governor, with the consent of the Council, was authorized to establish courts and appoint judges.

Under these *cy pres* instructions, to make as near approach to the Constitution as circumstances would admit, we find that the Governor and Council acted as the Court of Chancery, with almost arbitrary powers. They exercised the functions of an appellate court, not only as to questions of an equitable nature, but questions of common law and even fact. The Chief Justice, being a deputy of the Proprietors, was a member as of course, but not necessarily the Chancellor.

The supreme common law court was called the General Court, in which the Chief Justice presided, with an indefinite number of assistants, appointed by the Governor and Council. Sometimes the members of the Council were assistants. What powers these assistants had does not appear. They probably were merely advisers of the Chief Justice (who received his appointment from, and held at the will of, the Proprietors), as the assessors in Roman courts counseled the prætor. This seems clear from the fact that the early instructions to the Governor required that they shall be "able and judicious persons," and it was only about forty years afterwards, in 1724, that they shall be "learned in the law." Certainly in early days they were not, except in rare instances, lawyers. In 1728, Governor Burrington quarreled with the Chief Justice, and sought to neutralize his authority by claiming judicial power for the assistants. The Assembly stoutly contended, through John Baptista Ashe and Cornelius Harnett, the elder, that the Chief Justice was supreme, and that assistants only had power to inform and advise, "exactly as masters in chancery informed and advised the Chancellor." This view prevailed, although Burrington argues his point with ability. Again, I find when the Chief Justice was absent another was specially commissioned, the assistants not being allowed to hold the court. The assistants were allowed no salary or fees.

What we call "counties" were, until 1738, called "precincts," while a number of precincts constituted the larger jurisdictions of Albemarle and Bath counties. I do not find that County Courts contemplated by the Fundamental Constitutions, ever had an existence. The Precinct Courts were established at once, and under the name, subsequently given, of Courts of Pleas and Quarter Sessions, continued until abolished by the Constitution of 1868.

It is not certain that the earliest Chief Justices were lawyers. The title, "Captain" John Willoughby, does not suggest Coke or Littleton. He seems to have been a man of force, as we have an accusation against him before the Lords Proprietors that he was a "person who runs himself in many errors and *præmunires* by his extrajudicial and arbitrary proceedings in the courts." It is charged that he refused to grant an appeal to Thomas Eastchurch, saying

that his courts "were the court of courts and jury of juries." As to the truth of the charge we must suspend judgment until the other side be heard from.

The earliest record of any General Court that we have, in 1694, at the house of Mr. Thomas White, shows that it was held by the whole Council, with Mr. John Durant as assistant. The Chief Justice was likewise the executive, Hon. Thomas Harvey, Esq., Deputy Governor, the Governor of Carolina being at Charleston. Whether he was a lawyer does not appear. The assistants were Hon. Francis Tomes, Benjamin Lakar, Maj. Samuel Swann, Daniel Akehurst, Secretary, Esq., Lord Deputies. The cases brought before the Court were escheats, laying out roads, attachments, actions in debt, *assumpsit*, detinue, trespass, *quare clausum fregit*. Criminal cases were also tried. They sat also as a court in chancery.

An instructive case, illustrating not only the court practices, but the business habits of the people, was that of *Hopkins v. Wm. Spragg*—Attachment.

The Provost Marshal, as the executive officer of the Court was called, returned attachment on six sheep, one pair of steelyards and one loom, one cow and yearling, one cow and calf, with whatever of estate of Spragg was in the hands of Christopher Butler; also £3 5 shillings in bonds of Lawrence Misell. The plaintiff declared that Spragg was indebted to him in 1,400 pounds of merchantable pork, agreed to be paid for; 14 sheep sold by plaintiff to defendant; that defendant was willing to surrender the 14 sheep in satisfaction, but Christopher Butler, by persuasion, prevented the same, and then, with intent to defraud said Hopkins, purchased all the defendant's estate; whereupon, Butler comes and defends the suit.

A jury is impaneled, who find for the plaintiff. The Court orders that the Marshal make payment to the plaintiff of the 1,400 pounds of pork of the goods attached, being appraised according to law, with costs of suit, and the surplus, if any, to return to Butler.

Whereupon, Butler craves that further proceeding be stayed until the full hearing of the whole matter be had at the next Court of Chancery. Butler, and Mr. Stephen Manwaring as his surety for the appeal, give bond in the penal sum of 2,800 pounds of pork.

At the Court of Chancery, the same officers being present, with Col. Thomas Pollock, a Lord Deputy, and Col. Anthony Daws, as assistants, being added, it is recited that Christopher Butler, appearing and pretending title to the goods of Spragg, having obtained an injunction, has not filed any bill. It is decreed that the suit be dismissed. Evidently, Butler appealed for delay only. I find other appeals where there was no pretense of an equitable element.

I will give a criminal case—an indictment for murder—which shows the rudeness of the practice in that day. It is charged that "Thos. Denham, Gent., with a certain weapon, commonly called or known by ye name of catt of nine tayles, feloniously and maliciously did strike, beat, wounded and killed" one Hudson, who, by reason of aforesaid mortal strokes and wounds, did depart this life.

RICHARD PLATES, *Att'y Gen'l.*

Jury find "guilty of manslaughter."

The record states that Thomas Denham, having been convicted of manslaughter and "saved by his Book" (a curious entry for pleading the benefit of clergy), "ordered, that Thomas Denham be burnt in Brawne of left thumb with a hott iron having ye letter M. and pay all costs, and upon his petition, the court in chancery doth reprieve said sentence until her Majesty's pleasure be further known."

It seems here that the Governor and Council, sitting as a Court of Chancery, granted the reprieve. The power of reprieve was originally granted to the "Governor and Council." It is likely that the same body acted in an executive capacity at one moment, without leaving their seats, resolved itself into a Court of Chancery. The functions of the two were therefore sometimes confounded. Long afterwards we find that the Governor and Council prescribed days for holding court, generally the week after the session of the General Court.

It will be noticed that the reprieve was "until her Majesty's pleasure be known." This seems inconsistent with the claim of the Lords Proprietors to absolute rule, "*jura regalia*," in Carolina. History shows that there was great discontent with the practical independence of the Crown granted by the charters of Charles II. *Quo warrantos* were sometimes threatened for annulment of the grants, and the Proprietors found it necessary to make some concessions of their princely claims long before they sold their rights to the Crown. At one time the General Court refused to grant an appeal to the Privy Council, but afterwards it was deemed best to allow it, though so grudgingly that they refused to stay execution pending the appeal.

The oath required of the judges was short and to the point: "You shall doe equall Right to ye poore and rich after your cunning, witt & Power. You shall not be councell of any quarrell hanging before you."

We have no records of the General Court during the troublesome times of the so-called Cary Rebellion and the Tuscarora War. The record of one held in 1713, for the Province of North Carolina, is printed in the Colonial Records. This is like our modern courts. The Deputy Governor and his Council, with one or two assistants, are no longer the judges. In their place we find the Hon. Christo. Gale, Chief Justice, and Thos. Miller, Capt. John Pottiver, and Anthony Hatch, Assistant Justices. Gale was a lawyer, though Urmstone, the missionary (not a good witness, however, as a rule), says that he was in England only a lawyer's clerk. The others were plain justices of the peace. At what time these changes occurred does not appear. This constitution of the court continued for many years.

The pleadings are more accurately drawn, though the spelling does not improve. For example, we have "enorminous" for "enormous," "abrobrious" for "opprobrious," "dispositions" for "depositions." Lawyers are more numerous. The principal are Edward Moseley, Thos. Snoden, and Edward Bonwich, who is her Majesty's Attorney-General. The place of meeting is Capt. John Hecklefield's, in Little River. The Assistant Justices are sometimes styled "Associates." Instead of appealing to the Courts of Chancery to set aside judgments, motions are made before the Court itself for arrest of judgment. The points made by Edward Moseley in *Carey v. Took* would do credit to a modern lawyer with an unlimited access to books.

It is to be remarked in passing that the Colonial Records show that the act of the General Assembly, expressly declaring that the common law is and shall be in force in this government, except the "part of the practice in the issuing out and return of writs and proceedings in the Court of Westminster," etc., which Hawks and others say was first passed in 1715, was certainly passed as early as 1711.

Christopher Gale is the most imposing figure in the early judiciary. His portrait, with his dignified countenance and flowing wig, shows judicial serenity equal to his contemporaries in England. The missionary, Urmstone, whose grumbling spirit and vituperative pen destroy his credibility, cannot

help admitting that he had gained great esteem, and was regarded as an oracle. Everard and Burrington praise him at one time, and when he opposes their schemes violently denounce him, as they did all other officers not agreeing with them. But the vestrymen of his church endorse his piety, the members of the lower house of the Assembly, his learning and integrity, and the Lords Proprietors give him their support. My opinion inclines to Gale.

Whoever has held the great office of Chief Justice deserves at least that his name shall be recorded. I therefore state that Tobias Knight, the same who was accused of complicity with the pirate Teach, or Thache (pronounced Tack), known as Blackbeard, who was, however, acquitted, was in place of Gale, who vacated his office by going to England. Then came Frederick Jones, who, I am grieved to say, unjustly detained money, paid to him in lieu of bail, which his executors were forced to disgorge. Then came Gale again, during whose second term the court was for the first time held in a courthouse, in Edenton, formerly Queen Ann's Creek. In 1724 the terrible Burrington assumed the power of ejecting him and appointing Thomas Pollock, but the indignant Proprietors quickly reversed his action, ejecting Burrington and installing Sir Richard Everard as his successor. At the Court in 1726 ten assistants sustained the Chief Justice, while three indictments were found against the late Governor for trespass, assault, misdemeanor, and breach of the peace, which the accused contemptuously ignored until after the second term; the Court, in despair of enforcing its authority, ordered *nolle prosequis* to be entered. It was high time for the Lords Proprietors to surrender a trust which they had so shamefully mismanaged.

In 1728 the Proprietors transferred to the Crown the jurisdiction over all the territory covered by the charters of 1663 and 1665, and seven-eighths of the title to the land, Earl Granville retaining his interest in the soil, which was in 1744 conveyed to him in severalty. The jurisdiction was not formally assumed until 1731, when Burrington, the first royal Governor, replaced Everard. There was no change, therefore, in the court system until the latter date, Gale continuing to be Chief Justice, and having constantly stormy disputes with the Governor. He was superseded by William Smith, who is described as having been educated at one of the English universities and having been a barrister at law for two years. The royal instructions to the Governor show a desire to have a better government. The Governor was forbidden to displace a Judge, without good cause reported to the King or the Commissioners for Trade and Plantations. Justice was ordered to be dispensed without delay or partiality, and the privilege of the writ of *habeas corpus* was enjoined. Appeals from the Court to the Governor and Council were allowed in cases of over £100 value, and thence to the Privy Council in cases over £300.

Burrington, in an official report, gives a very intelligent account of the court laws of his day. The Chief Justice was paid a salary and fees for forty-one several acts, the scale of which may be estimated from issuing a writ being 3 shillings, filing a declaration or plea 2 shillings and 6d., etc. The Clerk's fees were about the same as those of his chief. The fees were payable in Proclamation money, or in certain commodities at prescribed rates, *e. g.*, tobacco at 11 shillings per 100 pounds, corn at 2 shillings per bushel, wheat at 4 shillings per bushel. The Clerk, Wm. Badham, reports that in 1772 the salary of the Chief Justice was £60 per annum, and fees about £100. The latter rose to £500. Attorney-General Little in 1731 estimates his own fees at £100, and the Chief Justice's income at £500 or £600, of which £60 was salary.

The depreciation in Proclamation money varied very much at this time—according to Burrington the pound sterling being eight to one, but according to the Assembly only five to one.

Governor Burrington's friendship with Chief Justice Smith was of short continuance. We soon find the latter proceeding to England bearing complaints of the Governor's tyrannical and overbearing conduct, one witness swearing that he had in the presence of the Court ordered the marshal to arrest and imprison him. The Governor endeavored to break the force of his attack by writing to the Board of Trade that Smith was "the jest and scorn of the men who perverted him," "a silly, rash boy, a busy fool, and an egregious sot," "ungrateful, perfidious scoundrel, and as much wanting in truth as understanding."

These are hard words to be said of one presiding in the highest court of the land, but the Chief Justice repaid the Governor with such compounded interest that Gabriel Johnston was soon seated in the executive chair, and Smith resumed his seat on the bench.

During Smith's absence in England, Burrington appointed John Palin as his successor, and on his resignation from ill health, Wm. Little, Gale's son-in-law, who died in two years and was succeeded by Daniel Hanmer, who in turn was soon ousted by the triumphant Smith. Those were sad times. In addition to the outrageous violence of the Governor, the lower house of the Assembly unanimously voted that Chief Justice Little was guilty of oppression and extortion, while Chief Justice Hanmer was imprisoned for perjury, which his friends charged was procured by the vindictive malice of Chief Justice Smith. Sixteen members of the Assembly charged Smith with grievous exactions and extortions and offered to prove the charges if time should be given for procurement of witnesses. And still people prate of the glorious old time: Even the old song, which tells of the miller's stealing corn and being drowned in his pond, and the weaver's expiating the theft of yarn by being hung in his web, and of the little tailor who went down below gripping tightly the purloined broadcloth under his arm, neither, however, meeting justice at the hands of the law—even that old song, bearing most cogent testimony of widespread corruption, has the effrontery to begin:

"In the *good old Colony times.*
When we were under the King!"

We now approach an important epoch in the history of our Colonial law. For many years the judges had been endeavoring to mould our judicial system after the English pattern—a court in bank, where all the pleadings were made up, sending out its judges periodically for trials of questions of fact in the neighborhood where the parties and witnesses reside. The first circuit ever attempted was Edenton and Newton, in Hyde County. The increase of population of the Cape Fear, the Neuse, and the Tar, made it proper to take steps to accommodate those localities. Governor Johnston and his able Council were leading spirits, determined, if possible, to introduce the English system more fully, with New Bern as the new Westminster and to adopt that town as the capital of the Province.

A formidable obstacle was in the way of this improvement. The Lords Proprietors had granted each of the six precincts of old Albemarle County, Currituck, Pasquotank, Perquimans, Chowan, Bertie, and Tyrrell, five members of the Assembly, while the others had only two. Such inequality may seem atrocious to us, but there were scores of worse inequalities among the

boroughs sending members to the British House of Commons; and we are familiar with diminutive Delaware having the same political power in the Federal Senate as her big sister New York, with population thirty-five times greater. Certainly the inhabitants of those counties clung tenaciously, without sense of shame, to their privilege; and their thirty members, being a majority of the House, voted solidly against transferring the seat of government from Edenton.

Governor Johnston determined to carry his point by surprise. He prorogued the Assembly, appointing the new place, Wilmington, as far as possible from the Albemarle, and the time, the latter part of November, when the swamps and lowgrounds were usually deep in water, and the Albemarle members, nearly all planters, were engaged in driving their hogs to market or curing their slaughtered carcasses for future use. He reckoned correctly that they would be slow in making the long and toilsome journey, and incurring danger of financial ruin by leaving their farms at a most critical period. By his advice, the southern members, taking advantage of their absence at the opening of the term, resolved that, by analogy to the British House of Commons, in which forty members constitute a quorum for transacting business, fourteen and the Speaker should be a quorum, and proceeded to reduce the representation of those counties to two each, fixed the seat of government at New Bern, and passed the court bill of 1746. They thus added one more to the instances of good measures, like the union of England and Scotland, and the *habeas corpus* act, passed by unworthy means.

By virtue of this act, New Bern took the place of Westminster. All writs, plaints, and process were to be commenced in the Supreme or General Court there, and all the pleadings and proceedings thereon were to be carried on until the case was at issue, and then the court issued out writs of *nisi prius* and subpœnas for witnesses to attend at the proper places.

These *nisi prius* courts were to be held by the Chief Justice twice a year at Edenton, in the Northern circuit, at Wilmington in the Southern circuit, and in the courthouse in Edgecombe in the Western circuit.

The supreme and principal Court of Pleas for the Province was to be held twice a year in New Bern, and was to be called by the old name, the General Court. The Court consisted of the Chief Justice, appointed by the Crown, and three Associates to be appointed by the Governor, the Associates to have the powers of Associates in England, and to hold the Court in case of the sickness or disability of the Chief Justice, or when he was a party.

The criminal cases were to be tried in courts of Oyer and Terminer and General Jail Delivery, to be held by the Chief Justice, or some person specially commissioned.

The Courts of Chancery were to be held in New Bern on the second Tuesdays after the General Courts.

The County Courts were to have cognizance of all cases above 40 shillings and not exceeding £20 Proclamation money, of all petty larcenies and misdemeanors, with right of appeal to the General Court.

This act was a great improvement on the old system. It contains many provisions of the court acts of North Carolina of our day. I conjecture it was drawn by Moseley, then Chief Justice, or by him and Samuel Swann, both of whom were able and experienced lawyers. They, with Enoch Hall and Thomas Barker, were appointed the same year to revise and publish the Acts of Assembly in force. Hall and Barker seem not to have acted, and Moseley died in 1749, so the work is called Swann's Revisal, or "Yellow Jacket."

The admirers of Archibald Maclaine claim for him the authorship of the much-lauded court law of 1777, which claim is, I think, successfully disputed by the admirers of James Iredell the elder in his behalf. The codifiers of the Revised Statutes of 1836 give the credit to the unknown author of the court law of 1767, but an inspection of the Acts of 1746 shows that its authors should have equal praise.

The acts met with vehement opposition at home and in England. The Board of Trade submitted the question as to their legality to the eminent law officers, both afterwards conspicuously adorning the Chief Justiceship of the King's Bench of England, Sir Dudley Ryder, Attorney-General, and Wm. Mansfield, afterwards Lord Mansfield, Solicitor General. Their opinion was that the acts were passed "by management, precipitation, and surprise, when very few members were present, and are of such a nature and tendency and such an effect and operation that the Governor, by his instructions, ought not to have assented to them, tho' they had passed deliberately in a full Assembly."

Whereupon, the agent for North Carolina craved leave to appear by counsel, Mr. Hume Campbell and Solicitor Sharpe. Their argument was ably replied to by Mr. Joddrell, counsel for the Albemarle counties.

This argument was had in 1751, five years after the passage of the act. Three years after this the Board of Trade made its decision against the acts, on the ground that they encroached on the King's prerogative. In consequence of this unaccountable and criminal neglect during all the years from 1746 to 1754, the six counties regarded not only these, but all other acts of Assembly, as illegal, and refused to recognize them in any way, because passed by an unlawful Assembly. Juries refused to attend the courts in Edenton, and there was practically no recognized government in the Albemarle country. Bishop Spangenberg, the Moravian, reports that "perfect anarchy prevailed. As a result, crimes are of frequent occurrence." This is not an unusual example of the misgovernment of North Carolina during the Colonial period.

The Assemblies under Governor Dobbs showed determined purpose to secure administration of the law, intelligent and honest. To secure independence they enacted that the Associate Justices should hold office during good behavior, which had been the rule in England since the Act of Settlement, in 1701. To secure legal ability and interest in the Province, they enacted that no one should be an Associate Justice unless he should have been an outer barrister of five years standing in England, or an attorney of seven years practice in this or an adjoining Colony, and also have been a resident here for one year.

This excellent law was vehemently objected to by the Crown officers of the Board of Trade, and was repeatedly disapproved by the Crown. The Assembly stood firm, so that occasionally there was an interval of anarchy between the notice of the disapproval and the passage of the new law. Riotous assemblies were had, jails broken into, malefactors set at large, and violence and robbery were frequent and unpunished. Attorney-General Robert Jones piteously complains that the rioters of Granville had notified him that they intended to petition the Court to silence him, and if they refused, to pull his nose.

The flimsy reasons given for the disapproval of these acts bring out clearly the strength of the position taken by the Assembly. They were:

1. That the qualifications prescribed for the Associates were an unconstitutional restraint on the power of the Governor, who held his power of appointment under the Great Seal.

2. That they practically prevented any one from England being appointed an Associate Justice.

3. That it was manifestly improper that the Associates should hold during good behavior, while the Chief Justice held at the pleasure of the Crown.

4. That the acts create the offices of Associate Justices, leaving the Governor only the form and name of commissioning them.

5. That it delegates to them, in the absence of the Chief Justice, the whole right of jurisdiction, which right can only be delegated by the Crown.

6. That by extending the circuit over 1,900 miles a year, a disability of attendance is created.

7. That the Chief Justice in distant and desert places will be deprived of recourse to books to enable him to make a right decision.

In 1760, Governor Dobbs was moved, by the urgency of the Assembly and prevalence of anarchy, with the approval of Chief Justice Berry, and the Attorney-General Childs, who had given a different opinion when in England, to sign a court law substantially the same as that disapproved by the Crown. For this he was severely censured by the King and Council, and the laws were disallowed; wherefore, in 1762, the Assembly receded from the obnoxious provisions. "A Supreme Court of Justice" was established in the district of Edenton, New Bern, Wilmington, and Halifax, to be composed of the Chief Justice and one Associate, and in the Salisbury district of the Chief Justice and an assistant Judge.

In 1767, a new and more elaborate court system was adopted for five years. The Province was divided into five judicial districts, Hillsboro being added to those heretofore mentioned. In each was a court held by the Chief Justice and two Associates, the latter appointed by the Governor and allowed £500 a year, for payment of which a special tax on each wheel of a pleasure carriage, and on lawsuits, was laid. Martin Howard was Chief Justice, and Richard Henderson and Maurice Moore were appointed Associated Justices.

This system was an essential departure from the English system. Instead of the judges trying questions of facts only in the districts, leaving the questions of law to be heard before all the judges sitting in bank in New Bern, all the members of the Court went to the courthouse of each district and there heard both questions of fact and questions of law. The *Nisi Prius* Court and the Appellate Court were held in the same town by the same judges, and during the same term. A great defect was, that one Judge, in the absence of the others, had all the powers of the Court.

The salary of the Chief Justice was £26, and of the Attorney-General £16, the Associate Justices £41 13s. 4d., Proclamation money, for each court.

The act was not renewed. After the expiration of the five years limit, the Governor and Council insisted on exempting from the attachment laws the estate of those who had never resided in the Province, and to confine them to cases of those debtors who had absconded from the Province with the intent to avoid payment of their debts. The Lower House unanimously resolved that the right to attach the estates of foreigners had long been exercised by the inhabitants of the Province; that it had been found greatly beneficial to its trade and commerce, and the security of the property of inhabitants, and that they could not, by any public act of theirs, relinquish this right, abandoning the interest of their constituents, and the peace and happiness of the Province. The Governor urged them to provide compensation, at least for those appointed by him especially to hold courts of Oyer and Terminer and General Jail Delivery, but they firmly declined. They claimed that such commissions could not be valid without the aid of the Legislature; that calamitous as the circumstances of a people might be, from the interrup-

tion both of criminal and civil jurisprudence, the House judged the misery of such a situation vanished in comparison with a mode of redress exercised by courts unconstitutionally formed. The various arguments of the Assembly on this question show ability and a fixed determination to secure for themselves the untrammeled right to pass laws suitable to the circumstances of the Province.

In consequence of this disagreement, our Province was without higher courts from 6th March, 1773, to December 24, 1777, which period is excepted out of the statute of limitations by the court law of 1777. Governor Martin attempted to inaugurate criminal courts by special commission, under the royal prerogative, Samuel Cornell being, *pro hac vice*, appointed Chief Justice, but such strong exceptions were made to the commissions that the scheme was not pressed. There is abundant evidence of the crime and turbulence resulting from the suspension of the courts. It was not long, however, for in August, 1775, the State Congress at Hillsboro adopted a provisional government in preparation for the War of Independence, and the functions of the judiciary were exercised by the stern hand of the Committees of Safety.

It only remains, before leaving the Colonial history of the Supreme Court, to give a list of the Chief Justices after Wm. Smith, who left for England in 1740. John Montgomery received the temporary appointment, which, on Smith's death, three years later, was made permanent. He was succeeded in 1744 by Edward Moseley, a man of great ability, who for forty-four years preceding his death, in 1749, with rare ability and weight of character, was ever foremost in public and in private life, in working for the material interest of the Colony, in battling for the rights of the people, in courageously withstanding the tyranny of the executive. After Moseley was Enoch Hall, whose good character receives the praise of Governor Dobbs, while his knowledge of the law receives his depreciation. On his visiting England in 1750, Eleazer Allen and James Hazell held the office successively. I know nothing of Allen. McCullough, the elder, estimates Hazell as a creature of Johnston, not bred to the law, and without the least knowledge therein. Peter Henly was next in office, a man of uprightness, according to the Lower House of Assembly. On his death in 1758, James Hazell was again the *locum tenens*, until the arrival of Charles Berry. He seems to have been a fair and upright Judge until he came to a tragic end in 1766, by suicide in a fit of temporary insanity, it is said, brought on by brooding over the displeasure of Tryon because the slayer of an English officer in a duel was not convicted in his court.

Martin Howard, the next Chief Justice, was a firm supporter of the royal prerogative. For his advocacy of the Stamp Act, while a Judge in Rhode Island, his home was burned and he was forced to flee for his life. Unusual obloquy has been heaped upon his name; but as he was allowed to reside on his plantation in Craven County, where he claimed to have made two blades of grass grow where one grew before, unmolested, until the middle of September, 1777, and was on friendly terms with Judge Iredell, I surmise that much of the odium against him must be attributed to party feeling. His legal reputation was high.

Judges Moore and Henderson espoused the cause of the Colonies, and the former was active as a legislator in Revolutionary times. Moore seems to have been an able lawyer. Henderson turned his attention to land speculation, and certainly had ambitious views, as history shows. A son of the former, Alfred Moore, became a Judge of the Supreme Court of the United States, and a son of the latter, Chief Justice of the Supreme Court of our own State.

HISTORY OF THE SUPREME COURT.

The Constitution of the free State of North Carolina was adopted on 18 December, 1776. The framers had no conception of any system in which judges of the supreme or appellate court should not themselves sit in the trial of causes. There is no provision in it regarding a Superior Court Judge. It is the legislative, executive, and supreme judicial power that are to be kept separate. The General Assembly is to elect Judges of the Supreme Court of law and equity and Judges of the Admiralty. It is the Judges of the Supreme Court who are to have adequate salaries. It is certain that the Constitution contemplated that the Supreme and Superior Court Judges should be the same persons, as in Colonial days and as in England.

Under the Colonial government, the Chief Justice was the highest judicial power; yet he was a member of the Council, and therefore an influential part of the executive department. As the Council was the upper house of the General Assembly, he was likewise an influential part of the Legislature. The Governor not only could disapprove acts and dissolve and prorogue the Assembly, but had large weight in the appointment and control of the Council, and thus had power in the Legislature. Moreover, being a member of, and presiding over, the Court of Chancery, he was an important factor in the judicial department. In fact, complaint was made against Governor Johnston that he acted as Chancellor when the court was not in session. Hence, we find the prohibition of the intermingling of the three departments of our government inserted in the Declaration of Rights. But the framers of the Constitution had had so much experience of the arbitrary conduct of the Governor and Judges that they made the executive and judicial branches almost entirely dependent on the General Assembly, the annually elected agents of the people. I will not stop to show this as to the Governor. The statement is abundantly evident as to the judges. They held office during good behavior, but they could be removed by repeal of the law authorizing the court. They were to have adequate salaries, but the Assembly had the sole decision as to what was adequate. The Assembly, without the intervention of a grand jury, could prosecute them by impeachment for alleged maladministration or corruption.

The Constitution of 1835 remedied at least two of these defects. By the amendments then adopted, the salaries of the judges could not be diminished during their continuance in office, and the Senate only could try impeachments, two-thirds being required for conviction. The judges were still removable by repeal of the law under which their offices were held. It was not until 1868 that the Supreme Court was made a part of the Constitution, so as to secure entire independence. It is a strong proof of the firmness and integrity of our judges since 1777, as well as the conservatism of our people, that those officers never hesitated to do their duty, even when in opposition to the will of the Assembly, and the people sustained them. They have repeatedly declared null laws framed by the body which could have docked their salaries and even abolished their offices. They have not hesitated to incur temporary unpopularity in defense of principles of lasting value.

On 15 November, 1777, the new court law was adopted. It is so nearly a copy of the Act of 1767 as to suggest the probability of having been drawn by the same lawyer. The term "Superior Court" was used when it was manifestly proper to use the constitutional term "Supreme Court," which would not have been a misnomer, as it had supreme jurisdiction. In another section the draftsman forgot to omit the words "or commander-in-chief" after the word Governor, as should have been done. In the oath are phrases copied

from the old oath, which are out of place in a government where the judges are in no danger from the arbitrary action of the executive.

The few changes were undoubtedly for the better. Two judges were required to declare questions of law, on demurrer, cases agreed, special verdicts, bills of exception to evidence, and motions in arrest of judgment. The licensing of new attorneys was taken from the Governor and given to at least two judges. The salary was increased to £100 for each term attended, or £50 in case of nonattendance from necessity, and no fees were allowed.

It shows the continued domination of English ideas that the establishment of courts of equity was delayed for five years. As the departments of government were obliged, under the Constitution, to be kept separate, the General Assembly could not, even if it desired, have conferred equitable jurisdiction on the Governor and Council, as in Colonial days, nor was the creation of new offices in accordance with their views. The expedient of making the same officer a judge at one hour, of law, and at another, of equity, was not obvious to the legislative mind until 1782.

The Act of 1777 followed that of 1776 in dividing the State into six districts, the Courts for which were to be held at Wilmington, New Bern, Edenton, Hillsboro, Halifax, and Salisbury. In 1782 the district of Morgan was added, and in 1787 that of Fayetteville, making eight in all. The Attorney-General, as in Colonial times, attended all the courts in behalf of the State. The people of the counties of New Hanover, Onslow, Bladen, Duplin, and Brunswick attended court in Wilmington; of the counties of Craven, Carteret, Beaufort, Johnston, Hyde, Dobbs, and Pitt, in New Bern; of the counties of Chowan, Perquimans, Pasquotank, Currituck, Bertie, Tyrrell, Hertford, and Camden, in Edenton; of the counties of Halifax, Northampton, Edgecombe, Bute, Martin, and Nash, in Halifax; of Orange, Granville, Wake, Chatham, and Caswell, in Hillsboro; of the counties of Rowan, Anson, Mecklenburg, Guilford, Surry, and Montgomery, in Salibury; of the counties of Burke, Wilkes, Rutherford, Washington, Sullivan, and Lincoln (Washington and Sullivan being in what is now Tennessee), in Morgan, now called Morganton; the people of the counties of Richmond, Cumberland, Sampson, Union, and Robeson, in Fayetteville.

A full Court consisted of all three Judges and Attorney-General. One Judge could hold the Court, but it required, as before stated, two Judges to sit as an appellate or Supreme Court. For trial of criminals beyond "the extensive mountains that lie desolate between the inhabited parts of Washington (in Tennessee) and the inhabited parts of Burke," it was provided by Act of 1782 that one of the Judges, and "some other gentleman commissioned for the purpose," should hold Court at the county seat of Washington (Jonesboro), for that county and Sullivan, the Judges and Attorney-General to have two-thirds of the allowance given for holding the other Courts.

The first Judges elected were Samuel Ashe, of New Hanover; Samuel Spencer, of Anson, and James Iredell, of Chowan. After riding one circuit, Iredell resigned his seat, and John Williams, of Granville, took his place in 1777. Iredell was a very able lawyer, of a judicial temper, afterward fully demonstrated on the Supreme Court Bench of the United States, to which he was appointed by Washington. Ashe held his office until 1795, when he was elected Governor; Spencer until his death in 1794; Williams until his death in 1799. For thirteen years, at a most critical period of our history, during the throes of the Revolutionary War, during the chaotic days of the nerveless confederacy succeeding, when the exhausted people, staggering under broken

fortunes and a worthless currency, were bringing into order the State whose liberties they had won, during the stormy discussions preceding the adoption of the Constitution, which many thought would bring back the galling tyranny of Tryon and Martin—during all these times of despondency and poverty, of dissension and furious party spirit, these three were the entire judiciary—Judges at *nisi prius* and Judges in bank, Judges of law and Judges of equity, Judges of the Superior and Judges of the Supreme Court.

The calm judicial demeanor, the superiority to the passions which tear the breast and influence the actions of clients and their lawyers, was not in those days, nor long afterwards, expected of the Bench. Fierce sarcasms, like those of Ellenborough and Chase, and foul curses, like those of Thurlow, could be paralleled at many courts in England and America. It was not until 1796 that a Judge in North Carolina was forbidden to express to the jury his opinion of the facts, and this practice inevitably provokes the wrath of lawyers. It is not wonderful that our judges had the faults of their day. Moreover, neither one of the Judges had properly much training in the law before his election to the Bench. Ashe was a lawyer, but the character of the practice and the turbulence of the times did not allow much devotion to his profession. Spencer had been Clerk of Anson Court and certainly had been a lawyer only a limited time, if at all. Williams had been a carpenter, and though possessed of good judgment and highest character, was unlettered. The troublous times of the Revolution afforded little opportunity for the Judges to perfect themselves for their judicial duties. Having witnessed with their own eyes the despotic conduct of Governors and other royalist officers, their feelings were warmly enlisted against the establishment of a strong general government. Some of the lawyers who practiced before them were well read in literary as well as legal lore, ardent Federalists, and at least two of the most prominent, Maclaine and Hay, were high tempered, and when irritated, had tongues sharp as a scorpion's sting.

The estimate placed by these gentlemen on the Judges is extremely unfavorable. Maclaine and Hay spoke of them with bitter contempt. Davie refused the offer of the District Judgeship of the United States, because of the paltry salary, though he was "anxious to escape from the d——d Judges." Hooper narrates the following, which I quote as showing our improvement in judicial dignity:

"Court went on in the usual dilatory mode. Great threats of dispatch accomplished in the usual way. Much conversation from Germanicus (Spencer), on the bench; his vanity has become insufferable, and is accompanied with overbearing insolence. Maclaine and he had a terrible 'fracas.' Germanicus, with those strong intuitive powers with which he is inspired, took up Maclaine's defense in an ejectment and ran away with it before it was opened. Maclaine expostulated, scolded, stormed, called names, abandoned the case. I prevailed, Spencer made condescensions, hostilities ceased and peace was restored."

Hay made, before the Assembly of 1785, accusations against the Judges for the following offenses. I copy verbatim from a letter of Hooper:

"1. High fines and shameful appropriations of them.

"2. Admitting new and illegal prosecutions (depreciations, etc.).

"3. Banishment of Brice and McNeill.

"4. Dispensing with laws (the New Bern case).

"5. Negligence of their duty and delay of business.

"6. Ill behavior to Mr. Hay at Wilmington."

As to these charges, the Attorney-General (Moore) said that some of them were quite new to him. Judge Ashe refused to notice these at all, and said that "he has clear hands and a pure heart."

Hooper says Hay "boils with as much fury against the Judges as Saul against the Christians." He adds that "the ridiculous pursuit of Hay's ended as he expected. It was conceived in spleen and conducted with such headstrong passion that after the charges were made evidence was wanting to upset them." On the whole, we must conclude that the Judges were not as learned or as dignified as our standards require, but they were by no means as deficient as the critical Federalist lawyers painted them. There were bad manners on both sides. That Spencer had talent and influence is proved by the continued hold he retained on the affections of the people of the State, especially of his intelligent constituents of Anson. It is proved by the evident respect shown to him and his opinions by such men as Iredell and Johnston and Davie in the Constitutional Convention of 1788, as well as by his strong arguments against certain clauses of the Constitution. I regret to say that tradition sustains the charge against his private character as to his anticipating, in his mode of living, the practices of Brigham Young, but I find no tangible charge of corruption in office. I am fortunate in being able to give a contemporary newspaper account of his death, the most peculiar in all the history of the taking off of great men:

"In extreme old age he was placed in a chair in his yard under a shady tree. A red cap protected his bald pate from the flies. The humming of bees and the balmy sunshine brought a gentle slumber upon him and caused him to nod. A large turkey gobbler mistook his nod for a challenge to fight, and smote with heavy spur the old man's temple. Suddenly awakened by the blow and resounding flaps of hostile wings, the venerable Judge lost his balance, and fell heavily to the ground and was dead." The inhabitants of the valley of the Pee Dee will tell you that the gobbler was his murderer. My newspaper states that he was killed by the shock of the fall. Let each of you make his own deduction, according to his views of *potentia proxima* and *potentia remotissima*. The only Judge cognizant of the facts died before rendering a decision.

Samuel Ashe was undoubtedly a man of force, strong in intellect and will, though his taste did not lie in hard study of the law. He had the confidence of his contemporaries during his nineteen years of judicial service, and after his elevation to the executive chair. The wrangling with the bar and between the Judges, so often imputed to Spencer and Williams, were not imputed to him, though the charge that his hatred of Tories swerved him from perfect impartiality, in cases in which they were parties, may probably be true. Williams was in all likelihood the most unlearned of the three, but he has left behind him, especially among his neighbors in Granville in and around the village named in his honor, an unspotted reputation for integrity and charitable conduct.

These, our earliest judges, are entitled to the eminent distinction of contesting with Rhode Island the claim of being the first in the United States to decide that the courts have the power and duty to declare an act of the Legislature, which in their opinion is unconstitutional, to be null and void. The doctrine is so familiar to us, so universally acquiesced in, that it is difficult for us to realize that when it was first mooted, the Judges who had the courage to declare it were fiercely denounced as usurpers of power. Speight, afterwards Governor, voiced a common notion when he declared that "the

State was subject to three individuals, who united in their own persons the legislative and judicial power, which no monarch in England enjoys, which would be more despotic than the Roman Triumvirate and equally insufferable." In Rhode Island the Legislature refused to reëlect judges who decided an act contrary to their charter to be void. In Ohio, in 1807, judges who had made a similar decision were impeached, and a majority, but not two-thirds, voted to convict them. As I have mentioned, the action of the court was the foundation of one of the charges brought by Hay. He accused them with dispensing with a law—the "New Bern case." This was the case of *Bayard v. Singleton*, in ejectment, which our Judges had the nerve, as early as May Term, 1786, to refuse to dismiss, as ordered by act of Assembly, on affidavit of the defendant that he bought the land in suit under confiscation sale. The Judges were sustained eventually by public opinion. Iredell wrote a strong pamphlet vindicating the power of the judiciary. New York follows with a similar decision in 1791; South Carolina in 1792; Maryland in 1802; the Supreme Court of the United States, in *Marbury v. Madison*, in 1801.

The Constitution contemplates that, as in England, the office of Attorney-General should be of great importance. In his mode of election, and in the mandate as to adequate salaries, he is classed with the Governor and Supreme Judges. It is very doubtful whether the act of 1790, which provided for a Solicitor-General for one-half of the counties, and that of 1806, which reduced the Attorney-General to little better than a solicitor for the metropolitan circuit, were not in this respect unconstitutional. They were certainly extra-constitutional. The early Attorneys-General were equal if not superior to the Judges as lawyers. Waightstill Avery, who first held the office, was an accomplished and able man, the worthy ancestor of one of our present Judges. On his resignation from ill-health in 1779, James Iredell succeeded and served until 1782. His successor, Alfred Moore, resigned in 1790 in disgust at being required to surrender to Edward Jones, the Solicitor-General, half of the honors and emoluments of his office. The office lost none of its dignity by next devolving on the greatest criminal lawyer of that day, John Haywood.

We now resume the legislative history of the Supreme Court:

In 1790, the eight judicial districts were separated into ridings, the districts of Halifax, Edenton, New Bern, and Wilmington constituting the Eastern, and those of Morganton, Salisbury, Fayetteville, and Hillsborough constituting the Western riding. An additional Judge, Spruce McKay, whose advent was hailed by the lawyers deservedly with joy, was elected. Two judges in rotation, with the Attorney- or Solicitor-General, were assigned to hold the courts in each riding. This law was, as to the appellate functions of the court, worse than the old. The uniformity secured by having the same Judges for all the State was lost, and the miserable spectacle of diverse decisions by different supreme tribunals of the same question was not only possible but frequent. Delays from difference of opinions were unavoidable. For example, take the case of *Winstead v. Winstead*, 2 N. C., 243, where the question was whether levy on the land of husband and sale after death divests dower. The court was composed of Williams and Haywood. They agreed that the levy did not divest dower, but concluded to write their opinions afterwards. Williams failed to send his opinion, so the case was continued, and in October, 1796, came before McKay and Stone. McKay stated that he was not ready to decide the question. Afterwards, at another term, when Williams returned, the case came up again, and he was inclined to change his opinion; so the case was continued again. The final entry is that it went off the docket without

decision, whether because the widow Winstead died of old age does not appear. It was impossible for the ablest and best-balanced judges to give satisfaction under these adverse circumstances, so there was widespread anxiety to procure a change. For eight years of this period, too, these judges, as I have said, were authorized to express their opinion of the facts to the jury, and as there was no appeal from their decisions, their power was certainly inconsistent with free institutions. It was greater even than in Colonial times, because then the Court of Chancery, and appeal to the King in Council, were checks to unfair decisions.

The student of history sees repeated instances of God's evolving good out of what appeared at the time an unmixed evil. The corrupt conduct of one of our most trusted and beloved public servants proved a partial remedy for our ruinously inefficient judicial systems.

It was found, amid universal horror, that James Glasgow, a Revolutionary patriot, so popular that a county had been called in his honor, Secretary of State since the adoption of the Constitution, by annual election, had been for years confederating with John and Martin Armstrong and others, in cheating the State by the issue of fraudulent land warrants.

To secure the punishment of these criminals, the General Assembly, probably deeming it more convenient to have the trial at the place where was the Secretary's office, was induced to create an extraordinary court. It was to consist of at least two of the Judges, who were to meet at Raleigh for the purpose of trying this prosecution. While so convened they were authorized to hear appeal of causes accumulated in the district courts. They were to meet twice a year, and to sit not exceeding ten days at each term. Both the Attorney- and Solicitor-General were ordered to prosecute, and a special agent was authorized to prepare and arrange the evidence and attend the trial, the solitary instance in our history of the employment of a public "attorney," charged with the functions of an English "attorney," as distinguished from the barrister. The act was to expire at the close of the session of the General Assembly next after June 10, 1802.

Notwithstanding the fact that Judge Haywood, moved by a fee of $1,000, which was of seductive magnitude in that economical period, resigned his judgeship to appear as counsel for the defense, the accused were convicted. We find the name of Greene replacing that of Glasgow in our list of counties, and the black lines of expulsion drawn around his name on the books of the venerable order of Masons.

The General Assembly were persuaded to grant the continuance for three years longer of such part of the act as provided for the meeting of the Judges for hearing appeals, and to give the court a name, viz., the "Court of Conference." The suspicion that the lawyers were pushing this measure for their own emolument, endangering the passage of the bill, the astounding provision was inserted, as a rider, that "no attorney shall be allowed to speak or admitted as counsel in the aforesaid court." I have called your attention to the fact that a similar ebullition of vulgar prejudice may likewise be found in the Fundamental Constitutions, drawn by the great philosopher John Locke, the ignorant legislators and the learned metaphysician both guilty of the extreme folly, first, of endeavoring to shut out light from the minds of the Judges, and, secondly, of supposing that such childish provisions could outwit the lawyers. I hope this august assembly will pardon me for saying that this "Locke on the human understanding" was exceedingly weak.

By the Act of 1804, the Court was made a permanent court of record, the Judges were ordered to reduce their opinions to writing, and to deliver the same *viva voce* in open court.

In the following year the name was changed to that contemplated by the Constitution, the Supreme Court. An executive officer, the Sheriff of Wake, was given to it and the limit to the duration of the term was removed.

In 1806, a great change was made in the Supreme Court system, for the purpose of relieving the people of long journeys for the purpose of attending to their court business. In modern days we cannot realize the evils in this respect under which our ancestors suffered. My old grandmother, who was married in 1788, said to me: "Talk about your bridal tours—in my day we had none. The only bridal tour I ever heard of was riding to the nearest judge to sign away the wife's land." Brides whose honeymoon devotion was equal to the sacrifice, were forced to traverse many scores of miles to reach a judge or a county court. Superior Courts, by the new law, were to be semi-annually held in each county. The counties were grouped into six circuits, called also ridings, but the judges were to ride in rotation. In other words, the existing system was adopted. Two new judges were created and four new solicitors. The Supreme Court now consisted of six, but two continued to be a quorum. The preamble of the act asserts that the old system caused such delays as often amounted to denial of justice, and the change was a great relief.

As the Judges for the last six years had not elaborated their opinions in such manner as met the approval of the profession, a law was passed in 1810 requiring them to write out their opinions "at full length," which mandate many young students of the law think was in after years occasionally obeyed with too much conscientiousness. For this additional labor they were to be paid £50 ($100) per annum. They were at the same time to elect out of their number a Chief Justice. John Louis Taylor was the first and only Judge that held this honorable office. The Governor was required to procure for the Court a seal, with suitable devices and motto. Any party to a suit in the Superior Court was given right to appeal to the Supreme Court on questions of law.

For fear that the requisitions as to the opinions would not be carried into effect, in the following year it was provided, in substance, that the decisions of the Court should have no validity until the opinions should be delivered publicly and in open court, stating at length the ground of argument upon which the opinions are founded and supported, and also copies of the same delivered to the Clerk.

This completes the legislation prior to the creation of the present organization of the Supreme Court. Although the meeting of the Judges at the seat of government to hear appeals was a great improvement on the preceding plan, it was impracticable to secure best results, while the Supreme Court was held by any two of six Judges, coming to their labors after long journeying over horrible roads at the rate of three or four miles an hour, and yearning for a needed rest at home. Some of those Judges were exceedingly able lawyers. Five of them—Taylor, Hall, Henderson, Ruffin, and Daniel—were eminent members of the new Court. Besides these there were others worthy to sit with them; for example, Alfred Moore, afterwards appointed to the Supreme Bench of the United States, and Henry Seawell, one of the strongest criminal lawyers we ever had. Duncan Cameron, of large brain, who, abandoning law to be president of the chief bank of the State, became one of the most astute

financiers of the land; David Stone, called from the bench to be Governor and United States Senator. But they did not have the opportunity for profound and uninterrupted devotion to the study of the principles of the cases before them, and that undivided responsibility which stimulates to highest exertions.

I have been somewhat minute in my notices of Ashe, Spencer, and Williams, because they were the first Judges, and because they sat together for seventeen years of the most important period of our history, ending five years after the adoption of the Federal Constitution. It would be a grateful task to give similar notices of their successors. Even the anecdotes of them which have been handed down should be recorded; such, for example, as that of the simple-minded Lowrie, from the foot of the Blue Ridge, on his first trip to Edenton, stopping a lawyer in his argument, because, from his seat on the bench, he could look out on the bay and see the behavior of two vessels in a gale of wind. "Stop, Mr. Attorney, this Court sees one ship going one way and another going right opposite in the same wind and the Court does not understand it." And when taken on a visit to one of the vessels, stamping his foot on deck, with some alarm, saying, "I declare, men, I believe she's hollow." But I must content myself with giving, in the appendix, a list of the Judges, with the dates of the beginning and ending of their terms.

The year 1818 is the great epoch in the history of the Supreme Court. When we consider the stern economy prevalent in the Legislature of that day, and the general prejudice against enlarging the official class, especially when lawyers only were to be visibly benefited, the creation of these new Judges, at an aggregate expense of $7,500, to perform their duties at a place remote from the constituents of the members, is most surprising, and shows that there were very enlightened and influential men in the Legislature in 1818.

I find in that body J. J. McKay of Bladen, Zebulon Baird of Buncombe, M. J. Kenan of Sampson, R. M. Saunders and Bedford Brown of Caswell, James Iredell the younger of Chowan, John Stanly, Wm. Gaston, and Vine Allen of Craven, John Winslow of Cumberland, Louis D. Wilson of Edgecombe, John B. Baker of Gates, David F. Caldwell of Iredell, Simmons J. Baker of Martin, Wm. B. Meares of New Hanover, A. D. Murphey, James Mebane, and Willie P. Mangum of Orange, Chas. Fisher of Rowan, and other strong men, a goodly array of leaders of the people. Their meeting at this time was not the result of accident. It was a time when there was wild excitement about internal improvements. The great Erie Canal was in progress. The time was approaching when Governor DeWitt Clinton, with a company of great officials, traveled in a canal boat from Buffalo to New York, and amid thunders of cannon poured into the ocean water brought from Lake Erie. The spirit of canal and river improvements spread like a prairie fire in a windstorm. In North Carolina there were dreams of navigating our streams from near their sources to the ocean. Raleigh was to receive the vessels of Pamlico Sound up Neuse River and Walnut Creek to the crossing of Rocky Branch by the Fayetteville road. Boats were to ascend and descend the Cape Fear and Deep Rivers to the Randolph hills. The produce of the Yadkin Valley, from the foot of Blowing Rock, was to cross over by canal to Deep River and be exported from Wilmington, and the puffing of steamboats was to echo from the mountains which look down on the headwaters of the Catawba and the Broad. In vain a Chatham member vowed that in dry times a terrapin could carry on his back a sack of flour perfectly dry down Deep and Cape Fear rivers to Fayetteville. All warnings were unheeded. Civil Engineer Fulton was brought from Scotland at a salary of $6,000 to make

Asheville, Raleigh, Morganton, Wilkesboro, Rutherfordton, Gaston, and Louisburg seaport towns. The western people, cut off by long roads of mud and jagged rocks, clamored for State aid. The eastern people, having by the old Constitution the Legislature by two-thirds majority in both branches, most of them having easy access to markets, sat heavily on the treasury box, and hence provoked a demand for a change of the Constitution. This eastern and western question aroused the fiercest passions and sent to the Legislature the ablest men.

This body of enlightened representatives, the General Assembly of 1818, by the triumphant vote of 42 to 16 in the Senate, and 73 to 53 in the House, gave to the State the priceless blessing of a Supreme Court, and manned it with excellent Judges. The constitutional mode of voting for officers was, until 1835, by ballot. John Louis Taylor, Leonard Henderson, John Hall, Archibald D. Murphey, Henry Seawell, and Bartlett Yancey were placed in nomination; Henderson and Hall were elected on the first ballot, and Taylor on the second. The great lawyer, Archibald Henderson, of Rowan, was nominated, but withdrawn, as he was unwilling to come in competition with his brother.

The measure was strongly recommended by Governor Branch, who gave his personal observation of the evils of the old system.

The creation of the Supreme Court was a wide departure from the old English system, and from that of our general government, in that its Judges do not try cases in the courts below. The English system adopted in 1873 is, in great part, similar to ours. It is easy to see that Congress will adopt our plan before many years. It was feared by many that the efficiency of our Judges would be impaired by not having their minds kept alert by occasional friction in actively contested jury trials. These fears have not been realized. Amid all the changes and excitements, in peace and war, for seventy years, the Court has, as a rule, with only an occasional transient exception, possessed the full confidence of the people. From the beginning, its authority has been extraordinary, being accepted with rare questioning, not only by this State, but by the tribunals of other States. Under the old system there were very able Judges. At one time on the appellate bench we had men of such uncommon strength as Taylor, Hall, Seawell, Ruffin, Daniel. At another period sat together Taylor, Hall, Seawell, Cameron—an aggregate of talent and learning equal to the best bench of any State. But there was not that regularity of attendance, that continuity of work, that sense of individual responsibility which leads to best results. Under the new organization the great principle of division of labor, which has done so much in modern times for promotion of science and the arts, was adopted for our judiciary. The new Judges were given salaries ample to enable them to discard all other pursuits and devote themselves solely to the final settlement of disputed questions involving the lives, the fortunes, the happiness of the people. This grand and sacred trust could not be shirked or shared with others; they had every incentive and full opportunity and leisure to make themselves experts in their profession, and to labor continuously to acquire new learning and greater wisdom. They were placed on high in sight of all the people. The ablest men, with sharp and critical eyes, watched their actions, ready to detect a failure or reward success. They had an opportunity seldom vouchsafed to men to win the admiration and gratitude of their fellow citizens by intelligent and faithful work. On the other hand, if, by ignorance or rash spirit of innovation, they should lose the public confidence, the representatives of the people, who under the Constitution of 1776, had full power over them, would return to the old system, to their eternal disgrace.

It was fortunate for the new experiment that, owing to miry and rocky roads, infrequent bridges and rough ferries over dangerous streams, and long distances from the seat of government, the members of the bar could not generally follow up their cases and argue them before the new tribunal. A few eminent lawyers found it profitable to devote most of their time specially to this practice. The spectacle, so often seen in these days of rapid transit, of counsel from a village where there is no law library, hurrying into the courtroom, after a restless night on the cars, beginning his speech by apologies for want of preparation, was never seen in the early days of the Court. The Nestor of the Bar and distinguished ex-member of the Court (Judge Reade), once satirized this practice with that peculiar cayenne pepper pungency which so often made ignorant pertness of the bar flinch and false witnesses quail, and even pierced to the marrow a presumptuous "D.D." who, in a commencement address, assailed the honor of our profession. The Supreme Court bar, composed of such lawyers as Peter Brown, Moses Mordecai, Wm. Gaston, Geo. E. Badger, Thomas Ruffin the elder, Archibald D. Murphey, Archibald Henderson, Henry Seawell, Gavin Hogg, Duncan Cameron, Joseph Wilson, James Martin, prepared with careful study their arguments, cogent in logic and mighty in language, and fortified by precedent. The Judges, aided by this presentation of all the strength of both sides of the case, deliberated with patient care, decided with conscientious desire for the truth, and wrote their opinions elaborately and clearly, for the guidance and instruction of the profession. Such have been the uniform ability, learning, and integrity of the members of the Court from the beginning, their freedom, as a rule, from partisan bias, that the people have, as we have seen, with wonderful unanimity, made it part of the fundamental law, one of the corner stones which support our fabric of government, one of the main props of our social system.

I will not describe in detail the constitution of the Court. That can be found in the Constitution of the State and the code of laws. It is, however, a part of my duty to chronicle the principal changes from time to time in its functions.

The number of the Judges continued to be three until the Constitution of 1868 increased it to five. The Convention of 1875 reduced it again to three. Experience demonstrated that the business of the Court, settling the litigations of a million and a half of people, was vastly greater than existed for six hundred thousand people in 1818. It was and is a common belief that the late Justice Ashe had his life shortened by labors too arduous for his constitution. By an extraordinary majority, the number, in 1888, was by constitutional amendment increased again to five.

Another change is in the mode of appointment of the Chief Justice. Until 1868 the designation of the Judge who was to perform the honorary function of presiding was left to the Judges themselves. From the beginning the safe rule was adopted, that the oldest in office should be chief. Henderson and Hall naturally yielded to Taylor, who had been for eight years Chief Justice with entire acceptability over the old court. When Ruffin, after serving as Chief Justice for nineteen years, resigned and came again to the bench in 1858, after the death of Chief Justice Nash, some were of opinion that he would be allowed to resume his old headship, but Pearson's claim to it under the unbroken rule was allowed without objection. By the Constitution of 1868 the appointment of the Chief Justice is vested in the people. The Constitution of 1876 continues the provision, as well as the designation of the associates as "justices" instead of "judges."

The salaries of the Judges are exactly as fixed in 1818. Men have come and men have gone; population has increased threefold; periods of prosperity have been followed by awful financial crashes and prolonged depressions in industrial efforts; near three thousand miles of railway have permeated our land, annihilating distance and economizing time, like the genii of Oriental stories on their magic tapestry; the men of the mountains and the men of the seaboard have become next-door neighbors; markets, once possible of access only over roads almost impassable, and many days of toilsome and dangerous journeying, have been brought to our doors; the cultivated land has vastly increased in area; factories are humming, and mines are being dug; yet there stand the same old figures, 2,500, as if engraved on adamant, unchanged, though representing much diminished purchasing power. The General Assembly, to all appeals to their liberality, make the answer that the salary is sufficient to attract the best legal talent and experience; and it is no flattery in me to say that the answer cannot be "traversed," however we can "confess and avoid" it.

When I say that the salary has not been advanced for seventy years, I am not unaware that in the dark days of our great Civil War it was nominally raised. For the year 1864 it was $3,000 per annum, and after January, 1865, it was ordered to be $7,000 per annum, but it was payable, by the terms of the law, in Confederate currency, and thus, in effect, in defiance of the Constitution, it was greatly lowered. Applying the scale of depreciation, we find that the salary for 1862 was $1,354.15; for 1863, $283.20; for 1864, only $117; and for the first quarter of 1865, the installment of $1,750 dwindled down to $17.50. At the end of 1861, it would buy 320 barrels of flour; at the end of 1862, 250 barrels; at the end of 1863, 30 barrels; at the end of 1864, 17½ barrels. The installment of $1,750, payable 1 April, 1865, would buy 3 barrels. The steadfastness and pluck with which the Judges performed their duties with this meager allowance are worthy of all praise.

The time of meeting of the Court has been several times altered. The first term began on 1 January, 1819, and after that on 20 May and 20 November. This was the next year changed to the third Monday in June and the last Monday in December. Soon after, the second Monday in June was substituted for the third, and these continued to be the days of the opening of the Court until the first Mondays of January and July were prescribed in the Constitution of 1868. The Constitution of 1876 omits this provision, and the General Assembly of 1881 fixed the openings on the first Mondays of February and October, as at present. In 1846 the lawyers of the western part of the State induced the General Assembly to order a term of the Court to be held in Morganton on the first Monday in August for all cases in the counties west of Stokes, Davidson, Union, Stanly, and Montgomery, and for cases from these counties, with consent of both parties. The experiment was not satisfactory to the Court or to the profession. Owing to a want of a law library, "Morganton decisions," as they were called, were regarded as less certainly sound than those at Raleigh. The Constitution of 1868 fixed the sessions of the Court "at the seat of government"; that of 1876 leaves the sessions at "the city of Raleigh, until otherwise ordered by the General Assembly."

The Judges of the Court, under the Constitution of 1776, were to hold office during good behavior, and were elected by the General Assembly. These provisions were not changed in 1835. Vacancies during the recess of the General Assembly were filled by the Governor and Council, until the end of the next session. Under the Constitution of 1868 and 1876, the election is given to the

people, the term of office is eight years, and vacancies are filled by the Governor alone, until the next general election. What will be the ultimate result of periodical dependence on the will of the people, time will show. One effect is obvious. All the Judges as a rule belong to the same political party, whereas the old Court had generally representatives of the two leading parties. It is beyond my province to discuss the propriety of these great changes. Our ancestors in Colonial days yearned and struggled for the life tenure as necessary for the independence of the Court. Whether tenure at the will of the people will prove to be better than was the tenure at the will of the Crown or the Governor, experience will decide. And whether the transfer of the election of the Judges from the General Assembly practically to the nominating conventions will be an evil must be left to the future.

By the supplemental act of 1818, if a Judge of the Supreme Court should be incompetent to decide a case on account of personal interest in the event, or some other sufficient reason, the Governor was authorized to give a special appointment to a Judge of the Superior Court, requiring him to sit with the other Judges *pro hac vice*. Under this law, Judge Murphey acted at June Term, 1820, in place of Judge Henderson, who had been counsel in important cases before the Court. The validity of the will of Moses Griffin, under which the Griffin Free School in New Bern was established, was maintained by this Court. The law was repealed in 1821.

Since 1834 two Judges have been authorized to hold the Court, "in case one of the Judges is disabled from sickness or other inevitable cause," and this continues to be the law in substance, The Code changing "sickness" to "illness," for what reason I know not. It has been the practice to regard the death of a Judge as a disability. This is in the spirit of its act, though hardly written in its letter, as at death the judgeship ceases and there is no Judge who can be the subject of disability. An interesting question would arise if a Judge should, without any inevitable cause, but from sheer obstinate neglect of duty, fail to take his seat. It would seem that the other Judges must await the removal of the offender by impeachment, or possibly two-thirds of both houses of the General Assembly might regard such contumacious refusal proof of "mental inability." I suppose, of course, this law will be amended so as to require three instead of two out of the five Justices to be present in order to constitute a court.

It was not until 1808 that there was any attempt made by law to furnish the people with the decisions of their highest legal tribunal. In that year the Clerk of the Supreme Court was directed to furnish the Secretary of State a report of the decisions of the preceding four years, and annually those made thereafter. There was no appropriation for the cost of publication, but advertisement was to be made for a printer to do the work at his own expense in consideration of the copyright for seven years, the State to have sixty-six copies free. In 1813, the same niggardly offer was made to the Clerk of the Court, the copyright being extended to the time granted by the laws of the United States. I think these laws led to no result, the reports of that day being published on private account.

In 1818 the Supreme Court was authorized to appoint a Reporter at a salary of $500, on condition he should furnish the State, free of charge, eighty copies of the reports, and the counties sixty-two copies. I presume, though it is not expressly so said, that he was entitled to the copyright. Afterwards he was allowed to print 101 copies for the State and counties at the public expense, and was allowed a salary of $300, and the copyright. In 1852 his salary was

raised to $600, and the number of copies for the State increased, so as to supply the libraries of the different States and Territories, and a few others. In 1871 the office of Reporter was abolished, and the duties and emoluments given to the Attorney-General. Afterwards the salary was increased to $1,000, and the State assumed all the expense of printing, distributing, and selling the reports in excess of those donated, and covered into the treasury the receipts of sales, less five per cent commission for selling. The office of Reporter has always been considered a very honorable one, and has been much sought after by aspiring lawyers. The list of Reporters in the appendix shows the truth of this.

Of these, Murphey was one of the most energetic and useful men the State ever had in legislative and judicial capacities. He was an enlightened laborer for public education and internal improvements. He collected valuable historical material for writing a history of the State, for the expenses of which he was authorized by law to raise $15,000 by a lottery, but it was not successful. His collections passed into the hands of President Swain, and much of them may be found in the issues of the *University Magazine* published in his day.

Dr. Hawks gave up a brilliant career at the bar for the Christian ministry, became an eminent divine, and an author of valuable historical works. Devereux was forced to surrender a large practice in order to take charge of great estates which he had inherited. Ruffin and Battle became Judges of the Supreme Court. Badger's great career as a lawyer, Judge, Secretary of the Navy, United States Senator, is well known. James Iredell the younger had been Speaker of the House, Judge, Governor, and Senator of the United States. Perrin Busbee was an able lawyer, one of the leaders of the Democratic Party, and in the line of promotion to the highest offices. Jones was a sound lawyer, and a popular Whig. Winston, to be distinguished from Patrick H. Winston, of Bertie, was regarded as one of the most learned in law and history in his day. Phillips had been Speaker of the House of Commons, refused the tender of a Supreme Court judgeship, and was afterwards Solicitor-General of the United States. McCorkle was a big-brained lawyer. I will not describe Shipp, Hargrove, Kenan, and Davidson, first, because they are still alive, and, secondly, they held their post as Reporters by virtue of holding the higher office of Attorney-General. This I will say, however, that if they had not towered high as lawyers, among the leaders of their respective parties, they would not have been chosen for the highest nonjudicial law office in the State.

The wonderful improvement in the style of the printed volumes was begun by Attorney-General Kenan.

The Clerks of the Supreme Court hold a most responsible office. Questions of great complexity are frequently referred to them. The duties require an excellent memory and business head, good knowledge of the law, great accuracy, perfect integrity, untiring patience, and unfailing courtesy.

The Court has been fortunate in its choice of officers. Their names are: Archibald D. Murphey, Wm. Robards, Edmund B. Freeman, Wm. H. Bagley, Thos. S. Kenan (the incumbent). The Clerk at Morganton was Jas. R. Dodge.

While they all met the approval of the Court, for their intelligence and fidelity, I notice specially Edmund B. Freeman, as having been identified with the Court for a third of a century. The following lines by Mrs. Mary Bayard Clarke, *though not historically perfectly accurate*, are very touching:

"The old Clerk sits in his office chair,
And his head is white as snow;
His sight is dim and his hearing dull,
And his step is weak and slow;
But his heart is stout and his mind is clear
As he copies each decree,
And he smiles and says as the Judges pass,
'Tis the last court I shall see.'
But he lingers on till his work is done,
To pass with the old *regime*,
When he lays his pen with a smile aside,
To stand at the Bar Supreme;
For the old Clerk dies with the Court he served
For forty years save three;
And breathes his last as the Judges meet
To sign their last decree."

The Court was authorized to appoint a Marshal in 1841. Previous to that time the Sheriff of Wake was its executive officer at the term held in Raleigh. The Sheriff of Burke was always its officer at the Morganton term. The names of the Marshals were: J. T. C. Wyatt, James Litchford, David A. Wicker, Robert H. Bradley (the incumbent).

It may interest you to know that Mr. Litchford, when pursuing, in early life, his business as tailor, had an apprentice boy, who, in company with several companions, threw stones at the house of one who had offended them. Dreading prosecution, he left Raleigh for a western home. In 1867 he returned as President of the United States. It was Andrew Johnson.

There have been important changes in the jurisdiction of the Court from time to time.

By the Act of 1709 the Court therein organized had jurisdiction of questions of law or equity which any Judge on the circuit was unwilling to decide, or on which there was a disagreement between the Judges.

By Act of 1810, any party dissatisfied with the ruling of the Superior Court had a right to remove it to the Supreme Court. By the Act of 1818 the Judges were to have all the powers of the Superior Court Judges, except that of holding a Superior Court. Any party could appeal from the final judgment, sentence, or decree of the Superior Court on giving security to abide the judgment or decree of the Supreme Court, which was authorized to give such judgment as should appear to them right in law, to be rendered on inspection of the whole record. Equity cases could be removed to the Supreme Court for hearing, upon sufficient cause appearing, by affidavit or otherwise, showing that such removal was required for purposes of justice, but no parol evidence was received before the Court, or any jury impaneled to try issues, except witnesses to prove exhibits or other documents. Under this provision it became customary to remove all important equity causes, so that the Superior Court Judge escaped the responsibility of giving any opinion in the matter. The Constitution of 1868 and that of 1876 put a stop to these proceedings by confining the jurisdiction of the Supreme Court to appeals on matters of law or legal inference. In 1830 original and exclusive jurisdiction was given to this Court for vacation and repeal of grants and letters patent, for fraud, false suggestion, or other cause, but this power was also swept away by the same constitutional provision. The provision of the Constitution giving to the Court original jurisdiction to hear claims against the State, and to report

their decisions to the General Assembly, has been construed by the Court to embrace only cases involving questions of law.

These are the principal changes made, specially by law, in the functions of the Court. But there was a mighty mass of changes in the character of their work thrown on the Judges, by the Constitution of 1868, and the transplanting to North Carolina the Code of Civil Procedure, first elaborated in New York. The Constitution of 1776, even as amended in 1835, was founded on the assumption that the agents of the people, the General Assembly, would be honest and have such stake in the soil that they could be entrusted with powers almost unlimited. They could tax any subject to any amount, and exempt any subject from any tax at all. They had boundless right to pledge the State credit. They had, as I have shown, vast powers in the control of the other departments of government. They had full discretion as to nearly all subjects of legislation.

The Constitution ratified in 1876, which is merely an amendment of that of 1868, is founded on the assumption that the representatives may be untrustworthy. Hence, the executive and judicial departments are made really independent of the legislative. Hence, there are limitations on the taxing power, and on the power of pledging the State credit. Hence, are made a part of the fundamental law numerous provisions, declaring what the General Assembly must do, what it may do, and what it may or may not do. Many provisions seem properly to belong to the statute books, to be modified or amended whenever the interests of the people require.

The General Assembly of 1868, being composed largely of the dominating spirits of the Constitution of that year, adopted the Code of Civil Procedure, framed to carry into effect the modern innovations in judicial proceedings, without attempting to harmonize them with the former habits of our people. Many of the members of the General Assembly, accustomed to the freedom allowed by the old Constitution, framed and voted for enactments without such careful compliance with the minute provisions of the new instrument as Judges are bound to exercise.

Moreover, the amendments to the Constitution of the United States, recently adopted, contain guaranties of privileges and immunities to the freedmen which, from lifetime experience of different relations, it was difficult to understand and appreciate thoroughly, and which it required the Supreme Court of the United States to elucidate and settle.

Then, too, the difference of opinion between President Johnson and Congress as to their respective powers in restoring the States which attempted secession, the subversion of the State government set in motion by the authority of the President, and the substitution of one under authority of acts passed by Congress, led to discussions and recriminations, alienations, and discord, and in certain localities even to strife.

All these innovations and experiments, and political and constitutional difficulties, threw vast responsibilities and peculiar perplexities on the Court, whose action, while not escaping criticism, was, in the main, conservative and wise. The Judges, trained under the old Constitution and legal procedure, have not obstinately impeded the legislative will, however unpalatable. As interpreted by them and amended by the Assembly, the changes seem acceptable to the lawyers, whose practice has been mainly under them. The decisions of the Court on questions growing out of the reconstruction laws have been sustained by the highest tribunal of the land and acquiesced in by all. Neither the people nor the Assembly have resented the frequent declaration

of unconstitutionality of legislative acts. On the contrary, the people applauded some of these decisions as preserving them from burdensome taxation.

Another ordeal in the history of the Court, which few tribunals ever pass through unscathed in character, was the Civil War. I think it may be said of our Supreme Court that it did not on the one hand so share in the prevailing excitement as to arrest improperly the laws in aid of the war power, or on the other to embarrass the military authorities by unreasonable interference. In defiance of unpopularity and even threats, when the most desperate exertions were put forth in the unequal contest, writs of *habeas corpus* issued by the Judges were executed in camps within the sound of the enemy's cannon. And so decisions in favor of military powers of the Confederate Government are such as have been approved by the judicial authorities in favor of the military powers of the United States. The Constitution of the Confederacy on this subject is identical with that of the United States.

I witnessed an interesting scene in the Convention of the reunited Episcopal Church, held in Philadelphia in October, 1865. A proposition was made to petition Congress to exempt candidates for the ministry from military service in future wars, and it seemed to meet with favor. One of the members from the South, a Judge of the Supreme Court of North Carolina, arose and opposed the resolution in strong language and convincing reasoning, sustaining the right of the government in times of war to the service of all its citizens, and their duty to render such service. The speech made a great impression on account of its being from a Southern man, and also because of the evident familiarity of the speaker with the whole question. It was telegraphed to the leading papers of the North. The resolution was killed at once. The speaker was Judge Battle, giving his carefully prepared opinion on the substitute case of *Gatlin v. Walton*, 60 N. C., 325, in which it was decided that Congress can conscript a man who has furnished a substitute under a former law; that one Congress cannot bind a subsequent Congress, or even itself, from calling out, if necessary, all the able-bodied men of the land, and is the sole judge of such necessity.

That the Court has given satisfaction, on the whole, to the profession and the people, is shown, as I have stated, by the strong hold it has upon their respect and confidence. It has been diligent in expounding the principles of the common law and applying them to the facts of the cases before them. When the principles of the common law or of equity, as established in England, are not suited to the condition of a new and unsettled country, it has changed them under the doctrine, *cessante ratione, cessat et ipsa lex.*

It would be most interesting and profitable to show, in detail, the various departures from English precedents, and the causes therefor, such as "waste" and "pin-money trust," "wife's equity for a settlement," "part performances," "*cy pres*," "purchasers seeing to the application of purchase money," and so on. It would be equally interesting, but presumptive, perhaps, to discuss, whether the Court might not advantageously have refused in other cases to follow English precedents, which they admitted to be bad law; but these inquiries belong, more properly, to the history of the law than of the Court. Certainly, I have not time to go into them now.

In the appendix will be found a complete list of the Judges since 1818, grouped into four periods, the first ending with the vacation of all the offices of the State in April, 1865; the second ending with the close of the provisional government inaugurated by President Johnson 1 July, 1868; the third ending with 31 December, 1878, during which there were five Judges; the fourth coming down to 1 January, 1889, during which period there were three Judges.

I will give short notices of those of the Judges who have passed away, more particularly of those who were longest members of the Court and had most to do in moulding its character. I begin, of course, with the first Chief Justice, John Louis Taylor.

It would be difficult to imagine how a man could have had a better training for the position of Chief Justice than John Louis Taylor. He was at his election forty-nine years old; was educated at the College of William and Mary, an institution of high character in those days, the college of Jefferson, Madison, Monroe, Winfield Scott, and Bishop Ravenscroft, and above all of Chief Justice Marshall. He was one of the leaders of the bars of Fayetteville and New Bern, until elevated to the Bench in 1798. He rode the circuit for twenty years, and was a faithful attendant on the Court of Conference. As already stated, he was made Chief Justice of the Supreme Court of 1810-18. He showed his devotion to his profession by publishing, in 1802, reports of cases determined in the Superior Courts of North Carolina, and in 1814 two volumes of "biographical sketches of eminent judges, opinions of American and foreign jurists, and additional reports of cases determined in our courts," under the title of the "North Carolina Law Repository," and afterwards a third work, containing reports of cases adjudged in the Supreme Court of North Carolina from 1816 to 1818. A charge to the grand jury of Edgecombe was of such excellence as to be published at the request of that body. In conjunction with Henry Potter and Bartlett Yancey, he, at the request of the General Assembly, revised the statute laws of the State and enumerated the statutes of Great Britain in force in North Carolina. In early life he had been an active member of the General Assembly. His judicial labors had been eminently satisfactory. His opinions showed that he possessed a style not only clear but eloquent. His literary taste was conspicuous; his manners elegant and winning.

John Hall, of Warrenton, was by two years the senior of Taylor. Like him, he was trained at William and Mary College. Unlike him, however, he did not have the gifts for rapid success at the bar. He won his way by persevering industry and faithfulness to duty, by constant study, and strictest integrity. He was elevated to the Bench in 1800, and held his place continuously until called to the new Supreme Court. He was not brilliant, but he was eminently a safe lawyer. He had a clear vision of the true points of a case, and had a widespread reputation for good sense. His language was plain, but clear and forcible. He was forced by disease to resign a year before his death.

Leonard Henderson, of Granville County, son of Judge Richard Henderson, of Colonial times, was three years younger than Taylor. He was, some time in early manhood, Clerk of the Court for the district of Hillsboro, an office of considerable dignity. His reputation as a sound and able lawyer, and his popular manners, led to his election as Judge in 1808. During his eight years' service, he gave eminent satisfaction. The public favor toward him and Hall was shown by his election to the new Court on the first ballot over Taylor, Seawell, Murphey, and Yancey, among the ablest lawyers of that period. He was Chief Justice from 1829 to his death in 1833.

Chief Justice Henderson had a vigorous, self-reliant mind, well stored with the principles of the law. He brought the questions before him to the test of sound reasoning. He was a conscientious seeker for the truth, and had great weight as an upright and wise Judge; but in culture and genius, and love of,

and capacity for, labor, was decidedly inferior to his successor. His genial manners and kindly temper gained him great favor with the public.

When these great men one by one passed away, leaving legacies of sound opinions for the better understanding of the law, the Court had a good measure of popular favor. It was raised to still loftier fame by their immediate successors. Providence vouchsafed to us judges of equal integrity, of still greater ability, and a longer term for efficient work. For sixteen years—1832 to 1848—Ruffin and Daniel sat together on the bench; for eleven years of this time Gaston was their coadjutor. No State of the Union, perhaps, not even the United States, ever had a superior Bench; few ever had its equal. At home and abroad their decisions, as a rule, had the weight of established and unquestioned law.

Of the three the Chief Justice was, undoubtedly, the ablest lawyer. He was in his prime, forty-six years old, when he entered on his great judicial career. He was a graduate of Princeton. He had an exceedingly strong mind, untiring industry, and uncommon powers of labor. When interested in great cases he would work all night, without dropping his pen, and be none the worse in health for it. When at the bar, traveling by night, he attended the courts of Person and Granville and the Circuit Court at Raleigh in the same week, a mule, instead of a locomotive engine, being his motive power. He read much and retained all he read. He had been a Judge in 1816, and again of the Superior Court in 1825. He had, as president, extricated the old State Bank from its troubles. He had experience in the General Assembly, and presided as Speaker of the House. In all these positions it was his habit to treat thoroughly and exhaustingly every subject which came before him. His opinions are elaborate and learned treatises on the questions involved. What Judge Pearson said of his opinion in *Hoke v. Henderson*, "that mine from which so much rich ore has been dug," may with equal truth be said of hundreds of others. Hard cases were not quicksands of the law to him. With inexorable logic he carried out the principles of the law, in criminal and civil cases, without being swerved by appeals for relaxation on grounds of hardship. Without hesitation he joined Gaston in sending Madison Johnson to the gallows, on the doctrine that preëxisting malice is presumed to be continued down to the killing, notwithstanding intervening provocation, although many of the ablest members of the bar agreed with Daniel's dissenting opinion. He never doubted, in excluding evidence of the violent character of the deceased, in Barfield's trial for murder, although Battle's dissenting opinion has been since recognized as good law. I saw him in the Convention of 1861, fiercely indignant at the proposition to abolish corporal punishment. His reply to the argument that it was an outrage to whip a free man, was with bitter emphasis: "Whip a free man! No! Whip a rogue! WHIP A ROGUE!" I saw him sentence a young white fellow, of eighteen years old, in Alamance County Court, for stealing money out of a dwelling house. "Young man, in consideration of your youth, the Court will deal leniently with you, in the hope that you will reform and lead a better life." I watched the boy's face. It brightened as he heard these words, but it was only for a moment, for the Chief Justice added: "Sheriff, take him to the whipping-post and give him thirty-nine lashes on the bare back." He was not a cruel man, but the doctrine, *justitia fiat, ruat cœlum*, was a reality to him. For twenty-three years he was, as the presiding officer of the Court, the greatest factor in moulding the law of the State. After resigning his post, at the age of sixty-five, he was, six years afterwards, induced by an almost unanimous vote of the

General Assembly, again to take a seat on the Bench, but in eighteen months he finally retired to the charge of his farm, complying, however, with occasional calls for his services on critical occasions.

Joseph John Daniel, of Halifax, was likewise in the prime of life, about the age of the Chief Justice. He had a large brain, but lacked ambition. To the business in hand he addressed himself with conscientious industry and rare ability. But he cared nothing for winning reputation by exhaustive discussions of collateral points not before the Court. He wrote not treatises on the general subject. He had a wonderful memory, probably a more extensive and accurate knowledge of history, especially of the law, than any man in the State, but he made no display and left no written record of it. His early training was at our State University. His opinions are short, but clear and strong and lucid, distinguished for lucidity and terseness. In private life he was singularly unostentatious and charitable and generous. He had only one fault, a habit contracted in early days. Uncle Toby's recording angel was often called on to blot out the careless words which the accusing spirit carried up to Heaven's chancery. I give one case in point to relieve the tedium of my narrative. He was once in church, at which he was a regular attendant, in company with Judge Ruffin, when the inexorable collector, with the inevitable plate, came to his seat. He felt in all his pockets but could only find a $5 gold piece. "Ruffin, lend me a quarter." The Chief Justice shook his head. "Lend me a half." A second shake intimated that this coin could not be had. "Lend me a dollar," and when his companion for the third time expressed his inability to supply his wants, he slammed the gold piece into the plate, saying in desperation, "D——n you, go!"

Notwithstanding this failing, Daniel was conspicuous for his obedience to the "Golden Rule." He is said not to have had any eloquence as an advocate, but made his way by learning and diligence.

William Gaston, the third member of the Court and the oldest of the three, although he had not the reputation of Ruffin for learning in the law, nor of Daniel for learning in history, yet, for a broad, statesman-like view of legal principles and acquaintance with literature, was unexcelled. He was more of a statesman and had greater oratorical gifts than either. As a member of Congress he impressed Webster and Clay and others as one of the great men of the Nation. His long service in our General Assembly and in the Convention of 1835 was distinguished by the liberal and intelligent views he took of all public questions. He was in 1818 the author and able advocate of the Supreme Court bill. His name was given to a western county because, although he was an eastern man, he had the pluck to advocate a convention for doing justice to the west. It was given to a town on Roanoke River, which had visions of future greatness, because, though his constituents lived on navigable water, he advocated giving State aid to the improvement of the interior streams. It was his personal example which made our people lose their fear of Catholics, and his eloquent advocacy that removed the anti-Catholic clause from the Constitution. Beginning the practice of the law at the age of twenty in 1798, the year of Taylor's election to the Bench, he had a successful career as a practitioner, for thirty-five years, before being called to the Bench. He brought to the aid of the Court his extraordinary popularity and elegant literary style, large legislative experience, and extensive learning in the law.

All the three Judges had great natural intellects—all had industry, all had unimpeachable rectitude of purpose, all of them had the unlimited confidence

of the bar and laity, all of them were of a conservative temperament, all of them were filled with the desire to decide correctly the cases brought before them, and to give right reasons for their decisions. Their personal relations were harmonious. Orange was then a western county, so that Ruffin was a western man; Daniel a middle county, and Gaston an eastern man. They represented the two great parties of the day. These three great men had just the qualifications and habits to strengthen the Court.

On the resignation of Ruffin, Frederick Nash, under the rule of seniority in service, became Chief Justice, and held the office until his death in 1858. After sixteen years' service as Superior Court Judge, he was elevated to the Supreme Court at the age of sixty-three. Succeeding Gaston, and sitting with Ruffin and Daniel, whose powers had been increased by years of study of great questions and practice in writing opinions, his reputation was subjected to a most trying ordeal. He proved himself a sound and able Judge, and his lofty character, in which all the virtues were harmoniously blended, his great popularity, gained by his unfailing courtesy and kindly heart, continued and strengthened the public confidence in the Court. As Mr. F. H. Busbee well said in an address in presenting a portrait of the Chief Justice to the Court, "clear in his conception of the law, well versed in its precedents, of singular felicity of language and chasteness of expression, with a simplicity and terseness that would have honored Westminster Hall, he has left opinions which may well bear comparison with those of his great colaborers."

Before coming to the Bench, Chief Justice Nash had large public experience. He had a full practice at one of the most cultured bars of the State, that of New Bern. He distinguished himself for his readiness, courtesy, firmness, and strictest impartiality in the difficult post of Speaker of the House of Commons. In all respects, he was a wise and well balanced man.

The successor of Nash, Chief Justice Pearson, acted a great part in the legal history of our State. He was a Judge for forty-two years continuously, with the exception of the eight months' vacancy in 1865. Of these, thirty years were spent on the Supreme Court Bench; during twenty of them he was Chief Justice. He entered on his judicial career at the age of thirty-one, after a few years' service as legislator and a large practice at the bar. His mind was singularly clear, strong, incisive, bold, and independent. While he had no appearance of self-conceit, he had perfect confidence in his own conclusions. He had no ambition to excel in literature or politics. He despised verbiage, surplusage, shams. He was impatient of efforts to shine in oratory or accumulations of learning. I tried a flight of eloquence on him once. I saw his eyes begin to look deadly, and I fell to earth at once. I recall his disgust at the sight of a distinguished lawyer carrying into court a wheelbarrow full of books with which to fortify his argument. He was kind in complimenting a clearly cut, well prepared argument, but a speech designed for the glory of the speaker was apt to meet with a sarcasm. His mind was steeped in law. He loved clearness and strength. He was fond of meeting legal difficulties by homely comparisons and phrases. The story of the Memphis lawyer weakening the force of one of his opinions by repeating to the jury a long array of his homely illustrations, may have been true. His wit consisted in unexpected application of legal language to nonlegal subjects. Governor Caldwell said to him, when they were both young, "Pearson, why did you let the Bishop confirm you? You know you are not a fit member of the church." "Well," replied he, "when I was baptized, my sponsors stood security for me. I thought it dishonest to hold them bound for me, and I

surrendered myself in discharge of my bail." I said to him once—he was always friendly and kind to me—"Judge, please decide a question of law for me: I have two brothers paying me a visit. One is named William and the other Wesley. A lady in town has sent an invitation to 'Mr. W. Battle.' Whom shall I advise to accept it?" "Well, on the principle that every deed is construed most strongly against the grantor, I decide that both should go."

These stories bring out another phase of his character. He was wonderfully genial and kind, especially to young men. This trait made him idolized by his law students. It entered into his decisions. He was watchful for circumstances which could mitigate murder to manslaughter, which could make a case one of larceny rather than one of highway robbery. His leaning was towards mercy.

The Chief Justice became a power in the State. His learning and acuteness and industry made him famous as a lawyer. His students spread abroad his fame as a law teacher. When he was nearing his three-score and ten years, his popularity became suddenly eclipsed by his rulings in the cases against Kirk and Bergen. I will not, of course, enter on a discussion of these matters. He has placed on record in the 65th volume of the Reports an unequivocal denial of all charges that he was actuated by any motive but carrying out what he considered his duty under the law. His four associates united in declaring that his rulings had their concurrence, and after his death leading members of the bar bore admiring testimony to his character, and his old law students, among the most eminent citizens of our State, reared in Oakwood Cemetery, near Raleigh, a monument to his memory.

Associated with Chief Justice Pearson for many years was William Horn Battle, of Orange. He was closely connected with the courts of the State for over a third of a century, beginning with his joint reportership in 1834, and ending in 1868, when, in common with all candidates not nominated by the then dominant party, he failed of reëlection. His republications of annotated editions of the early Reports, his labors as Reporter and in preparation of the Revised Statutes of 1835, and his Revisal of 1873, and also of the four volumes of his Digest, gave him a thorough knowledge of the statute law of the State and decisions of the courts. He began his judicial labors in 1840, when 38 years old; was a Judge of the Superior Court for about twelve years: this period of service was broken into by a short term on the Supreme Court Bench in 1848, by appointment of Governor Graham. He had a continuous service on the Supreme Court Bench, from his election in 1852, excepting the short interval of 1865, when all the offices were vacated, for sixteen years. From 1845 to his removal to Raleigh in 1868, and for two years before his death, he was principal of a law school and nominally Professor of Law in the University, but received no salary from the institution, and was not responsible for the discipline. After his retirement from the Bench in 1868, he practiced law in Raleigh, and was for a short time President of the Raleigh National Bank. During the last twenty years of his life, he took great interest in the legislation of his church, being a delegate to its Diocesan and General Conventions. In lieu of any observation of my own, I give an estimate of his judicial character in the words of Mr. Justice Merrimon, extracted from his address at the meeting of the Supreme Court Bar after his death in 1879:

"Judge Battle was a well-read, painstaking, and sound lawyer. He was well grounded in the great principles of the law, and was especially familiar with the law and judicial decisions of our own State. Indeed, there has been no lawyer more learned than he in the laws of this State. He was exceedingly

fond and proud of his profession; he upheld its honor always and everywhere, and he was an honor to it.

"He was a learned, patient, and upright judge. His judicial opinions were well considered and able, some of them strikingly so, and they afford an enduring monument to his memory, while they reflect high distinction on the Bench of the State."

Let me add, for the edification of the younger members of the bar, an anecdote of Judge Battle. In his early days at the bar he was not successful in getting practice. In fact, he said that but for the encouraging words of his wife he would have abandoned the profession in despair. The depression of spirit on this account preyed on his health. His physicians, according to the practice of the old school, advised a whiskey toddy before breakfast. He tried the remedy for some days. One morning, while dressing, he suddenly said, "I have resolved not to take another glass of whiskey." His wife said, "Why? I thought it was doing you good." "Perhaps you are right," said he, "but I found myself dressing fast in order to get to my drink, and I know, by that, it is dangerous." Such was his dread of that terrible poison, which has slain hundreds of our bright and promising lawyers, some of them, even in early life, the leaders of the bar.

Matthias Evans Manly was the last of the old ante-war Court. He was a strong-minded and able man. Like Judges Pearson, Battle, and Ashe, he graduated at our University, all of them among the best scholars of their classes. Being a good mathematician, he was employed, after graduation, as an assistant in the mathematical department, and on a vacancy in the professorship, offered to take charge of the department. Although deemed qualified, his youth was considered an objection, and Dr. James Phillips was elected. He then addressed himself to the law, and soon reached the top of his profession. His judicial career extends from 1840 to 1865, twenty-five years, during nineteen of which he was on the Superior Court Bench. He was elected to the Supreme Court in 1859, on the final retirement of Judge Ruffin.

Judge Manly was a very sound and well read lawyer. He had not the manners of a successful politician. He forced his way by unbending principle, unwavering faithfulness to duty, intellectual force, and dauntless pluck. When on the Superior Court Bench he had the undoubting confidence of all in his ability and learning and love of justice. But he sometimes lost patience with the prolixities and wranglings and apparent endeavors to take advantages, of which members of the bar in their zeal are sometimes guilty. His language and manner were, on such occasions, more caustic than was agreeable to the victims. I saw him once administer a rebuke to two of the most eminent practitioners of the State. "I do not sit here," he fiercely said, "to listen to the angry wranglings of attorneys. They must cease." There was no more indecorum during that term.

Judge Manly was on the Supreme Court Bench only about six years. During most of this time, while the great Civil War was raging, the number of cases before the Court was greatly diminished. He had not, therefore, the opportunity of rivaling the reputation of the greatest judges of the old Court, but his opinions are clear and forcible, and show that he was a learned and able Judge. He was Speaker of the State Senate in 1866. The General Assembly for that year elected him Senator of the United States, as a colleague of Wm. A. Graham, but neither was allowed to take his seat. He died on June 10, 1881, with the universal respect and confidence of the people.

It is not within my plan to give notices of the living, so I will only mention that after a distinguished career at the bar, in Congress, and in the Supreme

Court, which he reached after serving about four years as a Superior Court Judge, Edwin Godwin Reade, now most ably presiding over a national bank, is the last survivor of the judges of our highest tribunal elected by the General Assembly. Of those elected by the people three have gone to their final home. Of these Nathaniel Boyden came to the Bench at a greater age than any other of all the judges—at three score and sixteen. He had been an active member of the bar for forty-eight years, had been a member of the State and Federal legislatures, but had never held a judicial office. He had a mind of a high order, was a most adroit, zealous, and successful practitioner, possessed abundant learning in the law, and was a conspicuous figure in the *nisi prius* courts of the State. If he had come to the Supreme Court Bench at an earlier age, and had larger practice in its duties, he would have won high distinction as a judge.

Thomas Settle was eminently fitted for political life. He had great force of character, uncommon oratorical powers, a bold and independent spirit, a high order of ability, and exceedingly agreeable manners. The campaign between him and Zebulon B. Vance for Governor in 1876, will long be remembered for its brilliancy, only equaled, according to tradition, by that between Graham and Hoke in 1844. He was a successful practitioner in the courts, winning fame as Solicitor of his circuit in the prosecution of criminals. He was a ready and accomplished presiding officer of our State Senate and House of Commons. His heart was not in the judgeship, as was shown by his twice resigning his seat in order to enter the political field. His opinions, though pointed and clear, do not show the learning and logical powers of the old-time judges. He had the ability, however, to become a great judge, if his ambition had taken that direction.

Thomas Samuel Ashe, a lineal descendant of one of the first three Supreme Court Judges of free North Carolina, was after the best type of our great judges. After an eminent career at the bar and in the State Legislature, and as Confederate States Senator and member of the Lower House of Congress of the United States, he came to the Supreme Bench by popular election in 1878, at the age of sixty-six. He died in February, 1887, after eight years' service. He threw his whole strength into his work. He endeavored to make up for the time lost from the law while engaged in exacting legislative duties, and time-consuming practice in the Superior Courts, by close and unremitting study, trenching on the hours needed for repose. He succeeded in adding to his already great reputation for ability, and by the strength and learning displayed in his opinions he won a place little inferior to the best of his predecessors. It is believed that the severe labors his conscientiousness forced on him shortened his life.

Judge Ashe was of a type not often found among us in these nervous and impetuous days—the old-school gentleman. He was tall, stately, dignified, courteous, respectful to all, and exacting respect from all. Washington was of that pattern, and General Lee, and Governor Graham, and General Samuel F. Patterson, and Chief Justice Nash. It is impossible to imagine an unworthy act by such men. But under his self-contained exterior was abundance of fire, and under his grave manner abundance of humor. I have never seen the fire flash, but I have seen the humor play over his countenance like sheet lightning over a summer cloud. I recall his hearty laugh when he told me how, after the University had conferred the degree of Doctor of Laws (*LL.D.*) on himself and Judge Dillard, he went into the latter's room and found him investigating a knotty case, lately argued before the Court, and

saluted him thus: "Good morning, Doctor Dillard." "What do you mean?" replied he, looking up from his papers and books. "What do you call me doctor for?" "Haven't you read in the morning paper," said Judge Ashe, "that the University has made us Doctors of Laws?" "Well!" said Dillard, gloomily, "am I not a great Doctor of Laws, when I cannot, for the life of me, tell whether old Mibra Gulley ought to have brought this action before the Clerk or in term? I must say that I have not as much respect for the Trustees as I had before the degree was conferred." (See 81 N. C., 356.)

For the encouragement of those *twigs* of the law whose early success is impeded by bashfulness—a rare quality, however, in these spouting days—permit me to state that, when Mr. Ashe made his first speech—it was at Hillsboro court—his fright was so great that his tongue refused to go further than "Gentlemen of the Jury." He was about to take his seat in despair, when Mr. Priestly Mangum, the County Solicitor, arose and said: "May it please your Worships, I request the gentleman to stop a moment, to allow me to call some witnesses to go before the Grand Jury." This kindly interruption gave the young attorney time to recover his self-possession, and he made a creditable appearance.

Judge Dillard, recognized as one of our ablest lawyers, told me that his (Dillard's) first case was in Danville, Va., where the pleadings were required to be drawn out in full. He declared on a promissory note, "payable 90 days after date." These words were carelessly omitted in his declaration, and the consequence was a fatal variance in the proof. Said the Judge: "I took a nonsuit, paid the costs ($13.50) out of my own pocket, and got more profit out of that expenditure than out of any I have since made. I was afterwards careful never to make a mistake." I feel sure the Judge will pardon me for putting on record this incident, on account of its valuable lesson to those whom he loves so well, the young men of the bar.

Mr. Chief Justice: In conclusion I return to you and your associates, and to the members of the bar, my thanks for the great honor you have conferred on me in assigning to me the preparation and delivery of this address. It has been to me a labor of love. From boyhood I have had the strongest veneration for the Supreme Court of North Carolina. Far back in my memory, on the borderland of childhood, in the days of Devereux and Battle, I can see the neatly written copies by my mother, as amanuensis, of the opinions of Ruffin, Daniel, and Gaston, and I can recall her voice as she praised their greatness and by these praises sought to arouse the ambition of her children. A collateral benefit of the establishment of the Court has been the elevation of the bar of the State, by their constantly having before their eyes the highest standard of legal learning, tireless industry, and inflexible rectitude. The labors of the students are stimulated by the hope of winning the encomiums of the examining judges, the labors of the lawyers are stimulated by the hope of winning the decisions of the Court, the Superior Court Judges are urged to greater diligence and care by fear of their reversals. The aspiring spirits fix their eyes on the lofty prize of a seat on the Bench, and, thanks to a justice-loving people, strive to gain it, not by the politician's wiles, but by becoming conspicuous for legal learning and spotless character. It is a glorious thing that all our people have an assured confidence that the mantles of our great and good judges of the past have fallen on men worthy to wear them, on men who will leave the Court to their successors, fixed in the hearts of the people, as firmly as are the eternal principles of *Magna Charta* and the Bill of Rights of which it is the trusty guardian.

APPENDIX I

LIST OF JUDGES 1777 TO 1 JANUARY, 1819.

THE FIRST PERIOD,

Begins in 1777 and ends in 1790, during which the number of the Judges was three.

SAMUEL ASHE, of New Hanover; elected in 1777, was in office in 1790.
SAMUEL SPENCER, of Anson; elected in 1777, was in office in 1790.
JAMES IREDELL, of Chowan; elected in 1777, resigned in 1778.
JOHN WILLIAMS, of Granville; elected in 1778, was in office in 1790.

THE SECOND PERIOD,

From 1790 to 1806, when there were four Judges.
SAMUEL ASHE, elected in 1777, resigned in 1795.
SAMUEL SPENCER, elected in 1777, died in 1794.
JNO. WILLIAMS, elected in 1778, died in 1799.
SPRUCE MCKAY, of Rowan; elected in 1790, was in office in 1806.
JNO. HAYWOOD, of Halifax; elected in 1794, resigned in 1800.
DAVID STONE, of Bertie; elected in 1795, resigned in 1798.
ALFRED MOORE, of Brunswick; elected in 1798, resigned in 1799.
JNO. LOUIS TAYLOR, of Craven; elected in 1798, was in office in 1806.
SAMUEL JOHNSTON, of Chowan; appointed in 1800, resigned in 1803.
JOHN HALL, of Warren; elected in 1800, was in office in 1806.
FRANCIS LOCKE, of Rowan; elected in 1803, was in office in 1806.

THE THIRD PERIOD,

From 1806 to 1 January, 1819, when there were six Judges.
SPRUCE MCKAY, of Rowan; elected 1790, died 1808.
JOHN LOUIS TAYLOR, of Craven; elected 1798, elected to Supreme Court in 1818.
JOHN HALL, of Warren; elected 1800, elected to Supreme Court in 1818.
FRANCIS LOCKE, of Rowan; elected 1803, resigned 1814.
DAVID STONE, of Bertie; elected 1806, resigned 1808.
SAMUEL LOWRIE, of Mecklenburg; elected 1806, died 1817.
BLAKE BAKER, of Warren; appointed 1808, commission expired 1808.
LEONARD HENDERSON, of Granville; elected 1808, resigned 1816.
JOSHUA GRANGER WRIGHT, of New Hanover; elected 1808, died 1811.
HENRY SEAWELL, of Wake; appointed 1811, commission expired 1811.
EDWARD HARRIS, of Craven; elected 1811, died 1813.
HENRY SEAWELL, of Wake; appointed in 1813, resigned 1819.
DUNCAN CAMERON, of Orange; appointed 1814, resigned 1816.
THOMAS RUFFIN, of Orange; elected 1816, resigned 1818.
JOSEPH JOHN DANIEL, of Halifax; appointed 1816, elected to Supreme Court 1832.
ROBERT H. BURTON, of Lincoln; appointed 1818, resigned 1818.
BLAKE BAKER, of Warren; appointed 1818, died 1818.

FOURTH PERIOD

LIST OF MEMBERS OF THE SUPREME COURT SINCE 1818

CHIEF JUSTICES

JOHN LOUIS TAYLOR.....1818-1829
LEONARD HENDERSON.....1829-1833
THOMAS RUFFIN.....1833-1852
FREDERICK NASH.....1852-1858
RICHMOND M. PEARSON.....1858-1868
RICHMOND M. PEARSON.....1868-1878
WILLIAM N. H. SMITH.....1878-1889
AUGUSTUS S. MERRIMON.....1889-1893
JAMES E. SHEPHERD.....1893-1895
WILLIAM T. FAIRCLOTH.....1895-1901
DAVID M. FURCHES.....1901-1903
WALTER CLARK.....1903-1924
WILLIAM A. HOKE.....1924-1925
WALTER P. STACY.....1925-

ASSOCIATE JUSTICES

JOHN HALL.....1818-1832
LEONARD HENDERSON.....1818-1829
JOHN D. TOOMER.....1829-1829
THOMAS RUFFIN.....1829-1833
JOSEPH J. DANIEL.....1832-1848
WILLIAM GASTON.....1833-1844
FREDERICK NASH.....1844-1852
WILLIAM H. BATTLE.....1848-1848
RICHMOND M. PEARSON.....1848-1858
WILLIAM H. BATTLE.....1852-1868
THOMAS RUFFIN.....1858-1860
MATTHIAS E. MANLY.....1860-1865
EDWIN G. READE.....1865-1868
EDWIN G. READE.....1868-1878
WILLIAM B. RODMAN.....1868-1878
ROBERT P. DICK.....1868-1876
THOMAS SETTLE.....1868-1876
NATHANIEL BOYDEN.....1871-1873
WILLIAM P. BYNUM.....1873-1879
WILLIAM T. FAIRCLOTH.....1876-1879
THOMAS S. ASHE.....1879-1887
JOHN H. DILLARD.....1879-1881
THOMAS RUFFIN, JR.....1881-1885
AUGUSTUS S. MERRIMON.....1885-1889

HISTORY OF THE SUPREME COURT.

JOSEPH J. DAVIS.....1889-1893
JAMES E. SHEPHERD.....1889-1893
ALPHONSO C. AVERY.....1889-1897
WALTER CLARK.....1889-1903
JAMES C. MACRAE.....1893-1895
ARMISTEAD BURWELL.....1893-1895
DAVID M. FURCHES.....1895-1901
WALTER A. MONTGOMERY.....1895-1905
ROBERT M. DOUGLAS.....1897-1905
CHARLES A. COOK.....1901-1903
HENRY G. CONNOR.....1903-1909
PLATT D. WALKER.....1903-1923
GEORGE H. BROWN.....1905-1921
WILLIAM A. HOKE.....1905-1924
JAMES S. MANNING.....1909-1910
WILLIAM R. ALLEN.....1911-1921
WILLIAM J. ADAMS.....1921-1934
L. R. VARSER.....1924-1925
WALTER P. STACY.....1921-1925
WILLIS J. BROGDEN.....1925-1935

PRESENT MEMBERS OF THE COURT.

WALTER P. STACY, *Chief Justice*.....1925-
HERIOT CLARKSON.....1923-
GEORGE W. CONNOR.....1924-
MICHAEL SCHENCK.....1934-
WILLIAM A. DEVIN.....1935-

LIST OF REPORTERS OF CASES DECIDED PRIOR TO JANUARY, 1819.

JUDGE JOHN HAYWOOD, from 1789 to 1806 (1 and 2 Haywood Reports).

JUDGE F. X. MARTIN, from 1795 to 1797 (1 and 2 Martin's Reports).

JUDGE JOHN LOUIS TAYLOR, from 1799 to 1802 (Taylor's Reports).

DUNCAN CAMERON and WILLIAM NORWOOD, from 1802 to 1805 (Conference Reports).

JUDGE JOHN LOUIS TAYLOR, 1813 to 1816 (Carolina Law Repository, 2 Vols.).

JUDGE JOHN LOUIS TAYLOR, 1816 to 1818 (Term Reports).

JUDGE A. D. MURPHEY, 1804 to 1813, and at July Term, 1818 (1 and 2 Murphey).

LIST OF REPORTERS SINCE 1819.

ARCHIBALD D. MURPHEY, 1819 (3 Murphey).
THOMAS RUFFIN, January Term, 1820 (1st part of 1st Hawks).
FRANCIS L. HAWKS, 1820 to 1826.
GEO. E. BADGER, with DEVEREUX, January Term, 1826 (1st part of 1st Devereux).
THOMAS P. DEVEREUX, 1826 to 1834.
THOS. P. DEVEREUX and WM. H. BATTLE, 1834 to 1840.
WM. H. BATTLE, January Term, 1840 (1st part of 1st Iredell).
JAMES IREDELL, 1840 to 1852.
PERRIN BUSBEE, 1852 to 1853.
QUENTIN BUSBEE, Fall Term, 1853 (2d part of Busbee).
HAMILTON C. JONES, 1853 to 1863.
PATRICK H. WINSTON, SR., 1863 to 1864.
SAMUEL F. PHILLIPS, 1866 to 1870.
JAMES M. MCCORKLE, 1871.
WM. M. SHIPP, Attorney-General, 1872.
TAZEWELL L. HARGROVE, Attorney-General, 1873-1876.
THOS. S. KENAN, Attorney-General, 1877-1884.
THEO. F. DAVIDSON, Attorney-General, 1885-1892.

REPORTERS.

ROBERT T. GRAY.....1893-1898
RALPH P. BUXTON.....1899-1900
ZEB V. WALSER.....1891-1904
J. CRAWFORD BIGGS.....1905-1906
ROBERT C. STRONG.....1907-

CLERKS.

WILLIAM ROBARDS, January 4, 1819—January, 1828.
JOHN LAWSON HENDERSON, January, 1828—July 11, 1843.
EDMUND B. FREEMAN, July 13, 1843—June 30, 1868.
CHARLES B. ROOT, July 1, 1868—January 4, 1869.
WILLIAM HENRY BAGLEY, January 4, 1869—February 21, 1886.
THOMAS S. KENAN, March 1, 1886—December 21, 1911.
JOSEPH L. SEAWELL, December 26, 1911—January 12, 1923.
EDWARD C. SEAWELL, January 12, 1923—June 15, 1931.
FRANK NASH, June 15, 1931—July 10, 1932.
EDWARD MURRAY, July 13, 1932—

LIST OF ATTORNEYS-GENERAL SINCE THE ADOPTION OF CONSTITUTION IN 1776.

AVERY, WAIGHTSTILL.....1777-1779
IREDELL, JAMES.....1779-1782
MOORE, ALFRED.....1782-1790
HAYWOOD, J. JOHN.....1791-1794
BAKER, BLAKE.....1794-1803
SEAWELL, HENRY.....1803-1808
FITTS, OLIVER.....1808-1810
MILLER, WILLIAM.....1810-1810
BURTON, HUTCHINS G.....1810-1816
DREW, WILLIAM.....1816-1825
TAYLOR, JAMES F.....1825-1828
JONES, ROBERT H.....1828-1828
SAUNDERS, ROMULUS M.....1828-1834
DANIEL, JOHN R. J.....1834-1840
MCQUEEN, HUGH.....1840-1842
WHITAKER, SPIER.....1842-1846
STANLY, EDWARD.....1846-1848
MOORE, BARTHOLOMEW F.....1848-1851
EATON, WILLIAM.....1851-1852
RANSOM, MATT W.....1852-1855
BATCHELOR, JOSEPH B.....1855-1856
BAILEY, WILLIAM H.....1856-1856
JENKINS, WILLIAM A.....1856-1862
ROGERS, SION H.....1862-1868
COLEMAN, WILLIAM M.....1868-1869
OLDS, LEWIS P.....1869-1870
SHIPP, WILLIAM M.....1870-1872
HARGROVE, TAZEWELL L.....1872-1876
KENAN, THOMAS S.....1876-1884
DAVIDSON, THEODORE F.....1884-1892
OSBORNE, FRANK I.....1892-1896
WALSER, ZEB V.....1896-1900
DOUGLAS, ROBT. D.....1900-1901
GILMER, ROBT. D.....1901-1908
BICKETT, T. W.....1909-1916
MANNING, JAMES S.....1917-1925
BRUMMITT, DENNIS G.....1925-1935
SEAWELL, A. A. F.....1935-

INDEX.

ABATEMENT.

1. An action of debt, founded on a penal statute, as in this case, for harboring runaway slaves, abates by the death of the plaintiff, and cannot be revived. *Estis v. Lenox*, 292.
2. An action for seducing away a slave does not abate by the death of the defendant. *McAlister v. Spiller*, 314.
3. Rules as to Abatement, 88.

ACTION.

See DECEIT; JUSTICE OF THE PEACE; MILLS; SHERIFF, 2.

ACTS OF ASSEMBLY.

Acts of Assembly take effect from the beginning of the session in which they are passed. *Sumner v. Barksdale*, 328.

ADVANCEMENT.

Advancement of personal property made by an intestate in his life-time to his children, are under the Act of 1784 (1 Rev. Stat., ch. 64, sec. 1), to be brought into distribution for the benefit of the widow. *Davis v. Duke*, 526.

AMENDMENT AND JEOFAIL.

Where the complainants attempted to amend by making new defendants, but drew their amended bill in such a manner that it did not appear to have any relation to the original bill, they were permitted to amend further so as to connect the two bills, upon their paying all the costs incurred on the copies of the amended bill issued. *Benzien v. Lovelass*, 630.

See ATTACHMENT, 2, 6; PENAL ACTIONS, 2.

ANSWER.

1. An answer taken abroad under a commission, may be read, though the commission was taken out in blank and filled up by the defendant with the names of two persons, who did not appear either by the commission or certificate, to be authorized to administer oaths where the answer was taken. *Hunt v. Williams*, 230.
2. If a commission to take an answer be filled up by the master, the party cannot strike out the name of the commissioner to insert another, though he might have done so, had the commission been taken out in blank. *Dawson v. Speight*, 231.

See EVIDENCE, 11.

APPEAL.

1. The sureties in an appeal bond cannot be charged, if the condition of the bond leave out the most effective part required by law, to wit, that the sureties should be discharged on the performance by the appellant of the judgment in the Court above. *Waller v. Pitman*, 324.
2. Where, upon the hearing of a cause by petition for an account in the county court, the court ordered an account to be taken by an Auditor, upon the coming in of which exceptions were filed by the plaintiff,

APPEAL—*Continued.*

which, being argued and overruled, the plaintiff appealed, *it was held* that the Superior Court would begin with the exceptions and not to hear the cause first upon the petition, answers, and proofs, though possibly it should not stop with the hearing on the exceptions. *Erwin v. Arthur*, 6.

3. If a defendant be acquitted in the county court and the State appeal, a bond need not be given; and it is sufficient if the appeal be filed in the Superior Court at any time before State's day. *State v. McLelland*, 632.

See CERTIORARI.

ARBITRATION AND AWARD.

1. Awards are to be construed liberally; and in mercantile transactions, not admitting of certainty, nice objections ought not to defeat an award. If that to which the objection of uncertainty is made, can be ascertained by the context, the objection shall not prevail. *Borretts v. Patterson*, 126.
2. The meaning of the rule that an award must be mutual, is that the thing awarded to be done shall be a final discharge of all future claims by the party in whose favor the award is made against the other for the cause submitted. *Ibid.*
3. An award which merely directs a sum of money to be paid, but without stating the matter of controversy, or directing a release, or saying that the payment shall be in satisfaction of any specified injury or demand, may be rendered sufficiently certain, final, and mutual by averments connecting the award with the submission. *Bryant v. Milner*, 485.

ASSAULT.

See DAMAGES.

ASSUMPSIT.

1. The action of *assumpsit* will lie on either an express or implied promise to pay for the use and occupation of land. *Hayes v. Acre*, 247.
2. *Assumpsit* will not lie where a party has a remedy on a covenant under seal; therefore, where in a charter party under seal the defendant expressly covenanted to man and victual the vessel for the specific voyage and back again, etc., and afterwards sold her in a foreign port and received the money, *it was held*, that as the whole tenor of the contract showed that it was the intent of the parties that the vessel should return, it was a breach of the charter party for the defendant to sell, for which the plaintiff could bring covenant or debt, which was a higher remedy than *assumpsit*. *Davis v. Gibson*, 320.

See ATTORNEY and CLIENT.

ATTACHMENT.

1. The attachment law does not require the plaintiff to swear positively to the amount of his debt; therefore, it was held good where the plaintiff swore that he had good reason to believe that the defendant and his connections "had endamaged him to the amount of" a certain sum. *Powell v. Hampton*, 306.

ATTACHMENT—*Continued.*

2. Where an attachment was executed and returned to a court on the same day on which it was issued, the return is irregular, but is helped by the statute of jeofails, after verdict or judgment by default. *Ibid.*
3. It is not error for the court to order goods attached to remain in the hands of the sheriff of the county, such sheriff being the plaintiff in the suit. *Ibid.*
4. If a plaintiff in attachment fail to give bond or file an affidavit, it should be pleaded in abatement; it cannot be taken advantage of by writ of error. *Ibid.*
5. It is not error that the sheriff who summoned the jury to execute a writ of inquiry in an attachment was the party plaintiff in the cause. *Ibid.*
6. If an officer executing an attachment returns "executed and returned" without specifying on what he has levied, the return is informal, but is cured by the statutes of jeofail, after verdict or judgment by default. *Ibid.*
7. It cannot be taken advantage of by writ of error that no declaration or other paper setting forth the nature of the charge was filed in a suit by attachment. *Ibid.*
8. A garnishee may have a writ of error on the judgment against himself, or the defendant in the attachment. *Haughton v. Allen*, 364.
9. The attachment law does not require the plaintiff to swear positively to the amount of his debt; therefore, it was held good when the plaintiff swore that he had good reason to believe that the defendant had, in company with others, endamaged him to the amount of £219. *Bickerstaff v. Dellinger*, 474.
10. If the plaintiff in attachment fail to give bond or file an affidavit, it should be pleaded in abatement, it cannot be taken advantage of by writ of error. *Ibid.*

ATTORNEY AND CLIENT.

If an attorney promises his client, during the suit, to indemnify him against the consequences of it, the promise is without consideration and will not support an action. *Mitchell v. Bell*, 244.

BASTARDY.

The recognizance, on a charge of bastardy, to appear at the county court, must be taken before two justices. *S. v. Quinnery*, 123.

BAIL.

1. If the writ be altered from debt to case, the bail are no longer bound. *Bryan v. Bradley*, 177.
2. A man indicted for murder cannot be bailed upon affidavits taken *ex parte* by persons not authorized to take them. *S. v. Dew*, 94.
3. Where costs, which accrued after judgment, were not set forth in the *sci. fa.* against the bail, *it was held* to be no variance, on the plea of *nul tiel record*. *Alston v. Bullock*, 297.
4. The county to which the *ca. sa.* against the principal should issue, in order to charge the bail, is the county in which the defendant was arrested, unless the return of the sheriff or something equally satis-

BAIL—*Continued.*

factory and conclusive evinces that the county, where the defendant was taken, no longer continues to be his proper county. *Benton v. Duffy*, 316.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. In the case of paper not negotiable, the law is not so strict as in the case of negotiable paper, but the assignee must apply for payments in a reasonable time, and also give notice of nonpayment in a reasonable time, and on failure of giving such notice, if a loss really happens, the assignee must sustain it. *Plummer v. Christmas*, 145.
2. Damages cannot be claimed under the Act of 1796 (see 1 Rev. Stat., ch. 13, sec. 8), on a bill which has not the words "for value received." *Anonymous*, 161.
3. The assignor of a bond is not released by the obligor being discharged on a *ca. sa.* under the insolvent debtor's law. *Greer v. Blackledge*, 165.
4. The Act of 1786 (1 Rev. Stat., ch. 13, sec. 3), making bonds assignable, able, did not operate upon bonds theretofore made. *Wilkinson v. Wright*, 509.
5. Where A had money in the hands of B who could not pay it, but offered a bill on New York, which A did not want, but finding that C was willing to take it, received the money from him, and C, in consequence of an order from A, received from B his bill of exchange; upon the protest of this bill, and B's failure. *Held:* That A was not accountable to C for the money paid for the bill as he was neither endorser nor had promised to become responsible. *Wilkins v. McKinsie*, 570.
6. Damages and interest on bills are to be assessed according to the law of the place where the bill was drawn, and not where it was endorsed. *Schermerhorn v. Pelham*, 573.

See PARTNERSHIP, 1.

BOND.

See EVIDENCE, 8; PRESUMPTION OF PAYMENT.

BOUNDARY.

1. If a natural boundary be called for in a grant, a line is to be extended to it, disregarding distance. *Witherspoon v. Blanks*, 157.
2. If upon the face of a deed it be uncertain whether the boundary line be at one place or another, parol evidence may be received to show the true place; thus the line called for was "north to Bryant's;" north would not lead to Bryant's corner, though it would strike his line, and there was an old marked line to the corner permitted to be proved by parol. *Bustin v. Christie*, 160.
3. If there be a variance between the natural boundaries and the courses and distances called for in a deed or grant, the former shall be preferred. *Harramond v. McGlaughon*, 90.
4. A line of a deed or grant calling for the line of another grant, shall be extended to it if it be in the course, though beyond the distance. *Miller v. White*, 223.
5. Where the lines called for in a grant were "east 177 poles to an oak, thence southwardly, the various courses of the river;" and there was

BOUNDARY—*Continued.*

a marked oak at the end of the distance; and the river from the point where a direct line from the oak would intersect it, ran southwardly; but if the east line went directly to the river, the river from the point of intersection would run westwardly until opposite the oak; *it was held* that the jury ought to find the line to the oak, and thence southwardly to the river, if they believed that to be the real line run when the original survey was made. *Pender v. Coor*, 228.

CAPIAS AD SATISFACIENDUM.

If a defendant be arrested on a *ca. sa.* and discharged by the plaintiff's consent, the plaintiff cannot have a new execution against him; but if he is arrested, and escape by the neglect or permission of the sheriff, the plaintiff may have a new execution, though the sheriff could not arrest or hold him in custody on the old writ. *Ballard v. Averitt*, 147.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 3.

CERTIORARI.

1. A *certiorari* is not grantable to remove a cause from the county court before trial, especially where the party has the right of appeal, and the county court has original exclusive jurisdiction. *Street v. Clark*, 109.
2. Proceedings before a single justice cannot be brought before the county court by *certiorari* or other writ. They can come before it only by appeal. *Alexander v. Bateman*, 248.

CONFISCATION.

1. All lands, the legal title to which remained in Henry Eustace McCulloch on the 4th day of July, 1776, were confiscated, and the legal theory thereof vested in the State. *Cunningham v. Michael*, 298.
2. The proviso to the 6th section of the confiscation law of 1779, ch. 5, did not vest any title in the wife and children of absentees. *Faris v. Simpson*, 381.
3. Under the confiscation law of 1776, titles were not divested out of the persons coming within its operations without proceedings in the nature of an office found. But by the second confiscation act of 1779, the estates of the persons named therein were divested by the force of the act itself. *Ibid.*
4. Lands held by one, who ceased to be a citizen by the Revolution, in trust for the *Unitas Fratrum*, were not confiscated by the confiscation acts. *Marshall v. Lovelass*, 412.
5. Where confiscated lands were sold by the State and the contract afterwards relinquished and the lands surrendered to the State before the year 1794, the lands passed to the University of that year. (See 2 Rev. Stat., page 428). *Hughes v. University*, 533.
6. A person, who had been one of the objects of the confiscation acts, was held entitled, under the treaty of 1783, as a British subject, to recover the balance due on contracts made before the acts of confiscation. *Ray v. McCulloch*, 606.
7. Where a deed in trust of land was made to a firm, consisting of several partners, some of whom afterwards became subject to the confis-

CONFISCATION—*Continued.*

cation laws, but one of them did not; *it was held* that this one was adequate and competent to hold the land and execute the trust. *University v. Rice*, 610.

CONSTITUTION.

Where under the Act of 1795 (New Rev., ch. 433), a treasurer of public buildings was elected by the county court, and afterwards another person was elected to the same office under the Act of 1797 (New Rev., ch. 488), and brought suit against the first for money remaining in his hands, *it was held* that the court would not decide incidentally on the constitutionality of the latter act, but that in that case its authority was sufficient to sustain the action. *Freeman v. Lester*, 294.

CONTRACT.

See EQUITY, 3; HORSE RACING.

COSTS.

1. If the prosecutor on an indictment had probable cause, though his motives were of the worst kind, he ought not to pay costs. *S. v. Forsyth*, 114.
2. If the county court order the prosecutor to pay costs, and at the next term revoke this order, and order the defendant to pay them, although such a proceeding is improper, on an appeal from the last order, the Superior Court will not go into an examination of the fact, if the whole record of the cause has not been brought up. *Ibid.*
3. A defendant in an indictment is not bound to pay the witnesses for the State, except upon conviction. *S. v. Hargate*, 284.
4. If the same jury attend on the premises in ten different *caveats* for different claims to different parcels of land, the caveators in all the cases being the same, but the defendants different, the jurors shall receive pay in each case. *Harris v. Lenoir*, 304.

COVENANT.

1. Covenant will not lie on the assignment under seal of a bond for the payment or delivery of tobacco, the breach assigned being that the obligor did not deliver the tobacco. *Brickell v. Batchelor*, 326.
2. An assignee by estoppel merely, where no interest passed by the assignment, cannot maintain an action of covenant. *Nesbit v. Nesbit*, 490.

See ASSUMPSIT, 2.

DAMAGES.

In an action for an assault, any immediate provocation may be given in evidence to mitigate damages, but not any remote provocation. *Barry v. Inglis*, 163.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2-6.

DECEIT.

An action lies against one not a party to the contract for deceitfully asserting that an unsound mare is sound, and fraudulently encouraging the plaintiff to buy her. *Irwin v. Sherril*, 99.

DEMAND.

On a promise to deliver goods, a demand before action brought is indispensably necessary. *Benners v. Howard*, 172.

DEPOSITION.

1. Where the notice is to take depositions between certain hours of the day, such depositions shall not be read, unless it appears that they were taken within the time specified. *Farrar v. Hamilton*, 105.
2. Where the notice was "at the house of Capt. A. *Gordoner*, on the 13th and 14th *days* of March next, to take the deposition of said A. *Gardner*, on the commission was to cause A. *Gordan* to come before you" —between *Ridge's Orphans, by their next friend, J. Haines, complainants*, and *W. T. Lewis and other defendants;* and the preamble of the deposition recited, "to take the deposition of A. *Gordon*—where *J. Haines, as the next friend of the orphans of W. Ridge is plaintiff, and W. T. Lewis and W. Corch and others*, are the defendants, at the house of the said A. *Gordon*," it was held that the deposition might be read. *Ridge v. Lewis*, 599.
3. If the notice be at the courthouse in Jefferson, in the county of Jefferson, and the commission is directed to "G. D., P. T., and H. B., Esquires; and the deposition appears to be sworn to "before us, two of the acting justices of the peace, for Jefferson County, at the courthouse for said county," it may be read. *Ibid.*
4. A deposition taken under a commission directed to A. and B., Esquires, who certify it under their names with "J. P." annexed, may be read. *Ibid.*
5. Where a notice is to take a deposition at the "dwelling house" of a witness, and the certificate states that the deposition of the witness was taken at "his own house," it is sufficient. *Ibid.*
6. After a writ was issued, but before it was returned, the plaintiff, without any order for that purpose, took out a commission to take testimony, and a deposition was taken under it. *Held:* That it was irregularly taken and could not be read. *Holbrook v. Martin*, 624.
7. A deposition will be rejected if a witness refuse to answer proper questions on a cross-examination. *Mosely v. Mosely*, 631.
8. So, also, if written by the attorney of the party who has taken the deposition. *Ibid.*

Rules on taking depositions, 68, 74.

DEPRECIATED CURRENCY.

Contracts in depreciated currency should be scaled according to the rate existing at the time the contract was made. *Bruton v. Bullock*, 535.

DETINUE.

1. A special property as trustee, derived from the order of a court in Virginia, accompanied by possession under the order, is sufficient to maintain detinue for slaves. *Wade v. Edwards*, 549.
2. Detinue lies in every case where the property is detained, and no regard is had to the manner in which the defendant acquired possession. *Johnston v. Pasteur*, 582.

See HUSBAND AND WIFE, 6, 9; PLEADING AND PRACTICE, 15.

DEVISE.

1. Land purchased after the making of a will does not pass by any devise in it. *Johnston v. Hunly*, 220.
2. A devise by a testator to his two sons, A and B, in fee, and that if either of them should die without lawful issue begotten of their bodies, his son C should have the lands of the one so first dying, is too remote, and the limitation to C is, therefore, void. *Sutton v. Wood*, 399.
3. Where a testator after several bequests of specific chattels to his wife, proceed thus, "also all the remainder of my estate, whether within doors or out, that was not before given away—all the residue of my estate, and every part thereof, I give to my wife S. W., she paying all my just debts and funeral charges, etc., to her and her heirs forever;" *it was held* that his real estate passed to his wife in fee. *Ibid.*
4. When a devise would give to heirs what they would take without it, they shall be in by descent. But where the devise makes an alteration in the limitation of the estate, the heirs take by purchase. *Campbell v. Herron*, 468.
5. A devise to the widow for life with remainder to the testator's three daughters (his heirs-at-law), their heirs, executors, administrators, and assigns, makes the daughters joint tenants. *Ibid.*

See SLAVES, 4.

DISTRESS.

A landlord has no power in this State to distrain for rent, the process of distress never having been adopted here. *Dalgleish v. Grandy*, 249.

DISTRIBUTION.

See ADVANCEMENT; EXECUTORS AND ADMINISTRATORS, 3-6.

EJECTMENT.

1. The plaintiff cannot declare an ejectment for a whole tract of land, and give evidence of title to, and recover, an undivided moiety. *Young v. Drew*, 162.
2. A demise laid to have commenced on the 1st of February, 1801, and possession taken under it; "afterwards, to wit, on the 1st of January, 1801, defendant entered," etc. This was held good, for the word "afterwards" shows that the entry of the defendant was after the demise to and possession of the plaintiff; and the words "1st of January, 1801," being repugnant, may be rejected. *Brown v. Lutterloh*, 556.
3. Where the date of the demise and the commencement of the term were left blank in a declaration in ejectment, the declaration was held ill and the judgment arrested. *Hogg v. Shaw*, 576.
4. Where a defendant was acquitted on an indictment, and the clerk, without any express judgment being given by the court, issued an execution against him for his witness fees, under which the sheriff sold his land, and the defendant in the execution afterwards sold to another, *it was held*, in a suit by the purchaser at the sheriff's sale against the purchaser from the defendant, that the sheriff's sale bound the land, but the plaintiff must prove title in him against whom the execution issued. *Worke v. Hunter*, 634.

ENTRY.

See GRANTS, 2, 3; RIGHT OF ENTRY.

EQUITY.

1. The Court of Equity will issue a writ to the sheriff to take out of the defendant's possession, property, which is the subject of a suit, if it appear that there is danger of the removal of the property, unless he gives security for its production, etc. *Spendlove v. Spendlove*, 262.
2. Where a tenant covenanted to build and leave in repair, and did build, but the houses were destroyed by a fire, a Court of Equity will compel him either to rebuild or to pay the value of the buildings, and the bill may be against either an assignor or assignee of the lease, when the lessor has not consented to the assignment. *Pasteur v. Jones*, 393.
3. When a person agreeing to sell lands had a good title, and was able to convey at the time of the bargain entered into, and no delay can be imputed to him in performing his part of the contract, the contract is considered in equity as *then* executed, the subsequent conveyance being only matter of form, the substance being the bargain. *Ray v. McCulloch*, 606.

See AMENDMENT; ANSWER, 1, 2; PARTIES, PLEADING AND PRACTICE, 1, 7, 12, 16.

ESTOPPEL.

If a tenant in common recover a judgment against his cotenant, and direct the execution to be levied on a particular part of the tenant, he is estopped to claim a partition against the purchaser. *Walker v. Bernard*, 302.

See COVENANT, 2; HUSBAND AND WIFE, 7.

EVIDENCE.

1. If a deed be executed by an attorney, his power, or a copy of it, must be produced. *Yarborough v. Beard*, 117.
2. A certified copy of an instrument required to be recorded is sufficient evidence for the party when the original is lost, and complete evidence for strangers. But as to instruments not required to be recorded, the register's certificate is of no validity. *Ibid.*
3. A will which has been admitted to probate improperly in the county court cannot be attacked on that ground incidentally; therefore, in an ejectment, a copy of a will may be read as evidence, though one of the witnesses who proved the will was a delegatee. *Stanly v. Kean*, 150.
4. Whether one who claims title under an execution is bound to produce the judgment as well as execution, *quære*. *Hargett v. Blackshear*, 154.
5. An order to pay money is, in the hands of the drawee, evidence of payment; otherwise of an order to deliver goods. *Blount v. Starkey*, 157.
6. If one entitled to two-thirds of three lots, sells two lots, the sale is evidence of a partition. *Slade v. Green*, 158.
7. Cohabitation as man and wife and having children is evidence of a marriage. *Felts v. Foster*, 164.

EVIDENCE—*Continued.*

8. Under the plea of *non est factum*, it cannot be given in evidence that the bond was delivered as an escrow—such evidence is only admissible under a special plea. *Smallwood v. Clark*, 205.
9. The master of a vessel cannot give his protest in evidence. *Miller v. Ireland*, 222.
10. If a bill of lading be not stamped, parol evidence may be given of the contract to carry the goods. *Ibid.*
11. On the trial of an issue in equity, the defendant's answer cannot be read in evidence for him. *Salter v. Spier*, 230.

See BOUNDARY, 2; PRISON BOUNDS; WITNESS.

EXCEPTIONS.

See APPEAL, 2.

EXECUTION.

See CAPIAS AD SATISFACIENDUM; EJECTMENT, 4; SHERIFF, 1, 3, 4, 5, 6.

EXECUTORS AND ADMINISTRATORS.

1. An administrator is not entitled to claim anything for loss of time and personal services, though he will be allowed his necessary expenditures. *Schaw v. Schaw*, 168.
2. A sale of land by two of four executors appointed by the will is good if the others refused the executorship. *Miller v. White*, 223.
3. Under the Act of 1784 (see 1 Rev. Stat., ch. 64, sec. 1), a widow of an intestate dying without children is entitled to only one-third of his personal estate. *McAuslan v. Green*, 260.
4. The court of equity allowed commissions at the rate of five per cent only, though the county court had allowed at the rate of ten per cent on the whole amount of the estate. *Ibid.*
5. Letters of administration granted in another State will not entitle the administrator to maintain a suit here. *Butts v. Price*, 289.
6. The personal estate of an intestate, no matter where it be, is distributable according to the laws of the country where the intestate was a resident, or, in other words, where he was a citizen or subject at the time of his death. Therefore, *it was held*, that slaves in Virginia which belonged to the estate of an intestate, who was a citizen and an inhabitant of this State, must be distributed according to the laws of this State. *Williamson v. Smart*, 355.
7. An executor cannot plead that he has fully administered since the last continuance; as every plea of fully administered must have reference to the commencement of the action, or at least to the time of process served. *Smoot v. Wright*, 536.
8. The Act of 1715 (1 Rev., ch. 65, sec. 11) will bar a debt due on a bond, though there be no person entitled to sue. *McLellan v. Hill*, 595.

See LIMITATIONS, STATUTE OF, 5.

FORCIBLE ENTRY AND DETAINER.

An indictment for forcible entry and detainer upon the English statute of 21st of James 1st (see 1 Rev. Stat., ch. 49, sec. 6) must specify the kind of term from which the party is expelled, to authorize a writ of restitution; and the term must be unexpired at the time of the trial. *S. v. Butler*, 501.

FORGERY.

In an indictment for forgery the omission of a figure in the description of the instrument forged, is fatal. *S. v. Street*, 186.

GIFTS OF SLAVES.

1. The Act of 1784 (1 Rev. Stat., ch. 37, sec. 19), requiring that deeds of gift shall be recorded, applies only where creditors and purchasers are interested. *Hancock v. Hovey*, 152.
2. Slaves sent to the husband by the wife's father soon after marriage are presumed to be given. *Killingsworth v. Zollicoffer*, 95.

GRANTS.

1. Grants of escheated or confiscated lands, by officers appointed to issue grants for vacant lands, are void, and must be so declared on the trial of an ejectment. *University v. Sawyer*, 159.
2. Lands lying in one county cannot, under the entry laws of this State, be entered in another, and a grant issued on an entry made in another county is void. *Avery v. Strother*, 558.
3. Entries and grants of land within the Indian boundaries are void under the Act of 1783. *Ibid.*

HORSE RACING.

A horse-racing contract must be in writing; and parol evidence shall not be admitted to vary it. *Sharp v. Murphey*, 631.

HUSBAND AND WIFE.

1. Whether slaves, to whom the wife has a right in remainder, vest in the husband if he die during the coverture, without having reduced them to possession, *quære*. *Hynes v. Lewis*, 131.
2. The private examination of a *feme covert* as to the execution of a deed, cannot be proved by parol. *Harrell v. Elliott*, 92.
3. Slaves, to whom the wife has a right in remainder, do not vest in the husband, if he die during the coverture, without having reduced them to possession. *Blount v. Haddock*, 295.
4. Slaves, to whom the wife has a right in remainder, do not vest in the husband, if he die during the coverture, without having reduced them into possession. *McCallop v. Blount*, 314.
5. Where a tenant for life bequeathed one-half of the emblements to which she was entitled to her daughter and left an executor who, after reaping and housing the crop, married the daughter, but died before he had sold or otherwise disposed of it, *it was held*, that his possession of the crop was only as executor, and that upon his death the wife and not his administrator was entitled to it. *Berry v. McAllister*, 318.
6. Husband and wife must join in detinue for her slave detained before and at the time of the marriage. *Johnston v. Pasteur*, 582.
7. A husband suing as administrator of another for slaves, is not estopped by the deed of his wife, made while *sole*, conveying the said slaves to the defendant. *Millison v. Nicholson*, 612.
8. A husband may show the insanity of his wife before coverture to avoid a deed made by her whilst in that state of incapacity. *Ibid.*

HUSBAND AND WIFE—*Continued.*

9. Husband and wife must join in detinue for slaves of the wife detained before and at the time of the marriage. *Norfleet v. Harris*, 627.

See EVIDENCE, 7; PLEADING AND PRACTICE, 5, 7.

INDICTMENT.

1. The words "good and lawful men." in the caption of an indictment, inquest, etc., mean freeholders. *S. v. Glasgow*, 264.
2. If a public officer, entrusted with definite powers to be exercised for the benefit of the community, wickedly abuses or fraudulently exceeds them, he is punishable by indictment, though no injurious effects result to any individual from his misconduct. The crime consists in the public example, in perverting those powers to the purposes of fraud and wrong, which were committed to him as instruments of benefit to the citizen and of safety to their rights. *Ibid.*
3. The Secretary of State of the State of North Carolina, whose duty it was under an act of the Legislature to issue land warrants under certain circumstances, was held liable to be indicted in the courts of this State for fraudulently issuing such warrants, though the title to the lands for which the warrants were issued was in the United States, and not in this State. *Ibid.*
4. In an indictment for murder where the letter "a" was omitted in the word "breast" in describing the place of the wound, judgment was for that cause arrested. *S. v. Carter*, 406.
5. The court will not quash an indictment for petit larceny, unless the defect be very plain and obvious. Hence, they refused to quash where the caption of the indictment was as follows: "State of North Carolina, Franklin County, March Sessions, 1798." *S. v. Jeffreys*, 528.
6. An indictment, charging the offense to have been committed in November, 1801, and in the 25th year of American Independence, held to be bad, and the judgment arrested, because the offense is charged to have been committed in two different years. *S. v. Hendricks*, 532.
7. Where there was an indictment for perjury on an affidavit to *continue a cause* and the defendant found not guilty, and then an indictment on the same affidavit *with intention to procure an attachment to issue; it was held* that the proceedings on the first indictment did not support the plea of "former acquittal" to the second. *S. v. Williams*, 591.

See FORCIBLE ENTRY AND DETAINER; FORGERY; JURISDICTION, 4; LARCENY.

INJUNCTION.

Where a sheriff had levied an execution on goods, and upon the injunction from a court of equity being served on him, had redelivered the goods. *it was held* that he was not liable to the plaintiff, though no security had been given for the injunction. *Taggart v. Hill*, 370.

See LIMITATIONS, STATUTE OF, 2.

INTEREST.

1. In equity, as a general rule, interest upon interest is not allowable. But when the sum is ascertained and the annual payment of it forms part of the contract; where it is so specific that an action of debt may be sustained, and interest recovered by way of damages for the

INTEREST—*Continued.*

detention, and particularly where the payment of the principal sum is postponed to a very distant period, upon the faith of the regular and punctual discharge of the interest, interest upon interest ought to be allowed. *Kennon v. Dickins*, 522.

2. Interest will continue to accrue on a debt, if the creditor were in this country when the debt became due, although he be afterwards absent without leaving an agent. *Ogden v. King*, 567.

3. A debt contracted and partly paid before the mode of applying payments and cauculating interest was changed, is subject to the present rule of calculation. *Yancy v. Mutter*, 622.

JOINT TENANCY.

A widow and two children were joint tenants of a slave; upon the marriage of the widow, the joint tenancy is severed between her and the children, and between the children, by the Act of 1784 (1 Rev. Stat., ch. 43, sec. 2); and in trover by one of the children for the slave, he shall recover but one-third of the value. *Witherington v. Williams*, 89.

See DEVISE, 5.

JUDGMENT.

1. The Superior Courts cannot reverse one of their judgments given at a former term for error in a matter of law; but if it be absolutely void, or taken irregularly against the known rules of the Court, they will set it aside at any time on motion. *Anonymous*, 97.

2. It is only where the question between the parties has been once decided upon confession or verdict, that the judgment can be pleaded in bar to another action; therefore, where a plea of *nul tiel record* to a *sci. fa.*, reciting a judgment against James H. Green, was found for the defendant, because the judgment was against James Green, *it was held*, not to be a bar to a *sci. fa.* reciting a judgment against James Green. *Benton v. Duffy*, 316.

3. A party is not bound by a judgment to which he is neither party nor privy. *Williamson v. Smart*, 355.

4. To an action of debt on the judgment of a court of record in a sister state, *nil debet* is a bad plea; it should be *nul tiel record*. *Wade v. Wade*, 601.

See JUSTICE'S JUDGMENT.

JURISDICTION.

1. The Legislature of this State cannot define and punish crimes committed in another State. *S. v. Knight*, 143.

2. If the nominal plaintiff reside out of the State, the defendant may be sued out of his own district, if the suit be brought in the district in which the real plaintiff is an inhabitant. *Anonymous*, 182.

3. The civil division of the State into counties, etc., must be taken notice of judicially by the courts. *S. v. Glasgow*, 264.

4. While the law was, that all simple assaults should originate in the county court, where an indictment was found in the Superior Court "for assault with intent to murder," and upon a trial the jury found the defendant not guilty "of the assault with intent to murder, but

JURISDICTION—*Continued.*

guilty of an assault," *it was held*, that the Superior Court had jurisdiction to pronounce judgment on the defendant. *S. v. Cumpton*, 288.

5. The question of "prize or no prize" is exclusively of admiralty jurisdiction; even though the vessel captured was not carried in for condemnation. *Simpson v. Nadeau*, 332.

6. Under the act fixing the jurisdiction of the county courts at twenty pounds, the defendant should have pleaded that the sum due was less than twenty pounds when the action was commenced—otherwise the court will not, on motion, after verdict, finding less than twenty pounds, set aside the verdict and enter a nonsuit. *Brooks v. Collins*, 512.

7. Where a suit was brought against a party who lived in another district, and a judgment by default taken, which was afterwards set aside on condition of the defendant's pleading to the merits of the cause only, and upon the trial the plaintiff recovered less than fifty pounds, *it was held*, that a nonsuit must be entered. *Waggoner v. Grove*, 626.

JURY.

If a prisoner challenge peremptorily more than thirty-five jurors on a capital trial, the challenge shall be disallowed. *S. v. Gayner*, 479.

See COSTS, 4.

JUSTICE'S JUDGMENT.

The judgment of a justice does not bind lands; and if the defendant sell his lands before the levy of a justice's judgment upon them, the purchaser will acquire a good title, though the levy be afterwards returned to court, and the lands be sold under an order of court for that purpose. *Cressman v. George*, 115.

JUSTICE OF THE PEACE.

A civil action is maintainable against a justice of the peace, acting in his office out of court, either maliciously, oppressively, or corruptly. *Hardison v. Jordan*, 574.

LANDS OF DECEASED DEBTORS.

1. A *sci. fa.* against an infant heir to charge lands may be served on a guardian appointed by the court *pro hac vice*, but there should regularly be a guardian appointed by the proper court before the *sci. fa.* issued. *Gardner v. Ellis*, 154.

2. Lands in Virginia descended are equitable assets, and charge the heirs in this State with the debts of their ancestry due by specialty and binding his heirs; and if the heirs have sold the land and received the value, a decree shall be made against them for that amount. *Hamilton v. Haynes*, 547.

LARCENY.

Larceny may be committed of a slave; therefore, in an indictment under the Act of 1799 (1 Rev. Stat., ch. 34, sec. 10), for stealing a slave, it is not necessary to add "with the intention to sell or dispose of to another, or to appropriate to his own use," as that is implied in the charge of stealing. *S. v. Hall*, 168.

See INDICTMENT, 5.

LEGACY.

1. If a testator bequeath a negro woman to A and her future increase to B and others, the children of the woman born after the death of the testator will go to the legatees B and others. *Mullington v. Shipman*, 330.
2. The children of a female slave who is specifically bequeathed, if born after the execution of the will and before the death of the testator, go to the residuary legatee. *Jones v. Jones*, 482.

LIMITATIONS, STATUTE OF.

1. To a plea of the statute of limitations of 1715, to debt on a bond by a British subject, replication of the treaty of peace of 1783, is bad. *Miller v. Gordon*, 218.
2. An injunction or order of the court of equity, directing a promissory note to be deposited with the clerk and master, by which the plaintiff was delayed in bringing his suit, will not prevent the commencement or stay the operation of the statute of limitations. *Vance v. Granger*, 291.
3. Where the commissioner appointed to settle the army accounts issued a certificate in the sheriff's favor upon which the defendant drew the money, *it was held*, that the plaintiff's cause of action then accrued, and that a lapse of three years thereafter would bar him. *Coomer v. Little*, 311.
4. A reference to arbitrators will take a case out of the statute of limitations. *Colkings v. Thackston*, 312.
5. A forbearance to sue for more than seven years after the death of a testator and qualification by his executors, will bar the claim under the Act of 1715, notwithstanding the Act of 1789 (see 1 Rev. Stat., ch. 5, sec. 11 and 12). *Dry v. Roper*, 484.
6. If a tenant in tail aliens in fee and dies, leaving the issue in tail free from any of the disabilities mentioned in the statute of limitations, and such issue neglects to enter or make claim for seven years after the death of his ancestor, he and his issue will be forever barred. *Wells v. Newbolt*, 537.

See EXECUTORS AND ADMINISTRATORS, 8; PLEADING AND PRACTICE, 6, 8, 19, 20, 21; POSSESSION.

MILLS.

In an action for overflowing the plaintiff's land, he need not prove his title, though it be set forth in the declaration, for possession alone is sufficient to support this action against a wrongdoer. *Yeargain v. Johnston*, 180.

MURDER.

See BAIL, 2; INDICTMENT, 4.

NEW TRIAL.

1. If justice be done, the court will not grant a new trial on account of misdirection. *Miller v. White*, 223.
2. In a hard action, where the jury have found for the defendant, whose conduct has been *bona fide*, and the practice under which he acted as a public officer has been general, though perhaps not strictly consonant to law, the Court will not grant a new trial. *Taggart v. Hill*, 370.

PARTIES.

All persons interested should regularly be made parties to a bill, but where the enforcement of this rule would be attended with inconvenience, as where there are a great many persons interested in the same right, this rule may be dispensed with; but some of the persons interested must be named as complainants, and it will not be sufficient for the bill to be filed by a mere agent or attorney of the persons interested. *Marshall v. Lovelass*, 412.

PARTITION.

See EVIDENCE, 6.

PARTNERSHIP.

1. Two partners may draw a note payable to one of them, and the assignment by him will bind the other. *Blake v. Wheaton*, 148.
2. The representative of a deceased partner cannot be sued while there is a surviving partner. *Burgwin v. Hostler*, 167.

PENAL ACTIONS.

1. In penal actions the material facts on which the action depends must be stated with precision, and, therefore, where the declaration only alleged by way of recital, as "whereas the said defendant having," etc., *it was held* bad. *Harrington v. McFarland*, 543.
2. None of the statutes of jeofails, not even the Act of 1790, extends to penal actions. *Ibid.*

PLEADINGS AND PRACTICE.

1. A master in equity cannot act as a solicitor in his own court, and a bill filed by him will be dismissed. *Anonymous*, 103.
2. If a party and his witness are absent, the court will require that the absence of the party be accounted for, before they continue the cause. *Crites v. Lanier*, 110.
3. If an erroneous judgment be rendered on a plea in abatement, the defendant may either appeal from it or plead in chief, and upon a second erroneous judgment assign errors upon the whole record. *S. v. Quinnery*, 123.
4. On a *sci. fa.* to revive a judgment, if the defendant plead that he was formerly imprisoned for the same debt, the plea is bad for want of showing how he was discharged. *Ballard v. Averitt*, 147.
5. If a *feme covert* sue in her own name for the amount due for her attendance as a witness during coverture, she shall recover, if her marriage be not pleaded in abatement; advantage of it cannot be taken on a motion for a nonsuit. *Newton v. Robinson*, 174.
6. A plea of the statute of limitations, not being a plea to the merits, shall not be added after the pleadings are once made up; therefore, an executor shall not be allowed to add the plea of the Act of 1715 (see 1 Rev. Stat., ch. 65, sec. 11), if he neglect to plead it at first. *Campbell v. Hester*, 178.
7. A married woman may file a bill for separate maintenance against her husband in her own name without a *prochein ami*. *Knight v. Knight*, 163.
8. Judgments obtained against an administrator in other suits shall not be pleaded after the pleadings are once made up. *Grier v. Comb*, 91.

PLEADINGS AND PRACTICE—*Continued.*

9. Where the plaintiff sued in his surname with his title of courtesy, and there was a plea in abatement that his Christian name was not inserted, a replication that he was as well known by his title of courtesy as by his Christian name, is bad. *Labat v. Ellis*, 172.
10. Where the defendant's attorney informed the plaintiff's attorney at one term, that he should file a plea in abatement and then failed to do so, the plaintiff at the succeeding term was allowed to enter judgment as of last term, and execute his writ of enquiry *instanter*. *Henderson v. Scurlock*, 221.
11. In a writ of error, the errors must be assigned when the writ is filed, which must be fifteen days before the Superior Court. *Guion v. Shephard*, 253.
12. A writ of error may be granted upon notice to the attorney at law who obtained the judgment, when the party resides out of the State. *Leake v. Murchie*, 258.
13. When a defendant is served with a copy of a decree of the court of equity and refuses to perform it, an attachment is the proper mode of compelling performance. *Armstrong v. Beaty*, 259.
14. A default should not be set aside the third term after it was taken nor without imposing on the defendant the usual terms of entering only such pleas as will bring forward the merits of the case. *Alston v. Parish*, 309.
15. On an appeal from the county to the Superior Court, the plaintiff shall not change the declaration filed in the county court; and if there was no written declaration, he shall be confined to the grounds of action declared below. *Davis v. Gibson*, 320.
16. In detinue, where no value is laid in the writ of the property sued for, the defendant should demur; he cannot after a verdict finding the value, move it in arrest of judgment. *Hutchins v. McLean*, 327.
17. The court, before and instead of pronouncing a judgment on a demurrer to a bill, may give leave to the party complaining to amend his bill and to state that matter, without which the demurrer would be allowed. *Marshall v. Lovelass*, 412.
18. A plea in abatement that the declaration was not served on the defendant, must be filed within the first three days of the term, under the Act of 1777. *McFarland v. Harrington*, 542.
19. On a *sci. fa.* against a sheriff, issued on an amercement *nisi*, for not returning a writ to which the sheriff appears and pleads, the plaintiff is entitled to a trial at the return term of the *sci. fa.* *Hogg v. Bloodworth*, 593.
20. It is discretionary with the court to allow the plea of *plene administravit* to be entered after issue joined, or not, under the circumstances of the case. *Reid v. Hester*, 603.
21. The plea of the statute of limitations may be pleaded after issue joined, upon payment of full costs, under peculiar circumstances. *Ibid.*
22. The plea of the statute of limitations may be pleaded after issue joined, if it were omitted by the inadvertence of counsel, and appears to be a conscientious defense. *Johnston v. Williams*, 628.

See EXECUTORS AND ADMINISTRATORS, 7; JUDGMENT, 1, 4.

POSSESSION.

1. When a tract of land is, as to part, included in A's deed or patent, and the same part is also included in B's deed or patent, and each grantee is settled upon that part of the tract, comprised in his deed, which is not included in both deeds, the possession of the part included in both deeds is in him, whose deed or patent is the oldest; but if one of them is actually settled upon such part included in both deeds for seven years together, the possession is his, and the other will be barred thereby. *Bryan v. Carleton*, 151.
2. Possession without color of title will not avail anything under the statute of limitations. *Cobham v. Ashe*, 166.

PRISON BOUNDS.

A bond to keep the prison bounds need not be proved by the subscribing witnesses, for it must, under the act authorizing it, be deemed a record so far as concerns proof of its execution. *Wynn v. Buckett*, 93.

PRESUMPTION OF PAYMENT.

A writ sued out against a person who was named executor, but renounced the office, is not evidence to rebut the presumption of the payment of a bond twenty years old. *Quince v. Ross*, 185.

RIGHT OF ENTRY.

1. A mere right of entry cannot be sold or conveyed to another. *Farrar v. Hamilton*, 105.
2. A right of entry cannot be transferred while another person is in the adverse possession of the land. *Cobham v. Ashe*, 166.

RULES OF COURT.

1. If a plaintiff die during the pendency of a suit, and his executors do not apply to carry it on within two terms after his death, computing from the day of his death, and not from the suggestion entered by the defendant, the cause will abate, and the defendant be discharged from further attendance. Page 88.
2. But if, after this, the executors apply to be made parties by a *sci. fa.*, or notice served on the defendant, and they do not oppose it, and the plaintiffs are made parties by order of the court, it will be too late, afterwards, to move for an abatement; but the cause is to be tried. *Ibid.*
3. Proceedings in taking depositions. Pages 68, 74.

SET-OFF.

1. When a chose of action is assigned for value received, no debt contracted, or liability incurred, subsequently shall be allowed even at law as a set-off against the assignee, especially if there be an act of the Legislature taking notice of the assignment and enabling the assignee to sue in his own name. *Hogg v. Ashe*, 233.
2. Where a party cannot sue in his own name on a note, having but an equitable interest therein, he cannot, except under special circumstances, avail himself of it by way of set-off. *Wofford v. Greenlee*, 299.

SHERIFF.

1. A sale of land by the sheriff is valid, though he does not return the execution. *Farrar v. Hamilton*, 105.

SHERIFF—*Continued.*

2. A sheriff, who abstains from selling property which it was his duty to have sold, may recover on a written promise of indemnity for not selling if he believed at the time that he had no right to sell. *Joyce v. Williams*, 119.
3. A purchaser at a sheriff's sale is not bound to look farther than to see that he is an officer who sells, and that he is empowered to do so by execution. He is not affected by the irregular conduct of the sheriff. *Blount v. Mitchell*, 85.
4. When a sheriff levies on personal property, he should take it into actual possession, and have it present and shown to the bidders at the time of sale. *Ibid.*
5. If by consent a large quantity of effects are put up together, sold at one bid, and purchased by the plaintiff, who colludes with the defendant to defeat the claims of the other creditors, the sale is void. *Brodie v. Seagraves*, 96.
6. A purchaser at an execution sale is not affected by the irregular conduct of the officer. *Ibid.*

See PLEADING AND PRACTICE, 18.

SLAVES.

1. Negroes are presumed to be slaves until the contrary appears; not so with respect to persons of mixed blood. *Gobu v. Gobu*, 188.
2. The Act of 1791, relative to the killing of slaves, is too uncertain to warrant the court in passing sentence of death upon prisoner convicted under it. *S. v. Boon*, 191.
3. Under the Act of 1741 (Iredell's Rev., ch. 24), authorizing the county courts to pass such judgment upon a slave convicted of any other crime or misdemeanor than conspiring to rebel or making insurrection (for which the punishment of death was prescribed) as the nature of the crime or offense shall require; the court cannot pass sentence of death for any crime or offense for which a freeman would not also be liable to be so punished. *S. v. Sue*, 277.
4. Slaves cannot take anything under a devise for their maintenance. *Cunningham v. Cunningham*, 519.

See GIFTS OF SLAVES.

SURETY.

One surety cannot sue another for contribution at law. *Carrington v. Carson*, 410.

TAXES.

Where taxes were due on land for two years, and the sheriff sold the land for the taxes of the first year for a sum sufficient to pay the taxes of that year, but not those of the last year. *Held:* That the land in the hands of the purchaser was not liable for the taxes of the last year. *S. v. Cole*, 311.

TENANT IN COMMON.

When three tenants in common sell their estate at auction, confining the bidding to themselves, the purchaser must pay to the other two the whole amount he bids, and not *two-thirds* only. *Dickerson v. Collins*, 564.

See ESTOPPEL.

TRESPASS.

1. If an action of trespass be brought for killing a slave, pending an indictment for the same fact, and the indictment be first tried and the defendant acquitted of the felony, that proves that the trespass never was merged, and the plaintiff may proceed in his action. *Smith v. Weaver*, 141.
2. No man can be allowed to assert a right to property by violence; hence, if the owner of a slave, by force, take him from the possession of one who holds him, he is liable to an action of trespass. *Blount v. Mitchell*, 85.
3. Possession will support trespass against a party who interrupts that possession by force. *Pearson v. Smith*, 531.

TROVER.

Trover is founded on the right of property exclusively, and, therefore, the plaintiff cannot recover if defendant prove property in another when the conversion took place. *Hostler v. Skull*, 183.

USE AND OCCUPATION.

See ASSUMPSIT, 1.

USURY.

Where A had a judgment and execution against B and on the day of sale consented to indulge B in consideration of a sum more than the legal interest for the time of indulgence, and afterwards the judgment together with this sum was paid; *it was held*, that this was usurious, and that A was liable in an action for the penalty, under the statute against usury. *Carter v. Brand*, 255.

VARIANCE.

See BILL, 3; WRIT OF ERROR, 2.

WARRANTY.

A full price paid for an article always implies a warranty of its soundness; and in an action on the implied warranty, the plaintiff need not prove the return of the thing bought. *Torris v. Long*, 111.

WASTE.

1. The action of waste will lie in this State. *Bright v. Wilson*, 251.
2. It is not error for the judgment in an action of waste to be for the damages only and not also for the place wasted. *Ibid.*

WILLS.

1. A will of real estate in writing may be revoked by parol; but the words of revocation must denote a present intention to revoke. Therefore, where a devisor directed the person with whom his will had been deposited to burn it, who refused to do so, but said he would deliver it to the testator to be by him disposed of as he pleased; but it was not delivered back however, and the testator afterwards said the will should stand; *it was held*, that there was no revocation. *Giles v. Giles*, 377.
2. A revocation of a will of real estate carried completely into effect cannot be revived by any subsequent declaration by parol. *Ibid.*

See DEVISE, 1; EVIDENCE, 3; LEGACY.

WITNESS.

1. A collector of arrearages, whose commissions depend upon the amount of the recovery in the suit, is not a competent witness to prove a fraud against a defendant charged with fraudulently buying a sheriff's property. *Treasurer v. Nall*, 102.
2. The husband of the widow of the lessor of the plaintiff's ancestor, may be a witness for the plaintiff. *Beatty's Heirs v.* ———, 104.
3. Where a witness is called by one party and examined to a particular fact, and is afterwards cross-examined by the other party as to other facts, the party first calling him cannot object to his testimony on the ground of interest. *Farrar v. Hamilton*, 105.
4. On an indictment for perjury, the person against whom the defendant testified, and upon whose testimony he was convicted upon a charge for an assault and battery, is a competent witness. *S. v. Hasset*, 139.
5. The witnesses of the prevailing party could not, after the Act of 1783 (see New Rev., ch. 189, sec. 3), warrant for their attendance after judgment in the suit. *Stanly v. Hodges*, 203, 500.

WRIT.

A writ must be attested as well as signed by the clerk of the court from which it issues. *Buchannan v. Kennon*, 593.

WRIT OF ERROR.

1. A writ of error is, in this State, a writ of right to which a party is entitled upon complying with the requisites of the Act of Assembly. (1 Rev. Stat., ch. 4, sec. 17.) *Haughton v. Allen*, 364.
2. When the verdict is for more than the damages laid in the writ, the variance is fatal on a writ of error, unless the plaintiff will enter a *remittitur* for the surplus. And leave will be given him to do so upon paying the costs of the writ of error. *Singleton v. Kennedy*, 629.

See ATTACHMENT, 4, 7, 8, 10; PLEADING AND PRACTICE, 11, 12.