ANNOTATIONS INCLUDE 171 N. C.

NORTH CAROLINA REPORTS

VOL. 11

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1825
AND
JUNE TERM, 1826

FRANCIS L. HAWKS.
(VOL. IV.)

ANNOTATED BY
WALTER CLARK
(3D ANNO. ED.)

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JUDGES

OF THE

SUPREME COURT OF NORTH CAROLINA

DECEMBER TERM, 1825, AND JUNE TERM, 1826.

CHIEF JUSTICE:

JOHN LOUIS TAYLOR.

ASSOCIATE JUSTICES:

JOHN HALL.

LEONARD HENDERSON.

ATTORNEY-GENERAL:

JAMES FAUNTLEROY TAYLOR.

REPORTER:

FRANCIS L. HAWKS.

CLERK:

WILLIAM ROBARDS.

MARSHAL:

SHERIFF OF WAKE COUNTY,

Ex-officio.

JUDGES OF THE SUPERIOR COURTS

Name.	*County.*
JOSEPH J. DANIEL	Halifax.
FREDERIC NASH	Orange.
WILLIAM NORWOOD	Orange.
JOHN PAXTON†	Rutherford.
JOHN R. DONNELL	Craven.
THOMAS RUFFIN	Orange.
WILLIE P. MANGUM*	Orange.

*Appointed August, 1826, *vice* Judge NASH, resigned.
†Died November, 1826.

CASES REPORTED

CASES CITED

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1825.

MATLOCK v. GRAY & HARPER.

1. When a sheriff levies, and advertises for sale, but in consequence of the payment of the debt to the plaintiff by the defendant in execution does not actually sell, he is nevertheless entitled to his commissions on the whole debt, under the act of 1784.
2. When the plaintiffs in execution are administrators, who, after levy by the sheriff, suspend the proceedings under the execution, and subsequently receive the money from the defendant, without any sale by the sheriff, they are liable to the sheriff in action for his commissions, *individually*, and not as *administrators*.
3. Laws 1824, ch. 3, giving to the Supreme Court the power of amending, extends only to such amendments as the court below might have made; and *it seems* no *substantial* amendment will be allowed in the Supreme Court; because on such amendment the other party should have leave to amend his pleadings, and thus new issues are made which there is no tribunal to try.

ACTION on the case, brought by the sheriff of Rockingham against the defendants as administrators of one Solomon Parks. The cause was tried below before *Paxton, J.*, at ROCKINGHAM, and the jury found a verdict for the plaintiff, subject to the opinion of the court, on the following case: The defendants had recovered a judgment in Randolph County Court against Samuel Hill, and William Hogan, (2) his security, for $9,796, on which judgment a *fi. fa.* issued to the plaintiff, who was sheriff of Rockingham, and he levied the same on property of Samuel Hill, sufficient to raise the money due thereon, took it into his possession, advertised the sale, and gave notice thereof to the defendants in this case. Harper, in behalf of himself and Gray, wrote to Hogan, in forming him that the arrangement which had been agreed upon between them (Gray and Harper and Hogan) relative to the claim

against Hill and Hogan, could be attended to by Hogan, who was going to Rockingham, without the trouble of attendance on the part of Gray and Harper; and the letter added, that no advantage would be taken of the sheriff (the plaintiff), should he postpone the sale, provided Hogan and the sheriff should make an arrangement whereby the judgment would be satisfied by a certain time.

The arrangement which was referred to in the letter as having been agreed on was to this effect, that as Hill had gone to the south to raise money to satisfy the execution against himself and Hogan, the property might be purchased at the sale by Hogan without an actual advance of the money (in order to prevent a sacrifice), and the defendants were to indulge Hogan for the money.

Before the day of sale Hill returned and made a payment to Hogan of $7,000. Hogan then wrote to the plaintiff, informing him that he was authorized by Gray & Harper to attend to the business relative to the execution, and directing him to suspend the sale, and return the *fi. fa.* with an indorsement that the sale was postponed by consent of plaintiffs. Matlock, on receiving this letter, did postpone the sale, and returned the *fi. fa.* with his levy indorsed; and afterwards Hill having paid to the defendants the sum remaining due, no other execution ever issued.

Matlock applied to Harper, who was clerk of the court as well as plaintiff in the execution against Hill, before the payment made
(3) by Hill to defendants, for a writ of *ven. ex.* to make the debt and his commissions, and Harper, as plaintiff, refused to issue the writ. At the time that Matlock postponed the sale and returned the execution he was ignorant of the fact that Hill had paid Hogan the $7,000.

Hogan's only authority was contained in the letter of Harper before set forth; and after writing that letter, Hogan informed both Gray and Harper of the contents thereof, and they sanctioned what he had done.

Matlock brought this suit for his commissions on the amount of the judgment against Hill and Hogan, and on the case as above set forth the court gave judgment for the defendants, and the plaintiff thereupon appealed to this Court.

Gaston for appellant.
Badger for appellees.

(12) TAYLOR, C. J. The act of 1784, which is the only one in force relative to sheriffs' commissions, entitles them to 2½ per cent for *executing* an execution against the body or goods. These expressions do not appear to me to warrant a different construction from that uniformly given to the words employed in 29 Eliz., ch. 4, which are *levy or extend*

and deliver in execution. These words were intended to apply to all the various executions in England by which the body, lands, goods or chattels might be taken. Our act is confined to an execution against the body or goods. If upon a levy of a *fi. fa.* the sheriff is entitled to commissions, though the parties compromise before he sells any of the goods, under the statute of Elizabeth, it appears to me that he is equally entitled under our act. The case cited from 5 Term is a decision upon the very point, and it appears reasonable that after a sheriff has been at the trouble of levying upon goods, and perhaps incurred the risk of taking care of them till the sale, he should receive his commissions, notwithstanding the compromise of the parties. It is stated in this case that the sheriff levied, took the property into his possession, advertised the sale, and would of course have sold but for the letter of one of the defendants. These acts were all done for their benefit, and the (13) final act of selling was waived by them, as they had a right to do. But the sheriff being ready to sell, and being prevented by the defendants from so doing, was equivalent as between him and them to an actual sale, and entitled him to claim his commission from them. I think that after execution had been suspended by the defendants' direction, and the debt paid, the sheriff would have no right to take out a *venditioni exponas* against the consent of the plaintiffs in the execution, to sell for his commissions merely.

The execution is under the control of the plaintiff, who had it in his power to provide for the payment of the commission before he interposes to stop it; and if he neglect to do so, it is just that he should be chargeable with them. A contrary rule, it appears to me, might lead to great oppression.

Whatever doubt might be entertained as to the authority given by Harper alone to Hogan, yet I think there can be none when both the defendants sanctioned what he had done. This is quite equal to an authority given by both when the letter was written.

There is, however, an objection made to the form of the action, which must prevail. It appears from the writ that the defendants are sued as administrators, which cannot be done when they are liable in their own right. The cause of action and the implied contract arose after the death of the intestate, and was occasioned by the personal act of the defendants. It would operate most unjustly towards creditors and next of kin if administrators might burthen the assets with claims in which their intestate had incurred no responsibility; yet if a recovery is permitted in this action, the judgment will be, in the first place, against the goods of the testator, and the whole might be exhausted in discharge of that which the representative should properly answer in his own person.

The judgment of the Superior Court seems to have been rendered without any reference to this objection, and solely on the question
(14) of law made in the case reserved; it ought, therefore, to be affirmed so far as the question relative to the form of the action is involved in it, and reversed so far as it relates to the question made in the case reserved. This is my opinion as to the proper manner of entering the judgment of this Court, under the act of 1818, sec. 4, "that the Supreme Court may render such judgment as, on an inspection of the whole record, it shall appear to them ought in law to be rendered thereon."

HALL, J. The act passed in 1784, New Rev., ch. 223, allows to sheriffs 2½ per cent for executing a warrant of distress or an execution against the body or goods; and it is argued for the plaintiff that he is entitled to those commissions, because he levied upon the goods, and would have sold them, had the sale not been stopped by the defendants, who were plaintiffs in that execution; and in support of this doctrine *Alchin v. Wells,* 5 Term, and 1 Caines, 192, are relied upon.

In the first of these authorities it was held that the sheriff was entitled to his fees when he levied upon the goods under a *fi. fa.,* though the parties compromised before he sold them.

This case is admitted to be law, but it is denied that the British statute, which allows fees to sheriffs, resembles our act of 1784. It may, therefore, not be amiss to compare them.

By the statute of 29 Eliz., ch. 4, it is declared that it shall not be lawful for any sheriff, etc., to receive or take of any person, etc., for the serving and executing of any extent or execution upon the body, lands, *goods* or *chattels* of any person, etc., more, etc., than in this present act shall be limited and appointed, etc., that is to say, 12 pence for every 20 shillings when the sum exceeded 100*l.* and 6 pence for every 20 shillings over and above that sum that he shall so levy or extend
(15) and deliver in execution, or take the body in execution for. To make it more plain, I will read it thus: The sheriff shall receive for serving and executing an execution on goods such and such fees for such and such sums as he shall so levy. From this part of the statute I understand that the sheriff shall have fees in proportion to the sums which he shall *levy* or *raise* by serving and executing the execution. I think the verb *to levy* here means *to raise.* I cannot allow to it the meaning here that is sometimes given to it by the context, when it is said, "that an execution has been levied upon property, but not sold"; in such case its meaning is more restricted. I, therefore, think the authorities relied upon are applicable to the act of 1784; and that under the circumstances of this case the plaintiff is entitled to his commissions. I

think the law is founded in justice. The execution had been issued; was levied upon property which he was about to sell, in which event he would have received his commissions; the act he had undertaken to do was an entire one, was not divisible; and I think he is entitled to the whole of his commissions. If, therefore, the question depended upon the consideration of this part of the case, I should be for granting a new trial. But an objection is made to the form of the action, and that is, that the defendants have been brought into court by summons as administrators, and no declaration has been filed laying the cause of action against them in their individual characters; and it was not known until the trial came on and the evidence disclosed that they were sued for an act done by them in their individual characters. The case made up and sent here was taken from the evidence, and discloses a cause of action against them in their individual characters, and we cannot give judgment against them in those characters when the record shows they were sued as administrators; and we cannot give judgment against them as administrators for acts done by them in their own persons. When they stopped the further progress of the execution in the hands of the plaintiff as sheriff, they did not do it as administrators, but they did it in their individual characters, and they should have been sued accordingly. (16)

With respect to the aid contemplated by the plaintiff to be derived from the act of 1824, ch. 3, by amending the proceedings, I think it is not to be relied upon.

In the first part of section 2 of the act a general power is given to the Supreme Court to amend from time to time the proceedings in either the county or Superior Courts. In the latter part of the section it is restricted to such amendments as might have been made in the county or Superior Courts. Here the act is not very explicit; its words are broad enough to include all amendments that might have been made in a suit at any stage of the proceedings; but I am far from thinking that this Court possesses the power of making all such amendments by that act, but only such as the court from which the record came might have made after final judgment rendered by it. It would be preposterous to say that this Court could permit an amendment to be made which the court from whence it came could not make. In the earlier stages of a suit amendments might be made in either the county or Superior Courts; if they are not moved for until the suit has progressed further, it might not be proper *then* to permit them to be made. It certainly is not the meaning of the act that this Court will suffer amendments to be made here which the county or Superior Courts might have allowed to be made, in case application had been made at the proper time, but which after that time they ought not to have permitted to be made.

If, then, after the trial of this cause in the Superior Court, it was too late to amend the proceedings, so as that the suit would stand against the defendants in their individual characters, this Court has not the power of doing it. It is to be regretted that the cause cannot be decided upon its merits; but this Court has no alternative, but must say that judgment must be given for the defendants.

(17) HENDERSON, J. I agree with my brother *Hall* as to the construction of the statute 29 Eliz. and our act of 1784; they both mean the same thing as to the sheriff's poundage on a *fieri facias,* viz., the actual raising the money by the sheriff. The English authorities, therefore, on the construction of the English statute are decisive of this question. They are founded on this plain principle, that when one person is engaged at the request of another in an act for which such other person is to compensate him, and he is prevented from performing the act, or discharged therefrom, by the person who employs him, it gives to him all the rights of an actual performance, where the act is not made up of separate and distinct parts; for the act being entire, the law cannot make it to consist of parts. Here the receipt of the money by the defendants themselves rendered it impossible or illegal for the sheriff to proceed in his execution; he was thereby discharged from going on; and, besides, the pressure of the sheriff is presumed to have caused the defendant in the execution to pay the money. As to the sheriff's going on against the debtor for the poundage, he has no authority to proceed for that, he not having levied any money on the execution, on which condition alone he could levy his poundage on the defendant; for the poundage is so much in the pound for the sum levied or raised, and I am considering this part of the case as if the defendant in an execution was liable for poundage. In England he was not liable, until 43 Geo. III., and our laws are silent on the subject, but it has been the practice here since our act of 1784, and possibly before. How it commenced I am at a loss to determine; possibly from an act which subjects the party cast to the payment of all costs; but this was not considered as costs in England; the plaintiff paid it until the statute of Geo. III. However, it is founded on practice, and the Court will not now disturb the practice.

As to the defendants being liable to this action at the suit of the sheriff, I am at a loss for a principle to support it; the law im-
(18) plies no such engagement. But I think that these defendants were liable in this case in their individual characters, and not as administrators. They cannot rightfully onerate the assets with this charge, which is the test by which the question must be tried. This is unlike the promise made by an executor, when the testator received the benefit, or when his estate received it, or when he indorsed a note or bill

as executor. In such cases it is proper that the assets should be onerated. The court should prevent the assets from being charged, unless for such claims as should protect them from the demands of others having claims upon them.

As to making the amendment under the late law authorizing this Court to make such amendments on the records in the courts below, when brought into this Court, as it may judge proper upon terms, I am wholly at a loss to conceive a case where it would be proper to exercise this power, for every amendment, in substance, presents a different statement of facts, which the adverse party should have an opportunity of controverting. Every amendment in the writ or declaration (I mean substantial amendments) should be accompanied with permission to the defendant to amend his plea; and so permission to the defendant to amend his plea should be accompanied with a permission to the plaintiff to amend his replication. How this Court, which is entirely a court of errors in law, can make these amendments, I cannot conceive. How or where are the new issues of fact to be tried? If there are cases where we can exercise the power, I am satisfied that this is not one of them. However reluctantly, I am compelled to say that judgment must be entered for the defendants, for they are not liable as administrators.

PER CURIAM. Affirmed.

Cited: Arrenton v. Jordan, post, 100; *Glisson v. Herring,* 13 N. C., 161; *Hampton v. Cooper,* 33 N. C., 581; *Willard v. Satchwell,* 70 N. C., 270; *Dawson v. Grafflin,* 84 N. C., 102; *Cannon v. McCape,* 114 N. C., 583.

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(19)

GOODMAN'S ADMINISTRATOR v. ARMISTEAD.

A subpœna is good which is tested in a certain year of American independence, though the year of our Lord is not named.

SCI. FA. at CHOWAN, to the defendant as a defaulting witness, to which he appeared and pleaded *"Nul tiel record;* never summoned; prevented by sickness." The jury found the issues for the plaintiff, and the court adjudged there was such a record, and gave judgment for plaintiff; whereupon defendant appealed to this Court.

The evidence that defendant was summoned was a subpœna, perfect in all its parts, and regular, save that the year in which it issued was

not named; it being tested "the 7th day of April in the XLV year of our Independence, Anno Dom. 182—." This subpœna was returned by the sheriff "Executed."

Hogg for plaintiff.
L. Martin for defendant.

TAYLOR, C. J. The only objection taken to this subpœna is the omission of the date of the year of our Lord, or, rather, the omission of the unit figure; but as the forty-fifth year of the independence is inserted, there can be no difficulty in ascertaining the other period. In England the year of the king's reign forms a part of the date, to which the year of our Lord is regularly and usually added; but if the latter were omitted, the year of the reign, being a matter of so much notoriety, is considered sufficient always to supply the omission. The Court will always notice what is the year of our Lord, from a statement of the year of the reign; for where a deed was declared upon as bearing date *26 August,* 13 Will. III., and upon oyer the date actually in the deed was
(20) *26 August,* 1701, it was held to be no variance, and it must so be understood from the first date. 2 Ld. Raym., 795. The era of our independence is a more certain rule for the computation of time than the year a king begins his reign, as being more familiarly known to the mass of citizens.

And as the year of our Lord may be ascertained by the year of the reign, so where the latter is omitted it is sufficient even in an indictment, if the time be ascertained by other means. Kelyng, 10, 11. Upon the whole, it cannot be doubted that this is sufficient evidence of the party being subpœnaed.

PER CURIAM. Affirmed.

Cited: Cherry v. Woolard, 23 N. C., 440; *Freeman v. Lewis,* 27 N. C., 96; *Merrill v. Barnard,* 61 N. C., 570.

THE GOVERNOR, TO THE USE OF ALLEN, v. BARKLEY AND OTHERS.

Before parol evidence can be given of the contents of a paper, alleged to be lost, such loss must be satisfactorily shown. The *declarations* of the administrator of the person into whose possession the paper was last traced, that he could not find the paper among those of his intestate, is not sufficient proof of the loss, where the administrator is living, and there is no obstacle to procuring his testimony.

ALLEN *v.* BARKLEY.

THIS was an action tried in NORTHAMPTON against the defendants as securities of a constable on his official bond. In making out the plaintiff's case it became necessary for him to give in evidence a paper, or the contents thereof, which was traced to the possession of one Wheeler, who was since dead. To prove the loss of the paper, and to entitle the plaintiff to give parol evidence of its contents, he called a witness, Stevenson, who said that, by plaintiff's direction, he had called on Boon, who was the administrator of Wheeler, and requested him to look over Wheeler's papers for the one wanted; that Boon at the time was unwell, and produced a parcel of papers which he said were Wheeler's; that he, Stevenson, looked over some of these papers and Boon looked over some of them; that the witness did not find the desired paper, and Boon (21) said that he did not, but that he would look farther at another time. This witness also said that in a conversation some time afterwards with Boon he was informed by him that he had not found the desired paper.

It was admitted on the trial that Boon was alive, resided within a few miles of the courthouse, and had not been summoned.

The Court, *Donnell, J.*, holding that Boon should have been produced, and that his declarations were inadmissible, would not permit parol evidence to be given of the contents of the paper. The plaintiff's counsel then directed a nonsuit to be entered, and moved for a new trial on the ground of the improper rejection of testimony. New trial refused, judgment and appeal.

HALL, J. I think the judge decided rightly in not suffering the plaintiff to give evidence of the contents of the paper-writing before he had better accounted for the loss of it, when he had it amply in his power to do so by calling Boon, the administrator of Wheeler, into whose possession they had traced it. Boon's declarations ought not to have been received, when there was no obstacle shown to procuring his testimony as a witness. Of course, the rule for a new trial should be discharged.

The other judges concurring,

Affirmed.

Cited: Avery v. Stewart, 134 N. C., 291.

(22)

SPIERS v. CLAY'S ADMINISTRATORS.

Parol evidence shall not be received to contradict an acknowledgment in a deed of the payment of the purchase money.

ASSUMPSIT, tried in HERTFORD, on the express promise of defendant's intestate. The facts were that the plaintiff, on 28 August, 1822, had executed a writing in the following words:

August 28, 1822. Received of James Clay $450, in full payment for two negroes, ------ and Dave, her son, for which negroes I do warrant and forever defend the right and title of said negroes against all claim or claims whatsoever; and likewise do warrant them to be sound and healthy. Whereunto I put my hand and seal.

THOMAS SPIERS. [L. S.]

Witness, G. M. SMITH.

Afterwards, the plaintiff and Clay being together, Clay called on a witness and informed him that he wished him to take notice that the writing above was given under the following conditions, towit: That Clay had loaned to the plaintiff $100, and that Clay was about to go to Virginia; if on his return plaintiff should pay the $100, then plaintiff should retain the slaves named in the foregoing writing; but if he did not pay the $100, then Clay was to pay plaintiff $350 in addition to the $100, and keep the slaves. Clay went to Virginia, leaving the slaves, and shortly thereafter died without returning; his administrator took possession of the negroes, and this action was brought for the $350, on the express promise of Clay.

The presiding judge, *Daniel,* charged the jury that the bill of sale under seal acknowledged the receipt of the purchase money of the slaves, and no parol evidence could be received to contradict it; that the parol evidence had been permitted to enable the plaintiff to show that the deed, or bill of sale, had been *fraudulently* obtained, and if the
(23) parties understood what they were about when the writing was executed, and there was no actual fraud, then the acknowledgment of the payment of the purchase money could not be contradicted by parol evidence. The jury found for defendant; plaintiff moved for a new trial, which was refused, and from the judgment rendered he appealed to this Court.

(26) *L. Martin for appellant.*
Hawks for appellee.

The CHIEF JUSTICE delivered the Court's opinion in these words: The affirmance of this judgment is of course under *Brockett v. Foscue,* 8 N. C., 64, and the other adjudications of this Court to the same effect.

Affirmed.

Cited: Shaw v. Williams, 100 N. C., 280.

DOZIER v. EXECUTOR OF SIMMONS.

The distributees of A. filed a petition against the administrator of A., and charged in the petition that B., one of the children of A., had been advanced by his father in his lifetime, and made him a defendant in the petition. In the county court a jury found that B. had been advanced. B. removed the proceedings by *certiorari* to the Superior Court, where, after reference to the clerk of the matters of account, the suit as to the petitioners was settled and disposed of; and so much of the case as related to the advancement of B. was referred to arbitrators, who decided that B. was entitled to receive a certain portion of his father's estate; and when this award was returned, on motion judgment was rendered for the sum stated to be due, in favor of B. against the administrator, without objection: *Held,* that the circumstances under which the judgment was rendered were such as made the judgment substantially just, as much so as if B. had been one of the petitioners instead of a defendant; and as B. had issued a *sci. fa.* to the administrator on this judgment, if the administrator had any substantial plea he might urge it against the *sci. fa.*

THE distributees of James Dozier, deceased, filed a petition in CURRITUCK against Mitchell Simmons, as administrator of Dozier, for their shares of the estate. The petition stated that Enoch Dozier (who was the plaintiff in this proceeding) was one of the distributees, and had been advanced by James Dozier in his lifetime, and he was made a defendant in the petition. Enoch Dozier, in his answer, denied the advancement; and Simmons, in his answer, expressed his readiness to pay the estate to whomsoever the court might direct. In (27) the county court an issue was submitted to a jury as to the advancement of Enoch Dozier, who found that he had received by way of advancement $524.60.

Afterwards, Enoch Dozier obtained a *certiorari,* and the proceedings were thereby removed into the Superior Court, where it was referred to the clerk to take a general account of James Dozier's estate, and when the account was taken Simmons handed in his vouchers and they were allowed. There was no dispute as to the claim of the petitioners; and after the report of the clerk the matter as to them was settled, and so

much of the case as related to Enoch Dozier's interest in his father's estate was referred to arbitrators, who decided that Enoch Dozier was entitled to $282.67. When this award was brought into court, on motion, a judgment was rendered for that sum in favor of Enoch Dozier against the administrator of James Dozier.

There was no petition or cross bill filed by Enoch Dozier to have the benefit of the award before judgment was entered for the amount. On this judgment in favor of Enoch Dozier a *fi. fa.* issued against the goods and chattels of James Dozier in the hands of Simmons, his administrator, to which the sheriff returned that there was nothing to be found. Enoch Dozier then issued a *sci. fa.* to the executors of Simmons, who had died, calling on them to show cause why execution should not issue against the proper goods and chattels of Simmons; to this *sci. fa.* the defendants pleaded *nul tiel record,* with several other pleas, all of which were found by the jury in favor of Enoch Dozier; and on the plea of *nul tiel record,* the court, *Daniel J.,* presiding, was of opinion that there was a judgment of record as the *sci. fa.* alleged; and although the entering up of the same had been somewhat irregular, yet it was not
(28) to be avoided by the present plea.

The defendant then asked leave to file a petition to vacate or set aside the judgment, which the court refused, and gave judgment that Enoch Dozier have execution against the proper goods and chattels of Simmons in the hands of the defendants, whereupon defendants appealed.

(29) *L. Martin for defendants.*

HALL, J. I think the circumstances under which this judgment was entered were as favorable to both parties and answered the ends of justice between them as well as if the person to whom the judgment was confessed had been one of the petitioners. 'Tis true, he was a defendant in the original proceedings; but the subject-matter of the petition had, by consent, been referred, and when the award was returned the present defendant's intestate agreed that judgment should be entered against him for the amount awarded in his favor, and no objection was made by any of the parties interested in the distribution of the estate. I can see no objection to the judgment, more than if it had been confessed by the defendant in a more formal manner at any other time. If the present defendant has any plea to enter in his representative character, he might have done so on the return of the *scire facias;* but I think he is bound by the judgment confessed by his intestate, and that the judgment of the Superior Court should be

Affirmed.

The other judges assenting.

STEDMAN v. RIDDICK.

A vendee or assignee cannot sue in his own name for property which the vendor or assignor, at the time of sale, could only recover by a suit.

TROVER for the value of a negro girl. On the trial before *Daniel, J.*, at GATES, the plaintiff produced a bill of sale, executed by the defendant to one Voight, dated 28 July, 1824, and a bill of sale from Voight to himself, dated 4 August, 1824, for the negro girl. (30)

The subscribing witness to the last bill of sale deposed that at the time of its execution Voight informed the plaintiff that he did not have possession of the negro, nor did he know that he should ever be able to get possession of her again; that the defendant, before the date of the bill of sale from Voight, sent for the negro, and took her into his possession, claiming her as his property, and that she remained in his possession until defendant sold her to a person who carried her out of the State.

The court instructed the jury that if the defendant had the adverse possession of the negro when Voight sold her to the plaintiff, then the plaintiff could not recover; Voight had but a right of action, which, if purchased by the plaintiff, would not enable him to maintain an action at law. There was a verdict for the defendant, and on the appeal of the plaintiff the case here stood upon a rule to show cause why there should not be a new trial.

L. Martin for appellant. (33)

TAYLOR, C. J. At the time when Voight sold the slave to the plaintiff, the defendant had the possession, claiming it adversely against all the world; and the question is whether this chose in action is assignable, so as to enable the plaintiff to sue in his own name. For a chose in action comprehends specific chattels, as well as the right to recover a debt or damages, and extends to every sort of chattel property of which a man hath not the actual occupation, but a bare right to occupy it, and a suit in law is necessary to recover the possession, on account of an adversary claim.

The distinction in our law between choses in action and possession corresponds with a similar one in the civil and canon laws, in which property in possession is termed *jus in re,* property in action *jus ad rem.* It is a settled maxim of the common law that no *chose in action* can be granted or assigned, founded upon the policy of preventing an increase of lawsuits, by restraining those who would not assert their own rights from transferring them to others of a more litigious disposition. The

rule was doubtless more extensive than any mischief that could be apprehended; and it has accordingly been limited by various exceptions, as by the law merchant relative to bills of exchange, and in some instances *respondentia* bonds, by the acts making bonds and notes negotiable, and to the equitable sanction which is given to the assignment of choses in action for a valuable consideration. In many respects the rule at law is merely formal; for it is held that policies of insurance and judgments may be sued for by the assignee in the name of the original claimant. But I know of no authority for the position that a vendee or assignee may sue for property in his own name which the vendor or assignor, at the time of sale, could only recover by suit. It seems to me that
(34) much of the mischief which the rule aimed originally to prevent would still arise under such a practice; and it is not called for by the necessity of trade or commerce, or any of those causes which introduced the relaxations. *Morgan v. Bradley,* 10 N. C., 559, was determined on its own peculiar circumstances; a steer was turned out in the range a very short time before the sale, at which time both the vendor and the vendee believed it to be still there, and when driven up by the defendant with his own cattle he believed the steer to be one of them. The possession at that time proceeded from mistake, and could scarcely be considered adverse. The judgment must be

Affirmed.

McKELLAR AND THE OTHER JUSTICES OF CUMBERLAND, TO THE USE OF ARCHIBALD SMITH, JOHN SMITH, AND DAVID SMITH, v. BOWELL AND CAMPBELL.

The record of a recovery against a *guardian* is not evidence against his *securities,* in an action brought by the plaintiff in that recovery against the securities, to subject them upon the guardian bond for the default of their principal.

DEBT brought in CUMBERLAND against the defendants as securities to a guardian bond, given by one Archibald Smith as guardian to those for whose benefit this suit was instituted. Archibald Smith died and John Smith administered on his estate, and the guardianship was committed to another guardian, who filed a petition against the administrator of Archibald Smith, setting forth these facts and charging that the
(35) administrator of Archibald Smith had in his possession the property of the wards. This petition was answered by the administrator, an account taken by order of the court, and a decree made against

the administrator *de bonis intestati*, on which execution issued, which was returned indorsed "No goods or chattels of Archibald Smith, deceased, to be found in the hands of John Smith, his administrator"; and now in this action on the bond against the securities, the plaintiff offered the record of the proceedings in the case of the petition as *prima facie* evidence to charge these defendants with the amount of the same; but the court refused it, on the ground that the present defendants were not parties to that suit. The plaintiffs were nonsuited, and the case stood before this Court, by appeal of the plaintiffs, on a motion to set aside the nonsuit and have a new trial because of the improper rejection of evidence.

Ruffin for appellant. (37)
Gaston for appellee.

Taylor, C. J. This is an action against the securities to a guardian bond in which the question arises, whether the record of a judgment recovered against the guardian, in a suit brought against him alone, in behalf of the present plaintiff, is competent evidence against the defendants.

The general rule laid down by all the writers on the law of evidence is that it would be unjust to bind a third person by a judicial proceeding between two, in which he could not be admitted to make a defense or to examine witnesses or to appeal from a judgment which he might think erroneous. A verdict or judgment, however, in a former action, upon the same matter directly in question, is also evidence for and against privies in blood, privies in estate, or privies in law, because their rights are derived under the person against whom the judgment is recovered, and must consequently be bound as his were.

Every reason assigned for the exclusion of such evidence applies with full force to this case; for there defendants had no opportunity of making a defense in the former action, of examining witnesses, or of appealing from the judgment; nor is there such a privity subsisting between them and the guardian as to form an exception to the rule. 1 State Trials, 219; Runn. Eject., 364.

The defendants entered into a joint and several bond, conditioned for the faithful performance of the guardian's duty; but they have made no agreement, by the nature of their contracts, to be con- (38) cluded by a judgment against their principal; they ought, of course, to be bound only upon the assignment and proof of a breach of the condition, in a suit against themselves.

If A. binds himself to pay for goods sold and delivered to B., the admission of B. as to the amount of the goods sold and delivered to him is not admissible evidence in a suit against A. 5 Espin. 26.

Nor, upon the same principle, could a judgment against B., founded upon his admission of the debt, be evidence against A. So if A. and B. be bound in a recognizance that B. shall keep the peace, in another *scire facias* against A. he shall not be estopped by the first trial. 10 Vin., 464.

Another rule of evidence intimately connected with the foregoing is that no record can be given in evidence but such whereof the benefit may be mutual, that is, such as might be given in evidence either by the plaintiff or defendant; or, according to *Baron Gilbert,* that nobody can take benefit by a verdict who had not been prejudiced by it, had it gone contrary. The reason why it would not be evidence *against* the party has been already shown; and it could not be relied on by a stranger to the former suit, even against the party to it, because if the person offering it had been a party instead of the person gaining the verdict, different evidence might have led to a different result; or it might have been gained by such evidence as would have been inadmissible if offered against himself. So that to admit a verdict as evidence under such circumstances would be giving the party the benefit of evidence which he could not avail himself of in his own suit. But this reason seems to apply only where the verdict is offered in evidence by a third person against the party who failed in the former action, and not where it is produced against the party who succeeded. 1 Phil., 233. It goes,
(39) however, to show that if the guardian had succeeded in the suit brought against him by the plaintiff, the judgment could not be offered by these defendants to repel the action; and, therefore, as the judgment was rendered against the guardian, it shall not be evidence against this defendant.

The cases relied upon to show that a judgment against one person is admissible evidence against another, not a party to the suit, are all, either within the literal terms of the exception or within its spirit, relative to privies.

The cases wherein the warrantee or covenantee of lands or chattels has been allowed to give in evidence, against the warrantor, or covenantor, the judgment of eviction, or recovery against himself, have proceeded on the ground of privity of contract; and most of them have been accompanied with notice of the suit, and either the warrantor did defend it, or might have done so, and employed the name of the defendant. Some of them have been decided on the principle that there was a covenant against eviction, which, therefore, as a fact, the party was at liberty to prove by the judgment, but he must still allege that the eviction was by a lawful title. In these cases the covenantor was in fact, if not nominally, a party to the first suit, and might properly have been affected by the judgment.

In *Rennerly v. Onpie,* cited from 2 Douglas, 517, there was a verdict for the plaintiff in an action of trespass, committed in the plaintiff's fishery, against one who justified as servant, and this was received at *nisi prius* as conclusive evidence against another defendant in a subsequent action for a penalty incurred by destroying fish in the same fishery. On a motion for a new trial, it was held to be only *admissible* evidence; but in a recent case it is justly doubted whether the record of the first suit was at all admissible in evidence, upon the subsequent action against the defendant, who was not a party to the former action. 2 East, 366. It is true that by our act of 1784 a judgment re- (40) covered against an executor by a creditor who seeks satisfaction out of the real estate is made evidence against the heir, who is allowed at the same time to prove, if he can, that the executor has not fully administered. But this very provision shows that, in the opinion of the Legislature, it was not admissible evidence upon common-law principles. *Rip v. Brigham* was cited from 6 Johns., 158. That was a contract for indemnity, and all these contracts stand upon peculiar grounds; "for if a demand be made, which the person indemnifying is bound to pay, and notice be given to him, and he refuse to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the defendant in the first action was not bound to pay the money." Per *Buller, J.,* in 3 Term, 374.

And the case in 6 Johns. was decided in conformity to this rule; for there the sheriff had taken a bond with sureties for the liberties of the jail, granted to a prisoner in execution, and a judgment was recovered against the sheriff for an escape, and it was held that the sheriff might, in an action against the sureties, give the recovery in the former suit in evidence, and that it was conclusive, and prevented the defendants from controverting the fact of the escape. But a very important fact in that case was that regular notice of the first suit was given to the defendants, who assumed upon themselves the defense of the suit and became essentially parties.

A case was cited from 1 Ld. Ryan, 190, in which the declaration of an under-sheriff was received as evidence against his principal; but the rule laid down in that case has been restricted by later cases to declarations constituting a part of the *res gestae.* 1 Campb., 391; Peake, 65; Phil., 76.

It is remarkable in the case cited from 6 Johns. the Court lay down the broad position that the case of principal and sureties does not come within the rule of *res inter alios acta,* for which Pothier is cited. But upon recurring to the work of that perspicuous writer it will (41)

appear that although this position is correct in the civil law, it is so upon reasons and principles which have no existence in our law, and the total absence of which amounts to absolute demonstration that the case of principal and sureties is within the rule of *res inter alios acta,* according to the law we are now engaged in administering.

It was a rule of the civil law that the obligation of the surety being dependent upon that of the principal debtor, the surety is regarded as the same party with the principal with respect to whatever is decided for or against him. Therefore, if the demand against the principal has been dismissed, the surety may, in case he is afterwards proceeded against, oppose the exception *sic judicata* to the creditor. The creditor cannot in this case reply that it is *res inter alios judicata;* for as it is the office of a surety that his obligation depends on that of his principal, that the surety cannot owe more than the principal, and that he may oppose all the exceptions *in rem* which could be opposed by the principal, it follows that whatever has been decided in favor of the principal must be taken to be decided in favor of the surety, who ought in this respect to be considered the same party. And, on the other hand, if the judgment was against the principal, the creditor may oppose it to the surety and demand that it may be carried into execution against him.

This is the rule of the civil law, which, taken nakedly and without an investigation of the reasons on which it is founded, would clearly show not only the admissibility of this judgment against the sureties, but also its conclusiveness. But the same writer proceeds to explain the reason of this rule, which is, "that the surety is allowed to appeal against the judgment, or to form an opposition to it, if it is in the last resort."

Pothier on Obligations, Part 4, ch. 3, Art. 5, sec. 63. No com-
(42) ment is necessary to show that it is precisely because these reasons have no existence in our law that the case of principal and surety does not form an exception to the rule of *res inter alios judicata.* It is governed by the rule, and the judgment should be affirmed.

Hall, J. It is a maxim in law, founded on the immutable principles of justice, that a person shall not be deprived of his property or divested of his rights without being heard in his defense. Privies are bound by judgments against their principals; but there is no departure from the rule in those cases, because their principals under whom they claim were parties to such judgments. The present defendants are not privies to the defendant against whom the decree was made which is now sought to be given in evidence. They bound themselves as his securities that he, as guardian, should deliver over all the estate to the person who was entitled to receive it; but not to pay the amount of any decree that might be

made against him. The decree is not proof of an acknowledgment by the defendant to do it, of money or property in his possession to that amount, because it was made *in invitum*. It was made upon evidence offered by the petitioner with which these defendants were not confronted and which they had not the opportunity (and if they had, they had not the right) of opposing or explaining by other evidence. The guardian and securities are not identified by similar obligations in the bond, but the securities bear an exact resemblance to each other, and it would not be pretended that a judgment obtained against one security would be evidence in a second action against another security. I, therefore, think the judge properly rejected the decree in this case as evidence, and that the rule obtained for a new trial should be discharged.

HENDERSON, J., concurred.

Affirmed.

Cited: Chairman v. Clark, post, 43; *Armistead v. Harramond, post,* 341; *Governor v. Twitty,* 12 N. C., 156; *Vanhook v. Barnett,* 15 N. C., 271; *Governor v. Montford,* 23 N. C., 158; *Governor v. Carter,* 25 N. C., 341; *Brown v. Pike,* 74 N. C., 534; *Lewis v. Fort,* 75 N. C., 252; *Walters v. Moore,* 90 N. C., 45; *Moore v. Alexander,* 96 N. C., 36.

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(43)

CHAIRMAN OF MECKLENBURG COUNTY COURT TO THE USE OF McBRIDE v. CLARK & SPRINGS.

The record of a recovery by the creditor of an intestate against his administrator is not evidence in a suit by the creditor against the securities of the administrator.

DEBT on an administration bond, tried below, before *Nash, J.*, at MECKLENBURG; and on the trial it appeared that George Hampton had been appointed administrator of the estate of Thomas Henderson, and entered into bond with the defendants as his sureties. McBride, a creditor of Henderson, had sued Hampton and recovered judgment, which was unsatisfied, Hampton being insolvent; and in this suit McBride was permitted to offer as *prima facie* evidence the record of the recovery against Hampton. The admission of this testimony formed the ground of a motion for a new trial; and defendants contended, also, that this action would not lie against them.

PER CURIAM. This case presents the precise question that was made in *McKellar v. Bowell, ante,* 34. In that case the Superior Court rejected the evidence properly; in this case it was erroneously admitted. The judgment here must consequently be

Reversed.

Cited: Armistead v. Harramond, post, 341; *Governor v. Carter,* 25 N. C., 341; *Brown v. Pike,* 74 N. C., 534; *Moore v. Alexander,* 96 N. C., 36.

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(44)

THE GOVERNOR v. HANRAHAN AND OTHERS.

To an action on a sheriff's bond the plea was the act of 1810, barring suits on such bonds if not commenced within six years after the right of action accrues; replication, a promise within three years. The replication is a departure from the declaration; for, though the party promising may be liable in an action on the promise, yet the promise cannot restore the right of action on the bond; for, to that, by the express words of the statute, lapse of time is a positive bar.

DEBT, brought in BEAUFORT on the official bond of Slade Pearce, former sheriff of Beaufort, against the securities to said bond.

The defendants pleaded the general issue, conditions performed, and the statute of limitations of 1810.*

To the plea of the statute of limitations plaintiff replied a promise by the defendants within three years; and at Spring Term, 1825, the cause came on for trial before *Badger, J.,* when the jury returned a special verdict as follows: They find the writing obligatory declared on to be the act and deed of the defendants (naming them), that the condition of the said obligation has not been performed, but broken in this, that Slade Pearce, in said obligation named, returned to the court of pleas and quarter sessions of Beaufort County a certain *fieri facias,* at the instance of Thomas Ellison, against Henry Adams, at March Term, 1809, of said court, "Satisfied," and did not then, nor hath at any

Be it enacted, etc., That all suits on sheriffs', Superior Court clerks', and clerks of the court of pleas and quarter sessions' bonds, if the right of action has already accrued, shall be commenced and prosecuted within three years after the passage of this act, and not afterwards; and all such suits, in case the right of action shall accrue hereafter, shall be commenced and prosecuted within six years *after the said right of action shall have accrued, and not afterwards,* saving, nevertheless, the rights of infants, *femes covert,* and persons *non compos mentis,* so that they sue within three years after their disabilities are removed.

time since, paid the moneys into court or to any person author- (45) ized to receive the same. They further find that no demand was made against Slade Pearce in his lifetime, but that since his death and within a year before the commencement of this suit a demand was made against the administrator of said Pearce; that Frederick Grist (who was one of the sureties to the bond) "died in 1811; that no demand was made upon any of the other parties to the bond, or their representatives, before the commencement of this action, except on Walter Hanrahan; that a demand was made on him within a year before the commencement of this suit, and the said Walter promised to pay the same."

On these facts the court held that the plaintiff should take nothing by his writ, and that the defendants go thereof without day. Whereupon the plaintiff appealed.

Hogg for defendants.

TAYLOR, C. J. Whatever effect the promise to pay the money might have, in rendering Hanrahan individually liable (which is not the question now), it is evident that it cannot charge him in a joint action with the other sureties, when the suit is on the bond. It has been held that in an assumpsit against several persons the acknowledgment of one will take the case out of the statute as to all; and even in assumpsit against one, upon a joint and several promissory note, the acknowledgment of another drawer, not sued, will take the case out of the statute as to him who is sued. (2 Douglas, 652.) But the reasons of those cases do not apply to an action of debt on a bond, in which the declaration charges that the defendants became liable by their certain writing (49) obligatory, and a replication to a plea of the statute of limitations, that within three years they made a promise in manner and form *as the plaintiff had complained against them,* will be a departure from the declaration and in conflict with it. In these cases, too, the defendants held themselves out to the world as partners in that transaction, and, as such, the promise of one became obligatory on all. I think the bar of the statute could not be removed even by the promise of all, when they are sued on the bond, although if a presumption of payment from length of time had been relied upon, such promise would be proper and strong evidence to repel it. But where a positive bar by statute is relied upon, a new promise cannot revive the remedy *on the bond.* For these reasons I am of opinion that the judgment should be affirmed.

The rest of the Court being of the same opinion,

Affirmed.

Cited: Wagstaff v. Smith, 39 N. C., 4; *Thompson v. Gilreath,* 48 N. C., 495; *Hewlett v. Schenck,* 82 N. C., 235.

PRIDE, EXECUTOR OF JONES, v. PULLIAM.

A testator by will directed his slaves to be liberated whenever the laws of the State would tolerate it, and that until that time the slaves should be divided among his wife and children according to the statutes of distribution; eight years after the probate of the will, and after the slaves had been delivered over to the wife and children in a course of distribution, the executor filed a petition to emancipate one of the slaves, and set forth meritorious services: *Held*, that as the testator had not given it in trust to the executor to see to the emancipation of the slaves at any indefinite period of time, and as they had been delivered over to the wife and children by the executor, the trust ceased in the executor, and he had no authority under the will to file the petition; and the facts all appearing on the face of the petition, it was dismissed.

(50) APPEAL from WAKE, *Donnell, J.*

At February Term, 1815, of WAKE County Court the last will and testament of Nathaniel Jones was admitted to probate, and Edward Pride, who was named therein as executor, qualified as such.

The will contained these words, viz.:

"First, my will is that all my negroes, male and female, who have arrived to the age of 24 years, and their increase as fast as they shall arrive to the said age of 24 years, be emancipated or liberated, whenever the law or laws of said State will admit or tolerate it.

"And I do most solemnly enjoin it as an injunction on my executors hereinafter named, and all my representatives, not to sell, give, swap, or convey any of the negroes or their increase, in or out of the said State, as I may die seized or possessed of; and, further, my will is that until the said State shall pass a law or laws for tolerating emancipation or liberation, that all my negroes that I may die seized or possessed of may be divided among my wife and children, agreeably to the laws for the distribution of intestates' estates, and notice being had to what has already been given to my children, of which I have kept a just account, for which see a small memorandum book."

The conclusion of the paper was as follows, viz.:

"I suppose it will be asked my reasons for emancipating my negro slaves when the laws of the State will admit or tolerate it; which reasons are as follows, towit:

"Reason the first. Agreeably to the rights of man, every human being, be his or her color what it may, is entitled to freedom, when he, she, or they arrive to mature years.

"Reason the second. My conscience, the great criterion, condemns me for keeping them in slavery.

"Reason the third. The golden rule directs us to do unto every human creature as we would wish to be done unto; and sure I am that there is not one of us would agree to be kept in slavery during a long life.

"Reason the fourth, and last. I wish to die with a clear conscience, that I may not be ashamed to appear before my Master in a future world. These are the reasons for emancipating my slaves; and I wish every human creature seriously to deliberate on my reasons. And so farewell to this terrestrial world."

By a petition to the Superior Court of Wake, filed 11 January, 1823, the executor, setting forth therein the will, stated that among the slaves of the testator at the time he died was a black man named Allen, now of the age of 28 years, whose conduct from his childhood had always been sober, honest, industrious, and exemplary in every respect as (51) a faithful and trusty slave, and that his services had been meritorious and useful, and that accordingly he stood high in the favor and confidence of his late master; that by the intermarriage of the defendant with Amelia, one of the coheirs and legatees of the testator, the defendant became possessed of the said slave Allen, and detained him in slavery, claiming to be his owner and master; and that the defendant had sold or was about to sell said Allen to a dealer in slaves.

That the petitioner was ready to furnish satisfactory evidence of the good moral character and meritorious services of Allen; and that Allen was prepared to give such security as is required in cases of emancipation by our law; and the executor, therefore, prayed of the court that Allen might be emancipated and set free from bondage, pursuant to the will of his late master.

On hearing the petition, *Donnell, J.*, was of opinion that a license could not be granted to emancipate upon the facts disclosed by the petition itself, and therefore ordered it to be dismissed; whereupon the petitioner appealed.

Seawell against the petition.
Badger, contra.

HALL, J. The testator, in the first clause of the will, directs (60) his slaves to be liberated whenever the laws of the State will admit or tolerate it; he then enjoins it upon his executors, and all his representatives, not to sell, give, swap, or convey any of the negroes or their increase in or out of the State; that until the State shall pass a law for tolerating emancipation his negroes shall be divided amongst his wife and children, agreeably to the laws for the distribution of intestates' estates. The will was proved at February Term, 1815. This petition was filed at May Term, 1823, eight years afterwards, and after the slave

for whose benefit it professes to be filed has been delivered over to the defendant in a course of distribution, as the testator in his will has directed.

The testator has not continued the trust in his executors to see the liberation of his slaves, at any indefinite period of time; when they were delivered over to his representatives by the assent of his executor, the trust would seem to cease in the latter and attach to the former. If that is the case, the executors filed this petition without any authority from the will. For this reason I can see no objection to the decree of the court below when they dismissed it, and I think that decree should be affirmed.

The rest of the Court concurred.

Affirmed.

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(61)

FINCH'S EXECUTORS v. ELLIOT.

Where, upon a record and statement of the case sent to this Court, it appears that the charge of the court was not applicable to the facts stated, a new trial must be granted; for if there was no other evidence but that stated, the charge was irrelevant; and if there was other evidence, it should form part of the case; and in either event a new trial will be granted.

CASE brought in RUTHERFORD to recover the amount of two orders drawn by one Nelson in favor of the plaintiff's testator, on the defendant, and which had been accepted by the defendant in 1812. Defendant pleaded, among other things, the statute of limitations; and on the trial it was proved by a Mr. Hord on behalf of plaintiff that in 1817 the orders were sent to him by plaintiff, who lived in Virginia, for collection; that he called on the defendant, and in a conversation with him he produced a number of papers, from which the witness became satisfied that nothing was due to the plaintiff, and he returned the orders; in 1819 one James Finch came to the State as agent for the plaintiff, and Hord went with him to see the defendant; in the conversation which took place defendant again produced certain papers, from which Hord was satisfied, and he thought that the agent was, also, that nothing was due. The writ issued 15 April, 1821, and on one of the orders a payment was indorsed, bearing date 1 May, 1814.

The court, on this evidence, instructed the jury that nothing short of an express acknowledgment of a subsisting debt, at the time of making the acknowledgment, could take a case out of the statute; that an agreement to settle would have that effect, and it was for them to
(62) say whether any such agreement was made by the defendant at the

times spoken of by Hord; if there was, they were instructed to find for the plaintiff, and if not, for the defendant.

The jury found for the plaintiff, and the case stood on a rule to show cause why there should not be a new trial.

Wilson for defendant.

HALL, J. When the court charged the jury that there must be a subsisting debt at the time of the acknowledgment, or that a proposition to settle accounts would take the case out of the statute of limitations, it would appear that there must have been more evidence before the jury than appears upon the record sent here. It does not appear from the evidence exhibited here that there was an acknowledgment of a subsisting debt or an agreement to come to a settlement; and if there was no other evidence before the jury, I think the charge was not relevant, although there can be no doubt but it is warranted by law. If there was no other evidence before the jury, I think there should be a new trial; if there was, it should form part of the case, and for that purpose a new trial should be granted. I think the evidence offered by the plaintiff establishes nothing from which a new promise or an acknowledgment can be collected. (63)

HENDERSON, J. I am almost afraid to touch this subject, for the decisions are so much at variance and so numerous that it is almost impossible to say anything on the subject without being in opposition to some of them.

I still retain the opinion that an acknowledgment of an unsatisfied consideration, when accompanied with an express refusal to pay, will take a case out of the statute; but in such a case the unsatisfied consideration should very clearly appear from the acknowledgment, taken altogether and in connection with the things referred to in it, as if at the time of refusal there was an explicit acknowledgment that the debt had never been paid; or where it clearly appears from the reference there made, as if a defendant were to say that he would not pay the debt, for that he was discharged from its payment by his certificate of bankruptcy, and it should appear that the debt neither was nor could be proved under the commission, it is not sufficient that it is shown by argument and conjecture that it is quite probable that it has not been paid. The whole transaction, taken together, where there is an express refusal to pay, or a reliance on the statute of limitations as a protection (which I think is the same thing), amounts to an acknowledgment of an unsatisfied consideration; and it is not sufficient that the jury believe from other sources that the debt is unsatisfied; they must found that belief upon the ac-

knowledgment and its references; otherwise, it would amount almost to a repeal of the statute in such cases, *i. e.*, where there is an express refusal to pay. It is not sufficient that the thing referred to or relied on to show the discharge does not show it; it should show the *reverse*.

In the present case I cannot see that there was any evidence which the court should have left to the jury; for, allowing it to be true, it did not prove the point in issue upon the statute, nor could the jury infer it. The witness stated that the defendant, upon being applied to by him as the plaintiff's agent, said that he had paid the debt, and produced papers which satisfied him that it was paid; that the plaintiff afterwards
(64) applied in the witness's presence, who made the same reply as before, and again produced papers, which the witness thought satisfied the plaintiff. Here was no evidence, either direct or indirect, from which the jury were at liberty to say that the defendant agreed to settle with the plaintiff, and the judge should have so instructed the jury. The rule for a new trial must be made absolute.

The CHIEF JUSTICE assented.

Reversed.

DOE ON DEM. OF TATEM AND BAXTER v. PAINE AND SAWYER.

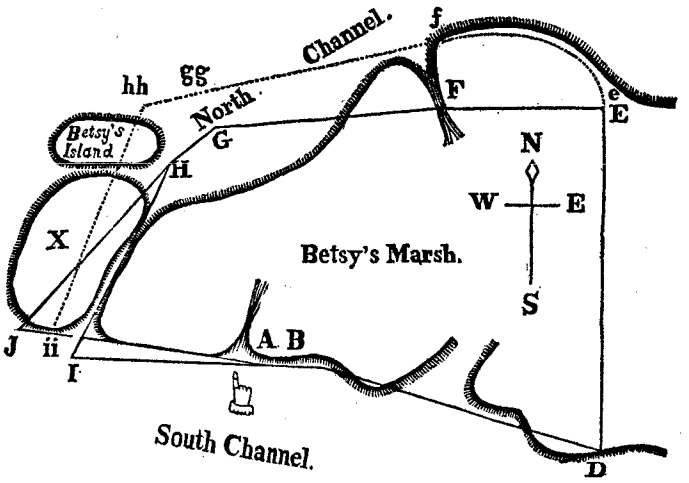
1. What are the termini or boundary of grant or deed is matter of law; where these termini are is matter of fact. The court must determine the first, and to the jury it belongs to ascertain the second. Where there is a call for natural objects, and course and distance are also given, the former are the termini, and the latter merely pointers or guides to it; and, therefore, where the natural object called for is unique, or has properties peculiar to itself, course and distance are disregarded; but where there are several natural objects equally answering the description, course and distance may be examined to ascertain which is the true object; for in such case they do not control a natural boundary, but only serve to explain a latent ambiguity.

2. Where a judge below is correct in his statement of a rule of law, but makes a misapplication of it, and it is obvious, from the finding, that the jury were led into no mistake thereby, *it seems* that a new trial will not be granted because of such misapplication.

3. If a release be offered in the course of a trial to render a witness competent, and is read without any objection made at the time as to the want of proof of its execution by the subscribing witness, such objection shall not avail after verdict as a ground for a new trial.

TATEM *v.* PAINE.

EJECTMENT, from PASQUOTANK. The lessors of the plaintiff claimed under a grant from the State, dated 18 March, 1823, to themselves, for the island marked X in the annexed diagram.



The defendants were in possession, and claimed the land under a patent granted to Thomas Williams, Joseph Ferebee, and John Williams, dated 2 December, 1807, described and bounded as follows: "A tract of land, etc., known by the name of Betsy's Marsh, or Island, beginning at Herring Gut (A), the beginning place of John Humphries' entry, running N. 79 E. 6 chains and 30 links," etc., giving the courses, "inclosing an entry made by John Humphries, Esq." These courses and distances are designated on the diagram by the letters A, B, C, D, E, F, G, H, I. From E the patent calls for a course "south 80 west, forty chains, *along the North Channel"*; the distance would terminate at f; the course and distance at F. If the course and distance are followed from f, the lines will run gg, hh, ii, and take nearly one-half of the island X, but the lines would be in the navigable waters of the North Channel.

The defendants offered to read a copy of John Humphries' entry to enable the jury to discover the proper boundaries of the patent; this was objected to, but the court permitted it. (66)

Defendants contended that the island X was, at the date of Humphries' entry, and at the date of the patent to John Williams and others, called, known, and esteemed a part of Betsy's Marsh, or Island; and that the sluices had been enlarged by storms, and that there is not, nor never was, a channel between the island X and the main island; and

to prove that fact, and also to show where the shoal at the head of the channels was situated, among other witnesses, they called John and Thomas Williams. It was objected that they had conveyed with warranty to Sawyer, one of the defendants, all their interest in the land, and the plaintiffs read a copy of the deed of bargain and sale to show it, which did contain a warranty to Sawyer for ten-twelfths of the land.

John and Thomas Williams then produced a release from Sawyer, which was read without any objection, at the time, to the reading of it, but an objection was taken that the release did not destroy the interest of the witnesses, as Sawyer had no right of action on the warranty before eviction. The court held that the interest of the witnesses was removed by the release, and they were sworn. They deposed that they purchased Humphries' entry; that in 1800 they had it surveyed by Samuel Ferebee, and that the land covered by plaintiff's patent was included in the survey; they ran around all the islands (X being one) and cornered at the shoal extending from the point J, and so down to Herring Gut, the beginning. The north and south channels separate 1 mile to the west of these islands, but the shoals of sand are covered by water down to the island. The witnesses John and Thomas Williams had been familiar with the place for forty years, and it was all called and known by the name of Betsy's Marsh; that the sluice between the island X and the main island was so shallow that cattle, etc., crossed it with ease; that there never was any channel through it, though canoes could go through it; that there are two ship channels, one running on the north
(67) side of the island, the other on the south, separating a mile above the island and uniting again at the inlet.

It was proven that the plat sent to the Secretary of State, on which the patent of Williams was obtained, was not made from actual survey, but that the county surveyor took it from the survey of other persons.

Plaintiff then called Samuel Ferebee. He could not say whether he included the small islands or not in the survey; he ran the lines as he was directed by Thomas and John Williams; nor had he any recollection of having run by Humphries' entry, or any other entry or paper, or that the county surveyor made his plat from the survey of witnesses. He produced his field book of the survey, and they did not correspond with the calls of the patent.

The court informed the jury that the principal question for them was whether the land covered by the grant of plaintiff's lessor was included within the bounds of the patent under which defendants claimed. If it was, then they should find for defendants, as theirs was the oldest grant. To ascertain the true boundary they would be guided by those calls in the patent which appeared to them most certainly to make out the intention of the parties; that there was no dispute until they came to the

letter E in the plat; the call thence was, "north 80 west 40 chains, *along the north channel.*" It was not disputed that the course was variant from the north channel; the course, therefore, must be disregarded, and the natural boundary followed, which, it was admitted, would be extended to f. From that point, if there were no other calls in the patent, course and distance would be their guide, although the lines might run over land not liable to be entered, as land covered by navigable water; for no objection could arise in running an ideal line across navigable waters to ascertain the true boundaries of land on the banks of such navigable waters. The course and distance followed from the point f would carry them through the island X and terminate at ii; then the plaintiffs would be entitled to recover that portion of the land west of the (68) line. But there were other calls in the grant which the jury might look to, and be governed by, if these calls gave them greater certainty as to the true boundary. The patent, after calling for course and distance, has these words, "inclosing an entry made by John Humphries, Esq." They were at liberty to look at the courses of that entry and be governed by its boundaries in the same manner as they would by a known line of a neighboring deed, which was called for when the course and distance would not go to such known line.

The counsel of the plaintiff then requested the court to charge the jury as to the effect of Samuel Ferebee's field notes of the survey. The court said that the field book of Ferebee was not evidence, unless the parties consented that it should be so deemed; it might be used to refresh the memory of the witness, but for nothing else; and the jury was directed to pay no attention to it. There was a verdict for the defendant, and the lessors of the plaintiff moved for a new trial:

1. Because the release from Sawyer to John and Thomas Williams was read without having been duly proved by the subscribing witness thereto.

2. The release, if properly proved, would not render J. and T. Williams competent.

3. The entry of Humphries should not have been received in evidence, nor Ferebee's survey.

4. The court misdirected the jury as to the law.

These reasons were overruled by the court, and judgment was rendered, whereupon the lessors of the plaintiff appealed.

L. Martin for defendants.

HENDERSON, J. What are the *termini* or boundaries of a grant (71) or deed is matter of law; where those boundaries or *termini* are is a matter of fact. It is the province of the court to declare the first, that

of the jury to ascertain the second. Where natural objects are called for as the *termini,* and course and distance and marked lines are also given, the natural objects are the *termini,* and the course and distance and marked lines can only be resorted to by the jury to ascertain the natural objects; they act as pointers or guides to the natural object. When the natural boundary is unique, or has properties peculiar to itself, these pointers or guides can have but little effect; in fact, I believe, none. Where there is more than one natural object in the neighborhood answering the description—that is, having common qualities—then those pointers or guides may be reverted to to ascertain where the object called for is, or which is the object designated. They do not then contradict or controvert natural boundary; they explain a latent ambiguity created by there being more than one object which answers the description. It is completely within *Lord Bacon's* illustration of the rule as to a latent ambiguity. The judge was, therefore, right in his general observations, that natural boundaries must prevail over artificial. But this is rather a rule of law than of fact; it governs, properly speaking, him and not the jury. It was a misapplication of the rule to inform the jury that after arriving at the letter H, they were at liberty to pass through the island X on the way to the great shoal, including part thereof within the grant and excluding part. The rule must work both ways. If the grant includes the whole of Betsy's Marsh, or Island, without regard to courses and distances, because called for by it, nothing but what is Betsy's Marsh, or Island, can be included in it by courses and distances. The island X was part of Betsy's Marsh, or Island, or it was not. If the first, the
(72) whole of it was included in the grant; if it was not, none of it could be brought within it by artificial calls. But this error produced no effect; the jury included the whole of the island X. A new trial ought not to be granted, therefore, for this error. The survey of Humphries' entry, made by the Messrs. Williams, was admissible to show the extent of Betsy's Marsh, or Island, for the entry and grant had the same calls. It was also proper to show that they, the Messrs. Williams—for they were witnesses on the trial—were uniform in their opinions on the subject, and I understand, from the judge's charge taken together, that it was introduced for the first purpose; for throughout the jury are told that natural boundaries will prevail over artificial, by which I understand the judge to say that in law the grant includes the marsh, or island. I am inclined to think that the difficulties in this case have arisen from not attending to the description in the grant, which is *marsh,* or island. If the island X could not pass under description of island, an island being land separated by water from other lands, and there being a sluice between the island X and what is called the main island, at all times having water in it, although fordable by cattle and hogs, yet

it might pass under the description of *marsh,* for a marsh may include many islands, particularly when separated only by narrow and shallow sluices, and in the neighborhood of and surrounded by broad and deep waters, where such small separations would scarcely attract attention.

It is not the duty, or perhaps right, of this Court to value the evidence; but I think it would not be improper, in this case, to say that after arriving at the letter H, if the line passed through the sluice, that is, along it, there was no possible inducement after getting through it to go to the great shoal at the head of the channel, a terminus called for in the grant. Only land covered by navigable water, which would pass, was included thereby. They would, obviously, have proceeded immediately to the Herring Gut instead of the great shoal; whereas, if (73) they ran around the island X, and included it within the description, they were carried to the great shoal, and it then formed a proper terminus for their departure from the Herring Gut, the place of beginning.

As to the objections to the release: the first, as to its not being proven, comes too late. It should have been taken on the trial. The other is entirely unfounded, for an obligation or contract of any kind can as well be released before breach as after. The only difference is that it requires more comprehensive terms to embrace a case before there is a breach. The words of this release, a copy whereof is appended to the record, was sufficiently comprehensive to embrace a case before breach.

PER CURIAM. No error.

Cited: Marshall v. Fisher, 46 N. C., 117; *Spruill v. Davenport, ib.,* 205; *Clarke v. Wagoner,* 70 N. C., 707; *Mizell v. Simmons,* 79 N. C., 193; *Strickland v. Draughan,* 88 N. C., 318; *Redmond v. Stepp,* 100 N. C., 218; *Sherrod v. Battle,* 154 N. C., 352; *Lumber Co. v. Bernhardt,* 162 N. C., 464; *Lumber Co. v. Lumber Co.,* 169 N. C., 104; *Power Co. v. Savage,* 170 N. C., 628.

WILSON v. MYERS AND OTHERS.

1. A petition was filed against several defendants, complaining of an injury done to lands by a mill-pond; a trial was had and verdict taken for the petitioner, and judgment against all the defendants. One of the defendants was dead at the time of judgment, and a writ of error was brought for this error in fact. On the return of the writ a motion was made be-

low to amend by suggestion of the death, *nunc pro tunc*, etc. The motion was allowed on payment of costs, and the writ of error dismissed. On appeal to this Court: *Held*, that the amendment had been properly allowed, for it would have been at the trial a matter of course.

2. The injury arising to adjacent lands by the overflowing of the waters of a mill-pond is a tort. Although the statute has given a new remedy for it, it has not altered its nature.

PETITION filed in 1816, in BEAUFORT County Court, under the act of 1809, against several defendants, complaining that the milldam of the defendants caused the lands of the petitioner to be overflowed,
(74) and prayed a writ to the sheriff commanding him to summon a jury to meet on the premises, inquire what damages petitioner had sustained, and assess the amount to be paid annually by defendants to the petitioner. In 1820, at the Spring Term of Beaufort Superior Court, a trial was had at bar, when the jury assessed the damages of the petitioner to 15*l.* annually for five years, and it was entered upon the record, "Let judgment be entered accordingly."

In July, 1820, Myers, one of the defendants, applied for a supersedeas of this judgment, and stated on oath that before the verdict of the jury was rendered, and the judgment thereon pronounced, Lucy Blount and Louisa Worthington (wife of Joseph W. Worthington), who were two of the defendants to the petition, were dead; and that no suggestion of the death of either was to be found of record in the proceedings in the suit; and further stated that notice had been given the petitioner of an intention to apply for a writ of error on said judgment. A supersedeas was granted, returnable to the Spring Term, 1821, at which term the petitioner appeared and filed an affidavit, setting forth that the judgment complained of was not rendered by the court on motion of his counsel, nor entered by his counsel, but by the clerk as a matter of course, on the finding of the jury; that he did not wish to have a judgment against any defendant who had died pending the suit, but only against those who were living when the issue was tried; and prayed to be allowed to amend his judgment so as not to affect the representatives of those who died. The court refused to permit the amendment, and allowed the writ of error. Louisa Worthington died in November, 1817, and Lucy Blount in February, 1818. At Fall Term, 1825, *Norwood, J.*, presiding, an entry was made on the record in these words: "At the present term, the motion made at Spring Term, 1821, to amend the original record
(75) by suggesting the death of Louisa Worthington and Lucy Blount, as if it had been done at Spring Term, 1818, was reviewed; and it was now ordered that the entry of record of Spring Term, 1821, be

rescinded; and it was further ordered that the amendment be made as prayed for, on payment of all the costs of the writ of error. The terms were accepted by the defendant in error, who paid the costs into the clerk's office, and the amendment was thereupon made, and on motion made after the amendment, the writ of error was dismissed; whereupon the defendant appealed."

Gaston for appellant.
Hogg for appellee.

HENDERSON, J. The statutes of amendments and of jeofails do (82) not affect this question. It depends on the principles of common law alone. As a general rule, it is unquestionably true that no act of the court, as contradistinguished from the act of its officers, or the parties, can be allowed or amended but during the term at which it was done. During the term the record is said to be in the breast of the judge; after it is over it is upon the roll. But this rule applies to such amendments as call into action the judgment or discretion of the court, and not to such as are a matter of course. In such cases the reasons of the rule no longer operate; forasmuch as the law confides in the integrity of the court, it admits a possibility of its being corrupt, and, therefore, guards it from temptation.

The case in 5 Term is an authority for this amendment, and there could not be one more in point; and *Lord Kenyon,* in a few words, gives the reason. *It is a matter of course;* the motion, if made at the proper time, could not be refused by the court. There can be no reason for not permitting it to be entered now for then, for it produces the same and no other effect than if it had been then entered. Upon its being entered, the error in fact assigned in this writ of error no longer exists. The judgment cannot, therefore, be reversed for error in fact. Whether there be error in law cannot be inquired into by virtue of the present writ of error; but if it could, I think that there are none; for although the statute has given a new remedy for injuries arising from mill-ponds, the injury is still the same in its nature. It is a tort, in which all or any one or more are liable for the whole injury. It, therefore, survives against the survivors. Nor is it any objection that some of those who did the injury were mere temporary owners, and that their interest may have since ceased. If their interest was limited, it should have been offered (if, indeed, it could have afforded any objection) when the five years judgment was about to be entered up. If their interests were then uncertain, and have since determined by casualty, their remedy is by *audita querela,* or some remedy in the nature thereof. (83)

If they are entitled to any relief, at any rate, it will not justify the court, upon a bare suggestion that such may be the case, to reverse the original judgment. The writ of error must be dismissed, and

PER CURIAM. Judgment affirmed.

Approved as to first point: *Gillet v. Jones,* 18 N. C., 346.
Approved as to second point: *Butner v. Keelhn,* 51 N. C., 61.

BOSTICK v. RUTHERFORD.

1. A discharge by a magistrate upon a warrant for a felony is *prima facie* evidence of the want of probable cause in an action brought by the defendant against the prosecutor for a malicious prosecution.

2. In such action the defendant may give in evidence, in mitigation of damages, that after the prosecution instituted by him the character of the plaintiff was bad upon subjects unconnected with the felony for which he was prosecuted.

ACTION for a malicious prosecution in RUTHERFORD. It appeared on the trial before *Nash, J.,* that the defendant had taken out a State's warrant in 1821 against the plaintiff, charging him with stealing cattle; the examining magistrate dismissed the warrant and discharged the plaintiff. Up to the time of the charge made by defendant, which was first made in 1819, the general character of the plaintiff was proved to be good; and defendant then offered to prove that since the warrant had been sued out, plaintiff's general character, on other subjects not connected with this charge, was bad. The court rejected the evidence, and instructed the jury that it was necessary for the plaintiff to show to their satisfaction that the charge against him was malicious and preferred without any probable cause; that the dismissal of the warrant and the discharge of the plaintiff by the examining magistrates were in law *prima facie* evidence of the want of probable cause; and when probable cause was wanting, the law inferred malice. It was also proved
(84) on the trial, by the magistrate who issued the warrant, that at the time of granting it Major R. Alexander, who was administrator on the estate of the man whose cattle were alleged to have been stolen, advised the defendant not to take out the warrant, as he would have the costs to pay. The jury found for plaintiff, and defendant moved for and obtained a rule on the plaintiff to show cause why there should not be a new trial: first, for misdirection of the court as to the law on probable cause; secondly, for the rejection of proper evidence as to plaintiff's character; and lastly, for surprise in the testimony of the magistrate who

issued the warrant. To support this last ground, the affidavits of defendant and of Major R. Alexander were filed; the first of which stated that Alexander was so much intoxicated when the trial took place that he was unfit to be examined; and, further, that no such advice as was deposed to by the magistrate had been given by Alexander, but directly the reverse. Alexander swore that he did not recollect having ever advised defendant not to sue out the warrant; that he had no cause to do so, for he thought there were good grounds for a prosecution. The rule was discharged, and from the judgment rendered defendant appealed.

The ground of surprise was afterwards abandoned here by Mr. Wilson.

Wilson for appellant.
Badger for appellee.

HALL, J. I am not disposed to disturb the case of *Johnson v. Martin,* 7 N. C., 248. In the incipient stage of a prosecution (88) before an examining magistrate much less grounds of suspicion will induce him to bind over the accused for further trial than will warrant either the grand jury to find a true bill or the petit jury to convict; and when the accused is discharged because a sufficient ground of suspicion has not been established against him, I can see no reason why such discharge should not furnish *prima facie* ground for an action against the prosecutor. If there was probable cause for the prosecution, and owing to any unforeseen accident it had not been made to appear before the magistrate, he may show it in his defense. I, therefore, think a new trial should not be granted on account of the first exception taken to the judge's charge.

As to the second exception, which relates to the rejection of evidence offered by the defendant, I am of opinion it ought to have been received. Evidence in this action may be offered for two purposes: first, as an item in the defense when the plea of justification is relied upon; second, for the purpose of mitigating the damages when a complete defense cannot be made out. When it is offered for the first purpose, it would be improper that it should relate to the plaintiff's character subsequent to the time when the prosecution commenced, because a knowledge of the plaintiff's bad character after that time ought not to be considered as a justification of what the defendant did before he acquired that knowledge. But if the plaintiff's character was bad before the commencement of the prosecution, evidence of it might be given, because that bad character, added to other circumstances, might be such a reasonable ground of suspicion as to induce a person, not governed by malicious motives, to take out a warrant to apprehend the person suspected; but a person who possessed a fair character, although in other respects similarly situated,

might not be considered so fit a subject for a public prosecution. It certainly requires stronger circumstances of suspicion to commence
(89) a prosecution against a man of good character than against a man of bad character. In this view of the case, character before the commencement of the prosecution may be gone into; but, however bad it may be afterwards, it can be no justification of what was done before.

But supposing the defendant to fail in his plea of justification, the next question is as to the quantum of damages. There is no exact rule by which they can be measured, as in case of debt or assumpsit; but the inquiry of the jury must be directed to all the circumstances of the case, in order, as well as they can, to fix upon a rule. In order to ascertain the amount of injury done, they may inquire into the character of the person who complains that he has sustained the injury. If his character is good, the damages ought to be greater; if his character is bad, he certainly has not so much cause to complain, and the damages ought to be smaller. In this view of the case, I think the testimony ought to have been received as to the character of the plaintiff. I will illustrate what I have observed by a familiar case. Suppose a man indicted for a malicious prosecution: the jury, whose province it is only to bring in a verdict of guilty or not guilty, ought not to hear evidence of the bad character of the person supposed to be maliciously prosecuted, after the prosecution commenced, because that would be no justification for the prosecution; but if the same evidence went to character before the prosecution, they ought to hear it, for that, added to other circumstances, might be a justification. But the court, when they fixed the fine, provided it was to go into the pocket of the injured party, instead of the public treasury, might inquire into character both before and after the prosecution.

I will make another remark in this case. If the evidence which the defendant wished to offer in this case originated from the prosecution which turned out to be malicious, the damages ought on that account to be increased; if it spring from other sources unconnected with it,
(90) they ought to be dismissed.

HENDERSON, J., concurred with Judge HALL in granting a new trial.

TAYLOR, C. J., on one point differed with his brethren, and gave his opinion as follows:

This is an application for a new trial, on two grounds, viz., of misdirection of the court in point of law, and the rejection of evidence offered by the defendant as to the plaintiff's character.

1. The principal ground of this action is that a legal prosecution was carried on without a probable cause, and this must be expressly proved,

and cannot be implied; but when this is established, malice is generally inferred from it; and both are necessary to support the action.

It was said in *Johnson v. Martin,* 7 N. C., 248, that a discharge by a magistrate after a full and fair hearing of the evidence was a strong indication of the want of probable cause; and the position was then thought to be so obvious as to require neither authority nor argument for its support.

It is yet believed to be correct, since, in the absence of particular evidence of the manner in which the magistrate discharged his duty, it must be presumed that he acted in the ordinary and legal manner; and that, upon examining the evidence in the case, he discharged the plaintiff, under a belief that the suspicion entertained of him was wholly groundless.

The duty of a magistrate on such an occasion is thus described: "If, upon inquiry, it manifestly appears that no such crime has been committed, or that the suspicion entertained of the prisoner was wholly groundless, in *such cases only* it is lawful totally to discharge him; otherwise, he must be committed to prison or give bail." (91) 4 Bl., 296.

It is the general usage with us not to discharge the accused unless it appears that there is no probable ground to suppose him guilty, and in that case the discharge by the magistrate is lawful. The modern practice by magistrates in England has never been adopted here, nor is it by any means called for by the frequency or enormity of crimes. There a magistrate does not usually discharge the accused, unless it appears in the clearest manner that the charge is malicious as well as groundless. 1 Chitty Cr. L., 89. Our practice obtains in some of the sister States; for where a person was arrested and brought before a magistrate on a charge made by another of a suspicious felony, and the justice, being satisfied that the suspicion was groundless, discharged him, it was held that an action for malicious prosecution would lie against the accuser; and that a magistrate, if he be satisfied that there is no cause for a commitment, may discharge the party accused. 2 Johns., 203.

It is said to be a bad rule that will not work both ways. Let us apply this test to the inquiry, What would be the effect of the magistrate's committing a person accused of felony, or binding him in a recognizance to answer the charge? Clearly, in an action brought against the accuser for a malicious prosecution, he might adduce this as *prima facie* evidence of the existence of probable cause; and this, unrepelled by evidence on the part of the plaintiff, would be *sufficient* evidence, even in a case where the plaintiff had been acquitted on his trial in court. It would be competent for the plaintiff to introduce any other evidence to disprove the probable cause which the magistrate's proceedings proved; but these,

unanswered, or answered only by the subsequent acquittal of the plaintiff on his trial, would show that the defendant had probable cause for the prosecution, from the legal presumption that magistrates and
(92) courts are indifferent and without malice as to the accused. 4 Mun., 465.

For these reasons, I am of opinion that evidence of a discharge by the magistrate shows the want of probable cause. But it does not preclude the defendant from proving that he had probable grounds of prosecution; nor, as it seems, does the law exact from him the proof of legal grounds for the prosecution; for it will be sufficient to excuse him if it appear from the circumstances of the case that he really believed the party to be guilty, and was actuated by an honest anxiety to bring him to justice. Cro. Jac., 193.

2. On the other question, relative to the rejection of the evidence as to the plaintiff's character, it is important to view, in connection, the grounds and principles of this action *for malicious prosecution,* and the rules of evidence as to an inquiry into character.

A very accurate writer on the laws of evidence, in treating on this action, states that the defendant under the general issue may justify the proceedings against the plaintiff and show that he had a probable cause for instituting them. If the charge against him was for felony, the defendant will be allowed in his defense to give evidence of the general bad character of the plaintiff; for in this case, when the point in issue is whether the defendant acted from malice and without probable cause, it is material to inquire into the situation of the parties, and whether the defendant had any reasonable ground for suspecting the plaintiff. Now, the notoriety of the plaintiff's character for dishonesty is a circumstance of suspicion not to be disregarded. 2 Phil. Ev., 115; 2 Esp., 720; 2 Stark., 69.

According to this rule, evidence as to the plaintiff's character is admissible only as throwing light upon the question of probable cause; and I have found no authority applicable to this *form* of action authorizing its admission in mitigation of damages.

But in this case the evidence offered was as to the plaintiff's character after the warrant was sued out against him; yet as it was proved to be good before that period, and furnished no probable ground of jus-
(93) tification for the defendant's conduct, it is impossible that any could be derived from its subsequent falling off. Such evidence could have no tendency to throw any light upon the questions in issue in the cause, and its only effect could be to mitigate the damages. But I am not prepared to say, in the absence of authority enforcing a different rule, that a man who was maliciously, and without probable cause, brought before a magistrate on a charge of felony, at a time when his

character was good, ought to recover less damages, because after that charge, and possibly in consequence of it, his character had contracted some opprobrium. My own opinion is to affirm the judgment.

By a majority of the Court,

Reversed.

Cited: McRae v. O'Neal, 13 N. C., 169; *Griffis v. Sellars,* 19 N. C., 495; *Jones v. R. R.,* 131 N. C., 137; *Stanford v. Grocery Co.,* 143 N. C., 426.

BANNER v. MCMURRAY.

From Stokes.

PER CURIAM. A new trial must be granted to ascertain the facts; no proper case having been sent up to this Court.

BRADY v. WILSON.

It is not actionable to charge a man with burning an outhouse not parcel of the dwelling-house.

SLANDER, tried in MOORE before *Ruffin, J.* The declaration contained two counts. In the first, the words laid were, "that Carrol Brady burned his, the defendant's, dwelling-house." In the second, the words were, "that Carrol Brady burned his, the defendant's, house."

Upon the trial there was no evidence given of defendant's hav- (94) ing spoken the words laid in the first count; but several witnesses testified that they had heard defendant say "that Brady had burned three houses belonging to him (the defendant) in the nighttime." The houses alluded to and described by the defendant, in conversation with the witnesses, were erected on a piece of land belonging to the defendant and situated about 4 miles from his residence. They were log houses, on a small plantation, and had been occasionally occupied as a dwelling-house and kitchen by tenants, to whom the defendant let the land from year to year; they were burned down in the nighttime, but had not in any manner been used during that year; the plantation was untenanted, and fences thrown down. In all the conversations the defendant described

the houses burned as is herein stated, or the witness (as defendant knew) was acquainted with the situation. To one of the witnesses defendant said that he believed Brady's reason for burning the houses was to get one Chavers as his tenant the next year, and prevent his living on defendant's land.

On this evidence, defendant moved for a nonsuit. The judge, however, submitted the case to the jury, with leave to the defendant, in case plaintiff had a verdict, to move to set it aside and enter a nonsuit, if the words were not actionable. The jury found the defendant not guilty on the first count, but guilty on the second, and assessed damages at $5. Defendant moved for a nonsuit, and the court ordered a nonsuit, on the ground that, although the acts charged upon the plaintiff might flow from a wicked and depraved heart, and involve great guilt in *foro conscientioe,* yet, inasmuch as the words did not impute to him any felony or other crime the temporal penalty of which would be legally infamous, the action at common law could not be supported. Thereupon the

(95) plaintiff appealed to this Court.

HALL, J. We think that, for the reasons given by the judge below, the rule for a new trial should be discharged.

PER CURIAM. No error.

Cited: Skinner v. White, 18 N. C., 474; *Wall v. Hoskins,* 27 N. C., 179; *Stokes v. Arey,* 53 N. C., 68; *McKee v. Wilson,* 87 N. C., 303.

MORGAN v. PURNELL.

Common reputation in the family is admissible as evidence of a marriage in that family; and it seems that the declarations of a member of that family are evidence of such common reputation; but such declarations must have been made before any contest had arisen relative to such marriage.

DETINUE for slaves, tried in HALIFAX before *Donnell, J.* The plaintiff claimed title under a parol gift from his mother, Ann Gunter, made prior to 1806, and offered evidence to establish the fact of such a gift. The mother was living with Peter Morgan, the father of the plaintiff, at the time of the alleged gift, but was not his wife at that time. Defendant contended that plaintiff's mother was afterwards married to Peter Morgan, and defendant claimed the slaves under two bills of sale, one from the executors of Peter Morgan to Wilson Carter, bearing date 19 May, 1812, and reciting a consideration of $470; the other from Wilson Carter

to defendant, dated 26 April, 1813, and reciting a consideration of $400. There was no evidence, but these recitals, of the payment of the purchase money mentioned in the bills of sale. Wilson Carter was dead; the witness to the bill of sale last mentioned was examined, but had no recollection of the transaction. It was proved that both the executors of Peter Morgan had removed from the State, and the witness to the bill of sale which they had made was also a resident of another State.

For the purpose of proving the marriage of Peter Morgan with plaintiff's mother, defendant offered to read the deposition of one Mary Dagget, which was admitted to have been regularly taken, but (96) was objected to on behalf of the plaintiff as containing only the declarations of the persons under whom the defendant claimed, and made subsequently to the plaintiff's title derived from her. The objection was sustained. The deposition was as follows:

"I know nothing of my knowledge, only that she, Mrs. Morgan, told me herself that she and Mr. Peter Morgan were married.

"I know nothing of any gift for Member; I only heard the report of the neighborhood that Anna Gunter gave Rose to Peter, her son; and I was at the house of Mr. Morgan about six months before his death, and he talked of making his will; and Mrs. Morgan requested him to give the negroes that came by her to her children."

Defendant then offered other evidence of the marriage. Plaintiff's mother survived her husband, Peter Morgan.

There was a verdict for the plaintiff, and defendant moved for a new trial, on the ground that the deposition of Mary Dagget was improperly rejected. A new trial was refused, and from the judgment rendered defendant appealed to this Court.

Badger for appellant.
Gaston and Seawell for appellee.

HALL, J. It cannot be contended that the judge erred in rejecting that part of the deposition which states that about six months before Morgan's death Mrs. Morgan requested him to give to her children the negroes that came by her, because, if it had any effect at all, it would have the improper tendency to invalidate the parol gift made by Mrs. Morgan herself, and under which the plaintiff claims title.

With respect to the other part of the deposition, it is very true that the declarations of husband or wife may be received to prove whether they were married or not; but it must appear that such declarations have not been made at a time or with a view to serve any (97) particular purpose. Norris's Peake, 23. In this case it does not appear *when* Mrs. Morgan told the witness that she and Mr. Morgan were married; it might have been, for aught that appears, before or

after the commencement of this suit. For these reasons, I cannot say that the judge erred in the rejection of this deposition. The rule for a new trial should be discharged.

HENDERSON, J. Common reputation in the family is admissible as evidence of a marriage in that family; and it is said that the declarations of an individual of that family are evidence of that common reputation. But such declarations must have been made before any contest had arisen in regard to the marriage. It is necessary that they should have been made not only without any view of benefiting the person making them, but also without a view of benefiting any other; that they should have flowed from a desire only of speaking the truth, which all are presumed to have when there is no motive to declare the contrary. The person, therefore, who offers such declarations must show that they were made under such circumstances; it is a prerequisite to their admissibility. It not appearing that those made in the presence of Mrs. Dagget were made under such circumstances, they must be rejected. For aught that appears to the contrary, they might have been made on the very day on which her deposition was taken, and with a view to this contest, to aid a purchaser under her husband's executors to increase her legacy, or the fund for the payment of debts, or other legacies, whereby her legacy would be the better secured to her. At all events, it does not appear to have been made *ante litem motam.*

The declarations cannot be received as coming from one privy in estate, for she had parted with her estate in the negroes before they were made.

The plaintiff is, therefore, not a privy in the estate which she
(98) then had.

As to the other ground of objection, towit, that it tends to invalidate an act which she had done, I know of no such rule of exclusion. The maxim, *Nemo audiendus est allegare suam turpitudinem*, is applicable to parties, and not to witnesses. If a person is not infamous, or interested in the event of the cause, he is competent; if his testimony tends to impeach an act which he has done, it goes to affect his credit.

The deposition must be rejected for the reasons first mentioned.

As I have not considered, so I express no opinion, on what effect such subsequent marriage, and sale by the husband or his executors, would have upon the previous parol gift of a slave by the wife, under our act of 1784 or any other law.

The CHIEF JUSTICE assenting as to the reasons for rejecting the deposition, Affirmed.

Cited: Smith v. R. R., 68 N. C., 116; *Hodges v. Hodges*, 106 N. C., 375; *Rollins v. Wicker*, 154 N. C., 564; *Lumber Co. v. Lumber Co.*, 169 N. C., 96.

ARRENTON v. JORDAN.

1. A sheriff may, but he is not *bound* to, *insist* upon two sureties to a bail bond. If he take but one, and he is *insufficient*, the plaintiff may except; but the bond with but one is good, either on *sci. fa.* or in an action for debt.

2. An assignment of the bail bond by the sheriff to the plaintiff is not required when the suit is in the county court. Section 17 of the act of 1777 is confined to the Superior Courts.

3. In *sci. fa.* against bail it is not necessary to state the issuing and return of a *ca. sa.* against the principal, though the want of such *ca. sa.* would be a defense for the bail.

APPEAL from *Paxton, J.*, in PERQUIMANS.

Proceeding by Arrenton, as plaintiff in error, to reverse a judgment which Jordan had recovered against him in Perquimans County Court. Jordan had sued one Townsend Elliot in debt for $375, and Arrenton became bail for Elliot's appearance, etc.

After judgment against Elliot in the county court, at August (99) Term, 1822, a *ca. sa.* issued against Elliot, which was returned, "Not to be found," whereupon *sci. fa.* issued against the plaintiff in error as bail of Elliot. On the return of the writ, Arrenton appeared and pleaded, and at August Term, 1823, a judgment was rendered against the plaintiff in error as bail, whereupon execution issued. On 31 October, 1823, Arrenton gave the defendants in error notice of an intended motion at November Term, 1823, for a writ of error in the case; and at that term the writ was allowed, plaintiff having assigned for error that the county court found an issue of fact, towit, that the bail bond was good; that the jury found an issue of law, towit, that the judgment against Elliot, the principal, was not void; that the bail bond was taken for more than double the amount stated in the writ, and, therefore, void under the Constitution; that there was but one security to the bail bond, and, therefore, though debt at common law would lie, yet a *scire facias* under the statute would not; that the *sci. fa.* issued for the amount of the judgment against Elliot, when it should have issued for the amount of the penalty of the bail bond; that the *sci. fa.* does not aver a writ of *ca. sa.* ever issued to the proper county against Townsend Elliot, the principal, nor does it show that said writ was returned "Not to be found"; that the *sci. fa.* does not aver the judgment against Elliot, the principal, to be unpaid, unreversed, or uncanceled; that it does not appear to whom the said Arrenton bound himself as bail for Elliot; that it does not appear from the *sci. fa.* that the bail bond was assigned by the sheriff to the plaintiff pursuant to the statute.

The defendant in error pleaded, in the Superior Court, *"in nullo est erratum,"* and *Paxton, J.,* held that there was error, and reversed the judgment of the county court; whereupon the defendant in error appealed.

(100) *Hogg for appellant.*
L. Martin, contra.

TAYLOR, C. J. It is necessary to notice but three of the errors assigned in this case, the others being such as are either cured by the statute of jeofails or might have been availed of in an earlier stage of the proceeding. The sheriff having taken but one bail, was at his own risk; and if that one was insufficient, the sheriff might have been rendered liable upon exception taken thereto by the creditor in due time. The sheriff may, if he pleases, insist upon a bail bond with two sufficient securities, but he is not bound to do so; and this rule is equally applicable to a *scire facias* and an action of debt.

The assignment of a bail bond, by the sheriff to the plaintiff, is not necessary, when the suit is brought in the county court. The provision of the act of 1777, ch. 17, is confined to the Superior Courts, and no similar one extends to the county courts.

This *scire facias* is informal; but it is no necessary part of a *scire facias* against bail to state the issuing and return of a *ca. sa.* against the principal. The want of a *ca. sa.* would be a defense for the bail, on the *sci. fa.* (Lutw., 1285), and if one had not issued before the *scire facias,* it might be assigned for error. Cro. Car., 481. But in this case it is stated that a *ca. sa.* issued from the sessions where the judgment was recovered, and returned to the ensuing sessions "Not found." There is, therefore, no sufficient reason to reverse the judgment.

HALL, J. In this case the parties are at issue upon the errors assigned. A motion is made by the defendant in error, under the act of 1824, ch. 5, to amend the record, and thereby cure the errors (if any there be) which have been assigned in the writ of error. What appears to me to be the true construction of that act, I have expressed in *Matlock v. Gray, ante,* 1, at this term. If the court from which the record comes could not grant the amendments now prayed for, after final judgment pro-
(101) nounced by it, this Court cannot permit them to be made.

Another objection is made to the time at which the writ of error was sued out from the county court, it being at a term subsequent to the one at which final judgment was obtained.

Laws 1777, ch. 115, sec. 76, declares that when any person shall be desirous of prosecuting a writ of error, he shall move the county court where such suit is, or hath been pending, for a writ or error. Section 79

declares that if it shall so happen that there shall not be thirty days between the *last* day of the term or *hearing* in the county court and the next term of the Superior Court to which such appeal shall be made, or writ of error allowed, a transcript of the record shall be filed in the Superior Court the term succeeding, etc. I recite this clause because it appears to me that the party can only sue out a writ of error at the term at which judgment against him is finally given in the words of the act, "till the last day of the term or hearing in the county court." In confirmation of this, section 80 declares, "that in every county court, etc., when any appeal shall be prayed, or writ of error allowed, the clerk of such court shall make a record of the proceedings in such cause, and shall, within ten days after the final adjournment of the term in which the cause shall be heard, give an attested copy of such record, etc., to the appellant or plaintiff in error." This clause, I think, incontestably limits the time of suing out writs of error from the county courts to the term at which judgment shall be finally rendered.

Much inconvenience would attend the practice of suing them out at any indefinite period of time. No provision is made for notifying the opposite party of the time of moving for them; and if they might be moved for at any time, the opposite party would have no day in court; it might be done after the debt was discharged.

When application is intended to be made to the Superior Court, under section 47 of the act, in order to guard against surprise, provision is made for notifying the opposite party, which, no doubt, would (102) have been done as to applications to the county courts if it had been intended that they might have been made at any indefinite period. I, therefore, think the county court cannot grant writs of error at any term after the expiration of the one at which judgment is finally rendered. But, taking it for granted that the defendant is too late in availing himself of this objection, as issue has been joined on the errors assigned, it is necessary to consider of those errors. The one which states that the bail bond was not assigned by the sheriff would seem to be formidable; but it appears that the act of 1777, ch. 118, which speaks of process returnable to the county courts, does not require an assignment to be made by the sheriff. That assignment as error may, on that account, be got clear of. I also concur in opinion with my brethren that the other errors assigned are not sufficient to reverse the judgment of the county court.

By the Court, Affirmed.

Cited: Gray v. Hoover, 15 N. C., 477; *Cochran v. Wood,* 29 N. C., 216; *Trice v. Turrentine,* 32 N. C., 551.

STAMPS v. GRAVES.

1. A variance between the writ and declaration, the former being in debt, the latter in assumpsit, is fatal even *after verdict.*
2. A note not assignable within the statute cannot be declared on. The consideration must be stated and proved. The note can only be evidence to the jury.
3. Where a note is made payable on a contingency, and the contingency is of such kind as shows no benefit to the one or injury to the other party, the note of itself is no evidence of a consideration, but proof of a consideration must be given independent of the note.

(103) DEBT, brought in CASWELL on the following instrument:

I promise to pay John Stamps, for John W. Graves, the sum of $286.32 out of a bond, when it shall be collected, on James Daniel for the sum of $452, due 1 March, 1820.

30 December, 1819. A. GRAVES.

The declaration was as follows:

John Stamps complains of Azariah Graves, in custody, etc., for that whereas the said Azariah Graves heretofore, towit, on 30 December, 1819, towit, at Caswell, aforesaid, for value received, made his certain promissory note, bearing date the day and year aforesaid, and thereby then and there promised to pay to the said John Stamps, for John W. Graves, the sum of $286.32 out of a bond, when it should be collected, on James Daniel, for the sum of $452, due 1 November, 1820; and the said John Stamps in fact saith that afterwards, towit, on, etc., at, etc., the said money *was collected* on the bond aforesaid of the said James Daniel; by means whereof the said Azariah Graves became liable to pay, etc., and being so liable, in consideration thereof, promised, etc.

And whereas, also, afterwards, towit, on, etc., the said Azariah Graves at, etc., for value received, made his certain promissory note, bearing date, etc., and thereby then and there promised to pay to the said John Stamps, for John W. Graves, the further sum of, etc., out of a bond, when it should be collected, on James Daniel for the sum of, etc., and the said John Stamps in fact saith that afterwards, towit, on, etc., at, etc., the aforesaid bond on James Daniel was collected by the said John W. Graves, by means whereof the said Azariah Graves became liable to pay, etc., and being so liable, in consideration thereof, promised, etc.

And whereas, also, afterwards, towit, on, etc., the said Azariah Graves at, etc., for value received, made his certain promissory note, bearing date, etc., and thereby then and there promised to pay to the said John Stamps, for John W. Graves, the further sum of, etc., out

(104) of a bond, when it should be collected, on James Daniel for the

sum of, etc.; and the said John Stamps in fact saith that afterwards, towit, on, etc., at, etc., the aforesaid bond on James Daniel might have been collected, and that the collection of the said bond was prevented and defeated by the willful act of the said John W. Graves; by means whereof the said Azariah Graves then and there became liable to pay, etc., and being so liable, in consideration thereof, promised, etc.

The fourth count was for money lent and advanced.

The fifth, for money had and received.

The defendant pleaded the general issue and payment, and on the trial before *Paxton, J.*, the plaintiff proved the execution of the instrument; that John W. Graves brought suit against James Daniel on the bond mentioned in the declaration, and obtained judgment; that Daniel appealed to Caswell Superior Court, and gave as securities for his appeal Charles Wilson, John G. Wilson, Jeremiah Dixon, and James Clay; that judgment was rendered in the Superior Court against Daniel and his securities, and execution issued thereon against them; that on this execution the sheriff returned that, exclusive of costs, $236 had been paid by Jeremiah Dixon, and that no property could be found to satisfy the residue. Plaintiff also proved that James Daniel and James Clay were insolvent, and that Jeremiah Dixon made the payment above stated in behalf of himself and Charles and John G. Wilson; that the payment was made under an agreement between Solomon Graves, as agent for John W. Graves, and Dixon and the Wilsons, that they, the securities to the appeal, should be discharged from all further liability for the balance of the debt, and they were discharged accordingly.

The defendant offered to prove by parol that the instrument was given by the defendant as agent for John W. Graves, but the court rejected the testimony; defendant contended, also, that it was incumbent on the plaintiff to show a consideration for the instrument, but (105) the court held otherwise.

It was admitted that at the time Dixon and the Wilsons were discharged the defendant was not the agent of John W. Graves in collecting the debt from Daniel; and also that no part of the money raised on the execution against Daniel and his sureties was ever received by the defendant.

The jury, under the charge of the court, gave a general verdict for the plaintiff, and the case stood here by appeal of defendant, on a rule to show cause why a new trial should not be granted.

Seawell for appellant.
Badger for appellee.

HENDERSON, J. It is objected by the defendant that the writ is in debt, and the declaration is in case or assumpsit.

The plaintiff answers that this objection does not appear, *oyer* not being craved of the writ; and it is likened to the original in England, and English authorities are cited which fully support the answer. But the objection, as it exists here, is not answered; the writ issuing from the same court is upon record without its being put there upon the prayer of *oyer*. In England the original issuing from a different court (the court of chancery) can only get on the records of another court but by obtaining *oyer* of it.

It is next answered by the defendant that the writ being only process, a variance between it and the declaration is immaterial; that the defendant in court is bound to plead to any declaration; and English
(111) authorities are cited which also fully establish this position.

This answer requires some investigation. In England no possible injury can arise to any one by thus disregarding the process, neither the bail to the writ, bail to the action, nor the defendant. In this country both the bail and the defendant may be materially injured by it. In England the bail to the writ are discharged by the defendant's appearance; the condition of the bail bond is fulfilled. The bail to the action cannot be injured, because they contract their obligation after appearance, and this obligation is evidenced by what is called the bail form, in which the particular action is specified in which they are bail, and they can be made answerable in no other. The party cannot be injured, because no steps can be taken against him until he appears in court, not even to declare against him; and if he is surprised by the charge, he is entitled to time to plead. The process may, therefore, very properly be considered as *functus officio,* and be disregarded. But in this State the bail to the writ are also bail to the action; and if the process may be disregarded, they may be charged with a judgment in a different action from the one in which they became bail. But it is said, if the action is varied, the bail are discharged. Not so, I answer, if it is a matter of course to disregard the process; it is only by regarding it that such consequence follows; but, above all, the heaviest consequences may fall on the defendant. In England a default is for withdrawing after having been in court; no steps can be taken by the plaintiff until he has got the defendant in court; if after having been in court he withdraws, it is an admission of the facts alleged against him. By the construction put upon our court law of 1777 a default may as well be before appearance as after; and we are daily in the habit of taking judgments by default against a person who has not appeared in court, some of them final, some interlocutory. If it were a matter of course to disregard the proc-
(112) ess, and that a declaration might be filed for any other cause of action, a defendant, who might have been arrested for some paltry sum which he disregarded, and therefore did not appear to defend it,

either because it was due or for any other cause, might have a final judgment entered against him by default for half or the whole of his estate; or he might be sued for one thing which he admitted himself culpable in, and charged in another which he would have denied. And it is no answer to say that the same law requires a copy of the declaration to be served on the defendant three or five days before court. This omission must be shown by *plea* of the defendant; and if he makes default, he is not there to plead. The court will only see that the original declaration is filed in court within the prescribed time. These inconveniences would result from adopting the English practice, which is admitted to be proper there, but, combined with our other rules of practice, would be ruinous here. Nor is it any reason why they should be adopted here that upon application to a judge a *supersedeas* might be obtained. It might, but it is best to prevent the mischief. A man might have his property sold, or his person imprisoned, before he could have an opportunity to redress himself. I, therefore, think that the variance is fatal. But as this is a new case, and the court below may allow of an amendment upon equitable terms, and there are good grounds for granting a new trial, the court will not arrest the judgment, but leave it to the discretion of the court below to allow an amendment, if it should think proper.

The next objection is to the declaration. The counts upon the note are bad. This is not a note within the statute of Anne, or our act of 1762. Were it so, it might be declared on, for these statutes make notes which come within them evidence of a debt, and not barely evidence of a promise, as such notes were before the statute. But this note being payable only on a contingency, and not absolutely, is unaffected by the statute. A note for money before the statute was evidence (113) of so much money lent, or had and received; it was given in evidence on counts like these, and the courts instructed the jury that they were well warranted in drawing such conclusions; for, from the nature of man, it was not presumable that he would give this deliberate evidence of his promise without having in his hands so much money belonging to the payee. But this was only presumption of fact; the law raised no such presumption, until the statute raised it. This note being a conditional promise to pay, on a contingency which might never happen, no such presumption can arise; it does not afford evidence that the plaintiff had lent the sum expressed in the note, or that the defendant had received such a sum for the use of the plaintiff; for if such had been the case, the plaintiff would not have accepted a note payable only on a contingency in satisfaction thereof. But if it is said that at least it is evidence of some sum having been received, or some sum lent, it may be asked, How much? Such a sum as would make the bet equal, whether Daniel's note would ever be collected? We have no means of ascertaining how much

this would be. Besides, this would be a species of gambling; to make the most of it, it would be left to mere conjecture what the consideration was; it might be good and it might be bad. There can be no harm in compelling the plaintiff to set out in his declaration what the consideration was. I am satisfied that the one stated in the declaration is not the true one, towit, for so much money had and received by the defendant to the use of the plaintiff, or so much money lent by the plaintiff to the defendant, and that the judge ought to have so instructed the jury. If the real consideration had been stated, and the money on Daniel's bond collected either in fact or in law, the court could have passed on the contract, and given the plaintiff a judgment, if in law he was entitled to one; if not, a judgment for the defendant. As it is, it is all conjecture. For this omission of the judge on submitting an issue to the jury with-
(114) out any evidence to support it I think that a new trial should be granted.

I do not intend to be understood as conveying an idea that only such notes as are within the statute can be offered in evidence in support of the money counts, for the statute has no operation upon this question. A note for corn, cotton, or any other article is certainly *prima facie* evidence of the maker's having received an adequate value; it is, therefore, evidence of such consideration *prima facie*. But I think these contingent notes, which may never become payable, do not raise such a presumption; in fact, the presumption which it raises is too uncertain. It requires proof of what the consideration was; and if proof must be made, the fact of the consideration must be stated in the declaration.

I should have thought that the statutes before mentioned had made notes which were within them conclusive evidence of a debt; for they declare that when any person shall make any note for the payment of money payable to any other person, the money expressed to be payable therein shall be considered to be due and payable to the person to whom the note is payable; thus making the note evidence of a debt by a conclusion of law, and, therefore, by the proof of the note the debt is proved, and that the want of a consideration could be no defense, for a consideration is not required by the statute to make the note evidence of the debt; that notes within the statute by its operation stood upon the same grounds in this particular as specialties, which were good without a consideration; for I think that Mr. Blackstone is wrong when he says that a bond, from the solemnity of the sealing, carries with it an evidence of a good consideration; a voluntary bond is obligatory at law, and equity will not for that cause alone interfere. Even if the want of a consideration appears upon its face, it is in the nature of an executed contract. The symbolical delivery of the obligor's seal, having the effect of executing the original contract, when an action

is brought upon it, it is not to enforce the original contract, which, (115) being executory, would require a consideration, but to convert the symbolical performance into an actual one, as it were, to compel the obligor to redeem the symbol. If a gift of a chattel is made, and there is no delivery, such gift cannot be enforced for want of a consideration; the contract is voluntary and requires a consideration to support it; but if a delivery is made, the property passes without a consideration: it is then an executed contract, and the want of a consideration is immaterial. I mean to say that a bond may be declared on without stating a consideration, and the defendant shall not impeach it by proof of the want of a consideration. A note within the statute has the same effect as a bond; it is evidence of debt, and is good without a consideration. To permit the defendant to impeach it for want of one is, I think, in the teeth of the statute. But those who came immediately after the statute said the statute effected no change in them between the parties, and confined its operation to cases after assignment, so far as regarded a consideration; and I believe it is now the settled course of practice to permit the maker of a note, as well when the note is within as when it is without the statute, to impeach it for want of a consideration, in a suit with his payee, confining the operation of the statute to cases where there is an indorsement for value.

PER CURIAM. New trial.

Approved as to first point: *Glisson v. Herring,* 13 N. C., 159.
Overruled as to second point: *West v. Rutledge,* 15 N. C., 39, 40, 41.
Cited: Hamilton v. Wright, post, 287.

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(116)

DOE ON DEMISE OF TAYLOR v. ROE AND SHUFFORD.

1. Common reputation is evidence in questions of boundary; and in ascertaining Earl Granville's line astronomical observation is a more certain mode (the latitude of the line being given) than an actual running of the line from a certain point designated on the seashore as its beginning.

2. The sovereign power cannot be estopped. Where the crown, in 1768, granted lands to A. which it had previously granted to Earl Granville, the grant in 1768 was void; and as the State succeeded, upon the Revolution, to Earl Granville's right to the land, a grant made by the State since shall be preferred to the royal grant in 1768.

EJECTMENT. Appeal from IREDELL. The plaintiff's lessor claimed the land in dispute, lying in Lincoln County, by virtue of a grant issuing to his father in 1768 from the crown of Great Britain.

The defendant claimed the land under a grant from the State of North Carolina of recent date, and contended that the land was within the boundaries of Earl Granville's grant, which being antecedent to that under which plaintiff claimed, the latter conveyed nothing to plaintiff.

On the trial before *Nash, J.*, it appeared that from the year 1753 acts of the Legislature of North Carolina had been passed, at various times, up to 1779, which acts call for and point out Earl Granville's line as the boundary between different counties; that in 1772 the line so called for by those acts had been actually run and marked as Granville's line by commissioners appointed for that purpose, and has ever since been reputed the line; but it did not appear how the line so run was ascertained to be Granville's line; nor did it appear to have been ascertained for any other purpose but that of marking the limits of the several counties bounded by it. The land in dispute lay to the northward (117) of the line run as Granville's, several miles.

The defendant proved that the latitude of the town of Lincolnton had been ascertained by observation, and that from Lincolnton to the Granville line extended would be about 2 miles going due north; and further, that from the observation which had been taken, the latitude of Earl Granville's line, as given in his grant, would make the line pass to the northward of Lincolnton between 2 and 3 miles.

On the part of the plaintiff it was contended that although the grant of Earl Granville called for a parallel of latitude as the southern boundary of the territory granted in it, yet it called also for other boundaries more certain in their nature and more easily ascertained, viz., Chickmacomack Inlet and the town of Bath; and that from a point north of Bath, as specified in the grant, Earl Granville's line was to be run west;* and that he could not be deprived of his land, unless it was shown that it lay to the northward of that line so run, which was denied to be the same with the line run and marked as Earl Granville's line.

It was further proved that, according to the maps examined by the witness (Mr. Mushat), the 35th degree of north latitude, measured on those maps by the scale upon them, was 12 miles to the south of the line laid down by them as the division line between the Carolinas; from the

*"Bounded to the north by the line that divides Carolina from Virginia, to the east by the great western ocean, commonly so called, and as far southwardly as a cedar stake set upon the seaside in the latitude of 35 degrees and 34 minutes at north latitude, being 6½ miles to the southward of Chickmacomack Inlet; from that stake, by a west line which passed 25 feet to the southward of the house wherein Thomas Willis liveth, and so west as far as the bounds of the charter granted to the lords proprietors of Carolina by his majesty, King Charles the Second, which west line went 1,660 poles to the north of the south end of Bath town."

35th degree of north latitude to the land in dispute (supposing (118) it to be due north from Lincolnton) would be 43 miles over hilly, broken ground; that the maps were not accurate, and that 34 minutes would measure 39 miles, and the witnesses could not say that the distance of 43 miles mentioned above would be more than 39 miles *air measure.*

The plaintiff, and those under whom he claimed, never had actual possession of the land, but, living in another county, the defendant had acted as his agent for many years in taking care of the land and paying taxes for it. Defendant admitted himself to be in the adverse possession.

The court charged that if the jury were satisfied that the land in dispute was within the chartered limits of Earl Granville's land, the plaintiff was not entitled to recover. There was a verdict for the defendant, and a new trial moved for on the ground that the jury should have been instructed that the mode by which the defendant ascertained the situation of Granville's line was not such as to entitle it to any weight in deciding the question where that line was; and further, that the jury should have been instructed that, although the land was to the north of Granville's line, yet the plaintiff was still entitled to recover, as the defect in his title was cured by the Bill of Rights.

A new trial was refused, and from the judgment rendered plaintiff appealed.

Wilson for appellant.
Badger for appellee.

(125) HENDERSON, J. In running a long line upon a parallel of latitude, the only mode of correcting the variation from the true line is to resort, from time to time, to observations.

HALL, J. I can see no objection to the charge given by the judge to the jury in this case. The question of fact was whether the lands in dispute lay within the boundaries of the lands granted by the king to Earl Granville; nor can I see any legal objection to the evi- (126) dence offered to the jury relative to that fact.

I would also think the question of law arising in the case free from doubt, if we take as true what the jury have found by their verdict, that is, that the land in dispute lies within the limits of Earl Granville's grant from the crown.

The plaintiff also claims title under a grant from the crown in 1768, subsequent to the date of Earl Granville's grant. As the king had conveyed title to the lands in dispute to Earl Granville, it follows that at the time of the grant to the plaintiff's father he had no title to the lands,

and of course could convey none. "For if he enters without title, or seizes land by a void or insufficient office, he is no disseizor; but if the king by letters patent grants land so seized, and the patentee enters, he is a disseizor, because he has time to inquire into the legality, which it is supposed the king has no leisure for." (Guilliam's Bac. Abr., "Prerogative," F., 3.) Therefore, as the plaintiff's pretensions to recover in this action rest solely upon the grant from the crown, he must fail; nor do I think his claim is in any respect bettered by the revolution in government which took place afterwards, when the State succeeded to the rights of the crown as well as to those of Earl Granville; because if, at that time, Earl Granville had not disposed of the lands, they still belonged to him, and, consequently, title to them vested in the State, and that title was not in any respect affected by any rights derived from the crown, because whatever right it once had to the lands, it had conveyed those rights to Earl Granville. For these reasons I think the rule for a new trial must be discharged.

HENDERSON, J. It is contended by the counsel for the defendant that were it true that the sovereign power, like an individual, could be
(127) estopped, yet where the conveyance is by grant without warranty, express or implied, as in the present case, there can be no estoppel; and he refers the estoppel arising from bargains and sales, and other conveyances deriving their efficacy from the statute of uses, entirely to the express warranties which are attached thereto; and in feoffments, to the implied warranty arising thereon before the statute of *quia emptores,* from the services due from the feoffee and his heirs to the feoffor and his heirs; and since the statute, to the warranty implied during the life of the feoffee, probably from the nature of the conveyance, or from an adherence to the rule after the reason of it had ceased, a thing not very uncommon in our law, as we still retain many rules growing out of the doctrine of feuds, although feuds have long since ceased among us. I think that the counsel is wrong in attributing the estoppel to the warranty. The estoppel arises entirely out of the affirmations of matters of fact made in the deed. He has confounded estoppels and rebutters; things essentially different in their nature, although frequently producing the same results. A rebutter operates on *the right of action to the estate.* It operates as to strangers as well as between parties and privies, which is a consequence flowing from its operation on the *right to the estate.* An estoppel operates entirely as to *facts;* its effect is to conclude the parties from making, and of course proving, the facts to be otherwise than they are stated or acknowledged to be in deed or other transaction out of which the estoppel arises. My collateral ancestor deprives me of my estate, and makes a feoffment in fee to a stranger with warranty, and

dies; the warranty descends on me as his heir (and this is done under such circumstances as that it does not amount to what is called a warranty commencing by disseizin). In any controversy which I may have with *any* one in regard to the lands, after the warranty has descended on me, this feoffment and warranty will bar my right of action to the estate. If I had lost my right of entry when the warranty descended on me, it is as effectual to bar or destroy my estate (and (128) that with regard to the *whole* world) as if I myself had made a feoffment of it. But if I today should make a feoffment or bargain and sale of lands, which do not belong to me, to A., and tomorrow purchase the estate of B., to whom it belonged, although nothing in reality passed from me to A., I, having nothing in the estate, could not transfer anything to him, for a person cannot grant that which he has not; yet in a controversy with B. I shall not be permitted, that is, I shall be estopped, to aver and, of course, to prove that I had nothing when I granted to him, and set up in myself the title which I had afterwards acquired of B.; for, having affirmed in my conveyance to him that I had the estate, I shall not afterwards affirm that another had it. But this estoppel is confined entirely to *parties* and *privies;* it affects not a stranger; and as it affects not a stranger, neither will it affect me in a controversy with him; for the agreement between A. and myself as to certain facts does not make the facts in reality so. The agreement as to how they are is only binding upon us and our privies; in our controversies with others we are at liberty to show how they really are. In a controversy, therefore, between myself and a stranger, if the stranger, for the purpose of showing that A. has title, and if A. had, I could not have it, shows my deed to him, it is competent for me to show that when I granted to A. I had nothing in the land, and I will prevail against him on my title derived from B.

Further, to show that estoppels operate as to the *facts* only: if A., reciting that he had not an estate in the lands intended to be granted, but that another has, bargains and sells them to B., if A. in reality had nothing in the lands, nothing passes, not even by estoppel, for there is affirmation against affirmation, and, of course, no estoppel can arise. To use the language of *Lord Coke,* there is estoppel against estoppel, and the matter is left at large. So if one has an interest, although not as large as the estate granted, as if lessee for life or years, bar- (129) gains and sells in fee, the affirmation of title shall be confined to the estate for life or years, and no estoppel arises; as if A. is tenant for the life of B., and A. bargains and sells the lands to C. and his heirs, and A. afterwards purchases the reversion from the owner and then B. dies, A. may recover the lands from C., notwithstanding his deed to C. and

his heirs; that is, the affirmation of title is confined to this, that A. had an estate during the life of B. Cases might be multiplied to show the difference between a rebutter arising from a warranty and an estoppel. We may add, also—which would seem of itself conclusive—that estoppels arise in cases where there can be no warranty; acts *in pais,* acts in the country. Nor is the reason more sound that estoppels arise only from such conveyances as operate by way of transmutation of possession, as a feoffment, and not on those which operate under the statute of uses; for as to their affirmation, and of course their estoppels, they are precisely alike. A feoffment, accompanied by livery of seizin, passes the estate; there is an actual tradition; the estate passes as to all the world, and any person may show it, because the *fact* is so. But in a bargain and sale there is no actual tradition; the statute only transfers the seizin which the bargainor has; if he has none, none in *reality* is passed, and strangers cannot be affected by a thing which never happened; but as between the parties the seizin shall be considered as passing, because the bargainor is estopped from showing that he was not seized, and if he was seized the statute transferred it. As between the parties, the bargain and sale shall pass what it purports to pass; as to strangers, what it actually does pass. Thus a feoffment in fee by a tenant for life is a forfeiture, because, as to all the world it passes the fee; it displaces the estate of the reversioner; it is, therefore, an injury to him which is punished by a forfeiture of the life estate. But if tenant for life bar-
(130) gains and sells the lands in fee, it is no forfeiture; for, as to all but the parties to the bargain and sale (in which term I include privies), it passes only the life estate, for that was the extent of the bargainor's seizin; and passing only the life estate, it did not displace the reversion; it was, therefore, no injury to the reversioner, and, therefore, no cause of forfeiture. Nor do the authorities cited from Cruise and Sheppard support the position contended for. They were cases of releases, operating by way of *mitter le droit,* or extinguishment. In them no *estate* passed by the release, but only a right, say, a right of action. Rights are not the subject of transfer or conveyance, but estates are. A right to an estate is not demanded in an action, but the estate itself. *Rights* may be *released* or extinguished, but not *granted.* If A. is out of possession, and assigns or transfers to B., who has no estate in the lands, B. can sustain no action for the lands, as well for the reason that the subject-matter was not the object of a grant as from the rule said to be founded on policy, that no man can sell his right of going to law. If A. releases to B. all his right in certain lands, B. having no estate in the lands, nothing passes, not even by estoppel, for that cannot pass by estoppel which in *reality* cannot pass by a conveyance. In the

cases cited the releasor, by his release, affirmed that he had *a right* to the lands, and no estate therein; for a release presupposes the *right* to be in the releasor, and the estate in the releasee (I mean as to releases operating by way of *mitter le droit* or relinquishment), and the release can support no action on such *acquisition;* it only confirms and strengthens the estate which he had before. If A., therefore, releases his right to B. in a certain estate which B. has in possession, and A. afterwards acquires a good estate in the lands, he may set it up, for it is a different thing from that which he affirmed he had in his release; and estoppels being odious, the party shall not be concluded from showing the truth, unless the affirmation be directly upon the point, not to be arrived at by argument and conclusion. And this distinction between an estate and a right is almost daily acted on. In our actions on covenants (131) for title and quiet enjoyment, if the right and estate were the same thing, no breach could ever with propriety be assigned for breaches of covenants for quiet enjoyment contained in an indenture of bargain and sale; for in such cases the bargainee is as much estopped as the bargainor. But it is as to the *estate* in which they are estopped. The breach is not that no estate passed, but that an *estate did pass,* but that the title to that estate was not good, and that he was disturbed in the *enjoyment of that estate* by one having title. In fact, the very idea of annexing a warranty or covenant presupposes an estate to pass; for unless the estate passes there can be no warranty, which is a dependent covenant, as is a covenant for quiet enjoyment, although by the phraseology there may be an independent covenant, but it is not attached in law to the estate. This very clearly proves what is affirmed, and what estoppels arise out of a bargain and sale.

With respect to the case cited by the counsel for the plaintiff from Co. Lit., where Edward IV. was barred, that was clearly the case of a rebutter arising from a warranty made by his collateral ancestor, the Duke of Cornwall, which descended on Edward IV. As to the case from Massachusetts, the operation of the resolve of the Legislature was not so much to declare where certain falls in the river were, as to locate a prior grant; it operated to locate the lands where the Legislature said the falls were; it operated as a new grant, which the Legislature certainly had the power then to make; it confirmed the old grant, and fixed it at certain falls; and if such was not its operation, the decision was wrong, for a sovereign cannot be estopped. But the sovereign power conveys neither by feoffment, bargain and sale, nor any conveyance dependent on livery of seizin or transferring uses into possession. By grant the sovereign will alone passes the property, evidenced by matter of record; and all grants from the sovereign are matter of record, (132)

and, when under the great seal of the State, prove themselves. And I know of no case where the sovereign power has been estopped; the cases are all the other way, and policy and justice require that they should be so. This sovereign, or sovereign power, is a trustee for the people; it acts by agents; the people should not be bound by any statement of facts made by those agents. For their benefit, the truth may always be shown, notwithstanding any former statement to the contrary. Where the State, therefore, succeeded to the rights of the king, and to those of Lord Granville, it was competent for the State to show that the king's grant to the plaintiff in 1768 passed nothing, the king having granted the same lands to Lord Granville in 1744; for the king, or sovereign power, cannot, any more than an individual, grant that which he has not. The lands in question were the property of the State when the grant was made to the defendant, for the State, I think, certainly succeeded to Lord Granville's lands, by the most complete confiscation, by taking the very property to itself, as it did by the entry laws, and passed them to the defendant by its grant in 1801.

As to the evidence which was received to establish the line of Lord Granville, I can see no objection to it. Common reputation is certainly admissible in questions of boundary; and it was applied to this case much more consistently with the spirit of the rule, and the reasons on which it was founded, than when we permit a witness to swear that a person since dead told him that a certain tree in a remote wood was a line or a corner tree of some other person's land; and as to the observations made by Mr. Mushat, fixing the latitude, although such observations may not lead to absolute certainty, yet it is the best method which we have to ascertain the fact, and certainly better than by going down to the seashore and running out west; for the latitude can as well
(133) be taken here, or in Lincoln, as there. It would be impossible to continue the same course such a distance by the compass alone. Astronomical observations must, therefore, be frequently made to keep the course correct; for I do not agree with the plaintiff's counsel, but adopt the argument of the counsel for the defendant, that the cedar stake or the houses by which the line is said in the charter to run, are nothing else than marks pointing to the line, which, notwithstanding those *indicia* given in the charter, is on the parallel of latitude 35° 34′ north. The rule for a new trial should be discharged.

By the Court. Affirmed.

Cited: Hartzog v. Hubbard, 19 N. C., 243; *Candler v. Lunsford,* 20 N. C., 543; *Wallace v. Maxwell,* 32 N. C., 112; *Southerland v. Stout,* 68 N. C., 450; *Bell v. Adams,* 81 N. C., 122; *Huffman v. Walker,* 83

N. C., 415; *Tolson v. Mainor,* 85 N. C., 239; *S. v. Williams,* 94 N. C., 895; *Halliburton v. Slagle,* 132 N. C., 955; *Wool v. Fleetwood,* 136 N. C., 468; *Weeks v. Wilkins,* 139 N. C., 217; *Buchanan v. Harrington,* 141 N. C., 41; *Walker v. Taylor,* 144 N. C., 178; *Weston v. Lumber Co.,* 163 N. C., 81; *Cooley v. Lee,* 170 N. C., 22.

McCLURE'S EXECUTORS v. MILLER.

An action by a father for the seduction of his daughter abates by the death of the father, and cannot be revived by his executors.

CASE, brought in RUTHERFORD by Arthur McClure against the defendant for the seduction of his daughter.

After the cause was at issue, Arthur McClure died, his death was suggested on the record, and his executors were made parties; and at the last term, when the cause was reached in order, *Nash, J.,* who presided, upon motion of defendant's counsel to dismiss, held that by the death of Arthur McClure the suit had abated, and gave judgment accordingly, whereupon the executors appealed.

Carson for appellants. (136)
Wilson, contra.

TAYLOR, C. J. This case depends upon the construction of Laws 1805, ch. 679; the words of which, so far as they relate to this case, are, "that no action on the case for damage done to personal property shall abate by the death of either plaintiff or defendant."

This is an action on the case, brought by a father for the seduction of his daughter, and the question is, Has it abated by his death? Considering the nature of the action, and the extent of injury and suffering which usually follow the crime of seduction, I should be gratified to discover a satisfactory ground for the opinion that the action might be revived. I think the plaintiff's counsel has presented the case in the strongest point of view it admits of; yet after all it must be admitted that the action is but in form and sound for an injury done to property, but is in substance for a wrong done to the person of the child, and to obtain satisfaction for the wounded feelings of the parent. The loss of service is in most cases imaginary; for though some evidence must be given of acts of service to satisfy the form, yet in the estimate of damages the jury usually look beyond this to the injury done the child. The *probata* are much more extensive than the *allegata,* and damages may be given as a compensation for the loss which the father has sustained in being deprived of the society and comfort of his child, and for the dishonor

which he receives. Hence evidence is admissible as to the circumstances of the father's family, their general good conduct, and the number of his children. Actions of this sort are brought for example sake; and although the plaintiff's loss may not amount to twenty shillings, the jury do right in giving liberal damages. 3 Wills., 19.

It is said in *Bedford v. McKowl,* 3 Esp., 119: "In point of form, the action only purports to give a recompense for loss of service; but we cannot shut our eyes to the fact that this is an action brought by a parent for an injury to his child. In such a case I am of opinion the jury may take into their consideration all that he can feel from the nature of the loss. They may look upon him as a parent losing the comfort as
(137) well as service of his daughter, in whose virtue he can feel no consolation, and as the parent of other children whose morals may be corrupted by her example."

As the child herself has no remedy, and the offense is only indictable under peculiar circumstances, it would pass with impunity were not these forced circumstances employed to give the courts cognizance. It is characterized by a sensible writer as one of the quaintest fictions in the world that satisfaction can only be come at by the father's bringing the action against the seducer for the loss of his daughter's service during her pregnancy and nurturing. Paley Moral Phil., 200.

From these considerations it appears to me that this action must be considered as a tort done to the person, unaccompanied by any injury to personal property, and it is accordingly so classed by writers on pleadings. 2 Chitty, 268. It is, therefore, abated by the plaintiff's death.

HALL, J. The sole question here is whether this action survives to the plaintiffs or abates by the death of their intestate. There is no doubt but it abated at common law. By the act of 1799, New Rev., ch. 532, it is declared that no action of detinue, or trover, or action of trespass, where property either real or personal is in contest, and such action of trespass is not merely vindictive, shall abate, etc., by the death of either party, but the same may be revived, etc. The present action is one in form brought to recover damages for the loss of the services of the daughter; but it is in substance brought to recover damages for the disgrace and degredation of which the defendant is the author. In this view of it, which I think we must unavoidably take, it does not involve in it a contest respecting either real or personal property; and I think, too, that the damages are, legally speaking, vindictive, for they cannot be measured by any injury which *property* may have sustained, but are dependent altogether, under the circumstances of the case, upon a sound discretion, intended to make reparation to the injured party as far as human tribunals *can* do it, for complete reparation in such cases
(138) is beyond their reach.

The next and only other act on the subject was passed in 1805, New Rev., ch. 679. It declares that no action of trespass *vi et armis,* or trespass on the case, etc., brought to recover damages done to property, either real or personal, shall abate by the death of either plaintiff or defendant, etc., but the same may be revived. If we consider this action in substance as brought to recover vindictive damages, as mentioned in the act of 1799, it is not made to survive by this latter act, for it is not brought for an injury done to either real or personal property. I, therefore, think it will not survive, but abates by the death of the plaintiff. The judgment of the Superior Court must be

HENDERSON, J., assented. Affirmed.

There is one part of the foregoing case on which no question was made, but which does not seem entirely free from doubt. The action brought was *Case,* notwithstanding some of the most respectable authorities hold *Trespass* to be the proper form of action. In *Woodward v. Walton,* 2 New Rep., 476, the action was *trespass,* and upon full argument, and after an *advisari,* it was held to be proper. *Sir James Mansfield* remarks, in delivering the opinion of the Court: "In actions like the present, as far as my recollection goes, the form of the declaration has always been in *trespass vi et armis* and *contra pacem.* I cannot distinguish between this action and an action for criminal conversation. If that be the subject of trespass, this must be so, too." It is true that *Mr. Justice Buller,* in *Bennet v. Allcot,* 2 Term, 166, said that "An action merely for debauching a man's daughter, by which he loses her service, is an action on the case." This case is commented on by *Sir James Mansfield* in *Woodward v. Walton,* and it is there said that the opinion thrown out by *Justice Buller* was founded on a mistake respecting two other cases, one in Burrow and the other in Lord Raymond. The case in Burrow was *Postlethwait v. Parks,* 3 Burr., 1878, and was *trespass;* and the case of *Russell v. Corne,* 2 Ld. Raym., 1031, is certainly rather in favor of *trespass* than against it. *Tullidge v. Wade,* 3 Wills., 13, was *trespass.* However, in *Macfadzen v. Olivant,* 6 East, 387, *Lord Ellenborough* seemed to consider *case* as the proper remedy for seducing plaintiff's wife, on the authority of *Cook v.* (139) *Sayer,* 2 Burr., 753; but the case of *Cook v. Sayer* is stated by Burrow to have been *trespass;* and in *Batchelor v. Biggs,* 2 Bl. Rep., 854, it is said to have been *trespass.* In a late case before the Court of King's Bench for seducing a daughter, *Speight v. Oliviera,* 2 Starkie, 493, decided in 1819, it was objected that the action should be trespass and not case, to which *Abbot, C. J.,* replied that he would not nonsuit upon that objection.

Amid these contradictory decisions, adverting to principle, it would seem that *case,* and not *trespass,* is the proper remedy. The injury which the *law* contemplates as entitled to redress is *consequential,* for it is believed no case can be found of an action brought for debauching plaintiff's daughter without laying a *per quod,* and some proof of service is always required, though the courts will gladly take notice of the slightest. Simply to debauch plaintiff's daughter, without her becoming thereby pregnant, is to the feelings of the parent a wound little if any less severe than that inflicted by her becoming the mother of an illegitimate child; but as this action in its form has been well characterized as a quaint fiction to recover compensation for wounded sensibility, the fiction must be so preserved throughout that the law may pre-

serve its principles unimpaired; and as the consequential injury in the loss of service has been resorted to, to furnish any ground for an action that consequential injury, like every other, can only be redressed by an action on the *case.*

It is true that *Sir James Mansfield* has said, "I cannot distinguish between this action and an action for criminal conversation"; but (with deference be it spoken) it would seem that however slight the difference may be as to the feelings of those who are injured, in the view of the jurist, the injuries belong to distinct classes. *Lord Ellenborough,* in *Macfadzen v. Olivant,* 6 East, 388, thus speaks of actions for criminal conversation: "The cause of action *in these cases* arises from the time of the injury done by the defendant, by *the corruption of the body and mind of the wife;* for from that time she is less qualified to perform the duties of the marriage state." The injury which the law redresses would seem, then, in these cases, to be *immediate* on the commission of the guilty act; and of course *trespass* is proper. A single act of adultery, though never manifested in its consequences, is an invasion of the husband's rights, and the law redresses it; but in actions for the seduction of a daughter, the "quaint fiction" of a *loss of service* seems, *ab initio,* to have been resorted to as the consequential injury which the law will compensate, without any reference to "the corruption of body and mind," which is the immediate injury complained of in an action for criminal conversation.

It is very correctly remarked by the plaintiff's counsel, in the argument of the foregoing case, that there is no difference in principle between
(140) this action and any other for the loss of service; they must all stand on the same ground. Suppose the case of an apprentice seduced from the service of his master by persuasion: can a case be found in which, under such circumstances, *trespass* will lie? No force, direct or immediate, is employed; the mere act of conversing with the apprentice is not of *itself* the foundation of an action, for should the servant not be prevailed on to leave his master, no injury results and no action lies; but if, being a free agent, he departs, it is his *voluntary* act, and his master cannot truly allege that his servant, by any force (in legal signification), has been taken away. His departure, and the master's loss of service, is the *consequence* of an act which in itself would not have supported an action, and the master's remedy is *case.* So in the case of the loss of service by seducing the daughter, *her consent* must have been given, and it was her *voluntary* act, and her father, in the forms of his suit, loses the character of a *parent* and appears only as a *master,* complaining of an injury resulting as a consequence from this act of hers which must have been voluntarily done, though at the solicitation of another.

If to this it be objected that in a case of criminal conversation the wife, who is a servant, *consents,* and yet her husband may have *trespass,* it may be answered that the case is one *sui generis;* the husband has, so to speak, a property in the body, a right to the personal enjoyment of his wife; for an invasion of this right the law permits him to sue as *husband;* he makes no complaint as *master.* Far different is the case of seduction of a daughter; her father has no such rights over her person as he has over the person of his wife; he makes no complaint but in the character of *master,* and the injury sustained by debauching his wife is such as never could be effected by the seduction of his daughter. REPORTER.

Cited: Hood v. Sudderth, 111 N. C., 220; *Willeford v. Bailey,* 132 N. C., 404; *Snider v. Newell, ib.,* 615, 623.

(141)

ALLISON'S EXECUTORS v. ALLISON.

1. A. executed a paper-writing in the form of a deed of trust, and afterwards, on the same day, made his will referring to the former paper, the purpose of which was a distribution of his estate after death. D. Y. was one of the trustees named in the deed, and also one of the executors named in the will, and one of the only two subscribing witnesses to both papers. The trustees were directed by the first instrument to retain out of the funds a compensation for their trouble. The testator had both real and personal property, which his trustees and executors were directed to sell. After the death of A., D. Y. released all his claim to the other trustees.

2. Whether the two papers are to be considered as one testamentary disposition, *quere.*

3. The will is not well executed. D. Y. had such an interest in the lands devised as was contemplated by the act of 1784, and when such interest exists at the time of attestation no subsequent release will avail.

JOHN ALLISON, on 1 May, 1821, executed a paper-writing in the presence of David Yarbrough and William Horton, subscribing witnesses thereto, with the solemnities required by law in a will to pass real estate. This writing was in the following words, viz.:

"Know all men by these presents, that on the first day of May, in the year of our Lord one thousand eight hundred and twenty-one, I, John Allison, of the town of Hillsborough, county of Orange, and State of North Carolina, of the one part, Frederic Nash, Abner B. Bruce, and David Yarbrough, of the town, county, and State aforesaid, and William Shaw, of the county of Wake and city of Raleigh, of the other part, witnesseth, that for and in consideration of the natural love and affection which he, the said John Allison, hath and beareth to his friends and relations in North Britain, in the shire of Renfrue, and to the intent to make some provision for their maintenance and advancement in the world, and for settling and assuring the premises hereinafter mentioned, and for other good causes and considerations me hereunto (142) moving, I, the said John Allison, from a full confidence I have in the honor, honesty, and integrity of them, the said Frederic Nash, Abner B. Bruce, David Yarbrough, and William Shaw as aforesaid, and for the consideration of the sum of five shillings to me in hand paid by them, the said Frederic Nash, Abner B. Bruce, David Yarbrough, and William Shaw as aforesaid, that is to say, in trust the following property, towit: my corner house now occupied by John Van Hook & Co., also my new house lately occupied by William Huntington & Co., both being on part of Lot No. 6 in the town of Hillsborough, be sold, separate or together, as may best suit the purchaser and enhance the price; also all my stock

I now have and possess in the State Bank of North Carolina at Raleigh, that is to say, if I do not sell said stock before my decease, consisting of twenty shares, amounting to $2,000, together with all the profits or emoluments that may be due thereon; I, the said John Allison, do hereby assign over and convey to them, my trustees, for the following purposes hereinafter mentioned, towit: that immediately after my decease, or as soon after as may be found convenient, I, the said John Allison, do hereby authorize my trustees aforesaid to sell my bank stock as aforesaid for the best price that can be got for it, and convey or transfer the same to the purchaser or purchasers thereof and to their heirs and assigns forever, and to do and transact all matters and things touching and concerning the premises agreeably to the laws and regulations that now are or may hereafter be established or required by the directors of said bank touching and concerning the premises, in trust and confidence that immediately after my decease, or as soon afterwards as may be found convenient, they, the said trustees aforesaid, are hereby required, empowered, and authorized to sell the corner house now occupied by John Van Hook & Co., also my new house lately occupied by William Huntington & Co., with the appendages thereunto belonging, de-
(143) scribed as aforesaid, for the best price that may be got for them, and to convey to the purchaser or purchasers thereof, their heirs and assigns forever, as fully to all intents and purposes as I myself might or could do were I living: *Provided, always,* that as soon as the money is received arising from the sale of my stock I have in the State Bank, so soon as the money shall be collected, shall be remitted by bills of exchange or otherwise, as my trustees may deem proper for the safe conveyance, and the bills to be drawn in favor of and made payable to James Craig, junior, manufacturer, in the town of Paisley, shire of Renfrue, North Britain; and further, my trustees are hereby required and directed that out of the moneys arising from the sale of my houses and lots as aforesaid $250 be paid to my nephew, James Allison, and $100 to Abner B. Bruce, for the purposes mentioned in my will; and $50 to Mary Allison, mother of James Allison, of the State of Delaware (if living at my death); and my said trustees are hereby directed that all the debts due to the said John Allison at his decease, either by note, bond, house rent, money on hand or otherwise, they, my said trustees, are hereby empowered to collect, sue for, and receive the same into their own hands, and also be placed with the money arising from the sale of my lots and houses and bank stock, and the balance of what may remain in their hands, after what I have hereby enjoined on them to perform, I do hereby require and direct to be remitted to the said James Craig, junior, manufacturer, in the town of Paisley, North Britain, shire of Renfrue; and the said trustees are hereby authorized and directed to

retain to their own use out of the moneys that may come to their hands a sufficient compensation for their trouble in performing and executing the trust hereby reposed in them, and also for discharging any debt that may arise from a sick or death bed, and physician's aid, if required, and funeral charges, etc. And I do hereby request of my trustees nothing but a plain and decent interment, and that no funeral (144) service shall be performed at my interment, but what a Gospel minister or private Christian may think fit and appropriate for such a solemn occasion. And this deed of trust shall not affect my last will and testament in favor of my nephew, James Allison.

"I hereby request Mr. William Shaw, of Raleigh, who I have appointed one of my trustees, that immediately after my decease, or as soon after as he may find it convenient, to write to Mr. James Craig, acquainting him of my decease; and I do direct that neither my stock nor my houses and lots in Hillsborough shall be sold until an answer be received from him. And in case of the death, inability, or removal of any of the trustees hereby nominated and appointed by me to act in this behalf, then and in that case the surviving and acting trustees are hereby required and directed to choose another or others in their stead; and shall have full power from time to time to act accordingly as the case may require. And it is hereby required by him, the said John Allison, that this deed of trust be put on record as soon as practicable after my decease. In testimony whereof I, the said John Allison, do hereunto set my hand and affix my seal, the day and year first above written."

Afterwards, on the same day, John Allison executed another paper-writing in the presence of the same subscribing witnesses, with the solemnities required by law in a will to pass real estate, and in it referred to the former writing; this last writing was in these words:

"In the name of God, Amen! I, John Allison, of the town of Hillsborough, county of Orange, and State of North Carolina, being well advanced in years and very infirm, but of sound, disposing mind and memory, and calling to mind the mortality of my body, do make, ordain, and publish this my last will and testament in manner and form following, towit, after all my just debts and funeral charges are paid by my trustees appointed for that and other purposes, I give, devise, (145) and bequeath to my nephew James Allison all the personal property I may be possessed of at the time of my death not otherwise disposed of, in addition to the sum of $250 to be paid to him by my trustees, to him, his heirs and assigns forever, except my stock in the State Bank at Raleigh, consisting of $2,000, and the dividends that are or may become due thereon, also excepting my house rents and debts of every description which I have made over to certain trustees for other purposes, which will more fully appear by reference to the deed of trust bearing

even date herewith, and excepting also my negro woman slave named Ann, which for divers causes and considerations me hereunto moving and meritorious services rendered to me by her in time of sickness, I do hereby will, devise, and bequeath my said negro woman slave Ann to Abner B. Bruce, with this condition, that she be not sold or given away to any other person except it be with her consent; but that the said Abner B. Bruce support her with food and clothing suitable to her station; and I do hereby give, devise, and bequeath to the said Abner B. Bruce the sum of $100, which sum I hereby direct my said trustees to pay to him for the support of my said negro woman Ann when she may, through old age or infirmities, become unable to perform the duties of a slave and servant; and should my said negro woman die, or be dead before or after my decease, the said sum of $100, notwithstanding, is to be paid to the said Abner B. Bruce as a legacy out of the real property I have made over to my trustees and directed to be paid to him by them.

"All my just debts, if any be due and owing to any person or persons whatever after my decease, I hereby direct to be paid by my trustees nominated for that and other purposes, who are also authorized (146) to collect all debts due and owing to me, whether due by bond, note, account, or in any other manner on what account soever.

"It is hereby declared to be understood, and my will and intention is, that my nephew James Allison shall have no claim, right, or title whatever to any bonds, notes, debts, dues, or accounts that may be due or owing to me on any account whatever at my decease. I, the said John Allison, do hereby nominate, constitute, and appoint my friends David Yarbrough and Thomas Clancy, esquires, executors to this my last will and testament, hereby revoking, annulling, and disallowing all former wills and bequests by me heretofore made, hereby allowing, ratifying, and confirming this only to be my last will and testament. In testimony whereof I, the said John Allison, do hereby pronounce, publish, and declare, in the presence of God as my witness, and by my well known signature written with my own hand and seal thereto affixed, this first day of May, in the year of our Lord one thousand eight hundred and twenty-one."

John Allison died without revoking or altering the foregoing writings, and they were offered for probate as containing one testamentary disposition of the estate of John Allison; prior to which, David Yarbrough, the subscribing witness, who is the same person mentioned by that name as a trustee in the paper-writing first set forth, by deed, fully released to the other trustees all the interest which he had under the writings, and was admitted as a witness, though objected to.

The probate was opposed, and on an issue submitted to a jury, they found that the two papers above set forth were the last will and testament of John Allison, subject to the opinion of the court upon the foregoing facts; and it was submitted to the court to say whether the two paper-writings together constitute one testamentary disposition or will.

The court (*Paxton, J.*) held that the paper-writing constituted one will, and rendered judgment accordingly, from which an appeal was taken to this Court.

Seawell for appellant. (147)
Hawks, Badger, and Gaston for appellee.

TAYLOR, C. J. It may be satisfactorily inferred from the cases (171) cited that any writing by which the intention of the party to dispose of his estate after his death appears will amount to a devise, provided such intention be consonant to the rules of law and the writing have the formalities required by the act. It is of no moment whether the testator would have called the instrument a deed or a will. The true inquiry is, How will it operate? and if the provisions in it are testamentary, it must operate as a will. The difference between a deed and a will is this: the former must take place upon its execution, or never; not by passing an immediate interest in possession, for that is not essential; but it must operate as passing that interest when the deed is executed. Thus, where a father covenants to stand seized to the use of his son, reserving a life estate to himself, the deed takes effect at once, by passing an interest to the son. But a will can only operate after death. Does this instrument convey to the trustees any power or capacity of acting till after the testator's death? It assigns over and conveys to the trustees, what? Not any property, but "that immediately after his decease, or as soon thereafter as may be found convenient," he authorizes them to sell his bank stock and real estate, and apply the proceeds in the manner he directs. They are not authorized to take a single step in the business of his estate till after his death; nor does he part with or impair his dominion and control over the property while he lives; indeed, it is a plain manifestation of what his intent was, that he directs the instrument to be recorded only after his death; and there is no reason to believe that he ever parted with the possession of it during his lifetime.

In *Hixon v. Witham,* 1 Ch. Ca., 248, the writing was in the form of an indenture, and used the terms "grant, bargain, and sell," yet it was decreed to be a good will. In *Proude v. Green,* 1 Mod., 117, articles of agreement which used the word "give," and were delivered as an act and deed, were held to be a will. The cases generally establish the position that whatever the instrument may be called by the party, (172)

or however it may be considered by him, if the intention upon the whole be that it shall not operate before his death, it is then testamentary. In addition to this, there is much weight in the reasoning that this paper is so plainly referred to and incorporated in the will as to become a part of it, although it had not been duly executed. But then it is indispensable that the will should be executed according to the directions of the act of 1784. This is the only part of the case in which I have entertained any doubt; but after much consideration my opinion is that it is not attested by two such witnesses as that act requires. If the act had merely required the will to be attested by two witnesses, the common law would have instructed us that their competence at the time of the proving the will would have been sufficient. The words which follow in the act, *two witnesses at least, no one of which shall be interested in the devise of said lands,* must be supposed to have been inserted for some purpose; and this could only be to refer to their competence at the time of attestation.

The preamble to this section of the act professes to guard against the undue influence of those about a testator in his last moments; and it must be a strong inducement to attempt the exercise of this influence if a witness is interested at the time of his attestation. The subsequent act of 1784 asserts that it was the design of this requisite of the attestation of witnesses to prevent fraud and imposition.

The statute of frauds required a will to be attested and subscribed in the presence of the devisor by three or four *credible* witnesses. Much difference of opinion existed whether this competence (for so the word was understood) should be referred to the time of the attestation or to that of proving the will; and I think it difficult to read the cases on this subject without a conviction that the weight of authority, as well as reasoning, is in support of the former opinion. In one of the earliest cases to be met with on this question the testator disposed of his real estate by will, and gave to one J. H. and his wife 10*l.* each for mourning, with an annuity of 20*l.* to E. H., the wife of J. H. The will was attested by three witnesses, whereof J. H. was one. The legacies and satisfaction for the annuity were tendered and refused. The question upon the special verdict was whether or not the will was well attested according to the statute of frauds. The Court was unanimously of opinion that the right to devise lands was not a common-law right; but depended upon the powers given by the statutes, the particulars of which were that a will of lands should be in writing, signed and attested by three *credible* witnesses in the presence of the devisor; that these were checks to prevent men from being imposed upon; and certainly meant that the witnesses to a will (who are required to be credible)

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should not be persons entitled to any benefit under that will. In answer to the objection that nothing vests till the death of the devisor, and, therefore, at the time of the attestation the witness has no interest, the Court said that he was then under the temptation to commit a fraud, and that is what the Parliament intended to guard against; that the true time for his credibility is the time of his attestation; otherwise, a subsequent infamy, which the testator knows nothing of, will avoid his will. *Austey v. Dowsing,* 2 Stra., 1254.

Lord Camden's opinion, though at variance with that of the judges who sat with him in *Hindon v. Kersey,* deserves much weight, not only from its cogent reasoning, but from the circumstance that the Legislature, within a few years after its delivery, adopted its policy and principles by destroying the interest of the subscribing witness, whatever it might be at the moment of attestation. This was by the act of 25 Geo. II., passed about thirty years before our act of 1784. The whole controversy must have been known to many members of the Legislature of that day, and I think they had the same policy in view, though they have pursued a different course to attain it. The question (174) to be asked on the will is whether the testator was in his senses when he made it, and that is the important moment when vigilance and caution are most necessary in the witnesses, and when their minds should be most free from any bias that might warp their judgment. In other cases, according to the opinion quoted, the witnesses were *passive;* here they were *active,* and in truth the principal parties to the transaction. The testator was intrusted to their care. The design of the statute was to prevent wills from being made which ought not to have been made, and always operates silently by intestacy. It is true, the design of the statute was to prevent fraud, though no fraud appeared in that case, yet it prescribes a certain method which every one ought to pursue to prevent fraud. As to the minuteness of the interest, as there was no positive law which was able to define the quantity of interest which should have no influence upon men's minds, it was better to have the rule inflexible than to permit it to be bent by the discretion of the judge.

Under this construction of the act of Assembly, which, however reluctantly, since it disappoints the will of the testator, I think the true one, my opinion is that the witness was disqualified, since he and the other trustees were authorized to retain a sufficient compensation for their trouble. This gave them an interest in the devise of the lands, and would, upon common-law principles, render them incompetent to prove the will, as to the land. Though in England the office of executor who has no commissions or a legacy is a burthensome one, and never injurious but from mismanagement.

HALL, J. There can be no doubt but that the paper-writing which purports to be a will of the personal estate was properly proved in the county court, and that the judgment given thereon in the Supe-
(175) rior Court affirming it was correct. But the question in reality submitted to this Court is whether, first, the paper-writing purporting to be a deed was in its nature testamentary; and if so, secondly, whether it was legally proved, as the law prescribes. My opinion on the last question renders it unnecessary to give an opinion upon the first.

The second question, in substance, is whether David Yarbrough, who is a subscribing witness to that deed, with William Horton, the only other subscribing witness, was in law a proper witness to prove its execution. He is one of four trustees named in that instrument for the purpose of selling the real estate of John Allison, who executed it; and there is a clause in it as follows: "and the said trustees are hereby authorized and directed to retain to their own use, out of the moneys that may come to their hands, a sufficient compensation for their trouble in performing and executing the trust hereby reposed in them, and also for discharging any debt that may arise from the sick- or death-bed, or physician's aid if required, and funeral charges."

By the act of 1784, New Rev., ch. 204, sec. 11, it is enacted that no last will or testament shall be good, in law or equity, to convey any estate in lands, etc., unless such will shall have been written and signed by the testator, and "subscribed in his presence by two witnesses at least, no one of which shall be *interested in the devise of said lands.*" This act is supposed by the plaintiff's counsel to have a resemblance in principle to the devising clause of the English statute of frauds, in which it is declared that all devises shall be attested and subscribed in the presence of the devisor by three or more *credible witnesses,* or else shall be utterly void and of none effect. The point has been much controverted in England, whether the subscribing witnesses should be credible or competent at the time of attesting the will or at the time when called upon
(176) to prove its execution. The question has also been examined with ability by the counsel in this case. I do not think it necessary to give any opinion on it, because I think the act of 1784 puts the question at rest. I will only say that if the test of qualification is to be applied at the time when the execution of the will is attempted to be proved, it appears to me that the term credible is a dead letter in the statute, because the rules of evidence would not permit any other competent witnesses (which *Lord Mansfield,* in 1 Burr., 414, says the term credible witnesses in the statute means) to be examined to prove the execution of a will, if the statute had not made such provision.

The same remark may be made as to the act of 1784. If a subscribing witness to a will is interested in a devise therein, and afterwards becomes

disinterested by a release or by any other means, and thereby a good witness, the clause would be inserted for no purpose which declares that "no one of which shall be interested in the devise of the said lands," because if no such provision had been made by the act, the rules of evidence would prevent any witness from being examined who was not at the time disinterested.

But I think the Legislature, by the act in question, intended to remove temptation out of the way, and not suffer wills to be made through the procurement of fraud; and this they could not better accomplish than by not suffering any person to attest a will unless at the time the person so attesting was disinterested in the thing devised.

If, therefore, David Yarbrough had an interest in the instrument he attested, at the time he attested it as a witness, the release by him made will not restore his competency.

The clause which I have before recited furnishes employment for him and gives compensation for it. It is like the common case of allowing commissions on the amount of the business transacted. The case does not resemble those cases where witnesses are received from necessity, and for the sake of trade, as when a person is employed to (177) sell goods, and is to have a certain per cent on the amount sold, he is competent to prove the contract of sale. 2 H. Bl., 590; 3 Wils., 407. See Guilliam Bac. "Evidence, B"; Norris's Peake, 240. It is very true, the interest of the witness in this case is very small; but this Court, on that account, cannot overlook it; it cannot judge between different degrees of interest. If this objection was overruled, at some future time a witness somewhat more interested might be offered; and so on, till the rule which rejects interested witnesses would be done away altogether. The rules of evidence are of great consequence. *Lord Kenyon* says our laws, liberties, and property depend upon them; they ought to be preserved inviolate and unshaken. For these reasons I am of opinion that David Yarbrough (whose character is admitted to be pure and upright) is not in law a competent witness to prove the paper-writing (which on the face of it purports to be a deed), which, in the court below, has been offered and proved as a will.

HENDERSON, J. There is no dispute as to the instrument in the form of a will. I am of opinion that the other paper, in form a deed, is testamentary as regards the personal property therein mentioned. I am rather inclined to think that it is not testamentary as regards the real estate; but on this point I wish it understood that I give no opinion, as it is unnecessary, for if it was testamentary, I think that it is not sufficiently proven; Yarbrough, one of the two attesting witnesses, being therein appointed a trustee for the sale of the lands and entitled to a

compensation for his services therefor; for the disqualification relates to the time of attestation, and not to the time of giving evidence.

I concur in the opinion that the judgment of the Superior Court be reversed so far as the probate of the said last mentioned instrument is established, and affirmed as to the other parts of the judgment;
(178) and that the plaintiffs pay the costs of this Court, and that the defendants pay the costs below, so far as regards the establishment of this instrument as a will of personal estate, and that the plaintiffs pay the residue of the costs.

PER CURIAM. Judgment accordingly.

Cited: Daniel v. Proctor, 12 N. C., 429; *Old v. Old,* 15 N. C., 501; *Matthews v. Marchant,* 20 N. C., 34; *Tucker v. Tucker,* 27 N. C., 165; *Morton v. Ingram,* 33 N. C., 370; *Huie v. McConnell,* 47 N. C., 456; *Gunter v. Gunter,* 48 N. C., 442; *Phifer v. Mullis,* 167 N. C., 408.

TRUETT v. CHAPLIN.

1. Where a lawsuit is pending between two parties relative to the title of a vessel, and they enter into a parol agreement to settle all lawsuits and matters in controversy between them; and afterwards the plaintiff in the lawsuit, instead of dismissing it, takes a judgment by default, and is thereupon sued on his breach of the contract of settlement, in such suit either party may introduce parol evidence to show how his rights, as to the vessel, stood at the time of making the contract of settlement, because by so doing it would more satisfactorily appear whether those rights were taken into consideration in making the settlement.

2. The compromise of a doubtful right is a sufficient foundation for an agreement.

APPEAL from *Daniel, J.,* at TYRRELL. Chaplin, the defendant in this action, had brought an action of trover in Currituck County Court against Truett, the present plaintiff, to recover damages for the conversion of a certain vessel called the *Farmer's Daughter;* both parties claiming to have title to the vessel.

Chaplin had also stayed Truett, by injunction, from carrying away the vessel.

During the pendency of these suits, and before Truett had pleaded to the action of trover, or answered the bill of injunction, Chaplin and Truett came to a parol agreement to settle all lawsuits and matters in controversy between them. Truett, in compliance with his part of the

agreement, delivered to Chaplin his obligation for $75, and his written promise, with security thereto, to deliver to Chaplin 100 gallons of molasses on a certain day; and Chaplin, in consideration (179) thereof, agreed to dismiss his suits within ten days and pay his own costs; and in further performance of the agreement, Chaplin gave to Truett a receipt for $6 in full of all demands and lawsuits which he, Chaplin, had against him, Truett.

After this agreement between the parties, Chaplin, without the knowledge or consent of Truett, took a judgment by default in the action of trover, afterwards executed a writ of inquiry, and obtained final judgment for $2,210, issued his execution, caused it to be levied on the *Farmer's Daughter,* then in Truett's possession, sold her under the execution, and became himself the purchaser at the price of $750, and took the vessel and carried her away.

For Chaplin's breach of contract Truett brought this action in Tyrrell County Court, whence it was carried by appeal to the Superior Court, and tried before *Daniel, J.*

Truett, on the trial, proved by the only three witnesses who knew anything of the contract, the terms of it as in substance above stated; and further, that Chaplin, when he made it, was not intoxicated, but sober; that it was made between the hours of 11 and 3 of 21 June, 1822. He proved, also, by the person who wrote the receipt for $6 before mentioned, the signing of it by Chaplin, though the witness did not see the money paid.

The defendant, in his defense, alleged that he expected to prove that Truett, at a sale made by the wreck master in Carteret County, about two years before this contract, purchased the *Farmer's Daughter* for Chaplin, the former owner, and afterwards held her, claiming her as his own. This evidence was objected to, but the court received it. And much contradictory evidence was given of the declarations and conversations of the parties, tending to show that at the time of the contract the title to the *Farmer's Daughter* was in the one or the (180) other.

Chaplin contended, also, that the two notes which Truett had given him as above mentioned were for the freight of the vessel from North Carolina to Bermuda.

The court charged the jury that if the defendant agreed to dismiss his suits in Currituck and did not do it, the plaintiff was entitled to recover; and if they should be satisfied that Truett had purchased the vessel at a wreck sale, or had title to the vessel, then they should give damages to the amount of her value; but if they were of opinion that the vessel belonged to the defendant, and the sums mentioned in the two notes were the price of the freight of the vessel to Bermuda, then the plaintiff was

entitled to recover but nominal damages for the breach of the contract, as no other property was levied on, or other injury shown. The court further charged that if the vessel was the property of the defendant the agreement to dismiss the suits in Currituck, on a settlement of all transactions between them, did not divest the defendant of his property in the vessel; but that the defendant would be permitted to set up his title whenever he could fairly get the possession. All the plaintiff could claim would be damages for a breach of contract.

Verdict for defendant, new trial refused, judgment, and appeal.

Gaston for appellant.
L. Martin for appellee.

HALL, J. There are two objections made in this case to the opinion of the court. The first relates to testimony offered by the defendant; the second to the charge given to the jury. With respect to the first, I think it is not sustainable. The contract by which it was alleged the parties had settled their disputes were not committed to writing, and there could be no objection to either party's showing how their rights stood at the time when such contract was entered into, because (181) by doing so it would more satisfactorily appear whether those rights were taken into consideration and included in it. If they were included in the contract, such evidence would not and ought not to have any tendency to invalidate it; if they were not, the contract, as to them, was a nullity, and the evidence was properly allowed.

The other objection is that the jury was told "that if the vessel was the property of the defendant, the agreement to dismiss the suits in Currituck, on a settlement of all transactions between them, did not divest the defendant of his property in the vessel, but that the defendant would be permitted to set up his title whenever he could fairly get the possession."

This objection I think sustainable, because if the right of the vessel was an item in the settlement of all transactions between them, that right vested in the person to whom the settlement gave it; and was divested out of the other party in case he had a right to it before that time. If an agreement is entered into upon a supposition of a doubtful right, it is binding. The compromise of a doubtful right is binding. 1 P. Wms., 727; 1 Atk., 10; 2 Bl., 448. If either party should be imposed upon by the fraudulent conduct of the other, the case would be otherwise; such agreement might be set aside for fraud. But as that is not the case here, I think the rule for a new trial should be made absolute.

And of this opinion was the rest of the Court.

Reversed.

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STATE v. ALEXANDER.

1. Where iron was left with one for a certain purpose, who after using part retained the remainder to his own use, a warrant cannot be brought, before a single magistrate, to recover the value of the iron retained; the act allowing warrants "for specific articles, whether due by obligation, note, or assumpsit," does not embrace this case.
2. Perjury cannot, therefore, be committed on the trial of the warrant before the magistrate.

PERJURY, alleged to have been committed on the trial of a warrant by a magistrate. The defendant, on the trial in WILKES, before *Nash, J.*, was convicted, and moved for a new trial on the ground that the oath alleged to be false was *coram non judice,* as the warrant was void. The warrant was in these words:

"You are hereby commanded to take the body of Randolph Alexander, if to be found in your county, and cause him to appear before some justice of the peace for said county, to answer the complaint of Jesse Gambill in a plea of debt of $45, due by open account, and a hundredweight of bar iron. Herein fail not."

The judge refused the new trial, and from the sentence pronounced defendant appealed.

Attorney-General for the State.

TAYLOR, C. J. The three acts of Assembly first passed for the purpose of increasing the jurisdiction of single magistrates all employ the same language, viz., "debts and demands, where the balance due on any specialty, contract, note, or agreement, or for goods, wares, and merchandise sold and delivered, or for work and labor done."

It must be a "debt and demand," and there must be "a balance due," which necessarily confines it to those cases of express contract where the sum due and the interest must form the measure of the (183) judgment. The utmost extent to which these words can confer a jurisdiction as to implied assumpsits is to ascertain the value of labor, or the price of goods, where none has been agreed upon between the parties, and there has been an express contract of sale, or work done under a like contract. 1777, ch. 115; 1785, ch. 233; 1786, ch. 253.

The next act adds to the words, "or for specific articles, whether due by obligation, note, or assumpsit." There must still be a balance due, and an express contract to deliver specific articles. This would add little to the difficulty of transacting the business, because the price of the article, when it was due, might be easily ascertained. 1794, ch. 414.

But if we go beyond these limits, and extend the jurisdiction to all cases of implied assumpsit and special agreements, where the sum sought to be recovered is not a balance due, but damages for the nonperformance of an agreement, I apprehend we shall not only misconceive the views of the Legislature, but charge magistrates with a duty which but a small proportion of them is competent to discharge.

If this case were within the jurisdiction of a single magistrate, the cause of action must be the nonperformance of an agreement to make a proper application of iron left with R. Alexander; the sum recoverable would not be a balance due, but damages for the breach of the implied contract, of which the value of the iron would not be the necessary standard; but if a jury were to try it, they would be at liberty to take into view any further injury suffered by the plaintiff in consequence of the defendant's failure. It is, therefore, plain to my understanding that no jurisdiction is given but in those cases where there is a balance due, and where, also, that balance may be ascertained by a fixed, definite standard, furnished by the parties when they made the contract.

(184) Let it be considered for a moment that a wide door of difficult and, I may add, impracticable jurisdiction would be opened by a construction that should give to magistrates cognizance of all cases of assumpsit, express or implied. A person who should estimate the damage he had sustained as not exceeding $100 might warrant for a breach of promise of marriage, upon a contract of guaranty or indemnity, against an attorney or physician for neglect of duty, against carriers and bailees of every description, upon express and implied warranties as to the quality or title of the chattel sold, and upon many other cases which, although sounding in assumpsit, the ascertainment of what is due depends upon various nice and intricate points of law which can scarcely be properly decided but by a jury, aided by a court.

This never could have been the intention of the Legislature, nor will their language bear this construction, grammatically read; for "the balance due" restrains "debt and demand," and connects itself with every item of the ensuing enumeration.

HENDERSON, J. If the justice of the peace before whom the false oath was taken had not jurisdiction of the matter then in controversy, the defendant is not guilty of perjury.

The defendant Willis Alexander was sworn as a witness on behalf of Randolph Alexander, the defendant in a warrant brought against the said Randolph, returnable before a single justice of the peace, out of court, by Jesse Gambill, in a plea of debt of $45 due by open account, and four hundredweight of bar iron; and, among other things, the said Willis Alexander deposed that all the iron which had been brought or

received by the said Randolph Alexander of or on account of the said Gambill had been worked up upon the wagon of the said Gambill. The indictment charges that the oath was material, false, and corrupt; that four hundredweight of iron had been put on the plaintiff's (185) wagon, and that the defendant had *converted the balance to his own use.* The act of 180__ declares that all *debts* and *demands* of £30 and under, for a balance due on any specialty, contract, note, or agreement, or for work and labor done, or for specific articles, whether *due* by obligation, note, or assumpsit, shall be cognizable and determinable by any one justice of the peace, out of court.

I will consider this case most favorably for the State, towit, that the defendant in the warrant *expressly* promised to return what was left of the iron after ironing the plaintiff's wagon; for perhaps such was the fact.

The whole question depends on this, Was that iron *due* from the defendant Randolph Alexander to the plaintiff in the warrant, within the meaning of that word in the act of 180__? Was it a debt, was it an obligation or promise to pay? To pay is to deliver to another that which belonged to the deliverer, and which delivery he was bound to make by some previous obligation; not the restoration to the owner of his own goods, and which had been out of his possession, or withheld from him. Property in the possession of a bailee is not *due* to the bailor; the bailee is not the *debtor,* but the trustee of the bailor until the trust is broken; the bailor has not a demand upon or right of action against the bailee; the possession of the bailee is the possession of the bailor. The whole phraseology of the act shows that the jurisdiction extends only to cases where there is an obligation to pay; as in the present case, if the defendant had promised to *pay* or *deliver,* that is, deliver as a *payment,* four hundredweight of iron, there is no doubt but that the justice would have had jurisdiction; it would in such case be a debt. It is asked, Where is the difference, in reason, between the cases? The difference lies in the obligation. If this had been a promise to pay or deliver 400 pounds of iron, the utmost care on the part of the defendant to (186) procure the iron would not have absolved him from his obligation. Were he to show that he had sent to market to get the iron and none was to be had; or that, after getting it, it was lost, together with other iron of his own, in crossing the river; or that he was robbed, or that he was taken by the enemies of the State: this would be no defense. Of course, the justice would not be confided in to try them; he was only to examine into the demand and whether it had been satisfied, or such other defense as the defendant might have; but none involving the exertions of the defendant, whether he had acted with good faith or fraudulently. For, however willing we may be to permit a single individual to pass on the

question, debt or no debt, payment or no payment, discharged or not discharged, we have evinced an unwillingness to submit to such individual the power of deciding on the right of property of *meum* and *tuum* to the amount of a single cent, or to say whether we have performed with good faith those personal obligations which we, by our contracts, have assumed. If it be admitted that the justice has jurisdiction over this case, he must of necessity have power of examining every question which would form a defense, and it must be extended to all bailments, for it would be difficult to confine it by the Legislature to such cases where the defense was simple, as probably it was in this case; but the most complicated must also be included; no line can be drawn. A justice of the peace would have to decide upon the quantity of diligence which will protect, or the quantity of negligence which will charge bailees of all descriptions, from the bearer for reward to the carrier who receives no reward. I repeat it, we are and have been unwilling to permit any one man to say to us, You have been negligent; you have been fraudulent; you ought to have resisted the robber; you were more careless of the rights of others than of your own. All these questions might have
(187) arisen in this case, for he was not bound to deliver the iron at all hazards, and the justice had not the right of passing on his justification or excuses, whatever they may have been. For these reasons I think that the expression in the act, *for specific articles, whether due by obligation, note, or assumpsit,* do not embrace this case; and this want of jurisdiction appears upon the indictment; for unless it was a promise to restore to the plaintiff his own iron, the question whether the iron had been worked upon the plaintiff's wagon could not be material, that is, it would have offered no defense. I, therefore, think that the judgment should be arrested.

Judge HALL assenting. Reversed.

Cited: Bell v. Ballance, 12 N. C., 395; *Fentress v. Worth,* 13 N. C., 232; *Clark v. Dupree, ib.,* 412; *S. v. Knight,* 84 N. C., 792; *S. v. Gates,* 107 N. C., 833.

STATE v. YEATES.

Under Laws 1816, ch. 20, corporal punishment and imprisonment cannot both be inflicted on a person found guilty of manslaughter.

INDICTMENT for the murder of a slave, tried before *Nash, J.,* at WILKES. The jury found the prisoner guilty of manslaughter, and the court sentenced him to be imprisoned eleven calendar months, and to

receive at two several times thirty-nine lashes. The prisoner, by his counsel, objected to that part of the sentence which imposed whipping; the objection was overruled, and the prisoner appealed.

Attorney-General for the State.

TAYLOR, C. J. This case calls upon the Court, for the second time, for a construction of the act of 1816, ch. 918, which abolishes the punishment of burning in the hand in clergiable felonies. The nature of this appeal has rendered it indispensable that the former (188) opinion should be carefully reviewed and reconsidered; and I have done so, under a perfect disposition to pronounce the result of my present conviction, uninfluenced by any former opinion on the question.

It may be readily conceded that a literal construction of the words of the act will justify the infliction of whipping on a conviction of manslaughter; but is the Court bound to give a literal construction of a statute, when they are thoroughly convinced that, in doing so, they will contravene the intention of the Legislature? The answer may be made in the language of the law, that a statute should be so construed as will best answer the intent the Legislature had in view; and this intention is sometimes to be collected from the cause or necessity of making the statute, and sometimes from other circumstances. This intention, whenever it can be discovered, ought to be followed with reason and discretion in the construction of the statute, although such construction seems contrary to the letter of the statute. A thing which is within the intention of the maker of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of a statute is not within the statute unless it be within the intention of the makers. Bac. Abr., tit. "Statutes." The latter rule applies forcibly to the cases where the court is required to pronounce a punishment as incurred by a crime, which they do not think the Legislature intended to annex to it.

If it should be inquired, as it naturally will, why the persuasion should be so thorough that the Legislature did not intend that the crime of manslaughter should be punished by whipping, the answer is, that from the early period of our law, when a distinction was established between murder and manslaughter by the introduction of the benefit of clergy, the latter offense, though felonious, has been considered as flowing from the frailty incident to human nature. It is the result of a temporary suspension of the reason, induced by a provocation which (189) the law deems legal. No disgrace, or opprobrium, ever has been, or is now, attached to the character of the man who commits it. The law has, in its policy, always denounced against the forfeiture of his goods as a punishment, because the violent death of a human being,

however produced, was too serious a thing to be passed over without animadversion. But the burning in the hand, so far from being a punishment, restored the party to credit and capacity. He ceased to be a felon, and was restored to all his legal rights and privileges; he was purged from his guilt by the privilege of clergy, which operated as a statute pardon.

To the other clergiable felonies there was an original infamy attached, from which, however the statute pardon might restore the party to his legal rights, his character could not be cleansed.

A convicted thief, although pardoned and admissible as a juror or witness, has irrecoverably lost his *caste* in society.

As a punishment, burning in the hand was too slight; but whipping, though it could give no additional infamy to the crime, might deter others from the commission of it.

There was, too, an evident absurdity in whipping for a larceny, where the thing stolen was under the value of a shilling, and burning in the hand, where it was over that value. This was removed by the act, which punished both crimes by the same measure.

In the case of manslaughter, however, the benefit of clergy restored the party to his legal right, and, in so doing, its operation was full and complete; for no crime had been committed which affected his moral estimation.

"We now consider," says *Justice Foster,* "the benefit of clergy as a relaxation of the rigor of the law, a condescension to the infirmities of the human frame. And, therefore, in the case of all clergiable felonies, we now measure the degree of punishment by the real enormity of the offense; not as the ignorance and superstition of former times
(190) suggested, by a senseless dream of sacred persons on sacred functions."

It appears to me that in legislating on this subject the first object was to get rid of the disgracing practice of burning in the hand; because the reason of its introduction had altogether ceased, which was to distinguish laymen from priests, that the former might not claim clergy a second time; and because it was too slight a punishment in larceny, and too disgraceful a one in manslaughter; that the words "moderate pecuniary fine," used in the act, were intended to apply to manslaughter; the "one or more whippings" were applicable to larcenies; and "in the discretion of the court, under the circumstances of the case," import a legal discretion, to be exercised with a view to the maxims, rules, and principles of criminal jurisprudence and the moral sense and habitudes of the citizens.

It is mentioned by writers on the criminal law as one of the glories of the system that the species, though not always the quantity or degree, of

punishment is *ascertained* for every offense, and that it is not left in the breast of any judge, nor even of a jury, to alter that judgment which the law has, beforehand, ordained for every citizen alike, without respect of persons. For if judgment were to be the private opinions of the judge, men would then be slaves to their magistrates, and would live in society without knowing exactly the conditions and obligations which it lays them under. 4 Bl., 317.

The construction contended for on behalf of the State would add a new principle to the criminal jurisprudence of the country which is without example in its history; for there is no instance of a judge being invested with a discretionary power to consign a man to infamy by the nature of the punishment, unless there is something infamous or mean in the crime itself. (191)

When the jury has convicted a person of manslaughter, the court is bound to understand it, in the sense of the law, as "the unlawful killing another without malice, express or implied," and is bound to apply that punishment which the law adapts to a crime which arises from the sudden heat of the passions, and not from the wickedness of the heart.

The court cannot aggravate the punishment from a belief that the jury have mistaken the case and ought to have found it murder; for that would be to usurp their constitutional functions. I have no fear that the judges of this land would not exercise this discretion with as much discrimination and lenity as any others in the world, but I think it an unsafe rule to confer such a power by force of a construction which would introduce an anomaly into the criminal law which the Legislature did not seem to intend. The following sentiments of a great judge on this subject are worthy of being remembered: "The discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper, and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly, and passion to which human nature is liable."—*Lord Camden.*

It may be thought, from the similarity of some expressions in this act with those of 19 Geo. III., that the latter was before the framer of the act, and that manslaughter, which is expressly excepted from the punishment of whipping by the British statute, is omitted in our act in order that it might be subject to it. This is possible; but I think it more probable that the exception was omitted through mistake or inadvertence, and that the Legislature could not have passed it in its present shape if they had believed it would have borne the construction now contended for.

There have been six sessions of the Legislature since the decision in *S. v. Kearney,* applying to the act of 1816 the construction which

(192) is still adhered to; and it is a very reasonable presumption that the members of the successive legislatures were apprised of the determination. Their silence on the subject is a strong reason for believing that they did not disapprove the construction adopted by the Court; because, upon several other occasions, they have passed laws in consequence of decisions made in this Court. My opinion is that the judgment, so far as it sentences the defendant to be whipped, should be reversed, and affirmed as to the residue.

HENDERSON, J., concurred with the CHIEF JUSTICE in opinion.

HALL, J., differed, and assigned his reasons as follows: In *S. v. Kearney,* 8 N. C., 53, I think the rules of construction were stretched too far. I am still of the opinion that the law would be more wholesome, and founded in better policy, if it was as that case declares it to be, and did not embrace the case of manslaughter, and for the reasons given by the Court in delivering their opinion in that case; and in a matter of legislation I would continue to be governed by those reasons; but as an expounder of the law, I confess I think the act of 1816, New Rev., ch. 918, is broad enough to include the case of manslaughter, and that there is no room left for construction.

It is very true that in *S. v. Kearney* the judgment pronounced by the Superior Court was erroneous, because both fine and whipping were ordered, and on that account could not and ought not to have stood; but I do not shelter myself under that part of the case. It seemed to me then that the opinion given on the act of Assembly was correct. I have thought much on the subject since, and from the best considera-

(193) tion I have been able to give it, I feel myself under the necessity of retracting.

I observe that a similar law passed the British Parliament in 19 Geo. III., ch. 74. In that law manslaughter is excepted. The court may impose a fine, but cannot order whipping to be inflicted. However desirable it is that a similar exception had been made in our law, as the Legislature have not thought proper to make it, I think the Court would transcend their limits to make it by construction. For these reasons, I think judgment should be entered for the State.

By a majority of the Court, Reversed.

Cited: S. v. Upchurch, 31 N. C., 462.

STATE v. TWITTY.

The Governor cannot, constitutionally, add to or commute a punishment; but under the power of pardoning, he may remit part of a fine.

THE defendant was convicted of forgery at Spring Term, 1825, of LINCOLN, and appealed to this Court, where the judgment below was affirmed. The sentence of the court was the pillory, three years imprisonment, thirty-nine lashes, and a fine of $1,000. Execution issued for the fine and costs, and the sheriff levied on property sufficient to satisfy them; afterwards a *ven. ex.* issued, on which the sheriff returned that he had sold the property, satisfied other executions from Mecklenburg, and had satisfied one-half of the above fine of $1,000, the residue having been remitted by Governor Holmes, and that by direction of Mr. Solicitor Wilson he still retained in his hands the remaining $500.

At October Term, 1825, before *Nash, J.*, the defendant was, on motion of Mr. Wilson, ordered to show cause wherefore execution should not issue for the remaining $500; and on argument the rule was discharged; whereupon the solicitor appealed, on the ground that by the Constitution and laws of North Carolina Governor Holmes was not (194) vested with the power which he had exercised.

The transcript of the case sent up did not contain a copy of the instrument signed by Governor Holmes.

The case was submitted without argument.

TAYLOR, C. J., delivered the Court's opinion: The power of pardoning is confided to the Governor by the Constitution, in very general terms, and restricted only to those cases where the General Assembly shall carry on the prosecution, or the law shall otherwise direct. This case does not come within either of the exceptions; and as the Governor might have granted a pardon as to the whole of the punishment, why may he not do so as to part? Though he cannot add to or commute a punishment, it is consistent with the spirit of this authority, and clearly within its words, that he should remit part of a fine. There seems to be no ground for doubting; and the judgment must be

PER CURIAM. Affirmed.

Cited: S. v. Manuel, 20 N. C., 155.

STATE v. JUSTICES OF LENOIR COUNTY.

The justices of a county court are not obliged, by their own exertions, to build and repair jails; they are only bound to use such means for the accomplishment of that end as the law prescribes—*i. e.*, to lay a tax, appoint commissioners to contract, a treasurer of public buildings, etc.; and for an omission of one or all these acts *it seems* they may be indicted jointly as a body; but the indictment must charge which of the duties prescribed by the act has been neglected; it is not sufficient to charge generally that they negligently and unlawfully did permit the jail to go to ruin and decay.

(195) THE question in this case arose upon the indictment in LENOIR, which was in these words, viz.:

"The jurors for the State upon their oath present, that within the county of Lenoir there now is, and from time immemorial there hath been, a certain common jail for the purpose of keeping in safe custody offenders and prisoners within the same, situate and being in the county of Lenoir, known by the name of the jail of Lenoir; and that on the first day of January, in the year of our Lord one thousand eight hundred and twenty-five, and continually from thence until the day of taking this inquisition, the said jail hath been and still is greatly ruinous, in decay, and out of repair, for want of needful and necessary repairing and amending the same, so that offenders and prisoners, during such time, could not, nor can they now, be kept and secured in safe and secure custody within the said jail, as they ought, and were wont to be, and still ought to be, to the great hindrance and obstruction of justice; and that (naming the justices), justices of the peace for the county of Lenoir, whose duty it is to amend and repair the same when and so often as it shall be necessary, have failed so to do; but negligently and unlawfully did permit the said jail to go to ruin and decay, contrary to the act of the General Assembly in such case made and provided, and against the peace and dignity of the State."

To this indictment defendants demurred, and the demurrer having been sustained below, Mr. Solicitor Miller, for the State, appealed.

Attorney-General for the prosecution.
Gaston, contra.

TAYLOR, C. J. There are some rules relative to indictments which it is indispensable to observe, notwithstanding the relaxation in point of form which is introduced by the act of 1811. The indictment must still contain a description of the crime, and a statement of the facts by which

it is formed, so as to identify the accusation; otherwise, the grand jury might find a bill for one offense and the defendant be put on his trial in chief for another.

The defendant ought, also, to know what crime he is called upon to answer, and the jury should appear to be warranted in their conclusion of "guilty or not guilty" upon the premises to be delivered to them. The court should, also, be enabled to see on the record such a specific crime that they may apply the punishment which the law prescribes; and the defendant should be protected by the conviction, or (196) acquittal, from any future prosecution.

These are elementary rules which must be substantially observed.

In ascertaining the duties imposed upon the justices in relation to jails, we find that the act of 1795, ch. 433, gives them power and authority to lay and collect taxes, from year to year as long as may be necessary, for the purpose of building, repairing, and furnishing their several courthouses and jails in such a manner as they shall think proper.

The other act of 1816, ch. 911, converts this authority into a positive duty, and directs that the justices shall, from time to time, lay a sufficient tax to erect and keep in good repair the public jail, courthouse, and stocks, in their respective counties. Without deciding whether the neglect of this duty is an indictable offense, it is obvious that the justices are not called upon to answer that charge, but one altogether distinct, viz., "negligently and unlawfully permitting the jail to go to ruin and decay."

There is no act which makes it the duty of the justices to repair the jail; and its going to ruin and decay may be the consequence of their neglecting the duty which is assigned, but the offense producing that consequence should be positively stated. Against the charge, if stated in the terms of the act, they might have a defense which they could not adduce in the present shape of the accusation; nor do I see how a conviction or acquittal on this indictment would protect them against a future prosecution for not laying the tax (supposing it to be indictable). The case of overseers of the road is very different from this; for the act makes it their positive duty to keep the roads in repair. A neglect in this point constitutes the indictable crime, and not the neglect of the preparatory steps, to which various penalties are annexed. For these reasons, without examining any other point that was made, I think the demurrer must be sustained.

HENDERSON, J. The form of this indictment is evidently taken (197) from the English precedents of indictments against the county for not keeping in repair the roads and bridges within the county, and I agree with the counsel for the defendants that there is no analogy in

the cases. Of common right, in England, the county is bound to keep all public roads and bridges in repair. They can protect themselves from the burthen only by throwing it on some other person. The *corpus delicti* is the permitting the road or bridge to be out of repair. The law will admit of no such defense as here, the employment of all the means in their power, an ineffectual attempt to repair. It presupposes an ability, and concludes that these defenses are false in point of fact. The justices of our county court are not obliged, by their own exertions, to build and repair jails; they are only to use the means to that end which the law has placed in their power; they are to lay the tax, make the order, appoint a treasurer of public buildings, appoint commissioners to contract for the building of the jail. An omission to perform one or all those acts, when necessary, is a violation of their duty, and they being of public concern, such omission is indictable. But the indictment must be conformable to the fact; it must charge which of these duties was omitted; for if this indictment were good, they might have made the order for repairing the jail, appointed the treasurer of public buildings, laid the tax for that purpose, and appointed commissioners to contract, and in every respect done their duty, and yet the indictment be true, that is, the jail out of repair on account of a failure somewhere beyond the control of the justices, and when they are actually endeavoring to punish the individual who failed to do his duty and to rectify the injury which he had done. I repeat it again, they are not by law bound to build or repair jails, but to take specific measures to that end. Their liability arises, not from the thing being undone, as here observed, but in (198) not taking those measures which the law has instructed them to take. I have no hesitation in saying that for this they are indictable, and without the least corruption, for in these cases they act not in their judicial characters, but as police officers; and that they may be indicted jointly, or rather as a body; for it is in their omission as a body that they have offended. The omission of the one is not the omission of the other; they are not responsible for the acts of each other, but the body as a body is liable for its own acts. Any individual member may justify, or rather defend, himself, as an individual, and escape individual punishment, by showing that he endeavored to cause the body to do its duty. The demurrer should be sustained.

HALL, J., assenting. Affirmed.

Cited: S. v. Comrs., 15 N. C., 351; *S. v. R. R.,* 44 N. C., 236; *S. v. Comrs.,* 48 N. C., 403; *Kinsey v. Magistrates,* 53 N. C., 187; *S. v. Fishblate,* 83 N. C., 655; *White v. Comrs.,* 90 N. C., 439; *S. v. Britt,* 118 N. C., 1257; *S. v. Jarvis,* 129 N. C., 702; *S. v. Leeper,* 146 N. C., 665.

STATE v. SAUNDERS.

Under the act of 1823 for the promotion of agriculture, the clerk proceeded against for not making a return may make his excuse to the judge of the Superior Court, and on the sufficiency of the excuse the judge of the Superior Court will decide in his discretion. This Court will not revise the exercise of such discretionary power.

PROCEEDING commenced by *scire facias* issuing under the acts of 1823, to promote agriculture, etc., against the defendant, as former clerk of JOHNSTON County Court, to show cause wherefore judgment should not be entered against him for the sum of $1,000 for his failure to make return on oath of all moneys in his hands as clerk, pursuant to the act.

The matter was heard below, before *Donnell, J.*, when the defendant offered as an excuse for his failure the facts set forth in an affidavit which he made. The substance of the affidavit was that defendant was appointed clerk of Johnston County Court in November, (199) 1786, and held the office until February, 1818; that in 1810 he appointed a deputy, who from that time took the entire management of the office in the receipt and payment of all moneys therein; that prior to the appointment of his deputy, when he bestowed his personal attention on his office, there was no law requiring him to keep a statement of moneys received from or paid to individuals, and that he kept none such; and during the time that he performed the duties of clerk by deputy he could not procure such statement but by his *personal* attention to the business, and his deputy would then have been useless; that his deputy died in 1823, and, therefore, his aid in making such statement was lost; that defendant had been advised that he was not subject to the operation of the law of 1823, because he was not a clerk when it was enacted, having resigned in 1818, and the duty required by it was not imposed by any law while he was in office; but that, notwithstanding, he had endeavored to make such a statement as the law required; this, however, from the lapse of time, the defect of memory, and the lack of certain data on which to proceed, he found impossible; and he quit, in despair of being ever able to make a statement to which he could swear with confidence; that he will not swear there is *nothing* in his hands, but he solemnly declares that he doth not know, nor has he the least recollection of any moneys being due from him as clerk.

The presiding judge, deeming the excuse sufficient, refused to grant the motion of the Attorney-General for judgment for the forfeiture, whereupon the Attorney-General, in behalf of the State, appealed.

Attorney-General for the State. (200)
Badger, contra.

HENDERSON, J., delivered the opinion of himself and brethren, and said: This is a proceeding against the defendant, late clerk of Johnston County Court, under the act of 1823, for failing to make a return of all moneys that had come to his hands by virtue of his office, and which had been uncalled for for the space of three years. The penalty of $1,000 attached upon the defendant for not making his return before the first Johnston Court after the first Monday in August. But the judge of the Superior Court, before whom process is directed to be commenced to enforce the forfeiture, has the power to excuse him for failing to do so. In this case the judge excused the defendant, from which it followed that the penalty did not attach. There was then nothing on which the proceeding could stand, and the judgment for the defendant followed as a matter of course. We have no right to supervise this discretion of the judge. This has been repeatedly decided in this Court. Whether this judgment will form a peremptory bar or not will depend on the construction of the act of 1823; for if the judge has not the power of entirely discharging him from his accountability, the judgment passed by him will not affect it.

We can *see* no error in the judgment; it must be

PER CURIAM. Affirmed.

STATE v. ANTONIO.

An alien is not entitled to a jury *de medietate linguæ* in North Carolina.

INDICTMENT for murder, tried in CRAVEN before *Norwood, J.* The prisoner, upon his arraignment, pleaded not guilty, and suggested to the court that he was an alien, and prayed that he might have a jury *de medietate linguæ*. It was admitted on the part of the State that the prisoner was an alien. The court overruled the motion for a jury *medietate*, and the prisoner was convicted, and sentenced to death.

The prisoner moved, before judgment, to set aside the verdict, and have a new *venire* because of the denial of his prayer for a jury *de medietate,* which being refused, and judgment pronounced, the prisoner appealed.

(202) *Gaston for the prisoner.*

HENDERSON, J. *Judge Williams* informed me that he allowed it at a court of oyer and terminer held at Wilmington many years ago for the trial of some prisoners who were aliens and natives of France.

GASTON: It seems, then, to have been considered the law; the Legislature has not since altered it.

Attorney-General for the State. (204)

The Court differed in opinion, HALL and HENDERSON holding that the prisoner was not entitled to a jury *de medietate,* and the *Chief Justice* that he was, and they delivered their respective opinions *seriatim,* as follows:

HALL, J. The privilege extending to aliens the right of a jury *de medietate linguæ* was granted by statute 28 Ed. III., ch. 13, reënacted by 8 Hen. VI., ch. 29. It is contended that those statutes are in force in this State, and that that privilege has been improperly withheld from the prisoner in this case. It is said that the act of 1715, New Rev., ch. 5, enforces those statutes. That act declares that all statute laws of England providing for the privileges of the people, limitations of actions, preventing vexatious lawsuits, immorality and fraud, confirming inheritances and titles to land, shall be in force. It is further argued that the act of 1778, New Rev., ch. 133, embraces them. That act declares that all such statutes and such parts of the common law as were in force and use and are not destructive of or repugnant to the freedom and independence of this State, etc., and which have not been provided for, in whole or in part, etc., are declared to be in full force.

If those British statutes were in force before the revolution, I do not think the latter act of Assembly excluded them; but I do not think they were in force by the first recited act. That act, as far as it relates to this question, enforces such as provided for the privileges of the people; the statutes in question provide for the privileges of aliens. I admit, however, that many statutes of Great Britain had become (205) the law of this State before the time of passing that act. When the State was first settled as a colony of Great Britain, the colonists brought with them, as their birthright, the laws of the mother country, namely, such parts of the common law, and statutes that were incorporated with it, as were suitable to their situation at the time of their migration; such as the statute of 4 Ed. III., ch. 7, *e bonis asportatis in vita testatoris,* the statute of uses, and the statutes of Eliz., against fraudulent conveyances to defraud creditors, etc. And if the statutes we are now considering were suitable and proper for the government and well-being of the colonists at *that* time, and were not afterwards repugnant to or inconsistent with the freedom and independence of the state and form of government therein established, I admit they are in force at this time. But it seems to me that those statutes were in their nature local; they were founded more in commercial policy than in general principles

calculated to answer alone the ends of justice and reach the objects of criminal law. They both speak for themselves. The statute of Hen. VI. premises that for want of such regulations "many merchant aliens have withdrawn, and daily do withdraw them, and eschew to come and be conversant on this side of the sea, and likely it is that all the said merchant aliens will depart out of the same realm of England if the said last statute be not more fully declared, and the said merchant aliens ruled, governed, and demeaned in such inquests according to the first ordinance aforesaid, to the great diminishing of the king's subsidies, and grievous loss and damage of all his said realm of England; and our lord the king, willing therein to provide for the weal and profit of him and all his realm, and to eschew the damages and inconveniences which may easily happen in this behalf, and also to give the said merchant aliens the greatest courage and desire to come with their wares and merchandises into this realm: by advice of the lords, etc., it is declared," etc. It will be kept in view that this statute was reënacting the statute of Ed. III., which first gave the privilege to aliens, which statute it was sup-
(206) posed had been repealed by the statute of Hen. V., in the preceding reign.

In the infancy of the settlement of this country the habits of the colonists were agricultural; their trade and commerce were altogether in the hands of the mother country. A quite different policy prevailed from that which dictated the statutes of Ed. III. and Hen. VI.; and the question we have now to decide is, not whether such a law extending the privilege to aliens would be suitable to our *present* situation, as it seems many of the States have thought it would be, but whether it was suitable to our situation as an infant colony at that time; for if that was not the case, and on that account it was not adopted at that time, it is not the law at this day, for it has never been enforced by any positive law.

I therefore think, as the reasons which induced the Parliament in England to enact those statutes were not good reasons why they should be enforced by the colonists, as not being applicable to their then situation, the court below gave a correct judgment in refusing the prisoner the jury he prayed for.

HENDERSON, J. I concur in the opinion given by *Judge Hall,* and for the reasons given by him. The policy which induced the Parliament of England to pass the statutes of Edward was to encourage foreign merchants, and possibly artists, to come and trade with and reside among them. This policy is not only declared in the act itself, but in the act of Henry VI., complaining of the construction given to the act of Henry V., respecting the qualifications of jurors. In the colonial system the policy was certainly inverted. Foreign merchants were prohibited from trading

with us, and artists were certainly not encouraged, for it was the policy of the mother country to supply the colonists with manufactures of her own production, and to keep the colonists engaged in the (207) cultivation of the earth, to grow the raw materials for the manufacturers of the mother country. As to those foreigners who were cultivators of the soil, and who might possibly have been invited to settle among us, as we find frequently bodies of Germans, Swiss, and French settling among us, the moment they arrived here for that purpose they were considered as colonists, having no intention to return; and, therefore, having no interests separate and distinct from other colonists, they lost their alien character. A few years residence here was required only to ascertain their character, and to show that their object was a permanent residence; and then they became entitled to all the rights and privileges of colonists from the mother country. Our ancestors, therefore, did not bring with them the statute of Edward. This law, I think, was territorial, and confined to England; it was unsuited to the situation of the colonists. If it was not brought with our ancestors, there is no act either of the colonial government, the mother country, or of our present government, which imposes it. The last act upon the subject enforces such acts of the British Government as had been in force and use here and were compatible with our form of government. If, therefore, it had not been in force before, that act did not enforce it. I am at a loss to declare the meaning of the words *in use,* as used in that act; I am now, and heretofore have been, much perplexed to ascertain its meaning; but I am satisfied that it produces no such effect as enforcing the act in question. I would mention, also, the various acts of our Legislature on the subject of the qualification and appointment of jurors as affording some evidence, although, I admit, not conclusive, that the law of Edward was not considered as being in force. I do not mean to say that had the act of Edward been in force, that these provisions would repeal it, for I think that they might be made to stand together; but only as affording some evidence that the law was not in use, and suffi- (208) ciently strong to repeal the evidence of its being in use, arising from its having been used by *Judge Williams* once or perhaps twice at Wilmington; if such partial and solitary instances of its being in use would satisfy that word in the act of 1778.

I place no reliance on the report of the gentlemen on the subject who lately revised our statutes. That report was not either sanctioned by law or disapproved; it was simply ordered to be published. And if the question were dependent on its having a legislative sanction by such order of publication, I would say that it was rather evidence that it had not. This subject was brought before the Legislature by the report, and it was simply ordered that it should be published, without expressing any

opinion thereon. It was saying that it must depend on its own merits; we will neither give it our sanction nor disapprobation.

I, therefore, concur with *Judge Hall,* that there should be judgment for the State.

TAYLOR, C. J., dissenting. It is difficult, perhaps impossible, to arrive at exact demonstration on a subject that involves the question whether an ancient British statute, passed nearly five hundred years ago, is now in force in this State. There are no certain guides to direct us in an inquiry of this sort; for the darkness that hangs over the early legislation and judicial history of this State, the dearth even of traditional knowledge, has left us little to resort to but general principles and reasoning, and no confidence that more can be done than grouping together the strongest probabilities. It is a matter of the highest duty, however, to make an honest effort to investigate the subject, in a case of such awful interest as the one before us, where, in all human probability, the life of a fellow-being depends on our decision.

In order to ascertain whether the prisoner has been legally convicted,
I shall consider two questions: first, whether the statute of 28
(209) Ed. III., allowing to aliens a trial *de medietate linguæ,* forms a
portion of that statute law of Great Britain which the first settlers of this State brought with them from the mother country; secondly, if it does, then, whether it has been repealed or superseded by any legislative act of our own.

It seems to be agreed by the writers on the subject that colonists who settle a new and uninhabited country carry with them the laws of the parent country as their birthright, so far as such laws are applicable to their situation and the condition of an infant colony; or, in the language of an early act of Assembly, the laws of England were, at the first migration of our ancestors, the laws of this Province, "so far as they were compatible with our way of living and trade." 1715, sec. 1.

The policy of 28 Ed. III. was to encourage foreigners, merchants, and others, to resort to that country, under an assurance that justice should be impartially administered to them, and that such a liberal mode of trial should be practiced in all controversies in which they were parties as would prevent the operation of prejudice and place them under no disadvantage to be apprehended from their ignorance of the customs and manners of the people among whom they found themselves.

There is the highest evidence of the wisdom of this policy in relation to England; for when the statute of 2 Hen. V. was afterwards enacted, that no person should pass on any inquest unless he had lands and tenements to the yearly value of forty shillings, and a construction was put on this act which excluded aliens from the privilege of a trial *de medie-*

tate linguæ, the Parliament interposed, and by the declaratory act of 8 Hen. VI., after reciting the mischiefs suffered from aliens leaving the kingdom in consequence of this construction, they declare that the statute of 2 Hen. V. did not intend to change the mode of trial where an alien was a party; but was meant to prescribe the qualification of jurors, between denizen and denizen. The act expresses an anxiety to give to the said merchant aliens "the greatest courage and desire (210) to come with their wares and merchandise into this realm."

As the wealth of the present State would increase with the prosperity of the colonies, any British statute having a tendency to promote the object was applicable to the circumstances of the new settlers. Immense forests were to be cleared, lands to be reclaimed and cultivated, and various labors to be performed, to which capital, enterprise, and industry were essential; and these were likely to be drawn from other sources besides the parent State in the degree which foreigners could be assured that they would enjoy a certainty of legal protection.

The statute of 28 Ed. III. may have been supposed to have been a mere commercial regulation, from the words of 8 Hen. VI., "merchant alien"; but the act itself says "merchants and *others.*" It is true that more of the trading profession of persons resorted to England at that period than others, yet no distinction was made between them and other classes of aliens; and all were equally entitled to the privilege.

The mechanic arts and the sciences were then struggling into a feeble existence; and of course few foreigners could bring any improvements, or discoveries, into a country where they received their first and strongest impulse. But in after ages it became the interest of Great Britain to introduce foreigners from states which rivaled or exceeded them in many of their manufactures; and it was equally important that this mode of trial should be allowed to all descriptions, as the means of extending their commerce through their manufactures, and of enriching their country by the diffusion of useful knowledge. But at the present day aliens are to be found in every State; some impelled to leave their native country by religious proscription or political intolerance; many inspired with the hope of improving their fortunes or being relieved from the anxiety of providing for their posterity by the new and ever (211) improving prospects opened to mankind by the salutary influences of a perfectly free government. All, however, bring with them, in a greater or less degree, the arts and industry that multiply the resources of man, or discoveries in science that give strength to his character, or embellishment to his existence.

But recurring to the early history of our own State, it may be thought that the system of commercial monopoly established by the navigation

act, and which, probably, went into full operation about the time the first permanent settlements were made here, would prevent the access of foreign merchants, and thus render useless and inapplicable the mode of trial now in discussion. That the colonial system would, in a very great degree, prevent an intercourse with merchant aliens must be admitted; but it is evident that the policy of that system was best promoted by giving encouragement to foreign agriculturists and others who would add to those productions of the soil which were exported to the mother country. The most advantageous employment of any capital to the country to which it belongs is that which maintains there the greatest quantity of productive labor, and increases in the greatest degree the annual produce of the labor and land of that country. All the surplus produce of the colonies, which consisted in what were called enumerated commodities, could only be sent to England; and other countries must afterwards buy them of her.[1]

The policy of encouraging foreign settlers was invariably pursued by the mother country, particularly as to these *then* colonies. By this she was a great gainer, without any diminution of her own inhabitants. In Pennsylvania upwards of four thousand Germans were imported in 1750.[2] The French Protestant refugees fled to Carolina in great
(212) numbers from and after the revocation of the edict of *Nantes* in 1685,[3] which was before the division of the colony into North and South Carolina. Many years before the revolution a considerable body of Palatines[4] migrated hither, and settled upon lands of which many of their descendants are, at this day, respectable cultivators. Swedes and Dutch from New York, French from the line of posts on our frontiers, and Spanish from our southern borders at St. Augustine, must have found their way to this State, and, in the vicissitudes of human affairs, required the advantage of this mode of trial.

The colonies (says an elegant historian[5]) which now form the United States may be considered as Europe transplanted. Ireland, England, Scotland, France, Germany, Holland, Switzerland, Sweden, Poland, and Italy furnished the original stock of the present population, and are supposed to have contributed to it in the order they are enumerated.

But this position may be further maintained by authority of the British Parliament; for by the act of 13 Geo. II. foreigners residing seven years in the American colonies were naturalized; and by 2 Geo. II.

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1 Smith Wealth of Nations.
2 2 Settlements in America, 201.
3 1 Ramsay's Hist. U. States.
4 1709, Williamson's Hist. N. Carolina.
5 Ramsay's Hist. of the United States.

foreign protestants, serving in royal American regiments for two years, were naturalized. Still these foreigners might require the allowance of this mode of trial until their right to naturalization was complete by the prescribed term of residence; and I think it probable that the demands and necessity of it would be not less frequent here than in England, in proportion to the difference of population. For it is a well known fact in the history of the national manners that the mass of population of the two rival nations, England and France, were formerly nurtured in inveterate prejudices against each other; and we cannot suppose that the minds of our ancestors were purified from the taint of the parent hive by a transatlantic voyage. It may well be believed that a (213) Frenchman, tried for his life in North Carolina, before the Revolution, would as earnestly invoke the protection of the statute of 28 Ed. III. as if he were tried in England; and, when we look at the habits and rank in life of the early settlers, who were to form his jury, would stand in equal need of it. "For a long time it was but ill inhabited, and by an indigent and disorderly people, who had but little property and hardly any law or government to protect them in what they had."* Happily, these prejudices are now no more than matters of history; they have been dispelled by the lights of knowledge and the genius of our institutions. But though an alien of any description has at this day nothing to fear from the operation of malignant passions, he might labor under many disadvantages from our ignorance of his language and the customs of his nation. If these may be obviated by allowing him a portion of his countrymen, or foreigners, upon his jury, in case of life or death; if by these means he will be better enabled to bring forward his defense to the consideration of the court and jury; and if there is no positive law directing us, in plain and intelligible language, to disallow the claim, it appears to me safer to follow in the footsteps of our forefathers.

In a case of this importance I cannot overlook what has been the practice of our predecessors, men who belonged to the profession before the revolution, and may be supposed to have practical knowledge of what was then the course of criminal trials. These venerable persons formed a sort of connecting link between the present age and the past; and, as they have always allowed the claim of a jury *de medietate linguæ,* whenever it was demanded, it is reasonable to suppose that such was the custom before their time.

The statute in question, though seldom called into action, appears to me, from these several views of the subject, to have been in the number of those which our ancestors brought with them, not less (214)

*Settlement in America, 256.

so than many others which influence our daily transactions, and to doubt the existence of which would throw rights and property into the utmost confusion.

2. No inconsiderable light is reflected on this question by what has been already mentioned relative to the statute of 2 Hen. V., for that made a general law for the qualification of all jurors, in terms as comprehensive as any of our acts of Assembly; yet the Parliament afterwards declared that they were not, and did not intend, legislating upon the special case of a jury *de medietate linguæ*.

Further, the statute of 27 Eliz., ch. 6, requires the jurors to have an estate of freehold of the yearly value of 4*l*. The words are, "that in all cases where any jurors are to be returned"; yet it was held that this statute did not extend to this mode of trial. Cro. Eliz., 84.

To ascertain whether a later statute repeals a former one it is necessary to inquire whether the later statute is couched in negative terms, or whether its matter is so clearly repugnant that it necessarily implies a negative. None of the acts on this subject relate to any cases but those between the State and citizen or between citizens. When they prescribe or alter the qualifications of jurors, the acts must be supposed to speak with a retrospect to those cases where *some* qualification in point of property was necessary to a juror, and not to those cases where no such qualification ever had been required.

A freehold qualification of some sort was always necessary to a juror by the common law (Litt. sec. C. 464; C. Litt. 157a), and it would seem to do violence to the intent of the Legislature to construe acts making provision for general and ordinary cases as repealing laws made for peculiar cases and wholly of an anomalous character, most probably not within their contemplation at the time. The course of judicial exposition fortifies this idea; for by 32 Hen. VIII. inhabitants of corporate towns, worth 40*s.* in goods, may try felonies in sessions and jail
(215) deliveries for such towns, and this is not repealed by subsequent acts concerning jurors. There is nothing in any of our acts which prevents them from being carried into complete execution in perfect harmony with the law relative to aliens. Nor do I perceive that the force of this general reasoning is impaired by the statute of 5 W. and M. having introduced an exception of this mode of trial, in an act prescribing the qualifications of jurors. This was done from abundant caution and to avoid the danger of misconstruction which had formerly arisen under the statute of Hen. V. But, doubtless, without this exception the courts would have made a like exposition, according to the cases before cited. I am, therefore, of opinion that the prisoner is entitled to a new trial.

By a majority of the Court, No error.

IN EQUITY

TAYLOR, EXECUTOR, v. LUCAS AND OTHERS.

As to personal property, a residuary clause not only carries all not disposed of, but everything that in the event turns out not to be disposed of.

APPEAL from CHATHAM. But one question was presented in this case, viz., whether a legacy left to a legatee, which lapsed by his death in the lifetime of the testator, should be divided among his next of kin or should belong to the widow, who was residuary legatee.

PER CURIAM, after stating the question: No rule is better established as to personal estate, though it is otherwise as to real, than that a residuary clause carries not only everything not disposed of, but everything that in the event turns out not to be disposed of, as by lapse (216) and the other means specified in the cases. 1 Ves., Jr., 109, 110; Ambler, 138; 8 Ves., Jr., 25; 4 *ibid.*, 732; 15 *ibid.*, 509. The law raises a presumption in favor of the residuary legatee against every one except the particular legatee. The testator is supposed to deprive the residuary legatee only for the sake of the particular; and the bounty to him being prevented by death, the residuary legatee is preferred to the next of kin.

Cited: Jones v. Perry, 38 N. C., 202; *Mabry v. Stafford,* 88 N. C., 604.

HECKSTALL AND WIFE v. POWELL.

The act giving power to courts of equity to order sales of real estate for the purpose of partition directs the proceeds to which infants are entitled to be secured to such infants or their *real* representatives. Hence, such share of the proceeds is to be considered as real estate, and (if the infant die before arriving at age) the heirs at law will succeed to it, and not the personal representative. But if the infant arrive at full age and then die, whether the heir at law will be entitled, *quere.*

APPEAL from BERTIE. The bill set forth that the mother of Mrs. Heckstall had died intestate (leaving surviving her her second husband, Samuel Powell), seized and possessed of certain land in Bertie County; that her heirs at law were Mrs. Heckstall, the child of her first marriage, and John Powell and Miles Powell, children of her second marriage; that afterwards Samuel Powell died, when a bill was filed in equity by

Mrs. Heckstall and John and Miles Powell to sell the land of their mother for the purpose of division; that a sale was decreed, which took place, and was afterwards confirmed by the court; that at the time of the sale and final decree John and Miles Powell were infants, and the defendant was appointed their guardian, and as such received two-thirds of the purchase money of the land aforesaid; that John and Miles
(217) were since both dead, without issue, leaving Mrs. Heckstall their heir at law, who claimed by the bill the two thirds of the money arising from the sale of the land.

The bill further charged that John and Miles left a large personal estate, and the complainant, William Heckstall, as their administrator, claimed the same.

The answer of Powell admitted that as guardian he had received two-thirds of the price of the land; and as to the other property which it was alleged had belonged to his wards, he referred to his accounts as guardian, making them part of his answer, whereby it appeared that the estates of John and Miles were indebted to him.

The answer also stated that John died first, and then Miles, after the defendant had received the purchase money of the land, and that Miles left, at his death, besides Mrs. Heckstall, two other sisters, Nancy and Patsy, on the father's side, who are equally entitled with Mrs. Heckstall, and are not parties to the bill.

The matters of account were referred, in the court below, to the master, and on his report, *Daniel J.*, below, decreed that the complainants should receive of defendant two-thirds of the amount for which the land sold, it being considered by the court as land; and that the defendant should retain the interest made on the money, as profits of the land, in part payment of his claim for advancements made to John and Miles as their guardian, and that each party pay his own costs.

From this decree defendant appealed.

(218) *L. Martin for complainants.*

TAYLOR, C. J. According to the directions of the act relative to the sale of lands for the sake of partition, the proceeds of an infant's share shall be so invested, or settled, that the same shall be effectually secured unto the person so entitled, or his or her real representative. 1812, ch. 847.

If John and Miles Powell had died intestate before the sale, Elizabeth, the plaintiff's wife, would have been their heir at law, in exclusion of their paternal half-sisters, conformably to the fourth rule of descent established by the act of 1808. It is equally clear that if either had died under age, after the sale, the money produced by the sale must have been

considered as land, and, therefore, the heir at law would have succeeded to it. But it is not so certain that if one or both had arrived at full age, and then died, that his or their share of the money would then have been considered as land, and be descendible accordingly. It is stated in the case that one died after he came of age, but it is stated incidentally in the defendant's answer, and for a purpose altogether unconnected with the principal question.

Now, the decree considers the whole sum as real estate, in (219) which it is erroneous, and must be reversed. The cause must be remanded for further proceedings, and especially for the purpose of ascertaining the ages of John and Miles Powell at the time of their respective deaths.

PER CURIAM. Remanded.

FORDHAM v. MILLER'S ADMINISTRATORS.

1. A father, by deed, gave a negro to his daughter, and provided in it that if she should die without children the slave should return to his family. The deed was put into the father's possession to be recorded, and afterwards, before it was recorded, the daughter, by parol, relinquished all claim under the deed, and exonerated her father from all obligation to have it registered, and authorized him to destroy it. She afterwards married and died. Her husband filed this bill to set up the conveyance: *Held*, that after the daughter's voluntary renunciation, she would not have been entitled to the aid of the court to set up the conveyance, and that the husband, succeeding to her rights, could claim nothing more than she could.

2. Independent of this objection, whether the court would set up this conveyance for the husband's benefit, thus giving it a different operation from what the parties intended, *quere*.

THE bill filed in LENOIR alleged that Philip Miller, the defendant's intestate, some years before the filing of this bill, partly in consideration of value and partly of natural love and affection, conveyed, by an instrument of writing under his hand and seal, a negro woman slave, Judith, and a negro boy slave, Essex, to his daughter, Nancy Miller; that in pursuance of the conveyance Nancy took possession of the slaves and kept them for many years notoriously as her property, with the consent of Philip Miller; that Philip Miller afterwards prevailed on Nancy to put the writing into his possession for the purpose of carrying it to court and acknowledging it for registration, but that he never did carry or acknowledge it in court, nor return it to his daughter, but fraudulently kept or destroyed it; that afterwards Nancy Miller intermarried with Fordham, the complainant, she then living at the house of her (220)

brother, William Miller, and having in her possession Essex and Judith with her increase; that Essex came immediately into the possession of Fordham, and Judith and her children were permitted to remain a short time after the marriage at the house of William, until Philip Miller took them into his possession and claimed them as his; that Nancy, wife of the complainant, was dead, and that her husband was her administrator, and as such had demanded the woman Judith and her increase, and had also applied for the instrument of conveyance, but that Philip Miller peremptorily refused to give up the negroes or instrument.

The answer of Philip Miller stated that Nancy Miller, having attained the age of 32 years without marrying, and with no particular prospect of marriage in view, requested the defendant's intestate, Philip Miller, to make some provision for her in such way that she should have a maintenance for her life, and that in case of her marrying and leaving issue, the property then settled should go to her children; but in case she did not marry or leave issue, then that the property should return to the family of Philip Miller; that deeming the request reasonable, Philip Miller made and subscribed an unsealed paper-writing, the purport of which was that Nancy should have Essex and Judith and her increase during the natural life of Nancy, and then the property to be disposed of according to the contingencies mentioned above; that this paper was witnessed and delivered to the witness with a distinct understanding between all parties concerned that it was only made to secure the provision for Nancy in the event of her father's suddenly dying without a will, but that it should be subject to any alteration he might think proper to make by will; that the only consideration was the affection which he felt for his daughter, nor was any consideration of any kind mentioned in the paper. Some time afterwards, in a conversation between
(221) Philip Miller, Nancy, and her brother, William Miller, it was suggested that, to prevent accidents from death, it would be well to have the paper recorded, and it was delivered to Philip Miller for that purpose. It happened, however, that he did not attend the next term of the court which occurred, and before another term occurred Nancy went to the house of Philip Miller and told him that, as it was not recorded, it might as well be let alone altogether; that she was willing her father should take back the right; and that what she was to have, Philip Miller might give her by his will; and this being acceded to, no further care was taken of the paper, which is now lost or mislaid.

TAYLOR, C. J. The allegations in the bill as to the deed of gift of the female slave are sufficiently made out by proof, and there seems to be little doubt of the deed of gift having been placed in the hands of Miller for the purpose of being registered. But the objection made to setting

up the deed is that, after the defendant had it in his possession, his daughter agreed to waive all claim under it, and trusted to her father making a provision for her by his will. Her declarations to this effect were frequent a very few days before her marriage, and in point of fact it is established. This seems to be one of the cases where a written agreement may be so far waived by parol that it may be a defense to a bill for a specific execution; for it was here an entire abandonment and dissolution of all claim by virtue of the deed, and restoring the parties to the situation they were in before it was made. But it may well be questioned whether, if this were not a solid ground of defense, this Court would feel justified in setting up the agreement so as to give it a different operation from what the parties intended. That was that if the daughter died without children, the slaves should return to the family. The husband made no settlement, and was apprised of the circumstances of his wife before marriage; his equity is at best doubtful. The bill must be dismissed. (222)

HALL, J. This is a bill brought by the surviving husband, who has taken out letters of administration on the estate of his deceased wife, for negro Judith and her increase, which he alleges belonged to her. If she had any title to the property in question, she derived it from the deed which it is admitted by both parties the defendant, her father, executed to her, and which it is also admitted was returned to the father for the purpose of being registered. If the matter rested here, although the father may have mislaid or destroyed the deed, the rights of the daughter would not be impaired, provided the contents of the deed could be established. But the evidence shows that afterwards, before the marriage of the daughter with the complainant, she released her father from any obligations which he was under to have the deed registered, and restored to him all right which he had to the negro before it was executed, by authorizing him to destroy it, and saying, if she lived and should have children, she had rather rely on the provision which he should make for her by will. If she herself was living, she could not claim the interposition of this Court, to set up this deed against her own voluntary consent given for its destruction, when she was a free agent, and where it does not appear that any fraud was practiced upon her to procure that consent. As the complainant cannot be in a better situation than she would be if living and single, as to the property in question, I concur in the opinion that the bill should be dismissed.

HENDERSON, J., concurring, also, Bill dismissed.

(223)

LEROY v. DICKENSON.

A judgment fraudulently confessed to cover the property of the debtor shall be postponed to a judgment obtained *bona fide* after such fraudulent confession.

THIS was a bill in BEAUFORT setting forth that complainant, some time before 14 August, 1811, owning and holding two several bonds of Joel Dickenson, William H. Williams, and William Guthrie, each for the penal sum of $6,011.75, and each conditioned for the payment of $3,055.87½, indorsed and transferred the same to Josiah Collins, to whom complainant was indebted, under an agreement that the same, if collected, should be applied to the payment of the debt to Collins; that Joel Dickenson, being largely indebted, and being desirous to place his property beyond the reach of his creditors, on 14 August, 1811, fraudulently executed to William H. Williams and Jordan Sheppard a conveyance embracing in it all the property which he (Joel) had, to be void on condition that Joel Dickenson indemnified Williams and Sheppard against certain debts for which they were responsible, and, among others, against the debt which complainant had assigned to Collins; that Joel Dickenson continued in possession of the property, which was worth far more than the debts for which Williams and Sheppard were responsible; that he exercised acts of ownership over it, notwithstanding a breach had been long made in the condition of the deed; that Jordan Sheppard died in December, 1811, having first, by his last will and testament, given and bequeathed nearly all his property to Joel Dickenson, who was his son-in-law, "in trust to and for the use of Louisa Dickenson" (wife of Joel), and authorizing Joel to sell the whole or any part of his estate for the use of Louisa D. and her heirs; and that Joel, designing to defeat his creditors, fraudulently combined with one Marshall Dicken-
(224) son, his kinsman, to effect his purpose. Accordingly Joel, immediately after Sheppard's decease, took into his possession the personal property of Sheppard, and before probate of the will sold part thereof at public sale; and at the next term of the county court the will of Sheppard was proven, and no executor being therein named, Joel Dickenson declined becoming administrator, and procured Marshall D. to become administrator, and joined as one of his sureties in the administration bond; and at the term of the county court next following, Joel confessed a judgment to Marshall as administrator for $6,525.90, on account of the property of Jordan Sheppard, which Joel alleged he had made use of and sold previous to administration granted, when in truth the value of the property taken by Joel was much less than the amount of the judgment confessed.

The bill stated, also, that Collins had obtained judgments on the bonds before mentioned, after the execution of this fraudulent contrivance between Joel and Marshall, but that the property, by collusion between the parties before named, was so hedged in and covered that the execution of Collins was unavailing; and, among other matters, prayed that the judgment fraudulently confessed by Joel might be postponed to the judgment of Collins.

There were other matters alleged in the bill as a ground for the Court's aid and interference, but the above presents the principal point made in the case, and that to which the attention of the Court was more particularly called.

There was much evidence filed in the cause, and so much as is here material will be found in the opinion of the Court as delivered by the *Chief Justice*.

TAYLOR, C. J. One object of this bill is to postpone a judgment confessed by Joel to Marshall Dickenson to the complainant's demand, ascertained by judgment, against the former. The allegation of fraud in the confession of the judgment, and in keeping it on foot (225) to cover the property from other creditors, is abundantly established by the depositions in the cause. The circumstances disclosed are numerous, and of great variety of character, yet all conducive to the same result, and it is impossible to resist their united effect. Those which principally influence the judgment of the Court will be briefly stated, though there are others of minor importance which have had some share in the formation of our opinion.

The judgment was confessed for upwards of $6,000, and purports to be founded on an account consisting of several items. One is a charge against Joel for the amount of purchases made at the sale. Now, the sale was upon twelve months credit, and it is improbable that Joel would expose himself to an immediate execution for what he was not then liable. Besides, several of the purchasers, of unimpeached credit, show that they paid the amount of what they bought to Marshall himself. There is other evidence to the fact that some of the notes given to Joel for purchases were in Marshall's possession, and that some were transferred by him after he administered. No satisfactory explanation is made why these sums were not applied to the credit of the judgment. There are other items in the account which at the date of the judgment Joel had not collected or applied to his own use; and one which, according to Buck's deposition, Marshall had received the whole of. The charge of lumber from the mills appears from one of the depositions to be unfounded, inasmuch as there was not more on hand than was necessary for their repairs. Another strong evidence of the quality of this

transaction arises from Green's execution, which, after it was satisfied out of Joel's funds, Marshall caused to be levied upon the house and lot. The charge for Williams' and Joel's note to May is exposed to very serious suspicions. No charge was made for it by Sheppard against his sons-in-law, and it is rather to be inferred that he intended it as an advancement to his sons-in-law; for the note is produced can-
(226) celed, and without any assignment, nor is any security taken from them.

And there is direct evidence that Joel had declared his deliberate purpose to defeat the complainant's claim, and the whole contrivance seems to be directed to that end. When to this are added the relationship, intimacy, and confidence subsisting between the parties; that Marshall, though succeeding to the trust held by Sheppard, allowed Joel the uncontrolled use of his property, the management of his vessels, and the direction of his mercantile concerns, without applying any credits to this judgment; the manner of confessing the judgment by the plaintiff's attorney under a power of attorney from the defendant; the apparent want of resources of Marshall when selected to administer; the disappearance of Sheppard's estate, without any administration accounts being settled: we can come to no other conclusion than that the judgment was covinous. It must, therefore, be postponed to Leroy's demand, and Marshall enjoined from proceeding on it as to Leroy.

Judgment accordingly.

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(227)

JARVIS ET AL. v. WYATT.

1. A. devises lands to J. W. and his wife during their lives, and to the longest liver of them, and also bequeaths to them certain slaves, etc., for their lives as aforesaid; and after their decease he gives said property, real and personal, unto the heirs of their bodies lawfully begotten, to be equally divided among them, to them and their heirs forever. J. W. and wife are tenants for life only, and the heirs of their bodies take an estate in fee in the lands in remainder as purchasers. The remainder is contingent, and, on the decease of the surviving donee for life, vests in such persons as are heirs of the bodies of J. W. and wife. A child, therefore, of J. W. and wife, who dies in the lifetime of the surviving donee, had no estate in the lands.

2. According to the intent of the testator, the personal property, on the decease of the surviving donee for life, goes over with the lands to the remaindermen; the heirs of the body of J. W. and wife take an absolute property in the personalty on the decease of the surviving donee for life, and the executor or assignee of a child of J. W. and wife, dying before the wife, has no interest in the personalty.

JARVIS *v.* WYATT.

THIS bill was filed in 1823 for foreclosure of a mortgage. Ambrose Knox, by his will duly executed, devised the use and occupation of four-fifths of his plantation, etc., to John Wyatt and Parthenia, his wife, during their natural lives, and to the longest liver of them; and he also bequeathed to them the use of certain slaves and their increase during their natural lives as aforesaid; and further, during their lives as aforesaid, the use of all his stock and household furniture and plantation utensils of whatever kind now in their possession; and after their decease he gives and bequeaths all and singular the property, both real and personal, above mentioned (for their use during their lives) unto the heirs of their bodies lawfully begotten, to be equally divided among them, to them and their heirs forever. The testator died in 1796. Upon his death, John Wyatt entered upon the lands, and had possession of the personalty until 1802, when he died; his widow, surviving him, took possession of the real and personal estate, and continued it (228) during her life. In 1804, William Wyatt, one of the children of John and Parthenia, by deed mortgaged to the complainants all his interest in the lands and slaves mentioned in the above devise and bequest. William Wyatt died in 1817, and was survived by his mother, Parthenia, who departed this life in 1821. The bill was filed against the defendants, who were the children of William Wyatt, and were his heirs and distributees. On the death of Parthenia, they had taken possession of the land and slaves mentioned in the mortgage; they were the heirs of the body of John and Parthenia, and by their answers insisted that William Wyatt had nothing in the premises in 1804 when he executed the mortgage, and that on the death of Parthenia the lands belonged to them, either under the will of Ambrose Knox or by descent from Parthenia, and that the slaves were their property either under the said will or as the distributees of Parthenia. The sole question in the case was whether William Wyatt had, in 1804, any interest in the lands and slaves. The court below being of opinion that he had not, dismissed the bill of the complainants with costs, from which they appealed.

Gaston for appellants.
Hogg for appellees.

TAYLOR, C. J. That the testator intended John Wyatt and his wife to have no more than the enjoyment of the subject devised, during their lives and that of the longest liver, seems evident from the terms he uses in the will. He "lends the use and occupation" of the plantation to them "during their natural lives, and to the longest liver," and he "leaves them the chattel property during their lives as aforesaid"; (249) thus showing his wish that they should be restrained from the power of disposing of the land, so as to defeat the ulterior devise to their

heirs. He then provides that *after* their decease all the property thus given shall go to the heirs of their bodies lawfully begotten, to be equally divided among them and their heirs forever.

It is argued on the part of the defendants that whatever the testator's intent might have been, yet the legal operation of the devise was to give an estate for life to John Wyatt and his wife, and an immediate remainder to their heirs, and that in such a case the rule in *Shelley's case* applies, and vests in the ancestors an estate in fee simple.

I think it evident that the words "heirs of their bodies," as used in this will, were designed to secure the estate in the first place to the descendants of John and Parthenia, and to make their issue the stock or root of the future succession, since if they had both died without leaving such issue, it would have contravened the intent of the testator to suffer the property to devolve on their collateral heirs. Upon the death of the devisees it would have vested in their lineal descendants as tenants in common, but the design of the will having taken effect, it would be an absolute estate in such children or grandchildren, descendible to their heirs general.

According to the authorities, "heirs of the body" have been held to be words of purchase, when the testator hath superadded fresh limitations, and grafted other words of inheritance upon the heirs to whom he gives the estate, thereby showing that those heirs were meant by the testator to be the stock of a new descent. Where the heirs are thus made ancestors it is evident that the terms "heirs of the body" are merely descriptive of the persons intended to take, and import such sons and daughters of the tenant for life as shall also be heirs of his body. This exception to the rule in *Shelley's case* is well established by the cases re-
(250) ferred to, particularly *Archer's case,* 1 Rep., 55, and *Lisle v. Gray* and *Lowe v. Davies.*

Although it appears plain to my apprehension that the heirs take as purchasers, yet I think it unnecessary to say much more on this point, because it can make no difference in the decision of the cause, since in neither case could William Wyatt become entitled to anything during the lifetime of his parents.

There are not on the face of the will any sufficient indications that the testator meant to use the word "heirs" in any other than its technical sense, that is this, those who should answer the description upon the death of the ancestor, until which event it must be unknown who would be his heirs. On the contrary, the will devises it to the heirs *after* the decease of the father and mother, and it is consequently a contingent remainder to those who should be heirs of the body on the death of the survivor. As the real and personal estate are disposed of by the same words, the construction must be the same in both, and no part of either vested in

William Wyatt. The husband and wife had a joint estate for life in both, and upon the death of either, the survivor became entitled for life; nor does it seem to me that it was such an interest in the wife as the husband might have assigned or released, so as to destroy the right of survivorship. Shepherd's Touch., 344; Cro. Car., 222; 1 Salk., 326; Cro. Jac., 570. I am of opinion that William Wyatt, having died before his surviving parent, took nothing in either real or personal property.

HENDERSON, J. Were the superadded words, *equally to be divided between them,* stricken out, and the case decided according to the laws of England, there would be no doubt but that the wife who survived her husband would take an estate in special tail; that the estate created by the devise should stand thus, an estate to husband and wife during the coverture with a contingent remainder in special tail to the survivor; for the heirs of the body being called to the succession in (251) the character of heirs, must take in the quality of heirs, which could not be effected without according to the ancestor an estate descendible to the heirs of her body, and this, regardless of the intent of the devisor, for the question is not what he intended to do, but what he has done; he has called to the succession the heirs of her body after giving to her a life estate; and they claiming in their character of heirs, the ancestor must have an estate of inheritance herself, for the heirs as heirs can take only that which was in the ancestor. But since the abolition of estates tail "heirs of the body" can no longer take in that character, and, therefore, cannot take in the quality of heirs. In their proper sense those words can no longer be considered as words of limitation or expansion; they must, therefore, be understood as words of purchase, when we are ascertaining in what character the heirs are called to the succession and in deciding on the question whether the ancestor took an estate of inheritance or a bare estate for his life only. It is admitted that if an estate be granted to A. and to the heirs of his body, that A. has a fee simple; not that it is *converted* into a fee simple by the act of 1784—it was not otherwise for a moment. The Legislature declared by that act that all such limitations thereafter made should create a fee simple descendible to the heirs collateral as well as lineal. We cannot, therefore, by construction, turn a life estate into an estate tail, and then give it up to the operation of the act of 1784, and thereby entirely defeat the intention of the devisor; for in such case the collateral heirs would succeed on failure of lineal heirs. Heirs general include the whole inheritable blood. By our law the latter description has lost its character; our law knows of no such body of heirs taking exclusively. But the words have not lost their meaning as a *designatio personarum;* they point to the same persons that they did before the act of 1784. When the person designated comes to

(252) claim, and not before, the question then arises, In what character does he claim in order to ascertain in what quality he should take? If, therefore, an estate for life be given to A., remainder to the heirs of his body, and a collateral heir, a brother, should come to claim, the question in what character he claims would never arise; the previous question would dispose of his claim, that he is not the person designated; he could, therefore, claim in neither character. As well might it be said that the two estates unite where the limitation is to the first son; first, for the word son is not a word of limitation, but of purchase, because it does not include the whole inheritable blood of either species of estates known to the laws of England. So here, heirs of the body are not words of limitation, but of purchase, when we are ascertaining this previous question, for the very same reasons; they do not include the whole inheritable blood on whom any estate of inheritance is descendible.

The rule, therefore, is, when by the words the same persons are called to the succession in the same manner as when called by the law, they claim in the character of heirs, and must take in the quality of heirs; and when not, they take as purchasers.

I am glad that we are relieved from deciding on the meaning of the words heirs of the body or heirs general when applied to personal property. The question in the abstract does not appear to be settled in England. The opinion expressed by *Lord Alvanley* in Ves., Jr., I think is the better one, that they mean heirs *quoad* the property. It is true that many cases may be found where it is said that they mean children, issue, descendants, next of kin, and the like. But this meaning is given to them in reference to the particular case then under consideration, as where the contest is between the eldest son and heir at law and the other children. There it was said they mean children to include the whole, for they are heirs *quoad* the property; also where they were construed children to prevent the operation of the maxim *nemo est hæres viventis,* and the like. There is one case decided by *Sir Thomas Clarke,*
(253) master of the rolls, in which it was adjudged that they meant children, in exclusion of grandchildren; but I do not find that this case is followed; it is not so much as noticed by *Lord Alvanley,* and it appears to me to be a strange decision; but there was a reason given for it, but a very poor one. The estate was devised to the heirs of the body of A. and to the children of B. *Sir Thomas Clarke* took hold of the word children of B. to exclude the grandchildren of A. If necessity required it, I think he ought to have reserved it. But in this case we are relieved from the consideration of the question, for the devise certainly intended the property to be kept together, and to go over together; and there is nothing improper to use a word proper to designate a person in

regard to real property, to point out a purchaser of personal property. It is true that the devisor could not make it descend as real property; but because we cannot effectuate his intent *in toto* is no reason that we shall not do it in part; and by these words we are carried to persons to take by certain designation, for the statute of 1784 has not destroyed the *meaning* of the words heirs of the body; they still designate those lineal descendants on whom an inheritance devolves so far as regards designating a purchaser. But, it was argued, why not take its meaning with respect to personal property as regards both species, as they are to be kept together, and carry both estates to the heir *quoad* the personal estate? The answer is, the words heirs of the body are more appropriate to real estate; it is there technical; in the other it is more uncertain, and we are left in some measure to conjecture. Besides, the real estate is the most worthy, and if both estates are to go together, its word of designation shall be preferred.

I, therefore, think that the mortgagor had nothing in the property when the mortgage was made, and that the other children, not claiming under him, will not be affected by his transfer. The bill must, therefore, be dismissed with costs. (254)

HALL, J. I think the interest intended by the testator for the heirs of the body of John and Parthenia Wyatt is contingent, and does not vest in them until the death of their mother, who survived their father, and that then they take as purchasers.

I think the words *heirs of their bodies lawfully begotten* are a description of the persons intended to take, because the words *equally to be divided between them, to them and their heirs forever,* give them a fee simple, and if they have a fee simple, they do not take it because they are the heirs general of their father and mother, but because the testator by using those latter words has given it to them. If, then, they have a fee simple by those latter words, they take nothing by the words *heirs of their bodies,* etc., as used in a technical sense; the only office of those words must be to ascertain, at Mrs. Wyatt's death, the persons who shall be entitled to take; before the happening of that event it cannot be done, for *nemo est hæres viventis.*

We have been urged to consider the words heirs of the body as issue or children, in order to let the property vest. But I cannot discover in the will any clause that justifies a departure from the words used by the testator; it is not likely that he intended that the children of John and Parthenia should have any control over the property before they got it into their possession. I, therefore, think that the real and personal property in question did not vest in William Wyatt during his life, and of course he conveyed nothing by the deed which he executed to the com-

plainants. But there is another view of this case, taken by my brother *Henderson,* to which I altogether subscribe, which leads to the same result, and that is, that the words *heirs of the body* give an estate in fee by *purchase,* although there is an estate for life to the parent pre-
(255) ceding it; because *heirs of the body* are not *heirs general,* and our law, since estates tail are done away, recognizes none as heirs except such as can inherit collaterally as well as lineally; and that, although where there is an estate for life to the parent, remainder to his heirs, both estates unite in the parent under the operation of *Shelley's case,* yet there can be no such union where the remainder is to heirs of the body; our law knows of no such heirs. Of course, they are words of description, and those that take under them must take as purchasers. In England the case is otherwise, because heirs of the body are recognized as heirs; they can inherit as such.

I also think, for the reasons given by *Judge Henderson,* that the personal estate in this case is to be governed by the same rules of law as the real estate.

Cited: Leathers v. Gray, 96 N. C., 551; *s. c.,* 101 N. C., 167.

Questioned and held doubtful authority: *Chambers v. Payne,* 59 N. C., 279; *Nichols v. Gladden,* 117 N. C., 504.

HENDERSON ET AL. V. STEWART ET AL.

1. The purchase money of land unpaid is a lien on the land where no conveyance has been made of it, unless there is evidence that the land was not looked to, or such lien has been abandoned. When, therefore, A. purchased real estate, and a conveyance was to be made when the purchase money was paid, the vendor has a lien on the land for the purchase money; and A. having afterwards mortgaged the premises to B., and B. having paid the purchase money, he may *tack* the money paid to the sum due on the mortgage; for the payment is for A.'s benefit; it discharges the lien, and enables him to demand the legal title.

2. Under ordinary circumstances the purchaser from a mortgagee stands in his place, and must submit to a redemption on the same terms; for though he may purchase for a large sum, and though he has the legal title, yet he has not equal equity with the mortgagor, for he buys *with notice;* his title being on its face for the security of money, should put him on inquiry; and anything which puts one on inquiry is sufficient notice.

3. There are cases, however, where a different rule prevails, as where the purchaser advances the money and takes a conveyance for the benefit of the mortgagor or his heirs, and not for his own benefit. But, as in this case the defendant took an *absolute conveyance* to himself, and in his answer *denied* complainant's *right to redeem,* he must be viewed as a mere as-

signee of the mortgagee, and must submit to a redemption on the same terms, and is not entitled to the sum which he has actually advanced.

APPEAL from WAKE. The bill stated that one Peter Casso, being seized in fee simple of a lot of ground in the city of Raleigh, by deed dated 23 December, 1800, mortgaged the same to one Moore, a merchant of Petersburg, to secure the payment of $2,814.12; that Casso made large payments to Moore at different periods during his life, and afterwards to his executor; that Moore died in the year ____, after devising the lot aforesaid to his son and heir at law, Archibald Moore, and appointed one Bowden his executor; that Peter Casso afterwards died, in 1811, leaving a wife and several children, among whom was Mary, the wife of Alexander Lucas; that administration on the estate of (257) Casso was granted to John Hodges, as being the highest creditor of Casso, and the personal assets being insufficient to satisfy the demand of Hodges, he proceeded regularly against the real estate of Casso, and at August Term, 1816, of Wake County Court obtained a decree against the heirs of Casso, to be satisfied out of the real estate, descended, for 134*l.* 7*s.* 6*d.*; a *fi. fa.* regularly issued thereon to the sheriff of Wake, who levied on and sold the lot aforesaid to Alexander Lucas for $625, whereby the absolute right of and to the inheritance and equity of redemption in said lot became vested in Lucas.

The bill further stated that Lucas was indebted to the complainants in the sum of $5,000 by bond; and to secure this debt, he conveyed the lot before mentioned, in trust, to satisfy the same; and the trustees, in pursuance of their authority, sold the same, when the complainants became the purchasers, and took a deed in fee simple from the trustees.

The bill further stated that the sheriff of Wake had neglected to make a deed to Lucas at the time of his purchase under the execution of Hodges, and that Alexander Lucas died without ever obtaining any conveyance from the sheriff; that Moore, in his lifetime, and Bowden, his executor, since his death, had received from the rents and profits of said lot large sums, which not only kept down the interest, but nearly extinquished the principal.

That in 1814 the defendant Stewart, pretending to have purchased the interest of Moore for a valuable consideration, and to be assignee of the same, or pretending to be agent for Bowden, the executor, or Archibald Moore, the heir at law, entered upon and hath ever since continued to occupy the premises, receiving therefrom large rents and profits, whereby the whole debt has been extinguished. That the complainants had often applied to the sheriff for a deed, and to Bowden, Archibald Moore, and Stewart, the defendant, in a friendly manner, exhibiting to them their title, and requesting them to come to an account and settle- (258)

ment of what remained due on the mortgage, which requests were denied on divers pretenses; and complainants now offer in their bill to pay whatever may be due on the mortgage, and pray to be permitted to redeem.

The defendant Stewart submitted whether, under the facts disclosed by complainants, they could be permitted to redeem, and stated in his answer that Casso in 1800 became indebted to Moore in the sum before mentioned, and executed the mortgage deed as set forth in the bill; that Moore was under the impression and belief that there were liens on the lot prior to his, particularly one held by Hamilton, the British agent, and he accordingly purchased Hamilton's claim for $1,100; that Moore died as stated in the bill, having devised the lot to Archibald Moore, his son; and that Casso continued in possession of the premises until 1808, when he left the State, his wife and family still remaining in possession; that in 1811 Casso died, and his family continued in the occupation of the lot until 1814, when Archibald Moore came to Raleigh to adjust the claim against Casso; that Mrs. Casso, the widow, applied to the Hon. H. Potter, as her friend, to liquidate the account, and accordingly he and Archibald Moore did settle the account, and ascertained the balance up to June, 1814, to be $4,178, due Moore; that Moore was anxious to close the business, but expressed his desire to consult the convenience of Mrs. Casso; that Mrs. Casso, whose daughter Stewart had married, seemed much distressed, and entreated the defendant to advance the sum found to be due on the mortgage; that her friends joined in her solicitations; but this defendant declared his inability to raise so large a sum, when Archibald Moore, influenced by feelings of kindness towards Mrs. Casso, agreed to release a part of his claim, and consented to receive $3,500, which the defendant Stewart paid him, and Moore then executed a deed to Mrs. Casso and her heirs for the lot; that not long after Mrs.
(259) Casso conveyed the lot to Stewart, but that she remained in possession as the tenant of Stewart until 1817, with the exception of a storehouse which Stewart placed on the lot in 1814, the actual possession of which, by himself or his tenants, Stewart had had for more than seven years; that Lucas, immediately after Mrs. Casso's death, took possession of the dwelling-house, and kept it until he died. Defendant admitted the sale under the execution of Hodges, and the purchase by Lucas, but averred that the purchase was avowedly made, not for the benefit of Lucas only, but of all the heirs of Casso. Defendant admitted the purchase by complainants at the sale under the deed of trust, and affirmed that complainants had then full knowledge of the moneys advanced by this defendant; that the money advanced by this defendant in discharging encumbrances and in necessary repairs on the lot amounted to $9,469.44; that he had received for rents and profits $1,981.31.

Defendant, further answering, said that complainants had applied to him for a settlement; that he gladly assented thereto, and offered to relinquish all claim upon receiving his money advanced, with interest thereon; that T. P. Devereux and J. F. Taylor, esquires, were selected to settle the accounts, and Mr. Taylor, after the settlement, reported the balance due this defendant to be $6,889.19; that the complainants admitted it to be correct, and promised to secure the payment thereof to this defendant by a promissory note; that complainants requested this defendant to make a draft for a deed of conveyance, which he did; but on the day appointed for the execution of the deed and receiving the note, the complainant Henderson informed the defendant that the matter should be settled by a court of equity, declining closing the business, and filed the present bill.

At a former term it was referred to the clerk and master to take (260) an account of the moneys due on the mortgage, of moneys due the defendant Stewart for advances made to relieve the mortgage, and for improvements of a permanent and substantial nature put on the mortgaged premises, and generally of all matters of accounts involved in the cause.

The clerk and master, among other matters, reported that Moore paid to Thomas Hamilton & Co. $1,080.35 on 4 February, 1802, in the purchase of a prior claim with which the lot was encumbered; and he charged the mortgaged premises with this sum and interest, and credited Stewart by the same amount.

Further he reported that the mortgaged premises were bound for the interest on the sum due from Casso to Moore from 23 December, 1803, the time fixed in the mortgage for the payment of the money, though the mortgage deed was executed 23 December, 1800. He reported, also, the value of the improvements made by Stewart at $2,500.

To the report exceptions were filed for that the money paid to Hamilton & Co. should not be taken into account, and could not be tacked; also, for that the improvements put on the mortgaged premises were valued at more than they were worth.

From the testimony in the cause it appeared that Casso had contracted for the purchase of the lot from one Alford, and gave his bond for the purchase money, but received no title from Alford; he afterwards mortgaged the lot to Moore, and Hamilton became assignee of the bond given to Alford.

Badger for complainants.
Gaston, contra.

HENDERSON, J. Without deciding on the right of the mortgagee to tack to the mortgage money other demands of a personal nature which

he may have against the mortgagor, and if he can as against the mortgagor, whether such right is extended against an assignee for
(261) value of the equity of redemption, and whether a purchaser of the equity of redemption at a sheriff's sale is such an assignee, I am very clearly of opinion that the mortgagor Moore has, in this case, the right of tacking the money paid to the Hamiltons; because I think it was an encumbrance and a lien on the land, and which prudence dictated to him to remove to give efficacy to the mortgage.

I give no opinion whether the purchase money after title is made, forms such lien; but I think it clearly does where title is not made, unless it appears that such lien was not relied on or abandoned; as if by the agreement title was to be made at a period before the purchase money became due. In this case it appears from the evidence, that Casso, the mortgagor, had contracted with Alford for the purchase of the lot, which he afterwards mortgaged to Moore; that he gave his bonds for the purchase money, with John G. Blount as security, but did not receive title to the land; that these bonds were transferred by Alford to the Hamiltons. Casso could not compel Alford to make title until these bonds were paid off. Moore, therefore, by paying off these bonds, destroyed this equitable lien and enabled Casso to call for the legal title. It was done for Casso's benefit; it thereby enabled Casso to fulfill his warranty to Moore. This exception must, therefore, be overruled.

I think the clerk erred in not allowing interest from the date of the deed, notwithstanding the deed calls for only the net sum at the end of three years, for the parties treated the contract as a conditional sale, and the rents were to come in lieu of interest; but the parties in 1814, and this Court now, considers it only as a security for money. Moore should, therefore, have interest on his money then due.

Although, under ordinary circumstances, the assignee of the mortgagee should stand in his place, and must submit to a redemption upon the same terms, and though, in general, it be true that it is no defense
(262) for him to say that the payments or other deductions claimed by the mortgagor do not appear upon the papers, because it is enough that it appears that it was redeemable, and it was his own act to purchase, and he might have informed himself, for the assignment only substitutes him to the mortgagee, yet there are cases where the sum really paid by the assignee shall be paid before a redemption shall be allowed, even when the mortgagor has been entirely passive. When he has lent his aid to swell the amount, there is no doubt that such will be the case. Such cases are when the mortgagor is an infant, or perhaps a *feme covert,* and is about to be turned out of possession, or to suffer injury, and one as a friend, and in order to preserve the mortgagor's rights and save him from injury, *bona fide,* advances money; and in this case, but

for the assignee's taking an absolute deed to himself and in his answer denying the right of the heirs to redeem, I think this would have been such a case; the more especially as he paid several hundred dollars less than the respectable gentleman who drew the mortgage deed reported to be due, after having examined the case as the friend of and at the request of the widow; but his taking an absolute deed and denying the right of redemption shows too strongly that he was not acting on the part of or in behalf of the heirs of the mortgagor, but for his own benefit; he must, therefore, stand upon the rights of the mortgagee. I should have mentioned above, in addition to the circumstances there stated, that Casso had left his wife and children without affording them means of redemption, or any other place of residence, and I regret very much that I am compelled to view the assignee as acting for his own benefit and not for that of the heirs; but I am not satisfied how the report of the master differs so much from the gentleman who settled the account in 1814. Justice requires, I think, that we should be informed, if possible, of the items of that settlement; I think the case should be referred to the master to ascertain them. (263)

I think that the master erred in fixing the value of the improvements; the evidence warrants no further than $1,800 at most. If the master went to the grounds that the improvements yield annually such a sum as, according to common calculations, requires an expenditure of $2,500 to be made, he overlooks the ground rent, which belongs to the mortgagor. As to the assignee standing (in ordinary cases) in the place of the mortgagee, I think that the rule is as laid down by *Lord Roslyn* and approved of by *Lord Eldon;* he can claim no greater rights; and that the rule laid down by *Lord Kenyon* is fallacious, for although he has the law on his side by obtaining the legal title from the mortgagee, he had not equal equity; he is not a purchaser without notice, for his title being for the security of money, he is thereby put upon inquiry as to the sum due; and that which puts a person on inquiry is sufficient notice.

There is another and very important point which I wish to have brought before the Court. It is alleged in the answer and supported by proofs; and that is, whether Lucas did not become, upon his purchase, a trustee for the heirs of Casso. I wish that question to be reserved and spoken to.

The other judges concurred in the opinion of *Judge Henderson,* and it was decreed that the lot be sold by the master, reserving the cause for further consideration of the points on which his Honor, *Judge Henderson,* expressed a wish for further examination.

Cited: Pullen v. Mining Co., 71 N. C., 567.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1826.

SELBY v. CLARK.

Proof of the handwriting of a subscribing witness, under a *temporary* absence of the witness without a change of domicile, shall not be received, for it might lead to great abuses; but where a witness leaves the State in the exercise of a public duty (as in the case of a Member of Congress) all presumption of collusion is repelled, and his handwriting may be proved.

TRESPASS on the case, tried before *Ruffin, J.*, at BEAUFORT. On the trial it became material for the plaintiff to give in evidence a bill of sale for a slave, to which Richard Hines, Esq., was the subscribing witness; it had been heretofore proved and registered upon the testimony of the subscribing witness.

Mr. Hines had been elected a representative of the district to which Beaufort County belongs, and at the time of trial was at Washington attending his public duties as a Member of Congress, but was not there with any intention of changing his domicile from this State. (266)

The suit had been pending for several years, but Mr. Hines had never been summoned as a witness in it, nor had any attempt been made by the plaintiff to obtain his deposition.

The plaintiff offered to prove his handwriting, and on such proof claimed to read the bill of sale; but the court refused to allow it, and a verdict was given for the defendant. The plaintiff moved for a new trial because the evidence was not received, and the court (by consent of parties, and in order that the rule of evidence might be settled) overruled the motion and gave judgment for the defendant; whereupon there was an appeal to this Court.

Badger for appellant.
Hogg and Gaston, contra.

TAYLOR, C. J. The general rule which requires the proof of a bond to be made by the subscribing witness has undergone various relaxations, the first of which seems to have occurred in *Coghlan v. William-*
(273) *son,* 1 Doug., 93, which was certainly a strong case, since besides the impossibility of obtaining the attendance of the witness, there was the defendant's admission of the debt. The rule which now appears to be established in England is that the secondary evidence is admissible where the witness is out of the jurisdiction of the court, so as not to be amenable to its process. I do not recollect any practice in this State which authorizes a proof of the handwriting under a temporary absence of the witness, and without a change of domicile, which I think it would be dangerous to establish, on account of the abuses to which it might lead; for a subscribing witness who might alone be cognizant of the corrupt consideration of a bond might be sent over the line to suppress all proof except that of the execution. But where a man leaves the State in the exercise of a public duty, as in this case, as all presumption of collusion is thereby repelled, justice ought not to be delayed or interrupted by his absence. I think, therefore, it may fairly be considered as coming within the reason of other admitted exceptions to the rule, and that there ought, therefore, to be a new trial.

HALL, J. If the defendant could not have dispensed with the testimony of the witness Hines, it would have been incumbent on him to have taken his deposition, because he could not procure his personal attendance. The witness being absent in the discharge of duties imposed upon him by law, so far resembled a witness whose place of residence was without the limits of the State; of course, his deposition might have been taken, if the party had thought proper to do so; but he was not obliged to do so, because it is a rule of evidence in our courts that the handwriting of a documentary witness may be proved, provided he lives without the limits of the State. I, therefore, think that the rule granting a new trial should be made absolute.

HENDERSON, J., concurring, Reversed.

Cited: Edwards v. Sullivan, 30 N. C., 305; *Miller v. Hahn,* 84 N. C., 227.

(274)

THE GOVERNOR, TO THE USE OF HOLCOMB, *v.* FRANKLIN AND OTHERS.

If a constable sue out a warrant, obtain judgment thereon, and receive the amount thereof from the defendant, *without an execution*, and fail to pay over to the plaintiff the amount received, the securities of the constable are liable to the plaintiff, notwithstanding he received the money without having an execution.

DEBT on a constable's bond, brought against the defendants, as securities to one Martin, a constable of Surry, tried before *Daniel, J.*, at SURRY. The condition of the bond was in these words:

"The condition of the above obligation is this, that whereas the above bounden Joseph Martin was duly appointed a constable in Jonesville District in the county of Surry: now, if the said Joseph Martin shall well and truly pay, unto the person or persons properly authorized to receive, all moneys which he may collect by virtue of said office, and shall faithfully execute all process which may come into his hands as such, and true returns make thereon; and, furthermore, shall well, truly, and faithfully, in all and singular, discharge the several duties belonging to his office as such, according to law, during his continuance therein, then the above obligation to be void; otherwise to remain in full force and virtue."

The facts were that Holcomb placed in Martin's hands a note to collect, and took a receipt for it. This note had been made by Joseph Harrison and Daniel Marrion, payable to James Waugh. The constable obtained a judgment against Harrison and Marrion, and execution was stayed; after the stay expired, the constable, having the judgment in his hands, but no execution having issued thereon, received the amount of the judgment from Harrison and Marrion, and failed to pay it over to Holcomb on demand.

The present action was then brought, and on the trial plaintiff offered to prove the admission of the constable, Martin, that he had collected the money; this was objected to, on the ground that by the terms of the condition of the bond the securities thereto were not bound (275) unless the plaintiff showed an execution authorizing the collection of the money. The court overruled the objection and received the evidence, and instructed the jury that if the constable collected the money in his official character, having a judgment for the same, though without execution, then the securities were liable, notwithstanding the condition of the bond did not specify and embrace the express terms of the act of 1818.

Defendants further objected that as the debt appeared to have been originally due to Waugh, and there was no other evidence of Holcomb's having an interest therein than the mere fact of his having taken a

receipt from Martin in his own name, that the suit should have been brought to the use of Waugh; but the court held otherwise, and the plaintiff had a verdict. Defendants moved for a new trial, which was refused, and from the judgment rendered there was an appeal to this Court.

TAYLOR, C. J. No formal condition for a constable's bond is prescribed by the act of 1818, ch. 980, but the general direction is that it shall be conditioned as well for the faithful performance of his duty as constable as for his diligently endeavoring to collect all claims put into his hands for collection and faithfully paying over all sums thereon received, either with or without suit, unto the persons to whom the same be due.

The material words of the condition of this bond are, "that if the said Joseph Martin shall well and truly pay, unto the person or persons properly authorized to receive, all moneys which he may collect by virtue of said office." If a constable is employed to collect money, and he does so without suit, he collects it by virtue of his office, because it is the general understanding that he is to bring suit only in the event of its being necessary, and the general words of this condition embrace moneys collected with or without suit. But here a suit was brought and
(276) judgment recovered, and I think the spirit of the act not only gave him a right to receive it without execution, but bound him to do so, if the debtor had tendered it; for why harass a man with an execution who is prompt to pay without one? The act contains a recognition of the universal practice of the country for constables to be employed as collectors of sums within a justice's jurisdiction, and seems designed to prevent sureties from escaping from their responsibilities because their principal, when he received money he was employed to collect, was unarmed with legal process.

On the other question, Holcomb being in possession of the note, had *prima facie* a right to receive the money, and the constable, receiving it from him for collection, admitted that right, and engaged to pay him the sum when collected. It is a common practice to sell notes without indorsement, and if constables were not bound to pay the money to the persons from whom they received them, it would lead to great abuses.

My opinion is that the judgment ought to be affirmed.

HALL, J. The act of 1818, ch. 980, declares that "the bond given by the constable shall be conditioned as well for the faithful discharge of his duty as constable as for his diligently endeavoring to collect all claims put into his hands for collection and faithfully paying over all sums thereon received, either with or without suit, unto the person to whom

the same shall be due." The bond on which the present suit is brought is conditioned that Martin, the constable, "shall well and truly pay, unto the person or persons properly authorized to receive, all moneys which he shall collect by virtue of said office, etc., and, furthermore, shall well, truly, and faithfully, in all and singular, discharge the several duties belonging to his office as such, according to law."

The act makes it his official duty to collect all sums put into his hands, with or without suit. A judgment had been obtained in this case through his agency; he received the money due upon it. I think (277) he received it in his official character. It was not necessary to apply to the justice for an execution, provided the defendant was willing to pay it without one.

I think the condition of the bond also covers this case, because in that bond the securities have stipulated that he shall pay all moneys which he shall collect by virtue of his office. I also think that suit was properly brought to the use of Holcomb, under the act of 1793, ch. 384, for he was the person injured, and the person authorized on that account by the act to bring suit. I think the rule for a new trial should be discharged.

HENDERSON, J., was of the same opinion.

PER CURIAM. Affirmed.

Cited: S. v. Corpening, 32 N. C., 61.

HUNTER v. KIRK.

The return of a sheriff of the service of a writ is made upon oath, and cannot be contradicted by the defendant's affidavit that the writ was not served. When, however, a defendant against whom a judgment by default had been rendered obtained a *certiorari*, and swore that the writ had never been served, and *that he had a good defense*, the *certiorari* will not be dismissed, but a new trial shall be had.

APPEAL from *Daniel, J.,* at MECKLENBURG, March Term, 1826.

Kirk sued out a writ against Hunter, the plaintiff, returnable to August Term, 1824, of Mecklenburg County Court. The sheriff returned this writ "Executed," and a judgment by default was taken. At the next term thereafter a writ of inquiry was executed, and the jury assessed plaintiff's damages at $81 and costs. An execution was issued thereon, and was returned satisfied.

On 30 March, 1826, Hunter sued out a writ of *certiorari* to Mecklenburg Superior Court, and when the cause came on to be heard before *Daniel, J.*, the affidavit of Hunter was read, stating that the writ (278) never was served on him, and, further, that he believed he had a good defense, but could not avail himself of it before, because he was ignorant that there was any suit pending against him. The affidavit of the sheriff was also read, stating that to the best of his knowledge the writ was served, and that he never had returned any writ as executed by himself which he had not actually served.

Judge Daniel dismissed the *certiorari* and ordered a *procedendo* to the court below, whereupon Hunter appealed.

HALL, J. Although the sheriff does not swear positively to the execution of the process, yet he states that he verily believes he did execute it. Indeed, he is a sworn officer, and his return cannot be contradicted by the defendant's affidavit.

But the defendant states that he believes he has a good defense to make on behalf of his intestate; that he did not make it because he was ignorant that any suit was pending against him. I think the ends of justice would be better answered by granting a new trial than by dismissing the *certiorari*.

PER CURIAM. New trial.

Cited: Lunceford v. McPherson, 48 N. C., 177; *Mason v. Miles,* 63 N. C., 565; *Miller v. Powers,* 117 N. C., 220; *Burlingham v. Canady,* 156 N. C., 179.

(279)

DOE ON DEM. OF BARDEN v. MCKINNE.

1. A levy on *chattels* vests in the sheriff a special property, and he may, therefore, sell after the return day of the writ without a *ven. ex.;* but a levy on *land* gives him neither property nor a right of possession; he has a naked authority to sell only; his sale transfers a right of property to the purchaser, and without the consent of the tenant the sheriff cannot give actual possession.
2. Therefore, a sale by a sheriff of real estate, after the return of a *fi. fa.* and without a new writ, is made without authority, and passes no title.
3. It *seems* that a levy on real estate shown only by an indorsement on the writ, made after the return day, is not valid.

EJECTMENT, tried before *Ruffin, J.*, at WAYNE. Plaintiff claimed title to the lands described in his declaration, as follows: George Bradbury

recovered a judgment in Wayne County Court, at May Term, 1820, against the defendant William McKinne, for $1,096.33, with interest thereon and costs, on which judgment a *fi. fa.* issued, tested of May Term, 1820, returnable to the succeeding August Term; this was delivered to the sheriff on 27 May, 1820; upon which writ (it never having been returned, nor any other execution having been issued on said judgment), the land in dispute was sold to the lessor of the plaintiff for $1, on 31 January, 1822, and the sheriff executed a deed.

George Bradbury died in October, 1820, leaving a will, of which Barden, the lessor of the plaintiff, is executor; the will was proved at November Term, 1820, of Wayne County Court, and Barden then qualified as executor.

The sheriff who sold under Bradbury's execution was called as a witness for plaintiff, and stated that between May and August Terms, 1820, he levied the execution on the land in dispute, and also on McKinne's negroes; that he did not then give any notice of said levy, nor indorse it on the execution until after February, 1821; that in February, 1821, he sold the negroes levied on, which did not fully satisfy the execution; that the lessor of the plaintiff, as the executor of said (280) George Bradbury, soon afterwards (but when the witness could not remember) directed him to sell the land, and that in pursuance of such instructions he advertised the land, and sold it on 31 January, 1822. He further said that between February, 1821, and January, 1822, he had advertised and offered the land for sale, but did not sell for want of bidders.

Upon these facts the court instructed the jury that the sale of the land to the lessor of the plaintiff on 31 January, 1822, upon the *fi. fa.* issued in May, 1820, and after the death of George Bradbury in October, 1820, was without lawful authority in the sheriff, and, therefore, void, notwithstanding any levy thereon made between May and August, 1820.

There was a verdict for the defendants, new trial refused, judgment, and appeal.

Badger for appellant.
Gaston, contra.

TAYLOR, C. J. It is not necessary to the decision of this case to express any opinion as to the levy upon the land; if it were, I should think that the sufficiency of the levy might well be doubted. How or in what manner it was performed by the sheriff, whether by going to the land and making a declaration of it or by a silent and mental volition, does not appear; but it does appear that no notice was given of it, and that the indorsement upon the execution was made after the writ was dead

in law. It would lead to endless abuses if a sheriff could make a levy simply by an indorsement on the execution after its force was spent and the lien arising from the *teste* had ceased to exist or had yielded its priority to other executions of later *teste,* issued perhaps in consequence of its being returned without any indorsement, and there being no *alias* ordered. It would be hazardous to purchasers, and inconvenient (281) in general, if a sheriff were allowed to continue the lien of the *teste* by an *ex post facto* indorsement of a levy, where the law permits it to be continued only by *alias* executions or the revival of the judgment; for if the sheriff, retaining the writ in his own possession, may do so after its force is spent, I can see no reason why he might not be permitted by the court to do it upon an execution returned without a levy and at a period when the writ had no longer any force.

But admitting that the levy was unexceptionable, the sale to the plaintiff was void for want of lawful authority in the sheriff to sell. It was not merely a purchase under an irregular execution, for that would not impeach the plaintiff's title, but a purchase without any execution. The general rule is that all process must be served before the return day; and as to chattels, if the levy be made in due time, the sheriff may complete the same by sale after the return day. But the reason of this is that the seizure of chattels vests a special property in the sheriff, who may take them into his own possession for the purpose of the execution. From the essential difference in the nature of the property, the operation of a *fi. fa.* issued against land must be different. It gives the sheriff no authority to take possession of the land and turn the defendant out. He cannot break open an outer door to execute a *fi. fa.* against chattels; how, then, upon the same writ, can he give possession of a house? A term for years may be sold on a *fi. fa.* or a moiety of land delivered on an *elegit,* yet in neither case can the sheriff give possession. The purchaser and the creditor must obtain possession by ejectment. I apprehend that the sheriff has no right to change the possession of land, nor does he acquire anything by the levy but a right to enter for the purpose of the sale. The seizin, the possession and the right of possession, remain in the defendant until the sale, whose dominion continues unimpaired, except as to the *jus disponendi.* Thus was one effect of the levy; (282) the other was to set apart this land to be converted into money according to the terms of the *fi. fa.* But there must be some lawful authority in existence for this conversion and sale; the sheriff clearly had none, for his had expired more than twelve months before the sale; and any private individuals might as legally have sold the land as the sheriff did in this instance. Though the statute of George II. and our act of 1777 have made lands liable to be sold on a *fi. fa.* equally with chattels, yet there are specific distinctions between the two sorts of prop-

erty, to which even laws must be molded in order to be useful. Land cannot be removed; therefore, the sheriff incurs no risk after the levy, and possesses consequently no right except that to enter for the purpose of a sale. After a sale he can give only the legal, not an actual possession, and every purchaser knows that he must resort to an ejectment unless the defendant is willing to surrender the possession. But with respect to chattels, he cannot even sell them unless they are present and so completely within his control as to enable him to deliver possession to the purchaser.

Though I am aware that the statute of 5 George II., ch. 7, was professedly intended to enable British subjects in England to sell real estates on execution in the colonies, in order to recover debts due to them, yet this then colony was no sooner emancipated than she passed a law for the purpose of rendering land liable to debts upon the deficiency of personal assets. Yet I cannot conceive that the Parliament, much less our own Legislature, intended to give to sheriffs the right to take possession of the land upon the levy, at his discretion; to turn the family out of possession, and to retain it himself until the sale. Nor has this been the construction of the statute in any of the colonies, for the defendant is never disturbed until the sale is consummated, and then only by his own consent, without suit. Judging from the practice, therefore, pursued in this State—for no light can be obtained from the British (283) cases—I should think that the proper mode would be to issue a *venditioni exponas* upon the return of a *fi. fa.* levied upon land, and that in no other way, after a levy, can it be sold by the sheriff. I think the judgment should be

PER CURIAM. Affirmed.

Cited: Tayloe v. Gaskins, 12 N. C., 296; *Tarkington v. Alexander,* 19 N. C., 91; *Love v. Gates,* 24 N. C., 16; *Smith v. Spencer,* 25 N. C., 264; *Samuel v. Zachery,* 26 N. C., 379; *Maynard v. Moore,* 76 N. C., 162; *Clifton v. Owens,* 170 N. C., 611.

HAMILTON v. WRIGHT & PARRISH.

1. A justice of the peace of Granville County rendered a judgment in Franklin. In an action on the judgment this fact may be proved, and the justice is a competent witness.

2. Justices' judgments are not records, and do not prove themselves; they resemble records in one particular, viz., their merits are not examinable in an original suit, and assumpsit will not, therefore, lie on such judgments.

3. It is not proper to permit a special plea to be added after the jury is impaneled.

THIS was an action originally commenced by warrant, and by successive appeals brought into GRANVILLE Superior Court, where it was tried before *Norwood, J.*

On the trial, and after the jury had been charged with the cause, the defendant's attorney moved for leave to add a special plea that the judgment on which the present warrant had been brought was rendered in the county of Franklin by a justice of the county of Granville; but the presiding judge refused the leave asked. The plaintiff then produced and duly proved the original warrant, the judgment thereon against the defendant Wright, the stay of execution by the defendant Parrish, on which the present suit was founded. These all appeared to be perfectly regular; the judgment appeared to have been confessed by the defendant Wright.

The defendant then called as a witness Anderson Paschall, the justice before whom the judgment appeared to have been confessed, and
(284) asked him where the said judgment was confessed; upon which defendant's counsel, being asked to state the purpose and show the relevancy of his inquiry, said that he expected to show by this witness that the judgment was confessed at a place called Plank Chapel, and then by another witness that Plank Chapel was in Franklin County.

Plaintiff's counsel then objected to the question put to Paschall, and the court sustained the objection. There was a verdict for the plaintiff, and a motion by defendant for a new trial, first, for the refusal to permit the special plea to be added, and, second, for the rejection of Paschall's evidence. Motion overruled and judgment rendered, from which the defendant Parrish appealed.

Manly for appellant.
Badger and Hawks contra.

TAYLOR, C. J. This was an action originating by way of warrant, in a paper purporting to be a judgment rendered by a justice of the peace in the county of Granville. On the trial the defendant offered to plead and prove that the judgment was rendered in the county of Franklin by a justice of Granville; the plea and evidence were rejected, and the propriety of this rejection is now argued on the authority of *Bain v. Hunt,* 10 N. C., 572. But in this case no question arose as to the proof of the record, it being assumed and admitted throughout that the judgment of the justice had an authentic existence. The only inquiry was as to the effect of such a judgment when proved; and every observation and argument tending to show its conclusiveness upon the right of the

parties to it would have been irrelevant, upon the supposition that the judgment declared on had no existence in point of fact.

In this case the point in contest is altogether different; it relates solely to the existence of the judgment set up; the defendant does not object to it because it is unjust or founded on a misconception of the merits of the case, for these inquiries can clearly never be made in an original suit founded on the judgment; but because no judg- (285) ment was given. It is impossible to apply the rules of evidence, established in relation to the authentication of records of courts of justice to the proceedings before magistrates. They cannot be decided on by inspection, they have no seals, they keep no copies of their proceedings, and the knowledge of their official existence is necessarily confined to the county of their residence. No provision is made by law for the authentication of their judgment, except in one instance; and, in the absence of such legislative provision, the inquiry must continue to be conducted, as it heretofore has been, by proof of the justice's handwriting either by himself or others, and by proof that the judgment was given by him, then a justice, within the limits of his jurisdiction. All these considerations arise out of the issue to be decided; for if he were not a magistrate in the county where the judgment was rendered, at the time of its rendition, there is consequently no such record, and the issue is maintained on the part of the defendant.

If the inquiry as to the jurisdiction is excluded, the same rule applies to the exclusion of an inquiry into the official character of the individual who holds himself out to the public as a justice of the peace; and the consequence will be that any individual may assume that character, and sign papers which shall have the force of judgments against other persons, simply on the proof of his handwriting, and that many such papers had been signed by him. When so much importance is attached to the judgment of magistrates as to render them unexaminable in another suit, their existence and authenticity ought to be established beyond controversy; and since the extensive civil jurisdiction of magistrates in this State has placed their judgments on an anomalous footing, and beyond the strict application of the rules of evidence pertaining to the regular judgments of courts, their legal existence ought to be ascertained by every reasonable inquiry before they are ultimately enforced.

For these reasons I think the evidence offered ought to have been received, and that there should be a new trial.

HALL, J. It cannot be seriously contended that the judge (286) erred in refusing to suffer a plea to be entered, after the jury were impaneled. To do it or not depended upon his discretion under all the circumstances of the case.

The evidence offered to show that the judgment was confessed without the limits of the county of Granville, I think, ought to have been received. *Bain v. Hunt,* 10 N. C., 572, does not stand in the way; that decided only, and was intended to decide only, the *effect* of a judgment given by a justice of the peace; but by no means to decide either as to the quantum or species of evidence necessary to prove the existence of such judgment; no such question was before the Court. The only question there submitted was whether assumpsit would lie on a judgment rendered by a justice. The Court decided that it would not, and, *quoad* that point and that only, compared it to a record, which precludes all future discussion as to the subject-matter of which it is evidence; but the question as to proof of its existence, as before observed, was not touched. Such judgment is the judgment of a court not of record; therefore, it cannot be established as a record, but is to be established as a public writing, not of record, by parol evidence. Parol evidence may be met by parol evidence. Of course, when the judgment was proved in this case parol evidence might be received to show that the judgment, although proved, was confessed without the limits of the county. For these reasons I think the rule for a new trial should be made absolute.

HENDERSON, J. In saying, in *Bain v. Hunt,* 10 N. C., 572, decided twelve months ago, that an action of assumpsit would not lie on a judgment rendered by a single justice of the peace, nothing more was (287) intended to be said than that such a document contained in itself *an inference of law* that the sum therein adjudged by the justice to be due from the defendant to the plaintiff was in law due, and that upon its being proven to be such a judgment, the debt itself was proven, and that in that respect it differed from such documents, writings, and promises on which an action of assumpsit could be supported, and which of themselves contained only inferences of fact, which must be drawn by a jury, if controverted, before the inference of law that there was a legal obligation could arise. A note not under seal, being only a promise to pay, creates not of itself an obligation to pay. There must be a consideration for the promise to create a legal obligation. This fact must be found by the jury or admitted on the record before the court can draw the inference of law that the promise creates that legal obligation. It is true that the jury may, from the note, make that inference, as it is evidence that the maker has so much money in his hands belonging to the payee, as lent, or had and received, but still it is matter of fact for the jury to infer, and which inference they are well warranted in making from the nature of man; for it is not to be presumed that a person would give that deliberate evidence of a promise to pay without having received

an adequate consideration. In *Stamps v. Graves, ante,* 102, I have expressed my opinion as to what operation the statute of Anne has upon such notes. I shall not here repeat it. As an exemplification of the effect of this doctrine, were the jury, in a special verdict, to find that the defendant had at such time and place made his promissory note to the plaintiff, wherein he had promised to pay him $100, and that he hath not paid the same or any part thereof, and pray the advice of the court as to the legal effect of the note, the court would be bound to render judgment for the defendant, because the jury had not found that the note was given on any consideration. But had they have added
that the note was given for so much money lent, a horse, goods (288) sold, or any other adequate consideration, judgment would be rendered for the plaintiff; but if, instead of a note not under seal, the jury had found that the defendant had made an obligation under seal, and asked the advice of the court, judgment would have been rendered for the plaintiff, because a writing under seal imposes an obligation without a consideration. As an action of assumpsit will not lie on such sealed instrument, as it of itself imposes a legal obligation, so the Court said, in *Hunt v. Bain,* 10 N. C., 572, that as the justice's judgment of itself imposed a like obligation, an action of assumpsit would not lie on it. In the same manner, if a person binds himself by a valid obligation to perform a certain act, as to deliver corn, a horse, or the like, as the specialty itself imposes the duty, an action of assumpsit will not lie on it, but the party must bring an action of covenant. If I am asked the reason why the action of covenant, or an action of debt, is the proper remedy, and not an action of assumpsit, the only answer I can give is that it has pleased our forefathers to prescribe different forms of action for different injuries. It may be shown from the plea in the action of assumpsit that it is not adapted to such an instrument or document as of itself imports an obligation. The general issue is nonassumpsit, which denies the liability to pay without denying the instrument or document from whence that liability arises. If that document of itself imposes an obligation, it is putting in issue the legal inference; it is admitting, and at the same time denying, the liability of the defendant. Thus, if to debt on bond or record *nil debet* is pleaded, it is bad, for, not denying the bond or record, the debt is admitted; it in fact amounts to a demurrer. But such plea is good to an action of debt on a note without seal, for you may admit the making of the note and yet deny the debt, for the debt arises not from the note alone; it must be made on consideration. The decision of *Hunt v. Bain* only establishes this, that a justice's judgment is evidence of a debt itself, and, therefore, an action of assumpsit will not lie on it.

(289) But it does not follow, as was contended in the argument of this case, that justices' judgments are records because an action of assumpsit will not lie upon them, or because, being established, they are conclusive evidence of a debt, or because they are entirely unlike foreign judgments or judgments of inferior courts of England; for a bond is unlike all these; and yet it is not a record, and the expressions used by the Court in delivering the opinion in *Hunt v. Bain* must be understood in reference to the object in view—they relate to that quality which they possess in common with records of concluding the parties from denying their affirmations, and not as to the mode of proving them. It was never thought that they, like records, carried on their face such marks of their own verity that they proved themselves, and did not receive trial by jury, witnesses, or otherwise, but by themselves. It is very easy to define what a record is, but it is not so easy to declare which are courts of record and which are not. Sir Edward Coke's definition is more like pointing out which are the courts of record in England than giving the distinguishing feature of such court. Other definitions are equally unsatisfactory. Were I to attempt one, I fear that it would be still more faulty; but we may with safety say that a justice's court is not a court of record, because the law has not prescribed a mode of authenticating and perpetuating their proceedings, because their procedures have not upon their face those indicia of verity which prove themselves upon a bare *inspeximus*, and that they require the aid of proofs *dehors* themselves; and from their nature and multiplicity, being capable of being made anywhere in the county wherever the justice may be, and being under the private seal and signature of the justice only, it is not to be believed that the Legislature intended that they should be received as genuine and authentic without the aid of proof. But this interferes not with the verity of their affirmations after having been proven. It is said that it must be a record because it was said in *Hunt v. Bain* to be entirely unlike the proceedings of the inferior courts of Eng-
(290) land, and also unlike the judgments of a foreign court; therefore, it must be the judgment of a court of record. Does it follow that the Legislature cannot create a new class of documents, or that of necessity, because it cannot fall into one class, it must fall into the other, where the two classes embraced only all those which were in existence at the time, and not those afterwards formed? It is admitted that if a document was formed it would fall into that class already in existence with which it possessed common properties; but if it possessed common properties with neither, it would then form a class of itself. Such is this justice's judgment: it is unlike the judgment of a court of record, because it wants the power of proving itself; it is unlike the judgment

of the inferior courts in England and foreign judgments, because it differs from them in that its affirmation cannot be controverted, and these differences arise from this, because as to a foreign court, we know nothing of the justice of their laws; we presume they are just, but we do not know; we will permit the adverse party to destroy that presumption by proof, and more especially as to the matter of fact, and even as to law, if they are shown to be unjust; we will not enforce an unjust judgment of a foreign court, but will lean much in favor of their justice, and call in even the aid of their policy to show them to be just. As to the judgments of the inferior courts of England, they are mostly local, governed by particular laws, frequently held by private individuals, and do not proceed according to the course of the common law, and, therefore, their decisions are not reviewed by means of writs of error, the proceedings in which are according to the laws of the land, and they alone form the rule of decision; there is no graduation from them up to the Superior Court. It is true, they are superseded occasionally by the King's Bench, by means of certain discretionary writs which issue, as it were, on the supplication and not on the application of the party. To make their decisions more than *prima facie* evidence would operate an injury on the suitors, because they could not have them examined in the (291) regular way or as a matter of right. As to the courts held by our justices, they are entirely different; they are governed by the general laws of the land, and there is a regular graduation to the court of supreme jurisdiction by way of appeal, which of itself must make their judgments conclusive.

I have taken up much time to explain *Hunt v. Bain,* and to show that this case is unaffected by it, because that case has been much misunderstood, and, if not corrected, might lead to consequences never contemplated by the Court. The justice's judgment not proving itself, must, therefore, be supported by proofs, and, therefore, may be shown to be different from what, upon the face, it purports to be; it may be shown to be a perfect nullity. The jurisdiction of justices of the peace being confined to the counties for which they are appointed, the Granville justice had no jurisdiction in Franklin. His acts within the latter county were those of a private individual. Proof, therefore, that the transaction took place in Franklin, before a person who had no jurisdiction to act as a justice of the peace in that county, destroys its apparent official character, and reduces it to a mere statement or certificate of a private individual, and such proof should have been received. The other objection, that the justice should not be heard to impeach it, cannot prevail. The rule is that a party shall not allege his own turpitude or departure from correctness as a protection; but there is no such rule in our law.

Infamy and interest are the only grounds of excluding a witness who has sufficient understanding to know and feel the obligations of an oath.

There must be a new trial.

PER CURIAM. New trial.

Cited: *Hamilton v. Parrish,* 12 N. C., 415; *Carroll v. McGee,* 25 N. C., 15; *Cobb v. Kornegay,* 28 N. C., 360; *S. v. Mangum, ib.,* 377; *Reeves v. Davis,* 80 N. C., 210.

(292)

PASCHALL v. WILLIAMS.

The charge of a judge should be judged of by its general scope and spirit. Hypercritical niceties are to be disregarded. When, therefore, in an action for an assault, the jury was told to imagine themselves placed in a situation similar to that of the plaintiff, and to give to the plaintiff such sum as they would be willing to take as a compensation for the injury, the language is not to be understood *literally.* It is to be considered as admonitory to the jury to regard not merely the wrong sustained by the plaintiff, but the provocation he had given, the effect produced on him, the ability of defendant to make compensation, and to estimate the damages from a view of all the circumstances.

TRESPASS for an assault and battery, tried below, before *Paxton, J.,* at WARREN. Upon the trial the only question was as to the amount of damages, it being admitted that plaintiff was entitled to recover. Upon this question the counsel addressed the jury; and the judge, in his charge, informed the jury that the amount of damages was for their consideration entirely, and in making up their opinion on the subject it would be right for them to take into view all the circumstances of the case and allow the plaintiff such damages as would compensate him for the injury he had sustained.

The jury was told to imagine themselves placed in a similar situation with the plaintiff; what sum would they think sufficient to compensate them for such an injury; that in viewing the subject in this light, by giving to the plaintiff what they would be willing to take, the justice of the case might be reached.

The jury found a verdict for the plaintiff; damages, $1,000 and costs. A new trial was moved for and refused, and defendant appealed.

Gaston for appellant.
Badger for appellee.

TAYLOR, C. J. A very minute scrutiny of this charge might (293) possibly detect something in it which we do not feel to be quite right, while we should be utterly at a loss to prove it to be wrong, from the absence of any standard whereby to measure judicial advice upon subjects not provided for by law.

Its literal meaning would perhaps convey an impression of what was impracticable in itself, what the judge did not intend, and what the audience did not understand. Collectively, the jury could not place themselves in the plaintiff's situation, unless their temper, fortune, feelings, and standing in society resemble his; and the attempt to do it individually would be an insuperable bar to an unanimous verdict. Such a rule of construction cannot be applied to these compositions with any useful or practical effect. They should be judged of according to their general scope and spirit, and if the whole mass is calculated to reflect a just light upon the path of the jury, the little shadow from the angles and corners may be well overlooked. Criticism should pronounce upon them in the liberal spirit of her philosophy, and not with the austerity of her logic. I think it probable that the jury understood it as admonitory to them to regard not merely the wrong sustained by the plaintiff, but the provocation he had given, the effect produced on him, and the ability of the defendant to make compensation, and to estimate the damages from a view of all the circumstances. It should certainly be understood as the jury probably did understand it, under the recent impression of the evidence and arguments, and I cannot think its tendency was to lead them from the proper inquiry. In this belief, I think the verdict ought to remain.

And of this opinion were the other judges.

PER CURIAM. No error.

Cited: S. v. Langford, 44 N. C., 444.

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(294)

PERSON v. THE PRESIDENT AND DIRECTORS OF THE STATE BANK OF NORTH CAROLINA.

Where a plaintiff sued out twenty-one warrants on twenty-one notes, amounting in all to $104 in cases where the causes of action were the same, and the defense was the same in all, the court compelled plaintiff to consolidate.

APPEAL from WAKE. Person warranted the State Bank in twenty-one different cases, on their notes, the whole amount of notes being some-

what more than $100, and having obtained judgments, the bank appealed to the county court of Wake. In the county court defendant moved to consolidate the several suits, and the court ordered them to be consolidated, on condition that the defendant would not plead in abatement the want of jurisdiction in the justice who tried the warrants, and that they would pay the fees of the clerk and constable. Defendant acceded to the terms, and pleaded the general issue, payment and set-off, and the cause was put to a jury, who found a verdict for the plaintiff and assessed his damages to $127.34 and costs, according to which finding the court gave judgment, from which defendant appealed to the Superior Court. The plaintiff also appealed from the judgment of the court as to the consolidation. Afterwards, in the Superior Court, *Paxton, J.*, presiding, it was ordered that the appeal of the plaintiff from the order of consolidation should be dismissed with costs, and the cause stand as one suit, brought upon appeal by the defendant; whereupon Person appealed to this Court.

In this Court, by consent of parties, the records of all the cases in the Superior Court (twenty-one in number) were considered as being before the court, from which it appeared that in each case the justice gave judgment for 50 cents more than the note amounted to, besides interest; and, further, that ten of the notes were protested and eleven were not.

Haywood for the Bank.

(297) HALL, J. The power which the courts exercise in consolidating actions has for its object the attainment of justice with the least expense and vexation to the parties; but as to the exercise of this power the decisions have not been uniform.

In *Smith v. Crabb*, 2 Str., 1149, and *Mynot v. Bridger, ibid.*, 1178, the Court refused to consolidate because, being distinct actions, the plaintiff might be ready for trial in one action, but unprepared in the other. But in *Cecil v. Briggs*, 2 Term, 639, the Court held that not to be a good reason against consolidating two actions, both being brought in assumpsit, the causes of action arising in the same county, the writs having been sued out on the same day, and the defendant having been held to bail in both actions; because, they said, if the defendant was not ready in both actions, but only ready in one, he might continue both. The reasoning on which this case stands is not satisfactory to the Court, in *Thompson v. Sheppard*, 9 Johnson, 262. There three actions were brought by the indorser against the maker on three promissory notes. The notes
(298) were dated on different days, for different sums, and payable at different times to the same person, who indorsed them to the plaintiff. The writs were issued at the same time and served at the same

time. On motion for that purpose, the court refused to consolidate the actions, because they said different defenses might be set up.

In the present case the different suits commenced by way of warrant. The defendants appealed to this Court. If they appealed without just cause, they ought not to be favored. The justice gave judgment in each case for 50 cents more (besides interest) than the notes amounted to, amounting in all to $10.50. Ten of the notes were protested, eleven were not protested. In this situation of things the defendants might have supposed themselves aggrieved. I, therefore, lay that circumstance, the appeal, out of the way. Where suits were commenced by way of warrant, two warrants would have answered the plaintiff's purpose to recover $104 as well as twenty-one, and, indeed, would have been less trouble to him as well as expense to the defendants. When the warrants were consolidated in the county court, I can see no injury the plaintiff was likely to sustain by it; it was altogether improbable there should be different defenses; the causes of action were the same. I cannot, therefore, find fault with the discretion which the court have exercised. Much expense or cost is saved by it. Although the authorities before recited differ in some respects, they all agree in this, that the court possesses the power of consolidating suits when a proper occasion offers. I think the judgment of the Superior Court should be affirmed.

The CHIEF JUSTICE and Judge HENDERSON concurring,

PER CURIAM. Affirmed.

Cited: Caldwell v. Beatty, 69 N. C., 371.

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(299)

RAWLS, INFANTS, BY THEIR GUARDIAN, FOSTER, v. DEANS AND OTHERS.

1. A record cannot be *prima facie* evidence. Where admissible at all, the fact which it affirms cannot be contradicted; where it affirms a fact *inter partes*, such affirmation is conclusive upon parties and privies; where it affirms a fact in a case where no one was a party, it is evidence of that fact as to all persons alike.

2. Where a suit was brought against three justices of the peace by an infant, for having appointed a guardian for him without taking any bond, the record of the county court was offered in evidence by plaintiff, showing that on a certain day of a certain term the court was opened, the defendants being on the bench as justices at the opening of the court, and various orders were entered on the record, among the rest, the appointment of the guardian to plaintiff. This record was offered as evidence that the defendants were the justices who made the appointment: *Held,*

that it is not *prima facie* evidence of the fact; because a record, if evidence at all, is conclusive. It was evidence from which no inference of law is drawn, but it should have been left to the jury to draw from it the inference of fact that the defendants did make the appointment, if it would furnish them with any such inference.

CASE brought in HERTFORD against the defendants to recover damages for a violation of their duty as magistrates, and tried before *Nash, J.*

The plaintiffs were orphans and infants, and alleged that the defendants, acting as a court at November Term, 1819, of Hertford County Court, appointed one George Gordon to take care of and attend to the management of the estate of the plaintiffs, without taking from Gordon bond and security as required by law; that Gordon, by virtue of such appointment, took into his hands the whole of the estate of the plaintiffs and converted a large portion of it to his own use, and since that time has died insolvent.

To support the allegation that the defendants were on the bench and constituted the court which appointed Gordon, the plaintiffs offered in evidence the records of Hertford County Court, from which it
(300) appeared that on Thursday morning of the term the court met pursuant to adjournment, and the defendants were stated to be present as justices at the opening of the court, and among other orders of that day, the third entered on the record was the order that Gordon should rent out the lands of the plaintiffs, and take bond with security to their use, payable to the chairman of the court, and file them with the chairman, and attend to the management of the estate of the plaintiffs until a guardian was appointed.

The introduction of this record was opposed by defendants, on the ground that the order as entered did not recite the names of the defendants as the justices who made it. The court, *Nash, J.*, presiding, overruled the objection, and instructed the jury that the record was *prima facie* evidence that the defendants were the justices who made the order.

There was a verdict for the plaintiffs; a new trial was refused and judgment rendered, when defendants appealed.

(303) *Hogg for appellants.*
Gaston, contra.

The judges severally delivered their opinions as follows:

TAYLOR, C. J. Neither a just construction of the acts of Assembly on this subject, the well known course of business, nor the reason of the thing warrants, in my apprehension, the reception of this record for any other purpose than to show that the court was opened by the three jus-

tices named, and that the various orders were made by a *court* legally constituted. In receiving it as conclusive for these purposes, the rule of law is satisfied and the interests of justice are maintained; in receiving it as *prima facie* evidence even that particular persons were on the bench at the precise moment when the order in question was made may, in most cases, burthen innocent persons with a heavy charge; for this *prima facie* evidence becomes conclusive unless it is answered and repelled by the defendants. The difficulty of proving who they were, in the crowded and confused state of a courthouse when the order was made, would generally be insuperable; and it is unjust that persons who are rendering disinterested services to their country should pay large sums of money for others or escape from the penalty *only* by proving an *alibi*.

The act of 1762, ch. 69, seems to have intended that the individual justices should be ascertained by some proof more specific; for when it confers the power of appointment it speaks of the *court;* where it imposes a penalty for the improper exercise of the power, it (304) refers to the *individuals* composing it at the precise point of time; thus endeavoring to guard against the very evil which the introduction of this record as evidence would produce. It is not the court, but the *justice or justices appointing* such guardian, who shall be liable for all loss and damage. We must believe that the court made all these orders, because the record says so; but we cannot believe that the defendants were the individuals composing it, unless there were none others competent to form a court. It is impossible to shut our eyes to the fact that though the court may be in session throughout the day, the individuals composing it are continually changing, and of these changes no memorial is made by the clerk. Sometimes three justices are collected for the purpose of opening the court. When they have done this, they often yield their places to others, whose stay there may also be brief, and the physical identity of the court changes with every passing hour.

——— ——— *ut unda impellitur unda,*
Tempora sic fugiunt pariter, pariterque sequentur.

An act passed in 1790, ch. 327, relative to the appointment of several public officers, serves to show the light in which the individual responsibility is regarded by the Legislature and the spirit in which these laws are conceived. The clerk is directed to make an entry at large, under a heavy penalty, of the names of the justices who shall be in court, or on the bench, at the time of the qualification of those officers, which would have been an useless provision if the record of the opening of the court had been evidence of the fact; and when that law was passed, a majority of the justices, or a certain number beyond three, was not necessary to the appointment of those officers.

My opinion is that the record was improperly received for any other purpose connected with the case than to show that these justices were present on that day when the court was opened, and that their averment that they were not present when the guardian was appointed is not in conflict with the record, which is not, therefore, an estoppel. I (305) am in favor of granting a new trial.

HALL, J. The act of 1762, New Rev., ch. 69, sec. 5, declares that if any court shall commit an orphan's estate to the charge of any person without taking sufficient security, the justices appointing such guardian shall be liable for loss and damages, etc., to be recovered by action at the common law. The act does not point out any mode by which the fact shall be established. I believe it is not usual with clerks, when entering such orders of appointment, to recite the names of the justices by whom they are ordered to be made, as is directed to be done by the act of 1790, ch. 327, when sheriffs and other officers are elected. It would certainly be the most eligible way of ascertaining the fact. But when that is omitted to be done, the parties are at liberty to prove the same fact by parol evidence, because, I think, such proof by no means contradicts the record.

I have no doubt but it was proper to read the record on the trial, the introduction of which as evidence is complained of. It proves that a court was open and held, etc., but what further effect it ought to have, or what further fact it should be taken to establish, is a question of great importance.

The law establishing county courts declares that the same may be held by three justices. In most of the counties there are from twenty to fifty justices, and it is as much the duty of one as another, but not more so, to hold the courts; hence it is not to be expected that the courts will be held by any particular justices. Sometimes one portion of them are on the bench at one time, and others at another, and this on the same day, and no doubt it was for this reason that the Legislature directed the clerks to record the names of the justices on the bench when particular officers were elected, as before noticed. This being the practice of the (306) justices in holding the county courts, I think the record in question should not be taken as evidence of the fact that the defendants were the justices who appointed Gordon guardian, etc. The fact may have been so, but it may have been otherwise; and in fixing a charge upon individuals so penal as this, more certainty ought to be required, when the case will admit of it; otherwise, innocent persons may suffer.

It is a hardship on infants that their interests should be neglected and their property lost by acts of omission by justices; and it is for that reason that the Legislature have made them personally responsible; and, no

doubt, the will of the Legislature will be obeyed when evidence is sufficient to point out the proper persons and is made to bear upon them. As I think that has not been done in the present case, independent of the record, and as I think the record is not sufficient for that purpose, I am of opinion that the rule for a new trial should be made absolute.

HENDERSON, J. A record cannot be *prima facie* evidence, by which I understand that evidence which, until contradicted, proves the fact, but which may yet be contradicted. Wherever a record is admissible, the fact which it affirms cannot be contradicted. Where it affirms a fact *inter partes,* and which of course they had the right to controvert, and which they did controvert or admit, then its affirmations are conclusive upon the parties and their privies. Where it affirms a fact where no one was a party, and, of course, no one had the right to controvert it, and no one, of course, did controvert it, then it is evidence of that fact, as well as to one person as another; that there are no parties or privies; it is not made upon the litigation or admissions of any one; and proceedings *in rem* are evidence against the whole world for the opposite reason, for, being parties, they either have or might have controverted. The record offered in this case is of that kind where no person was a (307) party; it was not made upon the litigation or admission of any person; its affirmations are, therefore, conclusive upon all—upon one as well as another. It is, therefore, necessary to ascertain what are its affirmations. It affirms that on the ____ Monday in November a court of pleas and quarter sessions was held at Winton, for the county of Hertford, and was opened by justices who are stated to have opened the court; it is also evidence that the various suits were tried or continued, and all the orders made, which appear upon the rolls or records of the court, and that the court adjourned from day to day; and that on Thursday the court met pursuant to adjournment, and at the meeting of the court the defendants were present, presiding as justices in the court; that the court on that day tried and continued the different suits mentioned in the proceedings, and made the different orders appearing upon the minutes, and among others the order committing the estate of the plaintiffs to the management of Gordon; all these facts stand upon the rolls, and no one can controvert them; that is, that these things were done. But what is to be inferred from these facts is a very different thing from making the record *prima facie* evidence, and from determining, if an inference is to be drawn, whether the law will draw it or whether it is to be left to the jury to draw. If it is *prima facie* evidence, then the fact stands proven that the defendants were on the bench when the order complained of was made. Until they show the contrary, it throws the burthen of proof upon the defendants; whereas, if it is only

an inference of fact, it is left to the jury to say whether it is proven to their satisfaction that because the defendants were present when the court opened (which fact cannot be controverted by any one as long as it stands upon the record) that they were also present when the order was made—a thing very different from making it *prima facie* evidence.

If this is matter of inference, all the doctrine of probabilities (308) is to be gone into by the jury, and they will determine according to the evidence of the common practice whether it is probable that they all were there, and if not all, who were; for in civil causes we are obliged to go upon probabilities to settle the right of the parties, and I am disposed to think that it is a presumption of fact, not of law; for it is not generally true that the ends of justice would be more often answered by drawing the conclusion as one of law that they were there than by leaving each case to be decided by the jury; for if made a presumption of law, the defendants would not be permitted to prove that they were not there. I think, therefore, the judge erred in telling the jury that the record was *prima facie* evidence of the fact that the defendants were on the bench when the order was made, and thereby threw on the defendants the necessity of offering opposing evidence; but, in the absence of all other evidence as to the point, he should have informed the jury that the record only affirmed that the defendants were present when the court was opened; that whether they would infer therefrom that they were also present when the order was made was a fact on which they would decide; that the law did not draw the inference one way or the other, and which indeed would be more emphatically expressed by the phrase, leaving it to them. The effect of the clerk's having stated on the record that they were present, if he had made such entry, not being required by law to do so, it is unnecessary to examine, for in fact he has not made such statement.

PER CURIAM. New trial.

Cited: S. v. King, 27 N. C., 207; *Link v. Brooks,* 61 N. C., 500.

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(309)

BRASFIELD v. WHITAKER.

The lien created by an execution is continued by an *alias* regularly issuing thereon; and if execution, at the instance of another plaintiff, issue after the lien of the first commenced, and before execution is fully done under it the *alias* come to the sheriff's hands, it shall have the preference.

BRASFIELD *v.* WHITAKER.

APPEAL from *Paxton, J.*, at WAKE.

This was a case agreed, as follows: The plaintiff, David Brasfield, at the November Sessions, 1820, of Wake County Court, obtained a judgment against one Mark Cooke, for $390.34, with interest, etc., and costs. Upon this judgment the plaintiff sued out a writ of *fi. fa.*, returnable to February Term of Wake County Court, 1821, directed to the sheriff of Wake, which in due time came to the hands of the defendant, then sheriff of the said county, and which was returned by him indorsed, "Nothing to be found."

Plaintiff then sued out an *alias fi. fa.*, returnable to the May Sessions of the same year, which came to the defendant's hands on 6 March, 1821, and was returned, "Nothing to be found."

At February Sessions, 1821, of Wake County Court Hutchins G. Burton recovered a judgment against Mark Cooke for $2,512.99, on which a *fi. fa.* issued, returnable to May Sessions, 1821, which came to the defendant's hands on 1 March, 1821. On the same day the defendant levied on a lot and improvements in Raleigh, belonging to Mark Cooke, and afterwards, on 27 April, in the same year, sold the same as sheriff for $1,100, and applied the purchase money to Burton's execution.

The case as above stated was submitted to *Paxton, J.*, who gave judgment for the plaintiff for the whole amount of his debt, interest, and costs. Whereupon defendant appealed.

Badger and Hawks for appellant. (310)
Haywood for appellee.

HALL, J. Brasfield's execution was a lien on Cooke's property, and that lien was continued by the *alias* execution which issued regularly after it.

Burton's execution issued after this lien commenced, and execution was not done fully under it before Brasfield's *alias* execution came to the hands of the sheriff.

Brasfield's execution had the preference and should have been first satisfied.

PER CURIAM. Affirmed.

Cited: Smith v. Spencer, 25 N. C., 260; *Harding v. Spivey*, 30 N. C., 65; *Dobson v. Prather*, 41 N. C., 34; *Watt v. Johnson*, 49 N. C., 193.

DOE ON DEM. GILLIAM v. JACOCKS.

1. These words are found in a deed of *bargain and sale*, viz.: "Furthermore, I, the said M. H., for myself, my heirs, executors, and administrators, do covenant and engage the above demised premises to him, the said J. H., his heirs and assigns, against the lawful claims or demands of any person or persons whatsoever, forever hereafter to warrant, secure, and defend." *It seems* that this is a *personal* covenant, and not a warranty.

2. M. H., the grantor in the deed, was tenant in tail, and supposing the clause above cited to be a warranty, still no discontinuance of the estate tail is worked by reason of such warranty occurring in a deed of bargain and sale; nor is the heir in tail put to her *formedon*. *Quere*, Can the writ of formedon be now brought?

3. The first heir in tail after the death of M. H., the grantor in the foregoing deed, when the right devolved on him was an infant, and died before the disability was removed, leaving an infant heir, who became covert before full age, and brought her action within three years after discoverture. She is not barred by the statute of limitations; she comes within the saving of the act.

SPECIAL VERDICT at BERTIE, by *Nash, J.*, as follows: The jury find that the lands demised to the plaintiff were granted to John Hardy in 1717, and were by his will in writing, duly executed to pass lands, dated 1719, devised to his daughter Elizabeth Hardy, in the words following, "Also I give unto my daughter Elizabeth another tract of land, lying on the east side of Rogues Pocoson, containing 424 acres, excepting (311) the 100 acres given to my brother Thomas." And after giving other lands, he devises as follows: "All which said lands I give unto my said daughter Elizabeth and her heirs lawfully begotten of her body." The jury further find that after the death of John Hardy the said Elizabeth Hardy intermarried with one Nathaniel Hill, and that there was only one child of that marriage, who was born 20 October, 1726, and was called Michael. The jury find that Michael Hill, by his deed bearing date 5 May, 1748, and duly proved and registered, conveyed to John Hill the premises in the words and figures following, that is to say:

NORTH CAROLINA.

To all people to whom these presents shall come, greeting: Know ye that I, Michael Hill, of Bertie County, in the Province aforesaid, for and in consideration of 60 pounds, current money of Virginia, to me in hand paid by John Hill, of the Province and county aforesaid, the receipt whereof I do hereby acknowledge, and myself therewith fully satisfied and contented, thereof and of every part and parcel thereof do exonerate, acquit, and discharge the said John Hill, his heirs, executors,

and administrators forever, by these presents have given, granted, bargained, aliened, conveyed, and confirmed, and by these presents do freely, fully, and absolutely give, grant, bargain, sell, alien, convey, and confirm unto him, the said John Hill, his heirs and assigns forever, one messuage or tract of land situate, lying, and being in the Province and county aforesaid, containing, by estimation, 424 acres, lying on the east side of Rogers Pocoson, and beginning at a poplar on the side of the pocoson, then north 60 east, 320 poles to a pine, then south 74 east, 216 poles to a pine in John Hardy's line of Brewer's Quarter, then along his line 100 poles to a red oak, his corner tree, then south 50 west, 160 poles to Rogues Pocoson, then the said course 60 poles to a chestnut, then through the pocoson, north 66 degrees west to the first station: to have and to hold the said granted and bargained premises, with all appurtenances thereto belonging or in any way appertaining, to him, the said John Hill, his heirs and assigns, to his and their only proper use, benefit and behoof forever. And I, the said Michael Hill, for me, my heirs, executors, and administrators, do covenant, promise, and grant to and with the said John Hill, his heirs and assigns, that before the ensealing hereof I am the true and sole owner of the above bargained premises, and am lawfully seized and possessed thereof in my own proper right, and of a good, perfect, and absolute estate of inheritance in fee simple; and have in myself a good right, full power, and lawful (312) authority to grant, bargain, sell, convey, and confirm the said bargained premises, in manner as above said, and that the said John, his heirs and assigns, shall and may, from time to time, and at all times hereafter, by force and virtue of these presents, lawfully, peaceably and quietly have, hold, use, occupy, possess, and enjoy the said demised and bargained premises with the appurtenances, free and clear and freely and clearly acquitted, exonerated, and discharged of and from all manner of former and other gifts, grants, bargains, sales, leases and mortgages, wills, entails, jointures, dowries, judgments, executions, encumbrances, and extents. Furthermore, I, the said Michael Hill, for myself, my heirs, executors, and administrators, do covenant and engage the above demised premises to him, the said John Hill, his heirs and assigns, against the lawful claims or demands of any person or persons whatsoever, forever hereafter to warrant, secure and defend. In witness whereof I have set my hand and seal, 5 May, 1748.

MICHAEL HILL. [SEAL]

The jury further find that John Hill, the grantee in the above deed, entered into and was peaceably possessed by actual occupancy of the premises therein bargained and sold, immediately on the execution of the deed, and continued so possessed until he departed this life about 1770

John Hill died intestate, and left Henry Hill, his son and heir at law, who upon the death of his father entered into the possession of the premises which descended to him, and continued his possession by actual occupancy until 3 May, 1791, when he by deed of bargain and sale of that date, duly proved and registered, in consideration of £679 10*s.* to him in hand paid by Moses Gilliam, conveyed the premises to said Moses and his heirs, by the description set forth in the above deed of Michael Hill; and the said Moses, in and by virtue of said deed, and by virtue of the statute transferring the possession to the use, was seized of the premises in fee, and entered into possession and continued in actual occupancy thereof until ____ May, A. D. 1819, when he was turned out of possession by a writ of *habere facias possessionem,* to the sheriff of Bertie directed, which issued in a suit in ejectment, wherein there was judgment in the Supreme Court of North Carolina that one John Doe
(313) should recover damages for a trespass of the said Moses in ousting the said John from a term of years, which he held on the demise of Elizabeth Jacocks, from 1 January, 1813, to the full end and term of seven years thence next ensuing. And the jury further find that the said Elizabeth, by the sheriff aforesaid, was placed in the possession of said premises, and continued in the quiet and peaceable occupancy thereof until 1 January, 1820, when she departed therefrom, and John Doe, in and by the demises set forth in the declaration in ejectment in this suit, entered and was possessed of his term as therein set forth until 10 January, 1822, when the said Elizabeth entered in and upon the said John and ejected him from his term aforesaid. The jury further find that Michael Hill and Elizabeth Hill had one son, Hardy, who was born 21 February, 1756, and died 5 September, 1777, intestate, aged 21 years, 6 months, and 14 days, leaving his daughter Elizabeth, his only child and heir at law. The jury find that she was born 18 February, 1776, and was married to Jonathan Jacocks 17 March, 1791. The jury find that she came of lawful age on 18 February, 1797, and that Jonathan Jacocks departed this life 2 December, 1810, and that she brought her action of ejectment in Bertie Superior Court, on ____ April, 1818, against Moses Gilliam, on which there was a judgment in her favor, and an appeal to the Supreme Court, in which the judgment was affirmed (*Jacocks v. Gilliam,* 7 N. C., 47) at May Term, 1819, and she was placed in possession as before mentioned.

Nash, J., who presided, on this special verdict considered that the law was for the defendant, and gave judgment accordingly, from which plaintiff appealed.

It was in this Court admitted that Michael Hill died 1760, and it was agreed the fact should be part of the case.

Hogg for plaintiff.

TAYLOR, C. J. Having formerly given an opinion in this case (331) (*Jacocks v. Gilliam,* 7 N. C., 47), which I do not, on reflection, see sufficient reason to change, I can only refer to it. I still think that the deed contains nothing more than personal covenants, and no one of them could have the effect of rebutting the plaintiffs. On the point of successive disabilities, I concur entirely with my brother *Henderson.* I am, therefore, relieved from the necessity of giving an opinion on the question whether a bargain and sale can, under any circumstances, operate a discontinuance. Following in the course of instruction transmitted to us by those men who have written on the subject, I should think that if a warranty is annexed to a bargain and sale, covenant to stand seized, or release, it may produce a discontinuance. Yet, as I have heard no argument on the subject, I am not prepared to say what alteration may have been effected by our particular system. In this case I am of opinion the judgment should be affirmed.

HENDERSON, J. In this case it is not pretended that the right of the defendant is bound. The objections go to the remedy only.

It is objected, first, that the deed of bargain and sale from Michael Hill, the tenant in tail to John Hill, of 1746, created a discontinuance of the estate tail on account of the warranty attached to it, and that thereby the heir in tail is put to her formedon to recover her estate tail, and cannot regain possession thereof by entry or action of ejectment.

It is objected, secondly, that the defendant is barred by the statute of limitations.

A bargain and sale is a rightful conveyance; the statute transfers the seizin of the bargainor to the bargainee; such a seizin, such an estate as the bargainor had, is transferred to the bargainee. I (332) speak not as to parties, but as to strangers—that is, those not claiming under either of them. A foeffment is called a wrongful conveyance, because it passes, even as to the whole world, what it professes to pass. It is true, if the feoffor had not the rightful estate, the estate which he passed may be put an end to by him who has the rightful one; but it continues till it is put an end to. If tenant in tail, therefore, bargain and sell the entailed lands in fee, it is not a discontinuance of the estate tail, for that is a *separation* of the *right* from the *estate;* for the issue in tail claims not from the tenant in tail, but *per formam doni;* he is, therefore, a stranger to the bargainor, and, as to him, the bargain and sale passes only an estate for the life of the bargainor. His estate *remains* still in him; he is not put to an action to *recover* it, for he has not *lost* it. He may *enter,* which is the touchstone by which is ascer-

tained whether an estate is lost or not; for if the tenant is disseized, and has not, by a descent or otherwise, lost his right of entry, he may compel the lord to avow upon him and in all respects recognize him as his tenant, as one having an estate; nor can he, so long as his right of entry remains, at his election throw off his estate. The lord may avow upon him as his tenant, and compel him to perform his services. And his right of entry will support a contingent remainder dependent on his estate as the precedent freehold, and as the issue in tail after the death of the bargainor may enter (which is not disputed by any one), it proves beyond a doubt that the estate tail is in him, and not in the bargainee—that is, that the bargainee has no estate of any kind, for there cannot be two persons on the same estate at the same time, holding adversely; there may be titles innumerable, but more than one estate at the same time there cannot be; and if it is in the issue in tail, it is not in the bargainee. There is, then, no separation of the right from the estate; they both are united in the issue; there is no discontinuance. These (333) principles are not controverted by a single writer that I know of.

But a feoffment made by a tenant in tail is a discontinuance; for a feoffment passes not only what the feoffor can rightfully pass, but what it professes to pass. The estate is, therefore, in the feoffee; and if in him it is not in the issue in tail, who has nothing but a right to the estate tail. There is a separation of the right from the estate, there is a discontinuance, and if a warranty is added to the feoffment, and it descends on him who is issue in tail, as heir of the warrantor, unaccompanied with fee-simple assets equal in value to the entailed lands, the issue in tail is barred by means of the warranty and assets combined—not upon principles of strict right, but of policy and convenience, for the sake of quiet and repose, to avoid circuity of action. The discontinuance does not affect the right, but affords to the party an opportunity of showing that which does. That the warranty and assets form no bar to divest is clearly proven by this: If the issue in tail should enter, an action cannot be sustained against him on the warranty and assets; and even where there is a discontinuance, and the entry of the issue unlawful, yet if the feoffee brings a writ of right, in which action the true right is tried, the issue will prevail; which proves that it is the avoidance of circuity of action which forms the bar. This accounts for such expressions as those to be found in all books, that it works a discontinuance; that it amounts to a discontinuance, if it only barred it; it is not one of itself; if it is not one of itself, it is made so by construction for particular purposes, when those purposes are answered, or when they were never active; the thing is as it is; it is itself.

I will next endeavor to show that it derives no aid from the warranty in discontinuing the estate; a warranty is a covenant *annexed to an*

estate. Without an estate there cannot be a warranty. When no estate passes by a deed, and the grantee had no estate before, the warranty is a nullity. If an estate is made to a man for life, with a warranty to him and his heirs forever, the warranty determines with the (334) life estate. A warranty is that which protects the estate; it entwines itself around it, and must fall to the ground with it. It is true that it is not necessary that a warranty should be annexed to a deed which passes or even professes to pass an estate, even right, provided the warrant has at the time an estate to which the warranty can attach itself; it may have passed from the warrantor before, or even from a perfect stranger.

It may be now safely asked, Does the discontinuance arise from the warranty or bargain and sale, or both combined? It does not arise from either separately, and there is no estate in the bargainee after the bargainor's death, with which the warranty can combine or unite; in truth, it cannot be a discontinuance unless we entirely change the nature of the thing. I am not unapprised of what is said by *Chief Baron Gilbert* in his Tenures, on this subject; but with deference to the learned judge, I think he is mistaken. Let his remarks pass for as much as his argument is worth. He says that the statute *de donis,* by prescribing the action for formedon, intended that the issue in tail should be put to his action, and if so, I have already admitted it as a discontinuance, for then there is a separation of the right from the estate. This is a strained construction, entirely unwarranted either by the letter or spirit of the act. It is true the formedon is prescribed; but that is where the issue has lost the estate, and seeks to recover it, not where he has not lost and may enter. It is a remedial act, intended to redress the wrongs which were committed on those conditional fees; and it would be strange, by a forced construction to deprive the holders of a right secured to them, or, if you choose, given, *de dono,* by the statute; this is of entering whenever they have the estate. It is further to be observed that when the statute was passed there was then no conveyance of an estate but those which operated by way of transmutation of possession, either such as carried the possession and estate with them or such as (335) recognized a previous possession and estate in the grantee.

I am, therefore, satisfied that a warranty attached to an estate, created by a bargain and sale, made by a tenant in tail, is not a discontinuance, nor in this country does it work one. It does not work one, for the inconvenience is the other way, for if she has right, and a discontinuance is worked against her, she cannot enter, she cannot bring an action of ejectment; for when she cannot enter she cannot bring ejectment. Let her bring her formedon, it is said, or some other real action. I should ask, Where, before what judge, what attorney shall she employ, what

clerk apply to for process? for there is not a man in North Carolina who ever brought such an action as lawyer, or tried one as judge, or issued process as clerk, or was present when one was tried, or knows anything about the manner of proceeding, and all these difficulties the defendant shall encounter, rather than put the plaintiff to his action, upon the warranty against the heirs or executors of, I will add, Michael Hill; and although in this particular case there would be great difficulty in reaching the assets of Michael Hill, from the great length of time—if he left any, and it does not appear that he did—yet the abstract question is now before us, and if it is a discontinuance in this case it is so in all. I mean not to express an opinion whether any of these old real actions can now be brought; it is sufficient in settling a question of convenience that these difficulties are to be encountered. In truth, it would be a mere mockery of justice to say to the defendant, You have a right, but for the convenience of a person who does not show as yet that he has any title, you must resort to some of those old remedies. We must conclude that either she has great demerits or that her adversary has great merits. The point made by her counsel upon the effect of her late recovery in ejectment against the now plaintiff, towit, that she is remitted thereby
(336) to her former or, rather, better estate, were it necessary to express an opinion on it, I should say that she is not, for if a person who has lost the right of entry, by any means acquires a term for years in the land, there still remains a tenant of the freehold to answer to his action. The law is not reduced to the dilemma of saying either that he must abandon his right or sue himself; there still remains, notwithstanding the term of years, a freeholder against whom he may bring his action, which puts an end to the claim for a remitter.

On the second point, the statute of limitations, I think that the English authorities, as far as they go, even on the construction put on the statute of James, which is somewhat different from our statute, are in favor both of cumulative and successive disabilities. I know of no case in point, for the question did not arise either in *Doe v. Jessup,* 6 East, 80, or in *Cotterell v. Dutton,* 4 Taunton, 826. In both of those cases more than ten years had elapsed after the disabilities had ceased; but it must be admitted, from what was said by the Court in *Doe v. Jessup,* that the disability of the plaintiff would have been disregarded. Although the right had descended from an ancestor who had been under a continued disability, yet in *Cotterell v. Dutton* the whole Court expressed themselves in very decided language to the contrary, *Chambre, J.,* saying that the ten years do not run during the disabilities, and Lens, Sergeant, who argued for the plaintiff, said that the case of *Doe v. Jessup* was decided contrary to the apprehension of the profession. In *Stowell v. Zouch,* Plowden, it was decided, after much argument, and not without

a diversity of opinion on the bench, that when the statute *begins* to run, it continues to do so, notwithstanding any supervenient disability. If supervenient disabilities are entirely disregarded, the statute would run over them, whether it had commenced running before they arose or not. The maxim would then be that the statute disregarded all supervenient disabilities—not *when it begins to run* it continues to run, regardless of such disabilities. The maxim as it stands presupposes a (337) time when there was no disability; it then commences, and, having commenced, it continues, for to prevent the operation of the enactment there must be a disability at the time the cause of action accrued. If there then was disability, the time allowed in the saving looked to the removal thereof; for disability, and not the lapse of time, was regarded in the saving. The lapse of time had been provided for in the enactment. To show that disability, and not time, was regarded in the saving, a person who was only one day old when the cause of action accrued has the same period after full age to assert his claims as one who was 20 years and 11 months old. Any one who will read *Stowell v. Zouch* (and that case has never been charged with favoring disabilities; it has, indeed, been many times struggled against on the other side) will perceive, I think, that the infant heir would not have been barred had not the statute commenced during the time of his ancestor, that is, at one period after the cause of action accrued, his ancestor was not under any disability; the time in the saving then began to run, and but for that the unanimous opinion of the Court would have been the other way; and from analogy to the common law on the subject of disabilities, I think the Court would have been well warranted in such opinion.

At common law, a *feme sole* of full age is disseized—and then taketh husband, and a descent is cast: neither she and her husband nor she after his death shall enter on the heir of the disseizor; for before her marriage she was under no disability, and might have entered. But if an infant *feme* be disseized, and before full age take husband, and then descent is cast, she shall after discoverture enter upon the heir of the disseizor, and so may her heir if she die during her coverture. Coke Lit., 246. It is admitted that the analogy is not perfect, but it is sufficiently so to warrant the courts in saying that disability, and not time, is re- (338) garded in the saving of the statute.

Stowell v. Zouch was decided on the saving in the statute of fines, and it was never formally applied, I believe, to the statute of James until the time of *Lord Kenyon,* 4 Term; and in the case of *East* it was charged by one of the Court that the words "or death" were inserted in the statute of James, which is not in the statute of fines, and were inserted in the statute of James to do away with all doubt; but even those expressions had no effect in *Cotterell v. Dutton.* They are not in our statute. The

statute of James also saves the right to the heirs; ours does not; it is given to them by construction, and very properly, for it surely could not be intended to make the right purely personal; and if it is right to modify it by construction in one particular, it is in another. It has been modified by construction in another part, and universally approved of: By the words of the statute, an infant has three years after arriving at full age to make his entry or claim. Should he die before he arrives at full age, is his right lost to his heir, or is the defendant never to be quieted in his possession? The case mentioned in the statute, arrival at full age, has never occurred; yet it was never doubted but that his heir, if under no disability, had the balance of three years yet to run to assert the claim, and, if under disability, I have endeavored to show three years after the disability was removed.

The first heir in tail after the death of the ancestor who aliened, Michael Hill, and who was the last person seized of the estate in tail, being when the right devolved on him an infant, and that heir dying before the disability was removed, leaving an infant heir, who became covert before full age, who having brought her action within three years after her discoverture, I am of opinion that she is not barred by the statute of limitations—that is, that she comes within the saving (339) of the act.

I shall not examine the question whether the deed of 1746 contains a pure warranty or only a covenant. This opinion is given on the supposition that it is a warranty; but on this point I express no opinion.

I have said, in the foregoing part of this opinion, that he who has the right of entry has the estate, and by a disseizin the disseizee does not lose the estate. I should have added, unless at his election, which he makes by bringing an action for it, for by demanding the estate of another, he allows that the other has it, and thereby admits that he has it not himself.

I have viewed this case as if there was a warranty in the deed; whether the covenant amounts to one or not, I have not deemed necessary to examine.

BY THE COURT. Let judgment be entered for the defendant.

Cited: Spruill v. Leary, 35 N. C., 418.

CHAIRMAN OF WASHINGTON COUNTY COURT TO THE USE OF ARMISTEAD v. HARRAMOND ET AL.

1. A judgment obtained against a deceased person during his lifetime, and a second judgment obtained thereon against his administrator after his death, are both as to the administrator and his securities evidence of a debt by the intestate; but not evidence against the securities that the administrator has or had *assets* to discharge it.

2. But if the administrator has returned an inventory, such inventory is *prima facie* evidence against the securities of assets to that amount.

APPEAL from *Nash, J.*, at WASHINGTON.

William B. Harramond, the defendant, had been appointed by Washington County Court administrator upon the estate of Benjamin Fessenden, and the other defendants were Potter, one of his securities in the administration bond, and Flower and Fagan, administrators of Webb, the other security.

This action was brought upon the bond, and upon the trial before *Nash, J.*, the real plaintiff, after proving the bond, gave in evidence the record of a judgment obtained by him against Fessenden (340) in his lifetime, which was objected to, but received by the court.

He further produced the record of a judgment obtained by him on the judgment last mentioned, against Harramond as administrator of Fessenden, on which an execution had issued against the goods and chattels of Fessenden in the hands of Harramond, which was returned *"Nulla bona."* At the succeeding term the plaintiff and Harramond corrected by an entry on the record a mistake which had been made in the calculation of the amount of the judgment against Harramond, an *alias* issued for the amount as amended, and was returned *"Nulla bona."* Plaintiff's writ issued before this last execution was returned.

The plaintiff further produced the inventory returned by the defendant Harramond as evidence of assets in his hands.

The defendants Potter and the administrators of Webb offered in evidence certain bonds, notes, and open accounts against Fessenden which, as they alleged, Harramond had paid before he had any notice of the judgment against his intestate. The evidence was rejected, and the court instructed the jury that the record of the judgment against Harramond was no evidence against the other defendants.

The jury found a verdict against all the defendants, and the case stood here upon a rule to show cause why there should not be a new trial.

Gaston and Hogg for plaintiff.

HALL, J. The judgment obtained against the defendant's intestate (Harramond), as well as that obtained against Harramond himself as administrator, is evidence of a debt due from his intestate, and he is bound by such evidence. The securities of Harramond, the other defendants, are not concerned in interest whether such debt is due or not; because if the assets are not liable to creditors they are subject to the claims of legatees; and the administrator, Harramond, is as much bound for the faithful administration in the one case as in the other, and
(341) it is only for the faithful administration of the personal estate by the administrator that his securities are bound.

But although the judgment against the administrator is evidence against him of a debt due by the intestate, and is evidence also of assets in his hands to discharge it; and although, for the reason before given, it is also evidence of a debt due, as far as it relates to his securities, yet it is not evidence against them that he has assets to discharge it, and thereby subject them to the payment of the debt, in case *nulla bona* is returned on an execution against the administrator. Whether the administrator has wasted the assets or not is an inquiry in which the securities are interested, and the judgment ought not to be introduced as evidence of the affirmation, because they are neither parties nor privies to that judgment. This principle was laid down in *McKellar v. Bowell, ante,* 34.

But as to the question of assets, I think the securities are bound *prima facie* by the inventory returned by the administrator. They have stipulated in the administration bond that the administrator shall return a true and perfect inventory of the personal estate, and that he shall well and truly administer it according to law. This is for the benefit of creditors and legatees, and when it is done, it should be evidence *prima facie* against them of assets to that amount, as evidence of the faithful administration of such assets would be evidence for them.

In *Chairman v. Springs,* 10 N. C., 43, the judgment was certainly evidence to prove that a debt was due from the estate of Henderson, the intestate, to the plaintiff; but it was not admissible against the defendants, the securities of the administrator, to prove the fact either that the administrator had assets or had wasted them; because, if this was the case, they were liable for the amount; and that fact ought not to
(342) be proved by a judgment and proceeding to which they were neither party nor privy; and it appears that it was in part offered in evidence for that purpose, and that that was the reason why an appeal was taken to this Court; for it does not appear that any other evidence was offered to prove assets in the hands of the administrator, or that he had wasted them. It is stated in the manuscript returned to this Court that the judgment, with *other evidence,* was offered, etc., but it does not

appear what that other evidence was; we cannot take it for granted that it established assets in the hands of the administrator, and that the judgment was offered only to establish the fact that a debt was due. If this was the case, it was admissible, but not to prove assets in the possession of the administrator, or that he had wasted them. For these reasons, I think the rule for a new trial, etc., should be discharged in the present case; the judgment was evidence of the debt, the inventory evidence of assets, etc.

The rest of the Court concurring, Affirmed.

Cited: Jones v. Biggs, 33 N. C., 413; *Strickland v. Murphy,* 52 N. C., 244; *Bond v. Billups,* 53 N. C., 424; *Brown v. Pike,* 74 N. C., 534; *Lewis v. Fort,* 75 N. C., 252; *Badger v. Daniel,* 79 N. C., 387; *Speer v. James,* 94 N. C., 424; *Grant v. Reese,* 94 N. C., 724; *Morgan v. Smith,* 95 N. C., 400; *Leak v. Covington,* 99 N. C., 562; *Brown v. McKee,* 108 N. C., 393; *Miller v. Pitts,* 152 N. C., 632.

BROWN v. GRAVES.

A. made a deed of trust to satisfy several creditors; after this, part of the property is levied on and sold under execution. The sale passes nothing. A. had not such an interest as could be levied on under our act of 1812, subjecting equitable interests to execution.

APPEAL from *Norwood, J.,* at CASWELL.

Trover to recover the value of two oxen. The writ issued 23 October, 1823, and the following appeared to be the case:

The plaintiff claimed title to the property under a deed of trust executed by Zacharias Groom to William Russell, for the use of Philip Pierce (who was Groom's security), dated 22 November, 1821, and by the trustee he proved on the trial that on 11 February, 1822, a sale was made under the trust deed, at the house of Groom; that the land mentioned in the deed sold for $280, the mare for $32, the oxen (343) (now in controversy) for $32. These articles, except the mare, were purchased by the plaintiff, who retained the purchase money in his hands; the mare was purchased by some other person, and the money arising therefrom was paid over to the plaintiff. There was also a quantity of tobacco mentioned in the deed of trust; this had been carried off by Groom and sold, except some trash tobacco, which was bought by the trustee for $2. At the time of sale the plaintiff and Pierce forbade Swift & Martin (to whom the debts mentioned in the deed of trust were

due, and for which debts Pierce was Groom's security) to bid for any of the property, unless they paid the money down for the bid, and stated that if they bid, the amount bid should not be paid by their entering it as a credit on the sums respectively due to them from Groom.

It also appeared that before this sale defendant had informed the trustee that he had purchased these oxen at a public sale made by virtue of an execution which he had against Groom; that at the sale defendant claimed them, and requested the trustee to sell the other property mentioned in the deed first; that he mentioned it to the plaintiff and Pierce, who insisted on his first selling the personal property, and he did so.

Groom swore that he and Pierce agreed to sell the property before the debts to Swift & Martin became due; that he owed the plaintiff by bond about $109; that he did not know what had become of the money plaintiff received from the trustee, for which the property was sold, nor had he ever agreed that plaintiff should apply it in satisfaction of his debt of $109; that the steers remained in his possession two or three days after the sale, plaintiff on the day of sale telling him to keep them until he, plaintiff, called for them, and that they were taken away by defendant. He further proved that he remained in possession of the land from the day of sale up to the time of trial, and it did not appear that (344) he was to pay any rent for the place. It further appeared that the oxen were in Groom's possession up to 11 February, 1822.

Swift proved that the plaintiff had a bond on him, and after the sale, on the same day, he and the plaintiff agreed that the claim he had against Groom and Pierce should be credited on his bond to plaintiff; and they afterwards so settled. He also stated that he had never called on Groom or Pierce for the money due him before 11 February, 1822.

It also appeared that Martin never made application to have his debt paid before or at the time of sale.

The defendant insisted that plaintiff could not recover, because—

1. The sale was fraudulent, it having been made to hinder the collection of Groom's debts, upon which judgments and executions had been obtained.

2. That the trustee by the terms of the deed had no authority to sell before the debts became due.

3. That defendant's purchase under execution, on 29 December, 1821, before the sale by the trustee, gave him the title.

4. That if defendant had not the legal title it was in the trustee, and, therefore, plaintiff could not recover.

Defendant then offered evidence of his having regularly purchased at execution sale on 29 December, 1821, under an execution dated 18 December, 1821, issuing on a judgment obtained 15 December, 1821.

To the charge of the court on the question of fraud no exception was taken. His Honor, *Judge Norwood,* further charged, that although Pierce could not direct the sale of the property before he was called on for the money, yet that Groom might direct it before the money became due on the judgments mentioned in the deed, notwithstanding that at the time there might be other judgment creditors who had executions; and that if he directed the trustee in this case to sell on 11 February, 1822, it would be valid.

And further, that the sale under execution of 29 December, (345) 1821, having been made before the debts mentioned in the deed of trust had been satisfied, was unauthorized by law, and passed no title to the purchaser; that if the debts mentioned in the deed had been satisfied by a sale of part of the property, the remainder of the property would then be subject to execution; but not otherwise.

Verdict for plaintiff, new trial refused, judgment, and appeal.

Badger for appellant.
Hogg, contra.

HENDERSON, J. This transaction, upon its face, bears evident marks of a fraudulent contrivance between Graves, Russell, and Groom to give to Brown a fraudulent preference in the payment of the debt which Graves owed to him, or to cause Graves' property to vest in him in fraud of creditors. If the object had been to give Brown a preference, and that object had been *fairly* and with good faith effected, the law would not have annulled it. The fraudulent design is evidenced throughout the whole transaction; the expediting the sale at the instance of Graves, and more especially by prohibiting the *cestui que trust* under the deed, by virtue of which the sale was made, from bidding at the sale; they could not have been objected to as not being good bidders, for the money was coming to them. The only object which can properly be assigned was to prevent competition, and thereby enable Brown to purchase the property at a reduced price; and if such was the object, of which a jury were the proper judges, the law pronounces the sale to be fraudulent; yet as the sale was made by the trustee, who had the legal title, and at the instance of Brown, the property passed as to all but those whose rights or interests were affected by the sale. The defendant does not claim under the trust deed, either as *cestui que trust* or purchaser. It is, therefore, not necessary to decide whether, if he stood in that capacity, he could avail himself of the fraud to defeat the sale. He claims as a purchaser at a constable's sale, under a justice's execution against Graves, (346) issued and levied after the sale under the deed in trust. The question, therefore, is, Had Groom, at the time of the levy and sale, or at the

sale, such an interest as could be sold under that execution? If he had not, the defendant is a mere stranger, and, however much to be regretted, appears in the character of an intermeddler—not, though, in the opprobrious meaning of that term; it appears that he has acted honestly. But if such be the case, that is, if the property was not subject to the execution, he cannot avail himself of the fraud practiced by Brown and others—if it be fraud. I believe nowhere can be found a more lucid and satisfactory opinion upon the subject than the one given by *Chief Justice Spencer,* of New York, in *Bogert v. Perry,* 17 Johnson, 351. To this, therefore, I refer. They have in New York, as regards this point, a statute similar to ours of 1812, both, in substance, taken from the statute of Charles. It is evident that, independent of that statute, Groom had not such interest as could be sold under an execution at law; he had nothing but a mere equity, at most a mixed trust, or a chose in action, neither of which an execution at law could affect. Our act provides that it may be lawful for the sheriff or other officer to whom a writ shall be directed, at the suit of any person upon a judgment then had or hereafter to be had, to so make and return execution to the party suing, of all the goods, lands, etc., as any other person shall be possessed or seized in trust of for the person against whom the execution issued, and that said lands and goods shall be held by the purchaser at execution sale free from and discharged of the title and encumbrances of the trustee. These are not the words, but the substance of the act. If there had been a doubt, upon reading the first part of the statute, whether a mixed trust such as this could be sold where part is held for one person and one purpose and part for another person and another purpose, I think the doubt would
(347) have been removed by that branch of it which divests the seizin out of the trustee and vests both his estate and the estate of the *cestui que trust* in the purchaser. It could not be designed by the Legislature to work this wrong, and it will not be attributed to them when there are proper subjects on which the act can operate, and coming more within its bounds—a person seized or possessed in trust for another, not one seized in trust for one for one purpose and to another for another purpose, where the formal and nominal title is in one in trust for another. By confining the statute to such cases, no injury is done, for the trustee had no other duties to perform than to permit the *cestui que trust* to enjoy the property. There is no possible way to reconcile the statute to anything like common justice but to say that the estates shall be apportioned, and all shall be taken out of the trustee, and with the trust estate vested in the purchaser, except what will enable the trustee to perform the trusts to others; in this case it would leave an estate in the trustee, of which I cannot well conceive. What is it? As much as will pay Pierce? What, then, is the nature of the estate which the pur-

chaser has? He has Groom's right to the surplus, and the trustee's legal title to the property out of which this surplus is to be raised. If the trustee could find property which would bring the debt to Pierce, and no more, he might sell it, and then the balance of the property in kind would belong to the purchaser at execution sale; sell as much as will pay Pierce, the balance is the purchaser's—the trustee has nothing to do with it; both legal and equitable title is in the purchaser. The purchaser might say to him, Take your pound of flesh, but not one pennyweight more. How the purchaser at the trustee's sale stands, who purchased one article which overwent the debts of the remaining *cestui que trust,* I know not; as to the amount of the debt, the sale was good, and bad for the balance; for that power which he once had to sell, being dependent on his title, was taken from him. As to part of the article the purchaser would have a right to it, and none to the other. I cannot see the extent (348) to which it may be carried. By such sales speculation would be encouraged, but would be placed upon unequal grounds. One might have correct and another incorrect information. I think that the Legislature intended to leave such interest (entirely untouched by the act) to the jurisdiction of a court of equity, where the property itself would be sold and the money divided according to the rights of the parties.

This is a hard case on the defendant; but I cannot see how he can prevail in this action.

By the Court, Affirmed.

Cited: Gillis v. McKay, 15 N. C., 174; *McKay v. Williams,* 21 N. C., 406; *Gowing v. Rich,* 23 N. C., 557; *Thompson v. Ford,* 29 N. C., 421.

STATE v. PATILLO & SAUNDERS.

Promissory notes are not public tokens of themselves; bank notes are. An indictment, therefore, for a cheat at common law, by passing certain "promissory notes" as and for bank notes, without an averment that they resembled bank notes, cannot be sustained.

APPEAL from *Daniel, J.,* at LINCOLN.

This was an indictment charging that the defendants, designing and intending to defraud one Barnabas West of a mare of the value of $20, "falsely, fraudulently, and unlawfully did conspire, combine, confederate, and agree among and between themselves to obtain and get into their hands and possession, of and from the said Barnabas West, the mare aforesaid, under a false color and pretense of paying to him, the

said Barnabas West, then and there, $45 of good and lawful current bank notes," and that the defendant Patillo, in pursuance of the conspiracy, afterwards did "falsely, fraudulently, unlawfully, and deceitfully pass to the said Barnabas West one promissory note of $20, two promissory notes of $10, and one promissory note of $5, purporting each to have been made and signed by one J. F. Randolph; and purporting to be (349) made payable to the bearer," and that Patillo and Saunders, in pursuance of the conspiracy, did "fraudulently and falsely pretend and affirm to him, the said Barnabas West," that the said promissory notes were good current bank notes; and that the defendants, "by the false pretenses aforesaid," fraudulently obtained possession of the mare; whereas, in truth and in fact, the notes were not good current bank notes, but, on the contrary, were not worth one cent. The indictment concluded at common law. The jury found the defendants not guilty of a conspiracy; but that the defendant Patillo was guilty of a deceit in manner and form as charged in the bill of indictment.

The defendant Patillo moved in arrest of judgment because the indictment did not charge a deceit, and because the bills mentioned in the indictment did not constitute such a *false token* as would sustain an indictment for a deceit at common law.

The court, *Daniel, J.*, overruled both objections, and passed sentence on the defendant, whereupon he appealed to this Court.

HENDERSON, J. Bank notes are public tokens, as much so as weights and measures, or the alnager's seal; it is not necessary that they should have a common-law existence to make the obtaining property by means of mere counterfeits, at least at common law, any more than it is: that a chattel should have had a common-law existence to make it the object of trespass or larceny. It is sufficient that they have, no matter when invented or discovered, the qualities of a public token, *i. e.*, calculated to inspire *public confidence;* in practice, they represent the coin of our country, and pass currently as money. Had this indictment, therefore, charged that the notes passed to the prosecutor bore the likeness and similitude of our common bank notes, and that the defendant (350) knew them to be worthless, I have not a doubt but that the conviction could have been sustained; and it appears from the evidence that such was the case. But it is to the indictment that we are to look to see what the defendant has done; in that it is stated that the notes passed by the defendant to the prosecutor purported to be signed by one Randolph, and to be payable to bearer, and that they were worthless, without any averment or charge that they had any resemblance to bank notes. They are discovered, therefore, to be nothing more than common promissory notes, made by an individual promising to pay money to the

bearer. We cannot view such notes as public tokens; these are not the kind of notes which pass with us as money. I repeat it, that had it been averred, and had the jury found, that they bore the resemblance of our common bank notes, and that the defendant knew that they were worthless, the offense would have been complete at common law. Whether it comes within our statute it is not necessary to decide; the indictment is not framed upon it.

Judgment arrested.

Cited: S. v. Boon, 49 N. C., 467.

STATE v. JOINER.

1. Upon the construction of section 2, chapter 985, Laws of 1818, N. R., against a mother for concealing the death of her bastard child: *Held*, by a majority of the Court, that the *corpus delicti* is concealing the death of a being upon whom the crime of murder could have been committed; therefore, if the child is *born* dead, no concealment is an offense against the statute.
2. It is not incumbent on the prosecution to show that the child was born alive, but the burden of showing the contrary is on the accused.

APPEAL from *Paxton, J.,* at PITT.

This was an indictment against the defendant, a single woman, and contained three counts.

The first and second counts were for the murder of her bastard (351) child, laying the death to have been accomplished by different kinds of violence, and both concluding at common law; the third count was for a misdemeanor in concealing the birth of the child, and concluded against the form of the statute.*

The prisoner was found not guilty on the first and second counts, but guilty on the third; and moved, first, for a new trial because the court instructed the jury that upon the third count it was not a material

*Laws of 1818, N. R., ch. 985, sec. 2:

Be it further enacted, That if any woman be delivered of issue of her body, male or female, which, being born alive, would by the laws of this State be a bastard, and she endeavors privately, either by drowning or secret burying thereof, or any other way, either by herself or the procuring of others, so to conceal the death thereof as that it may not come to light whether it were born alive or not, but be concealed, in every such case the said mother so offending shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $500 and an imprisonment not exceeding twelve months.

inquiry whether the child was born alive or not. This motion was overruled, and a motion was then made in arrest for that the third count did not allege that the child was born alive, nor that it died.

The count was as follows: "That the said Rinney Joiner, on 27 November," etc., "being big with a certain male child, afterwards, towit, on the same day and year last aforesaid, at and in the county of Pitt aforesaid, by the providence of God, did bring forth the said child of the body of her the said Rinney Joiner, alone and in secret, which said male child, if the same had been born alive, would by the laws of this State have been a bastard; and that the said Rinney Joiner, being moved by the instigation of the devil, afterwards, towit, on the said 27 November, in the year," etc., "as soon as the said male child was born, with force and arms, at and in the county of Pitt aforesaid, unlawfully, wickedly, and willfully did throw, put, and place the said male child under and beneath a crib there situate; and the said male child did then and there,
(352) under and beneath the crib aforesaid, unlawfully, wickedly, and willfully, hide, secrete, and conceal, she, the said Rinney Joiner, in manner and form last aforesaid, endeavoring privately so to conceal the death of the said male child that it might not come to light whether the child were born alive or not, but be concealed, against the form of the statute," etc.

The court, *Paxton, J.*, overruled the motion in arrest and pronounced sentence, and the prisoner appealed.

TAYLOR, C. J. The statute of 21 James I. was passed on account of the difficulty of proving the child's being born alive, in the case of its murder by the mother. It, therefore, makes the concealment of its death almost conclusive evidence of its being murdered by the mother. But the extreme severity of the law prevented it from being carried into full operation; and upon trials for that offense presumptive evidence was required that the child was born alive, before the other presumption, that it was killed by its parent, was admitted to convict the prisoner. But even under that statute presumptive evidence was admissible that the child was born dead; and if, from the view of the child, it were testified by one witness, by apparent probability, that it had not arrived at its *debi tunc partus tempus,* the case was considered as not being within that statute, on account of there being presumptive evidence that the child was born dead; but under such circumstances it was left to the jury, upon the evidence, as at common law, to say whether the mother was guilty of the death.

This statute was repealed in this State by the act of 1818 which restored the common law in trials for the offense of murdering a bastard child.

But although the concealment of the death of the child was justly conceived by the Legislature as insufficient to raise a presumption that the mother had murdered it, so as to be convicted of that crime, yet it was an offense calculated to destroy the proof by which the mother might have been convicted. The State shall not be called upon to prove that the child was born alive, because the mother has suppressed (353) the means by which such fact could be proved, and this, while it is an offense in itself, also raises a presumption against the mother that the child was born alive. The mother cannot be prosecuted for murder by reason of this concealment, and, therefore, she shall be prosecuted for a misdemeanor. It is, therefore, apparent to me that the *corpus delicti* described in the act is concealing the death of a being upon which the crime of murder could have been committed. If, therefore, the mother can show that the child was born dead, the presumption raised against her by the concealment is destroyed. She has committed no misdemeanor, because the subject concealed was not a human being upon whom the crime of murder could have been committed. The act in using the word "delivered" could only contemplate the birth of a live child, and not that sort of delivery which takes place before a woman can, according to the rules of parturition, be delivered of a live child.

The Legislature may be supposed to have addressed the woman thus: "We could convict you for the murder of this child, but to convict you it would be necessary to prove that the child was born alive. This you have put out of our power to prove, because you have concealed the death of the child; and in so doing you have committed an offense against public justice in suppressing the means of a prosecution for murder." But if the woman can show that the child was born dead, she has not impeded the course of justice, and ought not to be convicted. I, therefore, think it was fairly and strictly within the province of the jury to consider whether the child was born dead or alive. There ought to be a new trial.

HENDERSON, J. The offense consists in concealing the death, so that it could not be known whether the child be born alive. The object is to prevent the *destroying* such children, not the concealment of their *dead bodies;* the prevention of the latter is resorted to as a means (354) to prevent the former. It is, therefore, not incumbent on the State to prove that the child was born alive. The agency of the mother in concealing the death, *i. e.*, the manner of the death, and thereby preventing punishment from falling on the person who deprived it of life, is the *corpus delicti;* but if it appears either by the evidence on the part of the State or that which may be introduced on the part of the mother

that the child was born dead, or came to its death by natural means, it destroys the *probability* of the crime which the Legislature intended to prevent having been committed. The judge should, therefore, have informed the jury that to make out the crime of misdemeanor created by our act of 1818 it was not necessary to be *proven* that the child was born alive; but if, from the evidence, they were satisfied that the child was born dead, or that it came to its death by natural means, that they should acquit, under the act. As to the child's being killed in the womb by design, so that it came dead into the world, that is an offense different from the one created by the act. To give a contrary construction would be disregarding the substance and catching at the shadow, sacrificing the end to the means. It would require the conviction of the mother, who had concealed the body of the dead child which she had prematurely (and without any fault of her in that particular) brought into the world in that imperfect state, which, upon inspection, it was quite apparent could not sustain for a single moment animal life, as contradistinguished from *uterine;* a construction, I am sure, with due deference to those who differ with me, the Legislature never contemplated to be given to the act.

I therefore think that there should be a new trial.

HALL, J., *dissentiente:* The indictment states that the defendant did bring forth the said child, etc., which if born alive would be a bastard, etc., and that she, as soon as the said child was born, concealed it
(355) by placing it under a crib. It is not stated whether the child was born alive or not, and the judge charged the jury that it was not a material inquiry whether the child was born alive or not.

It is alleged on behalf of the defendant that the facts of which she has been found guilty do not amount to an offense under the act of 1818, ch. 985, and that, of course, no judgment can be rendered against her.

The act declares that if any woman be delivered of issue of her body which, being born alive, would be a bastard, etc., and endeavors privately, either by drowning or secret burying, or *by any other way,* etc., so to conceal the *death* thereof as that it may not come to light whether it were born alive or not, but be concealed, in every such case, etc.

It is argued that before the death can be proved to be concealed, life must be proved expressly to have existed. It seems to me otherwise. The act does not mean by the term *death* the *act of dying,* the transition *from life to death;* by *concealment of the death* is meant *a concealment* of the lifeless body. Issue of the body is itself proof irresistible that life accompanied and actuated it up to the stage of maturity in which we behold it a corpse; is proof that life existed, but has been taken away; in other words, it is proof of death, and concealment of the body may be or may not be a concealment of the death.

If the fact was established that the issue was born alive, and was destroyed by concealment beneath the crib, etc., it would be a felony, and come within the proviso in section 4 of the act. This act was made for the purpose of punishing women for concealing their issue, without imputing to them the crime of murdering them. I think judgment ought to be pronounced for the State.

PER CURIAM. New trial.

(356)

STATE v. ALLEN & ROYSTER.

Indictment against two for an affray in "mutually assaulting and fighting with each other." The defendants were found not guilty of an affray, but that the defendant A. was guilty of an assault and battery upon R., the other defendant. Judgment on the conviction for an assault and battery may be pronounced.

APPEAL from *Norwood, J.*, at PERSON.

The defendants were indicted in the following words: "The jurors for the State, upon their oath, present, that Thomas H. Allen and William H. Royster, all late of the county of Person aforesaid, with force and arms, at Person aforesaid, on 4 April, 1825, to, with, and against each other did fight and make an affray, to the nuisance of the citizens and against the peace and dignity of the State." The defendants pleaded not guilty, and the jury found that the defendants were not guilty of an affray, but that the defendant Allen was guilty of an assault and battery upon the defendant Royster, and that the defendant Royster was not guilty.

Allen moved in arrest of judgment because this was an indictment for an affray, and one of the defendants being acquitted, the other could not be guilty of the charge; and because on an indictment for an affray one could not be found guilty of an assault and battery on the other.

The court, *Norwood, J.*, overruled the reasons, and pronounced judgment against Allen, from which he appealed.

TAYLOR, C. J. There is no precedent in this case to govern the decision; but, I think, upon general principles, and the reason of the thing, that the conviction is right. An affray is the fighting of two or more persons in a public place, to the terror of the citizens. The very definition, therefore, includes an assault and battery; and if it was proved to the jury that two men fought together in a private place and under such circumstances as that it could not be a terror to the people, I think there is no doubt that they might be acquitted of (357)

the affray, and convicted of the assault and battery; for this they have committed, though without the aggravation of an affray. If both might be so convicted, why not one? Certainly not because one person is incapable of committing an affray; for there is one case at least where he may be singly indicted for it. 1 Hawk P. C., 63, ss. 2, 4. Nor would it be necessary in such an indictment to specify the particular mode of the affray, for an aggravated assault by one person is sometimes laid as an assault and affray. An affray, being, therefore, an assault aggravated by the circumstances under which it is committed, would seem to fall within the general rule that when an accusation includes an offense of inferior degree, the jury may discharge the defendant of the higher crime and convict him of the less. 2 Camp., 583. As upon an indictment for burglariously stealing, the prisoner may be convicted of the theft and acquitted of the nocturnal entry, and robbery may be softened into felonious theft, and many other similar cases.

The only exception to this rule arises from the prisoner's having been indicted for a different offense, whereby he would be deprived of any advantage which he would otherwise be entitled to claim; so that the prosecutor shall not be permitted to oppress the defendant by altering the mode of proceeding; thus, on an indictment for felony, a prisoner is deprived of several advantages which he would have on an indictment for a misdemeanor, and, therefore, he cannot be convicted of the latter upon an indictment for the former. No reason of this kind exists wherefore the defendant might not be convicted of the assault. The specific difference between this offense and a riot is that there must be three persons at least to commit the latter offense, and if two only are found guilty, they must be discharged; yet even in that case, if the defendants had been charged with committing the riot with divers other disturbers of the peace, judgment would have been pronounced. 1 Ld. Ray-
(358) mond, 484. If A. assault B. without provocation, in a public place, and a fight ensues, both would appear to be the aggressors to those who did not witness the beginning of the quarrel; but a jury, upon being informed of the origin of the strife, would, in most cases, think it unjust to subject B. to the same punishment with A. I think the conviction proper.

The other judges being of the same opinion, No error.

Cited: S. v. Woody, 47 N. C., 337; *S. v. Stanly,* 49 N. C., 292; *S. v. Perry,* 50 N. C., 10; *S. v. Brown,* 60 N. C., 450; *S. v. Wilson,* 61 N. C., 238; *S. v. Brown,* 82 N. C., 588; *S. v. Glenn,* 119 N. C., 804; *S. v. Griffin,* 125 N. C., 693; *S. v. Spear,* 164 N. C., 457.

IN EQUITY

AUGUSTUS MOORE v. ISAAC MOORE.

1. Contribution among cosureties was originally founded on the maxim that "Equality is equity" among those who stand in the same situation. This maxim can only be applied to those whose situations are equal; otherwise, equality is not equity; and hence, if one surety stipulate for a separate indemnity, the equality of situation between him and his cosurety ceases, and the maxim does not apply.

2. The indemnity taken by one surety can be reached by the other only in two cases, either when it was taken in *fraud* or for the benefit of the other.

3. Hence, if one surety, for his own benefit, *fairly* take an indemnity, he may use it until indemnified.

4. If a surplus remain in such case, the other sureties may have the benefit of it.

FROM HERTFORD. The bill set forth that about 14 August, 1815, the complainant and defendant, at the request of James Jones, now deceased, became his sureties on a bond which was then executed to one John Coffield for £950; that said Jones at the same time executed a bill of sale by which he conveyed unto the defendant five negro slaves, conditioned to be void if the said Jones should well and truly pay said debt to Coffield; else to be in full force. That Coffield, a short time before (359) the filing of the bill, had sued the complainant and defendant on said bond and obtained judgment; that James Jones died utterly insolvent, having first made his will and authorized his executors to sell his property; that said executors were about to sell the aforesaid negro slaves which had been mortgaged as aforesaid, when the defendant set up his claim to them; but he afterwards permitted the executors to sell said slaves upon condition the executors would pay to the defendant the amount for which said negroes were mortgaged, or apply said amount in such manner as should be directed by the defendant; that the complainant had been compelled to pay one-half of the aforesaid judgment at law, with interest, and the defendant the other half, viz., $1,016, on 25 February, 1818; that the defendant hath received $1,050 out of the proceeds of the sale of said negroes, and, besides this, another sum arising from said sale and sufficient to cover the other half of Coffield's debt (paid by the complainant) was applied by said executors, by direction of the defendant, to the payment of other debts due by the estate of said Jones

for which the defendant was responsible as surety, but for which said negroes were not bound in any manner. The bill then prays for relief, etc.

The defendant insisted in his answer that the bill of sale executed to him for the negroes was intended for his sole benefit, for that James Jones, being indebted to the complainant, went with complainant to Coffield to borrow the sum named in the bill; that Coffield refused it unless the defendant would join in the bond for the repayment of the sum loaned; that James Jones applied to this defendant to join him in the bond, which the defendant refused to do unless said Jones would give him some indemnity, when said Jones agreed to give the bill of sale aforesaid, and that the complainant knew nothing of this; that the complainant had previously signed said bond with said Jones, and without indemnity, and that said bill of sale was executed entirely for the (360) benefit of the defendant, and would not have been taken at all by the complainant. He further answered that the negroes were sold by the executors of Jones, though he forbade the sale and claimed the negroes; that the executors contended that three negroes had been levied on by executions before the date of his bill of sale. The defendant admitted the executors had paid him $800, and agreed to pay him the balance that may be due him on account of the aforesaid suretyship; that the two negroes which were unencumbered by the lien of executions prior to the bill of sale sold for $1,050, and the executors refuse to pay more than that sum.

HENDERSON, J. Contribution among cosecurities arises not from any contract between them, but from a principle of natural equity—that equality is equity among persons standing in the same situation. And this being now the established and well understood doctrine of a court of equity, it is sufficient to infer an understanding among them of mutual contribution; for men are presumed to act in reference to the laws governing the transaction. Hence it is that a court of law never sustains jurisdiction in cases where one surety seeks contribution from the other; but this principle of equity can only apply in cases where their situations are equal, for equality among persons whose situations are not equal is not equity. If one surety stipulates for a separate indemnity, in this respect his situation is different from that of one who makes no such stipulation; and this indemnity is reached in favor of his cosecurity, upon the ground either that it was intended for the benefit of all or that the taking it was a fraud upon the others. In such case, courts of equity convert him into a trustee, not permitting him to allege his own turpitude or selfishness as a protection; for they enter into the agreement under a belief of perfect equality, trusting apparently to the same laws of indem-

nity, and to the united exertions of each other, to avoid harm (361) severally; therefore, to take an indemnity is a fraud upon the rest, and more especially as it lessens the ability of the principal to indemnify the others; and if taken without such secrecy, it is presumed to be designed for the benefit of all and an indemnity fairly obtained. And such indemnities may be fair, and which the surety has a right to use exclusively for his own benefit, while he is indemnified; if more than sufficient for that purpose, the excess should be communicated to the other sureties, first, because it gives to the creditor an equitable lien on such indemnity, and the creditor should cede, and in equity is supposed to cede, to a suffering surety all his means and facilities in enforcing and securing payment; and, secondly, from the intimate connection subsisting between them, as being engaged in one common league, we have only to appeal to our own bosoms to ascertain the benevolent feelings excited by such connection, and the dictates of benevolence become duties, when not prejudicial to ourselves; but in observing its dictates, we are not bound to encounter hazard or trouble, and, therefore, where this surplus lien is sacrificed to our good or safety in that transaction, the cosurety has no right to complain.

The facts of this case preclude all idea that the complainant entered into the engagement under a false appearance of equality, and it affords as little evidence that it was designed also for his benefit, for he attested the instrument creating the lien. In truth, this appears to be a fair and explicit transaction. The complainant was willing to become Jones's security without a lien and without the participation of the defendant. Such proffer was made before the defendant was called on. Application was then made to the defendant, not at the instance of the complainant, to aid him in encountering the risk, but the money could not be procured without an additional name on the paper; in this situation, the defendant stipulates for a lien, and this within the knowledge and presence of the complainant, who required none, and negatived all idea that the defendant was acting for their joint benefit by attesting the (362) instrument creating the lien. He has, therefore, no claim, either on the ground of fraud or intention, and the claim to the excess, I think, stands on an equally slender foundation. Had the defendant wantonly or capriciously discharged the excess of the lien, the complainant would have had cause of complaint. But if the defendant, for his own ease and convenience in the transaction, sacrificed it, he has none. All he can ask is that he should have it when it is not longer of any service to the defendant. Good faith as to this is all that equity requires. If by sacrificing the excess he more promptly, and with less trouble and risk, obtained an indemnity, who has a right to complain? On whose rights or labors has he trespassed? Not on the complainant's. But I do not view

the transaction at the sale of the negroes by any means as an abandonment; it may be so, but the answer does not admit it. But, as I have said before, that is entirely immaterial. If he did so, it was for his accommodation, to avoid controversy, to make himself perfectly safe. In this he has violated no obligation, at least none which a court of justice recognizes.

PER CURIAM. Bill dismissed with costs.

Cited: Fagan v. Jacocks, 15 N. C., 264; *Hall v. Robinson,* 30 N. C., 60; *Long v. Barnett,* 38 N. C., 634; *Comrs. v. Nichols,* 131 N. C., 505.

FRANCIS PUGH v. MAER, MURFREE, AND BURGES.

An injunction granted upon the payment of the money, recovered at law, into the office of the master will not be dissolved simply because obtained more than four months after the rendition of the judgment at law. The object of the act of 1800 on the subject of obtaining injunctions was to prevent delay and hazard to creditors, and this is accomplished by the terms imposed.

FROM FRANKLIN. The bill alleged that the complainant, in the spring of 1819, contracted with the defendant Maer for the purchase of fish, without specifying the quantity, though complainant was to take (363) as many as said Maer would deliver at the following prices, towit, $4 per barrel for trimmed herrings, $6 for shad, and the same price for rock; that a few days afterwards, one Minor, the agent of Maer, called on the complainant and presented an account, in which were charged 168 barrels of herrings, 77 barrels of shad, and 7 barrels of rock, which, at the prices aforesaid, amounted to $1,176; that the complainant did then give his bond for said sum, payable to the defendant Maer three months after the date thereof; that he did so at the request of said agent of Maer when the complainant did not know whether the fish had been delivered or not, for there were boats on the river in which possibly the fish might have been taken, and complainant, therefore, took it for granted that all was right; that the said bond was given on 15 May, 1819, when, in fact, the fish had not been delivered, and that a few days after, upon the application of complainant's agent, he was unable to obtain other or more fish than about 178 barrels of herrings, 20 barrels of shad, and 4 barrels of rock, which, according to the prices agreed on as aforesaid, amounted to $856. The bill further alleged that said fish were shipped to Halifax, and consigned to Messrs.

J. & B. F. Halsey, merchants, for sale; and upon examination of them by said gentlemen it was found that at least one-third were spoiled and rotten; that the complainant had never seen the defendant Maer since he ascertained this defect in the fish, though at an early opportunity he informed him of the deficiency in quantity. The bill then alleged, further, that Maer indorsed the bond to the defendant W. H. Murfree after it fell due, towit, on 1 October, 1819, and that said Murfree indorsed the same a few days afterwards, towit, 10 October, 1819, to the other defendant, Thomas Burges; that Burges had sued the complainant in the County Court of FRANKLIN, and obtained judgment; that from this judgment the complainant appealed to the Superior Court of said county, at Fall Term, 1826, of said court, and prayed for an injunction against all of said judgment at law, except $571.66, and prayed also for general relief. (364)

The fiat for the injunction was made 15 March, 1821.

At Spring Term, 1821, the defendant Burges answered that he was a purchaser and indorsee of said bond for valuable consideration, and asked the benefit of the provisions of the act of 1800, ch. 9, and therefore prayed that the injunction might be dissolved; at which time the injunction was dissolved with costs, and the bill continued over as an original, and an order made that upon the payment of the whole judgment into the office of the clerk and master, the defendant Burges should not receive the same until he had given bond with security to answer the final decree in this suit.

The defendant Murfree answered that he was a purchaser and indorsee without notice; that after he received the bond he asked payment of complainant by his agent, and said agent did not inform the defendant that complainant made any pretense at that time that the fish he received were unsound, though he did state that some of them had never been delivered. Defendant believed it was nothing more than an excuse, and, therefore, did not inform the defendant Burges of it, to whom he assigned the bond for valuable consideration on 10 October, 1819, or thereabouts.

The defendant Maer answered, and admitted that complainant bought fish which he had at a fishery on Roanoke; that the prices stated by complainant were those agreed on by them; that the complainant attended on the day when the fish were to be delivered, and stated that he had no boat ready, and desired a postponement of the delivery till the next day, or some day fixed on by the complainant. Such postponement was had till then, when one Samuel Hussy attended for the defendant and counted out 168 barrels of herrings, 77 barrels of shad, 42 barrels of rock, which amounted to $1,176; that said Hussy stated to defendant that he delivered said fish by request of the complainant to the captain of the boat employed by the complainant, which boat's crew com- (365)

menced taking the fish on board before Hussy left there; that he was not present, but believes the account of the fish as above rendered to him by Hussy was correct, and that the same were delivered to complainant or his agents as charged.

Defendant answered, further, that he knew nothing personally of the quality of the fish, but that he was informed by his agent, and believes, that they were good; that the complainant and he agreed that part of the barrels should be opened, and that by that means the quality should be ascertained, and that his agent, Hussy, informed him that he did so, and the fish were sound, and that those not opened were well filled with pickle, which he ascertained from the sound in moving the barrels to count them.

Defendant further answered that he sent the account aforesaid to William R. Minor, and asked him to take the bond of complainant, which he did for $1,176, as aforesaid; that he assigned to the other defendant, Murfree, for valuable consideration, and he could give him no notice of complainant's equity, for he had not then heard of it; and concludes with a prayer for costs, etc.

To these answers replications were taken, and the cause set for hearing, and transmitted to this Court for a final hearing.

From the depositions it appeared clearly that a day or two after the date of the bond mentioned in the bill the complainant had received 202 barrels of fish, and that a delivery was made of the whole quantity contracted for; but that the remaining 50 barrels were left by complainant's boat until the first of June, when complainant, by letter, directed them to be sent to Cedar Landing, and that it was done.

With respect to the fish being spoiled, there was evidence on both sides.

(366) *Badger and Haywood for defendants.*

TAYLOR, C. J. The complainant comes into this Court seeking a reduction of the judgment at law upon the twofold ground that the quantity of fish he contracted for was not delivered, and that, of the quantity delivered, a considerable part was so damaged as to be unfit for use and totally unsalable.

That the number of barrels stipulated for was delivered to the complainant seems to be placed beyond all doubt by the depositions of Hussy and Minor, the agents of the defendants; and if after the former had counted them out and gave the complainant a control over them, and after Minor had, at the complainant's request, conveyed the 69 barrels to Cedar Landing, the complainant declined receiving them, he alone must be responsible for the loss, for the defendant could do nothing more to make the delivery complete.

The question as to the unsoundness of the fish is involved in some difficulty as to the facts. There can be little doubt that many of the barrels received by Halsey, to sell on account of Pugh, were unmerchantable, and that of these, some were marked with black paint; but whether these were the identical barrels which were received from Maer does not appear, though those also were marked with black paint. But (367) Pugh might have bought, and Halsey might have received, other barrels with a similar mark; or other barrels might have been put on board the boat in her passage up the river. I admit that the probability is strong that the fish which were spoiled had been purchased by Pugh from Maer, but better evidence of the fact might have been adduced.

But then the question occurs, Were the fish unsound when delivered to Pugh's agent, or did they become unsound afterwards, from causes which were in activity at the time of the delivery (for the same consequence will follow in both cases), or did both cause and effect begin their existence after their sale? Halsey says that he opened several of the barrels in the presence of the skipper, who was well satisfied with their soundness, and that he knew by the sound of the pickle in others that they were properly filled. Minor sent some of the same fish to Richmond, and retailed others in the neighborhood, and heard no complaint respecting either. The leakage of the cask and the escape of the pickle are well known to be the most frequent cause of such fish becoming spoiled, and this may have happened in the shipping and stowing.

On the other hand, it is stated by the clerk of Halsey that many of the barrels were without pickle, and that he was under the necessity of filling them up; so that from the evidence now before the Court I should be wholly at a loss to determine whether the fish were unsound when delivered, or in the way of becoming so, or whether they became unsound afterwards. The only thing certain is that Pugh sustained a loss from their unsoundness. But supposing that there was evidence of the unsoundness of the fish when sold, yet there is none of a warranty, or of a knowledge in the vendor that they were so, nor any allegation in the bill to that effect. This Court cannot, any more than a court of law, allow for the deficiency in the value of an article sold in a case where the maxim of *caveat emptor* applies. (368)

Upon the motion to dismiss on the ground of the injunction being issued more than five months after the judgment, though an opinion on that point is not essential to the decision of the cause, as I think the bill ought to be dismissed for the reasons I have given, yet, as a case of practice, it may be usefully settled.

The act of 1800 was passed for the avowed object of preventing delay and debtors from thus defeating the claims of their creditors. Now this is effectually obviated by granting an injunction upon the terms of pay-

ing the money into the office—for thus all risk of the debtor's insolvency, or that of his securities, is avoided; and the money is held to be paid according to the decree, without a moment's delay. To dismiss the bill, therefore, on this objection, where an injunction is granted under the same terms with this, would be to sacrifice the manifest spirit of the act to its literal construction. I cannot, therefore, believe there is any weight in this objection.

By the Court, Bill dismissed.

Cited: Smith v. McLeod, 38 N. C., 401.

CANNON v. JONES, ADMINISTRATOR OF NICHOLS.

The plaintiff was security for one G. The defendant, the administrator of the creditor, obtained judgments at law against the principal and surety in a joint action. Plaintiff filed his bill to be relieved against the judgment, on the ground that he was discharged in equity by the laches of the holder. G. is not a competent witness to prove the truth of plaintiff's bill.

FROM WAKE. This was a bill filed by the complainant, as a surety to one Glynn, against the defendant, as the administrator of George Nichols, deceased, who was the obligee in the bond, alleging that a short time after the bond was due, the principal offered to pay and discharge the same to the obligee, who refused to accept it, and gave further (369) time to the principal to pay the bond, without the knowledge or assent of the complainant; that afterwards the principal again called on the obligee in his lifetime, and offered to pay a part of said bond, when Nichols stated and agreed with the principal that he, the said principal, should not pay the said bond, but that the said Nichols might still keep it to harass the complainant; and that on several other occasions the same language was held by the said Nichols; and on one occasion the said Nichols promised said principal to surrender up said bond; that he has died without doing so; that Glynn has become insolvent; that the defendant has sued the complainant and principal at law, and prays an injunction and general relief.

The defendant, in his answer, denied any personal knowledge of the matter, and put the complainant to proof. The only evidence was the deposition of Glynn, the principal, who supported the allegations of the bill throughout.

The question presented was whether the principal in the bond is a competent witness to prove the equity of the bill.

CANNON *v.* JONES.

Haywood for complainant.
Attorney-General for defendant.

TAYLOR, C. J. The complainant Cannon was surety for Glynn, in a note given to Nichols, whose administrator, Jones, instituted a suit upon the same, and effected a recovery. The complainant has satisfied the amount of the judgment, and enjoined it in the master's office to abide the event of a decree in this cause. He claims to be discharged by the negligence and forbearance of the payee during his lifetime, and of his administrator since his death, who he alleges might have received the money from the principal. To establish the facts on which he founds his equity, he offers the evidence of Glynn, the principal, and the single question in the case relates to his competency. (370)

It is a general rule that persons who have an immediate interest in the event, as being liable to the costs of action, are incompetent witnesses. Thus, bail may not give evidence for their principal, because they are immediately answerable in case of a verdict against the defendant. In an assumpsit for goods sold, the plaintiff having proved the sale of the goods to the defendant and one J. S., who were partners in trade, it was held that J. S. could not be a witness for the defendant to prove that the goods were sold to himself and that the defendant was not concerned in the purchase, except as his servant; for by discharging the defendant he benefits himself, as he would be liable to pay a share of the costs to be recovered by the plaintiff. Peake, N. P., 174. Though Glynn is liable to the payment of this money either to Jones or Cannon, yet he is evidently interested to defeat Jones's action against Cannon, since in so doing he would be liable to Jones only in the costs of one suit; whereas if Jones recovered against Cannon, the latter may recover against Glynn the costs which he has paid in the suit brought by Jones. There is consequently a certain benefit resulting to Glynn if Jones fails in the suit, and a certain disadvantage if he succeeds.

This precise question came before the Supreme Court of the United States, and it determined that the principal obligor in a bond is not a competent witness for the surety in an action upon the bond; the principal being liable to the surety for costs in case the judgment should be recovered against him. *Riddle v. Moss,* 7 Cranche, 206.

But the witness offered is under an additional disqualification, by our act of 1797, ch. 487, which allows a surety, who has paid money for his principal, to recover the same by a citation and motion in a summary way, without resorting to an action. Upon these grounds I think there is no doubt of Glynn's incompetence.

The other judges concurred. Judgment accordingly.

(371)

HOLMES & WILLIAMS v. WILLIAMS.

Where a cause stands more than two terms upon replications, and the usual order for commissions, it is regular to set it down for hearing; and where no steps are taken to prepare the cause for trial, the suit may be dismissed for want of prosecution; but the plaintiff may, if he please, have the cause set for hearing on bill and answer, or may have it heard. Therefore, when the judge below refused both, and dismissed the bill without hearing, such dismission was held to be erroneous.

FROM WAKE. Bill filed at April Term, 1822, the object of which was to set aside a conveyance fraudulently obtained from complainant Williams. The last step taken in the cause appeared to have been at the Spring Term, 1823, when commissions to take testimony were ordered, and at Fall Term, 1825, defendants moved to dismiss with costs for want of prosecution. Complainants resisted this motion, and prayed the court either to hear the cause or set it down for hearing, which the court refused, and ordered it to be dismissed with costs; whereupon complainants appealed.

HALL, J. The rule that the party should be prepared in two terms to set the cause for hearing is a good one; it prevents delay, and where the parties have taken no steps to prepare for trial, the causes have been generally dismissed, because it would avail the party nothing either to have the cause heard or set for trial in that unprepared state; but cases may happen where a defendant admits enough in his answer to entitle the complainant to a decree for something, although in other parts of his answer he may deny other allegations in the bill which it is incumbent on the complainant to establish by proof; however, without procuring such proof, the complainant may wish to have the cause heard on
(372) bill and answer, or set for hearing upon bill and answer. This, I think, he is entitled to have done. As it was not done, I think a writ of *procedendo* ought to issue; but the complainant will not, of course, be entitled to take testimony in the cause; he can only do it upon sufficient cause shown.

And of this opinion were the other judges. Reversed.

BRUCE ET AL. V. CHILD ET AL.

1. When a bill is filed to surcharge and falsify an account stated nineteen years before, the delay must be well accounted for to repel the presumption arising from this acquiescence. For this purpose, it is not enough that the mistake sought to be rectified was discovered within a few months previous to exhibiting the bill, but it should appear why the discovery was not sooner made.

2. The bill alleged a certain sum received by the defendant, larger than that charged in the stated account. The defendant, in her answer, stated that her faculties were impaired by age and infirmities, and after so great a length of time since the transaction (about forty years) she could not speak with certainty to the matters charged in the bill, and said, in answer to the particular error alleged, that she *believed* the sum charged in the stated account to be the true one, and did "*expressly aver* that to be the sum she received from her attorney, J. N., and no other." The attorney, in his deposition, swore that he paid her the larger sum: *Held*, that the charge was sufficiently denied to bring the case within the rule, that a decree will not be made against a positive denial, on the unsupported testimony of a single witness.

FROM ORANGE. This was a bill filed 28 August, 1812, setting forth that the plaintiffs were heirs at law and distributees of John McKerall, late of Norfolk, Va., who died intestate, January, 1776, possessed of and entitled to a very considerable personal estate; that immediately upon his death the defendant, his widow, took possession of the personal estate, and on 21 October, 1784, took out letters of administration in Norfolk; that in 1785 the defendant intermarried with Child, who possessed himself of the estate of McKerall, and afterwards died, leaving the defendant his executrix.

That on or about 1 January, 1793, the plaintiffs, children of (373) John McKerall, and William McKerall, another of the children who was made a defendant to the bill, and Mrs. Child, caused an account to be stated of the estate of John McKerall, whereby a balance of £2,057 6 7 was found to be due to the estate from Mrs. Child, and on 31 January, 1803, the plaintiffs received their shares under such settlement.

The bill then charged that in the settlement were divers errors, which were particularized. The only one material in the cause was that the executrix gave credit for the sum of £220 only, Virginia currency, as cash received by her from John Niveson, of Norfolk, when in truth she received £301 3 5.

It was further stated in the bill that the plaintiffs never discovered this error until six months before filing the bill; that letters of administration on the estate of John McKerall, within North Carolina, had been

granted to the plaintiffs, and that they had applied in vain to Mrs. Child to have the error rectified.

The prayer of the bill was that the defendant Mrs. Child might be decreed to rectify the settlement and account, and to supply and correct its errors and omissions, and pay to the plaintiffs what might be coming to them.

The account and settlement, which were made part of the bill, exhibited a balance due, as before stated, and contained also the following statement:

"We, Absalom Tatom and John Hogg, at the desire and request of the widow and heirs of John McKerall, heretofore of Norfolk, in Virginia, deceased, viz., Mrs. Frances Child, heretofore widow and administratrix of said John McKerall, deceased, but now widow of Francis Child, Esq., deceased, Miss Frances McKerall, daughter, and John McKerall and William McKerall, sons of the said John McKerall, deceased (the said William, who is a minor, appearing and consenting hereto by his brother John, as is suggested by said John), having proceeded to state and settle the account of Francis Child, Esq., deceased, who intermarried with Frances McKerall, widow and administratrix of said John McKerall, deceased, for his (the said Francis's) intromissions with the estate of said John McKerall, deceased, do, from the vouchers and statements handed to us by the parties, find the amount to stand as above (374) stated, by which it appears that the net amount of said estate in the hands of the executrix of the said Francis Child, deceased, on 1 January, 1793, was, etc. [Then follows a statement of the gross amount, and the share of each.] In which account we have not included or taken into view any charge the said Frances may have against the said children for boarding, clothing, and schooling, previous to and during her intermarriage with the said Francis Child, Esq. The said parties having, in our presence, assented to and signified their approbation to this statement and settlement."

This was signed by Messrs. Tatom and Hogg, and bore date 13 August, 1793.

A receipt for their shares, signed by plaintiffs, and dated 1 January, 1803, followed.

Mrs. Child, by her answer (so far as it is here material), insisted on the great length of time which had elapsed since the accounts were settled by referees chosen by all parties; and as to the error in the sum received from Nevison, she stated that Nevison was her agent and attorney to settle and collect an account due from one Sheddon in Norfolk; that Sheddon had an account against her husband, McKerall, and that on the adjustment of these accounts by Mr. Nevison the balance due her husband's estate, as she believed, was £220, for which she had once accounted

to plaintiffs, and she expressly averred that, and no other, to be the sum received by her from Mr. Nevison.

As to the discovery of errors in the account by plaintiffs, but six months before the bill was filed, she denied it.

At March Term, 1824, of Orange Court of Equity, on motion of complainant's solicitor, the cause was referred to the clerk and master of that court to take the account and report to the next term of the court. At the following term the clerk and master reported that Mrs. Child had fully accounted for the estate of John McKerall, except as to the sum of £81 3 6, Virginia currency, received from John Nevison, as appeared by his deposition, which was referred to, and which the master stated to be the only proof. No exceptions were filed below to the master's report; but at the same term the cause was removed to this Court, on the affidavit of Mrs. Child. (375)

Mr. Nevison's deposition stated that Mrs. Child, while the widow of McKerall, and residing in North Carolina, placed in his hands as an attorney a number of claims, belonging to the estate of McKerall, on various persons residing in various places; that the length of time rendered it impossible for him to speak positively.

That one of these claims was against Sheddon, and the deponent believed was received by him at different times and from different persons; but the deponent could not recollect with certainty, nor could he resort to his books, as they had been sent away during the late war, and had not been brought back; that the only claim on which he ever received anything for Mrs. Child was that against Sheddon.

The deposition further stated that of the money thus received, the deponent "paid to Mrs. Child the sums stated as per a memorandum on an annexed commission, which memorandum was taken prior to his books being sent away, to enable the deponent to state the sums so paid, in a deposition then intended to be taken at the request of Mr. Bruce, but which was prevented, he believes, by the interruption of the times." The sums were then stated in three items, and exceeded the sum with which Mrs. Child had been charged in the settlement by £81 3 6.

Deponent further stated that he made no agreement for the amount of his compensation; he charged a commission of 5 per cent on money received; for traveling on his client's business, not only the traveling expenses, but a compensation for the same; and for all other business, customary fees according to the service, and that he made several journeys on the business of Mrs. Child. That not long before the late war the plaintiffs called on him and asked information relative to his transactions as the agent and attorney of Mrs. Child, when he showed them his books and vouchers and gave them a memorandum. (376)

On the opening of the cause here, Badger for complainants said that as no exceptions had been filed below to the report of the clerk and master, nothing remained for complainants to do but to move for a confirmation of the report, and to take a decree accordingly; that the reference to the master was an interlocutory decree, showing that this was a proper case to surcharge and falsify in, and the question could not be here debated.

Badger for complainants.
Gaston, contra.

(381) TAYLOR, C. J. The object of this bill is to surcharge for an omission made in a settled account closed between the parties something less than twenty years before the filing of the bill, and relative to transactions which date their existence about forty years before. In such a case there ought to be clear and satisfactory evidence of the existence of the error, and I do not think that the deposition of Nevison, singly opposed to the answer, containing as strong a denial as the nature of the subject admits of, affords such evidence.

The master's report is founded solely on that testimony, as appears upon the face of it, and this warrants the application of the rule that there cannot be a decree in this Court upon the testimony of a
(382) single witness, unsupported by circumstances, against the positive denial in an answer which is responsive to the bill. Her answer is that upon the adjustment of the accounts by J. Nevison she does not believe that the balance found to be due was £336 13 4, the sum with which she is charged by the referees; "and she does expressly aver that to be the sum she received from her said attorney, J. Nevison, and no other."

I am also of opinion that the complainants have not sufficiently accounted for the delay in not exhibiting this claim at an earlier period. The reason stated in the bill is unsatisfactory, that they did not know of it until six months before the filing of the bill. When the account was stated by the referees, at the instance of all parties concerned, it is fair to presume that men of business would take the obvious and easy method to become acquainted with their rights, that they might be prepared to exhibit just and repel unjust charges. Mr. Nevison was known to be the attorney for the estate, and charged with the collection of debts due to it. When the account was stated the administrators are charged with money paid by Nevison; and it was entirely in the power of the complainants to ascertain, within a reasonable period from the settlement, whether greater sums had been received from the attorney than the

estate had been credited for. Long delay, in matters of account, places the accounting party under insuperable difficulties, especially where he is to be charged by memorandums of a third person. An earlier application might have revived the memory of circumstances serving to show that the credit has been rightly given. The very forbearance to make a demand is considered as affording a consciousness that it was satisfied, or an intention to relinquish it.

"The Court will not aid stale demands, where the party has slept upon his rights and acquiesced for a great length of time; the activity of the Court can only be awakened by conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive (383) and does nothing. Laches and neglect are always discouraged; and, therefore, from the beginning of this jurisdiction there was always a limitation to suits in this Court." 3 Bro., 639. In one case it has been held that if the party, upon a notice that nothing was due, did not investigate his own account, and never made any demand for the money, a demurrer should be allowed upon the statute of limitations. 19 Vesey, 188. That case was within the statute of limitations; but it held that though the court follows the law by analogy to the statute, it does not adopt it in all cases. It may be equitable to demand a debt, though not legal; but if it be not equitable, the party will be left to law. After a great length of time without suit, it shall be presumed that the balance is satisfied. Though this is not a case affected by the legal limitation, yet it comes within the law of this Court, and presents a case wherein laches have made the demand inequitable. 5 Vesey, 678.

I am of opinion that the bill should be dismissed.

HALL, J. McKerall, the first husband of the defendant, Mrs. Child, part of whose estate is now sought after, died about 1776; his residence was at Norfolk, in the State of Virginia. Early in the Revolutionary War his widow and children removed to Hillsborough, in this State. In 1793, when the parties were of full age, a settlement was made between them by two persons chosen for that purpose. In this settlement Mrs. Child was debited with a certain sum of money received from Nevison, the witness, a resident of Norfolk. Nineteen years afterwards the present bill was filed. The complainants allege that Mrs. Child received a larger sum of money from Nevison than she was debited with in the settlement, and that they did not become acquainted with that fact until within six months before the suit was brought. They give us no reason, however, why they did not become acquainted with it. Nevison was as easy of access then as afterwards; facts could have been established with more certainty then than nineteen or more years after- (384)

wards. The mind and memory of Mrs. Child, who is now well stricken in years, were then much nearer their wonted vigor.

For these reasons, I have but little hesitation in saying that the bill ought to be

By the Court, Dismissed with costs.

Cited: McLin v. McNamara, 21 N. C., 409; *McDonald v. McLeod,* 36 N. C., 224.

ATTORNEY-GENERAL AND JOSEPH BELL AND OTHERS, INHABITANTS OF THE TOWN OF TARBOROUGH, v. BLOUNT.

Where a thing already exists which is alleged to be a nuisance, it may be a question whether this Court will interfere by injunction before a trial at law establishing the fact of nuisance; but where the object of the bill is to *prevent* the erection of that which will be productive of injury, serious and irreparable, if erected, this Court will pass upon the question, and interpose its authority to avert the threatened injury, for the matter cannot be tried at law, and should this Court refuse its aid, there would be no remedy.

FROM EDGECOMBE. The complainants in their bill set forth that the defendant intended to erect a mill and dam on a small stream in the vicinity of the town of Tarborough, and at a short distance from the public academy of that place; that a mill, now destroyed, had formerly been erected near the place at which it was understood defendant intended to build his, during the existence of which the health of the inhabitants of the town had materially suffered; and alleged that if defendant should be permitted to carry his intention into execution great and irreparable mischief would ensue, as the noxious vapors arising from the pond would materially affect the salubrity of the town and tend to the entire destruction of the academy. In conclusion, it sought
(385) the preventive aid of the court, and, therefore, prayed a writ of injunction.

The answer admitted the intention charged in the bill to erect a dam and mill in the vicinity of the town, and at a short distance from the academy; but denied that the injurious consequences which were apprehended would be the necessary result of such erection.

Upon the coming in of the answer, a motion was made to dissolve the injunction. The court refused the motion, but retained the injunction until hearing; and the cause, having been set for hearing, was removed into this Court, it was now moved to dismiss the bill.

Mordecai and Seawell in support of the motion.
Gaston for complainants.

After argument, upon the suggestion of the Court, the *Attorney-General* was made a party complainant, *curia adv. vult.*

TAYLOR, C. J. Two inquiries are presented by the argument in this case. The first relates to the power of the Court to interpose the preventive remedy of an injunction; the other, whether it is proper to exercise the power under the evidence and circumstances of (391) this case.

It is manifest that without some jurisdiction competent to prevent a threatened evil of the sort complained of, there would be a great defect of justice in this State; for when the injury, if done, cannot be repaired in damages, it is essential to the protection of right that this Court, whose process is alone adequate to the occasion, should interpose its summary remedy to compel persons so to use their own property as not to injure that of others. It has accordingly been long settled as a principle of the Court that in cases where irreparable mischief may be done, as of waste, or in a plain case of nuisance, an injunction will be immediately granted. Where there is a clear right to the enjoyment of the subject in question, and an injurious interruption of that right which in equity ought to be prevented, this Court will not withhold its aid; and this rule is abundantly established by the authorities. 1 Vern., 120, 127, 275; 2 Ves., 414; 2 Atkyns, 391, and many others.

It appears to me that the evidence in this case approaches as nearly to ascertain the certainty of the apprehended evil, if not prevented, as can be expected from the nature of the subject. There was formerly a mill-pond nearly in the situation where the defendant proposes to establish his, and during the whole time of its being kept up the whole community, particularly the younger part of it, were subject to destructive autumnal diseases. Soon after the milldam was broken and the pond emptied, a visible improvement took place in the healthfulness of the place; children were raised to maturity, the population increased, and a seminary of learning was erected within what was before the sphere of pestilential influence. Of these facts it is impossible to doubt after reading the depositions. Is it not to be expected that the same causes, if put into operation, will produce the same effect? Nor is the probability of this lessened by the proposed alteration in the site of the pond, its size, and the situation of the mill. The utmost allowance that can be made on this point is that it may not render the town quite so unhealthful; but if the Court sees that not merely in the fears of the inhabit- (392) ants, but a moral certainty exists that if this work is suffered to proceed, the health of this community will again be put in jeopardy, it is

its bounden duty to interpose. Indeed, it is impossible to shut our eyes to the fact that in this climate a collection of stagnant water in the neighborhood of a town will render the inhabitants unhealthy; and however different theories may be pressed into the service of accounting for it, or plans proposed to mitigate the evil, the painful conviction forces itself upon us that the effect invariably follows the cause, and no antidote is yet discovered.

Under this observation and experience, a court might be satisfied with much less evidence than has been adduced in this case. I am of opinion that the injunction ought to be made perpetual.

HALL, J. This is not a case where it is necessary to controvert the question whether this Court will interfere by injunction or not, before a trial at law is had, declaring that to be a nuisance or not which in the bill is set forth to be one. No such question in this case can be tried at law. No nuisance exists—the object of the bill is to enjoin the defendant from creating one; and it does appear to me that it is a proper case for this Court's interference.

The nuisance which it is apprehended will arise from the erection of the mill does not appear to me to be a phantom, created by the fears of the witnesses, but a reality bottomed upon past experience. It is not likely that the effects of ponded water would be less deleterious now than formerly; the same causes produce the same effects. I think the injunction ought to be made perpetual, with costs.

HENDERSON, J., was of the same opinion, so the injunction was made perpetual.

Cited: Raleigh v. Hunter, 16 N. C., 13; *Attorney-General v. Lea,* 38 N. C., 304; *Clark v. Lawrence,* 50 N. C., 85, 86; *Privett v. Whitaker,* 73 N. C., 556; *Vickers v. Durham,* 132 N. C., 881; *Pedrick v. Blount,* 143 N. C., 509; *Cherry v. Williams,* 147 N. C., 459; *McManus v. R. R.,* 150 N. C., 661.

(393)

CROOM, EXECUTOR OF WHITFIELD, v. HERRING ET AL., LEGATEES OF WHITFIELD.

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

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

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

FROM LENOIR. The bill, which was filed 10 April, 1820, stated that Bryan Whitfield died, having made a will, of which the plaintiff was an executor, and the sole surviving executor of those who had qualified; that a difficulty had arisen in the construction of the will whereby plaintiff was likely to be injured, by reason of conflicting claims, and, therefore, he prayed that the parties interested might be made to interplead with each other, and that for his protection he might have the advice and instruction of the court.

Bryan Whitfield had many children. To the elder of these he had made considerable advancements, both of real and personal estate. By his will he also devised to each of his younger children (who had not been advanced) real estate, bank stock, and slaves; and he also devised to his wife real estate, and bequeathed to her a few slaves and stock, provisions, and farming utensils to the value of $1,200; and he also devised and bequeathed to his elder children the estate advanced to them. (394)

The testator, besides the estate so particularly advanced, devised and bequeathed, was seized and possessed of real estate, bank stock, slaves, and other personal property to the value of $80,000.

After the several devises and bequests to his wife and children above mentioned, there came the following clause:

"I leave all my estate not mentioned in this will, both real and personal, except negroes and bank stock, to be sold on twelve months credit, and the money arising from the sale thereof, and the debts due me, after discharging all my just debts, together with my negroes and bank stock, not disposed of by this will, I leave to be divided among all my heirs, agreeable to the statute of distributions of intestates' estates."

The widow dissented from the will, and dower in the real estate was allotted her, but no notice was taken by them of the personal estate.

Upon the clause above recited, various claims were set up: the widow claiming to be entitled as one of the "heirs," according to the statute; the younger children contending that the advancements made during the testator's life should be brought into hotchpot, if the children advanced

claimed any part of the residuum; while the older children insisted that the residuum should be distributed without reference to the advancements; or that the specific legacies, as well as advancements, should be taken into account.

The cause was removed to this Court by affidavit.

HENDERSON, J. He on whom the law casts an inheritance on the death of the ancestor is designated by the technical word *heir*. It could not originally be used to designate him on whom the law casts the goods or chattel property, for it cast them on no one; no person was appointed by law to succeed to the deceased ancestor; on his death they be-
(395) came *bona vacantia*, and were seized by the king on that account, and by him, as grand almoner, applied to pious uses (now considered superstitious), for the good of the soul of their former owner. Hence it is that in the common-law vocabulary there could be found no technical word to designate such successor. After one was pointed out by the statute of distributions the technical word used in regard to inheritances would not answer for that purpose; for very frequently the persons are different, the rules of construction being very different from the canons of descent. The word *"heir,"* therefore, retains its primitive and technical signification when standing alone and unexplained by the context. But as words of every kind, technical as well as others, and particularly when used in last wills, are liable to be varied in their meaning, to meet the intention of those who use them, when shown in an authentic manner the word *heir* may mean some other person than him on whom the law casts the inheritance in a real estate; and the question is, Whom does it mean, when used in a last will, in reference to personal property?

It is admitted by all that it does not (unless under peculiar circumstances) mean the heir to real estate. By some it is said that it means children; by others, next of kin; and by others, all those who are called to succeed to personal estate by law (the statute of distributions). Those who are in favor of the meaning first mentioned, "children," say that this is its vulgar and common meaning, and as it cannot have its technical one, it must have this. I think that the premises are incorrect, and, even if correct, that the conclusion does not follow. The word heirs, in common conversation, may and very often must be understood to mean children; but this arises not from the word alone, but from the context, the manner and cause of speaking. For a person to say that another has got an heir, or that he has heirs, must unquestionably mean, if the speaker meant anything, that he has a child or children; for, to understand him as communicating something, and at the same
(396) time to use the word heir in its extended sense, is next to impos-

sible; for there is not a man in a hundred thousand born without there being some one to succeed to his property, should he die instantly, particularly to personal property, where foreigners are not excluded. Most of us are born with innumerable heirs, if so understood. Unless, therefore, we are speaking of some foreigner just come among us, and then in regard to real property, or some person whose family connection is unknown, or supposed to be unknown, to the person spoken to, children must be presumed to be meant by the speaker by the word heirs; for we are not born with children—they are an after acquisition; all of us do not have them at any time. It would be an absurdity to suppose that the speaker designed to communicate to another, to inform him that another had that which is common to every man in the community when, by not a very strained construction, a sensible and rational meaning can be attributed to the speaker. I think, therefore, that the word heirs, of itself, unaided by anything else, does not mean children, in common or vulgar conversation; although in such conversation it must be so understood, to give to the speaker a rational meaning, or any meaning at all. This arises from what may properly be called the context, the subject; and if the premises are right, I should think the conclusion wrong; for the word was certainly adopted from the law of inheritances, and thereby acquired an analogous meaning, which would by such construction be entirely lost. Others say that it means *next of kin,* admitting the analogy, and contending that blood connection is an essential constituent in an heir. It is admitted that, by the canons of descent in England, one to succeed as heir must be of the blood of the ancestor; but he is heir not because he is of the blood, but because he is the successor of the estate of the dead man. The law has prescribed blood as a qualification; but the right to succeed, and not the reason wherefore, stamps (397) him with the character of heir. The law prescribed the canon of descent to point out the successor; the person who succeeds is heir, not because he succeeds by this or that rule, but because he *succeeds.* And at once to put the argument at rest, it may be asked, Does the widow who succeeds to the estate of her deceased husband under the act of 1801 come to the estate by purchase or descent? For she must come in by the one or the other of these two ways; there is no other. It is very clear that she does not come in by purchase; that is, by her own act she is perfectly passive; it is thrown upon her by law, as much as it is thrown upon the uncle, there being no issue, brothers or sisters, or their issue; that is, none whom the law prefers to him. If she does not come in by the purchase, it follows that she comes in by descent. She is, therefore, in such case, the heir of the husband. Yet she is not of his blood.

Mr. Blackstone, in his discussion of the question whether the lord, who comes in by escheat, comes in by descent or purchase, has caused some

confusion on this subject. He could find no canon of descent which pointed to the lord as heir to his descent; the lord was passive, at least not active in the character of purchaser, *i. e.,* acquirer, and there was evidently a vague notion floating in his mind that he is not heir, because not of the blood. At length he takes the middle course, the one most apt to be taken by those who are not sure which course is right, and says that he succeeds by a kind of *quasi* descent, a kind of caducary succession. The fact is that he succeeded to the *estate* of his tenant by neither; for he succeeded to his *estate* not at all; the *estate* of the tenant expired by his death without heirs capable of succeeding him. It expired by the terms of its own limitation; for it was to him and his heirs; when they failed, the *lands,* not the *estate,* reverted to the grantor, the lord of whom he held them. The lord took the *lands* again in virtue of that right of reverter which in law is called a
(398) seignory. He comes in, not under or representing the tenant, but above him, and by virtue of a different estate. Exclude the idea of blood, and it is matter of surprise how it could be doubted that the widow is not included in the word heir, when applied to personal property. Her claims to the succession are precisely the same with the next of kin; both unknown to the common law, and both given by the same statute. Why the word heirs should be translated into next of kin cannot be accounted for otherwise than by blending blood connection with heirship; and if the meaning either of children or next of kin is to be received, grandchildren, where there are children, will be excluded; for it is said that grandchildren cannot take under the description of children where there are children, nor under the description next of kin; for grandchildren are not *next* whilst there are *nearer,* and in the statute the evil is guarded against in lineal accession, and in collateral, as far as brothers' and sisters' children; the Legislature being aware that the more remote of kin would be excluded by the nearer, under the description next of kin.

These afford insuperable reasons why the word heir should not be understood to mean either next of kin or children. If, therefore, it neither means next of kin nor children, there can be no objection to giving it a meaning analogous to what is the proper technical meaning of the words *mutatis mutandis, i. e.,* they whom the law has appointed to succeed to the personal estate of dead men who make no appointment themselves; as in real estates in such cases, the heir who is appointed by law to succeed the dead man. By this definition all those appointed to take under the statute of distributions are embraced; the law speaks and designates the heirs. Unless this expression is tolerated and permitted to bear this meaning, we shall be totally unable to express the idea without using a phrase instead of a term; for I know of no other term which will

convey the idea. Distributee is sometimes used, but scarcely ever without an apology for it; a term of our own coinage, which is not to be found in Johnson's Dictionary, in Jacob's Law Dictionary, nor (399) in any other that I know of. I do not recollect to have seen it in any English work of note, or not of note. As far as I have been able to ascertain, the English authorities warrant this construction; I am very well satisfied that they are not against it. *Sir William Grant* very lately said he was not, in the case then under consideration, called on to decide it, but that his opinion was, heirs, when applied to personal property, meant heirs *quoad* the property; and he repeated the same thing in another case.

It is true that there is a case to be found in Ambler (who is said to be not very high authority), decided by the master of the rolls, *Sir Thomas Clarke,* where it is said that heir means children; but the absurdity to which this led him is its own refutation. He first said that heirs meant children; and as grandchildren, where there were children, did not mean children, he excluded the grandchildren. He should have recollected that *nullum simile est idem.* When drawing from the likeness he had taken, he should now and then have cast an eye on the original; and the truth is, all who thus translate will be carried into the same absurdity.

Many cases were cited. I will examine a few of the most prominent. In 1 Ves., 84, the testator directed that certain personal property, after the death of his wife, to whom he had given the greater part of his estate (and possibly the whole) for life, should be equally divided among his *relations, according to the statute of distributions.* It was decided that it was not intended by the testator, by the word "relations," to include his wife: first, because the wife is not the relation of the husband—which means blood connection—and I think, properly, the husbands and wives of such, who are by marriage identified with each other; secondly, he had given a life estate in the greater part, and probably all of the same property, which incongruity raised a presumption that he did not intend to include her. It was further said that she was not brought (400) in by the words *according to the statute of distributions;* that by such reference to the statute he did not intend to point out who was to take, for that he had done before by the word relations; but only how they are to take. I express no opinion on the correctness of this latter part, for it does not affect this case, or this part of it. In 18 Ves., 53, the words are *my next of kin, as if I had died intestate.* It was held, and very properly, that the widow was not intended by these words; the wife is not kin, *i. e.,* of kind, to her husband. That had been long settled, soon after the statute of Henry VIII., relative to granting administrations. The words, as if I had died intestate, as said above, did not point to the persons who were to take, but to the manner, and they could not

enlarge by mere implication the known and definite meaning of the words *next of kin.* In the same book, p. 49, the words are *next of kin* or *personal representatives.* As it is the office and nature of a limited description to control and limit a general one, the *general description, "personal representatives,"* was *controlled* and *limited* by the more *limited* and *restricted one, "next of kin";* at least, that is the reason assigned. *Vaux v. Henderson,* decided in 1806, by *Sir William Grant,* to be found in Jacobs & Walker, 387, in a note, was not, as I conceive, upon the point; the question there was not what particular individuals composed the heirs, or, more properly, were comprised under the description, but which class was entitled. The question arose in Coutts' will, who had bequeathed to Vaux £200, and in case of his death before him, to Vaux's heirs. Vaux died before him. The contest was between those who answered the description at Coutts' death and those who did so at Vaux's death. The reporter called them the next of kin, a phrase, no doubt, of his own, as the question who they were did not arise. The contest was between classes, and not individuals. A term, therefore, was used different from the purpose, without any regard to the point whether
(401) it embraced all, and excluded all, and excluded none of those who contested the question. The words came nearer to it than any other words which he could well use; for, as was said before, there is no technical word, and he would dislike, as a lawyer, to use the word heirs when speaking of personal property. It was quite natural for him to use the word which embraced the greatest number of individuals composing the class, although it might exclude some; for it did not interfere with the question the note was designed to illustrate. The case proves nothing. For aught that appears, the widow might have been named in each class; if she was named in one, she was in the other. Her claim, except as to the quantum, possibly by there being more in one class than the other, was not affected by the question.

And as a confirmation that I am right in this view of the case, the decision was made by *Sir William Grant,* whose opinion I have before stated.

I must not pass over *Whitehurst v. Pritchard,* 5 N. C., 383, in the late Supreme Court, in which decision I participated, and which principle I think is at variance with the opinion here delivered. I have no hesitation in saying that the decision was wrong. It was decided without argument and on the authority of a case in Pere Williams, which I confess I did not then understand.

Upon the whole, I am satisfied that this testator meant by the words *"to be divided among all my heirs agreeable to the statute of distributions of intestates' estates,"* to call to the succession all those whom the law appoints to succeed to the personal estate of a dead man, in default

of his having made an appointment himself; and that his widow, in this case, is one of them. Upon the point of bringing advancements into account, after much hesitation, I am of opinion that the property passing under that clause in his will was not to be affected by any disposition which he had at any time made of any other property; that the statute of distributions was referred to to designate who he meant by the word heirs, and to point out the manner of the division of that (402) property.

I think that the widow has abandoned her claim to the $1,200. It is land; it was given in lieu of the land. Taking dower satisfies for all claims for land. She cannot have her full share of the land and that which was intended to make her share a full one.

The master of the court will take an account of the personal estate, in default of the parties appointing some one to do it; and in either case a report will be made to this Court.

The lands being directed to be sold and converted into money, are considered in this Court as personal estate.

The costs to be paid out of the fund.

By the Court, Decree accordingly.

Cited: Stow v. Ward, 12 N. C., 68; *Ricks v. Williams,* 16 N. C., 10; *Henry v. Henry,* 31 N. C., 280; *Brown v. Brown,* 37 N. C., 310; *Freeman v. Knight,* 37 N. C., 76; *Radford v. Radford,* 41 N. C., 498; *Brothers v. Cartwright,* 55 N. C., 116; *May v. Lewis,* 132 N. C., 117; *Price v. Griffin,* 150 N. C., 527.

BENZIEN'S EXECUTORS v. LENOIR ET AL.
AND
GRIFFIN'S HEIRS v. GRIFFIN'S EXECUTORS.

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

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

3. Here it was objected that the decrees complained of were decrees of this Court, or at least decrees directed by this Court to be made below, and that neither a petition to rehear nor a bill to review could be entertained

by the court below; but, *Held*, by two judges, that the decrees were decrees of the court below, and, as such, reëxaminable by bill or petition below, whether they were pronounced by the judge upon his own opinion or upon conference with the other judges.

THE bill, in the first of these cases, was exhibited in the District Court of Salisbury, and afterwards, upon the change of the judicial system in 1806, was removed to the Court of Equity of IREDELL County. In the latter court certain points were made presenting the whole case, and were transmitted to the Supreme Court, under the act of 1799, ch. 520, N. R., for an opinion thereon. In Supreme Court, at July Term, 1814, a decree was made for the plaintiffs, directing the lands mentioned in the bill to be conveyed to them and the possession to be surrendered; and further directing an account of the mesne profits to be taken and to be returned to the Court of Equity of Iredell.

(404) This decree was entered in the Supreme Court, and, according to the direction of the act of Assembly referred to, was also entered in the court below, to be there carried into execution. Afterwards a petition for rehearing was filed in that court, a rehearing ordered, and the cause transmitted, under the act of 1818, to this Court for rehearing.

In the second of these cases the bill was exhibited in the Court of Equity of Johnston, and ordered to the Supreme Court under its former organization. It was heard by the present Supreme Court, at a former term, and a decree pronounced for the defendants, and the bill dismissed. The decree was entered in the court below, according to the act referred to; and the decree having been enrolled in the court below, a bill of review was filed in the court below and ordered to this Court for hearing.

In this Court a motion was made to dismiss the petition for rehearing and the bill of review, upon the ground that the decrees sought to be reheard and reviewed were decrees of the Supreme Court, or decrees directed by that Court, and that, therefore, the courts below could not entertain an application to revise or reverse them.

The question was elaborately argued; in the first case, by *Gaston* and *Seawell,* in support of the motion, and *Badger, contra;* and in the latter case by *Gaston* in support of the motion, and *Seawell* and *Badger, contra.*

HALL, J. Whether there should be a rehearing in *Benzien v. Lenoir,* or whether a bill of review will lie in *Griffin v. Griffin,* depends upon the right construction of the acts of Assembly passed for the purpose of establishing the Court of Conference, afterwards styled the Supreme Court.

The first act that passed upon the subject was in 1799, entitled "An act directing the judges of the Superior Courts to meet together to settle questions of law and equity arising on the circuit (New Rev., ch. 520). This act, in the preamble, amongst other things, complains (405) of the want of uniform decisions in questions of law and equity arising on the circuits. It then proceeds to enact that the judges shall meet together at times therein fixed upon, in the city of Raleigh, for the purpose of determining all questions of law and equity arising and remaining undetermined upon the circuit. It there puts it in the power of a single judge on the circuit to adjourn questions of law arising on the circuit to the city of Raleigh, to be decided on by all the judges at their stated meetings.

It is then made the duty of the clerk of the Court of Conference to transmit a full and correct certificate of the decision of the judges to the clerk of the Superior Court of Law and Equity where the question had been depending and had arisen, and the clerk of said court shall issue execution as shall be proper in the case, or otherwise proceed as the decision of the judges may demand.

The reasons why there was a want of uniformity in judicial decisions was that the different Superior Courts were held by single judges, and there was no court established of higher grade for the purpose of making these decisions uniform, and, as might be expected, there were, on the same question, contrariant opinions. This mischief gave rise to the act I have just recited. This act did not establish a court of higher grade than the Superior Courts; it did not establish a Court of Appeals, to which an appeal lay from the Superior Courts, and in which, after an appeal, the suit was finally decided and settled; but it adopted the mode of making all the judges decide every disputed question which arose in any of the Superior Courts which the judge holding such court thought proper to adjourn to the Court of Conference.

After the judges in that court gave their opinions, those opinions were certified to the court from whence the case came, and the same proceedings were had on it as if the judges who held the court (406) had decided it alone, and had not adjourned it to the Court of Conference for the opinion of all the judges. The record between the parties was complete in the Superior Court.

It is to be kept in view that it was not necessary that the whole record should be taken to the Court of Conference; it was only necessary to transmit as much of it as set forth the questions adjourned there; after that question was decided the decision was certified to the Superior Court from whence it came, as before observed. The record sent to the Court of Conference remained there; but it was a dead letter; the Court could proceed no further upon it, and all further proceedings carried on in the

Superior Court, and I think, without doubt, that the judgment between the parties was in the Superior Court.

Suppose two questions of law to arise in the Superior Court, and one only to be transferred to the Court of Conference, decided upon and certified back, the other to be decided by the judge alone who held the court: there could be but one judgment in such suit, and that judgment surely would be in the Superior Court.

The act of 1810, New Rev., ch. 785, authorizes an *appeal* from any decision made in the Superior Court to the Court of Conference (now styled the Supreme Court), and by another act it is declared that no judge shall give an opinion in the Supreme Court from whose opinion an appeal may have been granted; but it is obvious that the regulations do not affect the present question, because the cases now before the Court were brought here by adjournment, under the act of 1799, and not by way of appeal, so that all the judges were at liberty to take part in deciding them.

The act of 1818, New Rev., ch. 962, constituting the present Supreme Court, declares that all causes pending in the then existing Supreme Court at that time shall be decided by the judges appointed by said act, and shall have, in every respect, the same effect and operation, and shall be certified and carried into effect in the same manner, in all (407) respects, as if made in the Supreme Court under its present form.

It, therefore, appears that both the cases now under examination are to be decided as cases adjourned to the Court of Conference under the act of 1799. I, therefore, think that when the decrees were made in those cases, and certified to the Superior Courts respectively, those decisions or decrees were decisions or decrees of the Superior Courts. These cases were adjourned to the Supreme Court, to make all the judges parties to their decision in order thereby to make the decisions in the State uniform.

If I am right in this view of the case, it follows that a rehearing may be had in one of them, and that a bill may be brought to review the other. Many authorities have been read in this case, which no doubt were very applicable to the organization of the courts in England, but which do not apply in this case; because our courts are far from being similarly constituted with the courts in that country.

HENDERSON, J. These cases depend, I think, on the question whether the decrees sought to be reheard and reviewed are the judgments of the courts wherein the petition to rehear and the bill to review them are filed, or the judgments or decrees of a superior and controlling court. This question depends on the construction of our act of 1799, directing the judges to meet at Raleigh for the purpose of determining all ques-

tions of law and equity arising and remaining undetermined on the circuit. Section 3 directs that whenever any question of law or equity shall arise upon the circuit before any of the judges of the Superior Courts which the judge sitting may be unwilling to determine, *and shall be desirous of further consideration* and a conference with the other judges, or where such questions had already arisen on the circuit, and had remained undecided by reason of a disagreement of the judges on the circuit, in either case the clerk of the district court, under the direction of the judge then sitting before whom such question (408) shall arise or come, shall make out a transcript of the proceedings in the case, and deliver the same to the judge, or the case shall be made out by the counsel, under the direction of the judge, or by the judge himself, as the nature of the case may require, which the judges shall file, at the meeting of the judges, with their clerk. By section 4 the judges are directed to argue and determine such cases, and file their opinions in writing with their clerk. Section 5 directs that the clerk of the meeting shall make out a full and correct certificate of the decision of the judges, and forward it to the clerk of the Superior Court of Law or Equity, where the question had been depending and had arisen; and the clerk of the said Superior Court shall issue execution or otherwise proceed as the decision of the judges may demand. I have not given the words of the act, except only such as may assist us in ascertaining the meaning of the Legislature so far as affects the present question. I consider this meeting of the judges under this act, and also under the act of 1810, when sitting on adjourned cases, as possessing not a single attribute or quality of a court, further than to protect themselves from interruption, that they might discharge the functions conferred by law; they had no process by which parties were brought before them or by which they enforced their decrees; the causes in which the points arose remained in the Superior Courts, the points only were adjourned to the meeting; the judgments were enforced by process from the Superior Courts, on judgments of the Supreme Court, entered in that Court; they are judgments of the same grade as the other judgments of the court. In ascertaining what the law is, I would respect it as a higher evidence, as I would respect an opinion maturely formed more than one hastily made up; as the opinion of six men, more than the opinion of one man. But in judicial graduations I should rank it only as the judgment of the Superior Court. I think there is nothing in the argument that upon the certificate of the clerk of the meeting of the judges, the clerk of the Superior (409) Court issues execution *instanter*. This is to avoid delay; the judgment is entered *instanter* from the certificate, as coming from the judicial power residing in that court; and it is as competent for the Legislature to provide that it should be transmitted by the mode pointed

out in the act as to await the arrival of the judge, and then (the doubts being removed) to receive the judgment from the lips of the judge. The clerk issues an execution upon it as a record of that court, and therein recites it as such. It is said to permit the judge to rehear is to permit him to alter or change the decree; it thereby places him above the Conference Court. I think not; it only makes him equal to himself, and gives to him the power inherent in our chancellors, to rehear and alter the interlocutory decrees of his own court and to review and to reverse its final decrees; nor can this be considered as a subterfuge, that it is obeying the opinion of all the judges in form and substituting his own opinion for theirs; he obeys the will of the Legislature by causing the opinion of the judges in conference to be entered as the judgment of the judicial power which presides in that court, and that judgment has all the qualities of a judgment of that court, and none other, liable to be reheard and reviewed by the same judicial power that made it. I am strongly impressed with the belief that this is the only fair construction of the act; for it is not fairly to be presumed that the Legislature intended to take from these judgments a quality incident to chancery decisions—a quality of being revised somewhere; and if not by application to the Supreme Court, to what court shall application be made? If to the Conference Court, the applicant would be informed that they have not, nor ever had, the record—it never was before them; that they had only the points of the case brought before the judicial body which presides in the Superior Courts when not in conference; that the instructions of that body had been entered on the records of the Superior
(410) Courts; that they had not any record to alter or amend.

I have cited no authorities, for none can be found in the history of the English law; it bears no analogy to the decrees of the House of Peers, that has every attribute of a court. That has the most compulsory process to bring parties before it, towit, an appeal which lies to them from the court of chancery, and there is no doubt but they might cause the decrees to be entered on their rolls, and enforce them by process of their own; but, as matter of convenience, their decrees are remitted to the court from which the case came, and there enforced. But on the point of reëxamining their decrees I express no opinion; nor would I be understood as expressing any in cases of appeals to the late Supreme Court, or to cases determined by this Court.

I am, therefore, of opinion that the motion to dismiss the bill of review in *Griffin v. Griffin,* and the petition to rehear the interlocutory decree in *Benzien v. Lenoir,* be disallowed. I think both stand on the same ground.

PER CURIAM. Decree accordingly.

Cited: S. c., 16 N. C., 226.
Distinguished: R. R. v. Swepson, 73 N. C., 317.

BRACHEN v. COLQUHOUN ET AL.

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

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

FROM ORANGE. In this case one of the defendants was a non- (411)
resident, and in the court below an order of publication was made, but it did not appear from the transcript filed in this Court that the publication had been made; nor was there any judgment *pro confesso* entered against the absent defendant, but the cause had been set for hearing below.

When the cause came on here to be heard, Badger, of counsel, desired to know if he might proceed in the hearing, upon the presumption that, as the cause was ordered to be heard, all the preceding steps necessary to make that order proper had been taken. The judges at first appeared to differ in opinion; but it was agreed if proof of the publication could now be shown the judgment *pro confesso* might be entered *nunc pro tunc*. The hearing was then postponed, to give time for the production of such proof; but at an after day Badger informed the Court that no such publication could be found in the *Gazette*, and prayed, if the Court should be of opinion that the cause could not be heard without such proof, that it might be remitted to the court below for further proceedings.

HENDERSON, J. Upon principle, the order for setting the cause for hearing presupposes that the conditional order for taking the bill *pro confesso* as to Jennett Colquhoun had been made absolute, for the former order could not regularly have been made without the latter, that is, the cause could not have been properly set for hearing without the defendants having answered, or been in contempt for not answering. And in ordinary cases, where the defendant is in court, it should not be required to be shown expressly that all proceedings have been regular. This regularity may be fairly inferred by showing an order or proceedings of the court, which could not have been properly done without such previous proceedings. But it would be improper to draw such inference in cases where the defendant is not in court, for its foundation in some measure fails; we should not give to the service by publication all the consequences of personal notice, so far as regards all the proceedings in the cause; it is sufficient if we give to it the direct effects pre- (412)

scribed by the Legislature. The management of the cause in such cases is entirely in the hands of the complainant, and we are aware that it is impossible, with the utmost vigilance of the judge, to preserve to an absent defendant all his rights; it is sufficient to award to the plaintiff all his direct advantages, without conferring any on him by inference. I am, for these reasons, for considering the rules for taking the bill *pro confesso* as conditional, it never having been made absolute. If the complainant could show that he had made publication, he might have it made absolute *nunc pro tunc*. This Court having jurisdiction only in cases set for hearing in the Superior Court, and an irregular order to that effect being as no order, the cause must be remanded; it was never properly here.

TAYLOR, C. J., and HALL, J., concurred. Remanded.

FALLS AND OTHERS v. TORRANCE.

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

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

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

4. *It seems* that equities of redemption and constructive trusts are cases in which equity acts in analogy to the statute, and time should be a bar in itself according to the recent decisions in England. But when the rule as to time was adopted in this State, in such cases equity was supposed to

act in analogy to the common law. Hence, the time adopted was twenty years, and hence, also, it was considered as only affording a presumption of fact, and not as a positive bar. Though this notion was incorrect, and properly seven years is the period and should be a bar, in analogy to our statute of limitations, yet the notion has been so long adopted, is supported by such a train of decisions, and so much property depends upon it, that it is now too late to disturb it.

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

FROM IREDELL. This cause having been retained, on a former motion to dismiss (9 N. C., 490), now came on to be heard, when it appeared to be a bill filed in 1817, setting forth that one Gilbraith Falls died intestate, in June, 1780, and that in 1781 administration on his estate was granted to his widow, who in 1784 intermarried with Hugh Torrance; that complainants were the children of Gilbraith Falls, and at the time of his death were infants; that some of them, the daughters, married in infancy, and were yet married women; that among other property which belonged to their deceased father was a negro woman, Flora, who came into the possession of Hugh Torrance upon his intermarriage with Mrs. Falls, and that Flora had become the mother of several children; that Torrance and his wife never made any settlement of their (414) accounts as administrator and administratrix of Falls, and in 1815 or 1816 they died, and letters of administration on the estate of Hugh Torrance were granted to his son, James Torrance, the defendant, who by virtue thereof took into his possession Flora and her children.

The bill further stated that for a number of years complainants were ignorant of the situation of their father's estate, and further, that Hugh Torrance made repeated declarations that he did not intend to hold nor did he claim Flora and her children as his property, but that they should be distributed among the children of Gilbraith Falls, whereby complainants became less anxious to press for an immediate decision.

The prayer of the bill was that James Torrance might deliver up Flora and her children, and account for the value of their labor.

The answer of the defendant admitted that Hugh Torrance died, as stated in the bill, possessed of Flora, and also of her children; and stated that in November, 1781, the personal estate of Gilbraith Falls was ex-

posed to public sale; that in March, 1784, another sale was made by the administrator, at which not only almost all the property sold at the sale of 1781 was again sold, but also sundry articles which had come to the hands of the administrator since 1781; that this second sale was made on account of the depreciation of the currency of the country in 1781, 1782, and 1783; that owing to the entire depreciation of the continental money before 1784, the value of the estate was greatly reduced, and Hugh Torrance applied to the purchasers at the first sale (who were mostly the next of kin or near relations of Gilbraith Falls) to surrender their purchases and permit the property to be again sold, and many of them did so. That as to the negro Flora, she was the child of Binah, who belonged to the estate of G. Falls; that Binah was purchased at the sale in 1781 by Mrs. Torrance, then the widow of G. Falls, at the price of £70 (415) hard money, which was a fair price; that Flora was born after this purchase of Binah, but whether before or after the sale in 1784 defendant was ignorant; that Binah was sold at the second sale in 1784, and purchased by Hugh Torrance, and Flora, if then born, must have been an infant, and was probably sold with her mother; and defendants insisted that if Flora was born before the second sale, she was born the property of Hugh Torrance, inasmuch as her mother, Binah, belonged to him under the purchase of the widow at the first sale, and his subsequent intermarriage with her; and that Hugh Torrance was not bound in law or equity to expose Flora to sale for the benefit of the estate of G. Falls.

Defendants also stated that a settlement of the accounts of the estate of G. Falls had taken place, and complainants had given receipts for their distributive shares more than eighteen years ago, and some as far back as 1785, and insisted that as the bill charged no fraud, and pointed out no specific errors, complainants ought not, after this lapse of time, to open the account, and they prayed all the benefit which equity would give from lapse of time.

As to the coverture of some of the complainants, defendants insisted it was true of a few only, and their husbands were competent to take care of their rights, and had every opportunity of learning the situation of the girl Flora; and as to declarations made by Hugh Torrance, that he held Flora and her children in trust for complainants, defendants answered that they did not admit, nor had they reason to believe, such to be the fact, but rather the contrary.

Seawell and Badger for complainants.
Gaston for defendants.

TAYLOR, C. J. Upon reading the evidence in this case, the gen- (418) eral conclusion I have reached is that Flora and her descendants

were, after his death, part of the personal estate of Gilbraith Falls, and as such subject to distribution amongst the next of kin, not having been otherwise disposed of by the administrators in their regular exercise of their prescribed legal duties. It is not shown at what period of time Flora was born, whether before or after the first sale; but from her not being named in the first account of sales returned, from her apparent age at the second sale, from the reason then assigned by the administratrix for not selling her, and from other circumstances appearing in the case, I feel warranted in the conclusion that she was born between the two sales. But admitting that she was born before the first sale, and that Binah, her mother, and herself were purchased by the widow, administratrix, that sale, as it respected Flora, was a nullity, and can inure only to the benefit of the distributees. Their right to the property was not divested by it.

The same consequence follows if she was born after the first sale and before the second. In either case she should have been disposed of with the rest of the personalty, and the administratrix omitting to make such disposition, must, in equity, be considered as retaining the possession under the original trust. When the second sale took place, it is admitted by the answer that Hugh Torrance was married to the widow, and that he possessed himself of Flora, who was then bound by the trust, of which Torrance had notice, as further appears in the answer, for he applied to the purchasers at the first sale to surrender their purchase for the purpose of a resale. He is, therefore, bound in equity, with re- (419) spect to Flora and her children, to the execution of the trust.

From this short review of the case it results that the complainants are entitled to a decree, unless relief is barred by the lapse of time. It is true that a court of equity is unwilling to countenance stale demands; and is averse to an interference in behalf of persons who have slept upon their rights, even in cases where there is no bar interposed by the statute of limitations. They will in such cases adopt the presumption, founded on the efflux of time, that the controversy has been settled by payment or otherwise. Time is, in such cases, a circumstance affording a strong *prima facie* presumption, but liable to be repelled by other circumstances explanatory of the delay.

There has been in this case a very considerable lapse of time, which, considered alone, would be much more than sufficient to bar many claims to which no act of limitations applies, and which at first view forms a great objection to the relief sought. But I cannot but think that the peculiar circumstances of the case are of strength sufficient to destroy any presumption arising from the delay, and to enable the Court to do justice without infringing any of its rules or holding out encouragement to the spirit of wanton and dormant litigation. The property remains

the same, with only the addition of an increase from the parent stock; it is completely identified, and has undergone no other change of possession than that from Hugh Torrance to his administrator. The state of the property seems to have been known to some of the witnesses, and most probably to the neighborhood, so that no purchaser will be vexed by a disputed title. The complainants could only assert their right by a legal controversy with the man who had married their mother, and who, it may be reasonably inferred, from the character given of him by the witnesses, had treated them with parental affection. But if these ties were too feeble to restrain them, those of interest may be deemed sufficient, for he had said in repeated conversations with the witnesses
(420) that the property he acquired by his marriage should devolve upon the children of Gilbraith Falls, who had made it; and it is not at all probable that those children were ignorant of such declarations. Under the influence of these combined motives, the distributees may be supposed to have abstained from the assertion of their rights, without taking into view the legal disabilities under which some of them continued. Against these circumstances I cannot presume that their demands have been settled or that they have unreasonably slept upon their rights; but am of opinion that the equity of the case is in their favor.

HENDERSON, J. As regards time, equity acts either in analogy to the statute law or common law. When to the former, the statute of limitations is introduced with all its rigors, time is a positive bar, it may be pleaded, it is cause for demurrer, nothing prevents its operation but what will have the same effect at law; when it begins to run, it continues to run, notwithstanding supervenient disabilities; if all the complainants are not within its saving, all are without them.

Where it acts in analogy to the common law, time is no bar of itself, but it furnishes evidence of a fact which is a bar, payment or satisfaction, or possibly abandonment; the lapse of time itself is not, therefore, pleaded as a bar, but the fact which may be inferred from it is; but it is an inference of fact, not of law, as under the statute; it is offered as evidence, and, like all other evidence, may be rebutted; there is something like an exception: when the lapse of twenty years, without other circumstances, is relied on, from this alone a presumption of payment is inferred. It is one of those cases mentioned by *Lord Erskine;* the mind forms no belief about it for want of data, yet it is an inference of fact, and the belief, if it deserves that name, may be repelled by evidence, either *dehors* or intrinsic, and a bill in such case cannot be de-
(421) murred to for want of stating those circumstances by which it is repelled, for they are matters of evidence only, and the bill should contain the facts and not the evidence. The first class of cases embraces

those suits in equity where the matter of them may also be the subject of one of those actions at law, enumerated in the statute, and in England at this day also, all suits in equity, where the subject of them is *analogous* to the subject-matter of any of such actions. An instance of cases of the first kind is a bill for an account for the same thing as would support an action of account at law; six years is a bar in such case, and may be pleaded as such. An equity of redemption, or an implied or rather a constructive trust, is an instance of the second kind; twenty years adverse possession in such cases is a statute bar, and may be pleaded as such. The equity of redemption and the constructive trusts, being analogous to legal estates, an entry into which is barred by an adverse possession for twenty years, a bill to redeem, after twenty years, such possession, without stating on its face that which would take the case out of the statute at law, is bad on demurrer. So all the late cases on the subject, and particularly *Beckford v. Wade,* 17 Ves., 98, and *Walpole v. Clinton.* When we adopted our rules as to time, as regards equities of redemption and construction trusts—indeed, as to all cases except in such where the subject of the bill might be the subject of one of those actions enumerated in the act—the rule was understood to be framed in analogy to the common law; it was thought, both here and there, that the statute had nothing to do with it. Time was, therefore, considered as a mere matter of evidence, a presumption of fact; it, therefore, did not vary with the change of time by the statute from twenty to seven years, as it would have done if it had been thought to have been formed in analogy to the statute of England. It was easy to make the change in the decisions, for the time remained the same, towit, twenty years. We have adopted the common-law rule throughout. Twenty years of (422) itself forms a presumption of payment or satisfaction, as it does at law; but is here, as there, a mere inference of fact. Time is the evidence, and the inference may be repelled here, as it is there. It cannot, I think, be denied but that, upon principle, the late English decisions are right, and, of course, that ours are wrong; but after an uniform train of decisions for more than a century, the principle has something like legislative sanction; we cannot make a change; too much property depends on it. We must, therefore, declare the rule to be that less than twenty years will not bar an equity of redemption, or an implied trust; and that should a longer period elapse, it is but matter of evidence, and that the presumption arising from it may be repelled; but that twenty years of itself, without proofs either way, *dehors* or intrinsic, raises a presumption of payment, abandonment, or satisfaction, imperative on courts and juries, as to equities of redemption of personal property, and implied trusts relating to the same, particularly as to slaves. I believe, but I am not positive, that the same rule has always prevailed. We can

get nothing on the subject from English decisions, personal property not being the subject of mortgage. It is there called *pledging,* in regard to which they have very different rules from those applied to mortgages. Pure trusts are not subject to the operation of time; for the possession of the trustee is the possession of the *cestui que trust.* It is that which supports and fortifies his estate, and which, in fact, cannot exist without it. An analogy to the law time forms no bar; for the cause of action does not accrue unless the trustee thinks proper to consider that it has; for it is not in the power of such a trustee to put off his character at pleasure. It was by agreement that it was created, and it requires the consent of both parties to put an end to it; but the *cestui que trust* may, if he thinks proper, consider the trust as at an end upon any misconduct of the trustee; but the trustee cannot, by his act or declaration, shake off his character. I am, therefore, disposed to (423) doubt the correctness of some late opinions that in such cases time begins to run from the time the trustee disavows his character, and that is made known to the *cestui que trust;* for I am persuaded that he can no more, by his own act, put off his character than a tenant can, during his time, put off his and convert his occupation into an adverse possession. During the period allowed by law for the settlement of the estate the administrator may be considered as holding the property on an express trust, and afterwards, perhaps, as to negro property, it would be doing him no injustice to view him in the same character; for, by law, he cannot purchase them himself, nor can they be rightfully sold by him but by an order of the court, and then only for the payment of debts, where the perishable property is insufficient for that purpose, or for the purpose of making division among those entitled. But this case does not require that this question should be decided; for the case is, I think, against him, upon the ground of his standing as a trustee by implication or construction, a situation more favorable for him.

It appears that at the second sale—for I pay no regard to the first, as far as purchases were made by the administratrix—that the girl Flora was not sold, she being claimed by Mrs. Torrance, upon some frivolous ground; that afterwards, when the settlement or statement was made by the commissioners, Huggins and Davidson (upon which settlement Torrance's distribution among each of the distributees was made and at different periods of time), she was not brought into account, and had she been sold for the payment of debts, it is to be presumed it would have been then alleged by him, for the statement was made long after the death of Falls and his marriage with the widow. All these facts show very clearly, I think, that she remains yet to be accounted for. It is a case where the next of kin do not barely show that he was once liable, and call on him to account, in which case lapse of time would of itself

afford presumption of satisfaction, but by these proofs render it (424) next to impossible that he should have accounted. I lay no great stress upon Torrance's declarations that Falls' children should enjoy the fruits of their father's labors, further than to rebut the idea of abandonment, for it grew out of some conversation in the family relative to the claim (I presume) for those negroes, for it does not appear that they claimed anything more; but it weighs nothing with me, as to Torrance's recognition of their right; for I think it was nothing more than a mere gratuitous promise, which the law does not recognize, but refers the obligation entirely to the will of the person who made it. An account, therefore, will be taken of the hire of the negroes and the expense of raising them, allowing all moneys or other things expended for their support. The account may be taken by any one the parties may agree on to do it; otherwise, by the master of this Court.

Cited: Nesbit v. Brown, 16 N. C., 31; *Petty v. Harman, ib.,* 194; *Benzein v. Lenoir, ib.,* 264; *Robinson v. Lewis,* 45 N. C., 61; *Glenn v. Kenbrough,* 58 N. C., 174; *Whedbee v. Whedbee, ib.,* 394; *Comrs. v. Lash,* 89 N. C., 168; *Grant v. Hughes,* 94 N. C., 237; *Summerlin v. Cowles,* 101 N. C., 478; *Worth v. Wrenn,* 144 N. C., 660.

SELBY, ADMINISTRATOR, v. DIXON ET AL.

A. was indebted to B. and C.; B. obtained a judgment against A., and before execution issued, a negro, the only property of A., was sold by a constable under an execution, when C. purchased him for $396, whereof he paid the constable $18, the amount of his execution, and by consent of A. retained the balance of his bid to satisfy the debt which A. owed him, as far as it was sufficient for that purpose. A bill filed by B. against A., C., and the constable, was dismissed. B. had no lien on the negro either in law or equity.

FROM HYDE. The complainant, who was the administrator of one Tooley, stated that as administrator he had recovered a judgment against Thomas Smith and his wife, Ann, for $300 at May Term, 1822, of Hyde County Court; that he issued an execution thereon, which was returned "Nothing to be found"; that before the execution issued the defendant Dixon, who was a constable, levied an execution on a negro man, the property of Smith, to satisfy an execution of $8, and sold the negro at public sale, when the defendant Havens purchased her for $396; that Havens paid the amount of the execution, $8, and no more, (425) and gave Dixon a bond to indemnify him in case he should sustain damage for not exacting of Havens the whole amount of his bid; that

Havens took the negro into his possession, and still owed for him $388, or thereabouts; that Smith and wife owned no other property, and that complainant's debt would be lost unless the negro, or the balance due from Havens, could be made liable. The bill further stated that Dixon was about to collect the balance from Havens, and to pay it over to Smith and wife, and charged Dixon, Smith, and Havens with a conspiracy to defraud complainant.

The answers stated in substance (and the proofs sustained the answers) that Havens purchased fairly at execution sale; that he paid the amount of the execution which Dixon had, and that by agreement with Smith, who was largely indebted to him, he retained the residue of his bid above Dixon's execution, in part satisfaction of his claim against Smith.

Upon the hearing *Norwood, J.,* dismissed the bill, whereupon complainant appealed.

HALL, J. I concur in opinion with the judge below, that this bill should be dismissed; the complainant has no lien on the negro or his value, which is in the possession of the defendant Havens, either in law or equity. Havens became the purchaser when the negro was sold, for valuable consideration; after paying off the debt for which he was sold, he retained the balance of the money bid for the negro in his own hands, for a debt which Smith owed him, and this was done by the consent of Smith. He might have purchased of Smith, *bona fide,* without the intervention of a public sale, because at that time there was no lien on the slave in favor of the complainant.

I think Dixon should be allowed his costs, and that the other defendants, jointly, should be allowed costs.

And of this opinion are the other judges.

By the Court, Affirmed.

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