ANNOTATIONS INCLUDE 168 N. C.

NORTH CAROLINA REPORTS
VOL. 12

CASES AT LAW ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1826
TO JUNE TERM, 1828

BY
THOMAS P. DEVEREUX
(VOL. I.)

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

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NOTE.—The subscriber, in presenting to the public this volume of the decisions of the Supreme Court, with his name alone on the title page, by no means intends to conceal the fact that many of the cases were stated by his former associate, GEORGE E. BADGER, ESQ. The first half of this volume may be regarded as the joint production of that gentleman and the subscriber. With the consent of Mr. BADGER, the present title page was adopted for the greater convenience of reference.

The subscriber also begs leave to acknowledge the obligation he is under to a professional friend, who was kind enough to prepare the very excellent index which accompanies this volume.

T. P. DEVEREUX.

RALEIGH, 7 April, 1829.

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA,

DECEMBER TERM, 1826, TO JUNE TERM, 1828

CHIEF JUSTICE:

JOHN LOUIS TAYLOR.

ASSOCIATE JUSTICES:

JOHN HALL. LEONARD HENDERSON.

ATTORNEY-GENERAL:

JAMES FAUNTLEROY TAYLOR.*

ROBERT H. JONES.†

REPORTER:

THOMAS P. DEVEREUX.

*Died June, 1828.
†Appointed.

JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

JOSEPH J. DANIEL.
JOHN R. DONNELL.
WILLIAM NORWOOD.
THOMAS RUFFIN.
WILLIE P. MANGUM.*
ROBERT STRANGE.†
JAMES MARTIN.†
JOHN PAXTON.‡

*Appointed August, 1826. Commission expired December, 1826.
†Elected December, 1826.
‡Died November, 1826.

CASES REPORTED

The letter *v.* follows the name of the plaintiff.

CASES CITED

W

Z

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1826

JOHN SHAMBURGER v. ALEXANDER KENNEDY, administrator of WILLIAM HUSSEY, deceased.

From Moore.

An agent cannot be appointed by *parol* to convey real estate for his principal. But where a levy on personalty was made under a *fi. fa.*, and lands, in lieu thereof, were sold by the sheriff, without levy or advertisement, at the request of the debtor, and bid off by A, and B paid the sum bid to the sheriff under a parol agreement that the sheriff should convey to him: *Held*, that as an *official* act of the sheriff, his deed passed the estate.

IN 1822 Isham Sheffield obtained judgment and sued out execution thereon against Hussey, the defendant's intestate, one Garner, and others. The execution was levied by McNeil, the sheriff, upon the personal property of Hussey, who was the principal debtor. On the day of sale, at the request of Hussey, the sheriff sold his real estate, which had not been levied on, in lieu of the personal property, and the same was purchased by Garner, at a sum greater than the amount of the judgment, and he being then unable to pay, the sheriff indulged him until the term at which the execution was returnable, at which time the plaintiff paid to the sheriff the amount of Garner's bid, upon an agreement between the plaintiff, Hussey, and Garner, that the sheriff, or Hus- (2) sey, or both, as the plaintiff might prefer, should convey to him. The plaintiff accordingly took possession of the lands, and the sheriff executed to him an official deed in the usual form. Afterwards, the defendant's intestate dying without having released or conveyed, and the plaintiff supposing that the deed from the sheriff conveyed no title, brought this action to recover back the money paid.

On the trial in the court below, *Norwood, J.*, was of opinion that the

deed from McNeil, whether he were considered as sheriff, acting under the authority of the writ, or as the agent of the defendant's intestate, under the parol agreement, was sufficient under the circumstances to pass the title, and directed a nonsuit, whereupon the plaintiff appealed.

HALL, J. The deed executed by McNeil, the sheriff, to the plaintiff, being an official act, conveyed a good and valid title. *Smith v. Kelly,* 7 N. C., 507. In the other view of the case taken by the judge, supposing the sheriff did not act officially, but as the agent of Hussey, I do not concur, unless McNeil had been duly authorized, by a written power of attorney, to execute the deed for him. An authority by parol would not be sufficient, because titles to land must be evidenced by written conveyances. I think the nonsuit ought not to be set aside.

PER CURIAM. Affirmed.

Cited: Delius v. Cawthorn, 13 N. C., 97; *Testerman v. Poe,* 19 N. C., 105; *Ward v. Lowndes,* 96 N. C., 381.

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(3)

WILLIAM MORISEY and Wife v. DAVID BUNTING, Sr.

From Sampson.

1. In a parol gift, deliberation and sedateness on the part of the donor is only evidence of the *animus disponendi.*
2. It seems that if *non detinet* and the *statute of limitations* are both pleaded, and the jury find "all the issues in favor of the defendant," this Court will not examine the correctness of the charge on the latter plea.
3. When B said he had given negro C to A: *Held,* that the will of B of that date is admissible to explain his declarations.

DETINUE for negro slaves; pleas *non detinet,* statute of limitations. On the trial, before *Norwood, J.,* the plaintiffs claimed title by a parol gift made in 1802, from the defendant to the plaintiff, Ann, his daughter, and offered evidence of such gift. The witness who testified thereto stated that defendant said he would keep the slave till Ann married, or during his life, and that at this time the defendant had been drinking until he felt it, though not drunk. The plaintiff then proved by a witness that the defendant in 1812 said he had given the slave to his daughter Ann, upon which the defendant called another witness present when

this declaration was made, who proved that afterwards, on the same day, the defendant said he had made a will, and defendant's counsel offered to give in evidence the will referred to, by which the negro was given to Ann. This evidence was opposed, but was received by the judge, not as direct evidence as to the title, but as a matter proper to be considered by the jury, together with the declaration of the defendant that he had *given* the negro, in order to ascertain his meaning in that expression. It was further in evidence that the slaves in question remained in the keeping and under the control of the defendant after the gift, up to the time of Ann's intermarriage with the other plaintiff, and that more than three years had elapsed after she came of full age, before the marriage and the commencement of this suit. And it also appeared that Ann, being an infant of tender years residing with her father at the (4) time of the alleged gift, continued to reside with him until her marriage, shortly after which suit was commenced. On this evidence, two questions were made: whether a gift had been proved, and, if so, whether the action was barred by the statute. On the latter point the plaintiff's counsel insisted that the defendant was a trustee for Ann, and therefore his possession could not be set up, by him, against her claim. The judge instructed the jury that, supposing the gift made, the defendant was in possession as the *bailee,* and not the *trustee* of Ann, and therefore not within the rule referred to by the plaintiff's counsel, which was confined to pure trusts, cognizable in a court of equity, and was not applicable to bailees in a court of law. That to bar the plaintiff, a possession adverse, and continued for three years after she came of full age, must be shown, and that the possession taken by the defendant under the void reservation of a life estate to himself would be consistent with the title of Ann, until the defendant did some act or made some declaration which changed the nature of his possession; that if he claimed the property as his own and treated it as such, this would render his possession adverse, whether she had expressed knowledge of the fact or not. Upon the evidence relating to the gift, the judge instructed the jury that as no consideration, in case of gift, passes from the donee to the donor, the law requires every parol gift to be a sedate, deliberate act, and therefore incautious expressions, or expressions used when the speaker was in a state of inebriety, would not be sufficient.

The jury found "all the issues in favor of the defendant." A new trial was moved for, on the ground of misdirection and the admission of improper evidence, which being refused, and judgment given upon the verdict, the plaintiff appealed.

Badger for the plaintiff. (5)
Gaston for the defendant.

HALL, J. The judge charged the jury in this case, "That as no consideration passes from the donee to the donor, the law requires every parol gift to be a sedate, deliberate act, and therefore incautious expressions, or expressions used in a state of inebriety, would not be sufficient."

It is objected that the charge is incorrect; that a gift is good if the person making it had the use of his understanding and was in earnest when he made it, although he did it without sedateness or deliberation, and was, at the time, in a state of intoxication.

I understand the judge, and the counsel, both to mean that every gift, in order to be valid, must have the free assent of the donor to it. The judge considered deliberation and sedateness as evidence of that assent, but that incautious expressions, coming from a drunken man, were not. He did not say that more deliberation was necessary in making a gift than a sale; if he meant that, I do not coincide with him in opinion. The free assent of the party is as indispensable in the one case as in the other. I am inclined to believe that the jury were not misled by the judge's charge in that respect.

As the jury have found for the defendant, on the plea of *non detinet,* it seems to be useless to say anything relative to the charge as to the statute of limitations. I will not observe, assuming it as a fact
(7) that the defendant was a trustee, that nothing emanating from him would change that character, and put the statute of limitations into operation in his favor.

It appears that defendant had given negro Cloe to his daughter Ann, by his will, but had not given her all Cloe's children which she had after the alleged gift; and *that,* after the date of the will, he made declarations that he had given Cloe to his daughter Ann. The defendant introduced the will, although objected to by the plaintiff, to explain to the jury what was meant by those declarations, namely, that he meant he had given her by his will. I can see no objection to this evidence; and from the view which I have taken of the whole case, I think the rule for a new trial should be discharged.

PER CURIAM. No error.

Cited: Mastin v. Waugh, 19 N. C., 518; *Cole v. Cole,* 23 N. C., 462; *Doub v. Hauser,* 29 N. C., 169; *Hall v. Woodside,* 30 N. C., 120; *Munroe v. Stults,* 31 N. C., 52; *Higdon v. Chastaine,* 60 N. C., 213.

MARGARET McDONALD v. KENNETH MURCHISON.

From Moore.

In an action for words, charging the plaintiff with perjury in a particular suit, he is not bound to produce the record of that suit.

CASE for speaking of the plaintiff these words: "You swore to a lie today, in a case tried before Josiah Tyson, esquire, against Daniel McDonald, for killing a dog, and you offered to swear to a lie before." On the trial before *Norwood, J.*, the plaintiff not being able to produce the warrant on which the proceedings before Tyson were had, nor to account for its absence, the judge directed a nonsuit, holding such proof to be a necessary part of the plaintiff's case, whereupon the plaintiff appealed.

TAYLOR, C. J. If it were not necessary to state in the declaration the warrant and proceedings before the magistrate, it could not be necessary to adduce upon the trial any proofs of their existence. And when the words spoken in this case are considered in reference to their actionable quality, I think it will appear that the law requires no other proof to be made than such as the plaintiff offered. (8)

To say of a person that he is forsworn is not necessarily actionable, because the words do not imply that the plaintiff had forsworn himself in a judicial proceeding, and that alone will constitute the crime of perjury. In bringing an action for such words, therefore, the plaintiff must, by way of introduction or inducement, state in the declaration that some proceeding took place, or that some fact existed, to which the defendant alluded; and this inducement is material and traversable. It must be shown by a colloquium that the words import a criminal charge, otherwise they are not actionable. But where the words spoken can be understood in none other than a criminal sense, as where the plaintiff is directly charged with a theft or a perjury, no extrinsic matter is necessary to be charged, nor consequently to be proved. These words do upon their face directly import that the plaintiff was guilty of a judicial perjury, inasmuch as a magistrate has, in the first instance, jurisdiction of indictable trespass, for the purpose of examining the charge, and of either binding the accused to court or discharging him. The words used by the defendant have discharged the plaintiff from the necessity of making the averments necessary to show that a judicial proceeding existed, and are certainly actionable, if spoken maliciously. In such a case the *prima facie* presumption is that everything took place before a court of competent jurisdiction, and if the fact be not so, it is incumbent on the defendant to prove it.

The slander in its present shape is calculated to injure the plaintiff to the same extent as if it had been shown that the warrant was issued and returned, and that the magistrate had jurisdiction; for every one, hearing it, would put the construction upon it that she had perjured herself in a judicial trial. For these reasons, I think the nonsuit was improperly awarded, and that there ought to be a new trial.

HALL, J. When one person charges another with having been forsworn, such words are not actionable unless it is also charged
(9) that the forswearing took place in some judicial proceeding, before a tribunal legally constituted, having jurisdiction of it; in that case, it is not material whether any such judicial proceeding ever took place or not. If there never had been any such judicial proceeding, and the defendant in that particular was guilty of a falsehood, he ought not to be in a better situation than if he had told the truth, which he certainly would be if it was incumbent upon the plaintiff to produce it or be nonsuited. When the plaintiff, in the present case, proved the words charged in the declaration, she made out her case, and was not bound to produce the proceeding before the justice of the peace. The nonsuit should be set aside.

New trial.

Cited: Chambers v. White, 47 N. C., 383.

AMBROSE NELSON v. BAIRD EVANS.

From Rockingham.

In slander, the defendant may prove a general report of the truth of the words spoken, in mitigation of damages, but not in justification. A record of the conviction of the slave (the master being notified and defending him) is not evidence against the master, unless the latter is charged as an accessory, and then only *ex necessitate*.

THIS was an action on the case for verbal slander. The words charged in the declaration to have been spoken were, that the plaintiff had broken into the defendant's house and stolen his gun, or that he (the plaintiff) had caused his negro slave to do it. The defendant pleaded not guilty, and a justification.

On the trial before *Daniel, J.,* the plaintiff having proved his case, the defendant's counsel offered to show that before the publication of the slander a general opinion and belief prevailed in the neighbor-
(10) hood that the plaintiff had caused his negro slave to commit the offense attributed to him. This evidence was opposed; but the

presiding judge received it as proper for the consideration of the jury, not to establish the justification, but to mitigate the damages.

The defendant then offered to give in evidence a record of the conviction of the negro slave for breaking the house and stealing the gun, but the judge rejected it. The defendant then proved that his house was broken in the month of July, while his family was absent, and that in June preceding the plaintiff was seen near his house, and the witness was about to state circumstances tending to show an illicit intercourse between the plaintiff and the wife of the defendant, when the judge stopped the evidence, as irrelevant and improper.

Witnesses having stated a general opinion that the plaintiff had caused the gun to be taken in order to prevent the defendant from killing him, the defendant's counsel proposed to ask if it was not a part of the general rumor that the illicit connection above mentioned existed, and was the motive for taking the gun. The judge refused to permit the question to be asked; and a verdict being found for the plaintiff, and a new trial, on the ground of error in the judge, being refused, and the judgment rendered for the plaintiff, the defendant appealed.

Murphey for the plaintiff.

HALL, J. I think the judge was right in permitting the defendant to prove the reports, in the neighborhood, of defendant's guilt, in mitigation of damages, but not in support of the plea of justification. (See the cases collected in Norris's Peake on this subject, 478.) The law considers the defendant less guilty, but not justified, when reports are publicly circulated imputing the charge complained of to the plaintiff. I also think the judge was right in rejecting the record of the slave's conviction, as being irrelevant, unless it was proved that the slave (11) committed the offense by the master's direction, or with his connivance. That conviction proved nothing of itself; it might, probably, have given rise to the reports before noticed, of which the court suffered the defendant to have the benefit, in mitigation of damages, but it was not authority for such reports, and of course could not be a justification.

The same remark may be made to the third objection to the judge's charge. The illicit commerce between the plaintiff and the wife of the defendant might have been the origin of the reports in circulation, of which the defendant had been allowed the benefit, in mitigation of damages; but it could not be a justification of them, nor of the charge made in this suit against the defendant.

HENDERSON, J. This case presents a question never agitated before in this country, so far as I know. In England it could not arise, owing to

circumstances peculiar to this country. The charge made by the defendant is that the plaintiff had caused his (the plaintiff's) negro to steal the defendant's gun. The defendant, after having the benefit of showing that such were the reports in the neighborhood, by way of mitigation of damages, offered in evidence a record of the conviction of the negro slave for stealing the gun, and notice to the plaintiff, his master, to appear and defend him, and offered to show that he did appear and assist in his defense. This was rejected by the judge, on the ground that, if received, it could only go in mitigation of damages; and that he had already had the benefit of it, through the medium of the report.

I am disposed to concur with the judge, but not for the reasons given by him; for *non constat,* the evidence offered, that the negro stole his gun, was believed. The defendant might wish to show that the
(12) report was true in part, to wit, that the negro did steal the gun, and thereby strengthen the whole report by showing that part of it was true; and if admissible at all, it might be received to prove a part of his justification, and the residue, to wit, that the plaintiff caused the negro to steal the gun, he might prove by other testimony. I am disposed to think the law is so, although ruled otherwise by *Chase, J.,* on the trial of *Callender.* But, putting this out of the case, and the point, which might be raised, that it was *res inter alios acta,* I am inclined to think that it is inadmissible, because the conviction of the slave might have arisen from evidence wholly incompetent against the master, a free white man. If it should be admissible, it is making *that* evidence indirectly which is not so directly, to wit, the testimony of negroes and mulattoes within the fourth degree. I am inclined to think, therefore, that the record ought not to have been received.

Should it be asked, If this record is inadmissible to prove the guilt of the negro, what is to be done with accessorial offenses of white persons in such cases? it is answered, that if the record of the conviction is a *sine qua non* to the conviction of the principal, the record must be received. It is the best which the State can do; but independently of it, full proof of the principal fact must be made, and practice must yield to principle, for the *conviction* of the principal is not essential to the guilt of the accessory. The accessory *may* be guilty, although the principal is acquitted. The conviction of the principal is required as a shield for the accessory, upon the principle that he who is charged with a crime can best defend the charge, either by opposing proofs or matter of justification; and with that view, originally, I think it was introduced, for unquestionably it is *res inter alios acta;* but, in time, it became *prima facie* evidence of the principal's guilt. If something of this sort is not
(13) done, no white person will be convicted of an accessorial crime where a negro, mulatto, or Indian is the principal; for the court,

when the record is offered, cannot inquire into the evidence upon which the conviction was founded, and admit such records where the evidence was such as is admissible against a white man, and reject them where it was not.

TAYLOR, C. J., concurring.

Cited: McCurry v. McCurry, 82 N. C., 299; *Sowers v. Sowers,* 87 N. C., 306; *Knott v. Burwell,* 96 N. C., 279; *S. v. Hinson,* 103 N. C., 375.

JOAB ALEXANDER v. JOHN B. HUTCHINSON.

From Iredell.

1. A promise, after arrival at full age, to pay a debt contracted during infancy, may be inferred; it is, however, an inference of fact, and is to be drawn only by the jury.
2. An implied promise to pay a debt barred by the statute of limitations is an inference of law.

ASSUMPSIT for goods sold by the plaintiff, as administrator of William Hutchinson. Plea, infancy. Replication, that the defendant promised after he came of age. On the trial a witness, who had been the guardian of the defendant, proved that the defendant, after he came of age, together with the other distributees of William Hutchinson, and the plaintiff, requested him to settle their accounts; that between the plaintiff and defendant a balance was struck in favor of the former, which was sought to be recovered in this action. The defendant said he was not allowed all his credits, but was informed by the witness that all had been allowed. The witness further said that defendant made no objections, neither admitting nor promising to pay the balance, and that the company separated in a friendly manner.

Paxton, J., charged the jury that, as a general rule, the plaintiff was bound to prove an express promise, to entitle him to recover; but, from the opinion of one of the judges of the Supreme Court in this case, if they believed the witness, they ought to give the plaintiff (14) a verdict.

The jury returned a verdict for the plaintiff. A motion was made for a new trial for misdirection, which was overruled, and judgment rendered upon the verdict. Whereupon the defendant appealed. The case has before been reported, *Alexander v. Hutcheson,* 9 N. C., 535.

Wilson for defendant.

TAYLOR, C. J. It should, I think, have been left to the jury to determine whether they could infer, from the defendant's behavior, a clear and unequivocal assent to and ratification of the contract. Any act or conduct on his part denoting a full assent of the mind and leaving nothing to doubt or conjecture, without the utterance of any words, would be sufficient to warrant such an inference; otherwise, a man without the faculty of speech would be incapable of ratifying a contract.

In this case the inference was drawn by the court that if the evidence was believed by the jury the plaintiff was entitled to a verdict; whereas the intent of the defendant entered into the very essence of his conduct, and could alone give it any effective meaning, and this was a matter of fact to be judged of by the jury. There must be a new trial.

HENDERSON, J. When it is said that an implied promise will take a case out of the statute of limitations, but that it requires an express promise, after full age, to bind a person to the performance of a contract made during his minority—all that is meant thereby is, that in the first case the law will make the promise, if there is an acknowledgment of a sufficient consideration; in the latter case, the *party* must make it *himself;* but the law has *prescribed* no *form* in which this promise shall be made; it may be by *words,* it may be by *signs* or *acts;* anything
(15) which shows an acquiescence, or an *assent* of the party's mind, is sufficient. The judge, therefore, mistook the meaning of the judge of the Supreme Court, to whose opinion he referred in his charge; at least, he mistook the law in saying to the jury that if they believed the aforesaid facts (referring to the testimony of the witnesses) they should find for the plaintiff. He should have told them that if they believed the facts, and inferred therefrom that the defendant promised to pay, that is, in the manner before stated, yielded or gave his assent to pay, then they should find for the plaintiff; for very clearly, from the facts deposed to, it was an inference of *fact,* and *not* of *law,* whether he promised or did not promise. *He,* therefore, undertook to draw an inference of *fact* when he gave these instructions.

The judgment must be reversed, that the jury may act understandingly on the subject.

PER CURIAM. New trial.

Cited: Turner v. Gaither, 83 N. C., 363; *Petty v. Rousseau,* 94 N. C., 362.

JONATHAN STEPHENSON v. LABAN JONES.

From Cumberland.

If no error is assigned in the charge of the judge, and none appears upon the record, the judgment of the Superior Court is of course affirmed.

THIS cause was brought up to this Court by *certiorari,* awarded on a rule made absolute, without notice to the defendant, the plaintiff swearing that he prayed an appeal to this Court, but that the Superior Court adjourned before he could get his sureties to the courthouse for the purpose of giving bond. The affidavit set forth no special cause for which the appeal was prayed, and the record, which was in the usual form, stated that after a verdict for the defendant, before *Donnell, J.*, the plaintiff obtained a rule for a new trial, "on the ground that the verdict was against law and evidence," which rule was discharged.

Gaston for the plaintiff.

PER CURIAM. From an inspection of the record in this case, (16) nothing appears showing that judgment was improperly rendered against the plaintiff in the Superior Court. That judgment must therefore be affirmed.

Cited: King v. Ellington, 87 N. C., 574.

JOHN B. EARLE v. WILLIAM DICKSON and CHARLES McDOWELL, Admisitrators of CHARLES McDOWELL, deceased.

From Burke.

1. **A residence in another State is not residence *beyond seas* within the saving of the act of limitations.**
2. **Where one covenants for himself, without mentioning his heirs, to convey land on a certain event, and dies before that event happens, his administrators are not liable; and it seems that the only remedy is against his heir in equity.**

ASSUMPSIT upon a written contract, dated in 1803, to convey 300 acres of land on the Mississippi; "the titles to be made as soon as the Indian claim to said land shall be extinguished."

The declaration contained an averment that the defendant's intestate died before the Indian claim was extinguished, and the breach assigned

was, "that the defendants had not made to the plaintiff a title to the land." Pleas, *non assumpsit* and the statute of limitations. To the latter, replication, "that the plaintiff was and had ever been a citizen and inhabitant of the State of South Carolina, and had not been at any time, from 1 January, 1818, to the commencement of this suit, within the State of North Carolina." It was admitted that the Indian title to the land was extinguished in 1819. There was a general demurrer to the replication, which was overruled by *Ruffin, J.,* a verdict was found for the plaintiff, upon the pla of *non assumpsit,* and judgment rendered accordingly, from which the defendants appealed.

Badger for the defendants.

HALL, J. A principal question in this case arises upon the con-
(17) struction of the ninth section of the act of 1715, Rev., ch. 2, which gives further time to plaintiffs beyond seas to bring the actions, provided they do so within a certain time after their return, and that question is, whether the words *beyond seas* mean that plaintiffs *not beyond seas,* but without the limits of the State, are within the saving. If that meaning is given to them, it is not because that is their natural import; they certainly have another meaning, to wit, what they plainly express, 1 W. Bl., 286, and so the Court thought in *Ward v. Hallam,* 2 Dall., 217. In that case the plaintiff was a citizen and resident of South Carolina, and it was held that he was not *beyond seas,* consequently not within the saving of the statute of limitations. See, also, Kirby, 299. In Maryland it seems to have been ruled otherwise, 1 Harris & McHen., 89, and also in the Supreme Court of the United States, 3 Wheaton, 541.

Our act of limitation was passed in 1715, the first year (as we learn from our statute-books) of our colonial legislation. The territory then inhabited, and the number of colonists, were very limited; we were rather an adjunct to Virginia than a distinct colony; we had little or no intercourse with any country, except Great Britain. It is most probable, in this state of things, that the saving in favor of plaintiffs was inserted in favor of British creditors, and not in favor of creditors who were only separated from their debtors by colonial limits.

If this was originally the fact when the act passed; if the saying was intended, as is expressed, only for British creditors and others really and literally *beyond seas,* shall we now give it a quite different and opposite construction, and allege as a reason that the state of things is much altered since the enactment of the law; or shall we not rather wait until it is the pleasure of the Legislature to make the alteration, as has been done in Massachusetts, 3 Mass., 271, and in New York, 3 Johnson, 263?

This question came before the six judges of this State in 1811, *Whitlocke v. Walton,* 6 N. C., 23. They held that the saving (18) in the statute of limitation, as to plaintiffs beyond seas, did not extend to persons resident in other States of the Union. They considered that it would be mischievous that citizens of other States, particularly adjoining ones, with whom we have the greatest intercourse, should be permitted, at any remote period, to bring suit against the citizens of this State.

It does not appear, from an examination of the contract sued upon, that there has been any breach of it. The defendant's intestate died before the Indian title became extinct, in 1819. He therefore was prevented from a compliance by the act of God. Gwillam's Bacon, Condition, q., 1 Co. Lit., 218.

Nothing can be charged against the defendants. On this point, however, it is unnecessary to give an opinion.

I am of opinion that the rule for a new trial should be made absolute.

HENDERSON, J. McDowell, by a written contract, bound himself to convey certain lands to the plaintiff (describing them) when the Indian title thereto should be extinguished. McDowell died before the Indian title was extinguished; and this action is brought against his executors for a breach of the agreement. All these facts appear upon the face of the declaration.

I am at a loss to see wherein this contract has been violated, either by McDowell in his lifetime or by his executors since his death.

When a person contracts to do what Lord Coke calls a local act, by which I understand an act that requires the concurrence of another, he has time during life to perform it, unless hastened by request; but he must do it at his peril during life (that is, even without request); if he does not, his contract is violated. If, however, he has a specified time to do it in, and he dies before the expiration of that time, the contract is not violated, for the act of God injures no man. Therefore, Coke advises that his heirs be bound. Coke Litt., 216, a. But it is (19) otherwise as to what he calls transitory acts, such as do not require the agency of the other party, as the payment of money or the like. If no time be specified, he shall do it presently in some cases, in others at a convenient time, and that without request. Where a time is fixed, and the person making the engagement dies before that time, it shall be done by his executors; for these acts may as well be done by the executors as the party, and the obligations devolve on the executors, whether named or not; but it is not so as to heirs; the obligation does not devolve on them, unless bound by their ancestor, nor is the ancestor or his executors bound for their acts, unless he binds himself for them, as in the case

recommended by Coke, before cited; that is, when he covenants that he or his heirs shall do a local act, within a specified time, and he dies within the time, his executors are then bound that the heir shall do it. But this case is much stronger than when a person binds himself to do a local act, within a specified time, where even he is excused by death. For here he binds himself to do an act, after another act is done, over which he has no control, and he dies before this other act is done. It cannot, therefore, be pretended that McDowell violated his agreement in his lifetime, or that his administrators have since his death, for they have no estate to convey, and it was never designed that they should make the estate. If the testator had bound himself, without limitations of time, and died without performance, his wrong would have been thrown upon his estate. But here I cannot perceive that any wrong has been done by any one. In this case, I think that the lands in question descended to the heirs at law, burdened with the plaintiff's equity, and in this view of the case complete justice will be done. The personal representatives have done no wrong and the personal estate is the proper fund, in the first instance, to make compensation for the wrongs of
(20) the owner, whether founded on tort or on breach of contract. If this action was sustained, those entitled to the personal estate might be disappointed, when the only wrong, if any, has been committed by the heir, in not performing the trust.

The judgment for the plaintiff should be reversed, and the judgment on the record arrested; but as there is a motion for a new trial on another ground, I am content to reverse the judgment. A new trial will follow of course, on the other ground. I concur with *Judge Hall,* in his construction of the saving in our statute of limitations.

TAYLOR, C. J., concurred.

Cited: Bennett v. Williamson, 30 N. C., 124; *Harris v. Harris,* 71 N. C., 176.

WILLIAM FAGAN v. ARTHUR NEWSON.

From Davidson.

1. Damages cannot be recovered for the loss of a good bargain. An action will not lie for a deceit in an executory contract, respecting the sale of lands.
2. Whether an action will lie for a deceit in the false affirmation of title to lands, *quære.*

CASE for a deceit in the sale of land. The defendant carried the plaintiff upon the land, and showed him a bottom containing about two acres, which he represented as a part of the land; a bargain was made, and the plaintiff paid the purchase money. The defendant tendered the plaintiff a deed, which did not include the bottom, and which the latter refused.

It appeared that the plaintiff knew he had no title to the bottom, and that it was the property and in the possession of another.

Daniel, J., charged the jury that if the defendant made a false representation of the boundaries of his land, knowing it to be false, and the plaintiff had parted with his money, relying upon such false representations, he was entitled to recover in this action. The jury (21) returned a verdict for the plaintiff; a rule was obtained to show cause why a new trial should not be granted, which being discharged, judgment was rendered upon the verdict, from which the defendant appealed.

Nash and Murphey for the defendant.
Badger for the plaintiff.

TAYLOR, C. J. It is a rule readily deducible from the authorities, that the plaintiff cannot recover in an action of deceit unless he prove, not only that a fraud has been committed by the defendant, but also that it has occasioned a loss and damage to the plaintiff. He must have been deprived, by fraudulent means, of some benefit or advantage that the law gave him a right to demand.

But it is by no means a necessary consequence of the establishment of both propositions that the plaintiff is entitled to recover in this action; for a question of law still arises upon the facts, whether the deceitful means employed were, in themselves, calculated to impose upon a person exercising the ordinary prudence and circumspection which men usually bring to the management of their affairs.

Truth and good faith ought to characterize every contract between men; and there can be but one opinion relative to the (22) immorality of asserting ownership in property, with a knowledge

of its falsehood, with a view to induce another to make purchase. Yet there are many violations of the moral law for which no compensation can be given in a court of justice; some injurious consequence, some actual loss to the party confiding, must be presented in a tangible form, and the misrepresentation must be of a kind the falsehood of which was not readily open to the detection of the other party.

Now, it appears to me that the conduct of the defendant was not calculated to impose on any one of common prudence. He pointed out these two acres of lowground as belonging to the tract he wished to sell; but they were, at the very time, the property and in the possession of another person. It might be supposed that this circumstance alone would be sufficient to awaken the plaintiff's suspicion, and incite him to examine, or procure to be examined, the registry books. It is a very reasonable principle that the purchaser should not be entitled to an action of deceit if he may readily inform himself as to the truth of the facts which are misrepresented. Accordingly, we find that if the seller of a house affirm that the rent was more than it really is, whereby the purchaser was induced to give more for it than it was worth, an action will lie; for the value of the rent is within the private knowledge of the landlord and the tenant, and they may collude to deceive the purchaser. But if the seller affirm that the thing sold is worth so much, or that one would have given so much for it, although the affirmation be false, yet if the buyer might inform himself as to the value, no action lies. 1 Salk., 211; 2 Ld. Ray., 1118.

And in this case, though the assertion was false, and made with a view to induce the plaintiff to buy the land, yet he might easily have informed himself as to the state of the title. It is laid down in another case
(23) that if one should sell lands wherein another is in possession, or a horse whereof another is possessed, without covenant or warranty for the enjoyment, it is at the peril of him who buys, and no reason he should have an action by the law, where he did not provide for himself. 2 Cro., 196. So if a purchaser neglect to look into the title, it will be considered as his own folly, and he can have no relief. Sugden, 347.

2. No damage has resulted to the plaintiff from the fraudulent misrepresentation of the defendant. Though the plaintiff paid the purchase money in the expectation of having the two acres as a part of the tract, yet when he discovered that the spring branch formed the southern boundary, he elected not to accept the deed, as he had a right to do, and thereby became entitled to recover back the purchase money. The receipt of this with interest would place the parties in *statu quo,* and complete the justice of the case. If damages were awarded in this case, they would be given for a bare, naked falsehood, the detection of which, be-

fore the consummation of the bargain, prevented any ill consequence to the plaintiff, who has not been deceived in the sale, though he may have lost a bargain.

I think there ought to be a new trial.

HALL, J. I concur in the opinion that the rule for a new trial should be made absolute, as the plaintiff alleges the defendant could not comply with his contract; he also, in case the fact is so, is absolved from a compliance, or, if he has paid the purchase money, he may treat the contract as a nullity, and recover that money and interest back; but he cannot recover damages for the loss of a good bargain. The plaintiff states that he refused to receive a deed for part of the land. Of course he has done nothing to prevent him from recovering back the purchase money.

HENDERSON, J. Strictly speaking, the injury charged in this (24) declaration is, that the parties being in contract for the sale of a tract of land, the defendant affirmed that certain lands were his, and a part of those they were contracting for, well knowing that they were not, and the plaintiff, being an unlettered man, and believing the false representations of the defendant, contracted with him for the purchase of the whole tract, and paid him therefor the sum of $300, and this action is not brought to recover back the money paid, as upon a consideration which has failed, thereby disaffirming the contract, but for a deceitful representation in making it, thereby affirming its continuance. It is therefore, in truth, an action brought for the loss of a good bargain, which I believe it is well settled cannot be sustained. *Flureau v. Thornhill,* Blk., 1078.

The injury really sustained is that the defendant cannot or will not perform his contract which gives an action upon the contract, not an action in deceit for an imposition. If the defendant had imposed the property, that is, had passed the estate under this deception (other things out of the way), an action might be supported; but no estate has yet passed, at least for the two acres. The only injury which the plaintiff has sustained is either the loss of a good bargain, the breach of contract to be compensated in damages or the loss of the money which he paid; if he has suffered any other, I am unable to perceive it; neither of which can be redressed in such an action as this. The case made in this declaration only resembles the first, which gives no cause of action. If the plaintiff still insists on his contract, an action is open to him; if he wishes his money back, he can recover it in an action for money had and received. As to damages, which the plaintiff has sustained by paying his money, the restoration of the same sum with interest is in law a compensation.

PER CURIAM. New trial.

Cited: Saunders v. Hatterman, 24 N. C., 32; *Fields v. Rouse,* 48 N. C., 74; *Lytle v. Bird, ib.,* 224; *Stout v. Harper,* 51 N. C., 349; *Capehart v. Mhoon,* 58 N. C., 182; *Walsh v. Hall,* 66 N. C., 242; *Etheridge v. Vernoy,* 70 N. C., 724; *May v. Loomis,* 140 N. C., 357.

(25)

JOSIAH TURNER v. SAMUEL CHILD.

From Orange.

1. An intermeddling for which there is a *colorable* right will not make a wrongful executorship.
2. Where A sold the property of B, as his agent, and *after the death of B* collected the proceeds: this does not make him an *executor de son tort.*
3. Where there is an administrator, acts for which the agent is responsible *to the administrator* will not make him an *executor de son tort.*

ASSUMPSIT for goods sold, charging the defendant as executor in his own wrong of Francis Child. On trial, it appeared that Francis Child removed from this State, leaving the defendant his agent, who on 3 January, 1823, sold the property to Francis, upon a credit of six months. Francis Child died on 16 January, 1823, and after the expiration of the credit the notes taken at the sale were collected by the defendant; it also appeared that there was an administrator of Francis Child duly appointed.

Daniel, J., charged the jury that by the death of Francis the agency of the defendant was revoked, and the collection by him of money belonging to the estate of Francis was an intermeddling which made him liable to creditors.

The jury returned a verdict for the plaintiff. A rule for a new trial being discharged, and judgment rendered for the plaintiff, the defendant appealed.

This cause was submitted.

Badger for the plaintiff.
Nash for the defendant.

(26) HENDERSON, J. I am of opinion that the collection by the defendant, after the death of the principal, of debts due on sales made by him as agent, in his principal's time, does not make him an executor of his own wrong. The collection of the money has a reference to the agency, and must be considered as the completion of an act, proper and lawful in its commencement, and it does not depend on the strict question of right, whether the agent had an authority to make the col-

lection; a colorable one will do, by which a character is given to the transaction showing that it was not done as an executor, or as one performing the will of the deceased. 1 Esp., 335. But I am rather disposed to think that the receipt of this money is not a colorable right, but actually so, and that a payment made by the purchaser, without directions to the contrary, is a discharge from the debt, and if so, it is not an officious intermeddling; for it would be strange if an act for which an authority exists will make a person executor of his own wrong. A sense of duty, very probably, induced the collection of the money. The sale was made by the defendant, and he might hold himself bound to omit no reasonable exertion that the proceeds should be forthcoming to the rightful owner when he should be called on for an account of agency. It is entirely unlike *Padget v. Priest,* 2 D. & E., 97, where the sale was made after the principal's death, at which time the authority ceased. If the debt arising from the sale had depended on the contract of sale only, it is not to be questioned but that the rightful administrator could have recovered on the contract; but if the agent had taken a bond or note payable to himself, I cannot see how the administrator, or any other person but the defendant, could have enforced payment; but if so, there cannot be the least pretense of charging him as an executor of his own wrong.

It appears, also, that there is an administrator. Of course no act for which the defendant is responsible to the administrator can make him an executor of his own wrong. For where administration has been taken, those acts only which subject the agent, not to the (27) action of the rightful administrator, but which interfere with the estate *quoad* creditors, render him liable, as an executor of his own wrong; as, if he takes possession, or even has possession, of goods under a fraudulent gift from the deceased, this makes him executor *de son tort;* for it does not subject him to the action of the rightful administrator. The gift being good as to the intestate, is good as to the administrator also, but it is void as to creditors.

TAYLOR, C. J., dissenting. This case having been submitted without argument, and presenting one question of some difficulty, and of no ordinary occurrence, I have examined the authorities with the view of ascertaining the principle which ought to govern the decision.

The principal question is, whether the defendant, having collected debts due to Francis Child after the death of the latter, though incurred for property sold during his lifetime, by the defendant duly authorized for that purpose, will amount to such an intermeddling as will make the defendant executor of his own wrong.

I take it for granted that the sale, being made in the lifetime of Francis, was properly made under an authority from him; but the cases have

satisfied my mind that upon the death of Francis all further power conferred by the agency was at an end, for a power to represent another can only continue as long as there is some one to be represented. Therefore, a letter of attorney to deliver seizin after the *death of the feoffer* is void, because upon his death the lands descend to his heirs, C. Litt., 52, b., and for a similar reason, a power to collect debts after the death of the principal, supposing it to have been expressly granted, which it was not in this case, must be void; because the right to collect the debts devolves upon the executor or administrator. In like manner the payment of a sailor's wages to a person having a power of attorney to
(28) receive them has been held void where the principal was dead at the time of payment. 5 Esp., 118. And what appears to me to be a strong case, going far beyond the one under consideration: it has been held that a power of attorney given to a creditor, authorizing him to receive a debt, without any actual appropriation or assignment of it, is void after the death of the debtor, although the latter declared at the time that it was given with a view to enable the creditor to apply the money received towards the liquidation of his own debt. 2 Ves. & Beam., 51.

It appears to me that if any case can decisively show the inflexible quality of the rule of law that all authority ceases at the death of the principal, this case does show it; for if it cannot be relaxed in favor of a creditor whom the debtor was desirous to secure, and to secure whom he did everything short of an actual assignment of his demand, ought it to be relaxed in favor of one who is not a creditor? of one who, when he collected the money, did not apply it to the payment of Francis Child's debts, or, as it appears from the case, had an intention to do so? So if the power be coupled with an interest, it is instantly revoked by the death of the grantor, and an act done under it afterwards, though *bona fide,* and before notice of the death of the grantor, is a nullity. 4 Campb., 272. And the case in 2 Term, 97, incontestably shows that if a man receive the money of the intestate after his decease, though it was received accordingly to an order in his lifetime, it will make him an executor *de son tort.* If it be an express power to sell and collect money, it is revoked by the death of the grantor; *a fortiori* must it be, where the power to collect is only incidental, and implied from the power of selling. From the view of the authorities, it results that the defendant has collected the debts of the deceased without legal authority and, I think, without the color of it, and in so doing has announced to the creditors that he has taken upon himself the burden of administration; he has made this announcement by such acts as are the usual and ordi-
(29) nary indications to creditors, against whom they are to bring their actions. The law says that slight circumstances of inter-

meddling are sufficient for the purpose of charging a man as executor of his own wrong. The cases put by way of illustrating this rule are the slightest imaginable, and such as can lessen the value of the estate, or affect the interest of the creditors, but in the most inconsiderable degree. But collecting the debts due to the deceased, without paying the creditors, is not only sweeping away the fund which the law has appropriated to them, but is, also, the least equivocal act a man can do who desires to be considered as administering; an act, too, of which there can seldom be any difficulty of proof.

I lay no stress upon the circumstance that the extent of the power to the defendant was not shown, or whether he was authorized to sell upon credit; because upon the assumption that the power of attorney was as broad as a skillful conveyancer could make it, yet nothing that I can perceive in the case will avert the consequence that the debts due for the things sold, whether by specialty or single contract, became *ipso facto,* on the death of Francis Child, the property of the rightful administrator.

In my opinion there was no error in the charge of the court, and I am in favor of affirming the judgment.

PER CURIAM. New trial.

Cited: S. c., post, 133, 331; *McMorine v. Storey,* 20 N. C., 330; *Bailey v. Miller* 27 N. C., 446; *Outlaw v. Farmer,* 71 N. C., 34.

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(30)

ROBERT D. FROST et ux. v. JOSIAH ETHERIDGE.

From Currituck.

1. A widow is dowable of lands sold after the death of the husband, under a *fi. fa.* tested before.
2. An agreement to sell lands, in equity, bars the wife's dower.

PETITION for dower. The only question presented to the Court was that decided in *Hodges v. McCabe,* 10 N. C., 78, viz., whether the wife is dowable of lands sold after the husband's death, under an execution tested and levied before. The case was argued at June Term, 1825.

Leonard Martin for the petitioner.
Gaston for the defendant.

TAYLOR, C. J. The question presented by the record is whether the levy of a *fieri facias* upon land, of which a person is in possession, under

a title not controverted, shall so operate as to deprive his widow of dower, although the sale is made after the death of the husband.

The act of Assembly entitles the widow to be endowed of all the lands of which her husband died seized or possessed; but the latter term being ambiguous, and not necessary to be defined in the decision of the question, the inquiry may be more directly pursued by considering whether the title of the owner is evicted by the levy of the execution. I cannot conceive upon what principle so important an effect can be attributed to the levy of a *fi. fa.* when it is the received and established law that it does not change the possession; for the sheriff cannot turn the defendant out of possession by force of the levy; nor can he after a sale and deed deliver the actual possession to the purchaser; he can only
(31) deliver the legal possession; and if the defendant will not voluntarily relinquish it, the purchaser must resort to an ejectment. To invest the sheriff by implication with the power to turn the defendant and his family out of doors, by virtue of a levy, seems to be as unfounded in principle as it would be oppressive in practice.

For how can we suppose a disseizin to be effected by the levy, without assuming a seizin in some other person? In whom shall it be considered, in contemplation of law? Not in the sheriff, for he has not the *scintilla* of right; not even so much as to enable him to bring an action of trespass against one who entered on the land after the levy. The right of ownership could be asserted only by the defendant. The writ does not authorize the sheriff to break open the dwelling-house, to seize the goods of the defendant, for this sanctuary of the man and his family cannot be violated. 2 Show., 87. Much less does it permit him to break open the house for the purpose of possessing himself of the land. Seizin was not in the plaintiff in the judgment; for even in goods seized he has neither interest, property, nor possession, by force of the levy, and can maintain no action against a trespasser who takes them away; his only remedy being against the sheriff. The plaintiff's right, both in chattels and land, is confined to the money which may be raised on the sale of them—to the lien from the teste of the execution, so as to entitle him to a priority if he sells under it; and to bind the property, of whatever nature, as against the party defendant himself and all claiming by assignment from or representation through or under him.

There is, then, no person in whom the seizin can vest, if it is divested from the defendant; nor can it be considered as in custody of the law, and in abeyance. Against the freehold's being in abeyance, the policy of the law, both ancient and modern, whether derived from the
(32) feudal system or from a principle directly adverse to the genius of that institution, viz., to facilitate the alienation of land, hath placed insuperable bars. It is an established rule that the freehold can-

not be in abeyance, although with respect to the inheritance it is sometimes admitted from necessity. But it cannot be done by the act of the party, and for this reason a freehold particular estate is necessary to support a remainder of the same degree. Hob., 153. The fee can be in abeyance only to the intent that another, previously designated, may have it afterwards. As in the case of a lease for life, the remainder to the right heirs of the body of A, who is alive, there the entail shall be in abeyance until the death of A, and then it shall vest in his issue, because it could not vest before; and to the purpose of vesting afterwards, it shall be in abeyance. But to make that to pass out of one which shall never vest in another is altogether incompatible with the design of the law in allowing things to be in abeyance. Plowden, 556. It is, besides, in direct conflict with the cautious policy of our law, in the solemn form it prescribes for the transmutation of freehold estates, to invest one of the slightest and most undefined acts a ministerial officer can perform with the tremendous effect of divesting the freehold right of a man in possession. I cannot give my sanction to the principle that the sheriff's indorsement of half a dozen words upon an execution shall be allowed to cut up by the roots the debtor's right to his freehold, nor to ascribe to that officer a plenitude of authority over the property of the citizens which is unknown to the Constitution and the laws in any other instance, and is, in all respects, adverse to the spirit of our institutions.

The language is intelligible (or, if we doubt, our books will furnish the necessary information) when we are told that a man may be deprived of his freehold by his own solemn act, executed in his lifetime; by a disseizin and a descent cast; by an adverse possession, under (33) color of title, for seven years; by the verdict of a jury, disaffirming his title in a suit brought to try it, or by a sheriff's deed, in pursuance of an execution. But I know of no case adjudging, after argument, that a levy of an execution is another means of divesting the seizin.

When we examine the reasons wherefore the law considers chattel property to be vested in the sheriff, to a certain degree, by the levy of a *fi. fa.*, it will be seen that they bear no application to freehold estates, and consequently cannot produce similar effects. Although the statute of 5 Geo. II., which first made lands in the colonies liable to be sold for the payment of debts, enacts "that they shall be liable in like manner as personal estates are seized, extended, sold, or disposed of absolutely, so as to pass the whole interest of the debtor to the purchaser," yet the laws must be construed in accordance with the rules and principles growing out of the existing and unalterable nature of things.

When personal chattels are levied upon by the sheriff under an execution, the debtor is discharged to the amount of their value, for which the

sheriff is accountable to the judgment creditor; nor does any claim exist against the defendant, although the sheriff waste the goods, or fail to return the execution. The debtor has lost the special property of the goods, which the sheriff may at once take into his possession, as well to render the levy effectual as to secure himself against the claims of the creditor. And by virtue of the special property thus acquired, the law arms the sheriff with authority to maintain trover, or trespass, against a wrongdoer, that he may be enabled to meet his responsibility to the creditors.

But in relation to lands, they will be more safely kept in the defendant's possession than in that of the sheriff; they cannot be secreted, rescued, or removed; the debtor cannot by any act of his transfer the
(34) title discharged of the lien arising from the *teste* of the execution; nor will so much of his debt as the land is worth be discharged by the levy, for the sheriff has no power to protect it from aggression, nor is he responsible to the creditors.

Chattels are transferable at common law, by delivery; they may be taken away into the sheriff's custody the moment he makes the levy; and if they are expensive in keeping, the law has made sundry provisions for the indemnification of the sheriff. But conventional estates of freehold can pass only by deed; and it is difficult to understand how in the language of the statute of Geo. II. lands "can be seized in like manner with personal estate," and not less so to perceive how consistently with our act of 1715, ch. 7, the debtor became disseized by the levy; for it is a rule of the common law that where seizin of an inheritance is once alleged, it shall always be intended to continue till the contrary be shown. *Cockman v. Farrer,* Sir T. Jones, 182. Seizin is also favored in equity. Gro. and Rudim. of Law and Equity, 66, rule 96.

These views of the subject induce me to believe that the levy on the land has, *per se,* no other operation than to fix upon that particular tract as the subject from which the sum claimed in the execution is to be raised; that the security of the creditor is founded on the *teste* of the execution, and derives no aid from the levy; and that even the benefit of this may be lost by the sale of the land under an execution of a posterior *teste,* as was admitted by this Court in *Green v. Johnson,* 10 N. C., 309.

It is urged on the part of the defendant that the sale of the land after the death of the debtor has relation to the levy of the *teste,* and thus evicts the seizin out of him from that time, and that consequently he did not die seized. There are some general rules touching the doctrine of relation which it may be useful to examine in the first place. It
(35) is a fiction of law intended to subserve the ends of justice, and will not be tolerated where it tends to injustice; nor will it apply

in any case, except between the same parties and for the same ends; but it shall never work a wrong to strangers, or defeat collateral acts which are lawful. 13 Co., 21. The same author in his 3 Co., 29, states it as a general rule that relations shall extend only between the same parties, and shall never be strained to the prejudice of a third person who is not party or privy to the act. I shall presently state the reasons why this appears to me to apply exactly to the widow's claim, and that she was neither party nor privy to the act which is set up to defeat her dower.

I will select a few of the illustrations of this general rule. Where a person is disseized, the disseizee, after reëntry, can maintain trespass against the disseizor; for the law as to the disseizor and his servants will suppose the freehold to have continued in the disseizee; but not so with respect to strangers who come in by right or title under the disseizor; they cannot be made trespassers by relation. *Lifford's case,* 11 Co., 51.

Before the enabling statute, the grant of a bishop was not good beyond his own life, without confirmation of his chapter; and if the confirmation was not till after his death, it came too late, and the successor was not bound. Fitzh. Abr., Tit. Confirmation, Pl. 22. Entry by feoffee on livery within the view is too late if postponed till after the death of the feoffer. Godb., 25. Livery of seizin, which is necessary to consummate the conveyance by feoffment, cannot be made effectually after the death of the feoffer (Litt., sec. 66); for, says Littleton, "after the decease of him who made the deed, the right of these tenements is forthwith in his heir, or in some other." This reason is applicable to this case, for it shows that in Littleton's opinion a conveyance to be effectual must be consummated in the life of the grantor, and that the consummation comes too late when the estate is vested in a third person. (36) So while atonement was necessary to the protection of a grant, if it was not made in the lifetime of the grantor, the grant was void; and this doctrine of Littleton, sec. 551, is confirmed by Lord Coke in his comment, who states the reason to be that every grant must take effect as to the substance of it, in the life both of grantor and grantee. So in an exchange made according to the forms of the common law, to perfect which entry is essential, if either party dies before, it cannot be made effectually afterwards. Co. Litt., 52 b.

If the sale relates to the levy, I have stated the reasons which satisfy me that in the case of land levied upon it relates to an act of very little consequence or legal operation. If it relates to the *teste,* it connects itself with an act the only effect of which is to give the creditor a contingent priority to raise his money from the property levied upon, and to invalidate any transfers made by the debtor after that period. But neither act impairs or subverts the debtor's seizin, for before his death he was a freeholder to all the intents and purposes for which that qualification is required by our law.

But I know of no case where relation is relied on to aid by its fiction an act of the party in destruction of a title conferred by law; and the rule is expressly stated in 3 Co., 29, "that though relations aid acts in law, *as dower,* yet they will never aid the acts of the parties, that is to say, to make void acts of the parties good, by fiction or relation of law," and hence, thinking the sale of this land was a void act as to the widow, whose title to dower was complete by the death of the husband, it cannot be made good by relation to the levy, or *teste.* The cases of bankrupt, too, cited at the bar, show that the title of the assignees shall not be overreached by the relation of an execution, because the title is conferred by law.

Before the act of 1784, ch. 204, sec. 8, the widow was dowable of all the lands of which her husband was seized in deed or in law during the coverture; and upon the assignment of the dower she held it dis-
(37) charged from all judgments, leases, mortgages, or other encumbrances made or created by her husband after the marriage; and the reason given is, because, upon the husband's death, the title of the wife being consummated, has relation back to the time of the marriage, and to the seizin which her husband then had, both of which precede such encumbrances. Co. Litt., 46 a, 4 Rep., 65 a. Our act has limited the right of dower to such lands as her husband died seized of; but these are to be assigned to her, in as full right as if the rest which she had aliened had not been stripped from her dower. As to what is left to her, she should be entitled to them *in pleno jure;* and I can see no reason why she should not be entitled to the benefit of the relation in a degree at least corresponding to the curtailed nature of her claim. Then, as to the land of which her husband died seized: his death having consummated her right of dower in them, *that* should have relation back to the time of the marriage, and to that period of her husband's seizin which preceded any encumbrance short of an actual disseizin or transfer of the title. This construction would place her, with regard to this tract of land, in the situation in which the act found her with respect to all the land of which her husband was seized during the coverture. This is a relation in maintenance of right and justice, founded in reality and not in fiction (Hob., 222), and overreaches in its operation the *teste* and levy of the execution.

We have the warrant of the law for giving the widow's claim a liberal construction, for it is transmitted to us, as a maxim, that the law favoreth three things: life, liberty, and dower (Bac. on Uses); and modern writers have shown that the legal right is founded on a moral obligation on the part of the husband to provide for his wife, not only during coverture, but after his death; because, during coverture, she can acquire no

property of her own, and what she has at the marriage belongs to her husband either absolutely or during the coverture. 2 P. (38) Wms., 702.

As to the wife being bound by the relation of the execution, because she is privy in estate, that is answered by the act of 1791, ch. 351, which prefers her claim to that of the creditors; for although after the assignment of her dower she is in from her husband and not from the heir, to whom her claim is paramount, yet the husband's estate continues in her, discharged of his debts and all other encumbrances, provided he died seized. When it is ascertained that she has the right of dower, that right must devolve upon her, both by the common law and our act of Assembly, pure and untrammeled. The plaintiff in the judgment cannot be viewed in any other light than as a creditor; his lien on the land is absorbed by an anterior right so far as it respects the widow, and it remains on that portion of the land only which descended upon the heir.

While I acquiesce in the wisdom of that policy which removed the restraints upon the alienation of real estates, it must be allowed that a very helpless part of the community has been made to sacrifice in an undue proportion towards its establishment; and this is, perhaps, a reason why the pittance that remains to the widow should be protected from reasonings and analogies which have indeed a salutary reference to chattels personal, but the application of which to real property is not so distinct and palpable. It might naturally have been expected that difficulties would arise from the application of a species of process to lands which has been introduced and used for centuries solely for the seizing and disposition of chattels, in relation to every step of which rules and principles have been established by a series of adjudications. I venture to think that much of our difficulty here has proceeded from an indiscriminate adoption of these decisions, without marking the inherent and fundamental difference between the two species of property.

Upon the whole case, my opinion is that the widow is entitled (39) to dower.

HENDERSON, J. A levy made on lands under a *fieri facias* (if it can be called a levy) does not divest even the possession of the defendant, much less does it vest his estate in the sheriff; and he who purchases at a sheriff's sale comes to the estate under the defendant, and not under the sheriff. The sheriff is no more than an *agent,* constituted by law to transfer the defendant's estate to the purchaser; his transfer does not interfere with the rights of others; he can only convey the estate which the defendant had at the time of the transfer, with a relation to the *teste* of the execution in certain cases, for reasons peculiar to such cases; in the case of the heir, because he is a mere volunteer and comes to the estate

in representation of the debtor; in the case of a purchaser from the defendant, because it is a presumption of law that such purchase was fraudulent as to the execution creditor, and, if so, it is the estate of the defendant as to such creditor, and the purchaser at his execution sale succeeds to his right. But there is no relation as to the wife; she claims the estate not as representing the husband, but in her own right, and as a purchaser by the operation of law, and to her acquisition no fraud can be imputed. It is supposed, because the purchaser at the execution sale can defeat him who purchases from the husband after the *teste,* and the latter can defeat the widow, where the husband dies after the *teste,* that the purchaser at the execution sale has a title preferable to that of the widow; and so it would be if the wife's estate could be impeached on the ground of fraud—that is, if it were presumption of law that the death of the husband was designed to defeat the execution, as it is the presumption that a sale or transfer made by a debtor after the *teste* of the execution was so designed. In the contest, therefore, between the pur-
(40) chaser at the sale under execution and the purchaser from the defendant, the title of the latter is impugned on the ground of fraud, which cannot be urged against the widow's title. But in the contest between the widow and the purchaser from the husband, the widow, *not claiming under the execution,* cannot impute fraud to the purchaser from her husband; for this presumption of fraud extends only to the protection of those who claim under the execution.

It is admitted that if it be shown that A is superior to B, and that B is superior to C, it is thereby shown that A is superior to C. But it is denied that if it be shown that A is superior to B in *strength,* and that B is superior to C in *skill,* it is thereby shown that A is superior to C in either.

There is a clear application of these principles in cases of bankruptcy. It is universally admitted that if a trader, after the test of a writ of execution, and after a levy, commit an act of bankruptcy, the whole of his property becomes vested in the commissioners of bankruptcy, and passes to the assignees. Under the words of the statute, *"all his property,"* the execution creditor loses his lien arising from the levy; the relation to the test has no effect, because the commissioners came to the estate by act of law, and, therefore, fraud cannot be imputed to them; for bankruptcy is considered in law as an involuntary act. These cases, in principle, I think, cannot be distinguished: the wife comes to her estate by act of law, the death of her husband not being considered a voluntary and fraudulent transfer to defeat the execution creditor. The wife's title, therefore, being *bona fide,* prior in point of time, must prevail against the purchaser under the execution. I have felt great delicacy in pronouncing this opinion, for it overrules a decision of this

Court, made without argument (a decision in which I concurred) and founded on one made by *Judge Haywood,* from which it was said, however, that *Judge Williams* dissented. I have therefore forborne to express it for more than twelve months after I had formed (41) it; but a sense of duty compels me to forbear no longer. I therefore concur in opinion with the *Chief Justice,* that the judgment of the Superior Court be reversed and that petitioner receive dower in the lands mentioned in the petition, and that this cause be remanded with such instructions.

HALL, J., *dissentiente.* The argument for the petitioner is, that she comes in by law, and paramount the title claimed under the execution. Had the act of 1784, Rev., ch. 204, sec. 8, never been passed, that argument would be irresistible. But I am of opinion that act has done away the force of it altogether.

At common law a widow was entitled to be endowed of all lands of which her husband was seized at any time during the coverture. By the act of 1784, she is entitled to dower in all lands of which her husband died seized or possessed; provision is also made against fraudulent conveyances made with intent to defraud her of dower. The question here is, whether the husband died so seized or possessed of the lands in question as to give her a title to dower in them.

At common law it was *generally,* but not *universally* true, that a wife was entitled to be endowed of any lands of which the husband was seized during the coverture. She was not dowable of lands in exchange, and lands taken in exchange, but she might make her election. The wife of a feoffee, upon condition, after condition broken and entry by feoffor, is not entitled to dower, nor is the wife of a mortgagee; many other cases might be put. Co. Lit., 31, 13; Saunders on Uses and Trusts, 84, 192; Pow. on Mortgages, 142; Ba. Abt., Dower, B. 4, g.

When a judgment is obtained, it immediately binds a moiety of the debtor's land (Gil. on Executions, 55), as well as reversions on leases for life or years (*ibid.,* 389), and if the debtor marry afterwards and die, I apprehend the widow's right to dower in those lands would (42) yield to the lien created by that judgment.

In *Crevill v. Bracebridge,* Co. Lit., 290, a. n., 248, "the conuser leased for years and died. The question was whether the execution bound the term for years, against the wife's right of dower. The Court were of opinion that if the marriage took place before the statute, it should not be extended, because the wife was in by the husband, and therefore had the better possession, and came in paramount the statute; but if the statute was before the marriage, then clearly the dower of the wife was extendible." The law, therefore, seems to be that as the wife's right to

dower commenced with the marriage, it was subject to all preëxisting encumbrances, but not to subsequent ones. So if a moiety of the debtor's land is extended under a latter judgment a former judgment shall extend half of what was first extended, which leaves one-fourth of the whole, the amount properly extendible under the second judgment (Gil. on Executions, 55); here there are no purchasers, and still the first execution preserves its lien.

It may be observed, also, that under the *elegit* the sheriff delivers only the legal, not the actual, possession, so that the tenant by *elegit,* as well as a purchaser under a *fi. fa.,* must bring ejectment against those in possession. *Ibid.,* 44 2 Eq. Ca. abd., 380, 381.

In this case the wife's right to dower commenced by the death of the husband, and the question is, how far it is bound by the execution which issued prior to the death of the husband.

By statute 5 Geo. II., lands are made liable to the payment of debts, and are subjected to the same process for that purpose as personal estates. By the act of 1777, Rev., ch. 115, sec. 29, it is declared that all process shall issue against goods and chattels, lands and tenements, but
(43) personal property shall be levied on in the first place, if to be found; if not, it shall be *executed upon land, etc.,* and such lands shall be sold to satisfy the judgment. It therefore appears that lands are placed upon the same footing for payment of debts with personal estate. In *Jones v. Edmonds,* 7 N. C., 46, the Court says that making land subject to the like remedies with personal estate placed it on a footing with personal estate in every case where those remedies are resorted to. *Lord Holt* says, after a seizure of goods by the sheriff the defendant is discharged, and the goods are in the custody of the law. 1 Salk., 122; 6 Mod., 299. But it is said the sheriff cannot take lands into his manual possession, as personal property. It is not necessary that they should, for they are always in place. But the debtor's right is as much bound as the case of personal property. If the execution *per se* does not completely divest the defendant's right, it creates a lien upon it; the defendant can only sell it subject to that lien, and though he die before the return of the execution, it may be still sold. It is certainly a lien paramount the wife's claim to dower, which commences with the death of the husband.

But whether the issuing of the execution divested the defendant's title or not, I think it was divested when the sheriff sold and conveyed the land, for that sale had relation to the issuing of the execution, anterior to the husband's death. *Winstead v. Winstead,* 2 N. C., 247.

The case in 8 Johnston, 520, relied on to prove that a seizure of land under an execution does not divest the estate of the debtor, was where the land was levied upon and sold, but no deed executed, nor the purchase

money paid. But in the same case, page 550, the "chancellor (who delivered the opinion of the Court) said that he was satisfied that the defendant's interest in the land was not otherwise affected by the seizure than as it became an inceptive step to a legal transmutation of his estate, if other requisites had followed to consummate it." If (44) a deed had been executed, it would, I think, have related back to that inceptive step. 3 Com. Dig., Execution D., 1.

It has been decided in this Court that if a constable levies upon land, and makes return to court, and there is an order for a sale by the sheriff, and other executions issue from the same term, the creditor for whose benefit the order of sale was made is entitled to the proceeds of the sale, in preference to the creditors in the executions, because the lands were first attached and levied upon by the constable for that purpose. *Lash v. Gibson,* 5 N. C., 266; *Ellar v. Ray,* 9 N. C., 569. And if the debtor had died after the levy and before the sale, in that case I should not think the wife would be entitled to dower in the lands. It is said that in case a younger execution is first executed, it will not be set aside in favor of the lien created by an older one. That is true, and the reason is founded in policy: the sheriff has acted wrong in executing the youngest execution first, when he ought to have executed the oldest first, and it makes him answerable to the creditor in the oldest execution, rather than the purchaser under the youngest. *Lord Holt* says sales made by sheriffs under executions ought not to be defeated, otherwise there will be no purchasers at execution sales. 1 Ld. Ray., 252; 4 East, 539. But this is not the case when there are no third persons concerned as purchasers, as in the case before put of a latter judgment upon which an *elegit* was issued and lands extended, such extent was obliged to yield to an *elegit* issuing on an older judgment. In this case, if the husband had contracted to sell the land, and there was no execution against him, I suppose the land would be bound by the contract, the heirs would be bound to convey, and the wife would be barred of dower. But if the defendant in this execution had conveyed after the *teste* of the writ and died, that conveyance could not stand in the way of the execution; the purchaser under it would be entitled to recover against the alienee of the husband, because, after the test of the execution, the husband could not (45) convey; but still that conveyance would bar the wife's dower, because the husband did not die seized or possessed of the land. If, then, the wife can recover against the purchaser, under the execution, we are in this predicament: the wife can recover against the purchaser under the execution, the alienee of the husband can recover against the wife, and the purchaser under the execution can recover against the alienee.

Dower in copyhold estates, or what is called the widow's *free bench,* seems much to resemble dower under our act of 1784. It is a right to

dower in such lands as the husband died seized of, etc. 2 Atk., 525; 3 Lev., 385; Cowp., 482. The husband died seized of copyhold estate, but had contracted during his life for the sale of it; it was held that the wife's right to dower was bound by that contract (Cro. Ca., 586; New. on Con.; 3 Ves., 256), and so I think it would be under our act of Assembly. If so, I am led to believe that a levy on land or a *fi. fa.* from its *teste,* before the death of the husband, would bind the wife's right to dower in lands of which the husband died seized. I can see no reason why an execution should not bind the land as much as a contract to sell by the husband, for the lien by the execution as well as the contract both take place *before* the death of the husband; and as her right to dower commenced *at* the death of the husband, she must take it subject to any lawful encumbrances which are upon the land at that time. I therefore think the petition ought to be dismissed with costs.

Judgment reversed and cause remanded.

Cited on first point: Davison v. Frew, 14 N. C., 4; *Samuel v. Zachery,* 26 N. C., 380; *Allen v. Miller,* 57 N. C., 148; *Perry v. Mendenhall, ib.,* 160; *Brown v. Morisey,* 126 N. C., 773.

Cited on second point: Tarkinton v. Alexandria, 19 N. C., 94; *Young v. Lathrop,* 67 N. C., 71.

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(46)

SAMUEL GUY v. WILLIAM McLEAN.

From Iredell.

1. The consideration of a bond can be impeached, at law, only upon the ground that it is against an express enactment, or against the policy of the law.
2. When A gave a bond in discharge of one made by B, evidence that the latter was obtained by fraud, of which A had no notice, is not admissible in an action upon the former.

DEBT on a single bond made by the defendant to Noah Partee, and assigned to the plaintiff after it became due.

On the trial the defendant offered to prove that the bond was given to satisfy three others, made by the defendant's brother, James McLean, to Partee, one of which was fraudulently obtained by Partee, having been executed when James was drunk and did not know what he was doing, and that this was unknown to the defendant when he delivered the bond in suit.

Daniel, J., rejected the evidence as not constituting a defense in a court of law. A verdict was rendered for the plaintiff; a rule for a new trial being discharged, and judgment entered up according to the verdict, defendant appealed.

HALL, J. If a bond is given upon no consideration, or upon an inadequate one, that constitutes no objection in a court of law to a recovery upon it. Proof of the fair execution of it precludes any examination into the consideration upon which it was given, unless that consideration was against the policy of the law, as for compounding a felony (2 Wilson, 344), or against the express provisions of law, as upon a gaming or usurious consideration. Upon these and other like considerations a recovery upon a bond may be barred, although the fair execution of it be proved; but proof of fraud or misrepresentation as to the subject-matter of the consideration on which a bond is given, in case the (47) fair execution of it is established, is inadmissible in a court of law; in such cases a court of equity is the proper tribunal in which to seek redress. Plow., 309; Pow. on Contracts, 332, 340; 1 Ch., 157; 1 E. C. Al., 84, pl. 1; Hard., 200; 2 Bl., 446. For these reasons I think the judge was right in rejecting the evidence in the Superior Court.

TAYLOR, C. J., *dissentiente.* The principle is too clear to be controverted, that a contract cannot be enforced in a court of law if entered into by a person so drunk as to be incapable of deliberation. It results from the general principles of justice, that as the essence of a contract consists in consent, a person must be capable of yielding that consent, and must necessarily have the use of his reason, that he may have the ability to contract; he must be mentally as well as corporally present. When, therefore, drunkenness has proceeded so far as absolutely to destroy the reason, it renders a person in that state, as long as it continues, incapable of contracting, since it renders him incapable of consent. There is such a perfect harmony of opinion on this subject, among all the writers, who have traced the rules that ought to govern human conduct up to the first principles of natural reason, that it seems singular at first view that anything should be found in our equitable system apparently in collision with so reasonable and just a doctrine. 1 Pothier, 29; Erskine's Institutes, 447; Puffendorf, B. 1, ch. 4, sec. 8. The rule seems to be settled, that if a man enters into an agreement in a state of drunkenness, equity will not on that account alone set it aside, particularly where it is a reasonable one to settle family disputes. 3 P. W., 130 n; 1 Vesey, 19. But if any advantage be taken of him while he is in that situation, or if he is brought into it by the contrivance and management of the person who obtained the deed from him, this (48) would be fraudulent. 1 Ch. Cases, 202.

It will be found, however, upon an examination of the cases, that the rule in a court of equity relates only to the common case of intoxication, on which account alone that court will not set aside an agreement, more especially if it be reasonable in itself. It will not interfere on either

side; not to assist a person who has obtained a deed from another in a state of intoxication nor to aid the person giving a deed in that situation, to set it aside. But with respect to that extreme state of intoxication that deprives a man of his reason, such as this case describes, I cannot doubt that a court of equity would, as a court of law clearly will, pronounce a deed invalid if executed in that state, whether the party voluntarily assume it or be brought into it by the contrivance and management of the other party. 18 Vesey, 12; Buller, 172.

So far it appears to me to be perfectly clear that if James McLean had been sued by the payee on the bond which he gave for $100, he might have given in evidence, on the general issue, the condition in which he was when he executed the same, and thereby avoided it.

The next inquiry is whether the defendant may rely on the same defense, as against the plaintiff, the assignee of the bond.

The act of 1786, which first made bonds negotiable, subjects them to the same rules with promissory notes; and, consequently, whatever may be set up as a defense against the indorsee of a note is equally available against the assignee of a bond. It is well settled that any illegality in the consideration of a note will affect an indorsee to whom it is assigned after it becomes due, for that circumstance renders it so suspicious that the indorser must stand in the situation of the payee. The law will imply notice of the illegality of the consideration whenever such circumstances exist as might reasonably be expected to incite a man to
(49) inquire into the contract between the original parties. Here the note was indorsed more than two months after it became payable, and it is therefore competent for the defendant to avail himself of any defense which he might have set up against the payee, such as fraud, want of consideration, payment, etc. 3 Term, 80, 33 n; 13 East, 497.

It is, however, objected to the defendant's availing himself of this defense that he was not drunk when he gave the bond now sued for, that he executed it with full assent and deliberation, and that the consideration of this bond was not illegal, whatever might have been that of the $100 bond obtained from James McLean.

That this objection to the defense is not valid will appear most clearly from an examination of the celebrated case of *Collins v. Blantern,* 2 Wilson, 348. In that case the principle of this objection was well considered, and overruled, upon reasoning which appears to me quite satisfactory. As this part of the case presents the only difficulty I ever felt in it, and which is now entirely removed from the consideration of the case just quoted, and one other, I find it necessary to be somewhat particular in the statement of them, in order to place my opinion in its true point of view. John Rudge had indicted five persons for perjury, in five several indictments, which were all ready to come on for trial, when the

corrupt agreement was made. That agreement was that Rudge would not appear to prosecute the indictment, provided Edward Collins, a stranger, would execute his note of hand to Rudge for the sum of £350, and it was agreed at the same time that two of the defendants in the indictments, together with Robert Blantern, then a stranger, should enter into a bond conditioned for the payment of the same sum as an indemnity to Collins in the event of his being compelled to pay the note to Rudge. The note and the bond were executed on the same day; Collins sued Blantern on the bond, and one of the grounds of de- (50) fense relied on was that Collins was not privy to the corrupt agreement, and the consideration of the bond, at least, was not unlawful, however the note may have been. But the Court held clearly that the whole transaction is to be considered as one entire agreement; that the manner of the transaction was intended to gild over and conceal the truth, and that whenever courts of law see such attempts made to conceal such wicked deeds, they will brush away the varnish and show the transactions in their true light.

In that case Collins was privy to the corrupt agreement; in this, Guy, the plaintiff, was connected with the illegal transactions by operation of law, in receiving the indorsement of the bond after it became due, and when by applying to the defendant he might have obtained information of the illegality of the consideration.

In that case Blantern knew that his bond was given to indemnify Collins against a note which was founded on a corrupt agreement; in this, the defendant was not apprised, when he gave his bond, that one of his brother's bonds had been fraudulently obtained from him, but received them on the assurance of Guy that they were all good.

A stronger light is thrown on this part of the case by what is said by the Court in *Cuthbert v. Haley,* 8 Term, 390.

The principal decision was that if an usurious note is transferred to an innocent indorsee, for a valuable consideration, and afterwards the maker of the note give his bond to the indorsee for the amount, the bond is good. In giving their opinion, the Court says "that if one security be substituted for another by the parties, in order to get rid of the statute of usury, the substituted as well as the original security will be void."

The sole reason of the distinction must be the innocence of the indorsee and the guilt of the party who consented to the usury. If there be any difference, where the new security is given by the borrower, (51) and a stranger, ignorant of the original transaction, it must be altogether in favor of the latter; and that is precisely the case we have to decide.

Nor does it impair the defense offered in this case, that part of the consideration of this bond was legal, inasmuch as two of James McLean's

bonds, for which it was given, were untainted by fraud; for I take it to be clear law that when a security is partly given for an illegal consideration the whole of it is void and cannot be apportioned. *Scott v. Gilmore,* 3 Taunt., 226.

The cases I have cited are relative to contracts made void by statute; but there is no difference between them and contracts void at common law, as it is strongly said by *Lord C. J. Wilmot* in *Collins v. Blantern:* "I think there is no difference between things made void by act of Parliament and things void by the common law. Statute law and common law both originally flowed from the same fountain, the *Legislature.* I am not for giving a preference to either, but if to either, I should be for giving it to the common law. If there had even been any idea or imagination that such a contract as this could have stood good at common law, surely the Legislature would have altered it. There has been a distinction mentioned between a bond being void by statute and at common law, and it is said that, in the first case, if it be bad or void in any part, it is void *in toto;* but that at common law it may be void in part and good in part; but this proves nothing in the present case. The judges formerly thought an act of Parliament might be eluded if they did not make the whole void. It is said the statute is like a tyrant: where he comes he makes all void. But the common law is like a nursing father: it makes only void that part where the fault is, and preserves the (52) rest.

This case might have been reasoned upon other principles, such as that a bond void in its creation cannot be made good by any subsequent transaction; but I have chosen rather to rest my opinion upon grounds more familiar in practice.

Upon the whole case I think the defendant is entitled to a new trial, and if the allegations made by him relative to the contract, as stated in the case, are established to the satisfaction of the jury, he is entitled to a verdict in his favor.

REDMOND CRUMPLER et al. v. THE GOVERNOR.

1. Where judgment is entered up summarily against the sureties of a sheriff, upon a proper case, it will be set aside.
2. In a bond given for a specific object, general words shall be construed with reference only to that object.
3. Therefore, when a bond is given with a condition that A. M. shall "collect the *county contingent tax*, and in all things perform his duty as sheriff": *Held*, that the public taxes cannot be recovered on it.

AT Spring Term, 1823, of WAKE, before *Badger, J.*, judgment was, on motion, entered up against the present appellants, sureties of A. McAlister, Sheriff of Sampson, upon the following certificates:

I, Joseph Hawkins, Comptroller of the Treasury of the State of North Carolina, do hereby certify the above and foregoing account to be raised from documents filed in this office, except as to the fine, which is charged agreeably to law. I likewise certify that agreeably to the certificate of the Clerk of the County Court of Sampson, Redmond Crumpler, etc., are named and returned as the securities of Alexander McAlister, sheriff of the aforesaid county of Sampson, and being liable, with him, for the taxes of 1821, payable on or before the 1st of October, 1822, and it is wished that judgment be had against them accordingly, in favor of the Governor, for the use of the State aforesaid.

J. HAWKINS, *Compt.*
J. HAYWOOD, *Pub. Treas.*

31 March, 1823.

A *fi. fa.* issued on this judgment, which was superseded under the *fiat* of the *Chief Justice*. At the next term a rule was ob- (53) tained upon the plaintiff to show cause why the judgment should not be vacated and the execution set aside. Upon showing cause, it appeared that the defendants in the original suit were ignorant of the motion to enter up the judgments; that McAlister and his sureties executed only the following bonds, viz., one payable to the Governor for $4,000, conditioned to account for the *poor taxes;* one other, also payable to the Governor, for $4,000, conditioned to account for the *county contingent taxes;* one payable to the chairman of the county court for $4,000, conditioned to account for all moneys received on account of public buildings, and a bond to the Governor for $10,000, conditioned to make *due return of all process coming to him as sheriff*. The conditions of all the bonds contained these general words, that the said A. M. should *"in all things well, truly, and faithfully execute the said office,"*

and "pay all fees and sums of money received by virtue of any process." *Mangum, J.,* at the request of the counsel for the present plaintiff, and *pro forma,* discharged the rule, whereupon the plaintiffs appealed.

Badger for the appellants.
Haywood for appellee.

TAYLOR, C. J. Various acts of Assembly have at different times imposed duties upon the sheriff which did not, in a strict and common-law sense, appertain to the office as such, and have endeavored to enforce the performance of these duties by prescribing, in substance, the several conditions of the bonds required to be given. While he had no other
(58) duties to perform than such as properly belong to the office of sheriff, the bond was directed to be made payable to the Governor, as it yet is, and his successors in office, and conditioned for the due execution of the duties incident to his office as sheriff, viz., the return of process and precepts, the payment of money levied by virtue of them, and the proper performance of his duty in any other respect. 1777, ch. 118, R. C. Afterwards he was required to enter into a bond payable in the same manner, and to be conditioned for the due collection from the collectors and the payment and settlement of the *public taxes.* 1784, ch. 219.

The only other bond required is to be made payable to the chairman of the county court, and conditioned for the due collection of and accounting for the county and poor tax. 1798, ch. 509.

The bonds into which the sheriff actually did enter in this case are, first, one payable to the Governor and conditioned for accounting for the moneys he may receive for the *poor taxes* of the county, followed by a general condition for the performance of his duty as sheriff.

2. One payable to the Governor and conditioned for accounting for all monies that the sheriff may receive on account of the *county contingent taxes;* and a general condition for satisfying all sums and fees received or levied by him by virtue of any process, and for the faithful performance of the duty of sheriff.

3. One payable to the chairman of the court, conditioned for accounting for the moneys he may receive on account of the public buildings, followed by a general condition like the others.

4. One payable to the Governor and conditioned for the performance of his office as sheriff.

The only one of these bonds upon which it can be contended with any shadow of argument that the securities are chargeable is that payable to the Governor, and conditioned for the payment of the county con-
(59) tingent taxes. But they cannot be charged by force of these words

without putting upon them a sense which they will not bear, either in their common acceptation or from legislative exposition. No person could understand from them that they import the public taxes, for they are used in contradistinction to them, both in common discourse and in the several acts of Assembly. One bond is to be given for the public taxes; another for the county and poor tax, nor is there any law which uses the terms, county contingent taxes, as signifying public taxes. So far from it, that county taxes are called those that are levied to defray the contingencies of the several counties for the purpose of distinguishing them from the taxes which are levied for the use of the public treasury. 1777, ch. 129.

So that, if this bond had been made payable to the chairman of the county court, the securities would by force of the terms have been made chargeable for the county taxes, for they must necessarily understand that for these, and these alone, they were called upon to subscribe the bond.

But it is said that if the securities are not chargeable by force of these terms, they are nevertheless liable by the general obligation contained in the condition, viz., "to satisfy all sums and fees received or levied by him by virtue of any process, and for the faithful performance of the duty of sheriff." Now, this argument proves too much, for every other bond entered into by them contains the same engagement; so that they would be bound three times to the Governor and once to the chairman of the county court, for the payment of the public taxes. They might then be sued for them, indifferently upon either of the bonds made payable to the Governor, whilst, when they entered into them, they must have clearly understood that each bond provided for a distinct and specific object. The general condition for the performance of the sheriff's duty is improperly inserted in all the bonds, except that given under the act of 1777; it has no business there, and if put there (60) by clerical caution or inadvertence, it can only be construed in subservience to the specific object which the bond is designed to secure; *noscitur a sociis*. Thus in the bond given under the act of 1777, it cannot be extended to other duties imposed upon the sheriff by subsequent laws, which duties are of a nature not properly belonging to the office of sheriff, for which extra duties, as they may be called, bonds with a particular condition are required to be given. The securities to such a claim might properly answer, We have entered into no such stipulations. It may happen that the sheriff is not able to prevail upon the same securities to subscribe all the bonds; one set may be willing to be responsible for his duty as sheriff; another for his collection of the public taxes; yet, if the general terms are inserted in the condition, and are to be construed without regard to the subject-matter of the bond, each set of securities

will be liable for every default the sheriff makes in any of his duties. And, not liable by a common-law process, with notice to them, and an opportunity of making a defense, but as in this case, by a summary proceeding and a judgment entered up, on the comptroller's certificate.

If the condition of this bond had recited that the sheriff by virtue of his office was bound to collect the county taxes, and to account for them according to law, the authorities are full to prove that the general engagement afterwards inserted in the condition shall receive such a construction as will restrain it to the particular duty for which the bond was given; and that in a case between individuals. I consider the doctrine thus established as more directly applicable to the case of a public officer, whose peculiar duties are pointed out by a public law, and the substantial terms of the condition of the bond he is to give, also defined by it. The law having by a particular provision imposed the
(61) duty, and defined its extent, a security called upon to execute a bond would naturally confide that he was binding himself so far and not further than the law had bound the sheriff, and would not be likely to inquire, scrupulously, whether the bond contained a term beyond the law. Whatever answer this argument would admit of in the case of a bond sued in common law, it seems to me decisive when the bond is sought to be enforced by a summary remedy. The authority I rely upon for the construction of the condition of this bond is the *Liverpool Waterworks v. Atkinson,* 6 East, 507. There the condition of the bond recited that the defendant had agreed with the plaintiff to collect their revenues from time to time for twelve months, and afterwards stipulated that at all times thereafter during the continuance of such his employment, and for so long as he should continue to be employed, he would justly account and obey orders. The breach assigned was the not accounting for money received after the twelve months, for a period during which the defendant remained in the plaintiff's service, which it was contended he was bound to account for, by force of the positive engagement contained in the bond. But it was held by the Court that the general words must be construed to be restrained by the recital stating an appointment for a specific time, and that the obligation must be confined to the twelve months.

For these reasons I am of opinion that the judgment should be reversed.

HALL, J. The judgment sought to be set aside was obtained against McAlister for public taxes. Four bonds are presented, some one of which, it is alleged, is sufficient to sustain the judgment. One of these bonds may be laid out of view; it was given to the chairman of the county court to collect taxes for public buildings. Another was given

to the Governor in the sum of $10,000. As this bond does not, in its terms, agree with the provisions of the law (being taken for a (62) larger sum), a summary remedy, such as has been resorted to in this instance, *Bank v. Twitty,* 9 N. C., 5, cannot be had upon it; and it may also be laid out of view. Another bond is given to the Governor, in the sum of $4,000, conditioned that the sheriff shall account for the poor taxes of the county, and pay all fees and money by him received by virtue of any process, and in all other things well, truly, and faithfully execute the said office of sheriff during his continuance therein, etc.

A fourth bond is given to the Governor, in the sum of $4,000, conditioned that the sheriff shall account for all moneys that he shall receive on account of the county contingent taxes, and pay all fees and sums of money which he shall receive by virtue of any process, etc., and in all things well, truly, and faithfully execute the office of sheriff during his continuance therein.

It would appear to me that the different objects for which the two latter bonds were given are specifically expressed in their conditions, and that the concluding words, "that he shall in all things well and truly, etc., execute the office of sheriff," cannot recover, or guarantee the payment of so important a part of the taxes as that due to the State; if this was the object, why are two bonds given of the same kind, and with the same securities, when one would have answered as well?

It appears to me that the concluding words mean that McAlister shall well and truly execute the office of sheriff as far as relates to the duties of the office, especially set forth in the preceding part of the bond.

I am inclined to think that the judgment complained of should be set aside.

HENDERSON, J. It must be admitted that if the words *"county contingent taxes for Sampson County"* were entirely stricken out of the second bond, that the general words which follow, to wit, "that he in all things shall well and truly perform the office of sheriff of the (63) county of Sampson," would embrace the obligations for which this action is brought. But it is alleged that these general words shall be restricted by the special duties prescribed by the preceding clause, and that they are to be understood as relating to his duties touching the collection of the county contingent taxes, and none others. If these special words were properly there, and were such as this bond, as an official one, would enforce, I admit the correctness of this argument, for it would be contrary to the *intent* of the parties to extend the general words to other duties than those which grew out of or properly belong to the special ones; for general expressions, when superadded to special ones, are introduced from a consciousness of our inability to foresee and point out

beforehand all that may be required in regard to the special ones. It is therefore nothing but fair construction to confine them to special things, before spoken of, or to things of a like kind. The question presented is, however, nothing but a question of *intent*. If, therefore, *that intent* can be collected from the transaction itself, either verbal or written, it is sacrificing substance to form to adopt such a rule of exposition. I would premise that the law does not, in this case, prescribe the form of the bond; it directs, in the act of 1784, that the sheriff shall give bond in the sum of $2,000, payable to the Governor, that he will collect from the tax gatherers the county tax, and pay it over to the district treasurers; and where the office of tax gatherer was abolished, and the sheriff directed to collect the taxes immediately from the people, nothing is said about his giving bond for that purpose, nor is he required by our acts to give bond for the public taxes except by the act requiring him to collect the county and poor tax he is directed to give bond to the chairman of the court for the faithful collection of these taxes, *as well as for the public taxes*. Thus by implication only, recognizing that he was bound
(64) to give bond for the public taxes. According to our decisions (which I still approve of), if the form of an official bond had been prescribed, and afterwards other duties are added, a bond given in the prescribed form, if that form is sufficiently broad to embrace those superadded duties, will enforce their performance; for although the duties were not in existence (if I may use the expression) when the form was prescribed, yet they were when the bond was given, and the words thereof embracing them, they are therefore within its obligations. If the words of this bond embrace the duties of the sheriff as collector we may fairly infer that it was so intended, for there is no prescribed form. It is payable to the Governor, in the sum required by law, conditioned for the faithful discharge of his duties as sheriff. The bond and the condition are consistent; it is payable to him who superintends the execution of the public law in regard to taxes; it is in the sum prescribed, and the duties of sheriff relate to the collection of the public tax; there is nothing but the words *"county contingent tax"* to contradict this. Why were they inserted? By design, as expressive of the intent? It is presumed not, for the Governor has nothing to do with the collection of the county tax; as an official bond, and such this was designed to be, it is upon this supposition a perfect nullity. It is fair to presume that the words meant something. If they were inserted by a mistake, thinking they embraced the public tax, under the name of county contingent tax (although that mistake would not make them embrace the public tax, if in fact they did not), yet it would prevent *them* from controlling general words which do embrace them, and were intended to do so; if they were inserted by mere inadvertence, without thinking of their meaning, it would produce the

same result. I am inclined to think, therefore, that the general words are not restrained by the special ones; that the rule which (65) excludes them is a mere rule of construction to ascertain the intent, and that special words inserted through ignorance or mistake, as it is evident those were, are without the spirit of the rule, and, therefore, without the rule itself.

As to the objection to the certificate, it does not appear to be in due form, but it is unnecessary to set aside the verdict when the result will be the same. The *judgment* is *regular;* if the objection had been made at the time it was entered, I think it would have prevailed, and although it may be said that the defendants had no notice, and could not have objected, yet it is a form of proceeding directed by the Legislature and sanctioned for more than thirty years. It is true that any objection which goes either to show that the judgment is void, or for too much, will be considered by the Supreme Court as not waived or lost by not being made, when in fact no opportunity of defense was open; but it is not so as to the regularity of the evidence, when it appears that the evidence, irregular as it was, spoke the truth. It is not like an objection made to the regularity of the evidence on trial.

I am sorry, therefore, that I cannot concur with my brethren. I think that the judgment should be affirmed.

PER CURIAM. Reversed.

Cited: Governor v. Matlock, post, 214; *Winslow v. Anderson,* 20 N. C., 6; *Jones v. Montfort, ibid.,* 70; *S. v. Bradshaw,* 32 N. C., 232. *Keaton v. Banks, ibid.,* 384; *Powell v. Joplin,* 47 N. C., 402; *Eaton v. Kelly,* 72 N. C., 113; *McLean v. Holt,* 75 N. C., 349; *Prince v. McNeill,* 77 N. C., 403; *Wilmington v. Nutt,* 80 N. C., 267; *Scott v. Kenan,* 94 N. C., 302; *County Board v. Bateman,* 102 N. C., 56; *Commissioners v. Sutton,* 120 N. C., 301.

THE GOVERNOR for the use of ARCHIBALD CAMPBELL, County Trustee, v. WILLIAM BARR et al.

From Stokes.

The county tax cannot be recovered of the sheriff upon the official bond required by the act of 1777.

DEBT upon a bond, conditioned that William Barr should "well and truly execute and due return make of all process, etc., and pay
(66) and satisfy all fees and sums of money by him received, etc., and *in all other things well, truly, and faithfully execute the office of sheriff, etc.*" The breach assigned was that Barr had not paid over certain county taxes which "he had collected and received by virtue of his office as sheriff." After oyer, the defendants plead: (1) *Non est factum.* (2) Conditions performed, and not broken. (3) That they sealed and delivered their bond for $2,000, to the chairman of the County Court of Stokes, conditioned that Barr should account for the county tax; that judgment had been obtained on the same for the sum of $3,024, of which $1,024 had been remitted, concluding with an averment that the sum so remitted was the sum now sought to be recovered.

Upon the third plea, *Norwood, J.*, intimating an opinion in favor of the defendant, the plaintiff was called and nonsuited, and a rule to set the nonsuit aside and grant a new trial being discharged, he appealed.

No counsel appeared for the plaintiff in this Court.
Murphey and Gaston for the defendant.

HALL, J. The bond on which this suit is brought certainly cannot be converted by the declaration into an obligation upon the sheriff to pay the county tax. The bond is a proper one, given to the Governor, and conditioned that the sheriff shall "execute all process," etc., and "pay and satisfy all fees and sums of money to the persons by law entitled to them"; but nothing in the bond makes it his duty to collect the county and poor tax. The defendant states that he gave a bond to the chairman of the county court for that purpose, and that judgment was obtained against him upon it.

I have no hesitation in saying that the nonsuit should not be set aside, and that there ought not to be a new trial.

Judgment affirmed.

Cited: Jones v. Montfort, 20 N. C., 70; *County Board v. Bateman,* 102 N. C., 56.

Distinguished: S. v. Bradshaw, 32 N. C., 232; *Wilmington v. Nutt,* 80 N. C., 267.

LEROY STOW v. LEVI WARD et al.

From Lincoln.

1. Devise "that the residue of my estate, real and personal, be equally divided between the heirs of my brother, John Ford (he being noticed as living), the heirs of my sister, Nancy Stow, the heirs of my sister, Sally Ward, and nephew, Levi Ward."
2. *Held*, that the *real estate* must be divided *per stirpes*, and that Levi Ward takes one-fourth under the devise to him by name, and a share of the fourth devised to the *heirs of Sally Ward*.
3. Devise "to the heirs of A," they take in the same proportion as if the estate had descended to them from A.

NATHAN FORD by his will devised as follows: "I give to my brother, John Ford, 200 acres of land," and (after several specific bequests) "it is my will, and I do allow, that all the remaining parts of my estate, both real and personal, be equally divided amongst the heirs of my brother, John Ford, the heirs of my sister, Nancy Stow, the heirs of my sister, Sally Ward, deceased, and nephew, Levi Ward." Levi Ward was the son of Sally Ward.

This case, which is reported 10 N. C., 604, came before the Court at this term upon the return of the partition, made according to the interlocutory decree of this Court at June Term, 1825.

HENDERSON, J. When I take a review of the construction which I once thought I was bound by precedents to give this will—precedents which in reality neither bore nor professed to bear upon it, so far as regards the real estate—and the struggles which I made in my own mind to get rid of them, it appears that I must then have labored under something like a delusion; for it was never for a single moment doubted, as far as I can collect from authorities, that where persons come to an estate as heirs, whether by descent as having been in by their ancestor, or by purchase as a new acquisition, under the description (68) of heirs, that they take *per stirpes* and not *per capita;* they take it in a representative and collective character, and as to others, are considered as an unit, however they may subdivide and parcel out the property among themselves; they take not individually, but collectively; not separately, but conjunctively. A has a daughter and two granddaughters, daughters of a deceased daughter; his lands descend one-half to his daughter and the other half to his two granddaughters. So if the limitation had been to the heirs of A, making them take as purchasers, they would take the estate in the same proportions, that is, *per stirpes* and not *per capita;* in the case of the descent, the lands of which A died seized

descend to his daughter and granddaughters, as persons designated by the canon of descent, under the description of heirs, or rather *as* heirs; in the latter case the same canons of descent point out the purchasers, and they take the same proportions as if the lands had descended from A. It is a fallacy to say that the law designates the persons, and the will points out a separate, equal, and individual interest in each. The will points to them as a unit, and the canons of descent do the same. I have not a doubt but the presiding judge was right when he said the devisor intended a division by stocks or families; if so, he could not have used a word in our language more appropriate, for the reasons given in *Croom v. Herring,* 11 N. C., 393.

Suppose one of the brothers had died after the date of the will and before the testator, leaving ten children: the surviving brother or sister of the testator would have to share equally with all these children, to get, instead of a third or a fourth, only a twenty-fifth part, or less if there were more children. The testator having in his will given a legacy to his brother, thereby noticing that he is alive, the word heirs is to (69) be construed heirs apparent, not only as to his heirs, but as to all where the parents are alive—that is, where it is necessary.

I must confess I feel some difficulty as to the double portion of Levi Ward, but the strong inclination of my mind is, and so I must decide, that he is entitled to one-fourth under the description given by name, and to one-half of one-fourth under that "of heirs of Sally Ward."

The former decree must be set aside, and the decree of the Superior Court reversed; for by that Levi Ward was allowed only half of one-third, whereas he is entitled to three-eighths, to wit, one-fourth, and one-half of one-fourth. Let it be decreed that the estate be divided into four equal parts, and that one-fourth be allotted to the heirs of John Ford, one-fourth to the heirs of Nancy Stow, one-fourth to the heirs of Sally Ward, and one-fourth to Levi Ward.

The authorities which perplexed us in this case relate entirely to personal property.

Decree reversed.

TAYLOR, C. J., dissented.

Overruled: Ward v. Stowe, 17 N. C., 510.

Cited: Clement v. Cauble, 55 N. C., 92, 103; *Gatlin v. Walton,* 60 N. C., 360.

JOHN FARRAR v. PHILIP ALSTON.

From Chatham.

1. When no loss is occasioned by a falsehood, an action for a deceit will not lie; neither will it when ordinary prudence would have prevented the deception.
2. A being surety for B, is falsely informed by C, administrator of B, that the debt is paid; trusting to this representation, A uses no means to secure himself. *Quære:* Does deceit lie?

CASE for a deceit. The allegations of the declaration were that the plaintiff and one Drake became sureties for one Ramsay, to the Bank of Cape Fear; that upon the death of Ramsay, the defendant being his administrator, falsely and fraudulently affirmed to the plaintiff that the note was taken up; upon which affirmation the plaintiff relying, used no means to secure himself; that afterwards, when the assets (70) of Ramsay were exhausted by other debts, and when Drake, the cosurety, "who was at the *time of their becoming jointly bound* as aforesaid, amply sufficient to pay one-half, had failed and become unable to pay any part thereof," the plaintiff had been compelled to pay the whole debt.

It appeared on the trial that Ramsey died in October, 1820, possessed of a large estate; administration was committed to the defendant in November following; upon which the plaintiff and Drake, fearing that Ramsay's estate would prove insolvent, applied to the defendant, who *promised to pay the debt.* In March, 1822, suit was commenced by the bank against the plaintiff and the sureties; shortly after which the defendant told Drake, who communicated it to the plaintiff, *that the debt was paid;* execution for it, however, issued, and was satisfied by the plaintiff.

Daniel, J., charged the jury that if the plaintiff had been lulled asleep by the false declaration of the defendant, and in consequence thereof had been compelled to pay the debt, he was entitled to a verdict, although the defendant had assets sufficient at the time to pay the debt; and that the affirmation made to Drake, and communicated to the plaintiff, was evidence to them.

A verdict was returned for the plaintiff. A rule for a new trial being discharged, and judgment rendered upon the verdict, the defendant appealed.

Several points were made in the cause which it is not necessary to notice.

Nash for the appellant.
Gaston for the appellee.

HENDERSON, J. The declaration is defective for want of an allegation that the fraud charged on Alston was intended to injure Farrar. It is also defective for want of an allegation as to the sufficiency of assets in Alston's hands, for Farrar's indemnity, at the time the assertion was made that the debt was paid, and as to the solvency of Drake at the same time. It states, it is true, Drake's solvency at the time he became
(72) joint surety, but that is not the material fact. But there is a substantial error in the judge's charge. He instructed the jury that the plaintiff ought to recover, although it was shown that Alston then had assets. This would destroy the very foundation of the action, for the complaint is, that during the time that Farrar was lulled into security by the fraud of Alston the assets of Ramsay, the fund to which Farrar was to look for his indemnity, were swept away, and that he was left without the means of obtaining satisfaction upon Ramsay's implied promise of indemnity; for the action is not founded on his being obliged to pay the debt, for he contracted that obligation without the agency or interference of Alston. The jury were not properly instructed, and there should be a new trial. What is said above as to there being no charge that the fraudulent act was intended to injure Farrar, was designed to apply to such a case as this, where the injury is not the direct, immediate, and natural consequence of the fraud, for when such is the case, perhaps it needs no averment that such was the intent, as the law presumes that was intended which is the immediate, direct, and natural consequence of an act, and the court, as the law draws the inference, does not require that the jury should do it. As this case may possible be so amended as to present a statement of facts which will enable the plaintiff to recover, I think it best to reverse the judgment, and award a new trial rather than arrest the judgment. The judge of the Superior Court will then exercise his discretion in permitting the plaintiff to amend.

HALL, J. Without looking strictly into the pleadings in this case, I concur in the opinion that the rule for a new trial should be made absolute, because it does not appear that in consequence of the deceit complained of the plaintiff cannot be compensated out of the assets of Ramsay's estate in the hands of the defendant.

(73) TAYLOR, C. J. I do not think that either of the two essential grounds of an action of deceit established in this case, viz., a fraud committed by the defendant, or a damage resulting from such fraud to the plaintiff. The fraud is alleged to consist in Alston's telling Drake that he, Alston, had paid off the debt for which the plaintiff and Drake were security. But though this assertion was untrue, the means of ascer-

taining the truth were completely within the power of the plaintiff; and if it were of sufficient importance to regulate his conduct in the transaction, it would obviously seem necessary, in the first place, to ascertain whether it were true or not. A person of ordinary prudence would not permit himself to be lulled into security by giving full credit to an assertion which was not made to himself, but reported to him by a third person. He would at least have applied to Alston to ascertain the time and circumstances attending the payment, and how far the assertion had been deliberately made. But the sure way would have been to inquire at the bank, whether he were still held responsible for the debt. If the plaintiff was in fact deceived, it was the consequence of his credulity and negligence, and in such a case the law does not profess to administer a remedy.

It does not appear from the declaration or the statement, that any loss was occasioned to the plaintiff which would not equally have happened if the promise or assertion had never been made.

The defendant had no sooner administered on Ramsay's effects than the apprehension was enteretained that the estate was insolvent, and the plaintiff and Drake applied in consequence to the administrator, who assured them that he had assets, and would pay the debt. This was about November, 1821, and the plaintiff took no further step; when about four months thereafter a writ was sued out against the administrator and the two indorsers, then at a return term in (74) March, 1822, a joint plea was entered.

It might have been expected that when the administrator had not paid the debt in that time, but suffered the indorsers to be sued, that it would impair their confidence in his promises, and urge, at least, the plaintiff, the only solvent one, to provide for his own security.

But so far from its having this effect, the plaintiff was again quieted, soon after the institution of the suit, by this assertion of Alston, reported to him by Drake, and allowed the suit to depend until the fall of 1824, when the judgment was recovered. I do not perceive that the plaintiff's paying the money was occasioned by the promise or the assertion of the defendant, but rather by his becoming indorser for a person whose estate was probably insolvent from the first; but if not, from his own negligence, in not securing himself when he might do so.

I think the jury have been misdirected in point of law on the merits of the case, and it is not therefore necessary to give an opinion on the minor points made in the cause. There ought to be a

PER CURIAM. New trial.

Cited: Watts v. Greenlee, post., 213.

SARAH B. CARTER v. SOLOMON GRAVES.

From Caswell.

A deed produced under a *subpœna duces tecum* was left after the trial among the papers in the office: *Held*, that it was subject to the control of the party producing it, and where the court below ordered the deed to be delivered up by the clerk, *Held further*, that the opposite party in the cause could not appeal from such order.

A DEED from Solomon Graves to Sarah B. Carter having been produced on the trial of a former suit between these parties, under a *subpœna duces tecum* directed to the agent of Sarah B. Carter, and having been left among the papers of that cause, the clerk, under the
(75) instruction of Solomon Graves' counsel, refusing to deliver it up, Mrs. Carter applied for permission to withdraw it from the office. By the direction of the presiding judge, notice of this application was given to the counsel of Graves. The application was opposed, and on the argument the statement made in the cause heretofore tried between these parties, *Graves v. Carter,* 9 N. C., 576, was read and formed a part of this case.

Daniel, J., directed the deed to be delivered up to the applicant, whereupon Solomon Graves appealed.

Badger for the appellant.
J. M. Morehead for the appellee.

HALL, J. It appears that the deed in question was executed by the defendant to the plaintiff; that it was not in the possession or under the control of the defendant, but in the possession of the plaintiff's agent. It was for this reason that the defendant secured a *subpœna duces tecum* to be served on the agent, to have the benefit of the deed on the trial of the suit set forth in this case; that when the deed was brought to court, and after the trial of that suit it fell into the hands of the clerk of the court, who was cautioned by the defendant's counsel not to let it be taken out of the office. It is to regain possession of the deed that this application is made.

It is to be observed that the deed was private property, and the defendant had no greater right to it after the trial than he had before; the law interposed so far only as to give him a right to use it as evidence in the trial of the suit; and the law would not be true to itself if, after the purpose was answered for which it dispossessed the plaintiff of the deed, it did not place her in *statu quo* by redelivering it to her; neither a right to the deed nor rights claimed under it were intended to
(76) be disturbed by its production on the trial of that suit. It would

therefore appear that the court did right in directing the deed to be delivered up. But from another view of the case, it appears that no effective opinion can be given on that point. By the act of 1818, ch. 962, sec. 4, appeals by either party are permitted to be brought to this Court from any sentence, judgment, or decree made in the Superior Courts. In this case Mrs. Carter made an application to the court for the deed. Legally speaking, Solomon Graves had no interest in the application; but the court directed notice to be given to his attorney—not his attorney, I presume, in this case, but his attorney in the former suit. This did not make Graves a party defendant; it did not constitute in court such *a cause* as the act of assembly contemplates in regulating and authorizing appeals from the Superior Courts. This is a proceeding *sui generis*.

I think the defendant had no right to appeal, but that the appeal should be dismissed with costs.

Appeal dismissed.

Cited: Davidson v. Cowan, post, 306.

JOHN HOWELL v. MARTIN ELLIOTT.

From Rutherford.

Possession retained by the vendor of chattels does not, *per se*, make the sale fraudulent in law. It is but presumptive evidence of fraud, proper to be left to a jury. To repel this presumption the vendee may show that consideration passed, though none be stated in the bill of sale.

TROVER for a horse, tried before *Daniel, J.* The plaintiff claimed title under a bill of sale from one Spurlin, the material parts of which were as follows: "I, Jesse Spurlin, have this day bargained, sold, etc., unto John Howell, Sr., one bay horse, one cow and calf, two feather beds and furniture, for which said property I acknowledge myself fully satisfied and paid, and I do therefore warrant and defend the said (77) property to the said John Howell, etc."

The subscribing witness proved that the bill of sale was given upon the plaintiff becoming surety for Spurlin to one Wilson for $57, with an agreement that if Spurlin paid the debt to Wilson the property mentioned in the bill of sale should be Spurlin's; that the property was delivered to the plaintiff, and then left by him in the possession of Spurlin. Spurlin paid to Wilson $6 in part of the debt, and the residue,

amounting, with the interest, to $56, was paid by the plaintiff, and the value of the property conveyed did not exceed that sum.

On the part of the defendant it was shown that the property continued in the possession of Spurlin from November, 1816, the time when the bill of sale was executed, until August, 1822, when the horse was seized under an execution against Spurlin, at the instance of the defendant, sold and bought by the defendant. It was also proved that in August, 1822, Spurlin having claims upon the plaintiff for work and labor done, and they differing as to the amount due, submitted that question to arbitrators, who assessed the sum due Spurlin at $130, and awarded the payment thereof to him. Spurlin afterwards assigned his interest under this award to one McEntire, who sued Howell in the name of Spurlin, and collected the money.

The presiding judge instructed the jury that possession being retained by Spurlin was not in itself a fraud, but was presumptive evidence of fraud, as was also the circumstance of taking a bill of sale absolute on its face, when a security for a debt was only intended; but that both were capable of being explained, and the presumption thence arising repelled by other facts and circumstances, that if the transaction was *bona fide* the plaintiff's title was not affected by the arbitration,
(78) for he was not bound to set off his claim in the action brought on the award; and that the plaintiff was not precluded from showing the consideration on which the bill of sale was founded, though it was not stated on the face of the bill of sale.

Under these directions the jury found a verdict for the plaintiff; and a motion for a new trial on the ground of misdirection having been overruled, and judgment rendered on the verdict, the defendant appealed.

The case was submitted without argument by *Manly* for the plaintiff, no counsel appearing on the other side.

HALL, J. Whatever of fraud may have been designed or practiced in this case was fairly left to the jury; they have passed upon it, and it is not within the limits of our duty to review their decision.

The title to the horse in question passed by the bill of sale to the plaintiff. Whether the levy and sale took place before or after the arbitration between the plaintiff and Spurlin does not appear. If before, certainly the defendant could derive no right from the purchase made by him at that sale; if after, the result must be the same, for it appears (viewing the bill of sale as a mortgage) that the debt it was given to secure has not been paid or satisfied. I therefore think the rule for a new trial should be discharged.

PER CURIAM. No error.

Cited: *Isler v. Foy,* 66 N. C., 551.

(79)

LYMAN POTTER v. WILLIAM STURGES.

From Stokes.

Where an agent collects money, no action accrues to the principal until a demand.

ASSUMPSIT on an accountable receipt given by the defendant, a constable, for two notes, expressing that the notes were received from the plaintiff for collection.

On the trial before *Daniel, J.,* a verdict was taken for the plaintiff, subject to the opinion of the court, whether, upon the following facts, the plaintiff had any cause of action.

The plaintiff resided in the State of Massachusetts, and had no agent residing in this State. The defendant collected the amount of one of the notes, and might have collected the other; no demand was made before the commencement of the action.

The presiding judge was of opinion that to sustain the action it was necessary that a previous demand should be shown, or that at least there should have been a known agent of the plaintiff within this State, authorized to receive the money, and directed the verdict to be set aside and a nonsuit entered, whereupon the plaintiff appealed.

In this Court no counsel appeared.

TAYLOR, C. J. Both the law and justice of this case have been, in my opinion, duly administered, for the defendant had done no act to put him in the wrong. He was not bound to leave the State to go in pursuit of the plaintiff, and the latter had no agent here to whom the payment could be made. If a man receive money to a special purpose, as to account or merchandise, it cannot be demanded of him as a duty till he has neglected or refused to apply it according to the trust under which he received it, and the declaration must show a misappli- (80) cation or breach of trust; and though a verdict for the plaintiff will aid such a declaration, and it will be presumed afterwards that the defendant refused to account, yet here the objection was taken at the trial and the point reserved. The law distinctly recognizes the principle that if goods are consigned to a factor for sale on commission, that a contract arises that he will account for such as are sold, pay over the proceeds, and redeliver the residue unsold whenever a demand is made. Nor will an action lie against him for not accounting, till after a demand made of an account; and from that period only will the statute of limitations begin to run against the plaintiff.

If this is a just rule as applicable to persons living under the same government, it is more so where the plaintiff has left the country and

put it out of the defendant's power to pay the money. 1 Salk., 9; 1 Taunton, 571. I therefore think a nonsuit ought to be entered up.

Judgment affirmed.

Cited: *White v. Miller,* 20 N. C., 53; *Waring v. Richardson,* 33 N. C., 79; *Kivett v. Massey,* 63 N. C., 241; *Comrs. v. Lash,* 89 N. C., 168; *Bryant v. Peebles,* 92 N. C., 177; *Wiley v. Logan,* 95 N. C., 361; *Moore v. Gardner,* 101 N. C., 374.

ELAM M. JOHNSON v. CHARLES CARSON.

From Buncombe.

A having contracted to build a house for B, and the work not being finished within the time fixed by the contract, afterwards sold, without the consent of B, his interest in the house: *Held,* that nothing passed to the purchaser, and therefore his promise to pay was *nudum pactum.*

ASSUMPSIT. The declaration contained a count for work and labor done, and also a special count stating, in substance, that the plaintiff had contracted with one Jason W. Wilson to build a house upon this land, and the house not being entirely finished within the time specified in the contract, it was agreed between the plaintiff and defendant that the latter should take the house in its unfinished state, for the price
(81) agreed to be paid by Wilson, deducting therefrom the value of the work remaining to be done. The breach alleged was the failure by the defendant to pay the money.

On the trial before *Daniel, J.,* the contract was proved as stated, and it was also shown that the defendant, who was the brother-in-law of Wilson, lived two miles from the site of the house, and that the land on which it was situate was, after the contract stated in the declaration, sold to one John Carson, a brother of the defendant. It was also in proof that a chimney to the house was finished by the defendant, but whether before or after John Carson's purchase of the land did not appear; and that the defendant had rented out the land as the agent of his brother. At the time of the trial an action was pending, brought by Wilson against the plaintiff, for his failure to build the house according to the original agreement.

The case was left to the jury without any instruction, none being asked by the counsel, and a verdict being found for the plaintiff, a motion was made for a new trial and denied, whereupon the defendant appealed.

No counsel for the plaintiff.
Gaston for the appellant.

HALL, J. It appears in this case that the plaintiff covenanted with Jason H. Wilson to build a house on the land of Wilson for a certain sum of money; that when he had nearly completed the work he sold the house to the defendant for the same sum, deducting therefrom the value of the work remaining to be done. To this contract it does not appear that the assent of Wilson was given. The plaintiff's demand, then, is founded on a promise made by the defendant to pay a sum of money for property to which the plaintiff had no right, and of which, of course, he could not dispose. (82)

But it further appears that the defendant is the brother-in-law of Wilson, and that Wilson, after the agreement between the plaintiff and defendant, sold the house to John Carson, the defendant's brother; it further appears that part of the chimney was built to the house by the defendant, who rented it out for John Carson, but whether it was built before John Carson purchased it or afterwards does not appear.

It is very probable from these circumstances that the matter was well understood by the brotherhood, and that the defendant's agency in purchasing the house was approved of by Wilson, and that they acted in the transaction with one mind; but that they did so has not been made to appear. It may have been otherwise, but it is too much to guess at. I therefore think that the defendant's promise was made without consideration, and that the judgment ought to be arrested.

Judgment arrested.

HENRY WILLIAMS v. DANIEL WOOD.

From Rowan.

A reference as to a disputed fact is not analogous to a submission to arbitration; the latter implies an exercise of judgment, and gives an authority to decide; the former requires only the recollection of a fact, and the statement of it as a witness. Hence the statements of such a referee are not conclusive.

COVENANT upon the following instrument:

"The condition on which Henry Williams and Daniel Wood settled is this: The said Wood is to pay to the said Williams $360, $100 of which sum was paid at or before the signing of this, and the balance to be paid as soon as they can conveniently get James Brooks to testify

what money was returned by him to the said Wood for George Williams out of the $207, which sum Williams says he received, and sent it back by said Brooks to said Wood. Now, if the said Brooks shall say that he returned the whole of the $207, then the said Wood is to pay said Williams $260, and whatever he says he returned less than $207, to be deducted out of the $260.

"D. W. [L. S.]
"H. W. [L. S.]"

Brooks, on being asked, said he had returned but $100. The plaintiff contended that Brooks had returned to Wood $200, whereupon this action was brought. On the trial Brooks swore that he returned but $100. The plaintiff proved that the defendant and Brooks both had acknowledged that $200 had been returned by the latter. This evidence was objected to by the defendant, but was admitted by the court. The plaintiff also proved by several witnesses that Wood had received $200 by the hands of Brooks.

Daniel, J., charged the jury that if they believed the evidence, they ought to find for the plaintiff. A verdict being returned for the plaintiff, a rule for a new trial discharged and judgment entered up upon the verdict, the defendant appealed.

Nash for appellant.
Badger for the appellee.

TAYLOR, C. J. It appears to me that the intention of the parties to this covenant does not admit of any reasonable doubt.

The defendant undertakes to pay the plaintiff the balance due to him upon the settlement of their accounts. The precise sum due depended upon the amount paid the defendant through the hands of Brooks,
(85) and on account of George Williams, who had borrowed $200 from the defendant. If this whole sum had been repaid to the defendant, he then owed the plaintiff $260; and that the fact was so, was alleged by the plaintiff. If a less sum than the $200 had been repaid, then the balance due the plaintiff would be lessened in proportion; and this was contended for on behalf of the defendant.

But as Brooks was known by both parties to have been the instrument of payment, it was natural to refer to him, in the first place, to ascertain the amount, and it could not have entered into the contemplation of either party that his assertion as to the amount should be conclusive upon them, if they could show that either his memory or his integrity had abandoned him. This is evident from the words themselves, which are, "as soon as they can conveniently get James Brooks to testify what

money was returned," which is equivalent to saying, as soon as they can get him to give evidence of the sum returned. As a witness, his evidence would be open to examination, and might be opposed by other testimony; nor would Wood have been bound by his assertion, if it had charged him with the receipt of the whole sum, any more than Williams is when it charges him with less.

Taking this to be the clear intent of the parties, apparent upon the instrument, is right, according to the established rules of law, which are in this case the dictates of natural justice, to be so construed as to correspond with that intention. A performance according to the letter, which contravenes the spirit of a covenant, is not a legal performance; as where the condition of a bond was that the defendant should, before a certain day, deliver to the plaintiff a bond wherein the plaintiff was bound to the defendant. If before that day the defendant sues the plaintiff on the bond, and recovers, though on the day he delivers it up, yet it is no performance, for it could not be the intention of (86) the parties that it should be put in suit. *Teat's case,* Cro. Eliz., 7.

And if the construction were even doubtful, the rule of law is that it is to be taken in that sense which is most strong against the covenantor and beneficial to the other party; as a covenant to pay a certain sum *per annum,* without saying for how long, it was held it should be for the life of the plaintiff. 1 Lev., 102.

I think it follows irresistibly from these premises that if the defendant had been allowed to prevail on the plea of "covenants performed," by proving that Brooks had said he had returned only $100, and all inquiry had been shut out as to the fact from other sources, it would not have been a real and faithful performance of the covenant, but evasive and illusory.

The law will not permit men thus to escape from their deliberate engagements, but uniformly exacts from them such a performance as will satisfy the true spirit and intention of the contract. Of this, the case of *Griffith v. Goodhand,* Tho. Raym., 464, furnishes a strong illustration. There the covenant was to deliver to the plaintiff seven parts of all the grains made in the defendant's brew house; and one breach assigned was that the defendant did put divers quantities of hops into the malt of which the grains were made, by reason whereof they were spoiled and became unprofitable to the plaintiff. After a verdict for plaintiff, there was a motion in arrest of judgment, that this breach is out of the articles, which contain no covenant not to put hops in the grains. But the court held clearly that as it was the intention of the parties that the plaintiff should have the grain for the use of his cattle, whatever rendered them unfit for that use was a violation of the spirit of the contract, though

within the letter. So if I covenant that I will leave all the timber which is growing on the land I hire, upon the land at the end of the time, if I cut it down, though I leave it on the land, it is a breach of my
(87) covenant. So if I covenant to deliver so many yards of cloth, and I cut it in pieces, and then deliver it, it is a breach of my covenant, for the law reprobates all such evasions in fraud of that good faith so essential to the welfare of society. So, as the design of this covenant was to enforce the payment of the sum due from Wood, the finding of a less sum in obedience to the testimony of Brooks, opposed by the witnesses and the defendant's own acknowledgment, would be a departure from common honesty.

The recovery in this case has been resisted on the ground that Brooks was agreed upon by the parties as an arbitrator to decide upon the sum paid by him to Wood, and that his decision was to be conclusive upon the parties.

But the analogy strikes me as wholly imperfect, for arbitrators are called upon to exercise their judgment on the subject in dispute, to enable them to do which they hear testimony, and decide upon the impression thus made upon their minds by the communication of knowledge from others. But here no judgment was necessary to be exercised. Either one sum or the other had been paid to Wood, and it required only a simple effort of memory by Brooks to ascertain which sum. If the name of the person returning the money had not been recollected, then the covenant would have bound Wood to pay the $260 or not, according as evidence should be given of his receiving the $200.

Then the insertion of the name of Brooks, evidently made in the very reasonable expectation that he would remember correctly, and state truly, the real sum, cannot possibly change the nature of the contract. In principle, it resembles the case where a man says, "Prove the debt, and I will pay you; or prove the debt by the person paying the money, and I will pay it." In either case it would be competent for the plaintiff to prove it on the trial of the action, and, consequently,
(88) for the defendant to introduce counter-evidence. 1 Comyn Dig., 140.

The cases in the court of equity cited by the defendant's counsel proceed upon the principle that there is to be an exercise of judgment by the person chosen by the parties to the contract. Thus if an agreement be made for a sale according to the valuation of two persons, one chosen by each party, the court will not entertain a bill for specific performance, praying that the valuation should be otherwise ascertained. Why? Because the parties have confined to specific individuals, a confidence upon a subject interesting to them, respecting which those individuals are

to exercise their judgment. The court will not, therefore, transfer to a stranger that confidence which was reposed in others under a belief of their peculiar fitness to discharge the duty. This would be making another agreement for the parties, and not executing that which they had made. Upon the whole case my opinion is that the law has been rightly administered and that there ought not to be a new trial.

HALL, J. It has been argued in this case that the matter in dispute was agreed by the parties to be referred to James Brooks as an arbitrator. The parties considered Brooks a disinterested witness as to a fact which was not known to the plaintiff, but which was presumed to be known to the defendant, and to Brooks, who had acted a part in it; he had paid the money to the defendant, and for this reason he was referred to as most likely to remember the amount paid. The party, however, had it in his power to prove the same fact by other witnesses. It appears that the amount due the plaintiff depended altogether upon the sum which had been returned to Wood, and that was within his knowledge; the balance was due immediately, and no credit was intended to be given for it. If Brooks had died, the debt was still due, and recoverable as soon as the plaintiff could make out his case; it was not at all dependent upon Brooks' memory.

Suppose the defendant Wood, the day after the covenant was signed, had acknowledged that he had received from Brooks $200, would not Brooks have been dispensed with, and could not suit have been brought immediately? I think the rule for a new trial should be discharged.

HENDERSON, J., concurred.

Affirmed.

JOSEPH DAVIDSON vs. GEORGE ROBINSON.

From Iredell.

Commissioerns appointed by an act of Assembly to lay off a town, sell the lots, and apply the proceeds to prescribed purposes, are not liable to the treasurer of public buildings for a surplus undisposed of by the act.

ASSUMPSIT for money had and received to the use of the plaintiff, as treasurer of public buildings for the county of Iredell, brought upon the appeal of the defendant from a judgment rendered before *Nash, J.*, upon a verdict for the plaintiff, after discharging a rule for a new trial.

The facts of the case are fully stated in the opinion of the Court.

J. Alexander for defendant.
Wilson for plaintiff.

HALL, J. It seems not to be contended that the defendant has any right to the money in his hands and for which he is sued in this action.

The question is, Has the plaintiff a right to recover it as
(90) treasurer of public buildings? It appears from ch. 30, 1788, that certain land was set apart on which the town of Statesville was to be erected. The defendant, with other commissioners, were directed to divide it into lots and make sale of them; out of the proceeds of such sale a certain part was directed to be paid to the person from whom the land had been purchased, and the residue, if any, to be applied towards defraying the expense of laying off said town.

It seems that after defraying that expense there is still a balance in the hands of the defendant respecting which the act is altogether silent.

It is necessary next to ascertain whether the plaintiff is entitled to recover it.

By an act passed in 1795, Rev., ch. 433, courthouses and gaols were directed to be built or repaired in all the counties; the county courts were invested with power to lay and collect taxes for that purpose, and a treasurer of public buildings was directed to be appointed, whose duty it should be to call to account and settle with all former commissioners who might have received county or district moneys *for such purposes.*

In an act passed in 1797, Rev., ch. 488, doubt is expressed whether under the act last noticed treasurers of public buildings were authorized to bring suits against former commissioners who might have county or district money in their hands *for the purpose of repairing or erecting the public buildings,* and power is thereby given them to commence suits against any commissioners who may have such moneys in their hands.

It is under these acts that the plaintiff claims to recover the money in dispute.

It is observable that the Legislature pointed out the manner in which funds were to be raised for public buildings, the officers in whose hands they were to be deposited, and the duty of those officers. Amongst other things, it was made their duty to sue former commissioners who
(91) had in their hands county or district money, and who had received it for the purpose of repairing or erecting public buildings.

There was no class of commissioners, however, who held public money under the same circumstances with the defendant; the acts do not speak of any such. He was neither a commissioner or treasurer of public buildings, nor was the money in his hands, by any act, appropriated to that purpose. In truth, it appears to be unappropriated, and, however

little his claim to it may be, I think the plaintiff has no authority to sue for and recover it; he might as well sue for public money unappropriated, in the hands of anybody else. I therefore think the rule for a new trial should be made absolute.

Judgment reversed.

JOHN DICK v. ALLEN STOKER, JOHN CULPEPER, SR., and DEMPSEY HONEYCUT.

From Montgomery.

To arrest and surrender the principal as agent of the bail requires, at least, a *written* authority; but the principal may make a voluntary surrender of himself, without the agency or even knowledge of his bail, and placing himself in the power of the sheriff (though at the time under *moral* coercion), for the purpose of being detained, is an effectual surrender by the principal to discharge the bail.

THIS was a *sci. fa.* against the defendants, as bail of one Cooper. The defendants pleaded several pleas, and among them a surrender by them of their principal to the sheriff; and on the trial before *Daniel, J.*, the case turned wholly upon this last plea. In support of it the defendants examined John Culpeper, the younger, who testified that when the defendant Culpeper became bail for Cooper, the latter deposited with him sundry notes and judgments as counter-security; and the defendant being a Member of Congress, and about to attend his duties (92) in Washington, gave to the witness, by parol, a general authority to attend to and transact his business. At March Term, 1825, of Montgomery Superior Court, the defendant being still absent in Congress, Cooper procured from the witness the notes and judgments, assuring him that he had settled the matter with the plaintiff. During the same court the witness, becoming alarmed in consequence of a communication from the defendant Stoker, took Cooper with him, went into the courthouse, called the sheriff to him, stated that his father (the defendant Culpeper) was the bail of Cooper, and informed the sheriff that he then surrendered Cooper to him. The sheriff said, "Your father is secured," and left him. Cooper was then standing by his side, and very near to him, and Honeycut, one of the defendants, was at the time in the courtroom, but whether in the same part of the room the witness was unable to state. It also appeared in evidence that Cooper immediately after went away, and the sheriff sent persons in pursuit who failed to arrest him.

His Honor, the presiding judge, charged the jury that as the sheriff cannot arrest the principal, a surrender involves in it the putting the principal, by the bail, into the custody of the sheriff; or arresting the principal, and offering him to the sheriff in such manner that the sheriff can secure him. But that if the bail use words importing a surrender, the principal being present, but not so offered to the sheriff, the latter ought at the time to object for that reason, else it will be a good surrender to discharge the bail and charge the sheriff. The judge further instructed the jury that the authority given by law to the bail, to arrest the principal, cannot be communicated by the bail to another by parol; for this purpose a written deputation is necessary, in order that the authority of the agent to arrest, and of the sheriff to detain, may (93) appear with certainty; but that, clearly, if an authority merely verbal be sufficient, it must be a special authority for that particular purpose, and cannot be deduced from a general agency to transact the business of the bail.

The jury, under these instructions, found a verdict for the plaintiff, and a motion for a new trial being made on the ground of misdirection, and overruled, the defendant appealed.

No counsel.

HENDERSON, J. If the principal is brought by a stranger, by physical force, and offered to be surrendered to the sheriff, who receives him into custody against the will of the principal, there is no doubt, I presume, but both the stranger and the sheriff are trespassers, unless the stranger had an authority from the bail to make the arrest and surrender; and that authority should be given by writing at least. But the principal himself may, without the agency or knowledge of his bail, surrender himself, and the sheriff is as much bound to receive him as if surrendered by the bail. When, therefore, the principal comes into the presence and places himself in the power of the sheriff, with an intention of going into his custody, in discharge of his bail, and his purpose is made known to the sheriff, either from his own lips or by the words of another, which he recognizes as evidencing his intention, this amounts to as full a surrender as if the words declaring that intent had issued from his own mouth. The surrender becomes completely his own, and all pretence of charging the sheriff as a trespasser is taken away by his own voluntary act. I call the act voluntary, notwithstanding the moral force which the stranger may have used to induce the principal to accompany him to the sheriff for that purpose, such as persuasion, representations, and the like.

I think that the judge erred in passing over this view of the case, and presenting another, which did not arise until this was disposed of; for the jury must necessarily have understood that the surrender amounted to nothing unless young Culpeper had an authority in writing from his father. There should, therefore, be a

New trial.

Cited: Shepherd v. Lane, 13 N. C., 154.

ARTHUR BUTLER and others v. ROBERT GODLEY, administrator of MARY GODLEY, deceased.

From Beaufort.

A man cannot hold *in trust* for himself; therefore, when a negro slave was conveyed to A in trust, for A for life, with remainders over: *Held,* that the whole interests vested in A absolutely, and the limitations over could not take effect.

IN JULY, 1792, Elias Godley and others, heirs of Nathan Godley, entered into a written agreement with Mary Godley, by whom it was recited that the said Nathan had by his will made no provision for his widow, and that she had taken the same into consideration, and that it had been mutually agreed between the parties that she should receive from the heirs a negro girl named Lucy, for her natural life, in full satisfaction of her dower and other interest in her husband's estate, real and personal; and the heirs in consideration thereof covenanted as follows: "to furnish the negro within eighteen months, and a good and lawful title to make unto the said Mary, during the term of her natural life, and after her death to go to her daughter Betsy Godley Butler, if living, and to the heirs of her body lawfully begotten, if any; but in case of the death of the said Betsy before the death of her mother, then Mary, her mother, to keep possession during her natural life; then it is the true intent and meaning hereof that the said negro return to the said heirs of the said Nathan Godley, deceased," etc.

In September, 1793, Elias Godley and others, the executors (95). and heirs of the said Nathan, deceased, executed a deed (written on the same sheet with the agreement), the material part of which is as follows: "We have on the day of the date delivered to Mary Godley, upon trust, for the purposes in the annexed agreement, a certain negro girl named Lucy, which said negro girl aforesaid, for the purposes as-

signed in the annexed agreement, and for the consideration therein set forth, that is to say, Mary Godley's part of Nathan Godley's estate, her deceased husband, we, the said Elias Godley, etc., do by these presents oblige ourselves to covenant and forever defend upon trust, unto the said Mary Godley, the said negro girl Lucy and her increase for and during her natural life, and after the death of the said Mary Godley, upon trust unto Betsy Godley Butler for and during her natural life, should she die without issue; but in case of marriage and her having lawful issue, we, the above-named parties, do bind ourselves to warrant and forever defend the said girl Lucy unto the said Betsy, *according to the true intent and meaning of the annexed agreement.*"

Betsy Godley Butler died unmarried, without issue, in the life of her mother, and after the death of the mother this petition was exhibited by her next of kin claiming distribution of the said Lucy and her issue, and an account of their hire, as being a part of the personal estate of the said Mary subject to distribution.

The case was heard in the court below, at Spring Term, 1825, before *Badger, J.*, who declared that by the two instruments taken together the whole legal estate in the slaves passed to Mary Godley in trust, for herself for life, remainder to Betsy G. Butler; but in case of the death of Betsy during the life of her mother, then in trust for Elias Godley and the other covenantors and grantors in the said instruments; and that, consequently, the defendant held in trust for them, and not for the next of kin of Mary Godley. The judge thereupon ordered the petition to be dismissed, with costs; and the petitioners appealed. This case

(96) was argued at June Term last.

Gaston for the petitioners.
Hogg contra.

The Court took time to consider, and now, at this term, the judges being divided, the opinion of a majority of the Court was delivered by

HENDERSON, J. If a legal estate passed to Mary Godley by the deeds in question, the limitations after her life estate are void, and the whole interest vested in her. To me it is incomprehensible how a person can take to the use of or in the trust for himself; that he should be his own trustee; that he should have a right to call upon himself to perform the use or trust, and, if refused, enforce performance. So far from such an union being recognized in law, it is a well-established maxim that if the two interests become vested in the same person, the use or trust immediately vanishes; it does not exist for a moment. It is true that where there is a sole corporation, as a parson or a bishop, the individual, the

sole corporation, may hold in one capacity to the use of or in trust for the other; and there is an unsatisfactory attempt made to make a tenant in fee hold for himself in tail, but this is upon the ground that there are two persons, the one natural, the other artificial, and it was attempted to be shown that a tenant in tail is an artificial person, created by the statute *de donis;* but this shows that it is upon the idea that there are two persons that the two interests are supported. I must therefore discard the idea entirely that Mary Godley held in trust for herself, and afterwards in trust for ulterior remainders.

That she took but a trust estate, her legal estate remaining in the grantors, appears to me to be also untenable. I will lay out of the case the contract of 1792, whereby the grantors bound themselves to purchase a negro girl and to limit her to Mary Godley for life, (97) and afterwards to her daughter, further than it is referred to, and its provisions by such express reference incorporated into the latter deed. The words of the deed of 1793 are that they, the grantors (naming them), having on that day delivered to Mary Godley, for the purposes declared in the annexed agreement, the negro Lucy for the consideration therein set forth, they then severally warrant the said girl upon trust to said Mary Godley for life, and after the death to her daughter, etc.: and the the question is, Does the legal estate pass to Mary Godley for life, or does it remain in the grantors? If the legal estate passes, the limitations are void; if it remain in the grantors, and nothing but trust passes, the trust is good. There are no words passing only a trust and retaining the legal estate; they deliver to her upon trust for the purposes of the annexed deed; the deed declares that they shall within eighteen months procure a negro of a certain description, and a good and lawful title to the said negro make to the said Mary, during the term of her natural life, and after death to her daughter, etc. Who are to perform the trusts, if there are any? The grantors? None are pointed out for them to perform; they are not to hold the negro in trust for Mary Godley, but Mary Godley is to hold upon trust. They did not grant the trust (the beneficial estate only) to her, retaining the legal one themselves; but they gave the legal estate to her, and on her imposed the trusts. What were those trusts? The only ones expressed are that she would hold the negro during her own life, and that after death the negro should go to her daughter, and return to the grantors if the daughter should die before the death of her mother. Were I to presume, I should say these were the ideas intended to be conveyed by the term "in trust." But allowing that the person who drew this deed had the idea that by means of a trust growing out of a legal estate these future and contingent limitations of personal property could be (98) made, and intended to draw such deed as would effect that object,

if he has not done so we cannot do it for him. No matter what he or the parties intended, we must decide the right of these parties upon what has been done, and not on what he intended to do. Is there a valid trustee to hold and preserve the legal estate until these future trusts arise? For it is upon that ground, and that ground only, that these future trusts can be supported. If there were any trusts declared, it was upon Mary Godley's legal estate, and not upon the estate of the grantors, and they were to her in the first instance, and if so, they vanished in a moment, and they will not arise again and fix on the estate after her death. I am constrained, therefore, to say that Mary Godley took the whole estate, and that upon her death the petitioners are entitled as her next of kin, she having died intestate.

Let the judgment of the Superior Court be reversed and the cause remanded with instructions that the Superior Court proceed in the cause.

HALL, J., *dissentiente.* If the title to the negro girl passed to Mary Godley, the petitioners are entitled to recover; nor will I deny that if she has the legal title, in trust for herself, during her life, they are entitled to recover; but the deed is drawn in too questionable a shape to admit of clearness and and certainty. The words are, that they "delivered to Mary Godley, upon trust, for the purposes in the annexed agreement, a certain negro girl," etc. The words, upon trust, seem to distinguish this deed from those commonly used to convey the property itself; it was not intended that she should hold the property as in common cases; and I think, where a doubt exists, as in this case, and two constructions may be placed on a deed, one of which would be against law, so as not to answer the end proposed, and the other is conformable to it, the latter ought to be adopted. Now, if we consider Mary
(99) Godley as only having a trust interest in the property, from the words "delivered to her upon trust," etc., the object in view will be accomplished. But if we adopt the other construction, and give her the legal title by those words, the object of the parties will be frustrated. The petitioners were never intended to be benefited by the conveyance. Where, then, it is stated that the ngro girl was *delivered to her upon trust,* I must understand it to mean that she had a trust estate, in contradistinction from a legal estate, and that the legal interest did not pass. I therefore think the petition should be dismissed.

By a majority of the Court, the judgment was

Reversed.

OFFICERS and others vs. HANAN AND ZEALOUS TAYLOR.

From Nash.

Where a suit abates by the death of one of the parties, each party is liable for his own costs.

AN ACTION had been pending in this Court, in which one Dempsey Taylor was the plaintiff and Hanan and Zealous Taylor were the defendants. Dempsey died, and in consequence of his death the action abated some terms ago and the defendants took out letters on his estate.

At last term *Badger,* on behalf of the officers of the court below, and of the witnesses who had attended in that court, obtained a rule upon the defendants in their own rights, and also as administrators of Dempsey Taylor, to show cause why execution should not issue against them for costs. And at this term, the rule coming on to be heard:

The Court said where a cause abates by the death of one of the parties, as there is no judgment for costs, each party remains liable to pay his own, and execution may issue therefor, at the instance (100) of the officers and others who have rendered their services and are unpaid. Let execution issue against the defendants *de bonis propriis* for their own proper costs, and *de bonis testati* for the costs of their intestate.

Rule made absolute.

Cited: Clerk's Office v. Allen, 52 N. C., 157; *Jackson v. Maultsby,* 78 N. C., 175; *S. v. Wallin,* 89 N. C., 580; *Brown v. Rainor,* 108 N. C., 205.

THE PRESIDENT AND DIRECTORS OF THE STATE BANK v. HENRY B. HUNTER, executor of HENRY HUNTER, PETER EVANS, and GRAY LITTLE.

From Edgecombe.

1. Taking interest in advance by a bank, upon discounting a negotiable security, though payable directly to the bank, is not usurious.
2. Deducting interest for the days of grace, upon discounting a bond, is not usurious, though the obligee is not entitled to the days of grace, the parties supposing that on such an instrument he was entitled.
3. A new trial is matter of discretion, and the refusal to grant one cannot be assigned as error. The Supreme Court is a court of errors in law, and the case stated by the judge is a substitute in our practice for a bill of

exceptions. Hence, this Court cannot grant a new trial because the judge below refused one, for that refusal is not error; but where the court below errs, as in receiving evidence, instructing the jury, or the like, this Court orders a *venire de novo* as a means of correcting such error.

THE plaintiffs declared in debt on a single bond executed by Henry Hunter, Peter Evans, and Gray Little, for $3,870, payable to the plaintiffs, dated 28 December, 1819, and due 88 days thereafter; to which the defendants pleaded usury.

On the trial the cashier of the bank proved that the bond was offered by Henry Hunter and discounted for his benefit fourteen days after its date; that it was the universal practice of the bank, on discounting bonds, to take interest in advance on the whole amount; that when (101) a bond was made payable at 88 days after its date and was discounted on the day of its date, interest for 92 days was deducted, and that the interest was calculated at the rate of 1 per cent for sixty days, according to Rowlett's tables, which were formed upon the supposition that the year consisted of only 360 days; that interest was calculated on the bond in question, according to the above principles, for 78 days. He stated that before the discount of this bond he was aware that the principles upon which the tables were formed gave a greater rate of interest than 6 per centum per annum, but as the book had been long used in the bank, before his appointment, he adhered to its use, believing the mode of calculation to be lawful; that the tables were used for the sake of accuracy and dispatch, and from no other motive.

This witness also proved that the bond had been offered by Hunter in renewal of one for the same amount, dated 22 June, 1819, and payable 88 days thereafter; the last in renewal of a former one, dated 16 February, 1819, also payable at 88 days, and so on in a course of renewals; that all these were discounted on the days of their dates, in the manner and upon the principles above mentioned; that frequently Hunter on renewing did not pay in cash the difference between the net proceeds of the new bond and the amount of the old one, and as the bank never received partial payments, the settlement was sometimes postponed for days, weeks, and even months, and when made, interest was taken on the old bond from its maturity, without regarding the discount of the new one.

The witness also proved that in discounting bonds the directors of the bank discriminated between those offered for renewal and new ones, but whenever a discount was made, the proceeds of the bond were (102) credited to the person for whose benefit it was offered, and were not applied to the old note, or to any other purpose, without his check; that Hunter often complained of the mode adopted in settling

the old bonds as injurious and oppressive; that these complaints were represented to the directors, who ordered the witness to persist in it. He stated that the bank allowed three days of grace on every bond; that the reason of taking discount for ninety-two days was to make the renewals take place on the same day of the week; that the board met every Monday night, the bonds offered were usually dated as of the next day, and the proceeds of those discounted were passed to the credit of the offerer, on the morning of Tuesday, and were subject to his order on that day; and that although the proceeds of bonds offered for renewal passed to the credit of the offerer, yet they could only be applied to the payment of the old bond.

A witness was examined, who had formerly been cashier, who agreed with the other witness as to the custom of the bank in discounting, and the manner of calculating; but he stated the reason why 92 days interest was taken was this, that the time the bond had to run was estimated as 88 days, exclusive of the day of its date, and as the borrower had the use of the money on that day, the time of the loan was 89 days, besides the day of grace.

His Honor, *Judge Paxton,* instructed the jury that deducting the interest at the time of making the discount, supposing the interest was calculated on proper principles, was not usurious; that it was usurious to calculate the interest according to Rowlett's tables, the officers being aware of the principle of calculation adopted in those tables, and that their supposition that this mode was lawful made no difference; that a corrupt agreement means any agreement which violates the statute, and that although a mistake in fact, as a miscalculation upon a right principle, is not usurious, yet a calculation upon a wrong principle, however, innocently made, is usurious; and that in this case, if it was the intent to take interest at a rate greater than that allowed by law, (103) through ignorance, it was a corrupt intent within the statute; that receiving interest on the old note up to the time of settlement, if the new note carried interest only from that time, was not usurious; but if interest was calculated on the old note to the time of settlement from its maturity, and interest was also reserved out of the new note for the same time, it was usurious.

That as to the days of grace, if the defendants had the use of money for 92 days, and legal interest only was calculated for that time, it was not usurious.

The jury returned a verdict for the plaintiff, and assessed the damages to $1,615.72. A rule for a new trial was obtained by the defendants upon the grounds that the verdict was contrary to law and to evidence, and that the jury had been misdirected by the judge. His Honor in-

formed the counsel for the plaintiff that the verdict would be set aside and a new trial granted, unless the excess of interest was remitted. The plaintiff then remitted $350, "the excess aforesaid," whereupon the rule was discharged, and judgment rendered for the plaintiffs, from which the defendants appealed.

Gaston and Hogg for the defendants.

(121) *Badger and Seawell for the plaintiffs.*

HENDERSON, J. We are satisfied with the decision of the Court in *Bank v. Pugh,* 8 N. C., 198; we therefore decline entering into an examination of the question whether the court mistook its duty in refusing a new trial. It is a mistake to suppose that this Court, since the repeal of the act declaring that it possessed appellate powers upon questions of fact, ever has awarded a new trial because the judge below refused one. The new trials which have been awarded here were in cases where there was some error which affected the verdict; such as the admission or rejection of evidence, which ought to have been received or rejected, or some misdirection of the judge to the jury on questions of law arising on the trial, or the like. Since the statute of Westminster II., 31 Ed. I, such matters may be assigned for error, and provision is made by the statute for getting them on the record, when brought into the court of errors. Our statements accompanying

(122) the records sent here are nothing but a practical construction put upon that statute, and owe their origin to our act of 1799, relative to the mode of bringing points of law arising on the circuit before the meeting of the judges, directed by that act. This mode was still practiced in cases of appeal afterwards allowed, and was continued after the organization of the present court. These statements we consider as containing the proceedings excepted to in the court below by the party against whom they operated. The judgment on the verdict obtained improperly, that is, through the error of the judge, is here reversed, and the cause remanded, with directions to issue a *venire facias de novo.* The new trial is, therefore, in consequence of the relief authorized by the statute. We may have inadvertently interfered in cases where we ought not; I think, in all probability, we did in *Cherry v. Slade,* 7 N. C., 82. We have not the power of examining those parts of the charge operating in favor of the defendants, for they are not excepted to.

But it is said that we ought to grant a new trial because the plaintiff, by remitting what is called "the excess of interest," has admitted that the contract was usurious. This affords ground for a judgment for the defendant if it affords foundation for any act of this Court, for it is

an admission of record that the contract was usurious. Why, then, send it to a jury to try that fact? But there is no admission of such fact. It is quite probable that it was admitted as usurious interest under the charge of the judge; but the court acts upon facts, not upon probabilities, and this admission is nothing but evidence of a fact; it is possible the plaintiff may have remitted from other causes. He might for some reasons unknown to us wish to retain his verdict. He may have feared that he would not be able to obtain so large a one at another time; he may have feared that delay would produce the loss of the debt through insolvency; or he may have had an immediate de- (123) mand for the money. These, it is true, are very improbable conjectures, but they may be correct; and if they may be so, it proves that it is not an inference of law, but of fact. In addition to this, it would not be sufficient for the plaintiff to acknowledge simply that he was guilty of usury in the contract, but he must confess how, that the court may see that the statute has been violated; for peradventure he might mistake what usury is within that statute. This is, therefore, neither cause for a new trial nor for a judgment for the defendant. But if the plaintiffs distinctly admit upon the record any fact which shows they are not entitled to recover, the court would be as much bound to notice it as if found by the jury, for the admissions of the parties upon the record are the highest evidence of the facts.

If there is any error examinable by this Court, it arises from those parts of the charge which were in favor of the plaintiffs, for these are understood as excepted to by the defendant. These are, that taking interest in advance on this bond was not usurious; and that taking interest for 92 days on this bond, it being given for renewal, is not usurious, for so I must understand this charge, notwithstanding the qualification that if the defendants had the use of the plaintiff's money, they ought to pay interest on it.

That the statute of usury is violated by taking the interest in advance, on the whole sum lent, is almost too evident to require argument. If the sum, say $100, agreed to be loaned for one year, at 6 per cent per annum, is counted down, and the lender immediately withdraws $6, by way of discount or interest, the sum actually forborne, which is the matrix of interest, is only $94, which at that rate of interest, together with itself, produces at the end of the year $99.66—less, by 34 cents, than the sum to be paid at the end of the year. As, therefore, taking the interest in advance gives an interest of $6 for one year, or $94, the statute is violated, for it plainly directs that six pounds (124) only (*i. e.*, $6) shall be taken on the hundred for forbearance for

one year, and in the same proportion for a greater or less sum, and for a longer or shorter time. The rule extended completely shows its impropriety by producing a result perfectly absurd. A note for $100, payable 16 years and 8 months after date, is offered for discount on the day of its date; if the interest on the whole sum is taken in advance it absorbs the whole amount of the note; the person who discounts it pays not a cent for it; of course, the person who offers it gets nothing. The rule of a dicount—and such, no doubt, the Legislature intended to be permitted by the statute of usury (whatever they may have meant when they incorporated the State Bank)—was that such a sum should be advanced upon a discount as would, together with its interest, amount to the sum to be paid at the maturity of the note. I speak not of the purchase of a note or bill in market, for that may be made at any price, taking care that it is not a device to cloak a loan; if it is a fair purchase the statute has nothing to do with it. We can derive nothing from what was said by the Supreme Court of the United States, that an authority to make discounts gives an authority to take interest in advance. True; but is the discount to be equal to the interest on the whole sum lent or only equal to the interest on the balance, after taking out the discount, the words in the statute being that more than six pounds on the hundred shall not be taken by way of "discount or interest." And I take it to be very clear—indeed, so much so that not a shadow of doubt is left on my mind—that the authority to make discounts gives the power to make them in such a way only as to leave as much outstanding as will, with its interest, amount to the sum to be paid at the maturity of the bill, note or bond; for a bond, being assignable (125) by our law, it is as much the subject of discount as a note. Were this case, therefore, to be decided by the application of our statute against usury to its facts, unaffected by other considerations, I could not hesitate to declare the bond usurious, and therefore void.

But an exposition, legislative, judicial, and popular, has been given to this statute and to usury laws similar to it, which I am bound to respect. When the charter of this bank was granted there had been in operation for some years two banks chartered by the State, whose operations were extensive, and whose practice of taking interest in advance on the whole sum loaned must have been known to the Legislature. The old bank of the United States had been in operation for twenty years, which discounted in the same manner. Banks in adjoining States and others with which we had great intercourse were also in operation, governing themselves by the same rules. With this information before them this charter was worded, in substance, in the same manner as to

the point we are now considering and I believe in the same words as that of the bank of the United States. The State was a stockholder in each of our local banks and many shares were retained for the State in this bank. These are strong legislative expositions.

In the courts in New York, Pennsylvania, Massachusetts, and Connecticut, this practice has been declared not within their statutes of usury, which are similar to our own, and it has been sanctioned by the supreme judicial tribunal of the Union, and in England, even in the case of private bankers; but I shall be told it has been sanctioned only in case of negotiable bills and notes, and not in the case of bonds. The principle has been applied there to negotiable securities, and bonds there, not being negotiable, *could not be discounted;* they there applied the remedy as far as the evil extended. The same principle will extend here to bonds. The popular exposition is equally univer- (126) sal, for during the thirty years that our banks have been in operation, although many millions have been lent on the same terms, this is the first instance of resistance which I have heard of made on these grounds to a recovery. And were I at liberty to hazard a conjecture as to the cause of this contest, I would say that it arose from the oppressive practice of this branch of the bank, in claiming interest on two bonds, running at the same time, that is, charging interest on the old bond and on the newly discounted bond, until the proceeds of the latter were applied to the discharge of the former. But I am free to declare that in a case where the change of construction would produce those evils only which ordinarily arise from the change of decision, I should feel that all which has been done is insufficient to control the plain words of the statute. But when I look to the incalculable injury which must arise from giving a different exposition—injury, the extent of which no man can foresee, the whole of our circulating medium in the hands of individuals, and in our treasury, annihilated and rendered worthless at a single blow—I must confess I am appalled at the consequences, and must abstain from acting, convinced that the obligation which I am under to the State, of asserting the supremacy of the law, does not require it at the expense of the peace and prosperity of individuals and the best interest of the State.

I am inclined to think that taking interest for 92 days on the note for 88 days is not usurious. It is clearly not so for charging interest for the days of grace, although they are not demandable on a bond; for if the contract was made with an understanding that they were to be allowed, the making of a writing whereby they were excluded would not be usurious, for it is the usurious contract which vitiates the security.

There cannot be any usurious security if the contract is not usurious.

If an authority is wanting to prove a position so plain as this, it (127) will be found in *Nevison v. Whitley,* Cro. Car., 501; Ord. on Usury, 59. Computing interest for day on which the new note was taken, if interest for the same day had been taken on the old bond, would be usurious, if it was the same or one continued loan. But I think that it is not, and the most satisfactory evidence of this is afforded from the fact that it was at the option of the bank to continue it or not. It is true that on notes of accommodation it is understood that it is quite probable that the time will be extended upon a compliance with the rules of the bank; but at the same time it is also well understood that the bank may, at its option, enforce payment, which must exclude all idea that the borrower, by the terms of the contract, has a further time for payment. I think that it was usury of the most oppressive kind to take interest on the new note before its proceeds were applied to the discharge of the old note, for until that time the bank advanced nothing, and it is no excuse to say that it was Hunter's fault, for he should have paid the difference and drawn a check in favor of his old note. These were the terms imposed by the bank on the new loan, and until they were complied with nothing was advanced; it was a bare agreement to lend upon the performance of the terms by Hunter. It is a fallacy to say that the money was to Hunter's credit and subject to his check; it would only stand to his credit upon his paying the difference, when he could check for it, and then he could only check in favor of the old note. Nothing, therefore, was lent by the bank until the proceeds were applied, and until that time no interest should have been charged. But this Court cannot get at that question; if it could, the judgment would be reversed; for I believe that this mode of doing business is confined to the Tarboro branch of this bank. It has not either a legislative, judicial, or popular sanction.

The universality and notoriety of the practice of taking inter- (128) est in advance by the banks and their connection with the Government would seem almost to exclude the idea of criminality. Usury, by our laws, is deemed to be a crime, for which forfeitures are inflicted on the offender, as loss of the debt, and double the amount loaned or foreborne, together with a liability to an indictment. In offenses of this kind if the actor is guilty, every person who is concerned in the transaction is guilty also: the directory, as having ordered the usury, which may well be inferred from their subsequent sanction, and even the stockholders if they knew it, by receiving the dividends, incurred the forfeiture. In this latter case the State would be impli-

cated, it being a stockholder to a large amount. This must exclude all idea of actual criminality. I say actual criminality, for in reality there cannot be a crime without an actual intent to violate the law. Crime presupposes a knowledge of the law; and ignorance of law is no defense, not because a knowledge of the law is not essential to crime, but because ignorance is not permitted to be averred and proven, it being a presumption of law that every man (however false in point of fact) knows the public law. These presumptions of law are nothing else but certain conclusions of fact which the law draws from motives of policy and convenience; as where the probability of a fact is very strong, that there is scarcely a possibility of its being otherwise, policy, and perhaps justice also, require that it should not be controverted, for, in the first place, it is so aften the fact that it had better in all cases be so considered rather than undergo an investigation in each case; and, secondly, even if an investigation in each case was permitted, so imperfect are all human means of arriving at truth that there is more reliance to be placed on the general conclusions than on the result of a particular investigation. Thus, if a stroke is given with a bar of iron it is a presumption of law that he who gave it intended to kill; and, therefore, when death ensues, the actual intent is not the subject of (129) inquiry, although a murder cannot be committed without an actual intent to kill. Here the law presumes the actual intent. So in England, leaving the goods in the possession of the vendor is *per se* a fraud, that is, a presumption of law that the transaction is fraudulent. It is not so in this State. It is said that the common custom and usage of that country require that this presumption should be made; here we think they do not. There has been an extraordinary change in the presumption of law in the case of murder. Originally murder could only be committed in secret, for it being of its essence that it should be committed with deliberation, that is, with malice aforethought, he who killed another openly and publicly was not believed to have done it with malice aforethought. The punishment being death, it was inferred that he was moved to the act by passion, not by judgment or reason. The presumption of law, therefore, was that he did not commit the act with malice aforethought. But experience proving that this presumption was in fact unfounded, and that wicked men would even in public commit homicide with malice prepense, the rule of presumption was therefore abolished.

I am also induced to believe that, upon the principle that a mistake in point of fact exempts a person from the penalties of usury, the plaintiffs are exempted in this case, for I think it cannot well be believed that they knew that they were violating the law; and ignorance of law,

could it be believed, forms as good an excuse as ignorance of fact. They are based on the same principles, the only difference being that in ordinary cases the one is not to be believed, but the other is. Upon the whole, I am of opinion that the judgment should be affirmed.

(130)

HALL, J. I concur in the opinion delivered in this case by *Judge Henderson,* who has gone into a more full examination of it than I propose doing.

By an act of the Legislature, passed in 1821, ch. 12, sec. 2, it is declared that the Supreme Court shall possess the same power to grant new trials, as well upon matters of fact as matters of law, as the Superior Courts of Law now have excepted in criminal cases. If the present question had occurred during the existence of that law it would not only be proper, but incumbent upon us, to examine the evidence in the present case, and, if upon such examination we should ascertain that the verdict was against evidence, to grant a new trial. But this act was repealed by an act passed in the succeeding year (ch. 32). This Court, then, possesses the power only of deciding such questions as shall be presented to it. It is, therefore, to the points of law decided by the judge, and not to the facts submitted to and passed upon by the jury, that our attention is to be directed. It follows, of course, that if in this case the jury found a verdict contrary to the law given them in charge by the judge, the judge only, and not this Court, can grant a new trial on that account. But if the judge gives a charge to the jury as to the law of the case and they find a verdict accordingly, the person against whom that charge is given has a right to have its correctness examined in this Court. It is therefore our province to inquire whether the judge charged in favor of the plaintiffs against the law of the case when he ought to have charged in favor of the defendant.

As to the point respecting the 92 days, the judge instructed the jury that as to the days of grace, if the defendants had the use of the money for 92 days, and if the bank only calculated legal interest for that time, it was not usurious. I am not prepared to say that the charge is wrong in this respect, because although if a quarter of a year's interest

(131) was charged for 88 days it would be usurious, yet it was an universal rule of the bank to allow three days of grace, and it is admitted that a quarter's interest for 91 days is not usurious.

It is alleged again, the bond for renewal was dated and carried interest on the day the last note became due, and that the latter note carried interest on that day, which amounted to more than legal interest. This at first view seems plausible, but it requires examination. If the contract with the borrower was that renewals should take place at stated

times, and it was his right to renew, the conclusion would be correct that it was usury; but this does not appear to be the case. The bank might renew or not at its pleasure. The contract of lending imposed no obligation upon it to renew. It might sue upon the bond discounted, when it became due. Viewing, then, the bond for renewal as a distinct contract, the matter stands thus: A person owes the bank a debt; on the day it becomes due he pays it and takes up his bond; on the same day he borrows another sum of the bank, for which he gives his bond. This is no more usury than if a stranger had borrowed the latter sum, although the bond taken up and the bond given both bore interest on the same day. It is possible, however, that this might be converted into a contrivance to elude the statute of usury. When it shall be so understood, it may have a very different construction given to it.

But it is alleged that the judge erred when he instructed the jury that deducting the interest at the time of discounting the note was not usurious. This is a question of momentous concern to the State and one which deeply involves in its solution the interest of its citizens. Was it a question of the first impression, I would say that the charge of the court was erroneous; or, was it a case between one citizen and another, or a case between the bank and a citizen, contrived to evade the statute of usury, I would still say the charge was erroneous. (132) But when I reflect upon what banking institutions now are, and what they have been, and survey their history, I am led to pause.

In England the statutes against usury are very rigid and much like our own act; they all prohibit taking more than a certain sum per cent for the forbearing or giving day of payment for one year for any given sum. In England in all their banks and banking institutions the universal rule has been and now is to take interest in advance. In the old and new bank of the United States the same rule has prevailed. The same may be said of the local banks in the different States. The legality of the rule has been established in the Supreme Court of the United States, and in all of the State courts (as I understand) which have undertaken to decide the question. The practice has continued for a series of years in full view of the National and State legislatures, and has acquired not only a judicial, but a legislative sanction. To the weight of such high authority I feel myself bound to submit, especially when I reflect upon the ruinous consequences which would follow a contrary decision. It has been argued that in the banks alluded to bills of exchange and promissory notes only were so discounted, but that this is the case of a bond. My answer is, that bonds with us are made negotiable and placed upon the same footing with promissory notes, and in principle I think there is no difference between them as

far as they relate to the subject under discussion. In conclusion, the remark may pass for what it is worth, the defendants have paid no more than what they owed, and the plaintiffs have received no more than what was legally due them. I think the rule for a new trial should be discharged.

TAYLOR, C. J., concurred.

PER CURIAM. Affirmed.

Cited: *S. v. Langford,* 44 N. C., 444; *Moore v. Edmiston,* 70 N. C., 477; *Thomas v. Myers,* 87 N. C., 33; *Wiggins v. McCoy, ibid.,* 500; *Walton v. McKesson,* 101 N. C., 436; *Crowell v. Jones,* 167 N. C., 388.

(133)

JOSIAH TURNER v. SAMUEL CHILD.

From Orange.

[In the statement of this case as presented at page 24, *ante*, two points were omitted, on which his Honor, the *Chief Justice*, gave an opinion. Although these points are not noticed in the opinions of the other judges, and though on the main point in the cause the judges differed, yet in the subjoined opinion the whole Court concurred.]

BEFORE the jury were impaneled in the court below the defendant submitted an affidavit and moved thereon for leave to add the plea of "fully administered," which the judge refused. On the trial the plaintiff produced the following account:

FRANCIS CHILD,
To YOUNG & TURNER, *Dr.*

To sundry items (stated)		$ 94.67½
Your due bill for a wagon		150
		$244.67½
Cr.		
By J. Phillips' note	$100.05	
Your mother's do	14	
	$114.05	
Discount for 11 months off	6.27	107.78
Balance due on this account		$ 84.48½

The plaintiff proved that F. Child had bought of Young & Turner a wagon of the value charged.

It was then proved by another witness that at the request of Young, the deceased partner, he drew off the above account; that F. Child was in the room while this was doing, but the account was not presented to him for payment, nor did he declare his approval of it. This witness also stated that Young, in directing him how to state the account, informed him that the amount of the wagon had been settled by the mother of Mr. Child, and directed credits to be given and the account to be stated showing the above balance to be due. On this proof the defendant's counsel insisted that the wagon being the only (134) article proved to have been delivered, and Young having acknowledged payment for that, the plaintiff could not recover.

On the other side it was said that the instructions to the witness and the account stated in pursuance thereof were all one transaction, and the account, though in writing, part of the declarations of Young, that the whole, when offered in evidence, should be submitted to the jury to be judged by them; and the defendant was not at liberty to select the particular declaration which served his purpose and offer that to the jury to discharge himself, separated from the written statement then made by which he was charged; and of this opinion was the presiding judge.

TAYLOR, C. J. The refusal of permission by the court to add the pleas was a subject within its discretion, and cannot be made the ground of appeal. *Armstrong v. Wright,* 8 N. C., 93.

The evidence relative to the account was properly left to the jury, for it is their province in a court of law to decide what credit is to be attached to the whole or part of any statement, whether oral or written. Dougl., 781.

The general rule is that if a party relies upon an account produced for the purpose of claiming credit, the account must be taken all together; the party may indeed contradict or disprove it, but if he do not, it is evidence to the jury. 5 Taunton, 245.

NOTE.—The Reporters feel that an apology is due from them to the Court and the profession, for presenting the above points with the opinion upon them, detached from the residue of the case. That apology will be found in the following statement.

Long and detailed statements of facts not at all material to illustrate the opinion of the Court, are certainly a fault in a book of reports; to avoid this, the present Reporters rigidly exclude every statement which is not demanded by the points decided in the cause. When the above case was prepared for the press, the Reporters had not seen the opinion of the *Chief Justice,* and were under the impression that, in consequence of severe indisposition, he had not filed one. The statement was made, therefore, in reference to the opinions of other judges. After the manuscript was in the hands (135)

of the printer, the opinion of the *Chief Justice* was received and printed, the printer not observing that the whole of the points noticed in it did not appear on the statement. Both the Reporters were absent at the time, and on their return found that the statements could not be amended and reprinted, without requiring that several other sheets succeeding should be also reprinted. They had no other alternative than to reprint the sheets, striking out the latter part of the opinion and preserving it in a distinct statement.

THE STATE v. PENDER WEEKS and WILLIAM BIGGS.

From Edgecombe.

1. In a criminal prosecution, there being no dispute as to ownership, title papers are evidence to explain the motives of a party's conduct.
2. Hence, where land is sold and the vendee puts a tenant at sufferance out of possession, in an indictment for an assault in putting him out, the deed under which the vendee claims is evidence.
3. Whether evidence of title can be received to decide the fact of possession between adverse occupants, *quære.*

THE defendants were indicted for an assault and battery. On the trial the prosecutor proved that he had kept a school for three weeks in a house on the land of one Cely Weeks, and that he had her permission to use it as long as he pleased if he prevented the boys from hurting the orchard. That a few days before the assault and battery complained of the defendant Weeks had read to him a deed from Cely Weeks for the land on which the schoolhouse stood, and had ordered him off. He also proved that he left the house on a Friday evening, secured as usual, with the design of returning on Monday and resuming his business; that when he returned he found the defendants in the house, who had removed all his property out of it, and told him he must not enter. This he disregarded, and pushing one of them aside, went in, upon which the defendants took him up and carried him out of the door. The de-
(136) fendants offered in evidence a deed from Cely Weeks, whereby the land on which the house stood was conveyed to the defendant Weeks, and which was executed after the permission given to the purchaser, but before the day when the prosecutor was notified to quit. This evidence was objected to by the State and refused by the court. The defendants then proved that before the alleged assault they entered the house peaceably, put out the property of the prosecutor, and were alone in the house when the prosecutor returned.

Mangum, J., instructed the jury that the question of title was wholly immaterial; that if they believed that the prosecutor had such possession

of the house as is usually held in schoolhouses, on the Friday evening before the alleged assault, and had left it with an intent to return on Monday, that in law the prosecutor was in possession when the defendants entered, and they had no right to prevent him by force from going into the house, or to remove him therefrom after he had entered.

The jury having returned a verdict for the State, a rule for a new trial being discharged, and judgment rendered for the State, the defendants appealed.

Attorney-General for the State.
Gaston for the defendants.

HENDERSON, J. This case does not involve the question whether title can be resorted to when there are adverse occupants to decide the fact of possession. The fact of possession between Cely Weeks and the prosecutor being before the jury, the deed was offered to show that the same state of facts existed between one of the defendants and the prosecutor. It was not offered to show that title was in the defendant and not in the prosecutor, but to communicate to the defendant the possession of Cely Weeks, if she had one, to substitute him for her as to that fact, and for no other purpose. I think that the evidence should have been received. (137)

HALL, J. It appears from the testimony of the prosecutor that he had the consent of the owner of the land to use the house as long as he pleased. There was no contract for that purpose; guarding her orchard from the inroads of the boys made none. Either party might alter their mind when they pleased; he might have left the house without any breach of contract, and the owner had the right of requesting him to do so, and enforcing the request by any lawful means. It appears that the defendant Weeks purchased the house of the owner. Notice of this was given to the prosecutor. He persisted in retaking possession of it, after the defendants had become possessed; and here I suppose that the assault and battery charged was committed. It does not appear that the defendants acted otherwise than to take up the prosecutor and put him out of doors; and as one of them owned the house, and the other acted by his authority, they had a right under the circumstances of the case to do so, if they used no unnecessary violence. But to show this right in them, I think the deed from Cely Weeks to Pender Weeks ought to have been read in evidence. As it was not, a new trial must be granted.

Error.

THE STATE v. JAMES K. BROWN.

From Granville.

An indictment charging that the defendant stole a "parcel of oats" is sufficiently certain.

THE indictment charged that the defendant "feloniously did steal, take and carry away *a parcel of oats* of the goods and chattels of one J. R. Eaton."

After a verdict for the State, the defendant's counsel moved (138) in arrest of judgment upon the ground that the property stolen was not described in the indictment with sufficient certainty.

Daniel, J., overruled the motion, and passed sentence upon the defendant, from which he appealed to this Court.

Attorney-General for the State.
Nash for the defendant.

TAYLOR, J. It appears to me that the article charged to be stolen is described with convenient certainty, and comes up to what is required in indictments and declarations, viz., certainly to a certain intent in general.

Where this is required, everything which the pleader should have stated must be expressly alleged, or by necessary implication be included in what is alleged, otherwise it will be presumed against him. Now, "parcel" signifies a part of the whole taken separately, and has for one of its meanings, "a small bundle." Johnson's Dictionary. A bundle of oats is the term actually employed, because oats are so made up for sale, and other purposes; but one name seems scarcely more certain than the other. It is therefore distinguishable from the cases in the books where indictments have been held defective for uncertainty in the description of the articles, as an indictment for stealing the goods and chattels of S. S., without any further specification of them; for engrossing a great quantity of straw and hay, or divers bundles of wheat, without showing how much of each, and various other cases, to the same effect. 2 Hawk Pl., 322. Here there is but one article, and the quantity of that so described that the mind cannot hesitate in understanding it. The motion to arrest the judgment should be overruled.

Affirmed.

Cited: S. v. Patrick, 79 N. C., 656; *S. v. Credle,* 91 N. C., 645; *S. v. Moore,* 129 N. C., 497.

(139)

THE STATE v. CURTIS ORRELL.

From New Hanover.

When the death does not ensue within a year and a day after a wound is inflicted, the law presumes that it proceeded from some other cause. Hence, an indictment upon which it does not appear that the death happened within a year and a day after the wound was given, is fatally defective.

THE prisoner was tried upon the following indictment:

"The jurors for the State upon their oaths present, that Curtis Orrell, late of the county of New Hanover, laborer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the seventeenth day of May, in the year of our Lord one thousand eight hundred and twenty-six, with force and arms, in the county of New Hanover, in and upon one Penelope Orrell, in the peace of God and the State then and there being, feloniously, willfully, and of his malice aforethought, did make an assault; and that the said Curtis Orrell, a certain gun, of the value of five shillings, then and there loaded and charged with gunpowder and leaden shot, which gun he the said Curtis Orrell in his hands then and there had and held, to, against, and upon the said Penelope Orrell, then and there feloniously, willfully, and of his malice aforethought, did shoot and discharge, and that the said Curtis Orrell, with the leaden shot aforesaid, out of the gun aforesaid, then and there by the force of the gunpowder, shot and sent forth as aforesaid, the said Penelope Orrell, in and upon the left side of her the said Penelope Orrell, a little above the left hip of her the said Penelope Orrell, then and there feloniously, willfully, and of his malice aforethought, did strike, penetrate, and wound, giving to the said Penelope Orrell, then and there, with the leaden shot aforesaid, so as aforesaid shot, discharged, and sent forth out of the gun aforesaid, by the said Curtis Orrell in and upon the left side of her the said Penelope Orrell, a little above the left hip of her the said Penelope Orrell, one mortal wound, of the depth of six inches, of which said mortal wound the said Penelope Orrell died. And so the jurors aforesaid, upon their oaths aforesaid, do say that the said Curtis Orrell the said Penelope Orrell, in manner and form aforesaid, feloniously, willfully, and of his malice aforethought, did kill, and murder, etc."

After a verdict for the State the prisoner's counsel moved in arrest of judgment:

1. Because it was not averred in the indictment that the death happened within a year and a day after the mortal wound was (140) given.

2. Because it did not appear upon the indictment that the deceased died in the county of New Hanover.

For these reasons the judgment was arrested by his Honor, *Judge Norwood;* whereupon the solicitor prayed an appeal.

No counsel appeared for the prisoner.
Attorney-General for the State, without argument.

HENDERSON, J. All the authorities tell us that some period of time when the alleged offense was committed must be stated in the indictment; yet the very same authorities most expressly inform us that it is entirely unimportant to confine the proofs of the commission of the crime to the day charged; all that is required is to show the offense was committed prior to the filing of the bill of indictment. Thus an indictment omitting to state any time when an offense was committed is insufficient; yet if the bill states that the offense was committed, as in this case, on 17 May, 1826, proof of an offense committed on 1 January, 1825, will support the charge. All that the law requires is that an offense prior in point of time to the filing of the bill should be proved. But it is our business to declare the law as we find it established by the lawmakers—not to make it ourselves. From these principles it necessarily follows that we must not understand that the mortal wound was given on 17 May, 1826. It may have been given at any day previous to the finding of the bill, for such proof would have supported the charge that it was given on that day. We cannot, therefore, draw any aid from the time laid in the bill when the wound was given, and, by comparing that time with the filing of the bill, show that the death
(141) followed within one year and a day from the time the wound was given. If such was not the case, that is, if death did not take place within a year and a day of the time of receiving the wound, the law draws the conclusion that it was not the cause of death; and neither the court nor jury can draw a contrary one. It not appearing, therefore, upon this indictment, when the death happened, and as it may have been more than the period aforesaid after the wound, the Court is bound to say that it does not appear to them that the defendant has been guilty of the murder of the deceased. The judgment, therefore, was properly arrested in the court below, for it is essential that it should appear that death ensued within what may be called the prescribed time.

TAYLOR, C. J. I cannot doubt that both the objections to this indictment are well taken. The place of the death ought to be stated, to the end of showing that the offense charged is within the jurisdiction of

the court. Though the rule was plain at common law, that murder, in common with other offenses, must be inquired into in the county wherein it was committed, yet it was doubted whether if a person received the stroke in one county and died in another, the offense was completed in either. The statute of 2 and 3 Ed. VI. provides, however, that the trial shall be in the county where the death happens; and supposing that statute to be in force, it cannot be intended on this indictment that the death took place in New Hanover. For aught that appears, it may have taken place out of the State.

Nor is it less important to state the time of the death, in order to show that the deceased died of the wound given her by the prisoner within a year and a day after she received it. For if the death happened beyond that time, the law would presume that it proceeded from some other cause than the wound. 2 Inst., 218. For these reasons I am of opinion that the judgment should be arrested.

Affirmed.

Cited: *S. v. Haney,* 67 N. C., 469; *S. v. Pate,* 121 N. C., 665.

(142)

THE STATE v. JIM, a negro slave.

From New Hanover.

1. In an indictment for a rape, the words "forcibly and against the will" are necessary.
2. Hence, an indictment for a capital felony, under the act of 1823, not containing those words, was held to be fatally defective.
3. Per TAYLOR, C. J., a slave on the trial of such an indictment is entitled to a jury of slave-owners.

THE defendant was indicted under the act of 1823 for making an assault "in and upon the body of one M. J., a white female, with intent her the said M. J. then and there feloniously to ravish and carnally know, etc."

In making up the jury the counsel for the defendant challenged for cause those jurors who were not owners of slaves, which was overruled by the presiding judge. After a verdict for the State the defendant's counsel moved in arrest of judgment because it was not charged in the indictment that the offense was committed "violently, forcibly, and against the will of the said M. J." *Norwood, J.,* for this cause arrested the judgment, whereupon the solicitor prayed an appeal to this Court.

Attorney-General for the State.
Gaston for the defendant.

HENDERSON, J. Rape is the carnal knowledge of a female, *forcibly* and *against her will.* These essential requisites, *forcibly* and *against her will,* are omitted in this indictment. But it is said that as the word "ravish" of itself implies that the act was done forcibly and against the will of the female, the words *"feloniously ravished"* supply this defect. This would be transferring from the court to the jury the right and power of drawing inferences of law; they and not the court would decide what acts did and what did not amount to rape. The law, therefore, in this and all other cases, requires the facts which constitute the offense to be stated, that the jury may affirm them or not, according to the evidence. Thus in murder, which *ex vi termini* means a homicide committed with malice aforethought, it is not sufficient to state in the indictment that the accused feloniously murdered the deceased. And so in other offenses the facts constituting the offense must be stated, for without such statement it cannot appear to the court that the jury have not drawn a false and impossible conclusion. The indictment, therefore, is defective, and the judgment of the Superior Court must be affirmed.

There are other points arising in the cause upon which, as they have not been argued, I do not wish to express an opinion.

TAYLOR, C. J. The charge in this indictment was no more than a misdemeanor at common law, though an aggravated one, as it still continues in relation to all but the colored population. But the form of the indictment constantly laid the intent to be to commit the
(144) offense "violently and against the will" of the female, as appears from the precedents referred to by the Attorney-General. The late act of Assembly having elevated the offense to a capital felony, affords an additional reason for maintaining and adhering to the established forms, for if so much precision is required to put a misdemeanor in the shape of an indictable offense, *a fortiori* should it be observed when the same offense is made capital, for the policy of the law will sometimes overlook exceptions made to an indictment for misdemeanor, which, nevertheless, it will sustain in *favorem vitæ.* In an indictment for an assault with intent to murder, it is essential to state the intent to be "feloniously, willfully, and of his malice aforehought, to kill and murder," because these are the characteristics of the crime designed to be perpetrated; and for the same reason, and in this case a stronger one, the essential qualities of the crime should be laid in an indictment for attempting it. There is indeed a case, 3 Johns., 505, where the indict-

ment was sustained, which charged the intent to commit a murder, on the ground that it followed the words of the statute. But in that case the statute did not raise the offense beyond its original degree of misdemeanor, but only aggravated the punishment by imprisonment in the State's Prison. For this omission, therefore, I think this indictment is defective.

It appears to me that the act of 1793, ch. 381, extending the trial by jury to slaves, and directing the jury to be composed of owners of slaves, is not repealed by any subsequent law. A twofold consideration dictated the policy of this law, the force of which remains unimpaired by the extension of additional privileges to slaves. It was intended to surround the life of the slave with additional safeguards, and more effectually to protect the property of the owner, by infusing into the trial that temperate and impartial feeling which would probably exist in persons owning the same sort of property. That the master would have assurance of an equitable trial by persons who had (145) property constantly exposed to similar accusations, and who would not wantonly sacrifice the life of a slave, but yield it only to a sense of justice, daily experience is sufficient to convince us. The property of a man is more secure when he cannot be deprived of it except by a jury, part of whom, at least, have the like kind of property to lose. And this reason, it seems to me, continues to operate with full force, notwithstanding the many humane and valuable provisions which have been subsequently made for the trial of slaves. I am of opinion that the judgment should be arrested.

Affirmed.

Cited: *S. c., post,* 508; *S. v. Arthur,* 13 N. C., 220; *S. v. Gallimon,* 24 N. C., 377; *S. v. Powell,* 106 N. C., 638; *S. v. Peak,* 130 N. C., 717; *S. v. Marsh,* 132 N. C., 1002.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JULY TERM, 1827

SUPERIOR COURT OFFICE v. DAVID LOCKMAN.

From Lincoln.

A party is at all times answerable for his own costs, and though he succeed in the cause, execution may issue against him therefor, if the same cannot be made out of the party cast.

LOCKMAN recovered judgment in the court below against one Allen, and the sheriff returned *"Nulla bona"* to a *fieri facias* issuing thereon, and the fees due the officers of the court for services rendered at the instance of Lockman, the plaintiff, remaining unpaid, a notice was served on him to show cause why execution should not issue against him for the amount of those fees.

A motion being made below for execution, according to the notice, *Strange, J.*, who presided, refused the motion and dismissed the proceedings; upon which, the case was brought here by appeal.

Wilson in support of the motion.

HALL, J. Strictly speaking, the party is at all times answer- (147) able for his own costs; but under the act of 1777, Rev., ch. 115, sec. 90, the successful party being authorized to recover them from the party cast, the practice has been to wait the event of the suit, and then to issue execution against the party cast for costs; before which time the officers do not claim to be paid their costs. But when the plaintiff's costs cannot be recovered of the defendant, there is no reason why the plaintiff should not pay them. And so it was held in *Merritt v. Merritt* and *Brehon v. Tuton*, 2 N. C., 20. I therefore think that in this case the motion ought to have been allowed in the Superior Court.

PER CURIAM. Reversed.

Cited: Clerk v. Wagoner, 26 N. C., 132; *Carter v. Woods*, 33 N. C., 24; *Office v. Allen*, 52 N. C., 157; *Martin v. Chasteen*, 75 N. C., 99;

Jackson v. Maultsby, 78 N. C., 176; *Andrews v. Whisnant,* 83 N. C., 448; *S. v. Wallin,* 89 N. C., 580; *Morris v. Morris,* 92 N. C., 143; *Long v. Walker,* 105 N. C., 97; *Speller v. Speller,* 119 N. C., 358.

LAWSON HENDERSON, Assignee, etc., v. WILLIAM SHANNON.

From Lincoln.

Where securities are declared void by statute, they cannot be enforced even by an assignee for value and without notice; but a bond, though void at common law for turpitude of consideration, being assignable, may be enforced by such assignee, and there is no distinction between consideration *malum in se* and *malum prohibitum.*

DEBT upon a sealed note, or single bill, tried before *Daniel, J.* On the trial the case was that Shannon had been arrested upon a charge of burning a house belonging to one Caldwell, and after his arrest he gave his bond, with the other defendant as his surety, payable to Caldwell, for the purpose of compounding the prosecution, upon which the warrant was dismissed. Afterwards, and before the bond fell due, Caldwell assigned the same by indorsement to the plaintiff for a valuable consideration and without any notice to the plaintiff of the consideration on which it was given.

(148) The presiding judge, upon these facts, directed a verdict for the defendants; and from the judgment thereon the plaintiff appealed.

No counsel for the defendants.
Wilson for the appellant.

(149) TAYLOR, C. J. If this were a question between the original parties to the bond, I should have no doubt that the defense could be available for the defendant, since the consideration of the bond is illegal; and I should be willing to make a similar decision as against an assignee; for the rule of law, which avoids the bond, though founded on evident justice and policy, may be eluded in every instance, if an assignee without notice can recover. But this is a consideration for the Legislature, and they have not left us at liberty to decide according to our individual perceptions of justice, but have established a rule which we are bound to follow.

The act of 1796 makes bonds "negotiable in the same manner and under the same rules and regulations as notes called promissory or nego-

tiable notes have heretofore been." This refers us to the existing law relative to promissory notes, which must furnish the rule for the decision in this case. The cases which are familiarly known concur in establishing the position that, independently of positive enactments, where a negotiable instrument is voidable as between the original parties, either because it is founded on a consideration prohibited by the common law or where it was without consideration at its commencement, it is nevertheless good in the hands of an indorsee for valuable consideration without notice, either express or implied, of the defect or failure of the consideration, as regards any other person than his own immediate indorsee. An indorsee so described is not affected by fraud or other transactions between the original parties. 3 Caines, 279; 4 Mass., 161.

But notice, in legal understanding, is not confined to the positive knowledge of a fact, but the law implies it whenever such circumstances of suspicion exist as ought in reason to put a man upon inquiry into the transactions between the parties to whose contract he is about to succeed. Thus, an indorsee who takes a note after the time of payment has elapsed may, in an action against the maker, be repelled by any (150) defense of which the maker could have availed himself in an action by the payee, such as fraud, want of consideration, payment, release, set-off, etc. 3 Term, 80; 1 H. Bl., 89, note a.

But I have met with no case, excepting those provided for by statute, wherein an indorsee without notice and for valuable consideration can be affected by the illegality or defect of the consideration when he sues the maker. Here the bond was indorsed before it became due, and for a valuable consideration; for which reasons I think the judgment below wrong, and that there ought to be a new trial.

HALL, J. This is not a contest between the obligee and the obligors, as in *Collins v. Blantum,* 2 Wils., 347. There the bond was given to stifle a prosecution for perjury, and both plaintiff and defendant were privy to the unlawful consideration, for which reason the bond was held to be void; nor is it the case of a bond declared to be void by statute on account of the illegality of the consideration on which it was given, as was the case in *Lowe v. Waller,* Doug., 736, where a bill of exchange given upon an usurious consideration was held to be void in the hands of an indorsee for a valuable consideration without notice of the usury. The present case is one where the bond is given upon a consideration which avoids it at common law, but assigned to the plaintiff before it became due, and without notice of the consideration on which it was given. I had doubted whether the purpose to stifle a prosecution, for which this bond was given, was not of so criminal a nature as to make it void in the hands of an indorsee; but it is said by two judges, in *Aubert v. Maze,* 2 Bos. &

Pull., 371, that there is no distinction between cases that are *malum prohibitum* and *malum in se;* and I am not aware that any adjudged
(151) case contradicts this position. Taking it, then, that there is no such distinction, the case of *Steers v. Lashley,* 6 Term, 61, must be considered an authority for the plaintiff. There A was employed as a broker in stock-jobbing transactions for B, and paid money for him, for which he drew a bill on B, and indorsed it to C, after B had accepted it; but C had a knowledge of the unlawful consideration on which it was drawn, and for that reason it was held by the court that he could not recover. From which I am to infer that had he been ignorant of the illegal consideration on which the bill was drawn, he would have been entitled to the judgment of the court in his favor. So in the case of *Brown v. Turner,* 7 Term, 626, where a bill drawn upon an illegal consideration, having been indorsed after it became due, was held liable in the hands of the indorser to every defense which existed against it in the hands of the original payee. From which I infer that had it been inforsed before it became due, and without notice of the consideration on which it was drawn, as in the present case, the plaintiff would have been entitled to the judgment of the court. Therefore I think the law is in favor of the plaintiff, and that the rule for a new trial be made absolute.

PER CURIAM. Judgment reversed, and new trial awarded.

Cited: Coor v. Spicer, 65 N. C., 402; *Bascom v. Smith,* 66 N. C., 538; *Weith v. Wilmington,* 68 N. C., 29; *Ward v. Sugg,* 113 N. C., 494, 499.

(152)

THE JUDGES to the use of WRIGHT EDMONDSON v. N. WASHINGTON and others.

From Wayne.

Where a judge's order directs a *certiorari* to issue to the county court, it is no violation of duty in the clerk of the Superior Court to issue the writ without security; to take such security belongs to the clerk of the former court before yielding obedience to the writ.

BY section 2 of an act of Assembly, passed in 1810, entitled *"An act to compel persons to give security in certain cases,"* it is enacted "that in all cases where *certioraris* are directed to the county courts *the clerk of the court is hereby required to take security,* in the same manner, etc., that security is taken on appeals from the county to the Superior Court."

In 1821, one Jernigan, against whom Edmondson had obtained a judgment in Wayne County Court, presented to the defendant N. Washington, the clerk of the Superior Court of that county, the mandate of the *Chief Justice,* directing him to issue writs of *certiorari* and *supersedeas* to bring up the record of that judgment, and to supersede execution thereon. The mandate was unconditional in its terms, and Washington issued the writs and the clerk of the county court certified the record, no security having been taken by either of them. Whereupon Edmondson, conceiving this a breach of duty in the clerk of the Superior Court, brought this action upon his official bond.

On the trial in the court below *Donnell, J.,* directed a verdict for the defendants, and the plaintiffs appealed.

Badger and W. H. Haywood, Jr., for the appellant.
Gaston contra.

HALL, J. The judge instructed the jury that the clerk of the (153) Superior Court, in issuing the writ of *supersedeas* on receiving the mandate of the *Chief Justice* was not guilty of misconduct in office so as to subject himself and his securities to the plaintiff's action, and in this charge I think the judge was guilty of no error. Laws 1810, ch. 793, directs that in all cases where *certioraris* are directed to the county courts the clerk of the court shall take security in the same manner and under the same regulations that security is taken on appeals from the county to the Superior Courts.

It was the duty of the clerk of the county court to take security as directed by this act, before he obeyed the *certiorari,* and a refusal by him who prayed such *certiorari* to give security would be a sufficient excuse and return to the writ. But this act is inapplicable to the present case. It imposes no such duty upon a sheriff to whom a *supersedeas* is directed; nor is any such duty imposed upon the clerk of the Superior Court who issued the *supersedeas,* either by law or the mandate of the judge who authorized him to issue it. I therefore think the rule for a new trial should be discharged.

PER CURIAM. The rule for a new trial is discharged.

THE GOVERNOR for the use of the State Bank v. ALLAN TWITTY and others.

From Rutherford.

1. The return of a sheriff that a *fi. fa.* is satisfied is conclusive upon his sureties in an action on his official bond.
2. A sheriff's bond payable to the Governor and his successors in a sum different from that directed by law, cannot be sued in the name of the successor.

THE writ and declaration were in debt in the name of "Gabriel Holmes, Governor, etc., and successor of John Branch, late Governor, etc." for the sum of £5,000, and the action was brought on the official bond (154) given by one Alley, and the defendants, his sureties, upon Alley's appointment to the office of sheriff of Rutherford in the year 1820.

On the trial before *Ruffin, J.,* in order to prove a breach of the condition of the bond, the plaintiff showed that the State Bank obtained judgment against one Ledbetter and others, in March, 1820, and issued execution thereon directed to Alley, which was by him returned, "Satisfied in part by the payment to him of $800"; and it was proved that Alley refused to pay any part of the money either to the plaintiffs in the execution or into court.

On the part of the defendant it was proved that no part of the $800 was actually received by Alley after the execution came into his hands; but that Ledbetter, not intending to defend the action, had, on being served with the *capiaas ad respondendum,* paid the sum to Alley, to be applied to the payment of the judgment when execution should issue, and the counsel for the defendants insisted that this was not a receipt by Alley in his official capacity, and that consequently there was no breach shown to support the action. The presiding judge being of opinion that this evidence had not varied the case, directed a verdict for the plaintiff, and a motion for a new trial being overruled, the defendants appealed.

In this Court the case was considered not only upon the motion for a new trial, but also upon a motion in arrest of judgment made here.

Gaston for the defendants.
Wilson for the plaintiffs.

HALL, J. When this case came before the Court at a former term, *Bank v. Twitty,* 9 N. C., 1, it was considered that the plaintiff was not entitled to a summary remedy under the act of Assembly, by merely notifying the sheriff and his securities to show cause why judgment should not be entered against them, because the sheriff's bond was not given pursuant to the act, and that circumstance in the case then disposed

of it. I am sorry to be under the necessity of saying that for a reason founded on the same principle, the case must now be disposed of.

We then decided that as the bond was not taken as prescribed by the act, it was not void, but that the party aggrieved must have recourse to a common-law remedy; as with respect to the remedy, so it is with respect to parties: if not taken as the act prescribes, although made payable to John Branch, Governor, and his successors, this action cannot be maintained on the bond in the name of the successor.

Another question was then somewhat examined relative to the sheriff's return. Speaking for myself, I was too much influenced by the reasoning on behalf of the securities, which has since been adopted in *McKellar v. Bowell,* 11 N. C., 34, without observing its total inapplicability to the case. There the decree was not permitted to be received as evidence against the securities, because they were not parties to it, (157) and because the evidence on which it rested might again be brought before the court when they became parties in any other suit; and so in this case it was said the sheriff's return was not conclusive evidence; that the question still was open, had the sheriff in fact received the money, although his return stated that he had. But I think the sheriff's return conclusive of the question, because as long as that return stands the plaintiff has no remedy against the defendant for the amount which the sheriff's return states to be received.

But I think, for the reasons first stated, this action cannot be sustained.

PER CURIAM. Judgment arrested.

Cited: Snead v. Rhodes, 19 N. C., 388; *Poor v. Deaver,* 23 N. C., 393; *S. v. McAlphin,* 26 N. C., 150; *S. v. Biggs,* 33 N. C., 413; *Walters v. Moore,* 90 N. C., 45.

THE GOVERNOR to the use of WILLIAM HOLLIDAY and another, executors of THOMAS HOLLIDAY, v. JAMES EASTWOOD and others.

From Greene.

1. A sale under a *venditioni exponas* of lands, or with or without a *venditioni,* of goods levied on under a *fi. fa.* is an act done in execution of the authority given by the writ under which the levy was made. Therefore, when such a sale was made in 1820, under a levy made before, it was held that the sheriff's refusal to pay over the money raised by the sale was no breach of the condition of his official bond for 1820.
2. A *venditioni* can issue only to the sheriff who made the levy.

JAMES EASTWOOD was sheriff of Greene from May, 1819, until May, 1820, at which time he was reappointed, and gave, with the other de-

fendants, his sureties, the bond on which this action is brought, dated May, 1820, and conditioned for the faithful discharge of his duties.

On the trial the evidence was that the executors of Holliday recovered three several judgments against one Brand, of which the whole
(158) amount was $300, on which *fi. fas.* issued, tested of February and returnable to May, 1820, on which Eastwood, the sheriff returned that he had levied upon a tract of land and several negroes, which remained unsold for want of bidders.

On one of these returns a *venditioni exponas* issued, returnable to August, 1820, on which the sheriff returned that no sale was made for want of bidders. It did not appear in evidence that any other executions issued upon these judgments or either of them, but on 27 February, 1821, Eastwood sold the land levied upon for the sum $1,500, and the negroes for a like sum; and a small balance remaining in his hands of the proceeds of the sale, after satisfying the judgments as well as other demands upon Brand, Eastwood came to a settlement and accounted with him therefor. The above judgments not being paid by the sheriff, the question was whether the plaintiff had shown a breach for which the defendants were liable upon the bond of 1820.

Daniel, J., who presided, instructed the jury that if no other executions issued than those mentioned above, the plaintiff had shown no breach; that it was incumbent on the plaintiff, if any other execution did issue, to produce evidence thereof; and, further, that if other executions had issued, founded on the levy returned to May, 1820, as writs of *venditioni exponas,* and under these sale was made, such sale related to the levy, and such new writ only authorized or required the completion of the former execution, of which the levy was the commencement, and therefore no breach was shown of the condition of the present bond.

Under these directions the jury found for the defendants, and a rule for a new trial being discharged and judgment given, the plaintiffs appealed.

(159) *No counsel for the appellant.*
Gaston contra.

HALL, J. I think the charge of the judge to the jury in the Superior Court was correct. The question submitted to the Court is somewhat confused, because Eastwood was sheriff both in 1819 and 1820. Let us suppose that some other person was sheriff in 1819, and that the executions of *fieri facias* issued into his hands and were returned no sale for want of bidders to May court, 1820, at which court Eastwood was appointed sheriff. From that court the plaintiff in the executions thought proper to issue writs of *venditioni exponas;* it is proper that these writs

should issue to the first who had levied on the property, because an execution is said to be an entire thing, and he who begins it must end it, *Anonymous,* 2 N. C., 415; Gwillam's Bacon Abrid. "Sheriff, J." and cases therein cited, consequently it would be the duty of the first sheriff, not of Eastwood, to sell the property, as was done in February, 1821. The power of finally selling the property was a continuation of the power which he had to levy upon it. But it seems that the same person, Eastwood, was sheriff in 1819 and 1820. Then it follows that as he levied upon the property by virtue of his appointment in 1819 and sold it, and received the proceeds of sale under a continuation of a power derived from the same appointment, that he did not in any respect act under the authority of his appointment in 1820; that he might and ought to have sold the property in 1821, although he had not been appointed sheriff in 1821. The consequence is that his failure to pay the money which is alleged as a breach can be no breach of the bond given at May court, 1820. I therefore think the rule for a new trial should be discharged.

PER CURIAM. Affirmed.

Cited: Barker v. Munroe, 15 N. C., 415; *Tarkington v. Alexander,* 19 N. C., 92, 96.

(160)

Den on demise of AMBROSE SEVILLE v. ADDISON WHEDBEE.

From Pasquotank.

The next collateral relation to the person last seized, though *ex parte paterna,* shall inherit, under the act of 1784, an estate descended *ex parte materna.* And the same rule is, though this collateral relation be of the half blood, and come *in esse* after the death of the person last seized.

EJECTMENT. The jury in the court below found a special verdict, the material facts of which are that the premises in dispute were devised in 1791, by the will of Thomas Davis, to his wife, Rebecca, who afterwards intermarried with one Robertson Seville, had issue by him, a son called William, and died in 1804, leaving the son surviving, upon whom the premises descended. Robertson Seville, the husband, also survived his wife, and intermarried with another, by whom he had issue, the lessor of the plaintiff, born in October, 1805. William, the son of Rebecca, died seized in August preceding the birth of his half-brother, the lessor of the plaintiff, and Robertson, the second husband of Rebecca, died in 1810. Upon these facts the jury prayed the advice of the court if the plaintiff was entitled, etc., and in the court below, by *Paxton, J.,* judgment was rendered for the plaintiff, from which the defendant appealed.

(170) TAYLOR, C. J. In the principal feature of this case it is not distinguishable from *Ballard v. Hill,* 7 N. C., 410, the maternal half-brother was preferred to a more distant collateral, though the estate descended upon the brother, under whom he claimed, from the father. It was a contest between the maternal brothers and sisters and the paternal cousin, who was heir at common law. In this case the lessor of the plaintiff is paternal half-brother, and the estate descended to his brother from his mother. The record not disclosing that there are any heirs (171) nearer in degree on the side of the mother, the plaintiff is entitled to recover.

The other question arising out of the facts stated has also been adjudged in *Cutlar v. Cutlar,* 9 N. C., 329. There the lessor of the plaintiff was born after the death of his brother; but upon his birth he became heir to him, and is consequently entitled according to the principles of the common law.

PER CURIAM. Affirmed.

NATHANIEL BOYDEN and Wife v. JOHN ODENEAL and Wife.

From Stokes.

The indorsement of an attorney on a writ is only *prima facie* evidence of the time when it issued.

CASE for words, tried before *Norwood, J.,* and on the trial the only question was whether the plaintiff was barred by the statute of limitations. The entry in the margin of the writ was in these words: "Issued 18 July, 1823," and the defendant offered to prove that in fact the writ was not issued until 28 September, 1823. This evidence was opposed on the part of the plaintiff, who proved that the writ was filled up and issued by T. Lacy, an attorney of the court below, and contended that the entry in his handwriting was conclusive of the time of issuing the writ, of which opinion was the presiding judge, and he rejected the evidence offered by the defendant. As the action accrued within six months before 18 July, the plaintiff had a verdict, and a new trial being refused, the defendant appealed.

(172) *Gaston for the appellant.*

TAYLOR, C. J. The point to be decided is whether the defendant may prove that the indorsement on the writ as to the time of issuing it is wrong, and that in truth it was issued several months later. The act of 1777, sec. 13, made it the duty of the clerk or attorney issuing original

process to mark thereon the day on which the same shall be issued, and this duty is enforced under a heavy penalty. The fact as to the time when a writ issued is all important in cases where the statute of limitations is relied upon, since the action must be commenced or brought within the different periods specified after the cause of action accrues. The plea in this case is that the defendant was not guilty within six months before the issuing of the writ. Then when the writ did issue is the very point in dispute, and I apprehend it never could be the intent of the Legislature to make either the inadvertent or the designed untrue indorsement upon the writ conclusive evidence of the fact.

If the indorsement of the writ has been confined to the clerk alone, the argument would be something stronger in favor of making it conclusive evidence of the time, "for no one can say that a writ was purchased at another time than it bears date, for to aver that it was antedated tends to the discredit of the officer of record." 2 Plow., 492. But this only goes to the mode of redress. The party is not finally concluded by the false date, but may have relief in a summary way. 2 Burr., 966. But it would be an alarming principle to establish that the plaintiff's attorney can prevent the bar of the statute of limitations, and thus finally conclude the defendant by antedating the writ. I am of opinion that the defendant ought to have been permitted to controvert the indorsement on the writ, which is only *prima facie* evidence against him, and that there should be a new trial.

HALL, J. Laws 1777, Rev., ch. 115, sec. 13, made it the duty (173) of the clerk or attorney issuing process to mark thereon the day on which it shall be issued. When process has been issued by an attorney, his indorsement thereon of the day on which it is issued is *prima facie evidence,* but no more.

The Legislature did not intend to give such an indorsement the force of a record. In the present case the plaintiffs proved that the indorsement was made by T. Lacy; it was surely competent for the defendant to prove (and by evidence of the same grade) that the indorsement was not made by T. Lacy, but that it was made by some other person, or that if it was made by T. Lacy he was mistaken as to the day on which the writ issued. It seems to me it was a question proper to be decided by such evidence.

Therefore I think the rule for granting a new trial should be made absolute.

PER CURIAM. New trial.

Cited: Jenkins v. Cockerham, 23 N. C., 311; *Simpson v. Sutton,* 61 N. C., 113.

WILLIAM UNDERWOOD v. CLARISSA LANE and another.

From Randolph.

1. A judgment and execution were returned to the justice by the constable; afterwards, they both searched among the official papers of the former, but could not find them. The justice and the plaintiff in the judgment having removed out of the State, it was held that proof of this search by the constable entitled one claiming under the judgment and execution to give parol evidence of their contents.
2. A bill of sale for a slave must be registered in the county where the vendee lives.

TRESPASS for taking a negro slave out of the possession of the plaintiff, tried before *Norwood, J.*

(174) The plaintiff claimed title to the negro under a purchase at a constable's sale, and showed a *pluries* execution and sale and a purchase by himself. But not being able to produce the judgment and former executions, in order to entitle himself to offer secondary evidence thereof he called as a witness the constable, who deposed that he had returned to one Williams, the justice who granted the judgment, the paper on which the warrant and judgment were written, and also the prior executions; that he, with Williams, had made two several searches among the papers of Williams, kept in a trunk containing all the papers on which he had acted officially, and the judgment and executions were not to be found; that Williams afterwards, at the request of the witness, searched again for them, and, as he stated, without success; that Williams, the justice, and one McNeill, the plaintiff in the judgment, had removed out of the State, and the latter was reported to be dead. Upon this testimony the judge thought that the absence of the papers sufficiently accounted for and permitted their contents to be proved.

The plaintiff further proved that the negro, at the sale, was delivered to him by the constable, and was afterwards taken away by the defendants.

The constable then stated, in answer to a question put to him by defendant's counsel, that he had made to plaintiff a bill of sale for the negro, on which the plaintiff's counsel, protesting that on the facts of the case no bill of sale was necessary to pass the title, and therefore he was not bound to produce one, yet produced that spoken of by the witness, and proved its execution. To this bill of sale it was objected that the plaintiff resided in Chatham, and the registration was in Randolph. To which it was answered, that as the defendant had been in possession of the negro, the registration in the county where he resided and where the sale was made was sufficient.

The judge held, first, that no bill of sale was necessary to be shown, and, secondly, if necessary, the registration was in the (175) proper county, and the bill of sale was read.

A verdict being found for the plaintiff, a new trial refused, and judgment entered on the verdict, the defendant appealed.

Nash for the appellant.
No counsel contra.

HALL, J. The rule for a new trial seems to have been obtained on the ground that evidence ought not to have been received of the contents of the judgment and executions, unless their absence had been better accounted for. It appeared that McNeill, the real plaintiff in the judgment, and the justice of the peace who rendered the judgment and issued the executions, had both removed from the State, and that ordinary diligence had been used in searching for the papers. I therefore think with the judge below that it was proper to receive evidence of their contents.

It appears that the deed from the constable who sold the negro in dispute to the plaintiff was objected to as evidence by defendant's counsel, because it had not been registered in the county where the plaintiff lived, but only in the county where the sale took place. This objection is sustained by *Palmer v. Popleston,* 8 N. C., 307. There, as in this case, a bill of sale made by the sheriff was registered in the county where the sale was made, but not in the county where the vendee lived. It was held there, and we must so decide here, that as the deed was not registered in the county where the vendee lived, as required by the act of 1792, Rev., ch. 363, there must be a

PER CURIAM. New trial.

(176)

DANIEL LAMON v. ARCHIBALD GILCHRIST, administrator, etc.

From Robeson.

1. Where a justice forgets to return an appeal at the next term after the judgment, it is proper, upon notice to the appellee, to return it and place the case on the trial docket at a subsequent term.
2. An appeal from a justice, granted on security given two days after the judgment, will not be dismissed, although allowed without affidavits, and although no entry appears that, at the trial, time was given to the plaintiff to find sureties.

BY the act of 1777, ch. 15, commonly called "the court law," at section 63, it is provided that either party dissatisfied with the judgment of a justice of the peace may appeal to the next county court, first giving

security for prosecuting his appeal with effect; and by an act passed in 1794 (Rev., ch. 414) the same provision is reënacted. By the third section of an act to amend the latter, passed in 1802 (Rev., ch. 609), it is enacted that whenever it shall happen that judgment is entered against either plaintiff or defendant, "he, she, or they not being present," that at any time within ten days after the judgment the person or persons against whom such judgment was given, on making oath before any justice, etc., "that he, she, or they was or were prevented from attending on the day of trial, by bodily infirmity, mistaking the day of trial, or other sufficient reason," may have an appeal to the next county court, etc., and it is made the duty of the justice granting the appeal to issue a written order to the constable, etc., having the judgment in his hands, to return the same to him, and to give notice to the opposite party in the case of such appeal being granted; and on receiving such judgment it is made the duty of the justice to make return thereof, together with the "affidavit of the party craving the appeal," to the next court, etc. And by the first section of an act passed in 1812 (Rev., ch. 832) it is (177) enacted when a judgment is given by a justice against any person who wishes to appeal, etc., and is unprovided with securities upon the day of trial, such justice may grant ten days to give security for the appeal, and "shall make an entry thereof upon the warrant."

At March Term, 1826, of the Superior Court of Robeson (in which county the Superior Court has jurisdiction of appeals from justice's judgments) one of the justices of the peace returned a warrant, judgment, etc., between the plaintiff and the defendant. The judgment which was indorsed on the warrant was for costs against the plaintiff, and was rendered 27 July, 1825, and the only other entry appearing on the warrant was signed by the justice, and was in these words: "The plaintiff appeared and craves an appeal to prosecute suit according to law by giving Archibald Currie security. This being granted to him 29 July, 1825." At the same term at which these proceedings were returned the plaintiff made a written affidavit that the justice had promised him to return the appeal at September Term, 1825 (being the next term after the judgment), but the justice, who attended as a juror at that term, and resided at the distance of 28 miles from the courthouse, alleged to the plaintiff, who attended on the last day of the term with a view of prosecuting the appeal, that he had forgotten to bring it up. Upon this affidavit the plaintiff moved for and obtained an order that notice should issue to the defendant to appear at next term and defend the suit, when before *Donnell, J.*, the defendant appeared and moved to dismiss the appeal because, if the plaintiff was present on the trial, it did not appear on the proceedings that he then signified his wish to appeal, or that time was then given to find sureties according to the act of 1812, and because

if the plaintiff was absent, no affidavit was taken to account for his absence as directed by the act of 1802. The plaintiff offered to prove by a witness that he did pray an appeal on the day of trial, (178) and obtained time to give sureties; but the judge refused to hear parol evidence thereof, and dismissed the appeal, from which judgment the plaintiff appealed to this Court.

HALL, J. It was not the fault of the plaintiff that the appeal was not returned to the court to which it was returnable. At that court the justice whose duty it was to return it attended as a juror; he lived 28 miles from court, and that was probably the reason why he could not then return it, having forgot to carry it with him when he first went to court. The defendant was notified of the motion that would be made to enter the appeal on the trial docket, and is now party to the proceedings. There is no hardship on the defendant in granting a new trial, but in refusing it an injury may be done the plaintiff. I therefore think the ends of justice will be better answered by setting aside the dismission of the appeal and granting a new trial, and that the rule granted for that purpose should be made absolute.

PER CURIAM. Judgment reversed and rule absolute for placing the cause on the trial docket.

HENRY WILKES v. WILLIAM M. CLARK.

From Hertford.

In an action of *assumpsit* against a carrier for damage to goods, a dormant partner need not join.

THE defendant had a boat commanded by one of his slaves, plying for freight on the river Roanoke, and a quantity of corn was shipped on board and delivered to the slave by one John Wilkes, to be carried to Plymouth for the customary freight. In this John Wilkes acted as agent for the owner or owners, and it did not appear that any (179) express agreement was made between him and the slave, or that the shipment was known either to the owners of the corn or of the boat. The corn having been damaged, this action was brought, in which the plaintiff declared in *assumpsit;* and on the trial, before the late *Paxton, J.*, the fact of the delivery and loss of the corn being shown, the defendant's counsel read the deposition of one W. H. Pugh, and, insisting that upon the facts therein stated, Pugh was joint owner of the corn, and should have been joined in the action, moved for a nonsuit. The ma-

terial statement in this deposition was that the plaintiff bought the corn of John Wilkes, and some time before the shipment told Pugh that he should have to pay for it before he could get it to market, and was not in funds to do so; Pugh offered to let him have money to pay for one-half of the corn, upon an agreement that the plaintiff should receive and dispose of the corn in his own name as though Pugh had no interest in it, and after the sale should return the money with one-half the profits. To this proposal the plaintiff agreed, and received the money from Pugh. The advance of money was not a gift or a loan, but was put into the plaintiff's hands to pay for half the corn, the money and half the profits to be returned as stated above, and the witness said that in the event of loss he should have felt himself bound in honor to sustain half of it. The whole of the transaction between the plaintiff and Pugh was entirely private.

The presiding judge refused to direct a nonsuit, and instructed the jury to find for the plaintiff, who accordingly had a verdict and judgment.

Hogg and Badger for defendant.

(181) *Gaston for the plaintiff.*

TAYLOR, C. J. The question to be decided in this case is whether the Superior Court erred in refusing to instruct the jury that Pugh had such an interest in the corn that he should have joined in the action brought by Wilkes, and that Wilkes alone could not maintain it; and my opinion on the case and Pugh's deposition is that there was no error committed by the court in refusing this instruction.

The agreement made between the plaintiff and Pugh took place one or two months after the former had purchased the corn from John Wilkes, and it was a part of that agreement that the plaintiff was to receive and dispose of the corn, in his own name, in the same manner as if Pugh had nothing to do with it. The agreement to this effect was private between them, and Pugh thinks it was unknown to any other person. It was consequently unknown to John Wilkes when he

(182) shipped the corn, who must have believed that he was acting as the agent of and for the sole account of the plaintiff Henry Wilkes. If, therefore, when he made the shipment, an express contract had been made between him and the carrier, it must have been made in the name of his brother, and would have inured to his benefit, for the law will only imply that which it may be supposed the parties would have expressed had they defined the terms of the agreement.

It follows that John Wilkes was the agent for the plaintiff alone, and that the latter was unknown in the contract of shipment. The case then falls within the rule that the party with whom the contract was made

may alone sustain the action, although it turn out that another person, whose name is not mentioned, is secretly interested. Thus in *Lloyd v. Archbole,* 2 Taunton, 324, it was held that it is no ground of nonsuit, in an action on a contract, that a dormant partner, who is not privy to the contract and is not party to the suit, partakes of the benefit of the contract, and therefore ought to be joined as plaintiff; the Court in that case holding that the only ostensible partner who made the contract was the only proper plaintiff; for the only acting partner might owe much money to the defendant, which the defendant might set-off; but if the plaintiff and the dormant partner had sued, that debt of the acting partner could not be set-off. "If you can find out a dormant partner defendant, you may make him pay, because he has had the benefit of your work; but a person with whom you have no privity of communication in your contract shall not sue you." *Ibid.* To the same effect are the cases cited from 2 Esp., ch. 468; 1 M. and S., 249, and several others.

Upon general principles I think that Pugh was a partner with the plaintiff, for though nothing was expressed relative to a possible loss, yet he who takes a moiety of the profits shall by operation of (183) law be made liable to the losses; and since by sharing the profits he lessens that fund which is properly liable to the creditors for the payment of the debts, he is justly responsible to them. In such a case it is not competent for a person having an interest in the profits to withdraw his share from the liability, and deny his being a partner. The question in many cases is susceptible of different views, whether considered in relation to the parties themselves or to third persons dealing with them. There may be a partnership as respects third persons, when the transaction would not be considered such among the parties themselves. Indeed, there may be cases in which it is the undoubted intention of the parties to the contract that they should not be partners, as that one is to contribute neither labor nor money, nor to receive any of the profits; yet if by lending his name as a partner he gives credit to the house, he cannot, as against creditors, deny his being a partner, otherwise the greatest frauds might be practiced. But it is needless to pursue this inquiry, for though I think that Pugh would have been considered as a partner in respect to creditors, I am of opinion that he cannot join in the action as plaintiff, for the reasons above stated.

PER CURIAM. No error.

(184)

WILLIAM HUMPHREYS v. JOHN R. BUIE.

From Richmond.

Where the facts in a special verdict are not sufficient to dispose of all the issues submitted to the jury, no judgment can be given thereon, but a "*venire facias de novo*" should be awarded.

THIS action was commenced 20 April, 1824, by warrant from a justice to recover the amount of a former justice's judgment, and was brought by appeal to the Superior Court of RICHMOND, where it was tried at Spring Term, 1827.

The pleas were "general issue, statute of limitations, former suit and retraxit therein." And the jury by special verdict found the judgment and that a former suit thereupon was at March Term, 1825, "dismissed." The court below, upon this verdict, rendered judgment for the plaintiff, from which the defendant appealed to this Court.

HALL, J. I think the special verdict ought to have been set aside in the Superior Court, because the jury have not found all the facts arising on the issues submitted to them, nor have they found facts on which the court can award judgment for either party. Neither the finding of the jury nor the judgment of the court show what disposition was made of the statute of limitations, which the defendant pleaded. Laws 1820, Rev., ch. 1053, makes three years a bar to a judgment obtained before a justice.

A "*venire facias de novo*" should be awarded by the Superior Court, and the suit must be remanded for that purpose.

PER CURIAM. *Venire de novo.*

(185)

JACOB LOUBZ v. JOSEPH HAFNER and another.

From Lincoln.

Trespass *vi et armis* is the proper remedy for an injury of which the defendant is the immediate cause, though it happen by accident or misfortune. Therefore, for beating a drum in the highway, where a wagon and team are passing, by which the horses take fright, run away and damage the wagon, this action may be supported by the owner.

THE plaintiff declared in trespass *vi et armis,* and on the trial before *Strange, J.,* offered to prove that as he was passing with his wagon on the highway, the defendants came into the road (but not so as to interrupt the plaintiff's progress) and commenced beating a drum for the

purpose of frightening his horses, whereupon they took fright, ran away, and damaged the plaintiff's wagon, etc.; but the presiding judge being of opinion that case, and not trespass, was the proper remedy, the defendants had a verdict. A new trial was afterwards moved and denied, and the plaintiff appealed.

Wilson for the plaintiff.
No counsel for the appellee.

TAYLOR, C. J. All the authorities concur in the position that whenever the injury is committed by the immediate act complained of, the action must be trespass; in other words, "if the injurious act be the immediate result of the force originally applied by the defendant, it is the subject of an action of trespass *vi et armis,* by all the cases ancient and modern, and that it is immaterial whether the injury be willful or not." Several cases are put to illustrate this rule, as when one shooting at a mark with a bow and arrow, and having no unlawful purpose in view, wounded a man, it was held that trespass was the proper action.
So where a person is lawfully exercising himself in arms, and (186) happens to wound another, the same action must be brought.
Hob., 134. In actions of trespass the distinction has not turned either on the lawfulness of the act from whence the injury happened or the design of the party doing it to commit the injury; but on the difference between immediate injuries or consequential ones; for if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally or by misfortune, yet he is answerable in trespass. 3 East, 600.

It is impossible to doubt from the statement in this case that the action is properly brought according to all the decisions, for if willfulness were a necessary ingredient in the case, it exists here, since the defendant beat the drum for the purpose of frightening the plaintiff's horses. It is much stronger than *Scott v. Shepherd,* for here the act was immediately injurious, without any intermediate agency. If in *Scott v. Shepherd* the injury had been done to the person upon whom the squib first alighted, it would have resembled the case before us, and then there would have been no grounds for the dissenting opinion of *Mr. Justice Blackstone,* who thought that the first act was complete when the squib lay on the stall where it first fell, and that the injury done to the plaintiff after the squib had received two new directions was the consequence of and not done immediately by the first act of the defendant.

The nature of the act done in this case, the time and place where it was done, a wagon and team passing the public road, rendered it probable that injury would be the immediate consequence, and would render

the defendant liable in the action, though he had no views to the consequences; for though the bad intention must be alleged and proved
(187) in a charge of felony, it is not necessary to be considered in this action. "Where a man shoots with a bow at a mark and kills a man, it is not felony, and it should be construed that he had no intent to kill him; but when he wounds a man, although that it be against his will, he shall be said to be a trespasser." 3 Wils., 408. If the injury done be not inevitable, the person who doth it or is the immediate cause thereof, even by accident, misfortune, and against his will, is answerable in this action of trespass *vi et armis*. 1 Strange, 596; Sir T. Jones, 305; Sir T. Raym., 422. For these reasons I am of opinion that upon every ground of law and convenience, as well as the most manifest justice in the particular case, the action was well brought, and the plaintiff on the proof offered should have had a verdict.

PER CURIAM. New trial.

Cited: McCless v. Sikes, 46 N. C., 311; *Stewart v. Lumber Co.,* 146 N. C., 85.

JAMES L. ARMSTRONG and another v. JOHN HARSHAW.

From Burke.

A judgment against a defendant named in the writ, but not made a party either by service, public notice, or attaching his estate, is merely void, and should be disregarded when produced on *nul tiel record*.

DEBT. The plaintiff declared upon a judgment recovered in Tennessee, and the defendant pleaded *"nul tiel record."* On the trial before *Strange, J.,* the plaintiff produced a duly certified transcript of proceedings had in Bedford County, in Tennessee, by which it appeared on an affidavit made by the plaintiffs that the defendant had absconded or concealed himself so that process could not be served on him; a writ of attachment issued against his estate, which was levied on a quan-
(188) tity of corn, supposed to be his property, and the levy indorsed on the writ; and an order was made to sell the corn, upon which the officer returned that no money had been made in consequence of older attachments having been previously levied on the same corn. At the succeeding term of the court, the writ being returned with these indorsements, the plaintiffs filed their declaration, signed judgment by default, and their damages being assessed by a jury at the next term, a final judgment was entered.

On the production of this record, the presiding judge gave judgment for the plaintiffs, and the defendant appealed.

Wilson for the defendant.

HALL, J. The Constitution and laws of the country guarantee the principle that no freeman shall be divested of a right by the judgment of a court, unless he shall have been made party to the proceedings in which it shall have been obtained. When personal notice cannot be given, it must be dispensed with from necessity, and that must be done which is next most likely to answer the same purpose: public notice must be given, or the defendant's property must be laid hold of. The latter mode was directed and attempted to be adopted in the present case, and had it succeeded the plaintiff would have been authorized to proceed to judgment, because the property when levied upon represented its owner, and of course was liable to that judgment. But no property of the defendant was levied upon; his right to the corn was divested by older process, and judgment was obtained against him when he was not made party to the proceedings in any way known to the law.

I cannot, therefore, consider it a sufficient and legal foundation for the judgment rendered in this case. I am consequently of opinion that the rule for a new trial should be made absolute. (189)

PER CURIAM. New trial.

Cited: Skinner v. Moore, 19 N. C., 150; *Burke v. Elliott,* 26 N. C., 358; *Deaver v. Keith,* 27 N. C., 376; *Stallings v. Gully,* 48 N. C., 345; *Perry v. Mendenhall,* 57 N. C., 159; *In re Ambrose,* 61 N. C., 93; *McKee v. Angel,* 90 N. C., 62; *Spillman v. Williams,* 91 N. C., 487; *Stancil v. Gay,* 92 N. C., 463; *Stafford v. Gallops,* 123 N. C., 22; *Morris v. House,* 125 N. C., 564.

THE TRUSTEES OF THE QUAKER SOCIETY OF CONTENTNEA v. WILLIAM DICKENSON.

From Wayne.

1. By the act of 1796 religious societies or their trustees have not a general capacity of acquisition; they can only take for the use of the society.
2. Hence, by a conveyance of slaves to the trustees, for purposes forbidden by the policy of the law, nothing passes, and in an action brought in their name to recover such slaves against a stranger, he may, by parol, show the unlawful purpose in contradiction of the deed.

3. It seems that even a party might offer such proof, for, as deeds conclude the parties only when valid, they cannot exclude proof of an unlawful design which avoids them.

DETINUE, brought in the name of Joseph Borden and fourteen other persons, styling themselves "Trustees of the Religious Society or Congregation of Christians, called Friends or Quakers of the Contentnea Quarterly Meeting, etc.," to recover a negro slave, and was tried before *Ruffin, J.*, at April Term, 1826. On the trial it appeared that in November, 1817, one William Dickenson, the elder, executed a deed by which he conveyed the negro slave in question, and others, "to Thomas Cox, Joseph Borden, and Francis Mace, Trustees of the Religious Society and Congregation, usually known by the name of Quakers, etc.," to have and to hold to them, trustees as aforesaid, and their successors, "for the use and benefit of and in trust for the said Religious Society and Congregation forever." It was admitted that the persons named in the deed (190) as trustees were duly appointed such, according to the act of Assembly of 1896, and that the plaintiffs are their successors in that office or appointment. It was then proved by one Elijah Coleman, the subscribing witness to the deed, that the religious principles of the people called Quakers forbid them to hold the use of themselves individually, or to the use of the society, any persons as slaves beneficially as property, or for purposes of profit; that it was the intent of Dickenson, Cox, Borden, and Mace, parties to the deed, as well as of the society, that neither the trustees nor the society should have any profitable or beneficial use of the slaves, but that the trustees, as sort of guardians of the slaves, should hold them in the name of the society for the benefit of the slaves themselves, they working under the direction of the trustees and entitled to receive the profits of their labor, after defraying the expenses attending their comfortable maintenance, and to be ultimately emancipated by the society or trustees, whenever it could be effected according to the laws of this State. The witness being asked if it was not intended that the slaves might be sent out of the State to be emancipated, answered that nothing was said by the parties as to such a disposition of them, but he understood it to be the intention that they should remain in North Carolina until emancipated, and then to choose their own places of residence.

The presiding judge was of opinion that the plaintiffs, as trustees, could take and hold only property conveyed and intended for the use of the society, and that a conveyance to the trustees expressed on its face to be for the use of the society, but in fact for the benefit of some other person, was not valid; that the use required must be one actually beneficial to the society, who could not constitute its trustees or itself trustee for third persons, and at all events, not for the uses and pur-

poses specified by the witness. The judge was also of opinion (191) that evidence of such beneficial use for the society formed a necessary part of the plaintiffs' case, and though such use was *prima facie* to be inferred from the declaration in the deed, yet if the jury believed from the testimony of the witness that no beneficial use to the society was intended, but that the conveyance was made for the other purposes stated by the witness, the plaintiffs had not a title to the slave, and were not entitled to a verdict.

The counsel for the plaintiffs submitting to this opinion of the court, the plaintiffs were called, and, a motion to set aside the nonsuit having been refused, appealed to this Court.

Gaston for the appellants.
Badger contra.

TAYLOR, C. J. The deed of gift executed to the three trustees (200) of the Friends Association does upon its face convey the negroes to them for the purposes authorized by the act of 1796, and, deciding from the conveyance alone, passes a valid title to them. But as the defendant was a stranger to the deed, it is competent for him to give parol evidence of the real objects of the deed, and of the trusts it was intended to effect beyond those expressed. 3 Term, 474; 8 Term, 379; Starkie on Ev., 4, 1051; 10 Johns., 229.

Before the passing of the act of 1796 the Society of Friends had no capacity to acquire property as an association, because they were not incorporated; they could take only in their individual characters, the gift being confined to the very persons in existence when it was made. To enable it to manage its own affairs and to own property for the exclusive use of the society as a religious association without the continual necessity of conveying it from one to another, the act of 1796 was passed. A corporation exists but in contemplation of law, and possesses those properties only which the law confers upon it. By the very act of incorporation, and without any special power to that purpose, it is incidental to it to acquire property. But as it is the creature of the legislative will, it is competent for the Legislature to limit its capacities and powers as it may think proper. It may withhold altogether its capacity to acquire property; it may consequently limit and restrain it to definite purposes. It cannot be said of the trustees of this society that they have a general power to purchase and hold property, because the act declares that they shall hold it in trust for the use and benefit of the society. If, then, the case discloses the fact that the trustees hold this property for an use different from that of the society, and for the benefit of persons not contemplated by the Legislature when they gave the power,

(201) and for objects that are not less adverse to the words and spirit of the act than to the general policy of the law, I think it will follow that the plaintiffs have no title to recover.

What are the real objects of the donation? The individuals composing this society believe it to be repugnant to their religious principles to become the owners of slaves, and will not employ their labor to the profit and advantage of themselves or of the society. The trustees were to act as guardians to the slaves, and to hold them for the benefit of the slaves themselves, who were to receive the surplus of the profits of their labor for their own emolument, and ultimately to emancipate them whenever it could be done consistently with the laws of the State.

So far, then, from the plaintiffs taking the property for the objects permitted by the act of 1796, it appears to me that nothing but the name is wanting to render it at once a complete emancipation; the trustees are but nominally the owners, and it is merely colorable to talk of a future emancipation by law, for as none can be set free but for meritorious services, the idea that a collection of them will perform such services, under the construction which those terms in the act of 1777 have uniformly received, is quite chimerical.

It is said that the Legislature could not mean that the society should take no property but such as it derived a pecuniary benefit from. Certainly that was not their intention; but it evidently was their intention that the property they were allowed to acquire should subserve in some way the legitimate object of a religious association, which every man can comprehend when stated, though it may be difficult to give a definition that shall include the whole.

A place of worship, of interment, the support of a minister, the means of educating and assisting their poor members, and various other objects which yield no pecuniary profit, we perceive at once to be within (202) the scope of the permission.

But if a sense of religious obligation dictates to any society the exercise of an enlarged benevolence which, however virtuous and just in the abstract, the policy of the law, founded on the duty of self-preservation, has forbidden, it irresistibly follows that a transfer of property so directed must be void.

Nor do I feel the force of the remark that the property belongs to the society that they may make profit out of it if they choose, or sell it or dispose of it in any way that another owner might. This is to presume that a society not less remarkable for the purity of its principles than for an unshaken steadfastness in maintaining them will at once degenerate from their long-tried morality. The whole history of the people called Quakers shows that neither prosperity nor adversity, favor or persecution, or any known vicissitude of their condition, has ever interrupted

the even tenor of their ways. I firmly believe—indeed, I consider it morally certain—that if the plaintiffs recover, this property will be disposed of in the manner described by the witness, and in no other.

It is true that an individual may purchase a slave from gratitude or affection, and afford him such indulgences as to preclude all notion of profit. The right of acquiring property and of disposing of it in any way consistently with law is one of the primary rights which every member of society enjoys. But when the law invests individuals or societies with a political character and personality entirely distinct from their natural capacity, it may also restrain them in the acquisition or uses of property. Our law allows the trustees to hold them for the benefit of the society, whereas in truth they hold them for the benefit of the slaves themselves, and only in the name of the society.

I cannot distinguish this case in principle from the former de- (203) cisions wherein trusts for the emancipation of slaves have been held void in equity, on the ground that the law had forbidden such attempts, except in the manner prescribed by the act of 1777. There resort was necessarily had to equity, because the legal title passed to the executors; but here, as it is justly remarked by the judge who tried the cause, evidence of the beneficial use for the society forms a necessary part of the plaintiffs' title, of which, though the deed is *prima facie* evidence, it is not conclusive.

Upon the whole, my opinion is that the plaintiffs have no legal title, and although the province of this Court is to administer the law as they find it, without any regard to consequences, yet my judgment is in some degree fortified by the belief that a contrary decision would produce most, if not all, of the ill effects which the Legislature sought to avoid by the act of 1777.

If that law could be eluded by transferring slaves to this society, there is no foreseeing to what extent the mischief might be carried. Numerous collections of slaves, having nothing but the name, and working for their own benefit, in the view and under the continual observation of others who are compelled to labor for their owners, would naturally excite in the latter discontent with their condition, encourage idleness and disobedience, and lead possibly in the course of human events to the most calamitous of all contests, a *bellum servile.*

HENDERSON, J. What may be the effect of the deed of William Dickenson to Thomas Cox, and the other original donees, viewing them merely as individuals or natural persons, we are not called on to say. The form of the action, or rather the party plaintiffs, necessarily bring into discussion its validity under the act of 1796, authorizing religious societies to purchase and hold property; for without the aid of (204)

that or some other act creating them a corporate or artificial body the present plaintiffs cannot sustain this action, there being no privity or connection between some of the present plaintiffs and the original grantees. By that act religious societies are not made corporate bodies with unlimited and unqualified powers of acquisition, for were that the case it is admitted that the use or trust upon which they held their acquisition would not affect their legal title. If the use or trust was vague or unlawful, it would be a reason why it should result to some other person or for some other purpose, but such modification of the use would not affect the legal ownership; because in this case the trustees having a general and unqualified capacity to acquire property, as individuals or natural persons, the use or trusts upon which such acquisitions were held with such bodies, as with natural persons, would not affect their estates at law. The act of 1796, however, does not confer a general and unqualified power of acquisition, but only a limited and restricted one, to wit, for the use and benefit of the society. It is therefore the use which gives to the transaction its artificial character by bringing to its aid the act of 1796, if such use is for the religious society. The society (either itself or its trustees, which is immaterial as regards this question) are invested with corporate or artificial qualities, qualities commensurate with the object in view; but if the use or trust is not for themselves as a religious society, but for others, they can derive no aid from the act. They must then rest on their rights as individuals or natural persons, and it would seem to follow as a most necessary consequence, if this use is forbidden by law, if it is contrary to the policy of the State, that the transaction can derive no aid from an act of the Legislature by which the use, and the use only, gives character and validity to the deed. In saying that it is the use which gives character and (205) validity to the deed, I mean not to assume the power of examining into the question whether the use is actually beneficial to the religious society or not; it is sufficient that they as a religious society think it so; of this they are the sole and exclusive judges; but when the question is presented to me, it is my duty to see that such use does not violate the laws or policy of the State, and I think in this case the use offered to be shown on the part of the defendant, from an examination into which the plaintiff shrunk, and which must, therefore (if the testimony is admissible), be taken as true, is forbidden by law, is contrary to the policy and hostile to the best interests of the State. It is contrary to law to permit slaves to hire their own time. The pernicious effect this must produce on our slaves is too obvious to require illustration. Neither is any person permitted to emancipate his slave by his own act; it requires the sanction of the constituted authorities of the State to effect it, and no one, I think, can for a moment doubt the policy of these acts. I

must also confess, after a careful examination of the case, that I can discover no difference in effect, so far as regards the evil example to our slaves, between hiring to them their own time and placing them on farms and giving to them what they made after deducting the expenses of supporting them; and no great difference between emancipating them and holding them in the above-mentioned manner until they can be emancipated. It must produce dissatisfaction and a restless spirit among others, the very evils the Legislature designed to prevent. There can be nothing, I think, in the objection that the uses and purposes for which this society hold these slaves, not being expressed in the deed, averments supported by parol evidence are inconsistent with it, and therefore inadmissible to show what those uses are. In the first place, they are not inconsistent with the deed, the deed being general. But even between the parties to a deed any averments may be made, and of (206) course proof received, to show its nullity. When strangers are concerned—and how this defendant claims does not appear, consequently we must view him as a stranger—such averments are very clearly admissible. The recitals in a deed can bind the parties only, when it is taken as valid; but in endeavoring to show that it is void, its recitals and affirmations may be disproved by any one, either party or stranger; otherwise the parties by false recitals can protect the most unlawful contracts from scrutiny.

HALL, J., *dissentiente*. The act of 1796, ch. 457, authorizes religious societies and congregations to appoint trustees, who may purchase lands and receive donations for their use and benefit, and after such purchase or donation the society is declared to possess the absolute estate of all such property. The principal and only qualifications required by the act is that the society shall be a religious one.

But it is stated in this case that it is contrary to the religious principles of the Association of Friends to hold slaves to their own use, and it is argued that on that account the conveyance is void under which they claim the slave in question.

I do not understand from that statement that they are averse from holding a title to slaves, or from being considered as having a right to the use of them, but that in point of law they may have the legal title, and a right to the use, but they claim the right of disposing of that use in any way they may think proper, provided that disposition does not conflict with the laws of the land; that they may gratify their thirst for gain with it, or render it subservient to the gratification of any other desire not prohibited by law; that the enjoyment of the use (207) consists in the freedom of disposing of it; that it is optional with

them to build churches, employ preachers or give it away in charity or in any other way their conscience approve of.

Preachers, individually, have the capacity to purchase slaves, and when they become owners of them are, like other citizens, subject to the laws made for their government; and when they form themselves into religious societies, the Legislature confers upon them the capacity to purchase; the transfer of power is general. The Legislature has made no exceptions on account of religious tenets, and it appears to me not to be the province of this Court to discriminate and make any. As to their liberation of them, for which purpose it is said they purchase them, it can be effected only in the way pointed out by law, and when it can be effected in that way they have a right, in common with other citizens, to avail themselves of it. If they permit them to hire their own time or otherwise mismanage them, they are, like other citizens, amenable to the law for such conduct. It is not for this Court, by legal anticipation, to apply a preventive remedy.

If we take a step into the moral world and contemplate the unbiased principles of our nature, we will discover for the exercise of our discretion a wide range between humanity and cruelty, and we might not find fault with those who mingled with their religion the dictates of the one and carefully abstained from the exercise of the latter.

But if, on account of our unfortunate connection with slavery, these sentiments tend to a mistaken policy, if self-preservation impels us to a different and contrary course, that course should be pointed out by the Legislature; the mischief and the remedy are both with them. If the act of 1796 hath produced the one, they can, by some other act, furnish the other.

Therefore, the best consideration I have been able to give this case results in a conviction that the rule for a new trial should be made
(208) absolute.

PER CURIAM. Affirmed.

Cited: White v. White, 18 N. C., 267; *Shober v. Hauser,* 20 N. C., 228; *Redmond v. Coffin,* 17 N. C., 441; *Walker v. Fawcett,* 29 N. C., 47.

Den on Demise of WILLIAM BUFFERLOW v. RICHARD NEWSOM.

From Northampton.

1. A widow remaining in possession, as widow, of lands occupied by her husband in his life, is bound by an estoppel which bound her husband.
2. A jury is bound by an estoppel, and the court will disregard a finding contrary thereto, except where the party entitled to the estoppel has waived it by mispleading.

EJECTMENT, tried before *Ruffin, J.*, when a verdict was taken subject to the opinion of the court upon the following case:

One Jesse Webb, being seized and in the actual possession of the premises in dispute, on 16 March, 1817, conveyed to one John D. Amis in fee, upon trust to sell and pay a debt due to one William Amis, if Webb should fail to pay. On 30 October, 1820, Webb having fully paid the debt, William Amis executed to him a release of the same, and also of all claim to the land. No sale or conveyance was ever made by J. D. Amis, and Webb continuing in possession with the consent of both William and John, on 30 September, 1820, sold and conveyed to the lessor of the plaintiff in fee simple, with general warranty. After this sale and conveyance Webb still continued in possession of the land by leave of the lessor of the plaintiff (though without any formal or express lease for any particular time), and cultivated it until March, 1821, when he died. Mary, the widow of Webb, after his death remained (without any allotment of dower), with the other members of his (209) family, in possession, setting up no other title than such as she had under her husband, until November, 1823, when she intermarried with the defendant Newsom, who thereupon, as her husband, entered into possession, setting up no other title than that of his wife.

Upon this case it was agreed, if in the opinion of the court the defendant was estopped to set up the outstanding legal title in John D. Amis to defeat the action, then the verdict to stand; otherwise the verdict to be set aside and a nonsuit entered.

The presiding judge was of opinion with the plaintiff, and from the judgment rendered upon the verdict the defendant appealed.

Seawell for the appellant.
Badger contra.

HENDERSON, J. The defendant is doubly estopped from showing title in John D. Amis, first by the deed of Jesse Webb to the lessor of the plaintiff. The widow is estopped by her husband's deed, for she is tenant to the heir, who is estopped, and the tenant is always bound by an estoppel on his landlord, when his title is derived after it arises. She is

also estopped by matter *in pais;* her husband, after his conveyance to the lessor of the plaintiff occupied the lands as tenant at will or sufferance under the lessor; he could not, therefore, dispute his landlord's title. Upon his death, the widow succeeded to the possession, accompanied by the estoppel, as she could not succeed to her husband's possession stripped of its incidents, one of which was that he could not dispute his lessor's title. The defendant, upon his marriage with the widow, succeeded to her possession in the same manner in which she held. The judge was therefore correct in disregarding the facts showing title in John D. Amis; and although it is said that a jury is not estopped, but may (210) find the truth, that is only in such cases where the party has waived the estoppel, as, when having an opportunity to plead and rely on it, he omits to do so, but relies on the real fact. *Trevivan v. Lawrence,* 1 Salk., 276. In this case, from the nature of the action, he could not plead it; he shall therefore have the same advantage on the evidence as if he had pleaded and relied on it. It is not intended to impugn the rule that in an ejectment the lessor of the plaintiff recovers by the strength of his own title, and not by the weakness of his adversary's. In this case the evidence which shows his title to be weak, to wit, that the title is in John D. Amis, is excluded by the estoppel, and if offered and found by the jury, must be disregarded, for the estoppels (the admission of the parties) appear also.

PER CURIAM. No error.

Cited: Gorham v. Brenon, 13 N. C., 176; *Norwood v. Marrow,* 20 N. C., 586; *Williams v. Bennett,* 26 N. C., 126; *Grandy v. Bailey,* 35 N. C., 223; *Wilson v. James,* 79 N. C., 352; *Love v. McClure,* 99 N. C., 295; *Atwell v. Shook,* 133 N. C., 392.

MARY WATTS v. JOHN M. GREENLEE.

From Burke.

A count charging the defendant with speaking slanderous words is not supported by proof that he maliciously procured another to speak them.

CASE for slanderous words. The plaintiff declared that she being a person of good fame and reputation and so esteemed by all persons, and never having been guilty of any of the infamous acts imputed to her by the defendant, etc., nevertheless, the defendant, being an evil-minded person and intending to slander her in her good name, fame, and charac-

ter, on, etc., at, etc., "did falsely and maliciously publish of her the plaintiff, the following scandalous words, to wit: "She the said Mary is big [meaning big with child] to his negro Ben," "that all (211) Watt's girls [meaning the plaintiff as one of said girls] are with child to negro Ben," "She [meaning the plaintiff] is incontinent," he knowing at the time the said malicious and slanderous words to be untrue and false, etc., to the damage of her the said Mary $5,000, and therefore, etc."

The issue, joined on the plea of "Not guilty," came on to be tried before *Strange, J.*, when the speaking of the words by the defendant was sworn to by several witnesses, and their credit being drawn in question, the plaintiff further proved by other witnesses that on several occasions the defendant asked of an old man named Martin, who lived with him, what was the story about Watts' daughters and negro Ben, and Martin in answer to the inquiry stated that all Watts' daughters were big with child by negro Ben. The judge instructed the jury that though they should disbelieve the witness who testified to the defendant's having spoken the words, yet if they believed that he procured the words to be spoken by Martin, in reference to the plaintiff, and in his presence, with a design to impress the bystanders with the opinion that she was guilty of the scandalous conduct implied by the words of Martin, the defendant was as guilty as if he himself had uttered them. The jury found for the plaintiff, and a motion for a new trial and in arrest of judgment having been overruled, the defendant appealed.

Nash and Badger for the appellant.

(213)

HENDERSON, J. In this case it is clear that there is error both in the judge's charge to the jury and in rendering judgment on the record, properly so called. We will examine the first point only, for should there be a defect in the pleadings, we very plainly perceive that there is sufficient substance in the declaration to support an action, and the judge below has it amply in his power to permit amendments to be made to meet the justice of the case upon such terms as he may think proper. *Farrar v. Alston, ante,* 69. We shall therefore confine ourselves to that part of the charge wherein the judge says that if the jury should not believe the witnesses who had deposed to the defendant himself having used the slanderous words, yet if they believed that he procured the words to be uttered by Martin, in his presence, and with the design of having it believed by the bystanders that the plaintiff was guilty of the scandalous conduct which the words of Martin implied, he was as guilty as if he had uttered them himself. I understand the charge as amounting to this, that such evidence would support a count that the defendant

himself uttered the words. There is no doubt that the defendant is responsible for this slander thus uttered by Martin. But the charge in the declaration must correspond with the proof, and although a declaration may be framed upon the words spoken by Martin, at the instigation of Greenlee, yet such proof cannot be received in support of a count charging Greenlee with speaking them, without violating the rules requiring precision in pleading. Starkie Ev., 266, 270; 8 Term, 150.

PER CURIAM. New trial.

Cited: S. c., 13 N. C., 115.

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(214)

THE GOVERNOR for the use of the County Trustee v. JOHN MATLOCK and others.

From Rockingham.

Where the condition of a bond has appropriate words to secure the performance of a certain class of duties imposed by law on a public officer, general terms superadded thereto (though large enough to include all his official duties) shall not extend *the liability of the surety* to other duties for which by law a separate bond is directed, but omitted to be given.

THE defendant Matlock, on being appointed sheriff of Rockingham, entered into a penal bond in the sum of £5,000 with the other defendants as his sureties, payable to the Governor and his successors, the condition of which was that he should well and truly execute all process and precepts to him directed, and pay and satisfy all sums of money by him received or levied by virtue of any process into the proper office by which the same by the tenor thereof ought to be paid, or to the person or persons to whom the same should be due, his, her, or their executors, etc., and "in all other things well and truly and faithfully execute the said office of sheriff during his continuance therein." No other bond was given by him, and the county contingent tax having been collected and unaccounted for, the present action was brought upon this bond to recover the amount of that tax.

A verdict having been taken below for the plaintiff, subject to the opinion of the court whether there was any breach of the condition before set forth, *Norwood, J.,* who presided, directed the verdict to be set aside, and gave judgment for the defendant; whereupon the plaintiff appealed.

Nash for the appellant.
Gaston contra.

HENDERSON, J. The sheriff was not originally a fiscal officer; but at a very early period of the Provincial Government it was made his duty to collect the taxes which were laid by the Legislature, and it is admitted that the obligation to do so was embraced by his official bond. I presume that the Revolution, of itself, produced no change in this particular; it was only a change of sovereignty. But immediately after it, tax gatherers, as they were called, were appointed to collect the taxes and pay them to the district treasurer; upon which the collection of the taxes ceased to be within the duty or power of the sheriff. Afterwards the sheriff was directed to receive the taxes from the tax gatherers (217) and pay them to the treasurer; soon after which it was made his duty to receive them directly from the people, and bond payable to the Governor was required for the performance of this duty. This bond is in addition to his ordinary, or, as it is commonly called, his official bond. The county court was authorized and directed to lay a tax for the county contingent purposes, and to appoint collectors thereof, who were to give bond. This duty could not then be performed by the sheriff. Of course, it came neither within his official bond nor that for the collection of the public taxes. By a subsequent statute it was made the duty of the sheriff to collect those county taxes, and he was required to give bond payable to the chairman of the court for the discharge of this duty. I think it very clear that on this last mentioned bond, and this alone, his sureties are liable for his failure of duty in this particular, not on the bond to the Governor for the collection of the public tax, although it may contain words sufficiently broad to embrace this, or all his duties; for the Governor is not appointed by law to superintend the collection of these taxes, and the general words shall be controlled and restricted by the particular words to duties of the like kind; for those particular words being properly inserted, they were not there by mistake. And this fact distinguishes this case from that of *Crumpler v. Governor, ante,* 52. It is not embraced by the sheriff's official bond, payable also to the Governor, for the same reasons.

This opinion does not conflict with anything which heretofore has fallen from the Court, or any member thereof. It is placed entirely on the ground that when it was made the duty of the sheriff to collect the county contingent taxes he was directed to give bond payable to the chairman of the court for the performance of that duty, which withdraws the obligations imposed by that law, both from the bond (218) given for the collection of the public taxes and from that for the discharge of his ordinary official duties. Independent of the clear intent of the Legislature that it should be so, the most inexplicable difficulties would arise were it otherwise, between persons having claims of different natures against the sheriff, and possibly they may occur in the present

case, for this recovery, if made, may, with those hereafter had on this official bond, exhaust the penalty. What shall those persons do who may have suffered by a breach of the official duties of the sheriff? Shall this recovery forestall them, and shall they be sent after the county trustee for satisfaction? For I presume it must be admitted that they have the preferable right, and, if so, may pursue the fund. I think the plain and evident intent of the Legislature was to confine each class of claimants to the bond given for their benefit. There should be judgment for the defendant.

PER CURIAM. Affirmed.

Cited: Jones v. Montfort, 20 N. C., 70; *S. v. Bradshaw,* 32 N. C., 232; *Eaton v. Kelly,* 72 N. C., 113; *Wilmington v. Nutt,* 80 N. C., 267; *Board of Education v. Bateman,* 102 N. C., 56.

CHARLES BANNER v. JOHN MCMURRAY and others.

From Stokes.

A deputation of necessity expires with the office on which it depends. Therefore, where a sheriff appointed a deputy, who gave bond for his faithful conduct "*during his continuance*" therein, and the sheriff was reappointed, and the deputy continued to act under him for several years, it was *Held*, that the words "during, etc.," should be restricted to the first year, for the deputation expired then; and whether even express words could have extended the liability further, *quære.*

THE plaintiff was appointed sheriff of Stokes in June 1813, and in January, 1814, appointed the defendant McMurray one of his (219) deputies, who, with the other defendants, as his sureties, executed a penal bond to the plaintiff, in which he was called "Charles Banner, now sheriff of Stokes," with a condition, which after reciting that the plaintiff had appointed McMurray one of his deputies, provided that if McMurray should ably and faithfully demean himself in his appointment of deputy sheriff, perform all and every act and acts which he should be legally bound to perform "during his continuance in said appointment," then the obligation to be void, etc. In June, 1814, when the plaintiff's office by its tenure expired, he was reappointed, and so also in the years 1815 and 1816. McMurray during all this time continued to act as deputy, by color of his original deputation, and duly qualified as such in June, 1814, for the ensuing year, and so also in June, 1816.

In June, 1814, McMurray was in default as deputy at that time. At the end of the second year, in June, 1815, he was in advance to his prin-

cipal on account of that year in the sum of $176.67, and in June, 1816, he was again in default for the year then expired to the amount $1,045.05. At June session, 1816, of the county court the plaintiff was paying the county tax for the year 1814, and called on McMurray for money, who paid $315.

In 1819 the plaintiff brought this action upon the bond of McMurray and the other defendants, and assigned many breaches, of which the only ones that applied to the year ending June, 1814, were for not collecting and for not accounting for the county taxes for that year. On the trial before *Norwood, J.*, the foregoing facts were stated in a case reserved, upon which he gave judgment for the whole amount for which the deputy had been in default, after deducting therefrom the two sums of $315 and $176.67 above stated; and the defendants appealed.

Nash and Badger for the appellants.

HENDERSON, J. The deputation given to McMurray expired (221) with the appointment of his principal, as the principal could not substitute another in an office which the principal did not then hold. The deputation, I presume, would so have expired, even if it contained words importing a substitution in future years, when the sheriff might be reappointed, but certainly it is so when general words only are used, as in the present case.

The only evidence we have of the extent of the deputation is contained in the recitals of the bond and condition. The former describes Banner as "now sheriff of Stokes," and the latter recites that he "has appointed McMurray one of his deputies." It would, therefore, be inconsistent as well with authority as reason to extend against sureties the obligations of this bond to the faithful discharge of any other duties than those arising from the deputation which he then held. In support of this, I refer to 6 East, 507, 2 Saunders, 412, and the other authorities cited in the argument. We must confine ourselves, therefore, to the breaches at June, 1814, when Banner's appointment expired. McMurray was then in default in the sum of $191.69, and this breach is within the obligations of the bond. For this sum, then, with interest, judgment would be rendered, were it not that in June, 1815, McMurray was in advance to the amount of $176.67; in other words, Banner owed him that sum, However McMurray and Banner might themselves have settled it, if no other persons were concerned, yet where sureties are concerned the fact of Banner's having so much money in his hands belonging to McMurray was *ipso facto*, a satisfaction, even in a court of law, of the breach as far as it would go, and it was out of the power of Banner and McMurray by any agreement, either expressed or implied, to appropriate it to other pur-

poses thereafter. I say thereafter to happen, for had there been (222) at the time any other debt due to Banner from McMurray, McMurray might upon paying it have applied it to that debt, or, in his default of making the application, that right revolved on Banner; or, if McMurray had paid upon any special agreement or for a particular purpose, it would not have operated as satisfaction for the default. But where money falls into the hands of the creditor rightfully, and by the debtor's consent for no definite and particular purpose, when sureties are concerned, and the creditor has but the one demand, it operates *ipso facto* a discharge of the obligation, for such application can then do neither creditor nor the principal debtor any wrong; and in the absence of all evidence why it was placed there, the presumption is irresistible that it was placed there in satisfaction of the obligation; which presumption the creditor and principal debtor may do away or destroy as between themselves by their after conduct; but the rights of sureties cannot be affected by their acts. As to the payment of the $315 at June Term, 1816, McMurray not having made the application when he paid it, and being then indebted to Banner in a larger amount, the right of application belongs to Banner.

The judgment, therefore, should be for the difference between the sum of $191.69 and $167.67, with interest.

PER CURIAM. Reversed, and judgment for the plaintiff for the lesser sum.

Cited: Thomas v. Summey, 46 N. C., 555; *Jackson v. Martin,* 136 N. C., 199.

(223)

EDWARD S. JONES v. LUKE HUGGINS.

From Onslow.

1. A witness who has seen many certificates of survey attached to grants and purporting to have been made by a surveyor who had been many years dead, is competent, from the knowledge of his writing thus acquired, to prove that a particular plat of survey is in the handwriting of the deceased surveyor.
2. A survey, though ancient, made by direction of the owner of lands, for his own convenience, is not admissible evidence for him or those claiming under him.

TRESPASS *q. c. f.,* tried before *Daniel, J.* The plaintiff deduced title under a grant for 640 acres of land to one Joel Martin in 1713, a convey-

ance to John Starkey in 1759, and subsequent descents and devises to himself. The plaintiff also deduced title to himself, under a grant to John Starkey in 1760, for 80 acres, to which grant was annexed a certificate of survey purporting to have been made 24 October, 1759, by John Skibbow, deputy surveyor of Onslow. A long continued and actual possession was then shown of land alleged to be in both grants, of neither of which was a corner or line tree to be found; and in order to locate them, the plaintiff gave evidence of the general reputation respecting their boundaries. As further evidence, it was proposed to submit to the jury a map or plan, purporting to represent the two tracts of land, on which were laid down various water-courses, dwelling-houses, and other objects, and at the foot of the map was a memorandum in these words: "This plan represents 660 acres of land in Onslow County, on the west side of White Oak River, beginning, etc. [setting forth the various courses and distances], as by the patent granted, etc., doth appear. Explained for John Starkey, Esq., 24 October, 1759. P. J. Skibbow, D. S." The plaintiff proved by an aged resident of the county that John Skibbow was dead before his recollection, and that he had under- (224) stood from general report that Skibbow in his lifetime acted as a surveyor or deputy surveyor of the county; that the witness had seen many plats of surveys attached to grants of land and purporting to be made by Skibbow, and, from the acquaintance with his handwriting thus acquired, believed that every word in the memorandum and in the map produced was of the proper handwriting of Skibbow. Whereupon the judge, notwithstanding an objection taken thereto by the defendant's counsel, received the map in evidence and left its weight and effect to be judged by the jury.

A verdict was found for the plaintiff, and a new trial being refused, the defendant appealed.

Badger for the appellant.
Gaston contra.

TAYLOR, C. J. I consider that the evidence offered by Skibbow's handwriting was legally admitted, and that it was certainly free from the objection of its being proof from comparison of hands. The witness was an aged man, and Skibbow had died before his remembrance. The witness's knowledge of the general character of Skibbow's handwriting was derived from having inspected many plats of surveys annexed to grants, which surveys purported to have been made by him, who was reputed to be a surveyor or deputy. I think this satisfies the rule of law, that the witness must have acquired his knowledge of the handwriting by sufficient means; for the authenticity of these grants held by various persons as

the muniments of their estates cannot reasonably be questioned. The offices where they issue, and where they are recorded, the small (228) temptation presented to commit forgery and the facility of detecting it, place these documents on more elevated ground than bank bills or postoffice franks and bring them within the operation of the rule stated by *Le Blanc, J.*, in *Reo v. Rawlings,* 7 East, 282. This very point has been so decided in New York, as appears from the case quoted at the bar.

But on the question whether the survey itself be competent for the plaintiff, the Court is of opinion that it is inadmissible as being a private memorial procured to be made by Starkey for his own convenience, and is not evidence for him, or for any one who claims through him. The reason for excluding such evidence is decisive, viz., that it might benefit men to include in such surveys more than belonged to them. There must consequently be a

PER CURIAM. New trial.

Cited: Dancy v. Sugg, 19 N. C., 516; *Dobson v. Whissenhunt,* 101 N. C., 648; *Burwell v. Sneed,* 104 N. C., 120; *Riddle v. Germanton,* 117 N. C., 389; *Hagaman v. Bernhardt,* 162 N. C., 383.

JESSE BATTLE, administrator, v. JOHN RORKE.

From Wake.

A judgment *quando* is a judgment in favor of the defendant, who is therefore entitled to his costs.

ERROR from the Superior to the County Court, and upon the return the case was that the plaintiff in error had in the county court pleaded *non assumpsit,* payment, a set-off and *plene administravit,* to an action brought by the defendant in error. The jury found a verdict for the plaintiff below upon the three first pleas, and for the defendant upon the last. Judgment *quando* was entered up for the damages and costs (229) of the plaintiff below, and "as to the costs of the defendant in this behalf expended, it is considered that he go without day, etc."

The error assigned was "that the judgment aforesaid, in form aforesaid, was given for the said Jesse Battle against the said John Rorke, but by the judgment aforesaid the said Jesse Battle does not recover his costs and charges, etc."

Paxton, J., on the Spring Circuit of 1826, reversed the judgment and awarded restitution. Whereupon the defendant in error appealed.

W. H. Haywood for the appellant.
Devereux contra.

TAYLOR, C. J. This case depends upon the construction of the act of 1777, concerning costs, and the principles of pleading as applicable to the particular defense relied upon by the administrator. The act provides that in all cases whatsoever the party in whose favor judgment shall be given shall be entitled to full costs, unless where it is or may be otherwise directed by statute. Was judgment given in favor of (232) the defendant in the original action? No rule of pleading is better settled at common law than if the plaintiff joins issue upon the plea of *plene administravit,* and it be found against him, the judgment is that he take nothing by his bill. In such case the defendant goes without day, and the plaintiff is concluded from all further proceeding against him. It is only where he confesses the plea to be true, that the plaintiff is entitled to a judgment *quando.* Cro. Car., 373; Comyn's Pleader, 2 D. 9. It has also been lately decided, in *Hogg v. Graham,* 4 Taunton, 134, that if upon the pleas of *non assumpsit* and *plene administravit* the plaintiff joined issue and omitted to pray judgment of assets *quando,* the first issue being found for the plaintiff and the second for the defendant, the defendant is entitled to the *postea* and general costs.

An exception to the rule of praying judgment *quando* is made by our act of 1794 in those cases where the administrator sells upon a credit and the money has not been received at the time of trial. There it shall be liable to the satisfaction of judgments previously obtained, and entered up as judgments when assets should come to the hands of the executor or administrator. It is necessary, however, in that case, to bring the administrator in again upon a *scire facias.* As to the question of costs, it was decided in *Wellborn v. Gordon,* 5 N. C., 502, to which the practice has since conformed. I think the judgment should be.

PER CURIAM. Affirmed.

Cited: King v. Howard, 15 N. C., 582; *Terry v. Vest,* 33 N. C., 67; *Lewis v. Johnston,* 67 N. C., 39

Distinguished: Lewis v. Johnston, 69 N. C., 394.

(233)

ISAAC FOLSOM v. WILLIAM GREGORY.

From Pasquotank.

A debtor convicted of fraudulent concealment of his effects, upon an issue between him and A, and ordered into custody thereupon, according to the act of 1822, ch. 1131, is not in execution at the suit of B, another creditor, in whose case no such concealment was found or suggested.

DEBT for an escape. On the trial, before *Paxton, J.*, the case was that the plaintiff and one Cluff had obtained severally judgments against one Wilde, who was arrested by the defendant as sheriff of the county, on writs of *ca. sa.* issued thereon, and was duly discharged out of custody upon giving the bonds required by the act of 1822, Taylor's Rev., ch. 1131, for his appearance at the next county court, to take the benefit of the act as an insolvent debtor. In the case of Cluff it appeared from the record of the court that a suggestion was made by him that Wilde had fraudulently concealed his estate, and issue being thereon joined, the jury found the suggestion to be true; whereupon the court adjudged that Wilde should be imprisoned in the public jail, etc., until a full and fair disclosure of all his effects, etc. And under this judgment the sheriff had held him in custody, and afterwards permitted him to go at large.

In the case of the plaintiff against Wilde, no entry appeared on the record, save this, "that the surety brought him into court and surrendered him."

Upon this case the question was, if Wilde was in the custody of the sheriff upon the plaintiff's judgment, or not; and the presiding judge being of opinion that he was, the plaintiff had a verdict and judgment, from which the defendant appealed.

In this Court the cause was submitted without argument, no (234) counsel offering on either side.

TAYLOR, C. J. It is essential to a recovery in this action against the sheriff that the party escaping shall be proved to have been arrested or charged in execution at the suit of the plaintiff. In this case the issue was made up and tried between Cluff and Wilde, and it was on account of the fraudulent attempt of Wilde to deceive his creditors, established on that issue, that the order was made for his commitment. The sheriff was not bound to take notice of the claim of any other person, for it does not necessarily follow that Wilde would have been committed at the suit of Folsom, or that the same verdict would have been returned by the jury. If a debtor be in custody of the sheriff at the suit of one person, or by process of law, and another has a *ca. sa.* against him, the sheriff is not chargeable with an escape at the suit of the latter, unless the writ has

been delivered to him. But if the second writ is delivered to him, the party is then in custody by force of that writ, in judgment of law, and the plaintiff may declare accordingly. *Frost's case,* 5 Co., 89.

The caution with which the law abstains from charging a sheriff with an escape, where he has not due notice of the party being in custody at the suit of the person suing for an escape, is strongly shown in *Westby's case,* 3 Coke, 71. There Bustard had severally in execution at the suit of Dighton, as well as at the suit of Westby, and the sheriff, at the end of the year, delivered over Bustard, among others, to the new sheriff by indenture, in which indenture the execution of Dighton was mentioned, but the execution at the suit of Westby was omitted. And afterwards Bustard, always being in jail in the time of the new sheriff, escaped. In a suit brought against the old sheriff for the escape, it was argued for him that he was not liable, since he had delivered the body of (235) Bustard, then being in jail, to the new sheriff, consequently the escape began in his time, and as he had the party in his custody, he ought at his peril to take notice of all executions, being matters of record, and ought to keep him till all were satisfied.

But it was resolved by the Court: 1. That when the body of Bustard was delivered to the new sheriff, as in execution of the suit of Dighton only, by that he was out of custody of the old sheriff, and he cannot be within the custody of the new sheriff for Westby's execution, because he was not delivered to him, nor the sheriff charged with him, for Westby's execution; and although he was within the walls of the prison, yet it was an escape in law as to Westby; and that the escape began the moment the old sheriff delivered the prisoner to the new sheriff.

2. That the old sheriff ought to give notice to the new sheriff of all the executions against any one who is in custody, although the executions are of record; yet the new sheriff shall not take notice of them at his peril, but shall be charged only with such whereof the old sheriff gave him notice.

This case appears to me to show clearly, upon common-law principles, that the sheriff cannot be chargeable to this plaintiff for the escape of Wilde, however the case may prove to be between Cluff and the defendant.

But I think the same conclusion is deducible from the act of 1822, under which these proceedings have taken place. The plaintiff's argument must be that a commitment, on the finding of the issue between any one creditor who had arrested Wilde, must be a commitment as to all; and that the sheriff should have taken notice of all those claims wherein Wilde's bail had surrendered him, and should have detained him till he was discharged as to all. To this the answer is, that the court may commit for either of three distinct causes: (I) fraud or concealment;

(236) (2) refusing to answer on oath; (3) not giving notice to the creditor. Now, it may happen that the debtor is committed for not giving notice to the creditor between whom and himself the issue is made up. Shall the commitment be considered as on account of those creditors to whom he had given notice, which, no issue having been tried between him and them, he had no opportunity of showing? I think this alone sufficient to decide the case.

I am of opinion that the judgment be reversed, and a new trial granted.

HALL, J. The plaintiff's situation seems to differ widely from that of Cluff. Cluff contested the question of insolvency with the common debtor Wilde, and was successful; upon which the court ordered Wilde to be imprisoned until he should make a full disclosure of his property, etc. This disclosure was to be made for the benefit of Cluff. The plaintiff was not party to the proceedings in that suit, and the order of imprisonment grew only out of the proceedings in that suit. There was no order for commitment in the plaintiff's suit; and it does not appear that the defendant held Wilde in custody therein.

Escapes draw after them heavy penalties, and ought not to be presumed or made out upon slight grounds. The record of *Cluff v. Wilde* being received in evidence, it proved only that Wilde was imprisoned at the suit of Cluff, but not at the suit of the plaintiff.

I think a new trial should be granted.

PER CURIAM. New trial.

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(237)

JAMES SHEPPARD v. SAMUEL SIMPSON.

From Pitt.

1. Contradictory descriptions in a deed, one of which is sufficient to designate the thing granted, shall not frustrate it. But if the descriptions can be reconciled, both shall stand.
2. Where land was conveyed to one by his mother, and afterwards a moiety of it devised to him by his father, a sheriff's deed conveying the *interest* of this person and describing it as "a part of three patents, situate, etc., being land devised to him by his father," passes only moiety.

PETITION for partition, to which the defendant pleaded that "he was not tenant in common with the defendant." On the trial of this issue the jury returned a special verdict, the material facts of which were as follows: The land in question belonged to one Jemima Smith, who conveyed it in fee to her son Charles. David Smith, the husband of Jemima and the father of Charles, by his will devised the same land to his wife for life, with a remainder in fee to his sons Charles and John. Before the

executions and the sale hereafter mentioned, John Smith, the devisee of of David, died intestate and without issue, and Charles Smith succeeded, as one of his heirs, to one-eleventh of his real estate. After the conveyance by the mother, and after the death of John, executions issued against Charles, under which the land in question was sold by the sheriff, whose deed, after setting forth the executions, recited that he had levied them "on a tract of land in the county of Pitt, situate on the south side of Tar River, and on both sides of Hardie's Run, being the land devised to Charles Smith by his father, David Smith, and the undivided share of the said Charles Smith in the lands of his brother John Smith, containing together 500 acres, more or less, being a part of three patents granted to John Hardie; and also upon the interest or share of the said Charles in the crop growing upon the said land." In a subsequent part of the deed the sheriff "did grant, bargain, and sell, to the purchaser (238) "the tract hereinbefore mentioned, and the share of the crops thereon growing, with all the estate and profit of the said Charles Smith in and to the said land and crop." The defendant claimed title under the purchaser at the sheriff's sale. Charles Smith had conveyed any interest he had in the land to the demandant.

Upon these facts, *Paxton J.*, on the Spring Circuit of 1826, thinking that the purchaser at sheriff's sale took only one-half and one eleventh of one-half of the land, decided that the parties were tenants in common in the proportion of five-elevenths to the demandant and six-elevenths to the defendant, and awarded a writ of partition; on the return of this writ at the next term, before *Mangum, J.*, a judgment of confirmation was entered, whereupon the defendant appealed.

Hogg for the appellant.
Gaston contra.

TAYLOR, C. J. The question in controversy is what land was actually conveyed by the sheriff's deed to David Smith, whether the whole tract as conveyed to Charles by his mother, or the land as devised to him by his father, and supposed to be acquired by the death of his brother John Smith. The granting part of the deed conveys the land "before mentioned (in the recital), with the shade of the crop thereon (243) growing, with all the interest, estate, and profit of said Charles Smith in and to the said land crop." The recital of the deed is that the sheriff levied "on a tract of land in the county of Pitt situate on the south side of Tar River, and on both sides of Hardie's Run, being the land devised to Charles Smith by his father, David Smith, and the undivided share of the said Charles Smith in the lands of his deceased brother, John Smith, containing together 500 acres, more or less." There is a

further recital that he also levied "upon the interest or share of the said Charles in the crop growing upon the said land."

It is evident, then, that the sheriff neither levied upon nor sold the whole, as in fact owned by Charles Smith, because he expressly refers to his title as acquired from his father's will and the death of his brother. And as to the moiety devised to John Smith, that cannot pass by the deed, because the sheriff only conveys the individual share of Charles in that moiety. And to make this construction more obvious, the deed states that this individual share in John's moiety, together with Charles' moiety, contain together 500 acres. If the whole tract had been conveyed, Charles would have been entitled to the whole of the crop, whereas only the share he was supposed to be entitled to in John's part is conveyed.

The principle is conceded that if in the description of an estate in a deed there are particulars sufficiently ascertained to designate the thing intended to be granted, the addition of circumstances false or mistaken will not frustrate the deed. But I am unable to perceive any description or particular in this deed which ascertains that the whole tract of Charles, as derived from his mother's deed, was designated as levied upon or conveyed.

The first description, "a tract of land in the county of Pitt, situate on the south side of Tar River, and on both sides of Hardie's Run," does not designate the whole tract as derived to Charles from his (244) mother's deed, because it is equally a true description of the land upon the supposition that he derived title from his father's will and the subsequent death of his brother John. But when the recital proceeds to state, "being the land devised to Charles by his father David," it limits and restricts a description applicable to both titles to that specific one which the sheriff believed him to own. Then the granting part of the deed conveys the tract "hereinbefore mentioned, with all the interest, estate, and profit of the said Charles" in and to the said land and crop.

Every part of the description is true in relation to the title supposed to be in Charles under his father's will; every part is false with respect to Charles' title to the whole tract from his mother's deed, provided the first general description is sustained by the recital, which the authorities cited clearly show it ought to be.

The sheriff's intent as to what land was meant to be sold can be collected only from the deed. It is the land there described which was levied upon, bid for, and sold, and what I apprehend the sheriff likewise intended to sell, though I have little doubt that if he had known the true state of the title he would have sold the whole tract; but being misled by the will of the father, he sold only the land claimed under it. It is of great consequence to the public that land sold at a sheriff's sale should be so specified and defined that every person attending may know what price

to bid, and to be under no doubt as to the land he is bidding for. If the whole of Charles' land passed under this deed, it would give an undue advantage to those bidders who were apprised of the true state of the title, and enable them to purchase the whole tract, while others were regulating their bids by the belief that nothing more than the land described by the sheriff was set up for sale. In this case the price was given for the land as described in the deed, and not for the land which (245) it is almost certain the sheriff did not know of, and which there is no reason to believe the purchaser did. It has been said with much force on a similar question, "It ought to be received as a sound and settled principle, that the sheriff cannot sell any land on execution but such as the creditor can enable him to describe with reasonable certainty, so that the people whom the law invites to such auctions may be able to know where and what is the property they are about to purchase." Sales by process of law under the protection of rules established for the common safety, and should be construed with a view to repress speculation and prevent the unnecessary sacrifice of property—consequences which would probably follow from a judgment in the defendant's favor. I am therefore of opinion that the judgment of the Superior Court be affirmed.

HENDERSON, J. If I understand the argument of the defendant, it is that the reference made in the sheriff's deed to the will of David Smith, describing the land sold, should be rejected, as repugnant to other descriptions which are sufficient to identify and locate it, which, being more certain, should control, and if necessary correct that contained in the reference. The description contained in the sheriff's deed is "a tract of land lying in the county of Pitt, on the south side of Tar River, and on both sides of Hardie's Run, being the lands devised to Charles Smith by his father, David Smith, and the undivided share of the said Charles Smith in the lands of his deceased brother, John Smith, containing 500 acres, more or less, being a part of three patents granted to John Hardie." It is true, as contended by the counsel for the defendant, that if there is a full and clear description contained in one part of a deed, and in another part one less full and clear, which cannot be reconciled with the first, the weaker shall give way, and, if it cannot be disposed of (246) otherwise, entirely rejected. Thus, if A grant to B black acre, which he purchased of C, black acre will pass, although A purchased it of D, and not of C. If possible, the weaker description shall not be rejected; where they can be reconciled, it shall be done, and it is rejected only when that is impossible. But so far am I from thinking in this case that either should be rejected as false or contradictory, I am of opinion that the description is incomplete without both. That the lands lie on the south side of Tar River, in Pitt County, on both sides of Hardie's Run, is certainly

not sufficiently descriptive, nor is their locality fixed by further adding, "being part of three patents granted to John Hardie." If the words had been, "being the lands granted to John Hardie," it would have admitted of very great doubt whether the reference to David Smith's will could have any effect; but the words are "part of three patents." What part—one-half, one-tenth, or one-twentieth? The reference to the will of David Smith is therefore necessary to ascertain what part, and the defendant himself is under the necessity, not only of admitting it, but of insisting that it was made solely for the purpose of identifying the lands sold, and not the quantity of estate; for if the reference is used for the latter purpose, nothing passed, as Charles derived no estate in the lands from his father, he having none in them to give, they being the property of his mother. Indeed, if there is any doubt at all, it is whether *anything*, rather than *what*, passed. But I think there is none or very little. The reference to the will rendered that certain which was before vague and undefined.

PER CURIAM. Affirmed, with costs of this Court.

Cited: Knight v. Leak, 19 N. C., 136; *Murphy v. Murphy,* 132 N. C., 362; *Babb v. Mfg. Co.,* 150 N. C., 140.

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(247)

JAMES MOORE v. IRA H. COFFIELD.

From Martin.

1. An endorser discharged by the laches of the holder, being ignorant of such laches, promises to pay. The promise is not binding, although it appear that on a sale of real estate by the endorser to the maker, the note and a deed of trust were taken to secure the purchase money, and the deed still held by the endorser at the time of the promise.
2. Where the maker is a seaman, without any domicil in the State, who goes on a voyage about the time the note falls due, no demand on him is necessary in order to charge the endorser.

ASSUMPSIT against the defendant, as indorser of a single bill or obligation of which one Best was the maker and the defendant the payee. On the trial before *Mangum, J.*, at the Autumn Term, 1826, of the court below, the plaintiff proved the execution of the note and the indorsement, and further proved that Best was a seafaring man, and, at or about the time the obligation fell due, sailed from Washington, in this State, as captain of a vessel trading between that place and New York. One or two days before the maturity of the bond, one Hyman, as agent of the

plaintiff, caused two letters to be written, each addressed to Best, and demanding payment, and sent one of them by mail to Plymouth and the other to Washington, and the day the bond came due he gave to the defendant a written notice, at the same time informing him that he had written the letters to Best. Coffield said he supposed he should have to pay this bond, but he should avoid the payment of another which he had indorsed to one Watts, who had failed to give him notice. Coffield also informed Hyman that he had a deed of trust from Best for a tract of land to secure the payment of the note, and requested him to take the land in discharge of the claim; and, upon his refusing, desired him not to press the collection of the money, and Hyman promised to indulge (248) him as long as he could.

By a deed of trust it appeared that Coffield had sold to Best a tract of land, and for the purchase money had taken the obligation on which this action was brought, and the one indorsed to Watts, and Best conveyed the same land in trust to secure the payment of these obligations.

Upon this evidence the plaintiff's counsel insisted, either that no demand was necessary or there was such a promise to pay by the defendant as to avoid it.

The judge instructed the jury, first, that if Coffield had sold the land to Best, and in order to secure the payment of the purchase money to himself, and without any view to an indorsement, took the obligation and deed of trust, he had not thereby waived his right to insist on a due demand of the obligee, and notice to himself; secondly, that though the jury should believe Coffield did promise to pay, yet if at the time he was ignorant that payment had not been demanded of Best, the promise did not dispense with the demand, nor bind Coffield; and, thirdly, that though the payment of the obligation to Coffield was secured by the deed of trust, and the payment being thus secured to him, he afterwards promised to pay the same to the plaintiff, he was not bound thereby, the deed of trust not being a sufficient consideration to support the promise.

Under these instructions a verdict was found for the defendant, and, a new trial being refused, the plaintiff appealed.

Hogg for the appellant.
Attorney-General contra.

HALL, J. The judge was right in the three propositions laid down by him in his charge; but another point properly arose upon the facts stated in the case, which was not duly noticed. It was proved that (249) Best, the maker of the obligation, was a seafaring man, and, at or about the time the obligation became payable, sailed from Washington as master of a vessel bound to New York; and it did not appear that he had

a domicil, or any establishment within the State, at which payment could be demanded. The maker being at sea, in his usual employment, and the indorsee not being bound to follow him beyond the State, it follows that if he had no such domicil or establishment, and demand should be dispensed with.

In this view of the case the defendant was liable upon his indorsement, without any express promise to pay, and the jury should have been so instructed, and consequently, for the judge's omission to give such instruction, there must be a

PER CURIAM. New trial.

CHARLES McDOWELL and another, administrators of C. McDOWELL, v. DAVID TATE.

From Burke.

1. The word "set-off" entered by a defendant with the general issue shall be taken as a plea in bar where the amount is equal to or greater than the plaintiff's demand; where less, it shall be taken as a notice of set-off only.
2. An account signed by one with another, whose bond the first holds for a larger amount, should be left to the jury as evidence of a payment on the bond.

DEBT for $472, due November, 1799, and secured by bond. The memorandum of the defendant's pleas was entered in these words, "General issue, payment and set-off," no formal pleas being filed; and the plaintiff's counsel, when the cause was called for trial, asked leave to
(250) amend the pleadings by replying the statute of limitations to the last plea; but *Ruffin, J.*, who presided, declared that he considered the entry to be equivalent, in the loose practice permitted in this State, not to a plea, but to a notice of set-off, and the matter proposed to be replied could be used on the pleadings as they were, and therefore refused the amendment as unnecessary.

On the trial, the defendant, after proving some partial payments, claimed the benefit of a further payment of $90, of which the evidence alleged was written receipt signed by the plaintiff's intestate in his life, and the defendant being unable to produce the receipt itself, proposed to prove its loss by his own oath, in order to let in evidence of its contents, which proof the judge refused to hear.

By way of set-off the defendant then offered in evidence an account of £78, acknowledged and signed by the plaintiff's intestate 20 November, 1802. More than three years having elapsed from that time till the bringing of this action, the judge treating the word "set-off" as an informal notice only, instructed the jury that the account was barred.

A verdict was found for the plaintiffs, and a motion for a new trial being overruled, the defendant appealed to this Court, where the cause was submitted without argument, no counsel appearing on either side.

HENDERSON, J. A set-off to the full amount of the plaintiff's demand may be pleaded in bar of the action. If it is less than the demand, it cannot of itself be pleaded in bar; but the defendant avails himself of it by annexing it to some plea which with the sum set off amounts to a full defense, and giving notice of the set-off—most commonly thus, in the short entries on our dockets, general issue and notice of set-off; and if the particulars of the set-off are required, they must be furnished. And so it is, I apprehend, when it is pleaded in bar. The particu- (251) lars must be furnished if required; and should the set-off, when offered in the form of a plea, be found not to amount to the plaintiff's demand, the defendant may use it as a notice of set-off. At least this is a common practice, and I can see no objection to it. The entry in this case is "General issue—set-off." This I should have understood as offered in the form of a plea, and had it amounted to the full demand, it could not be objected that it was barred by the statute of limitations; for that which confesses and avoids cannot be shown under a general replication, which is nothing but a bare denial. But if the defendant insists on this being a plea, it is clearly insufficient, for it is not an answer to whole demand. It can be used only as a notice of a set-off, and if good, is applied to extinguish the plaintiff's demand to an equal amount. It necessarily follows that it may be repelled by showing that it is barred by the statute of limitations, without any replication to that effect; for in fact, when it comes in as a notice, no answer of record is given to it, that is, it is not noticed in the pleadings farther than before stated. But I think the judge erred in not submitting it to the jury as a payment. A payment differs from it only in this, that a payment is, by consent of the parties, either expressed or implied, appropriated to the discharge of a debt; a set-off is a mutual, independent claim, which still continues to exist as such, and one which the parties did not intend should be appropriated to the satisfaction of an existing demand, but that each should have mutual causes of action, and of course mutual actions if they pleased against each other. In this cause, Tate was indebted to McDowell to the amount of several hundred dollars, and Tate furnishes Greenlee with articles to the amount of £70, and Greenlee signs an account acknowledging their receipt. It is unfair to presume that Tate intended anything else (252) but to pay his debt as far as the amount would go, and that McDowell received them with the same intention. It is not probable that McDowell intended to come under an obligation to pay Tate that sum, whilst Tate owed him a large debt, or that Tate intended to enforce pay-

ment from him; and whatever might be Tate's original intention, if McDowell received them to be applied as a payment or credit to the bond, and this was known to Tate and assented to by him, it becomes a payment —that is, it is appropriated. And the conduct of Tate is a strong exposition of his understanding of it, for he has kept it for upwards of twenty years, without attempting to enforce payment; and although the statute in relation to set-offs has not changed the nature of mutual debts, and converted that to a payment which it its nature is not, yet, in the interpretation of the acts of the parties, to get at the intention which gives character to the act, it has had a great effect, as in the present case. It is not presumed that Tate intended this as a set-off, or an independent demand, for if he attempted to enforce it, McDowell would set off his large demand against it, and make him pay costs; and if he did not, but waited to set it off until McDowell should bring suit, McDowell could entirely defeat it, by virtue of the statute of limitations.

I do not pretend that the statute has changed the nature of the thing, but only that when its character depends on intent, it has waived the presumption of that intent and thereby given to it a different character.

PER CURIAM. New trial.

Cited: Peace v. Nailing, 16 N. C., 292; *Norment v. Brown,* 79 N. C., 368; *McClenahan v. Cotten,* 83 N. C., 335; *McRae v. Malloy,* 87 N. C., 199; *Sugg v. Watson,* 101 N. C., 191; *Electric Co. v. Williams,* 123 N. C., 54; *Hicks v. Kenan,* 139 N. C., 346.

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STATE v. HENRY A. LANGFORD.

From Lincoln.

1. Burglary can only be committed in a dwelling-house, or such out-buildings as are necessary to it *as a dwelling.*
2. Therefore it is not burglary to break the door of a store situate within three feet of the dwelling and enclosed in the same yard.

THE prisoner was indicted for a burglary, and on the trial before *Strange, J.,* the breaking proved was of the doors of a store opening into the street; the store was within three feet of the dwelling-house of the owner, and was inclosed by the same fence, but there was no entrance common to both. His Honor instructed the jury that if they believed the breaking as proved, it was a burglarious one, and the prisoner was guilty.

A verdict being rendered for the State, and judgment of death awarded, the defendant appealed.

No counsel for the prisoner.
Attorney-General for the State.

HENDERSON, J. Burglary is a breaking and entering the mansion house of another in the night-time, with an intent to commit some felony within the same, whether such intent be executed or not. It is almost the only case where crime in the highest degree is not dependent on the consummation of the intent. In almost all other offenses there is a *locus pœnitentiæ*. But the law throws her mantle around the dwelling of man, because it is the place of his repose, and protects not only the house in which he sleeps, but also all other appurtenant thereto, as parcel or parts thereof, from meditated harm; thus the kitchen, the laundry, the meat or smoke house, and the dairy are within its protection; for they (254) are all used as parts of one whole, each contributing in its way to the comfort and convenience of the place as a mansion or dwelling. They are used with that view, and that alone; and it may be admitted that all houses contiguous to the dwelling are *prima facie* of that description. But when it is proved that they are used for other purposes—for labor, as a workshop; for vending goods, as a storehouse—this destroys the presumption. It then appears that they are there for purposes unconnected with the actual dwelling-house, and do not render it more comfortable or convenientas a dwelling; in short, that they are not a pearcl or part thereof, but are used for other and distinct purposes. The house, as a dwelling, is equally comfortable and convenient without them or with them. Their contiguity to the dwelling may afford convenience or comfort to the occupants as a mechanic, a laborer, or a shopkeeper, but none to him as an house-keeper. These principles, I think, are fully recognized in *King v. Egginton,* 2 Bos. & Pul., 508, and spoken of in East, Starkie, and Russell with approbation. In fact, without some such rule, we should be at sea without a rudder; for shall we take distance as our guide? Must the off-house be within one foot, ten or a hundred feet? Or, as some say, a bow's shot? Those who speak of distance ascertain it only by its being reasonable, and what may be reasonable to the mind of one man may not be to that of another. Shall we take the curtilage as a guide? It may be asked to what extent. A small yard or a large one, inclosed or uninclosed? for writers do not precisely agree as to what constitutes the curtilage. I think, therefore, that it is unsafe to extend the signification of the word dwelling-house farther than to embrace the dwelling itself, and such houses as are used as part or parcel thereof, such as are used with the dwelling, considered as a dwelling-house, and

tending to render it convenient and comfortable to the dweller as
(255) an housekeeper. If it be asked, on the other side, what is to be done where the kitchen or pantry is placed at a great distance from the dwelling, whether it is to be protected as part thereof, it is answered that it must then lose its protection, not because it is no longer part of the dwelling, but on the score of carelessness or indifference; as the dwelling-house of a man is not protected who leaves his doors and windows open, or who places his property in a situation where he knows it will be stolen. For the criminal law protects men against those acts only from which they cannot protect themselves, and leaves the careless and negligent to their civil remedy.

TAYLOR, C. J., *dissentiente.* The definition of burglary, as furnished by the best writers on criminal law and explained by adjudged cases, does, in my opinion, include the case under consideration. The mansion, according to Hale, not only includes the dwelling-house, but also the out-houses, such as barns, stables, cow-houses, dairy-houses, and the like, if they be part of the messuage, though they be not under the same roof or joining contiguous to it. An outhouse upon a lot in a town cannot be more completely placed within the protection afforded by law to the mansion house than this store was. It was three or four feet only from the dwelling house, and connected with it by a gate, and it was under the same fence on all sides where a fence could be made, so as to be within the curtilage, or piece of ground lying near, and belonging to the dwelling-house. In these circumstances, it is stronger than *Castle's case,* 1 Hale, 558, where two men were condemned for breaking open a back-house of Castle's, eight or nine yards distant from the dwelling-house, only a pale reaching between them. It is as strong as the case of *Gibson* and others reported in Leach. There the shop was built close and ad-
joining to the dwelling-house, but there was no internal com-
(256) munication between the house and the shop, and no person slept in the shop. The only door to the shop was in the courtyard before the house and shop, which courtyard was inclosed by a wall three feet high. In the wall was a wicket which served as a communication to both the house and the shop. The burglary was committed in the shop, and the conviction was held to be proper. That case must have proceeded on the principle that the proximity of the shop to the mansion placed it under the same privilege and protection. It was burglary, because the shop was within the curtilage, and not because the house and the shop were both inclosed by the same fence, for that is not essential to the formation of the curtilage, as appears from *Brown's case,* cited in East P. C., 493. Nor can it be collected from *Castle's case,* already cited, that there was any common inclosure.

These cases seem to me to show the conviction here to have been proper; and I think their authority is strengthened by the cases relied upon in behalf of the prisoner, which being founded, in my view of them, on exceptions to the rule, prove the existence of the rule itself.

The first is *Garland's case,* Leach, 130, where the breaking was of an outhouse, and occupied by the owner with his dwelling-house, and separated therefrom by an open passage of eight feet wide, but the outhouse was not connected with the dwelling-house by any fence inclosing both. The prisoner was acquitted, because the outhouse was so separated from the dwelling-house, and not within the same common fence. But in the case before us both circumstances exist, from the absence of one of which the prisoner was acquitted in *Garland's case;* for here the store was connected with the dwelling-house, and both were inclosed within the same fence; for I consider a fence on three sides, (257) where the front is on a street in a town, as equal to a fence all around in any other situation. But in *Garland's case* the prisoner must have been convicted without the fence, if the outhouse had been connected with the dwelling-house by a pale, instead of being separated from it by an open passage, otherwise the principles of *Castle's case* would have been disregarded.

Parker's case, cited from 4 John., 423, is the same as *Garland's case,* save only in the distance of the store from the dwelling-house. It was not connected with the house, nor was there any inclosure.

Egginton's case, 2 Bos. & Pul., 508, was decided on grounds which have no application to the circumstances of this case. From the facts stated in that case, from the points relied upon by the prisoner's counsel in arguing it, and from the manner in which it is constantly quoted by writers, I infer that the judgment proceeded on the ground that the center building was severed from the mansion house by lease or otherwise, and adapted to the use of several manufactories, the partners of which had it on their joint occupation; consequently it could not be considered as the mansion house of M. R. Boulton. So if a man let a shop only, and sever it from his house for years, and the party who hath the shop does not lodge in it, and this be broke open in the night-time, it is no burglary. Kelyng, 84. If Boulton had used the center building in a manufactory of his own exclusively, it must have been considered as part of his dwlling-house, although there was no internal communication between them.

The books may be searched in vain for any rule or case, referring to the use made of an outhouse as the criterion, whether burglary can be committed by breaking it open. A shop or manufactory may, in judgment of law, be part of the mansion house, as much as a dairy or stable, or any other house subsidiary to the comfort and employ- (258)

ment of the mansion, as some of the cases already remarked upon show. And *Mr. Justice Blackstone* says if the barn, stable, or warehouse be parcel of the mansion, and within the same common fence, a burglary may be committed therein, for the capital house protects and privileges all its branches and appurtenants, if within the curtilage or homestall. 4 Bl. Com., 225. Lord Coke divides a mansion house into two branches, viz., to inset edifices, as hall, parlor, buttery, kitchen, and lodging chambers, and the outset buildings, as barns, stables, cow-houses, dairies, etc. All these are parcels of the mansion house, and will pass by that name. Without ascribing to his lordship's *et cetera the* same extent which he gives to some of Littleton's, we may fairly understand it as including all the houses within the homestall, whatever may be their use. It would be strange, too, in practice to protect a more remote dairy and leave unprotected a contiguous store, presenting much stronger temptations.

This is my view of the case maturely considered, though expressed with all possible brevity; but as it may be erroneous, I am highly gratified that the opinion of my brothers renders it harmless to the prisoner.

PER CURIAM. New trial.

Cited: S. v. Whit, 49 N. C., 352; *S. v. Jenkins,* 50 N. C., 431; *S. v. Jake,* 60 N. C., 472; *S. v. Foster,* 129 N. C., 707.

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THE STATE v. SAMUEL ROBERTS.

From Buncombe.

Where a prisoner has once been induced to confess by the impression of hope or fear, confessions subsequently made are presumed to proceed from the same influence, until the contrary is shown by clear proof; and while this presumption remains unanswered, these latter confessions (though induced by *no immediate* threat or promise) are not admissible evidence.

THE prisoner was indicted for burglary, and on the trial before Strange, *J.,* Mr. Solicitor Wilson offered in evidence confessions made by the prisoner under the following circumstances: After he was arrested, some person (one Smith, the prosecutor, being present) said, "that as the prisoner was now in custody, any confession he might make could not be given in evidence against him; he might therefore as well come out with the whole truth"; and some other person added, "that as he was a young man, if he made confessions it would be more to his credit hereafter." Upon this, the prisoner made the confession which was offered to be given in evidence, but the court rejected it.

It was then proved that several days after the prisoner was committed to jail, he of his own voluntary motion requested the jailer to send for Smith, stating that he wished to disclose to him the names of certain persons who had been concerned in and advised the commission of the burglary. Smith came, and after the prisoner had stated his accomplices' names, Smith asked him how he got the door open, in answer to which he described the manner of opening the door, and stated other circumstances tending to establish his guilt, many of which were confirmed by the testimony of other witnesses.

These latter confessions the court received and left to the jury, who found the prisoner guilty; and a new trial being refused and judgment pronounced, the prisoner appealed.

No counsel for the prisoner.
Attorney-General for the State. (260)

TAYLOR, C. J. I think it would be unsafe to extend the admission of confessions in evidence against a prisoner further than a course of approved adjudications warrant. The true rule is that a confession cannot be received in evidence where the defendant has been influenced by any threat or promise; for, as it has been justly remarked, the mind, under the pressure of calamity, is prone to acknowledge, indiscriminately, a falsehood or a truth, as different agitations may prevail; and therefore a confession obtained by the slightest emotions of hope or fear ought to be rejected. Here the prisoner was told his confession could not be given in evidence on account of his being in custody, and that he had better tell the whole truth; and further, that as he was a young man, it would be to his credit hereafter. Some confession was made under the immediate influence of the motives thus presented to him. Two or three days afterwards, without any immediate influence being exercised over him, he made a fuller confession; but it is impossible to say that the latter was voluntary, for it may have been the result of the hope first held out to him, and before it is admitted, the court ought to be thoroughly satisfied that it was voluntary.

There ought to be a new trial.

HALL, J. In order to make the confessions of a prisoner evidence to a jury, it should appear that he was not induced to make them from a hope of favor or compelled by fear of injury. (261)

As to the first confessions made by the prisoner in this case, two circumstances are observable: first, he was told that any confessions he might make could not be given in evidence against him, because he was in custody; and, secondly, that if he made any, it would be more to his

credit hereafter. I think the judge acted altogether right in rejecting, as evidence, these confessions, because they were made with the expectation of benefit and under a belief that they could not afterwards be raised up in evidence against him. When these confessions were made, Smith, the prosecutor, was present, and the confessions which were afterwards made to him in jail appear to have been a continuance of those which were made as before observed upon. The prisoner, it is presumable, did not think that these would be used against him more than those first made. Indeed, it would seem a little strange that confessions made at one time should not be evidence, but a repetition of them afterwards shollld be; besides, it may be asked, why did the prisoner, by his last confessions, try to make others participate in his crime, unless it was therefrom to derive benefit and lighten his own burden? I think these confessions were not of that voluntary character which the law requires they should be to make them legal evidence. The first and last made confessions appear to me to be of the same character. I am of opinion a new trial should be granted.

HENDERSON, J. Confessions are either voluntary or involuntary. They are called voluntary when made neither under the influence of hope or fear, but are attributable to that love of truth which predominates in the breast of every man, not operated upon by other motives more (262) powerful with him, and which, it is said, in the perfectly good man cannot be countervailed. These confessions are the highest evidences of truth, even in cases affecting life. But it is said, and said with truth, that confessions induced by hope or extorted by fear are, of all kinds of evidence, the least to be relied on, and are therefore entirely to be rejected. It seems to be admitted in this case that the confessions first made were of that character, and were therefore rejected; but that, being repeated to the same person some time afterwards, they lost their original character, assuming that of free and voluntary ones, and became evidences of the truth. But for what reason I am at a loss to conceive. How or whence does it appear that the motives which induced the first confession had ceased to operate when it was repeated? It is not incumbent on the prisoner to show that they resulted from the same motives. It is presumed that they did, and evidence of the most irrefragable kind should be produced to show that they did not. It is sufficient that they may proceed from the same cause. 4 Starkie, 49. In fact, the latter confessions are mere duplicates of the first, and it might as well be said that the copy is more perfect than the original. Had the prisoner gone further in the last confessions than in the first, such further admissions are all of the same character, and are supposed to flow from the same source. As to the confessions being corroborated by other testimony, that

cannot affect the case. They were admissible or inadmissible, of themselves. It is true that where a fact has been ascertained through extorted confessions, such fact may be proven: as if the prisoner disclose the place where the stolen goods were concealed, it may be shown that the goods were found there; but nothing that the prisoner said in regard to them is admissible. Were it not for authority, which I am not prepared either to admit or deny, I would say that nothing but the insulated fact pointed out by the prisoner's confession should be proven; not (263) even that the discovery was made by means of the confessions. 4 Starkie Ev., 51. These corroborating circumstances, I think, were improperly received, and this upon authority, as well as reason; for the confessions cannot be propped by circumstances tending to establish their probability. The evidence showing that must rest on its own basis, and cannot be propped by confessions improperly obtained.

PER CURIAM. New trial.

Cited: S. v. Scates, 50 N. C., 422; *S. v. Fisher,* 51 N. C., 481; *S. v. Mitchell,* 61 N. C., 448; *S. v. Lawhorne,* 66 N. C., 639; *S. v. Drake,* 82 N. C., 596; *S. v. Ellis,* 97 N. C., 449; *S. v. Drake,* 113 N. C., 626; *S. v. Brittain,* 117 N. C., 786; *S. v. Davis,* 125 N. C., 614.

STATE v. ROBERT H. MOLIER.

From Buncombe.

1. Although the testimony of two witnesses is necessary to convict of perjury, yet the direct oath of one witness and proof of declaration of the prisoner inconsistent with the oath in which perjury is assigned is sufficient
2. Perjury is properly assigned in an oath taken before a court of competent jurisdiction, although the witness was erroneously sworn.
3. False spelling which does not alter the meaning of the word misspelt, is no ground for arresting the judgment.

PERJURY alleged to have been committed on a trial before a justice of the peace, in which the prisoner was the plaintiff and one McGhee the defendant, for "a debt of one dollar due by account." Upon the trial the prisoner was sworn as a witness for himself, and proved an account for one sifter or sieve, swearing that it "was just and true." The prisoner was then asked by the justice whether he had not given the sifter to McGhee, to which he replied that he had not given it, but that McGhee then owed him for it. The prisoner was not asked whether the matter in dispute was a book account, nor whether he could prove the delivery

of the sifter by other means than his own book and oath. Neither was the book-debt oath exhibited to him, but he was admitted to prove
(264) the sale and delivery, without any objections by McGhee or the justice. On the trial of the indictment, before *Ruffin, J.*, the falsity of the oath was proved by McGhee, who swore that the prisoner had given him the sifter, and by four other witnesses, two of whom swore that a short time before the delivery of it they had heard the prisoner say that he intended to give it to McGhee, and the other two swore that a short time thereafter they had heard him say that he had so given it.

The counsel for the prisoner contended that he could not be convicted, first, becaues the falsity of the oath was proved by one witness only; that other witnesses proving declarations of the prisoner, which, although inconsistent with the oath, might be false. Second, that if the oath was false, it was not perjury, as it was taken extrajudicially—a justice of the peace not having jurisdiction to swear the declaration prescribed by the act "ascertaining the method of proving book debts." Both of these objections were overruled by the presiding judge, who instructed the jury that if they were satisfied by the oaths of two witnesses that the prisoner had deliberately, knowingly, and corruptly taken a false oath, they ought to find him guilty; and that the rule of law requiring two witnesses to convict was well satisfied by the proof of the declarations made by the prisoner, provided they believed the witnesses who swore to them.

The jury found the prisoner guilty, and his counsel moved first for a new trial, on the ground of misdirection, and, second, in arrest of judgment, because the word sieve was spelt sive. Both of which being overruled and judgment pronounced for the State, the prisoner appealed.

Gaston for the appellant.
Attorney-General for the State.

TAYLOR, C. J. It is a well-established rule of evidence that the testimony of a single witness is insufficient to warrant a conviction
(265) on a charge for perjury. But it does not appear to be anywhere laid down that two witnesses are necessary to disprove directly the fact sworn to by the defendant, although in addition to the testimony of a single witness some other independent evidence ought to be adduced. To convict a man of perjury there must be strong and clear evidence, and more numerous than the evidence given for the defendant, is a rational rule laid down in 10 Mod., which seems to have been followed ever since; for if you weigh the oath of one man against another, the presumption always made in favor of innocence shall turn the scale in favor of the accused. Here the falsity of the oath was directly proved by one witness, who swore that the prisoner gave him the sifter; and the

evidence given by the other four witnesses appears to me to be of that independent and supplemental character which will satisfy the rule of law. To two of these witnesses the defendant told that he intended to give the sifter to McGhee, and to the two others he said, a short time afterwards, that he had given it. This is undoubtedly strong evidence of the falsity of the oath, and, when added to McGhee's evidence, removes the dilemma of weighing his oath against the prisoner's, by creating a decided preponderance against it. It is such evidence as was properly admissible on the trial of the warrant, according to *Kitchen v. Tyson,* 7 N. C., 314, and if admitted, must have destroyed the credibility of the prisoner. I cannot perceive why it is not equally strong, upon the trial of the indictment, in addition to McGhee's evidence, to show the falsity of the oath.

As to the other reason for a new trial, it presents the inquiry, whether the oath was judicially administered. That the magistrate had jurisdiction of the matter, being a book account, is not to be doubted; and any irregularity in the mode of administering the oath can- (266) not oust that jurisdiction. The record sent up authorizes the belief that the defendant McGhee was present at the trial of the warrant, and as he did not require the preliminary questions to be asked of the prisoner, it must be considered as a waiver of them, the law being introduced for his benefit. But considered in any point of view, the proceedings at the utmost can only be considered as erroneous, and not void; whence it will follow that perjury may be assigned in the oath so taken while the proceeding stands unreversed. 1 Vent., 181; 1 Sid., 148; Raym., 74. Indeed, a respectable writer on the criminal law makes a question whether a perjury in a court whose proceedings are afterwards reversed for error, may not still be punished as perjury, notwithstanding such reversal. 1 Hawk. P. C., 432.

It appears to me difficult to distinguish this case from one where a witness is improperly admitted by the court and the witness swears falsely. Can it be doubted that he would be indictable for perjury, provided the court has jurisdiction of the matter?

With respect to the motion in arrest of judgment on account of leaving out the letter *e* in the word sieve, I think it is not to be sustained. I know of no authority for arresting judgment for false spelling in an indictment, where the word misspelt is of the same sound, and does not constitute a different word. It was impossible that the jury could be misled by mistaking the word so spelt for any other in the English language, except the word intended, viz., a bolter or search.

In *King v. Beach,* Cowp., 230, *Lord Mansfield* said that the Court had looked into all the cases on the subject, and that the true distinction is, even in the case of a variance, that where the omission or addition

(267) of a letter does not change the word, so as to make it another word, it is not material. Thus, if the misrecited word is in itself a word, though not intelligible with the context, as *air* for *heir,* there the variance, according to the decisions, is fatal; but not if the mutilated word does not make any other word. I Doug., 194, *in notis.* I am consequently of opinion that the conviction was right.

PER CURIAM. No error.

Cited: Colbert v. Piercy, 25 N. C., 81; *S. v. Brown,* 79 N. C., 644.

STATE v. JACOB ELLAR.

From Ashe

Profane swearing, charged to be a public nuisance, is punishable by indictment, notwithstanding the power to proceed summarily given to the justices of the peace by the act of 1741.

THE indictment charged that the defendant, being an evil disposed person, "did, in the public street of Jefferson, profanely curse and swear and take the name of God in vain, to the evil example, etc., and to the common nuisance of the good citizens of the State."

After a verdict for the State the counsel for the defendant moved in arrest of judgment upon the ground that the offense was not indictable. *Strange, J.,* sustained the motion, and judgment being arrested, the solicitor appealed.

Attorney-General for the State.
No counsel for the defendant.

TAYLOR, C. J. It was held in *S. v. Waller,* 7 N. C., 229, that if the offense with which the defendant then stood charged had been laid as a common nuisance, and the jury had so found it, the judgment (268) would have been supported. Drunkenness and profane swearing are placed on the same footing by the act of 1741, ch. 30, and where committed in single acts may be punished summarily by a justice of the peace. But where the acts are repeated, and so public as to become an annoyance and inconvenience to the citizens at large, no reason is perceived why they are not indictable as common nuisances. Several offenses are stated in the books as so indictable, though not more trouble-

some to the public than the one before us. A common scold is indictable as a common nuisance; and with equal if not stronger reason I should think a common profane swearer may be so considered.

PER CURIAM. Reversed.

Cited: S. v. Jones, 31 N. C., 40; *S. v. Brewington,* 84 N. C., 785; *S. v. Chrisp,* 85 N. C., 529; *S. v. Davis,* 126 N. C., 1062.

STATE v. JESSE UPTON.

From Davidson.

Where a case is so defectively stated as not to enable the court to perceive the points intended to be presented, a new trial will be awarded.

THE prisoner was indicted for the murder of his wife, and tried before *Daniel, J.,* on the Fall Circuit of 1826. The following is a copy of that part of the record sent to this Court which is necessary to the elucidation of the case:

"The court refused to permit the prisoner to give evidence of the declarations of his wife, not in the presence of her husband, before death, made to different persons and at different times, that the defendant was deranged, or subject to periodical derangement."

"The State inquired of a witness whether the wife of the defendant had not come to him and requested him to go to her house, and the court permitted the charge she made, after they got there, in the pres- (269) ence of the defendant, to be given in evidence, and his denial of the charge, but refused the declarations of the wife made to the witness, at the witness's house, when she first went for him, when the husband was not present."

The jury having returned a verdict for the State, and a rule for a new trial being discharged, the prisoner appealed.

Nash for the prisoner.
Attorney-General contra.

TAYLOR, C. J. I do not know upon what principle the declarations of the wife, made at the witness's house, are admissible in evidence. They could be so only on the ground of their being dying declarations; but it nowhere appears from the case that she had then received the fatal wound. Independently of this ground, which cannot be assumed, her

sayings touching the insanity of her husband are not proper evidence, whether they were favorable or otherwise to him. If material to the defense, it should be shown by other evidence.

But this case is made up so unsatisfactorily that it is difficult to collect from it what we are called upon to decide. For this reason alone I am disposed to grant a new trial.

PER CURIAM. New trial.

Cited: S. c., post, 513.

REGULÆ GENERALES.

JULY TERM, 1827.

It is ordered that in all appeal cases, whether on the law or equity side of the Court, the counsel for the appellant shall deliver to the counsel appearing on the other side, if any, a statement in writing of all the points intended to be made and relied on, at least eight clear days before the day of the argument of the cause; and any point or matter of objection to the judgment or decree below, not contained therein, shall be considered as waived, unless the Court shall, for sufficient reasons offered or appearing, allow or desire that such matter or point may be made and discussed.

And it shall also be the duty of the counsel for the appellant to furnish to each of the judges of this Court (at least four clear days before the day of argument of any cause) a copy of the statement or statements delivered to the counsel on the other side.

Leaving with the clerk or his deputy for the counsel for the appellee, the statement required by this rule, will be a sufficient delivery to the counsel.

A true copy from the minutes.

Teste: WM. ROBARDS, *Clerk.*

APPENDIX.

OPINION OF MARSHALL, C. J., IN U. S. CIRCUIT COURT.

JONATHAN WHITAKER v. FREDERICK FREEMAN.

1. Of several pleas, each is separate and independent as if contained in different records; therefore, where in an action for a libel the defendant pleaded not guilty and a justification, *It was held*, that the admission of the libel contained in the latter plea could not be used either to estop the defendant to insist on his denial or as evidence to prove the publication on the issue joined on the former plea.
2. A declaration for a libel must undertake to set out the very words; to give the substance and effect is not sufficient, and if, on the trial, the libel produced does not correspond with that set out, the plaintiff must fail, since no reason can be assigned why the plaintiff should not be required to prove what he is required to allege.

LIBEL, tried at November Term, 1826, of the Circuit Court for the district of North Carolina, before the *Honorable John Marshall,* Chief Justice of the United States.

The declaration, besides the usual introductory averments of good character, etc., alleged a special inducement that the plaintiff was a Congregational clergyman and minister of the gospel, and that the defendant designed to defame him in that character, etc. The declaration then charged the publication of a libel in the form of a letter directed to one H. P., from which particular sentences were selected and stated in various forms, in twenty-five different counts, all exactly alike in the inducements, etc., and setting forth the libelous sentences extracted, not according to the tenor, but charging that the letter contained, amongst other things, "the false, scandalous, malicious, and defamatory matter following."

The libelous matter was charged in the different counts as (272) follows:

1st Count. "He lived within 30 miles of my father. The reports of his frequently whipping his wife are well known there."

2. "He was in the habit of whipping his wife."

3. "It was said that he whipped his wife."

4. "It was notorious there that he was in the habit of whipping his wife."

5. "I have it from good authority that he has been guilty of giving his wife repeated whippings."

6. "He has been guilty of stealing wood."

7. "He has been charged with stealing wood."

8. "I have it from good authority that he has been guilty of stealing wood."

9. "I have it from good authority that he has been charged with stealing wood."

10. "If he has credentials with him, they are forgeries."

11. "If he has credentials with him, they are probably forgeries."

12. "If he has credentials with him, they are probably forgeries, or were given him to get rid of him."

13. "If he has credentials, they are forged."

14. "If he has credentials, they are probably forged."

15. "If he has credentials, they are probably forged, or given him to get rid of him."

16. "He is an impostor, and should not be countenanced."

17. "He is an impostor, and should not be countenanced as a teacher of youth or preacher of religion."

18. "He is an impostor, and should not be countenanced or employed as a teacher of youth or preacher of religion."

19. "He should not be countenanced as a teacher of youth or preacher of religion."

20. "He should not be employed as a teacher of youth or preacher of religion."

21. "He is an impostor, and should not be employed as a teacher of youth or preacher of religion."

22. "He is an impostor, and should not be countenanced or employed as a teacher of youth or moral instructor."

23. "My object in giving you information is that he may not be employed as a preacher of religion or instructor of youth."

24. "I give you information that he may not impose himself on other communities."

25. "You are at liberty to use this letter as you think proper, to prevent the people from being imposed on by him."

The declaration also contained a distinct set of counts, alleging the several libelous charges in this form: "they (*innuendo,* the plain-
(273) tiff and one Daniel K. Whitaker) lived, etc.," in all other respects exactly like the first set.

To this declaration the defendant pleaded, first, not guilty; and, second, the truth of the matters contained in the libelous charges as a justification.

On the trial, the latter being produced under a *subpœna duces tecum,* the material facts of it appeared to be in the following words:

"No sooner did I cast my eye upon that part of a former letter of yours, informing me of your being visited (infested, I should say) by

two antitrinitarian preachers—a father and his son—than it was impressed upon my mind, *Whitaker and his son are the men!* The character of these men I know full well. They are from New Bedford, Massachusetts, which is within thirty miles of my father's house, and which place I have often visited—and visited this last fall. I never heard any good of them. I have heard from the best authority much evil. Not that they were capable of doing much hurt by preaching; they were considered by all as unfit to to preach—as too *immoral* even to preach socinianism. The older man has been settled over the antitrinitarian church in New Bedford a number of years, and had also a school in that place until last spring or summer. Reports of his *stealing wood, etc., whipping his wife unmercifully,* and such like deeds had become so frequent, and his immoralities and infidelity so notorious, that his people (his church and congregation) were ashamed of him and were anxious to get rid of him. At length (his congregation have dwindled away to almost his own family) and the parish wishing to have another minister, agreed to give him $1,200 if he would release them from their obligation to support him, and clear out. He found this for his interest, and left N. B. These two men, no doubt, finding their character gone in Massachusetts, have come to these ends of the earth, hoping to impose upon the good people. The young man has probably taken up preaching since he left his native State. They may have recommendations from those who were willing to have them leave these regions, and cared not for what impositions they might practice elsewhere. Their testimonials, if they have any, may be forged. It is a pity they should be permitted to impose upon the people anywhere, either as preachers or schoolmasters. I consider them as dangerous men in either occupation.

"You are at liberty to show the above, as far as you may think proper."

It was insisted on the part of the defendant that the letter produced did not support any one of the counts, and that the plaintiff was not entitled to a verdict; while on the part of the plaintiff it was (274) contended that there was no material variance between the declaration and the letter, and that if there was, the defendant, by his plea of justification, which admitted the publication of the libel as charged in the declaration, was estopped to deny the publication; or if he was not technically estopped, yet the admissions in that plea were evidence from which the jury upon the plea of not guilty must find against the defendant.

These points were fully argued by *Gaston* for the plaintiff and *Badger* for the defendant, when the *Chief Justice* expressed a wish that the trial should proceed, reserving these questions for his further consideration; upon which a verdict was taken for the plaintiff, with an agreement that

if the court should be against the plaintiff on the matters reserved, the verdict should be set aside and a nonsuit entered.

The case was held under advisement until May Term, 1827.

MARSHALL, C. J. This is an action on the case, founded on a libel published by the defendant. He pleaded not guilty, and has also justified the words as being true.

At the trial the plaintiff gave in evidence a letter written by the defendant to his correspondent in Raleigh, for the purpose of being shown to others, which contains substantially the charges stated in the declaration, but in different language.

The plaintiff insisted at the trial: (1) That the plea of justification admitted the publication of the libel charged in the declaration, and dispensed with the necessity of proving it. (2) That the letter given in evidence supported the declaration. The jury found a verdict (275) for the plaintiff, subject to the opinion of the court on the two points reserved.

1. On the first point the plaintiff produced cases to show that the plea of justification contains a formal admission of the words charged in the declaration, and would not be good without such admission. It must confess and avoid the charge.

He then insisted that this being a confession on record, was stronger than a confession made orally in the country, and estopped the party from denying it. In support of this last proposition he relied on the generally admitted dignity of record evidence, and cited *Goddard's case,* 2 Co., 4, 6.

In *Goddard's case* the Court, after saying "that the jurors who are sworn to say the truth shall not be estopped, for an estoppel is to conclude one to say the truth," added, "but if the estoppel or admittance be within the same record in which issue is joined upon which the jurors shall give their verdict, then they cannot find anything against that which the parties have affirmed and admitted of record, although the truth be contrary; for a court ought to give judgment upon a thing confessed by the parties, and the jurors are not to be charged with any such thing, but only with things in which the parties differ."

In *Goddard's case,* as was very properly remarked by the counsel for the defendant, there was a single plea, and the admission and agreement of parties, to which the observation of the court applies, are made in the particular and single issue which the jury was sworn to try. The language of the Court is applicable to such a case only. The jury, though not generally "estopped to say the truth," is estopped "if the admittance be within the same record in which issue is joined upon which the jurors shall give their verdict." When this case was de-

cided a record contained a single issue, and the word record (276) might be used generally, in the same sense with the word issue. The relative "which," in the last instance, refers to "issue," upon which issue the jurors shall give their verdict. This is proved clearly by the reason the Court assigns why a jury is estopped from finding the truth contrary to such admission. It is that "a court ought to give judgment upon a thing confessed by the parties, and the jurors are not to be charged with any such thing." Now, the jurors are charged with every issue of the cause, and must pass on every issue. The court cannot give judgment until a verdict is found on each. Indeed, I do not understand the plaintiff to contend that the admission in one plea estops the jury from finding the truth in an issue made upon a different plea; but that the admissions in one plea may be given in evidence in support of a different issue in the same cause. *Goddard's case,* then, turns on a principle entirely distinct from this, and inapplicable to it. In *Kirk v. Norvill,* 1 Term, 118, *Buller, J.,* said that several pleas in the same cause were "as unconnected as if they were in separate records."

In England, under the statute of the 4 and 5 Anne, ch. 16, the defendant is allowed to plead several pleas with leave of the court. In commenting upon this statute, 5 Bacon Abridgment, 448, says: "It hath been frequently insisted upon that a defendant could not, within this act, plea contradictory and inconsistent pleas, as *non assumpsit* and the *statute of limitations,* etc. But the court has allowed such pleas," observing, "that if the benefit of the statute was to be confined to such pleas as are consistent, it would hardly be possible to plead a special plea and a general issue, the one always denying the charge, the other generally confessing and avoiding it; and the statute itself makes no distinction herein." In conformity with this rule the English books on the subject of pleading, in all their forms of special (277) pleas, state the general issue as being first pleaded. This would be entirely useless if the admissions contained in almost every special plea in bar could be used to disprove the facts alleged in the general issue. The English books do not, I believe, furnish a decision, or even a *dictum* to countenance the idea that the matter of one plea can be brought in evidence against another. Their entire independence of each other has been often held. In *Grills v. Manville,* Willes, 378, the attempt was made to aid one plea to which a demurrer had been filed, by an averment in a subsequent plea. *Lord Chief Justice Willes,* in delivering the opinion of the Court, said: "Though he has denied it in his second plea (that the opposite party was seized in fee), that will make no alteration, it being a known rule, and never controverted, that one plea cannot be taken in to help or destroy another, but every plea must stand or fall by itself."

This opinion undoubtedly applies to the sufficiency of a plea in point of law. It asserts that one plea cannot be affected in point of law by a fact averred in a different plea; not that such facts may not be used as evidence, but it shows that distinct pleas in the same cause are entirely independent of each other, and have no technical connection. The same principle is laid down in *Kirk v. Norvill,* in first Term Reports. That was an action of trespass, in which the general issue and three special pleas in bar were pleaded. The jury found three issues for the plaintiff and the last for the defendant. The plaintiff obtained a rule to show cause why judgment should not be entered up in his favor, because the last plea, on which the verdict was found for the defendant, was no bar to the action. The defect in the fourth plea was cured by an averment in the second and third; but the court made the rule absolute; and Butler said: There never was such an idea before,
(278) as the counsel against the rule have suggested, that one plea might be supported by what was contained in another. Each plea must stand or fall by itself."

It is admitted that these cases apply only to the entire independence of different pleas in point of law; but they certainly show that the facts alleged in one plea have no more influence on an issue made upon a distinct plea in the same cause than if the same matter had been pleaded in a different cause. Ever since the statute of Anne it has been usual in England, where the defendant meant to justify, to plead also the general issue. This is so apparently useless, if the plea of justification amounts to a confession, which can be transferred to the general issue, that a court would not give leave to plead both pleas, where the right depended on the court, and the defendant would not ask it, where useless pleas are attended with heavy expenses.

The principle in pleading, that a special plea must confess and avoid the fact charged in the declaration, was introduced at a time when the rigid practice of courts required that every cause should be placed on a single point, and when it was deemed error to plead specially matter which amounted to the general issue; it was not allowed to deny the fact and to justify it. The defendant might select his point of defense, but when selected, he was confined to it. That a single point might be presented to the jury, he was under the necessity of confessing everything but that point. The attention of the jury was not directed to multifarious objects, but confined to one on which alone the cause depended. This rigid rule was undoubedly productive in many instances of great injustice. The Legislature in England thought proper to change it, and to admit of various defenses in the same action. But the forms of pleas remained. The permission to put in more than one with
(279) the leave of the court did not vary the established forms. The

admissions which are contained in one plea respect only the issue made up on that plea. The purpose for which the rigor of the ancient rule was relaxed by law would be defeated if the matter of one plea were to destroy another.

There is no more reason that a plea of justification should prove the libel on the issue of not guilty than that it should support a new action for a libel founded on the plea itself. It contains an averment that the words were true, and if uttered by the defendant, not in his defense by way of plea, but as a substantive and voluntary allegation, would be the foundation of a new action. But such a plea has never been so considered. Whether the reason is that the allegation is in the form prescribed by law, which the defendant must use in order to avail himself of a defense allowed by law, or that the plea is put in by counsel, and the words are used by him, and are not the words of the defendant, the reason operates as strongly against their being used as testimony in support of a general issue as against their being used in support of a new action founded on the plea. Certain it is that in England this use has never been made of them.

In the United States, generally, the rigor of the ancient rule, that the defense shall be confined to a single point, has been relaxed still further than in England. In most of the States, and North Carolina is understood to be among them, the defendant has a legal right, without asking the leave of the court, to plea as many several matters as may be necessary, or as he may think necessary, for his defense. It would be entirely inconsistent with the spirit and object of these acts to permit forms of pleading devised at a time when judicial proceedings were regulated on a principle which they were intended to change, to render one of the defenses which they authorize an absolute nullity. In England this has never been attempted. The courts there will (280) not exercise the power they possess to restrain the defendant from pleading inconsistent pleas, because such restraints would defeat the policy of the act of Parliament. The policy of the acts passed on the same subject in the United States is still more apparent.

It is true that in one State the principle maintained by the plaintiff in this cause has been sustained. The very respectable court of Massachusetts has decided that in an action for slander the admissions contained in a plea of justification do of themselves disprove the plea of not guilty. I am far from disregarding any opinion of that Court; but I believe it stands alone, and that no similar decision has been made in any State in the Union.

It constitutes no inconsiderable deduction from the authority of the decision in Massachusetts that there is reason for the opinion that it was disapproved generally by the bar. The Legislature of that State has

enacted that henceforth the plea of justification shall not, in an action of slander, be held to disprove the plea of not guilty, if that be also pleaded. This act of the Legislature shows, I think, that the general sense of the profession, even in that State, was opposed to the decision of the Court.

I think it a fair construction of the act which authorizes the defendant to plead several pleas, that he may use each plea in his defense, and that the admissions unavoidably contained in one cannot be used against him in another. It was therefore incumbent on the plaintiff in this case to prove the libel charged in the declaration.

2. Has he done so?

The letter offered in evidence contains substantially a charge that the defendant is guilty of facts essentially the same as are stated in the declaration; but the charge is made in words which very materially from those alleged in the declaration, and they also state the fact as
(281) varying in form. Does this evidence support this issue on the part of the plaintiff.

The *Queen v. Drake,* 3 Salk., 224, was an information for a libel, which stated the words according to their tenor. The word "nor" was inserted instead of "not." This variance, though it did not alter the sense, was held fatal. The Court said that *cujus quidem tenor* imports a true copy. Holt said a libel may be described either by the sense or by the words; and, therefore, an information charging that the defendant made a writing containing such words is good, and in such a case a nice exactness is not required, because it is only a description of the sense and substance of the libel.

In *King v. Burr,* 12 Mod., 218, it was again held that "according to the tenor and effect following" imported a literal copy. The word "effect" alone, it was said, would have been too uncertain, but that word did not vitiate, and "tenor" was certain.

The language of the Court in the *Queen v. Drake* would seem to justify the inference that it is sufficient to state the sense and substance of the words in the information or declaration. If the charge be "that the defendant made a writing containing such words," that is good; "and in such case a nice exactness is not required, because it is only a description of the sense and substance of the libel." "A nice exactness" in what? I presume, in the proof of the words laid in the declaration. It does not purport to charge the whole libelous matter in the very words used in the libel, but to charge its sense and substance.

The exact extent of this decision is not quite apparent. Whether the very words laid in the declaration must be proved, or the material words will be sufficient, or whether equivalent terms will satisfy the law, remains unexplained. It would be difficult to sustain the proposi-

tion that the word "tenor" was indispensable in order to bind the (282) plaintiff to an exact recital of the words of the libel. That such words as these, the defendant made and published of and concerning the plaintiff, "a paper-writing in the words following, to wit, he (the plaintiff meaning, etc.)" would not import a recital of the very words, as much as if the word "tenor" had been inserted. And if the sense and substance is all the charge imports, it is difficult to assign a reason why it would not be sufficient to charge the sense and substance in the declaration. Yet, in the *King v. Burr* the Court said that to state in the declaration that the defendant published a false, scandalous, and malicious libel, "according to the effect following," would be too uncertain.

In the *Queen v. Drake* the Court took a distinction between slander written and spoken, which seems founded in reason. "Words are transient, and vanish in the air as soon as spoken, and there can be no tenor of them; but when a thing is written, though every omission of a letter may not make a variance, yet if such omission make a word of another signification, it is fatal."

We are left to conjecture whether this observation applies to every declaration for written slander in which words are specified or to such only as charge the libel according to tenor.

Nelson v. Sir Woolson Dixie Cases, in time of Hardwicke, 305, was an action for words spoken. The words which were spoken to the plaintiff's servant were laid in the declaration thus: "Where is that thief, your master—that confederate thief with Barker, who hath robbed me? I will hang him, by God; damn me if I do not." The variance was, that the words proved were, "I will hang them both," instead of "I will hang him"; and this was held fatal. *Lord Hardwicke* said: "The words laid are not proved. An action for words may either lay the particular words spoken, as in this case, or may set out the substance of the words; and if the substance only be set out, as that the defendant charged the plaintiff with such or such a crime, etc., (283) then it is sufficient to prove the substance of the words; and that was *Stayley's case,* and there are precedents of the sort in Rastal's Entries, and the substance is laid in Latin; but where the very words are laid those words must be proved as laid, though the rules are not now so strict as formerly; for if there should be a variation in the order of the words as proved to be spoken from what is laid in the declaration, so it be agreeable in substance, it is sufficient."

It is not stated in the report of this case that the declaration charged the slanderous words to be spoken according to tenor, but that it purported to state the words themselves; and in such case it was held necessary to prove them as laid. It is observable, too, that the variance does

not consist in the slanderous words themselves, but in additional words, which are perhaps explanatory of the meaning of the words importing the slander. Nor is there any distinction as to the meaning of the slanderous words themselves, between threatening to hang both the thieves, and threatening to hang the plaintiff only. That this variance was held fatal shows how nearly it was then supposed the proof must come to a declaration purporting to recite the slanderous words.

The opinion expressed by *Lord Hardwicke,* that the declaration may set out the substance of the words, as that the defendant charged the plaintiff with such or such a crime, is contradicted in other cases, and seems now to be overruled in England; though in Richardson's Practice a declaration in that form is inserted, and has been supported, I am told, in the Court of Appeals of Virginia. It has also been supported in Pennsylvania, *Kennedy v. Lowry,* 1 Binny, 393. In England it is certainly held bad. In 3 Maul and Selwyn, 110, the plaintiff charged the defendant in one count with speaking false, scandalous, and malicious words, to the effect following, etc. This was held bad after ver-
(284) dict. The Court observed in *Dr. Sacheverel's case* the judges said: "By the law of England, and constant practice in all prosecutions by indictment or information for crimes or misdemeanors by writing or speaking, the particular words supposed to be criminal ought to be expressly specified in the indictment or information." The Court added: "There seems no reason for any difference in this respect between civil and criminal cases. The action arises *ex delicto.*" A reason assigned for this rule is, that were it otherwise "it would be almost impossible to plead a recovery in one action in bar of another."

In *Wood v. Brown,* 6 Taunton, 168, the declaration charged the defendant with publishing a libel "purporting, etc." On demurrer this was held bad, because by such a mode of declaring the plaintiff would withdraw from the defendant the power of demurring to the words of the libel.

In *Zenobio v. Axtell,* 6 Term, 162, where the libel was published in a foreign language, it was held ill to set forth its substance in a translation. The declaration ought to state the libel in the original language. In *Wood v. Brown,* 1 Marshall, 522, the declaration charged the defendant with publishing "a certain false, scandalous, malicious, and defamatory libel, purporting thereby that the plaintiff's beer was of a bad quality, etc." The Court seemed to think that what was said by *Lord Holt* in the *Queen v. Drake* furnished a strong argument in favor of the opinion that it was sufficient to set forth the sense and substance of the libel. "Here, however, the plaintiff had neither stated the words nor the substance. He had merely stated the conclusions which he himself had drawn from the supposed libel, and which might be very different

from those which the court would draw from it." The *Chief Justice* said: "We will consider of this case; I certainly have always thought it was necessary to state the libel."

After taking time to consider, *Lord Chief Justice Bibbs* said: "We have looked into the case, and into the other cases on the subject, and though in some of the cases there are expressions which have carried this doctrine farther than was at first intended, we think it (285) impossible that this declaration can be supported. It charges the defendant with publishing a libel purporting as is therein stated. In all actions for libels it is the province of the court to say whether the expressions complained of amount to a libel or not; and if this mode of declaring could be supported, the court would lose that jurisdiction, and it would be given to the jury."

It has been held very clearly, 2 East, 426, that in a plea justifying slander because the defendant heard it from another, it is not sufficient to allege that the person referred to spoke words to the effect of those on which the action is brought. The words themselves must be set forth in the plea.

If the words themselves must be set forth, as seems to be the prevailing opinion, it is difficult to assign a sufficient reason, especially in actions for written lander, why the words should not be proved. The distinction between charging a libel according to tenor, and charging it in words purporting to be the very words of the libel, seems entirely arbitrary, and one for which no satisfactory reason can be assigned. Its effect would naturally be to discard the word tenor from every declaration, as being at the same time useless and dangerous. But it is not easy to reconcile the rule which requires the words themselves to be stated with that which dispenses with their being proved. It would seem to consist with reason and with general legal principle that in all cases where the declaration professes to charge the very words the plaintiff should be held to prove those words, at least if they are in writing. The (286) cases on this subject, however, are very unsatisfactory.

Mr. Justice Buller, in his Nisi Prius, p. 5, says: "It was formerly holden that the plaintiff must prove the words precisely as laid; but that strictness is now laid aside, and it is sufficient for the plaintiff to prove the substance of them."

Mr. Buller does not inform us whether this rule is confined to words spoken, or extends also to libels. His examples are of oral slander. There is too wide a range for those who are to determine in what cases the evidence proves the substance of the charge. The books do not, and perhaps cannot, furnish complete satisfaction on this point. It is clear

that words spoken in the second person will not sustain a declaration charging the same words, if alleged in the declaration to be spoken of the plaintiff in the third person; and it is also clear that the slightest variation between the evidence and the charge, if it may indicate a different thing, is fatal. *Waters v. More,* 2 Barnwell and Alderson, 756, is a strong example of this. The declaration charged that the defendant said of the plaintiff: "This is my umbrella, and he stole it from my back door." The evidence was that the defendant said: "It is my umbrella, etc." The variance was held fatal, because the words charged in the declaration applied to a particular umbrella which was present, and the words proved applied to an umbrella which was absent. And yet the words, "it is my umbrella, etc.," may be spoken of a particular umbrella then present. There are many cases to the same effect, but they all turn upon the principle that the difference in language, though very slight, may denote a different offense. In such cases there is a plain and sufficient reason for holding the variance fatal.

In the *King v. May,* Doug., 183, it was held, in an indictment for perjury, the words, "in manner and form following, that is to say, etc.," do not bind the party to recite the instrument *verbatim.* This (287) was an indictment against May for perjury, in an indictment against the present prosecutor for an assault. It referred to the former indictment, and added, "which indictment was presented in manner and form following, that is to say," and then proceeded to set forth the indictment *in haec verba,* but omitted a word contained in the original indictment. It was admitted not to have been necessary to recite the former indictment; but it was contended that the prosecutor had undertaken to recite it, and, that having done so, was bound to set it forth *verbatim.* A verdict was given for the plaintiff, and a rule was moved to show cause why the verdict should not be set aside. The objection had been made at the trial before *Buller, J.,* but was overruled by the judge, who said "that the word tenor had so strict and technical a meaning as to make it necessary to recite *verbatim;* but that by the expression in this case nothing more than a substantial recital was requisite, and that the variance here was only in matter of form." The rule was granted, but was afterwards given up, and judgment was pronounced against the defendant. This, it is true, was not an action for a libel; and it was not necessary for the action to set forth the paper in which the misrecital, by the omission of a word, took place. But it is a very strong case to prove what I have said appears to me to be very unreasonable, that the plaintiff is not held to a strict recital, unless the word tenor is used. Still it is difficult to reduce the materiality of the variance to certain rules.

Campagnon v. Martin, 2 Bla., 790, was an action for words, in which it was held that though all the actionable words laid in the declaration were not proved, the plaintiff might have a verdict for such as were proved. That, however, was an action for words spoken, not written, and an action was sustainable for the words proved. (288) Had the words which were not proved been left out of the declaration, no doubt would have existed in the case; and it was thought material that the judge directed the jury to disregard those words in estimating damages.

Tobart v. Tipper, 1 Campbell, was an action for a libel. The words charged in the declaration were: "My sarcastic friend, by leaving out, etc." The libel produced in evidence was, "My sarcastic friend Moros, by leaving out, etc." The sole variance was that the word Moros, which existed in the libel, was omitted in the declaration. And yet the reporter does not state that the declaration charged the words according to tenor. If an exact recital was unnecessary in an action for a libel, where the declaration purports to state the libel in terms, I feel some difficulty in accounting for this case. The omission of the word Moros does not seem to me to be a substantial variance.

In 7 Taunton, 204, the declaration charged the defendant with saying, "Hancock's wife is a great thief, and ought to have been transported some years ago." The words proved were "Hancock's wife is a damned bad one, and ought to have been transported seven years ago." The variance was held fatal.

In *Barnes v. Holloway,* 8 Term, 150, words laid affirmatively were proved to have been spoken interrogatively, and this variance was held fatal. Yet it is clear that an interrogation may imply an affirmation, and may be so understood by the hearers. The Court said, whatever the party may mean, the words must be proved as they are laid. There is "a manifest distinction between the same idea conveyed by words spoken affirmatively and put interrogatively."

The person who looks into this subject will be surprised at finding how very unsatisfactory the cases are.

I will not compare the libel adduced in evidence with that charged in the declaratiaon.

The *Chief Justice* then proceeded to dissect the letter, and to compare with critical exactness the several sentences it contained, (289) with the counts in the declaration intended to set them forth, and observed that though the imputations cast upon the character of the plaintiff were of equal atrocity with those charged in the declaration, and in some instances approached so nearly as to be substantially the same, yet were they, in no instance, exactly the same; and the verbal

variations were such as at least to make the charges susceptible of a slightly different meaning from the proof. He concluded by declaring that upon the principles he had stated, such variance, though slight, was fatal, and that consequently the verdict must be set aside, and a

Nonsuit entered.

NOTE.—It is proper to state that the declaration was drawn without the inspection of the letter declared on, which was not seen by the plaintiff's counsel until produced on the trial, and the only information possessed of its contents was derived from the recollection of witnesses who had heard it read. It should also be added that after the nonsuit was entered, the *Chief Justice*, on motion of the plaintiff's counsel, directed that on payment of the costs the nonsuit should be set aside and the plaintiff allowed to file a new declaration.

Cited: Rogers v. Ratcliff, 48 N. C., 238; *King v. Whitley,* 52 N. C., 532; *Sumner v. Shipman,* 65 N. C., 625; *S. v. Townsend,* 86 N. C., 678.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1827

THOMAS D. WATTS v. THOMAS SCOTT.

From Orange.

The act of 1802, ch. 29, regulating the town of Hillsboro, enables the treasurer of the corporation to sue, in his own name, for penalties incurred under the by-laws authorized by that act, as well as for those incurred under the act itself.

THE plaintiff, as treasurer of the town of Hillsboro, warranted the defendant for a penalty incurred by the breach of an ordinance passed by the commissioners in 1822.

In the Superior Court, on the last circuit, the plaintiff relied upon the 5th section of the act of 1802, ch. 29, entitled "An act for the better regulation of the town of Hillsboro," which section is as follows: "And be it further enacted, that the commissioners of said town shall hereafter appoint a treasurer, who, etc.; and it shall be the duty of said treasurer, in his own name, to sue for and recover all forfeitures which shall accrue under this or any other act heretofore passed and in force for the regulation of said town"; and contended that under it he was entitled to maintain the present action in his own name.

His Honor, *Judge Strange,* being of a different opinion, nonsuited the plaintiff, who appealed to this Court.

No counsel appeared for the plaintiff. (292)
Badger for the defendant.

HALL, J. The by-law under which the penalty in question is claimed is not stated in the case, but we are told that the plaintiff founds his right to sue for it under the 5th section of the act of 1802, ch. 29. That sec-

tion declares that "it shall be the duty of said treasurer, in his own name, to sue for and recover all forfeitures which shall accrue under this or any other act heretofore passed."

Now, the penalty sought to be recovered is not a penalty accruing for a direct breach of the act itself, as where the constable refuses to execute a warrant or process directed to him from the magistrate of police; but I think, by a liberal construction, it is a penalty accruing under the act. If the commissioners are authorized to make by-laws (which is not disputed), no doubt penalties are imposed for a breach of them, and such penalties indirectly accrue under the provisions of the act which gave the power of imposing them, although they accrued directly under the by-law. No inconvenience can result from this construction of the act. The case is substantially within its meaning. I therefore think the nonsuit should be set aside and a new trial granted.

PER CURIAM. Reversed.

Cited: Comrs. v. Capehart, 71 N. C., 158.

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(293)

WILLIAM BRITTAIN, executor of STEPHEN BROWN, v. THOMAS G. JOHNSON.

From Northampton.

The rule respecting notice to endorsers varies with the pursuits of the parties. The same strictness is not required between farmers resident in the country as between merchants resident in towns. In the first case, what is due diligence must be left to the jury under the direction of the court.

THIS was an action commenced before a justice of the peace against the defendant, as indorser of a single bond, dated 13 February, 1825, and payable one day after date. The indorsement was stated to be for value received of the plaintiff's testator, and was dated 16 February, 1825. In the trial before *Ruffin, J.,* it was in evidence that the obligor, the plaintiff's testator, and the defendant were all farmers; that the obligor and the defendant lived together, and that the plaintiff's testator resided in the same county, about seven miles from them. On the Saturday before the last Sunday in February, 1825, or on the Sunday next before the last (which day was positively proved), the plaintiff's testator made a demand on the obligor, who refused to pay the bond. Notice of this was given to the defendant on the next day, and he requested that the obligor might be pushed. On the next Monday a warrant was taken out against both the obligor and the defendant; the constable was di-

rected to serve it on the obligor, and notify the defendant of the fact, and, if he did not then take up the bond, to execute it on him also. The defendant refused to pay the amount due on the bond, and was warranted. On the day of trial a justice could not be had, and the warrant was discontinued.

Afterwards the present warrant was sued out against the defendant alone, the obligor having absconded.

The presiding judge instructed the jury that if they believed (294) the testimony, the plaintiff was in law entitled to recover. A verdict being returned according to the charge, the defendant appealed.

At the last June term the cause was submitted by *Hogg* for the plaintiff, no counsel appearing for the defendant. *Cur. adv. vult.*

TAYLOR, C. J. Where the parties all reside in the same town, and are engaged in mercantile pursuits, or have transactions with a bank, there is a common understanding that the demand upon the maker must be made without delay, and notice promptly given to the indorser. The application of the strict rule to persons so situated can seldom be productive of injustice, and this Court has considered itself warranted in requiring the utmost diligence under such circumstances. But the existence of such a rule amongst farmers living on their plantations has never been recognized, and could not operate without manifest wrong. It would be unreasonable to require that a person in the country, receiving an indorsed note, should neglect the concerns of his plantation to attend solely to that particular business. He usually calculates on meeting the maker on the next occasion which calls the citizens together—a muster, a sale, or a court—and then making a demand without neglecting other affairs; and in this arrangement there seems to be a tacit acquiescence.

Though it may be inconvenient to have several rules, applicable to different classes of persons, it is confessedly more so to have one applied to all, which is wholly unsuited to the habits, transactions, and experience of the greater number. It is impossible to lay down a rule in the abstract which is equally just in its bearing on all persons to be affected by it; it must depend upon the circumstances of the case, and must be determined by the jury, under the directions of the (295) court. I think the facts of the case are such as amount in law to reasonable diligence, considered in relation to the pursuits and the residence of the parties respectively, and that there was no error in the charge of the court.

PER CURIAM. No error.

Cited: Ward v. Ely, 374, *post; Bank v. Bradley,* 117 N. C., 530.

Den ex dem. of JONATHAN S. TAYLOE and another v. FEN and DAVID GASKINS.

From Bertie.

A sale made by the sheriff on the return day of the *fi. fa.* is good.

EJECTMENT, and on the trial the case was that the lessors of the plaintiff claimed the premises under a deed from the sheriff of Bertie. The judgment and execution were regular, but the sale was made by the sheriff on the second Monday of August, 1825, which was the return day of the writ.

Martin, J., instructed the jury that the sale was good in law. A verdict being returned for the plaintiff, the defendant appealed.

Hogg for the appellant.
No counsel for the plaintiff.

TAYLOR, C. J. The lessors of the plaintiff claim title under a sheriff's sale, made on the day the *fi. fa.* was returnable; and the only question in the case is whether such a sale is legal. It has been repeatedly decided that the sheriff may lawfully execute an execution on the day it is returnable. As to chattels, if he levy before, he may sell after the return day; and as to land, a sale on the day is unquestionably valid. (296) The general rule is explicitly stated in 1 Salk., 321, and the cases there cited. The case cited for the defendant from 4 Hawks was where the sale took place more than a year after the teste of the execution, and without a *venditioni exponas;* where the writ has never been returned and the indorsement of the levy made under questionable circumstances, being after the sale. There the execution was dead in law; here it was in full vigor.

The judgment should be affirmed.

HALL, J. The question made in this case is whether the sheriff can legally sell lands on the first day of the term to which the execution is returnable. Against it is cited *Barden v. McKinne,* 11 N. C., 279. In that case the sheriff sold about two years after the execution was returnable, and without any new execution. But this question is put at rest by the judgment given in *Lanier v. Stone,* 8 N. C., 329. It is there stated to be the daily practice, and no inconvenience has been experienced from it. It is often done at the importunity of defendants, to give them the longest possible time to raise the money.

The rule for a new trial must be discharged.

PER CURIAM. No error.

Doe ex dem. of HOSEA GALLOWAY et al. v. ROE and PETER YATES.

From Beaufort.

The probate of a will under Laws of 1784, sec. 5, is good, if the place of its deposit be proved by one witness only.

EJECTMENT, tried before *Donnell, J.*, on the last Fall Circuit. The lessors of the plaintiff claimed by descent from Thomas Yates; the defendant, as his devisee; and the only question was whether the will was properly proved. The jury returned a special verdict, the material fact of which was the probate of the will of Thomas Yates, (297) which was as follows: "Michael Hill, George Hill, and Terence Delany, being introduced to prove the same, who being duly sworn, Michael Hill declared on oath that he was well acquainted with the handwriting of Thomas Yates, deceased; that he verily believed the paper purporting to be the will and testament of said Thomas Yates was in the proper handwriting, as also the signature of said Thomas Yates; that after the death of said Thomas Yates he was at the house of said Thomas Yates, and Rachel Yates, the widow of said deceased, brought the will to him, taking it out of a chest in which he believes the deceased usually kept his valuable papers." The other two witnesses only deposed to the handwriting of the testator, and said nothing of the place in which the paper was found. If the will was sufficiently proved, the verdict was to be entered for the defendant; if not, for the lessors of the plaintiffs.

Upon this verdict his Honor, the presiding judge, gave judgment for the defendant, from which the lessors of the plaintiff appealed.

Gaston and Hogg for the lessors of the plaintiff.
Badger for the defendant.

HALL, J. It appears to me that the judgment given in the Superior Court upon the special verdict was correct.

The act of 1824, Rev., ch. 225, requires that the signature and handwriting of the testator should be proved by three witnesses. Here this has been done. The other circumstances attending the probate, such as with whom the will was deposited for safe-keeping, or where it was found, are left by the act to be established by the same evidence that is ordinarily used in other cases. To establish these, three witnesses are not indispensable; the testimony offered was relevant and (298) proper, and, if believed, sufficient to authorize the probate.

I therefore think the judgment of the Superior Court should be affirmed.

PER CURIAM. No error.

JOHN ANDERSON and another v. ALFRED M. HUNT and ADAM HAWKINS.

From Franklin.

1. Laws 1817 and 1820 (chapters 937 and 1046), requiring joint suits to be brought against the obligor and endorsers of bonds, etc., do not prevent the defendant from demanding separate trials.
2. Application for separate trials should be made at an early stage in the cause.
3. An application made after the cause was called, rejected, as too late.

DEBT upon the single bond of the defendant Hunt, payable to the defendant Hawkins, and by him assigned to the plaintiff. The action was commenced in the county court on 28 May, 1822. At June term following the defendants jointly pleaded "payment and a set-off," to which there was a replication to the contrary. At the next term, viz., at September, 1822, leave was given the defendants to amend their pleas, when Hunt pleaded the general issue, and specially that the bond was given upon a gambling consideration. At the same time the defendant Hawkins also pleaded the general issue. The plaintiffs obtained a verdict in the county court upon the issues made by the pleas, from which the defendants appealed.

In the Superior Court, before a trial, had at Spring Term, 1822, the defendant Hunt filed an affidavit alleging that he had no means of establishing his defense, under the statute against gambling, but from the testimony of his codefendant; that he had filed a bill in equity (299) for a discovery, and that the defendant Hawkins had not answered it. The cause stood for trial until Spring Term, 1827, when, before *Ruffin, J.*, after the cause was called, and before the jury was charged, it was moved on the part of the defendant Hunt that the trial should be severed and the jury charged with the case as to one of the defendants only at a time. This motion was supported on the ground that the act authorizing makers and indorsers to be sued jointly was intended for their protection, that the demands were in their nature severable, although a joint remedy was given, and the statute was not passed to deprive the defendants of any advantage which they had before its enactment. The counsel avowed the object of the motion, which was to enable the defendant Hunt to establish his plea by the testimony of the defendant Hawkins. His Honor acquiesced in the reasoning of the defendant's counsel, but thought that the motion was made at too late a period—the appearance term, or some early stage in the cause, being the proper time. The motion was therefore disallowed.

The jury returned a verdict for the plaintiffs against the defendant Hunt, and found for the defendant Hawkins upon the general issue. Whereupon the defendant Hunt appealed.

Badger and W. H. Haywood for the plaintiffs.
Seawell for the defendant.

TAYLOR, C. J. I am of opinion that the decision of the Superior Court was correct, under the circumstances of the case, and is shown to be so by the reasoning of the judge who tried the cause. To this it may be added that if the motion had been made at an earlier stage of the cause it would have enabled the plaintiff to meet the testimony of Hawkins with counter evidence, if it existed—a preparation he could not make when the severance was made immediately before the trial. It is much more likely that justice should be duly administered, when the plaintiff was apprised in time that one defendant was severed in order that he may be a witness, than that the trial should immediately follow the severance. It depends, after all, upon the exercise of a sound discretion in the court, as to the time when the motion should be made; and though the claim to sever may be founded on right, since the law was introduced for the benefit of drawers and indorsers, yet some limitation in point of time must be settled in practice, as to the time of moving it. (300)

PER CURIAM. No error.

SAMUEL GREENLEE v. JOHN B. TATE and others, heirs of WILLIAM TATE.

From Burke.

It is fraudulent in law for the grantee to survey his own entry. Therefore, when this fact was found by the jury, and further that the survey was fairly made, it was *Held*, that the grant must be vacated.

PETITION to vacate a grant. From the petition it appeared that the grant to the ancestor of the defendants issued in November, 1802; that in July, 1820, a grant for a part of the same land issued to the plaintiff. The petition charged that William Tate, the grantee in the first grant, surveyed and located his warrant of survey himself.

From the petition and answer the following issues were made up and submitted to a jury:

1. Was the land surveyed according to law, and were the chain carriers sworn?

2. Did William Tate, enterer and grantee, survey for himself?

(301) 3. Did William Ttate lay before the county surveyor the survey made by him, and was the same ratified and signed by the county surveyor?

4. Was there any fraud in surveying the land or in obtaining the grant which issued to William Tate?

The jury being instructed by his Honor, *Judge Strange,* that it was not fraudulent *per se* for the grantee to survey his own entry, found:

1. That the land was surveyed according to law, and that the chain carriers were sworn.

2. That William Tate, enterer and grantee, surveyed for himself.

3. That William Tate did lay before the county surveyor the survey made by him, and that the same was ratified and signed by the county surveyor.

4. That there was no fraud in surveying the land or in obtaining the grant which issued to William Tate.

Upon this verdict judgment was rendered for the defendants, from which the plaintiffs appealed.

Attorney-General and Devereux for the plaintiff.
Wilson contra.

HALL, J. The question in this case lies within narrow limits. It turns upon the fact that the land in controversy was surveyed by the ancestor of the defendants, who entered it, and to whom a grant issued.

The principle which must decide this case against the defendants was established in *Avery v. Walker.* It is there established that no deputy surveyor shall be permitted to survey land for himself, and to that case I refer, instead of repeating the reasons there given in support of this position. The grant must be vacated.

PER CURIAM. Reversed, and judgment for the plaintiff.

Cited: Crow v. Howland, 15 N. C., 418.

MOSES D. SMITH et ux. v. JAMES YEATES.

From Hertford.

1. The act of 1806, requiring gifts of slaves to be authenticated by writing, cannot be evaded by a fictitious sale; therefore, where the donor gave the donee the purchase money, and then sold and delivered the slave, receiving back the money, this was held to be a gift, and void without a deed.
2. It seems that a writing conveying a slave is void as a bill of sale, or a deed of gift, unless attested by a subscribing witness.
3. It also seems that the sale and delivery of a slave is good without a bill of sale, notwithstanding the act of 1821.

DETINUE for negro Tony, tried before his Honor, *Judge Hartin,* on the last circuit. On the trial the plaintiff offered in evidence the following paper, which was proved and registered:

"Received of Mariana Lewis ten dollars in cash, it being for a certain negro boy Tony, 18 May, 1822. JAMES JOHNSON."

The wife of Johnson proved that Mariana Lewis, who afterwards intermarried with the plaintiff, resided with her at the house of her husband; that before the date of the instrument she had heard Johnson express an intention of giving Tony to Mariana. That on 18 May, 1822, Johnson repeated his declaration, but observed that he could not give the negro unless some money was paid him by Mariana, and said if she would give him $10 Tony should be hers. Mariana replied that she had not the money. He told her that she could borrow it of his wife. The money was accordingly produced by the witness, and handed to Mariana, who gave it to Johnson, upon which he wrote the instrument and delivered it, the boy being present.

The defendant claimed title under the will of Johnson, of a subsequent date.

His Honor instructed the jury that to constitute a valid bill of sale the instrument must contain some words showing an intention of passing the property. That if the writing was not a good bill of sale, they were to inquire from the evidence whether there had been a (303) sale and an actual delivery. If there had been a sale, accompanied with a delivery, the property in the slave passed, notwithstanding the act of 1821, although there was no bill of sale. And that lending or even giving the money, by Johnson's wife, would not invalidate an actual sale accompanied by a delivery.

The counsel for the defendant moved the judge to instruct the jury that if they thought the $10 was not in fact lent or given by Johnson to Mariana, and that he did not mean to give her credit for the amount,

but furnished them to her, and received them back, merely colorable, and to make a gift, under the pretense and form of sale, that the property did not pass.

The judge declined giving such instructions, and the jury returned a verdict for the plaintiff, whereupon the defendant appealed.

Hogg for the defendant.
No counsel for the plaintiff.

HALL, J. With respect to the act of 1821, concerning the sale of slaves, accompanied with a delivery, the inclination of my mind is with the judge below. I also agree with him that the receipt is inoperative as a bill of sale, if for no other reason, because it has no subscribing witness to it (Rev., ch. 225); for the same reason it cannot be supported as a deed of gift (Rev., ch. 701). The question then is, Was (304) there a sale and delivery of the negro in dispute?

The receipt is evidence that the $10 was paid, but the circumstances attending the payment are before us. From them it appears there was in fact no payment made by the plaintiff. The money was in reality paid by Johnson to himself; so that, although the jury found a delivery, the payment did not amount to such a consideration as to make it a sale of the slave. If, then, there was a delivery, but upon no consideration, it was a gift; but that, by the act of 1806 (Rev., ch. 704), is void, because not authenticated by deed. A sale, completed by delivery, requires no such evidence. Disguise this case as you will, it is only a gift. If it is considered as a sale, the act of 1806 may be evaded, by consideration of a peppercorn. There should be a

PER CURIAM. New trial.

WILLIAM DAVIDSON, administrator of ARCHIBALD FREW, v. JAMES COWAN.

From Mecklenburg.

1. A sheriff should not be permitted to amend his return, to the injury of strangers to the record, and this especially after the lapse of sixteen years.
2. But when on a rule obtained he was directed to amend: *Held*, that the opposite party could not appeal from the order.

THE plaintiff, on the Spring Circuit of 1827, obtained a rule upon the defendant to show why a former sheriff of Mecklenburg should not

amend his return to a writ of *fieri facias* against one David Cowan, which issued on 21 June, 1810, and was returnable to the ensuing term of the Superior Court for that county.

Upon the cause being shown, the facts were that the writ came to the hands of the sheriff on 4 October, 1810, who levied it upon sundry negroes, but neglected to indorse a return of the levy. Before the next term of the court the defendant in the execution died, (305) an *alias fieri facias* issued, the *teste* of which overreached the time of his death. Under this writ the negroes were sold by the sheriff, and the plaintiff's intestate became the purchaser. In 1821 the same negroes came to the possession of the defendant in the rule, who claimed under the widow of David Cowan.

An action of detinue was pending between the parties to the rule, in which the plaintiff sought to recover the negroes of the defendant, and the object in obtaining the rule was to enable the present plaintiff to use the return, now sought to be made, as evidence of that action.

Strange, J., made the rule absolute, whereupon the defendant appealed.

Gaston for the appellant.
Wilson contra.

HALL, J. I think the proceeding in the Superior Court was irregular, because an alteration was suffered to be made in a record at the instance of one who was not a party to it and whose right might be affected by it. Besides, the alteration, at this distance of time, may injure the rights of third persons, held under the record as it originally stood. This seems to be the object now in view; for as the negroes were not levied upon, as appears by the sheriff's return, under the execution which issued in 1810, but were sold under that which issued in 1811, after the death of David Cowan, it is intended by the proposed alteration to validate that sale, and of course to affect the title (306) of James Cowan to the same property, acquired in 1821, under Ann Cowan. Be this as it may, I think the court erred in permitting the alteration to be made. This case, however, is similar to that of *Carter v. Graves, ante,* 74, and the appeal cannot be considered as taken from a regular proceeding in the court below; it must, therefore, be dismissed, but the appellant is not bound to pay costs to the appellee.

PER CURIAM. Appeal dismissed, each party to pay his own costs.

Cited: Williams v. Sharpe, 70 N. C., 584; *Williams v. Weaver,* 101 N. C., 2.

SNODE B. CARRAWAY v. ABNER BURBANK.

From Washington.

An act of ownership over personal property, inconsistent with the rights of others, is a conversion. Therefore, where an administrator exposes property of his intestate at public sale, and buys it in himself, this is a conversion as to persons having a title to the property.

TROVER for a horse, and on the trial before *Martin, J.*, the facts were that the horse belonged to the plaintiff, who sold him to one Coakley, upon condition that if the money was not paid by a specified time that that the title should return to the plaintiff. Before the day of payment Coakley died, and administration upon his estate was committed to the defendant, who set up the horse at public vendue, and bought it himself. There was some contradiction in the testimony as to the character of the sale to Coakley, upon which it is not material to remark. His Honor instructed the jury that if they believed the evidence of the sale by the defendant, and the purchase by himself, it did not, in law amount to a conversion; that the plaintiff should have proved a demand of the horse and a refusal to deliver on the part of the defendant, which would
(307) have been evidence of a conversion. The jury returned a verdict for the defendant, and the plaintiff appealed.

Gaston and Devereux for the defendant.
No counsel for the plaintiff.

HENDERSON, J. Conversion is an act of ownership, exercised over the personal chattel of another, inconsistent with the owner's right. It must be an act; bare words will not do. Words, however, may qualify an act, and show its character. A refusal to deliver upon demand is not the conversion; but it is the possession afterwards which is qualified by the refusal, and shown to be adverse after the right to possess is put at an end by the demand of the owner. Putting up this horse for sale as the property of his intestate by the defendant, although he bid him in himself, is an unequivocal act showing the nature of his possession, and declaring it to be adverse to the right of the owner. A demand is not required to give the defendant an opportunity of avoiding a suit, by delivering up the property in dispute; but to put an end to the defendant's right to possess, which before might be lawful, as in the case of a finder or of the owner's bailee. The detention afterwards is the conversion. And if before the demand possession is wrongfully

parted with, this is itself a conversion. Or the defendant may be concluded by his wrongful act from setting up as a defense his want of possession at the time of the demand.

There must be a new trial.

HALL, J. Whether the sale by the plaintiff to the defendant's intestate was conditional or whether it was absolute, and time given to pay the purchase money, was properly left to the jury. As to the second question, relating to the sale of the horse, which is relied on (308) as a conversion; if the horse had been purchased by a third person, and the money paid to the defendant, or if the money had not been paid, it would have amounted to a conversion, as it would have been an exercise of ownership over him. As to this question, the fact that the defendant became the purchaser can make no difference; he thereby evinced his intention to become the owner.

It is said in Bacon's Abridg. (Trover B.) that every disposition of property as a man's own is a conversion. If one dispose of another's property for the benefit of a third person, this is a conversion. If a person intrusted with another's goods places them in the hands of a third person, contrary to orders, it is a conversion. *Syds v. Hay,* 4 Terms, 260. Every unlawful intermeddling with the goods of another, and exercising acts of ownership over them, is a conversion. I therefore think the rule for a new trial should be made absolute.

TAYLOR, C. J. It is not necessary to prove a demand and refusal, where the plaintiff can show an actual conversion. If a person purchase another's goods, from one having no right to sell them, and takes them into possession, it is assuming upon himself the property and right of disposing of another's goods, and amounts to a conversion. The defendant's possession and claim were adverse to the plaintiff's right; and the possessing himself of the horse under such circumstances constitutes the cause of action. There should be a

PER CURIAM. New trial.

Cited: Rhea v. Deaver, 85 N. C., 340, *University v. Bank,* 96 N. C., 285; *Smith v. Young,* 109 N. C., 227; *Smith v. Durham,* 127 N. C., 419.

(309)

PETER O. PICOT, administrator of LUKE LEGGETT, v. THOMAS SANDERSON.

From Washington.

A delivery is essential to a gift. Where the obligee gives the obligor an order on his agent for the delivery of the bond, which was not obeyed, it was *Held*, that the gift being incomplete, might be revoked, and that resuming the possession and bringing suit was a revocation.

DEBT upon the single bond of the defendant, payable to the plaintiff's intestate. On the trial, before *Martin, J.*, the jury returned a verdict for the plaintiff, subject to the opinion of the court upon the following facts: After the bond became due the plaintiff's intestate voluntarily, and without consideration, drew an order on his agent, in whose hands the bond was placed for collection, directing him to deliver it up to the defendant. This direction was not obeyed by the agent, who, upon the obligee's death, handed it to the plaintiff, by whom this action was brought.

His Honor, thinking that the facts formed no bar to the action, judgment was entered for the plaintiff, from which the defendant appealed.

Devereux for the defendant.
No counsel for the plaintiff.

HENDERSON, J. The order for the delivery of the bond is clearly not good as a payment or satisfaction of the debt. It resembles more the gift of the bond itself; but this it cannot be, for want of a delivery, which is essential to a gift. Without a delivery, the transaction is a mere contract or agreement to give, which, being without consideration, cannot be enforced. If the person on whom the order was drawn had delivered the bond, in pursuance of the order, before it was countermanded, the gift would have been complete. But the owner, or
(310) his representative, might countermand it, which was done in the present case.

The only authority I have seen which in any measure supports a gift without delivery is taken from Brooke's Abridg., Trespass, ul., 303. There it is said, if A, in London, the owner of goods which are in York, give them to B, and before B has obtained the actual possession a stranger take them, B may maintain trespass for them. If this be law, it is on the ground that the action is brought against a stranger, without any revocation on the part of the donor.

The executor, by resuming the actual possession and bringing the present action, has clearly revoked the gift. *Withers v. Lys,* 3 Ser. Low., 9.

PER CURIAM. Affirmed.

Cited: Adams v. Hayes, 24 N. C., 368; *Medlock v. Powell,* 96 N. C., 501.

MATTHEW WHITAKER, administrator of LEVI H. McLEAN, v. CARY WHITAKER, executor of WILLIAM TAYLOR.

From Halifax.

A slave hired out is a *chose* in the possession of the owner. Therefore, when the slave of a *feme sole* was, before her marriage, hired for a year, and the husband died during the term, the property does not survive to the wife, but vests in the personal representative of her husband.

DETINUE for a negro, and on the trial the jury found specially the following facts: The slave in question was the property of Elizabeth Whitaker, and was by her hired out for the year 1825, she being of full age and unmarried. During the term Elizabeth intermarried with the defendant's testator, who died before its expiration. At the end of 1825 the slave came into possession of the widow, the former owner, who agreed with the defendant to pay hire for it, if in law it belonged to him. Elizabeth, the widow, was in possession of the slave under this agreement until she intermarried with the plaintiff's (311) intestate, who continued it until his death, when the defendant took the slave into his possession, claiming as executor of Taylor.

Upon this verdict, *Daniel, J.,* gave judgment for the plaintiff, and the defendant appealed.

No counsel for either party.

HENDERSON, J. This case depends upon the effect which a contract of hiring has upon the possession. If it divests the owner of the possession and places it in the person hiring, the thing hired ceases to be a *chose* in possession, and becomes a *chose* in action, and therefore does not pass absolutely, but *sub modo* only, from the wife to the husband, upon their intermarriage.

A contract of hiring is not a sale of the thing for the period of hiring; the property remains as it did before—it is a contract for the use of the thing hired. The hirer is a mere bailee, or *locum tenens* for the

owner, and only holds the property for him. The general property draws to it the possession, as long as the occupant, or qualified owner, retains the occupancy. At any rate, the possession of the hirer is not a possession for himself, for nothing is more common than the maxim that the possession of the bailee is that of the bailor; and hiring is a species of bailment. If the hirer possessed for himself, he could not possess for another, whose possession has continuance and is exclusive of his. He is called the qualified owner, not to express his ownership, or that he has any part of the property, but for want of a proper term to express his interest in it.

I therefore think the owner's possession is not disturbed by the hiring; that the occupancy of the hirer is perfectly consistent with it, and therefore does not divest it; that the owner has such a possession that he may either sell or give the property. Of course, in the pres-
(312) ent case the marriage was a complete gift of the slave in question to the first husband. For an inability to give, sell, or transfer is the reason why the marriage is not a perfect gift of the wife's *choses* in action to the husband, they being incapable of a complete transfer, not for the reason generally given, that it is selling a right of going to law, and thereby stirring up lawsuits, but because such things are not property, and property only is the subject of transfer.

PER CURIAM. Reversed, and judgment for the defendant.

Cited: Granberry v. Mhoon, 458, *post; Pettijohn v. Beasley,* 15 N. C., 513; *Carter v. Spencer,* 29 N. C., 18.

THOMAS O. DWYER v. HENRY G. CUTLER.

From Hertford.

A single magistrate has no jurisdiction of actions founded upon a covenant of guaranty.

THIS action was originally commenced by a warrant, and was founded upon the following instrument:

"I have this day transferred to *Thomas O. Dwyer* a note of *Arthur Lawrence* for ninety-five dollars, dated 30 August last, and payable 5 September, 1826, which note I guarantee unto the said *Thomas O. Dwyer,* or his assigns, for value received. Witness my hand and seal, 12 October, 1826. HENRY G. CUTLER."

On the trial it was objected on the part of the defendant that a justice of the peace had no jurisdiction of the subject. The objection was overruled by his Honor, *Judge Martin,* and a verdict being returned for the plaintiff, and judgment entered accordingly, the defendant appealed.

The case was submitted without argument by *Gaston* for the plaintiff. No counsel for the defendant.

TAYLOR, C. J. The act of 1820, extending the jurisdiction of (313) justices to $100, does not embrace this case. The words are, "bonds, notes, and liquidated accounts." This is a guaranty under seal, on which the sole remedy is by an action of covenant, in which damages would be recovered for the nonperformance of the guaranty.

It was certainly not the design of the act that magistrates should have jurisdiction of a case in which questions are likely to arise which it would be diffiult for them to settle. The construction of a guaranty, the extent of the obligation imposed by it, and the degree of diligence which, under the circumstances of the case, the plaintiff is bound to use, require the consideration of a jury, aided by a court qualified to instruct them. There ought to be a

PER CURIAM. New trial.

THOMAS M. D. REID v. JOHN B. KELLY.

1. The records of the county courts cannot be collaterally impeached in the Superior Courts. Therefore, evidence offered to prove that a judgment of the county court, in another suit, was entered up in the vacation, without the order of the court, is inadmissible.
2. Every court has power to correct its records; and in this respect the Superior Courts have an appellate jurisdiction to correct those of the county courts.

THIS was a special action on the case in which the plaintiff declared that he had brought an action of debt against one Flora Martin in the County Court of Moore; "that the defendant, being an attorney of that court, entered an appearance for the said Flora, and after the final adjournment of the court to which the writ was returned, and without the leave or order of the court, did falsely enter at the clerk's office in the record of the said action between the plaintiff and the (314) said Flora a judgment of nonsuit, whereby, etc." The defendant pleaded not guilty, and upon the issue made by that plea the cause was tried, before *Ruffin, J.,* at the last Fall Term of Moore.

The plaintiff offered in evidence the record of the cause between himself and Flora Martin in the county court, whereby it appeared that

the defendant was the attorney of Flora, and that a judgment of nonsuit was entered because there was no appearance on behalf of the plaintiff. The judgment as the same was set forth in the record was regularly entered by the court during the term. The plaintiff offered to prove that in fact the judgment was not entered by the court, but that the entry thereof was made by the present defendant in the records of the county court after the adjournment of the court, at the clerk's office, when the rules were taken by the attorneys. The defendant objected to the admission of this testimony, because the county court is the exclusive judge of the correctness of its own records, and is alone conversant of its rules of practice in signing judgments of nonsuit, and taking other rules which are of course and which are nsually entered at the clerk's office.

The presiding judge, acquiescing in the correctness of this reasoning, rejected the evidence. In submission to this opinion, the plaintiff suffered a nonsuit, which the judge refusing to set aside, he appealed.

W. H. Haywood for the plaintiff.
No counsel for the defendant.

HENDERSON, J. I concur with the judge who tried this cause in the court below, and for the reasons given by him.

The records of a court, by which I understand the memorial of the proceedings of a court of record upon a matter within its jurisdic-
(315) tion, when offered in evidence, either in the same or any other court, cannot be impugned by counter evidence. The only question of fact to be examined into *dehors* itself, if any, is, Is the thing offered as a record a memorial of the judicial proceedings of the court as recognized by the court itself? If it is, there is an end to further inquiry as to the facts it affirms; it is taken as verity itself. But this does not impeach the power of the court, upon proper proceedings instituted for that purpose, to examine into and ascertain how that which appears regularly upon their memorial came there; and if found to have been improperly placed there, to expunge it from their proceedings. This power, however, is confined to the court of which it purports to be a record. No other court possesses it (unless acting in an appellate capacity), not even the supreme over the most inferior court. *Slocumb v. Anderson,* 4 N. C., 466; *Jones v. Zollicoffer,* 9 N. C., 492; *Austin v. Rodman,* 8 N. C., 71; *Tisdale v. Gandy, ib.,* 282.

PER CURIAM. Affirmed.

Cited: S. v. Reed, 18 N. C., 380; *Galloway v. McKeithan,* 27 N. C., 14; *Forbes v. Wiggins,* 112 N. C., 125.

ELIZABETH PEARSON v. ALEXANDER NESBIT.

From Rowan.

The same person cannot be both plaintiff and defendant in the same cause. Where two executors confessed a judgment to a copartnership, of which one of them was a member, it was *Held*, to be error in fact, and for it the judgment was reversed.

RICHMOND PEARSON appointed the present plaintiff and Jesse A. Pearson executor and executrix of his will. At the time of his death he was indebted to Alexander Nesbit & Co., which consisted of the present defendant and the same Jesse A. Pearson, whom he had appointed one of his executors.

A writ issued in the name of "A. Nesbit & Co.," plaintiff against (316) "Jesse A. Pearson and Elizabeth Pearson, executor and executrix of Richmond Pearson," defendants, returnable to Fall Term, 1820, of Rowan Superior Court, when judgment was confessed thereon by the defendants. Execution issued on this judgment, and was continued until Spring Term, 1823, when a return of *nulla bona testatoris* was made. After the confession of the judgment (the case did not state when) Jesse A. Pearson died. A *scire facias* on the judgment issued at the instance of Nesbit, as surviving partner, to subject the present plaintiff *de bonis propriis.*

At Fall Term, 1827, the present plaintiff, one of the original defendants, filed an affidavit stating that Jesse A. Pearson was both plaintiff and defendant in the first action; that she never had received any of the assets of Richmond Pearson, and moved (1) for a writ of error *coram nobis;* and if the matter assigned was not error, then (2) to set aside the judgment confessed by her and Jesse A. Pearson. The defendant pleaded (1) *in nulla est erratum;* (2) that if there was error, it was waived by the confession of the judgment.

On the last circuit, before *Strange, J.,* an order in the alternative was made whereby the judgment was reversed for error, if error *coram nobis* was proper; but if not, then the judgment was vacated. Upon which Nesbit appealed.

Gaston for the plaintiff.
No counsel for the defendant.

HENDERSON, J. A suit at law is a contest between two parties in a court of justice, the one seeking and the other withholding the thing in contest. The same individual cannot be at the same time both the person seeking and the person withholding; for it involves an absurdity

that a person should seek from himself, or withhold from himself. (317) Between a corporation and the individual composing it the identity does not exist, and the absurdity above stated is avoided; but where the same person is both plaintiff and defendant, in different rights, as for himself on the one side and as executor on the other, this absurdity is involved. When adversary rights, as creditor and executor, or debtor and executor, meet in the same individual, the law considers the contest as settled—at least as long as the union exists. As soon, therefore, as it appears to the court that the same individual is both plaintiff and defendant, any judgment entered up in the cause is, to say the least, erroneous, and should be reversed.

I am not prepared to say whether a writ of error or a motion to vacate is the most proper mode of proceeding in this case; but I am satisfied that a writ of error is a proper remedy, although it may not be the only proper one.

The judgment of the Superior Court reversing the original judgment must be

PER CURIAM. Affirmed.

Cited: Justices v. Armstrong, 14 N. C., 286; *Justices v. Bonner, ib.,* 289, 290; *Skinner v. Moore,* 19 N. C., 150; *Newsom v. Newsom,* 26 N. C., 389; *Keaton v. Banks,* 32 N. C., 384; *Sanders v. Bean,* 44 N. C., 318; *Arrowood v. Greenwood,* 50 N. C., 415; *Eason v. Billups,* 65 N. C., 218; *England v. Garner,* 84 N. C., 214; *Larkins v. Bullard,* 88 N. C., 37; *Bank v. Griffin,* 107 N. C., 174.

FREDERICK STEVELIE, administrator of LEWIS FERRILL, v. JAMES GREENLEE.

Where an administrator takes the book-debt oath and swears that the original entry is in the handwriting of a person who has not, after diligent inquiry, been heard of for seven years, and that he knows of no one who can prove his handwriting, the account was held to be sufficiently proved.

ASSUMPSIT, commenced originally by warrant in September, 1808, and tried at the last Fall Term of BURKE, before *Norwood, J.*

On the trial the plaintiff produced the books of his intestate, and swore that he verily believed the account charged therein was just; that there were no witnesses within his knowledge who could (318) prove the items charged; that he found the books in the same condition in which they were then exhibited, and that he knew

of no credits due the defendant. It appeared on his examination that the book was not in the handwriting of the intestate, but in that of two other persons. The plaintiff swore that he had made diligent inquiry for those persons, and had not heard of them for the last seven years, and that he knew of no person who could prove their handwriting.

His Honor instructed the jury that if they believed the evidence the account was sufficiently proved and the plaintiff entitled to a verdict. The jury found according to the charge, and the defendant appealed.

No counsel on either side.

HALL, J. The book-debt law does not require that the articles charged in the books of an intestate, put in evidence by executors or administrators, should be entered in his own handwriting. The administrator took the oath which the law required. He gave the best evidence which the nature of the case admitted of. It was a question altogether for the jury to decide on, and they have done so. The rule for a new trial should be discharged.

PER CURIAM. No error.

(319)

ALPHA P. MOORE v. JAMES MCNAIRY, executor of LUCY PEEBLES.

From Guilford.

In *assumpsit*, matter which arises after plea pleaded may be given in evidence under the general issue, in mitigation of damages; and where, if pleaded, it would bar the action, the plaintiff is only entitled to nominal damages.

ASSUMPSIT for work and labor done, commenced in the lifetime of the testatrix, and upon her death the defendant was made a party. On the trial the will of Lucy Peebles was offered in evidence by the defendant, who contended that a bequest therein was accepted by the plaintiff in satisfaction of the claim.

There was no plea of this satisfaction *puris darien continuance.* Neither was the reading of the will objected to by the plaintiff.

After a verdict for the defendant the plaintiff moved for a new trial because the will had been improperly read by the jury. *Strange, J.,* who presided, discharged the rule, and the plaintiff appealed.

No counsel for the plaintiff.
Attorney-General and Devereux for the defendant.

HENDERSON, J. As it does not appear upon the record whether the jury found that the defendant's testator did not promise, or that she

(320) had promised, and satisfied the demand by the legacy, we must necessarily examine if the evidence of satisfaction was properly received. There can be no doubt that the evidence of the legacy, if objected to, was improperly received. As a bar, or as a full defense, it should have been pleaded since the last continuance. But without such a plea, it was proper to lessen the damages; and if in full of the demand, the plaintiff would have been entitled to nominal damages, only as upon a default. *Holland v. Jourdine,* 3 Ser. and Low., 5. Indeed, it is the general doctrine that in *assumpsit* payment or satisfaction since plea pleaded may be given in evidence, under the general issue, in mitigation of damages, without resorting to a plea since the last continuance, which, if sustained, bars the action entirely. Should we grant a new trial it would be only because the plaintiff got nothing, when he was entitled to one cent; and and that, too, not upon the merits, but from a mere omission in pleading. The defendant did not neglect to plead since the last continuance from design; for since our act declaring that plea to be no waiver of those originally entered, he could have no motive in this design.

But there is another ground upon which there can be no doubt. The objection, if made, was upon a mere matter of form. It was not made until after as full a trial was had as if that form had been complied with. Had the plaintiff succeeded, the trial would have availed him as much as if the necessary forms had been observed. After having one fair chance, by his own consent, he now wishes for another. If he were indulged, it would be too strong an inducement for parties to hold back, and, if unsuccessful, take another chance. I wish to be understood, not to refuse a new trial, because justice has been done, that is, justice in violation of the law, but for the reason in law above mentioned.

PER CURIAM. No error.

(321)

Den ex dem. of WINSTON J. McREE et al. v. FEN and PHINEAS ALEXANDER.

From Mecklenburg.

The saving clause of the act of 1715, ch. 2, preserves the right of one of several coheirs who is within the proviso, although the other coheirs are under no disability, and although they are barred. Therefore, in ejectment by three coheirs, upon a joint demise, two of whom were free from disability, but the other under coverture, judgment may be rendered against the plaintiff upon the title of those under no disability, and in his favor upon the title of the *feme covert.*

McREE *v.* ALEXANDER.

EJECTMENT on the joint demise of Winston J. McRee, David M. McRee, Isaac S. Henderson and Lucinda, his wife, and on the trial before *Strange, J.*, the jury returned the following facts specially: That Winston J. McRee, David M. McRee, and Lucinda Henderson were the heirs at law of David McRee, who died intestate, seized of the premises in the declaration mentioned; that the lessors of the plaintiff were tenants in common of the land, and that no partition thereof ever has been made; that the defendant obtained a grant for the same land, ousted the lessors of the plaintiff, and kept possession for more than seven years before the commencement of the present action; that at the time of the ouster Winston and David M. McRee were under no disability, but that Lucinda Henderson was and still is covert of Isaac S. Henderson, one of the lessors of the plaintiff. Upon this verdict his Honor gave judgment for the defendant, from which the lessors of the plaintiff appealed.

The case was submitted without argument by

Wilson for the lessors of the plaintiff.
No counsel for the defendant.

TAYLOR, C. J. The lessors of the plaintiff are tenants in common, claiming as heirs to McRee. Two of them were under no disability when their right of entry accrued; one was under the twofold disability of infancy and coverture. More than seven years have elapsed (322) since the right of entry accrued, and the question open on this record is, whether the right of entry of all, or any of them, is taken away by Laws 1715, ch. 2. By the third section of that act it is incumbent on the lessors of the plaintiff to show that they had a right of entry when the action was brought. No person or persons shall enter or make claim but within seven years next after his, her, or their right or title descend or accrue; and in default thereof, such person not so entering or making default shall be utterly excluded or disabled from any entry or claim thereafter to be made—3d section. The 4th section provides that if any person or persons that is or hereafter shall be entitled to any right or claim of lands, tenements or hereditaments, shall be, at the time the said right or title first descended, accrued, come or fallen, within the age of twenty-one years, *feme covert,* etc., that then such person or persons shall and may, notwithstanding the said seven years be expired, commence his, her, or their suit, make his, her, or their entry, as he she, or they might have done before this act, so as such person or persons shall, within three years next after full age, discoverture, etc. Each individual lessor might in this case have brought an ejectment to recover his own share, without the necessity of joining the other who was under disability; for as tenants in common, they hold by several titles, or by one title and several

rights; and so strictly was this notion acted on that until a late decision in this Court it was held that tenants in common could not make a joint demise. But as the lease is a mere fiction and the action liberally construed, so that the possession which is recovered inures to each lessor according to his title, such effect should be given to the demise as the law warrants, otherwise the substance will be sacrificed to form.

(323) Even the case of coparceners, who constitute but one heir, one may on her sole demise recover her own share; and so of the sole demise of a joint tenant to the plaintiff in ejectment, for that severs the joint tenancy, and entitles to a recovery for the lessor's proportion. *Bowyer v. Judge,* 11 East, 287. So where an estate descended to two coparceners, one of whom was under a disability and the other did not enter within the period prescribed by the statute, no doubt was suggested of the right of one who was under disability to recover. The only doubt was whether the disability of one did not preserve the right of the other. There were in that case, it is true, two counts, one upon a joint demise by the two coparceners, the other upon the sole demise of the one under disability, upon which latter one the judgment was entered up; but that was a mere form unconnected with the justice of the case. *Langdon v. Rowlston,* 2 Taunton, 441.

As the only plea in this case is the general issue, it is incumbent on the claimants in the first instance to establish their right to the possession; whatever operates as a bar to that right must apply distributively to each, and judgment rendered for those whose rights are preserved.

The construction of the 9th section of the same act bars the remedy of all the plaintiffs who necessarily join in the action, although some are under disability, for it is competent for those who are under no disability, as well as their duty, to take care of the rights of those who were unable to protect themselves; and for the other reason stated by the Court in *Riden v. Frion,* 7 N. C., 577, that the grammatical construction of the words enforced such construction, since the words "person or persons" in the proviso meant where there is a single plaintiff he must be under a disability in order to come within the exception; or where there are several plaintiffs, they must all be under disability. For these reasons I think judgment should be entered up for one-third part of

(324) the land, the share of the *feme covert.*

HENDERSON, J. In a joint action brought by several, where the defendant avails himself of the bar given to such action by the statute of limitations, all the plaintiffs must bring themselves within some of the savings of the statute, otherwise the bar is not avoided. *Riden v. Frion,* 7 N. C., 577. The decisions on this point are uniform, as far as I know, and I shall not now inquire whether they are founded on the technical

reason that, the action being joint, all or none of the plaintiffs must recover, otherwise the judgment does not pursue the writ and declaration; or whether on the very words of the statute. But I must say that the result is disgraceful to our system of jurisprudence, as it sacrifices the spirit of the proviso either to technical absurdity or to literal construction. But neither of these reasons can be brought to bear in this case. The action of ejectment *eo nomine* is not within the statute of limitations. It is true that the statute bars an entry, and that this action cannot be brought but by one who has the right of entry. The law, however, does not require a joint entry to be made; each may enter according to his estate or right. Where many have a joint right of entry, and one enters, his entry inures for the benefit of all; if there is a joint title, and some have lost and some have not lost their right of entry, he who enters does it for the benefit of those whose right of entry is enforcible. It follows that if all have lost the right of entry but the one who enters, he enters solely for his own benefit, and becomes tenant in common with those who have acquired an estate in the land by possession or otherwise. But if after his entry those who have lost their right of entry recover their estates in a higher action, he becomes joint tenant, a coparcener, or tenant in common with them, according to the nature of their estates. (325)

In this case there is nothing in the statute which prevents the *feme covert,* one of the lessors of the plaintiff, from entering; and if her brothers and coheirs had not lost their right of entry, she entered for their benefit also, and they became by our law tenants in common. If they had lost their right of entry, she entered for her own benefit, and became tenant in common with the defendant, who had acquired an estate by possession, for tenants in common may hold their estates by different titles. The one may be wrongful and liable to be defeated, the other rightful and indefeasible.

But if the plaintiff is driven from all other grounds, there is one on which she may rest her case. This action is not brought by several plaintiffs; it is brought by John Den, the lessee. He derives title, it is true, from three; but they are not the plaintiffs, and if his lease from them or any of them is good it is sufficient. If there was a real lease and the lessee had been evicted, and had brought his ejectment, which is the appropriate remedy for the eviction of a termor, it would be no objection to his title that he claimed from three different persons. If the title of one of them was good for the whole, he would recover the whole. If the title of one was good for a part, and that of the others bad for the whole, he would recover that part. The lessor of the plaintiff does not lose by the fiction of the lease; and the question on the trial is, Could the lessors, or any of them, make a valid lease; that is, had they, or any

of them, a right of entry to the whole or to any part; and if to a part, what part? In the case of a real lease, the lessee might set up a title under any number of different lessors, from whom he actually claimed the estate, however adverse their claims might be. But in the case of a fictitious lease, as that is a proceeding by leave, under the sanction of the court, demises from many persons, claiming differently, would not be permitted, because it would make the case too complicated for (326) fair and easy investigation. But in a real lease, where the party actually sets up title from many different persons, however complicated and various their titles may be, I do not perceive how the court could interfere and confine him to any one or more of those titles; he must be permitted, if he can, to show it from any source.

I therefore think that the judge erred in saying that there should be judgment for the defendant, and that all the lessors of the plaintiff were barred of an entry unless all were within some of the savings of the statute.

PER CURIAM. New trial.

Cited: Caldwell v. Black, 27 N. C., 471, 472; *Holland v. Crow,* 34 N. C., 280; *Williams v. Lanier,* 44 N. C., 36; *Johnson v. Prairie,* 91 N. C., 163; *Cameron v. Hicks,* 141 N. C., 35.

JAMES Y. JONES v. JOHN DUNN.

From Wake.

A sheriff is not bound to take notice that the defendant in a *ca. sa.* is not entitled to the benefit of the act of 1822; and where, without actual notice that the contract on which the action was brought was made before 1 May, 1823, on executing a *ca. sa.*, he took bond pursuant to that act, it was *Held,* not to be an escape.

DEBT for an escape, in which the following case agreed was made up by the counsel:

The plaintiff was a resident of Virginia, and there in September, 1823, obtained a judgment against one Delony, for his debt, with interest from 10 April, 1821. Upon this judgment suit was brought against Delony in the County Court of Wake, and at August Term, 1825, judgment was obtained and a *ca. sa.* issued, which came to the hands of a deputy of the defendant on 31 July, 1826. Delony was arrested on this *ca. sa.* and thereupon gave bond for his appearance at the next term of the county court, pursuant to the act of 1822, when the defendant by his deputy

permitted him to go at large. At the time of the arrest and discharge of Delony neither the sheriff nor his deputy had actual (327) notice of the facts above stated, except so far as they were recited in the execution, which commanded the sheriff "to take the body, etc., to satisfy and pay the sum, etc., with interest from 16 August, 1825." The attorney of the plaintiff, whose name was indorsed on the execution, resided in the city of Raleigh at the time of the arrest, and was so known to reside both to the sheriff and his deputy, neither of whom applied to him for instruction.

Upon this case *Daniel, J.*, gave judgment for the defendant, from which the plaintiff appealed.

W. H. Haywood for the plaintiff.
Badger contra.

HALL, J. The proceeding upon which this action is founded cannot be charged to the bad intention of any one, and if a loss has happened it must be borne by that party who has been the most negligent.

When the execution came to the hands of the sheriff he proceeded under the provisions of the act of 1822, made for the benefit of insolvent debtors, which directs the sheriff upon executing a *ca. sa.* to take bond and security for the appearance of the defendant at the court from which the writ issues, instead of committing him to jail. By a proviso contained in the act its operation is restricted to executions on (328) judgments which are obtained on contracts made since 1 May, 1823. The sheriff was ignorant whether the contract on which the judgment in this case was obtained came within the proviso or not. Until the receipt of the execution he was a stranger to the suit, and there is no reason to believe that he was in any way consonant of the judgment. The law does not require that he should be; but this is not the case with the plaintiff. He was a party to the contract, the judgment, and the execution; the latter issued for his benefit. It was therefore completely in his power to notify the sheriff of the course he was to pursue. As he has omitted to do this, the sheriff ought not to be subjected to the payment of his claim against the defendant in the execution. In many cases the entry of the judgment does not show when the contract on which the action is founded was made, and in such a case the most vigilant sheriff could get no information from its examination. On the other hand, if the plaintiff wishes to derive a benefit from the proviso in the statute, the fact that his case is within it can easily be entered on the record and made known to the sheriff. When sheriffs depart from their duty wantonly and from improper motives, as they have much in their power, they should be rigorously dealt with; but when they act honestly and

with a view to the faithful discharge of their duties, they should be protected, so far as the rules of law will permit. I cannot bring myself to think that the defendant should be subjected to the plaintiff's demand in this case.

TAYLOR, C. J. That the laws of the State where a contract was made shall be resorted to for its exposition, but the laws of the country where a remedy is sought shall be applied to it when it is enforced, seems to be a principle well established in England, and has been frequently (329) recognized in the courts of the United States. The form of action, the process, and the time within which it may be commenced must necessarily be gathered from the law of the State where the suit is brought. Thus where a bond is given in another State, where it is assignable, and a suit is brought in England, it must be in the name of the obligee, because there it is not assignable by law. *Folliot v. Ogden,* 1 H. Bl., 135. So where a contract was made abroad, and sued on in England, the statute of limitations of that country was allowed to be pleaded (2 Ves., 340), and this rule has been adopted and followed in various State courts: 2 Mass., 90; *Nash v. Tupper,* 1 Cain, 402; *Ruggles v. Keeler,* 3 Johns., 263. So that if there were before us evidence that when this contract was entered into the laws of Virginia gave the creditor a right to imprison his debtor on a *ca. sa.,* and that he made his engagement with him on the faith and expectation of a power in our forum, the only inquiry is, Does the law of this State give him the same right? There is a case in one of the British reporters in conflict with this principle, but the decision was not unanimous, and the authority of it has since been questioned. The case was where a defendant entered into an instrument in France, by which his property only, and not his person, was liable according to the law of France. The court discharged him on a common appearance. *Melan v. Duke of Fitzjames,* 1 Bos. & Pull., 138; but see 2 East, 455; 2 Johns., 158. If that decision is correct, it would follow from it that if the defendant had been amenable in his body by the law of France, though not so by the law of England, he must have been held to special bail or have gone to prison.

This brings me to the act of 1822, for the relief of debtors, upon the true construction of which this case depends; and considering that the question now first arises, I think we ought to construe it as not to (330) make sheriffs liable for acts of inadvertence which they could not readily guard against, and where there was no record or process in their possession to apprise them that the defendant was not entitled to the benefit of the act. The act extends the benefit to every debtor taken upon a *ca. sa.* for any debt contracted after 1 May, 1823. The only information the sheriff could derive from the writ of execution in this

case was that it issued 17 June, 1826, about three years after the time when contracts entered into were privileged by the act; that the recovery was of a debt, but whether founded on a judgment or not, the execution does not disclose. It does, then, appear to me reasonable, that if presumption was to be made either way, it should be in favor of the defendant, since the sheriff could not be ignorant that from the dispatch with which business was done in that court there had been ample time to contract a debt since May, 1823, and to obtain judgment and execution for the nonpayment. The execution, too, shows that it was executed by the deputy, who may have lived in the country and in the neighborhood of the defendant. The consequence of keeping him in custody until the deputy came to town to ascertain when the debt was contracted would, in a case where the debt was contracted since May, 1823, and the bond was tendered, have made the sheriff liable to an action of false imprisonment. That consequence, to be sure, would not have resulted in this case; but the rule, if established, must be general in its application. I therefore think it would be a severe rule to impose upon the sheriff the duty of ascertaining the time when a debt was contracted, considering how easy it is for the plaintiff to have it indorsed on the execution, or to give notice to the sheriff; and the case reminds me of the excellent remark of Lord Coke, "and forasmuch as escapes are so penal to sheriffs, the judges of the law have always made such favorable (331) construction as the law will suffer in favor of sheriffs; and to the intent that every one bear his own burden, the judges shall never adjudge one to make an escape by a strict construction." *Boynton's case*, 3 Rep., 44. I think the judgment should be

PER CURIAM. Affirmed.

JOSIAH TURNER v. SAMUEL CHILD.

From Orange.

1. Where an agent appointed one under him to sell the goods and collect the debts of his principal, and upon the death of the latter notifies his substitute that the agency was at an end, if the substitute acts in the agency after such notice he becomes *executor de son tort.*
2. An *executor de son tort* cannot retain for his own debt.

AFTER the new trial had in this cause at a former term of this Court, *ante*, 25, it came on again before *Strange, J.*, on the last circuit, when it appeared that there was no rightful personal representative of Francis Child, and that the defendant had intermeddled with his effects under the

following circumstances: Francis Child had appointed one Clancy his agent, who authorized the defendant to sell on a credit the property of Francis, for the purpose of paying debts due to the defendant, and those for which he was responsible. Before the expiration of the credit given at the sale, Francis Child died in the State of Tennessee; upon learning this, Clancy refused to interfere with the property, and notified the defendant of his determination, who, disregarding it, collected notes taken at the sale to an amount larger than the sum due him, or that for which he was responsible.

The defendant offered to prove that Francis carried to the State of Tennessee several horses, which were before his departure the
(332) property of the defendant. But his Honor, thinking the testimony irrelevant, rejected it.

A verdict being returned for the plaintiff, and a rule for a new trial discharged, the defendant appealed.

Badger for the plaintiff.
Attorney-General and Devereux for the defendant.

TAYLOR, C. J. The case is somewhat different in its circumstances from what it was when before appealed from, for it now appears that there was no rightful administrator on the effects of Francis Child. It follows, thence, that if the defendant has done any act which makes him liable as executor *de son tort,* the plaintiff, having established his debt, is entitled to recover. Another feature in the case now is that Clancy was appointed the attorney in fact of Francis, and that the defendant's authority was derived under this agency. Supposing, therefore, that the attorney was authorized to collect the money arising from the sale after the death of his principal, yet Clancy renounced the authority after hearing of the death of F. Child, and gave notice to the defendant that he had done so; but after this, when the defendant was without a shadow of authority, he collected money belonging to the estate. This makes him an executor *de son tort,* and the remaining question is, whether the evidence of F. Child, having taken away horses belonging to the defendant, was properly rejected. I think it was in no manner connected with the fact which made the defendant executor *de son tort,* viz., the taking into possession the goods of his brother, and collecting his debts; and because if the defendant meant to rely upon it, as authorizing him to retain, it was inadmissible. Such an executor cannot retain for his own debt, otherwise there would be a struggle among creditors to ob-
(333) tain possession of the goods, without obtaining administration.

If he pleads a retainer to satisfy his own debt, the plaintiff may reply that he is executor *de son tort. Alexander v. Lane,* Yelv., 137.

Nor can he defend himself by showing that he has paid debts of the deceased to the amount of what he has received, unless he pleads *plene administravit. Whitehall v. Squire,* Carthew, 104. I am of opinion that the case has been properly decided.

PER CURIAM. No error.

TULLY BELL et al. v. JOSEPH DOZIER et ux.

1. In the descent of acquired estates the only qualification necessary to a collateral is that he be the nearest relation of the person last seized. In descended estates he must be of the blood of the first purchasr.
2. Where an estate was purchased by the father, and descended from him, and the *propositus* left a mother, a maternal half-brother, paternal uncles of the half-blood, and other more distant paternal collaterals, it was *Held,* that the proviso in the 6th canon of descents (act of 1808) applies to cases where a surviving brother or sister cannot inherit, as well as to cases where none are left, and therefore that a life estate in the lands descended to the mother and the fee to the paternal uncles of the half-blood.

WASTE, tried before *Nash, J.,* at Spring Term, 1826, of CURRITUCK, when a verdict was taken and damages assessed for the plaintiffs, subject to the opinion of the court as to the right to sustain the action upon the following case: In 1813, Peter Barnard died intestate, seized of the lands on which the waste was committed, leaving two children, Elizabeth and Jesse, and a widow; and afterwards, in the same year, Elizabeth died intestate and without issue. The widow had dower assigned her in this land, and in 1813 intermarried with the defendant Joseph Dozier, by whom, in the succeeding year, she had issue which is still (334) alive; and afterwards Jesse Barnard died intestate and without issue. The lands were purchased by Peter Barnard, and the plaintiffs are his maternal half-brother and sisters, and nearest of blood to him; but he had also collateral relations, the descendants of his father's nephews and nieces.

The presiding judge being of opinion for the plaintiffs, gave them judgment for treble the damages assessed by the jury, and the defendants appealed.

Hogg for the defendant.

HENDERSON, J. Peter Barnard, the first purchaser of the lands in question, died seized thereof in 1812, intestate, leaving two children, Elizabeth and Jesse, and a widow, the mother of Jesse, I presume, although it is not so stated in the case. The *locus in quo* was assigned to

the widow as her dower. Elizabeth died intestate, without issue, in the same year. In 1813 the widow married Dozier, one of the defendants; and in 1814 had a child, which is still alive. The plaintiffs are the maternal half-brothers and sisters of Peter Barnard, and the nearest of kin to Jesse, except the child before mentioned. Peter Barnard's father left nephews and nieces, whose descendants are still alive.

The question presented is, On whom did the inheritance descend upon the death of Jesse?

The second canon of descents, in the act upon the subject, passed in 1808, calls the females equally with the males to the succession. It thereby abolishes the priority of the male over the female line, and places them upon a perfect equality, both as to collateral and lineal descents. The express declaration, whether of the paternal or maternal line, to be found at the close of the fifth canon, was therefore un-
(335) necessary. Its omission in the fourth canon, under which this case falls, will not prejudice the maternal line. The only qualification required is that it be the blood of the first purchaser. I also think that the provision made in the sixth canon, declaring that the collateral relations of the half blood shall inherit, equally to the whole blood, was also unnecessary, it being an entire enactment upon the subject, and the previous provisions embracing them; the only qualification required being that in the case of an estate which has descended, such collateral relations should be of the blood of the first purchaser; for we shall presently see that the words "such ancestor," in the close of the fourth canon, must be stricken out, and in lieu thereof the words "first purchaser" inserted. As we had been so long in the habit of considering the paternal line as preferable to the maternal, and the half blood as entirely excluded, it was perhaps safer expressly to declare it. This argument is made that no objection should be taken to calling in the maternal line under the fourth canon, under which this case falls, because the maternal line is not, in that section, placed upon an equality with the paternal, as it is in the fifth, which provides for newly acquired inheritances. The only qualification, therefore, required by our law in case of a collateral descent is that the claimant be the nearest collateral relation; and in case of a descended estate, that he be of the blood of the first purchaser; the preference of the male over the female line and the whole over the half blood being entirely abolished. I have said that the words "such ancestor," in the fourth canon, must be stricken out, and the words "first purchaser" inserted in lieu of them. If those words are retained, had this land descended to Peter Barnard from his father, and from Peter to Jesse, they would call to the succession Peter's maternal half-brothers and sisters, before the brothers and sisters of his father, for they are of the blood of Peter, and the inheritance descended

from him to Jesse. Yet the same principle which excludes this (336) child before mentioned (Jesse's half blood on the mother's side) in favor of Peter's brothers and sisters, in such case would exclude Peter's half-brothers and sisters on the mother's side (the present plaintiffs) in favor of the nephews and nieces of Peter's father, the first purchaser of the inheritance.

The case does not expressly state that Jesse was ever actually seized; but I think it may be inferred from the assignment of dower, for it is taken out of his seizin. But if it did not, the first canon of the act, speaking of lineal descents, declares that a seizin in law shall make a *propositus;* and although no such declaration is made in case of collateral descents, but the word seized only is used, I apprehend that the Legislature intended to make a legal seizin sufficient in both cases. No reason can be given why, if it is good in the one case, it is not so in the other.

Upon the death of Jesse without issue, the lands in question devolved on his mother for life, although he left a brother or a sister. For the words "capable of inheriting the estate" must be added to the following words in the sixth canon, "That in all cases where the person last seized shall have left no issue, nor brother, nor sister, nor the issue of such," for why postpone the mother, where the brother or sister cannot take? It is certainly the same as if there were none, for her claims are postponed to theirs. When they have no claims, it is the same as if they did not exist.

It is unnecessary to say what became of the dower, when a life estate devolved on her in the whole land; for she remained a tenant for life, and liable to the action of waste.

I am of the opinion that the inheritance, subject to the life estate in the mother, descended to the plaintiffs upon the death of Jesse, and that the judgment should be

PER CURIAM. Affirmed.

Cited: Flintham v. Holder, 16 N. C., 354; *Wilkerson v. Bracken,* 24 N. C., 321; *Caldwell v. Black,* 27 N. C., 469; *Lawrence v. Pitt,* 46 N. C., 348; *Dozier v. Grandy,* 66 N. C., 484; *Jones v. Haggard,* 108 N. C., 181; *Paul v. Carter,* 153 N. C., 28; *Watson v. Sullivan, ib.,* 248; *Poisson v. Pettaway,* 159 N. C., 652.

(337)

JOHN WEAVER v. GEORGE CRYER and SAMUEL MOORE.

From Hertford.

1. Erroneous process is a justification to the officer who executes it, but not to the person who sues it out.
2. An execution which issues on a judgment more than a year and a day old is erroneous only.
3. Where the officer and the plaintiff in an erroneous *fi. fa.* are jointly sued in trover for property sold under it, the former may show his justification under the general issue, although it be jointly pleaded. If, however, they had joined in pleading the justification specially, the plea would be bad as to both.
4. General reputation and cohabitation are evidence of a marriage in all cases except action for *crim. con.*

TROVER for cattle, in which the usual memorandum of "not guilty" was entered on the clerk's docket. On the trial before *Martin, J.*, on the last circuit, it was proved by the plaintiff that the cattle in dispute were levied on as the property of Bridget Weaver by the defendant Moore, who was a constable, and bought by the defendant Cryer, and that Bridget Weaver had before the levy sold them to the plaintiff. At the sale a woman who lived with the plaintiff claimed the cattle by a gift from Bridget Weaver; the plaintiff was present when this claim was made, and said nothing. The plaintiff also proved that it was generally reputed that the woman who lived with him was his wife. It appeared that he was a mulatto and that the woman was white.

The defendants offered in evidence a judgment in favor of the defendant Cryer against Bridget Weaver, rendered by a justice of the peace on 7 June, 1823, and a writ of *fieri facias* thereon, written on the same paper, directed to the defendant Moore, and dated 30 August, 1824, which was returned levied on the cattle in dispute. His Honor rejected the evidence, thinking that an officer could not justify under
(338) process which issued on a judgment more than a year and a day old.

The counsel for the defendant requested the judge to instruct the jury that common reputation was not evidence of a marriage between the mulatto and a white woman, as the policy of the country forbade such connections. His Honor declined giving this instruction, but informed the jury that they were at liberty from reputation and cohabitation to infer a marriage.

A verdict being returned for the plaintiff, the defendant appealed.

Hogg for the plaintiff.
No counsel for the defendant.

HENDERSON, J. The judge erred, I think, in rejecting the evidence of the execution, as regarded the constable, for although issued upon a dormant judgment, yet it is a justification to the officer who acted in obedience to it. Nor does it vary the case that execution is on the same paper with the judgment, from which fact, on a bare inspection, he could discover that the judgment had been granted more than a year and a day before the execution issued; for *non constat* that there had not been an intermediate execution. Of these things the officer is not presumed to be a judge, his office being merely ministerial, and the issuing an execution, or rather the order to issue it, a judicial act, confided to another. But as to the plaintiff in the judgment, the execution is no protection to him. He acted as a wrongdoer in suing it out, and is liable for the acts of the officer who acted under it, the maxim being *qui facit per alium, facit per se*. Were this an action where such a defense could not be made under the general issue, but the party bound to plead it specially as a justification, I should feel some difficulty on the subject, for it is more certain upon authority that if two or more join in a plea of justification, if it be bad for one, it is bad for all. I (339) cannot, however, consider the short memorandum made upon the clerk's docket as anything but a mere intimation of the ground of defense, which the adverse party, by not refusing, receives in lieu of a formal plea; but if drawn out at length, which the plaintiff may cause to be done if he wishes, the matter is to be set forth formally. If by law, therefore, the justification may be good for one and not for the other, as it is in this case, the memorandum will be understood as a memorandum of a several plea. We are relieved, however, from decisively determining this question, as in this action the justification may be given in evidence under the general issue, which is, in its nature, a several defense, or rather, in joint actions, a several denial of the acts imputed to the defendants.

As we cannot grant a new trial to the officer without granting it to the other defendant—that is, if it be granted as to one, it must be granted as to both—let the judgment be reversed, and a new trial granted generally.

TAYLOR, C. J. It may be collected from the record that this appeal was brought up to ascertain whether the opinion delivered by the judge was correct. The opinion affirms two propositions: the one is that a constable cannot justify under process when the judgment on which the execution issued is dormant. The other is that a marriage between a

mulatto and a white woman may be proved by common reputation. This appears to be the controversy from the case made by the judge, though the record itself places the sale in 1820, three years before the judgment, and more than five before the execution. I conclude, therefore, that this statement is a manifest mistake.

(340) This being an action of *trover,* there was no necessity to plead the justification, for the facts relied upon to constitute it might have been given in evidence under the general issue. Nor, indeed, is it regular, in this action, to plead a justification, unless it admit the property to be in the plaintiff, and the conversion, but justifies the latter. Comyn's Digest, Pleader, E. 14.

It is therefore most fair to deduce the law from the facts of this case, rather than to decide on a question of pleading; for there the rule is that if two defendants join in a plea which is good as to one, but not as to the other, the plea is bad as to both, for when they put themselves on the same terms, the court cannot sever the plea and say that one is guilty and the other is not. Thus, if an officer plead separately under a writ of *fi. fa.* or other process, he need not state the judgment; but if he join in the plea with the plaintiff in the former action, and the judgment is not stated, the plea will be bad as to both defendants, unless the plaintiff in the former suit justify in aid of the officer. *Barker v. Braham,* 3 Wils., 376.

With regard to the first question, I take the law to be settled that an officer is bound to execute all precepts that are directed to him from a competent jurisdiction; and inasmuch as he may justify under an erroneous process, he is not at liberty to disobey it. The distinction is between void and voidable process—the latter, in all cases, affording protection to the officer. Thus, if a *ca. sa.* is taken out after a year, and the defendant thereupon arrested, and afterwards suffered to escape, debt lies against the officer, though the process was erroneously awarded, for it was sufficient to arrest him, and the sheriff may justify in an action of false imprisonment, and therefore cannot let him at large. *Bushe's case,* Cro. E., 188; *Sherly v. Wright,* Ld. Ray., 775. But with respect to the plaintiff in the judgment, as he sued out the execution irregularly, he cannot derive a title under the sale, so effected, though the except-

(341) tion could not be taken to it if a stranger had become the purchaser.

On the question of evidence I apprehend that the law was correctly stated; that general reputation and cohabitation are evidence of a marriage. It is so in all cases except in actions of *crim. con.* There ought to be a

PER CURIAM. New trial.

Cited: Dawson v. Shepard, 15 N. C., 498; *Skinner v. Moore,* 19 N. C., 155; *Stewart v. Ray,* 26 N. C., 271; *Rutherford v. Raburn,* 32 N. C., 146; *Harriss v. Lee,* 46 N. C., 227; *Jones v. Reddick,* 79 N. C., 292; *Williams v. Williams,* 85 N. C., 386; *Ripley v. Arledge,* 94 N. C., 471; *Spaugh v. Hartman,* 150 N. C., 456; *Walker v. Walker,* 151 N. C., 166.

JOHN PEEBLES v. JAMES GEE.

From Halifax.

Payments made on account of a debt are first to be applied to the interest which has accrued thereon; and this is the rule in cases where it is given by positive enactment, as well as where it is allowed by the jury in their discretion.

ASSUMPSIT for work and labor as an overseer. On the trial the plaintiff proved his services as an overseer for eight years. The defendant introduced an account in the handwriting of the plaintiff and indorsed by him, "Settlement between James Gee and John Peebles." This account, after showing the time of plaintiff's service and the terms per annum, together with sundry payments made by the defendant, exhibited a balance, exclusive of interest, of $740.62 due the plaintiff. The defendant then proved payments to the amount of that balance.

Daniel, J., instructed the jury that where partial payments were made upon bonds, bill, notes, or signed accounts, such payments are to be applied first to the interest, and, after its discharge, then to the extinguishment of the principal; because in these cases, the interest being given by law, the creditor has the same right to demand it as to demand the principal; and, therefore, when payments are made without any direction from the debtor as to their application, the creditor may (342) apply them as he pleases; and that hence such payments are always applied to that debt which does not bear interest. But that the present claim not being one on which the law allowed interest as a debt, the plaintiff had no right to demand it, although juries might and usually did give it. But that the payments made were to be applied to the principal, because that was the only debt existing at the time they were made; and that this application being made in the present case, by the law, they were not at liberty to apply them otherwise, and that if they found the whole principal to be paid, their verdict ought to be for the defendant.

A verdict being returned according to the charge of the judge, the plaintiff appealed.

No counsel for the plaintiff.
Badger for the defendant.

HENDERSON, J. The judge, in his directions to the jury, distinguishes between cases where the law reserves interest upon the contract and those in which the jury, in their discretion, may allow it. He decides that in the first case the law applies the payment primarily to the discharge of the interest, the balance of it, if any, to the extinguishment of the principal. In the second, that the law applies the payment to the principal alone; that the jury cannot make a different application, and that if the payments amount to the principal, the interest, being only incident and no part of the debt, is entirely lost.

I am not apprised of any such positive rule. If by law a debt bears interest, and a payment is made, the law applies the payment first to the discharge of the interest. If it is left by law to the discretion of the jury to give interest or not, according to the circumstances of the
(343) case, and a payment is made, the payment is to be applied to the interest, if the jury should allow it, in the same manner as if the law reserved interest upon the contract. Determine the fact that interest is to be paid, whether it arises from the imperative injunctions of the law or the discretion of the jury in the particular case, and the result is the same—the law applies the payment to the interest. It is unlike the case where a person is indebted in two debts, or two ways; there the debtor may apply the payment at the time of making it, as he pleases—*cujus est dare, ejus est disponere.* If he fails to direct its application, the right of doing so devolves upon the creditor. Not so in cases of the kind before us; the application is made by law, and depends upon the facts of the case. If there is interest due, it shall be first extinguished; and it is immaterial whether this fact is settled by law *a priori,* or allowed afterwards upon the adjustment of the account.

If the judge is correct, it would be in the power of a debtor, in such cases, to avoid payment of the interest by making a tender and bringing the money into court, for that amounts to a payment, and the creditor is bound to receive his debt, although he protests the whole time that interest is due, and refuses the sum tendered. Even after action brought, the net sum may be brought into court under the common rule and the same result obtained. I cannot believe that such is the law.

Much is conceded in support of the judge's opinion, to allow that there are in England any cases where it is imperative upon the jury to allow interest; and even here, although our act of 1786 declares that debts of a certain kind shall bear interest, yet neither that nor any other act declares at what rate interest shall be given. The act of 1741 prohibits the taking more than 6 per cent. Within that sum the amount to be allowed

is left to the agreement of the parties or the discretion of the jury. The law of England is the same as to the latter point and silent on the former. It is true, both with us and in England, that it follows (344) as a matter of course to allow interest in certain cases; but there and even here, in extreme cases, juries, under the directions of the court, have departed from this common custom. *Child v. Devereux,* 5 N. C., 398. It is, in our courts, a well-settled rule that interest shall be paid whenever the debt is ascertained, the amount known to the debtor and the time of payment fixed. In this case nothing was wanting but the signature of the defendant to bring it completely within the act of 1786. The account was stated, the balance struck, the paper indorsed as a settlement between the parties, and this all in the handwriting of the defendant. When our rule, before mentioned, shall have received the sanction of time, and a distinction shall be attempted between debts imperatively bearing interest and those which do or do not, according to the discretion of the jury, there will be no difficulty in classing such a debt as this. In England those cases in which interest follows of course had precisely the same beginning, and now its allowance is so well established that within a few years a jury is dispensed with, and it is referred to the clerk, upon a default, to ascertain the amount.

PER CURIAM. Error.

(345)

RICE B. PIERCE v. EDMUND MYRICK.

From Halifax.

1. In trespass for killing a slave, an outrage by the slave less than a threatened felony will justify the killing.
2. In such an action evidence of the slave's good character is admissible to repel the presumption of his improper conduct.
3. In trespass, where not guilty, and a justification are pleaded, and the jury find the first issue for the defendant, the rejection of admissible testimony pertinent to the latter only is not ground for a new trial.

TRESPASS for killing the negro of the plaintiff. The defendant pleaded "not guilty" and a justification.

On the trial before *Daniel, J.,* after giving in evidence circumstances from which the killing by the defendant might be inferred, the plaintiff offered evidence of the peaceable and submissive character of the slave, in order to rebut the presumption of such ill conduct in him as would justify the defendant in killing him, if the jury should infer that he was killed by the defendant. This evidence was objected to by the defendant and rejected by the judge.

His Honor instructed the jury that if the circumstances in proof before them rendered it probable to their minds that the defendant killed the negro, they should find for the plaintiff, unless they collected from those circumstances a reasonable inference that the slave was killed by the defendant to defend his person or property from some threatened felony.

The entry of the verdict was, "The jury find all the issues in favor of the defendant, and the defendant not guilty."

A rule for a new trial being discharged, the plaintiff appealed.

No counsel for the plaintiff.

(346) *Badger for the defendant.*

HENDERSON, J. The plaintiff has certainly no ground to complain of the charge of the judge, for it left the defendant very narrow grounds on which to rest his justification—too narrow, in the case of an outrage attempted by a slave.

As to the evidence of the general good character and orderly deportment of the slave, offered by the plaintiff and rejected by the judge, I think it should have been received to repel the presumption relied on by the defendant as a justification. It was relevant, as it tended in the absence of positive proof to throw light upon the subject and aid the jury in arriving at the most probable conclusion as to the circumstances under which the act was committed by the defendant, if in fact it was committed by him. But the plaintiff is not entitled to a new trial on that ground, because the jury, having found the defendant not guilty, the justification could not have been passed on by them. Although they have found all the issues in favor of the defendant (which is a very improper way of entering the verdict, as the facts in issue should be either affirmed or disaffirmed), yet they also find the defendant not guilty. We cannot impute to the jury the absurdity of saying that the defendant was justified in an act which they at the same time say he did not commit.

PER CURIAM. No error.

JOHN BARNES v. TURNER DICKINSON.

From Wayne.

DETINUE, tried before *Donnell, J.*, and after a verdict for the defendant, the plaintiff moved for a new trial upon the following grounds:

1. That one Cooke, who had been examined as a witness for the defendant, was interested in the event of the cause, and that this

interest was not discovered by the plaintiff until after th jury (347) had returned their verdict.

2. That the deposition of one Rebecca Hicks had been read for the defendant, which was in the handwriting of the witness Cooke.

3. That the witness Rebecca Hicks had declared to the plaintiff before the trial of the suit that she was illiterate and knew nothing of the contents of the deposition.

The defendant filed the affidavit of Cooke, the witness, who swore that the only way in which he was interested in the cause arose from the fact that his father was the bail of the defendant, and that his father was still alive. His Honor discharged the rule, and the plaintiff appealed.

Gaston for the plaintiff.
Badger for the defendant.

HALL, J. It does not appear that Cooke had such an interest in the cause as to render him incompetent.

As to what Rebecca Hicks told the plaintiff relative to her deposition, he had ample time to avail himself of it (if that could be done) on the trial; he might also then have objected to her deposition, because it was in the handwriting of Cooke, if that objection would have availed him. I think the judge did right in not granting a new trial for these reasons.

PER CURIAM. No error.

Cited: Taylor v. Vick, 16 N. C., 273; *Bible Society v. Hollister,* 54 N. C., 14.

(348)

ANDREW HOYLE v. THOMAS HUSON and others, devisees of MASON HUSON.

From Lincoln.

A devisor devised so much of his lands as his wife could cultivate, to her during her life or widowhood, and that his executors should rent out the residue of his cleared land until his children came of age, to take it in possession. The life estate having expired during the nonage of some of her children, it was *Held*, that those of age had a right to an immediate partition of the whole of the land devised.

PETITION for partition of land devised by Mason Huson, deceased, to his six children.

The will of Mason Huson was attached to the petition and made part of it. By it the land of which partition was demanded was devised as follows: "I will that my wife, Mary Huson, shall have such a part of

my land as she with her children and negroes, which are left to her, can attend under crop annually, during her natural life or widowhood, and the balance of clear land I will that it be rented out annually by my executors until my children come of age, to take it into their own possession."

The petition charged that Mary Huson, the wife of the devisor, had married; that the plaintiff had purchased the interest of Elizabeth Huson, one of the devisees, and that Ridley Huson, another of them, had died intestate after the devisor.

No answer or plea was filed, but from the orders made in the cause in the court below it appeared that some of the devisees were infants when the petition was filed.

On the last circuit the cause was heard before *Norwood, J.*, upon the motion of the demandant for a writ of partition, when his Honor, (349) thinking that the devisor had carved out of the inheritance a term for years, which had not expired, and which vested in his executors, in trust for the maintenance of his children until the full age of the youngest, dismissed the petition, from which the demandant appealed.

Wilson for the demandant.
No counsel for the defendants.

HALL, J. The clause of the will on which the question in this case turns is as follows: "I will that my wife, Mary Huson, shall have such a part of my land as she with her children and negroes, which are left to her, can attend under crop annually, during her natural life or widowhood; and the balance of clear land I will that it be rented out by my executors until my children come of age, to take it into their own possession." It is stated that Mary Huson is since married; and I suppose it may be taken for granted that Elizabeth Huson was of full age when the petitioner purchased her interest in the land in question. Whether Ridley Huson died before or since that purchase is not stated. If since, the petitioner has no right to his share of the land. But I suppose the real question intended to be submitted is whether the petitioner has a present right to have partition, consistently with that clause of the will before recited.

The reason why the devisor directed the land to be rented out until his children came of age was that before that time they were presumed not to have sufficient capacity to manage it. Now, there was no one time when all the children came of age; that event happened at different periods. When one of them came of age, he or she thereby acquired capacity to manage his or her property, and that one had no concern in

point of interest whether the others were minors or not. The land was to be divided amongst them, and it made no difference with the minors whether the one that was of age managed his property or not. It is not stated in the case that the land undivided yielded more to each claimant than it would do when divided. Nor is there an appro- (350) priation made of the rents and profits of the land for any particular purpose, or for any particular time, so as to prevent a partition as the children severally arrived at maturity. Again, suppose one of them to be of age, and others of them of very tender years; it may be ten or fifteen years, or perhaps a longer time, before the one of age could be let into the possession of his land, although the infants would not be at all benefited by a continuance of the tenancy in common. Much injury might, in such a case, be done to the elder branches of the family, and no possible benefit could result to the younger. I therefore think the petitioner has a right, at the present time, to have partition made as prayed for in the petition.

PER CURIAM. Reversed, and judgment that partition be made.

Cited: Hoyle v. Stowe, 13 N. C., 318.

NATHAN HAMRICK v. FRANCIS HOGG.

From Rutherford.

1. Moral turpitude in the defendant is necessary to charge him in an action for a deceit.
2. Where the defendant, in an action for a deceit in the sale of a slave, had been informed that the slave was unsound, if he does not credit the fact, he is not bound to disclose it.

CASE for a deceit in the sale of a female slave. On the trial it appeared that the negro had belonged to one Rutherford, who died intestate in 1819. Letters of administration upon his estate did not issue until January, 1823, when the defendant, being appointed administrator, took the personal property into his possession and sold the negro in dispute to the plaintiff, in February, 1823, at public auction. During the interval from Rutherford's death until the appointment of the de- (351) fendant, the negroes belonging to the estate had been hired out under an order of the county court. The plaintiff proved by the person who hired the negro for the year before the sale, that in the first part of that year her health was very bad, and that she was unable to work, but that in the latter part of it she was better, and rendered him some serv-

ices; that when he returned the slave to the defendant, in January, 1823, he informed the defendant of this sickness, and on that account claimed a deduction from the hire. The witness also swore that at the same time he offered to keep the slave until the sale, which was then advertised, on the same terms he had given for the year which was then just past.

Norwood, J., instructed the jury that if they believed the defendant, at the time of the sale, had forgotten the information given him by the witness as to the health of the negro, they ought to find for him. But if they collected from the testimony that such information had been given, and not forgotten by him, and that he did not communicate it to the plaintiff, his disbelief as to the truth of the information would not exonerate him from liability, which would depend on the fact whether the negro was well or not.

A verdict being returned for the plaintiff, the defendant appealed.

Attorney-General and Devereux for the plaintiff.
No counsel for the defendant.

HENDERSON, J. This action is founded on a fraud; to support it, there must be either a fraudulent misrepresentation or a fraudulent concealment. It is not sufficient that the representation be false in point of fact; the defendant must be guilty of a moral falsehood. The
(352) party making a representation must know or believe it to be false, or, what is the same thing, have no reason to believe it to be true.

Concealment *ex vi termini* imports a knowledge of the thing concealed; for a person cannot be said to conceal that which he does not know, and silence as to a fact which the party does not believe to exist cannot be said to be a fraudulent concealment. I cannot therefore agree with the judge below, that the defendant was bound to declare, and was guilty of a fraud if he did not declare, that which he did not believe to exist, although he had been told that it did exist. It should have been left to the jury to say whether the defendant had a knowledge of the unsoundness of the negro.

I disturb this verdict with great reluctance, because I believe it meets both the law and the justice of the case.

PER CURIAM. New trial.

Cited: Stafford v. Newsom, 31 N. C., 510; *McIntyre v. McIntyre,* 43 N. C., 299; *Gerkins v. Williams,* 48 N. C., 13; *Tarault v. Seip,* 158 N. C., 370; *Pritchard v. Dailey,* 168 N. C., 333.

LEMUEL MOORE v. JOSEPH MOORE.

From Rutherford.

1. Between brothers, administration will be committed to the one most interested to execute it faithfully.
2. The county court has power to revoke letters of administration issued during the same term, and to grant them to another.

THE County Court of Rutherford on the first Monday of March Term, 1827, ordered that letters of administration upon the estate of Rebecca Flecher should issue to Lemuel Moore. The next day those letters were revoked, and administration committed to Joseph Moore. On an appeal to the Superior Court, it appeared that George Moore, the father of the present parties, died in 1817, leaving a will, of which he appointed his sons Lemuel and Joseph executors; by it he directed his estate to be equally divided between his four children, of whom Rebecca Flecher was one. Property of the testator came to (353) the hands both of Joseph and Lemuel, the former of whom had settled with the legatees, but the latter had refused to account for the assets which came to his hands, and a petition was pending against him, filed by Joseph, Rebecca, and James, the other child of George Moore. Rebecca Flecher had been dead two years; she left children, but no one had applied for letters of administration upon her estate.

Norwood, J., affirmed the judgment of the county court, and awarded a writ of *procedendo,* whereupon Lemuel Moore appealed to this Court.

Wilson for the appellant.
No counsel for the appellee.

HALL, J. Both the County and Superior Courts have appointed Joseph Moore the administrator of Rebecca Flecher, deceased; and in the absence of all evidence in the case, this Court would see no reason why he ought to be removed and another appointed. But from the evidence which accompanies this case abundant reason is shown why he ought not to be removed.

The rights of the next of kin of Rebecca Flecher are more likely to be legally adjusted where they are identified with similar rights claimed by Joseph Moore, both of which are to be examined and decided on in the petition now pending between him and Lemuel Moore.

The circumstance that Lemuel had been previously appointed at the same term is not of itself a sufficient objection to the appointment of Joseph. It admits of two answers: first, it does not appear that Joseph

had previous notice of the intended application; second, all the days of the term are considered as one, and everything is in the power of the court during its continuance.

PER CURIAM. Affirmed.

(354)

JOEL ESTES v. PETER HAIRSTON.

From Stokes.

1. A *certiorari* being intended as a substitute for an appeal, can only be allowed on the same terms as are prescribed in relation to appeals.
2. *It seems* an assignable contract can only be assigned by writings on some part of the same paper which contains the contract.

GASTON and Badger moved for a *certiorari* to bring up the record of case lately pending in STOKES between Hairston as plaintiff and Estes as defendant. The petition of Estes stated that Hairston brought suit by attachment against the petitioner, who was on his way, with a considerable number of slaves, from Virginia to Tennessee; and while passing through the county of Stokes his negroes were attached, and before he could procure bail and replevy them the expenses of their maintenance while in the custody of the sheriff amounted to $1,400. At Autumn Term, 1826, of the court below the cause was tried, and a verdict found against the petitioner for nearly $10,000; and a motion being made for a new trial and overruled, the petitioner prayed an appeal; but the sum being large, and he in a strange country, was unable to procure security. The petitioner then set forth the efforts he had made, by sale or mortgage of his estate, to procure the security, and his inability to accomplish it; that he was advised injustice had been done him by the verdict, and that the judge erred in his decisions at the trial, and hence his exertions to find security had been continued without intermission. In the meantime, Hairston having proceeded against petitioner's bail, and being about to obtain judgment against them, petitioner had recently surrendered himself in their discharge, and was now in execution for the judgment. The prayer of the petitioner was for a *certiorari* to issue without security.

(335) To the petition was appended a copy of the case, made up by the presiding judge below, from which it appeared that the plaintiff declared, as assignee of Robert Hairston, upon a written agreement, in these words: "Memorandum of an agreement made between Robert Hairston and Joel Estes and W. and E. W. Estes, all of the county of Pittsylvania, Virginia. The said Hairston agrees to sell the

said Estes his crop of tobacco at the following plantations (naming them), estimated at between 60,000 and 80,000 weight, for which said Estes agrees to give the said Hairston $10 per hundredweight, payable at or before 1 December next. The tobacco to be delivered by 25 April next." This agreement was executed in Virginia, in March, 1818, when the parties resided in that State. The assignment under which the plaintiff claimed to sue on the contract was not indorsed thereon or attached thereto, but was written on a separate paper, and executed in Stokes County, North Carolina, 4 December, 1822. By this instrument, Robert Hairston assigned to Peter all his interest "in and to a certain instrument of writing relative to a tobacco contract, signed, etc." (describing it), and also "appointing him the attorney in fact of Robert, to sue in his (Peter's) name, and recover to his own use, etc."

It was insisted by the defendant's counsel that the contract declared upon was not assignable in North Carolina, whatever might be the law of Virigina, and that no assignment made here could enable the plaintiff to sue in his own name, and also that if the contract were assignable, yet the interest therein could not be transferred by a writing on a separate paper entirely detached from the contract intended to be assigned.

But the presiding judge (*Daniel*) was of opinion against the defendant on both points, and the plaintiff had a verdict.

On hearing the petition of Estes, with the accompanying affi- (356) davits, and the case made by the judge below, the Court were clearly of opinion that the judge had erred, and said, even if the contract were assignable, the position could not be maintained that such assignment could be made on a detached paper. It must appear on the same paper on which the contract to be assigned is written, though it is not material on what part of the paper, whether on the face or the back.

HENDERSON, J. The only difficulty seemed to be how to get the case before the Court; that it was a clear case for a *certiorari;* but the Court doubted its power to dispense with security, though if the Court possessed the power it would feel no hesitation to exercise it, as the petitioner's case seemed to be one of hardship and oppression. A few days after,

TAYLOR, C. J., informed the counsel that he and his brothers had considered the case, and were of opinion that security must be required; that the *certiorari* is merely a substitute for an appeal, where the party has been deprived of the benefit of the latter by accident, etc., and is intended to place the party in the same situation as if he had obtained his appeal. But as the law is imperative that no appeal shall be granted without security, the *certiorari* which is substituted for the appeal must be subject to the like condition. He added that the Court had reluc-

tantly come to this conclusion, being very desirous to aid the petitioner, whose situation seemed to render it very difficult to procure surety, and whose case demanded relief.

It was thereupon ordered that a *certiorari* issue, and a special writ to the sheriff, commanding him, on security being given for the *certiorari*, and that fact certified to him by the clerk of the court below, that he should admit the petitioner to bail and discharge him out of custody.

Cited: *Collins v. Nall,* 14 N. C., 227; *Chastain v. Chastain,* 87 N. C., 284.

Distinguished: *S. v. Warren,* 100 N. C., 493.

(357)

STATE v. WILLIAM G. YOUNGER and RICHARD I. COOK.

From Rutherford.

1. A combination by two or more to any unlawful act, or one prejudicial to another, is indictable at common law as a conspiracy.
2. A combination by two to cheat a third person, by making him drunk and playing falsely at cards with him, is indictable at common law.

THE defendant was tried before *Norwood, J.,* upon the following indictment:

"The jurors for the State upon their oath present, that William G. Younger and Richard I. Cook, on, etc., at, etc., did combine, conspire, confederate, and agree, to and with each other, to cheat and defraud one P. D. out of his goods and chattels, and in pursuance of the aforesaid agreement, so as aforesaid between them had and made, the said W. G. Y. and R. I. C. did, at, etc., cause and procure the said P. D. to be intoxicated, and did then and there propose to him, the said P. D., to play at a game of cards for money. By means whereof the said W. G. Y. and R. I. C., by falsely, fraudulently, and deceitfully playing at the game of cards with him the said P. D. for money, they the said W. G. Y. and R. I. C. did then and there cheat and defraud him, the said P. D., out of the sum, etc. And so the jurors aforesaid, upon their oath aforesaid, do say that the aforesaid W. G. Y. and R. I. C., by means of the aforesaid combination, conspiracy, confederation, and agreement, so as aforesaid, between them in manner and form as aforesaid had and made, him the said P. D. of the aforesaid sum, etc., of the goods and chattels of him the said P. D. then and there, in manner and form aforesaid, by falsely, corruptly, and deceitfully playing and gambling at the game of cards

aforesaid, falsely and deceitfully did cheat and defraud, to, etc., and against the peace and dignity of the State."

After a verdict for the State the defendant moved in arrest of judgment upon the ground that the facts set forth in the indictment did not constitute any offense at common law. His Honor overruled the motion and gave judgment for the State, upon which the defendants appealed. (358)

Attorney-General for the State.
No counsel for the defendants.

TAYLOR, C. J. It is to be decided in this case whether the facts set forth in the indictment, and which are affirmed by the finding of the jury, constitute an indictable offense at common law. The charge in substance is that the defendants conspired together to defraud and cheat the prosecutor out of his goods; and to accomplish that end they procured him to be intoxicated, and engaged him to play at cards, when they fraudulently cheated him out of $300. Conspiracy was anciently confined to imposing by combination a false crime upon any person, or conspiring to convict an innocent person by perjury and a perversion of the law. But it is certain that modern cases have extended the doctrine far beyond the old rule of law, and it has long been established that every conspiracy to injure individuals, or to do acts which are unlawful, or prejudicial to the community, is a conspiracy, and indictable, as where divers persons confederate together by indirect means to impoverish another; or falsely and maliciously to charge a man with being the reputed father of a bastard child; or to maintain one another in any matter, whether it is true or false. *S. v. Poll,* 8 N. C., 442, sec. 2. Playing at cards for money is in itself unlawful, and where two persons conspire together to make an unlawful act the means of doing an injury to or impoverishing another, it is stronger than many of the cases which have been held indictable. Even a bare conspiracy to do a lawful act, to an unlawful end, has been held indictable, though no act was done in consequence thereof. 8 Mod., 321. The conspiracy to do the act constitutes the offense, though if an individual only were concerned the offense must have been complete before the indictment would lie. The line of distinction is accurately marked in *Wheatly's case,* 2 Burr., 1125, between cheats perpetrated by an indi- (359) vidual, and which can only be effected by false tokens, and a conspiracy between two or more to commit the like offense. The indictment was at common law, and against a brewer, for that he, intending to deceive and defraud A. W. of his money, falsely, fraudulently, and deceitfully sold and delivered to him 16 gallons of amber for and as 18

gallons of the same liquor, and received 15 shillings as for the 18 gallons, knowing there were only 16 gallons." The Court were clearly of opinion that the offense was not indictable, but only a civil injury, for which an action lay to recover damages. *Lord Mansfield* said it amounted only to an unfair dealing, and an imposition on this particular man, by which he could not have suffered but from his own carelessness in not measuring it; whereas fraud, to be the object of criminal prosecution, must be of that kind which in its nature is calculated to defraud numbers, as false weights or measures, false tokens, or where there is a conspiracy. There are various instances of convictions in the books for cheats, in their nature private, and without false tokens, but they were indicted as conspiracies; nor could the indictments have been sustained without this circumstance. *Regina v. McKarty,* 2 Ld. Ray., 1179; 2 East P. C., 823. There is a very strong case in 1 Mass., 478, where the defendants were indicted and convicted of a conspiracy to cheat the prosecutor out of his goods by obtaining credit for them on the false assertion that they were about to set up a retail store. No motion was there made in arrest of judgment. Upon the whole, I think this indictment sustainable on common-law principles, and that it describes a complicated offense much more aggravated than many of the cases in the books on which convictions have taken place; for here is a cheating by means of conspiracy—making the prosecutor drunk, and playing at cards.

PER CURIAM. Affirmed.

Cited: S. v. Brady, 107 N. C., 826; *S. v. Howard,* 129 N. C., 660, 665; *S. v. Van Pelt,* 136 N. C., 640, 644.

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(360)

STATE v. ARCHIBALD JOHNSON.

From New Hanover.

The act of 1825 was passed to prevent the transportation of slaves by persons having those facilities to do it which a connection with a ship gives. The act of concealing a slave on shipboard, with the intent to carry him from the State, by a person having no connection with the ship, is not within the mischief. An indictment on the statute, which did not charge the prisoner to be in any way connected with the ship in which the slave was concealed, was held to be fatally defective.

THE prisoner was tried upon an indictment consisting of four counts, upon the first and third of which only he was convicted.

The first count was as follows:

"The jurors for the State, upon their oath present, that Archibald Johnson, late of New Hanover, on the twenty-first day of February, in the year of our Lord one thousand eight hundred and twenty-seven, he the said Archibald Johnson then being within this State, on board a certain vessel called the *Sally Ann,* with force and arms, in the county of New Hanover, feloniously did conceal, on board the said vessel, a certain mulatto slave named Frederic; the said mulatto slave then being the property of a citizen of this State, to wit, the property of one Edward B. Dudley, without the consent in writing of the said Edward B. Dudley, the owner of the slave, previously obtained, with the intent, and for the purpose of carrying and conveying the said mulatto slave out of this State, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

The third count was exactly like the first, with the exception that it charged that the prisoner "did convey on board," instead of "did conceal on board."

After verdict, *Ruffin, J.,* upon a motion in arrest of judgment, delivered the following opinion, which is extracted from the case sent to this Court:

"But the court, considering the indictment, doth deem it insufficient to authorize sentence of death upon the prisoner, because it charges only that the prisoner being in this State, on board a certain vessel called the *Sally Ann,* but without charging that he was the master (361) or the cook, or a mariner of some other description, then on board as such. From the whole act taken together it is thought to extend only to seafaring persons, and those belonging or attached to the particular vessel to which the slave is conveyed or in which he is concealed, and not to embrace even seamen forming the crew of another vessel, much less mere landsmen, though they may convey and conceal a slave in a vessel, and, in so doing, may get upon or into the vessel, so as to be literally on board of her. Casual, or wrongful, or temporary personal presence on board does not either create the temptation or present the facility for executing the crime of which the statute enacts the punishment. Only a permanent occupation of the vessel as a matter of right or duty, either as commanding or serving the ship, or controlling the cargo, or taking passage for a voyage, accompanied with actual personal presence in conveying, receiving, or concealing the slave, is such a being on board as is within the meaning of the act. This indictment, although it follows the words of the statute, by alleging that the prisoner being on board, etc., contains no averment of the capacity in which he was thus on board; so that he might have been a landsman, or belong to another ship, and gone on board the *Sally Ann* only to convey the slave, remain-

ing only to conceal him, and then left the vessel. Such a case is covered by this indictment. So that the innocence of the prisoner, so far as respects the felony created by this statute, is consistent, and may well stand with the averments of the indictment, inasmuch as, for aught appearing to the contrary, he may be a mere stranger to the *Sally Ann.* As his connection with the vessel must be proved by extrinsic evidence to bring his case before the jury, within the meaning of the statute, it is equally necessary that this indictment should aver the fact to
(362) which such evidence is applicable, and for want of such averment the guilt of the prisoner is not affirmed by the verdict. For this reason the court doth arrest the judgment."

From this judgment the solicitor appealed.

Attorney-General for the State.
No counsel for the prisoner.

TAYLOR, C. J. The act of 1825, on which this indictment is framed, is amendatory of the act of 1792, on the same subject, the principal defect of which seems to have been that it made it criminal only in the master or commander of any ship or vessel trading within this State to carry out of this State or to conceal on board for that purpose any slave the property of a citizen of this State.

Now, the offense might often be perpetrated by persons belonging to the vessel, without the knowledge or privity of the master, whose vessel might thus be made subservient to the felonious carrying away the property, without any criminality in him. The same danger did not exist with regard to persons not belonging to the vessel; for it was not probable that they could carry away, or conceal, in the vessel of another, this kind of property. The mischief to be guarded against was that of some person belonging to the vessel, besides the captain, committing the act. The law accordingly is extended to the mariners, or any other person or persons trading or being within this State. There are frequently on board vessels from the northern and eastern States persons who bring articles for sale, and dispose of them on board, who are not, strictly speaking, mariners, though they may occasionally assist in working the vessel. They are nevertheless attached to the vessel, and have as much facility as the master or mariners to commit the offense. That
(363) the Legislature meant only to include persons attached to the vessel is apparent, I think, from the consideration of the objects of the act, following the same clause, where they drop the words "trading or being within the State," and say "person or persons on board any such ship or vessel"; so that, connecting the words together, they would read, "if any master of any ship or vessel, mariner, or any other person,

trading or being within the State, on board of any such ship or vessel." From which I think it follows that the indictment ought to have described the prisoner as one of the persons attached to the vessel, against whom the penalty of the law is denounced, and that the reasoning of the judge who tried the cause leads to the conclusion that the judgment ought to be arrested.

PER CURIAM. Affirmed.

Cited: *S. v. Stanton,* 23 N. C., 430; *S. v. Pickens,* 79 N. C., 654.

STATE v. JOSEPH WEIR.

From Cabarrus.

1. An accomplice is a competent witness for the prosecution on the trial of his associate.
2. When a bill of sale is introduced *as a forgery* for the purpose of supporting the credit of a witness, the subscribing witness need not be produced on the trial.
3. Where on the removal of a cause the transcript does not state either the appointment of a foreman to the grand jury or a motion for the removal, they may be inferred from the other entries on the record.

AN indictment against the prisoner for grand larceny was found in the Superior Court of LINCOLN, which, on the affidavit of the prisoner, was removed for trial to Iredell County. Upon the cause being called in the Superior Court of Iredell, it was removed again, on the affidavit of the prisoner, to CABARRUS, where it was tried on the last circuit before *Norwood, J.* (364)

The transcript from Lincoln did not state that a foreman to the grand jury had been appointed. The entry, after stating the term, and the judge who held the court, set forth that "the following grand jury was impaneled, sworn, and charged, to wit, A. B., foreman, etc., who returned a bill of indictment, etc." The indictment was also indorsed, "A true bill. A. B., foreman." Neither did the transcript from Lincoln set out any motion made by the prisoner for the removal of the cause to Iredell; but his affidavit of those facts upon which such orders are usually made was copied into and formed a part of the record.

On the trial the solicitor introduced a witness in behalf of the State, one Jones, who was objected to by the prisoner on the ground that he was an accomplice. His Honor, however, overruled the objection, and the witness was examined before the jury. He swore that while one

Kennedy and himself were at the house of the prisoner, making preparations to carry off several stolen negroes, the prisoner gave them the form of a bill of sale for a slave, and directed them to draw by that form four others; that Kennedy accordingly drew four bills of sale to him, the witness, each for a slave, signed them as an attesting witness, and put two other names to them, as witnesses also; that these bills of sale were given to the prisoner, without any name being to them as a vendor; that the prisoner took them, and in about three hours returned them with the name of John Moore signed as the vendor. After the examination of Jones, the solicitor offered, for the purpose of supporting his testimony, to read to the jury the four bills of sale. The counsel for the prisoner objected to the introduction of these papers unless they were proved by the subscribing witnesses. This objection was also overruled by his Honor, and the papers were read to the jury.

After a verdict for the State, the counsel for the prisoner obtained a rule for a new trial on account of the introduction of incompetent testimony; which being discharged, they moved in arrest of judgment (365) for the following reasons:

1. Because the record did not show that a foreman to the grand jury had been appointed by the Superior Court of Lincoln.

2. Because it did not appear upon the record that the cause was removed from Lincoln on the motion of the prisoner.

The presiding judge overruled the motion, and awarded judgment of death; from which the prisoner appealed.

Attorney-General for the State.
No counsel for the prisoner.

TAYLOR, C. J. On the first question arising on the motion for a new trial as to the competency of Jones, the decision of the Superior Court was in conformity to the principles of the common law and the long-established course of practice in this State. In deciding upon the competency of a witness, the court can exclude him only after conviction of an infamous offense or for direct interest in the event of the cause. The confession of guilty, simply, without a conviction, is not sufficient to render a man legally infamous; for a copy of the judgment, as well as the conviction, must be produced; and therefore the testimony of an avowed accomplice may, in all cases, be taken, even though an indictment has been found against him for the offense respecting which his evidence is admitted. Hawkins, B. 2, ch. 46, sec. 94. Allowing the partakers in the crime to convict their companions in guilt was introduced in the room of the old custom by which they were allowed to become approvers, in that the court exercised a discretionary power

whether to admit them or not; but they are bound to admit accomplices, even though they have received a promise of pardon, (366) or are entitled by some statute to claim a reward on the prisoner's conviction. Wills, 425; Hawkins, P. C. B. 2, ch. 46; 4 Black. Com., 330. The accomplice may entertain a hope of pardon, if he make a free disclosure, and therefore he must have some interest in the conviction of the offender. This may affect his credit with the jury, but does not take away his competency. It is now settled that his evidence may be left to the jury, who, if they believe him, may convict the prisoner.

With respect to requiring proof of the pretended bills of sale by a subscribing witness, that was impossible to be effected, for Kennedy put his own name as one witness, and signed the name of two other persons, before there was any signature by a feigned vendor. They were introduced as forgeries incapable of being proved as genuine instruments, and offered only to show the probability of Jones's evidence.

The first reason in arrest of judgment is that the record does not show that the Superior Court of Lincoln appointed a foreman to the grand jury. To this objection the record furnishes an answer that there was a foreman to the grand jury, as appears both from the list of their names and his indorsement upon the bill of indictment, and he could be appointed only by the court; and as it is further stated that the grand jury was impaneled, sworn, and charged, we cannot be ignorant that the court had previously appointed a foreman. So with respect to the objection that the prisoner made no motion to remove the case from Lincoln: the prisoner made a strong affidavit for the removal, and it was ordered by the court. On all the grounds, I think the conviction is right.

PER CURIAM. Affirmed.

Cited: *S. v. Haney,* 19 N. C., 398; *S. v. Cowan,* 29 N. C., 245; *S. v. Stroud,* 95 N. C., 632; *S. v. Register,* 133 N. C., 754.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1828

(367)

Den ex dem. ARTHUR WALKER and wife v. FEN and SAMUEL GREENTREE.

A judge of the Superior Court has power to continue a cause upon the condition of reading absolutely the deposition of a resident witness; and the party accepting the terms cannot on the trial insist upon the production of the witness.

EJECTMENT, tried on the last term of WILKES, before *Donnell, J.*

At the term before the trial the defendant had applied for a continuance, which was granted upon condition that several depositions then filed in the cause, and among them that of one Ford, should be read absolutely. On the trial the deposition of Ford was offered by the lessor of the plaintiff and objected to by the defendant upon the ground that the witness being a resident of this State, the judge who made the order had no power to impose upon the defendant the terms of permitting it to be read absolutely. The presiding judge overruled the objection, and a verdict being returned for the lessors of the plaintiff, the defendant appealed.

Gaston for the lessors of the plaintiff. (368)
No counsel for the defendant.

HALL, J. Whether it was right to continue the cause upon the terms of reading absolutely on the trial the depositions filed, and among them that of Ford, is a question not open for us to decide. It was a matter solely within the discretion of the judge who made the order. It does not appear that in making it he has violated any rule of law. His opinion may have been formed upon a variety of circumstances wholly unknown to us. We must therefore say that the rule for a new trial should be discharged.

PER CURIAM. No error.

CONSTANTINE D. LADD v. PETER HAIRSTON.

From Stokes.

An appeal lies to the Superior Court from a judgment of the county court, upon a petition for a cartway.

PETITION originally filed in the county court, whereby the petitioner prayed that a jury be summoned to "lay off a cartway according to law, from, etc., over the lands of Peter Hairston, etc."

A jury returned their verdict, laying off the way according to the prayer of the petition, and a judgment of confirmation was rendered in the county court, from which the defendant appealed to the Superior Court.

On Fall Circuit of 1827, *Strange, J.*, upon the motion of the petitioner's counsel, dismissed the appeal, holding that since *Wood v. Hood,* 4 N. C., 126, the Superior Courts had no jurisdiction to revise such orders of the county courts.

(369) From this decision the defendant appealed to this Court.

Nash for the defendant.
No counsel for the petitioner.

HALL, J. In *Hawkins v. Randolph,* 5 N. C., 18, it was decided that an appeal would not lie to the Superior Court from an order of the county court concerning a public road. By the act of 1813, Rev., ch. 862, an appeal is given in such cases, but nothing is said either by the Court in *Wood v. Hood,* 4 N. C., 126, or by the Legislature in that act, respecting private ways or cartways, jurisdiction of which is given to the county courts by the act of 1798.

In *Wood v. Hood, supra,* it was held that a petition for a cartway so far resembled a petition for a public road that an appeal would not lie from a decision made on it, before the passage of the act of 1813, and that the act gave an appeal.

I think the act of 1813 does not give an appeal with respect to cartways, etc., but is confined altogether to public roads. In the present case the appeal is proper under the act of 1777, it being a contest between two individuals, and it does not fall within the reasons upon which an appeal was refused with regard to public roads.

The judgment of the Superior Court dismissing the appeal must therefore be reversed, and the cause remanded.

PER CURIAM. Reversed, and writ of *procedendo* ordered.

Cited: Burden v. Herman, 52 N. C., 355.

(370)

DAVID SHELTON v. CHARLES YANCY.

From Granville.

The purchaser of a slave at auction, where the terms were that bond and surety was to be given before the property passed, obtains a title, although the bond of another person is taken for the purchase money.

REPLEVIN for a negro, and on the trial it appeared that one Field being indebted to the plaintiff, it was agreed between them that Field should purchase at an auction to be held by one Epperson, the negro in dispute, and the plaintiff was to take him in discharge of his debt. Field applied to the defendant to bid off the negro for him, which was done; after the slave was cried off, the defendant requested he might be charged to Field, but Epperson refused to do this, and directed that he should be charged to the defendant, who observed that if he was to be held responsible for the negro he would hold on to him. The terms of the sale being that bond and surety should be given for the price of the negro before the property was changed, Field applied to the plaintiff to become his surety, who declined. A similar request was then made by Field to the defendant, who consented, upon condition that he should be discharged at the next county court, to sit within a few days. After Field had given surety, he delivered the negro to the plaintiff as his property, in the presence of the defendant, and received a discharge to the amount of the value of the negro. After this delivery the defendant said to the plaintiff that the negro was to be his (the defendant's) unless he was released from his suretyship for Field at the next county court; to which the plaintiff assented. Field wholly neglected to release or to indemnify the defendant, whereupon he took the negro in his possession. There was no evidence that the plaintiff was present at the time Field agreed to indemnify the defendant. Neither was there any evi-
dence that the negro was delivered to the defendant or was in his (371)
possession before the taking for which the action was brought.

Daniel, J., charged the jury that the legal title to the negro vested in the defendant, upon his bidding him off and the price being charged to him. That if the defendant delivered the negro to the plaintiff, either under an agreement between the defendant and Field, or the plaintiff and defendant, or Field and the plaintiff, as the property of the plaintiff, the title thereby vested in the plaintiff, and he was entitled to a verdict. But if Yancy insisted on retaining the title to the negro until he was indemnified on account of his responsibility for Field, and only delivered the negro to the plaintiff to keep until he was indemnified, then the title did not pass to the plaintiff upon the delivery to him, but remained in the defendant, and he had a right to retake the negro, upon Field's

neglecting or refusing to indemnify him. Under this charge the jury returned a verdict for the defendant, and the plaintiff appealed.

Nash for the plaintiff.
Badger and W. H. Haywood contra.

PER CURIAM. The charge of the judge below was correct, and the judgment must be affirmed.

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(372)

FRANCIS WARD v. HORACE ELY.

From Washington.

1. In articles for the purchase of land, whereby the purchaser covenanted to pay in notes "such as he would be responsible for," the covenant binds him as a guarantor.
2. A deposition must be sealed up by the commissioners so as to prevent inspection and alteration; it need not be certified under the seals of the commissioners.

COVENANT upon articles for the sale of land, the material part of which is as follows: "And I do agree to make the payments in the following manner: one-third on 1 March, 1820, in your own (the plaintiff's) notes or cash, one-third on 1 March, 1821, in notes of hand such as I will be responsible for the payment of," with a stipulation precisely similar as to the residue of the purchase money. The breach assigned was that the defendant had refused to pay the amount of a note made by one Blount, payable to him, and by him delivered to the plaintiff, in discharge of one of the two last installments of the purchase money.

On the trial the defendant offered in evidence a deposition "taken in the city of New York, and a caption stated that ——— attended on the part of the plaintiff, and S. B. C. and A. R. as commissioners on the part of the defendant. The deposition was taken by said C. and R., who were named commissioners in the said commission, but was not certified under their seal or seals." The presiding judge refused to let the deposition be read. It was proved that Blount was insolvent when the note was delivered to the plaintiff, and that his insolvency was then known to the defendant.

Martin, J., instructed the jury to inquire whether the amount due upon Blount's note would be lost to the plaintiff unless made good to him by the defendant, and "if they should be of opinion it would
(373) be lost, they were then to inquire whether the loss was owing to the laches and want of due diligence on the part of the plaintiff,

or whether it was owing to the insolvency or want of ability in Blount to pay. If the former, they ought to find for the defendant; if it was owing to the insolvency of Blount, they ought to find for the plaintiff." Under this charge a verdict was returned for the plaintiff, and the defendant obtained a rule for a new trial, (1) because the judge erred in rejecting the deposition; (2) on the ground of misdirection. The rule being discharged and judgment rendered on the verdict, the defendant appealed.

Hogg for defendant. (374)
Devereux for plaintiff.

HALL, J. The plaintiff's remedy upon the covenant does not depend upon the question whether he has used all the diligence in applying to Blount for payment, and in case of nonpayment in giving notice to the defendant, which the law requires of an indorsee of a negotiable instrument before he can maintain a suit against the indorser. Strict diligence in both respects is held to be indispensable in the mercantile world, and indeed was required of every person (whether merchant or not) who became a party to such instruments, until *Brittain v. Johnston, ante,* 293.

If the plaintiff is held to such diligence in this case, it was unnecessary for him to procure the covenant from the defendant upon which he has brought suit. That covenant, I think, has withdrawn the parties from the strict rules applicable to negotiable papers, and placed them upon the plain, inartificial principles of justice and common sense—principles which in the eyes of plain, untutored men are not obscured by any technicalities or refinements.

The defendant covenants that he will deliver to the plaintiff notes of hand such as he will be responsible for the payment of. With respect to Blount's note, which was one thus transferred, the court directed the jury that "if they should be of opinion that it would (375) be lost through Blount's insolvency, they were to inquire whether the loss was owing to the laches and want of due diligence on the part of the plaintiff, or whether it was owing to the insolvency or want of ability in Blount to pay. If the former, they ought to find for the defendant; if it was owing to the insolvency of Blount, then they should find for the plaintiff." Under this charge (properly given, as I think) the jury found a verdict for the plaintiff. I see nothing in the law or justice of the case that ought to disturb it.

There is another ground on which a new trial is moved for, that is, the rejection of the deposition. Why the deposition was not taken by the commissioners chosen by both parties does not appear. No reason is assigned, nor is any reason given why the persons named in the com-

mission ought not to have taken it. As far as appears, they stood indifferent between the parties.

It is stated further that the deposition was not certified under the seals of the commissioners, which the commission directed. If by this is meant that seals were not affixed to their names, I cannot think the objection a good one, if from their certificates it appears that they acted in the character of commissioners. When the deposition was taken it was their duty to return it to court with the commission under seal; it certainly was not to be sent open, subject to be inspected or altered by anybody. I could wish that this part of the case had been more fully stated. The deposition may be of importance to the defendant. I think it right that there should be a new trial, therefore, on account of its rejection.

PER CURIAM. New trial.

(376)

SAMUEL SCOTT v. JOSEPH WILLIAMS.

From Davidson.

1. In questions of slavery or freedom a presumption of slavery arises from a black complexion, but none from that of a mulatto.
2. In questions of this kind the amount of damages is within the discretion of the jury, and where the plaintiff's mother, a free woman, had been indentured to the defendant's father, and the plaintiff given to the defendant as a slave, a direction to the jury that they might give substantial damages was held to be proper.

TRESPASS for an assault and battery and false imprisonment, the object of the suit being to ascertain whether the plaintiff, a negro held in slavery by the defendant, was not in truth free. On the trial the plaintiff proved that he was the son of Jemima, who was the daughter of Jane Scott, and the question was whether Jane Scott was a free woman. Contradictory statements of her color were given, but the plaintiff introduced an indenture whereby Jemima was bound to the father of the defendant as a free girl of color. The plaintiff was given as a slave by the defendant's father to him, and resided with and served the defendant from the time of the gift to that of the trial.

His Honor, *Daniel, J.*, instructed the jury that the first question for them was whether Jane Scott was a free woman, and in ascertaining that fact her color might enter into their consideration. If she was of a black African complexion, they might presume from that fact that she was a slave; if she was of a yellow complexion, no presumption of slavery arose from her color. His Honor further informed the jury that if their

verdict should be for the plaintiff, they might, if they pleased, give him more than nominal damages.

A verdict with substantial damages was returned for the plaintiff, and a rule for a new trial being discharged, the defendant appealed.

Gaston and Badger for the defendant. (377)
Hogg contra.

HALL, J. How far the charge of the judge in this case will admit of verbal criticism is not my province to inquire; but that it is plain and perspicuous, so as to be readily comprehended by the jury, I think there can be but little doubt. They were told that they might consider whether Jane Scott was of a black complexion. If she was, they might presume from that fact that she was a slave; if she was of a yellow complexion, no presumption of slavery could arise from her color. This part of the charge has been found fault with in argument, because the jury were not instructed that they must presume that Jane Scott was a slave, if she was of a black African complexion. The judge, to be sure, in more harsh, dictatorial terms, might have done so, but I think the difference would be verbal rather than substantial. When they were told that no presumption could arise from a yellow complexion, they must have understood the judge to mean that a presumption of slavery must arise from a black one. I think there is nothing solid in this objection. No doubt but that the attention of the jury was principally directed to the evidence offered as to the fact of slavery or freedom; and to that evidence the next objection made to the judge's charge makes it necessary to advert. It is argued that the damages ought to be nominal; that it was an action brought to decide a mere question of property between innocent persons. This may be the case; but the fact is that the mother of the plaintiff was indentured for a term of years, as a free girl, to the father of the defendant, and the plaintiff was put into the possession of the defendant by the father. It is true, the indentures to Joseph Williams, Sr., were not conclusive that Jemima was a free person; but it was a circumstance in evidence to the jury, and as they, under the charge of the court, (378) have found more than nominal damages, having a discretion to do so, under the circumstances of the case, I think it improper to grant a new trial.

PER CURIAM. No error.

Cited: S. v. Miller, 29 N. C., 276; *Nichols v. Bell,* 46 N. C., 34; *Creech v. Creech,* 98 N. C., 160.

WILLIAM HUMPHREYS v. JOHN R. BUIE.

From Richmond.

1. Debt and not *assumpsit* is the proper remedy against the stayer of execution, when the judgment is dormant, and it lies against him without joining the principal.
2. Whether the seal of the justice is necessary to a valid judgment, *quære;* but the want of it, as an objection, is too late after verdict.

THE defendant was warranted in debt as surety for the stay of execution on a judgment against one Neil Buie. After a verdict for the plaintiff the defendant moved in arrest of judgment for the following reasons:

1. Because debt would not lie against a surety for the stay of execution.

2. Because of the nonjoinder of Neil Buie.

3. Because neither the original warrant or the judgment thereon nor the stay of execution were under the seal of the justice.

Norwood, J., arrested the judgment, and the plaintiff appealed.

Nash for the plaintiff.
No counsel for the defendant.

HALL, J. The first reason for arresting the judgment is that debt will not lie upon the defendant's liability as surety for the stay of the execution. Such suretyship is tantamount to a judgment, because exe-
(379) cution may issue upon it against the surety, and he is as much bound as the principal, and for that reason *assumpsit* will not lie against either in case the judgment became dormant. *Bain v. Hunt,* 10 N. C., 572.

The second objection is that debt will not lie against the surety without joining the principal in the action with him.

Laying aside any construction of the act of 1789, Rev., ch. 314, which in its spirit tends to the severance of contracts, it is to be observed that in the present case there was not a judgment against two, but a judgment against one, and a liability of another for the same debt as surety. They were both bound, but not *eodem modo.* I therefore think that an action may be brought against either.

The third reason for arresting the judgment is that the justice's seal was not affixed to the warrant, judgment, or stay of execution upon which the action is brought. Whatever force there might have been in this objection, if taken at an earlier stage of the proceedings, it is sufficient now to say that it comes too late. It would be against the order of pleading and very inconvenient to suffer an objection to the evidence to

prevail after a case has been heard and decided upon its merits. The reasons in arrest of judgment must be overruled, and judgment entered for the plaintiff.

PER CURIAM. Reversed, and judgment for the plaintiff.

Cited: Barringer v. Allison, 78 N. C., 81.

MILLY WILLIFORD v. EDWARD CONNER.

From Robeson.

A creditor cannot seize property fraudulently conveyed, unless by virtue of his execution.

TROVER for a colt, and on the trial the plaintiff proved a sale and delivery of the property to her by one Barnes, and a subsequent conversion by the defendant. The defendant produced a judgment and execution thereon against Barnes and himself in favor of one Ward, (380) the date of which was prior to the sale to the plaintiff, and when that was made, the execution was in force and might have been levied on the property. There were circumstances in proof tending to impeach the sale to the plaintiff as fraudulent, but there was no evidence of the manner in which the property came into the defendant's hands.

Norwood, J., informed the jury that if the sale by Barnes to the plaintiff was fraudulent and void as to creditors, yet it was valid between the parties to it, and that a creditor could not avoid the sale by taking possession of the property fraudulently conveyed, but must levy his execution upon it, and that any other taking, however fraudulent the sale might be, rendered the creditor a trespasser and subjected him to this action.

The jury returned a verdict for the plaintiff, and the defendant appealed.

No counsel for either party.

HALL, J. The charge of the judge in this case was certainly correct. The statutes against fraudulent conveyances in favor of creditors can only be carried into effect by due process of law. If the sale of the colt in this case was fraudulent as to creditors, Ward's execution should have been levied upon it in the hands of the plaintiff. But the defendant had

no right to be a judge in his own cause, and seize upon it on that account. The sale between the parties was good and valid, and the defendant, in taking the property, acted as a wrongdoer.

PER CURIAM. No error.

Cited: Green v. Kornegay, 49 N. C., 69; *Moore v. Ragland,* 74 N. C., 347; *Bynum v. Miller,* 86 N. C., 564; *Peebles v. Pate,* 90 N. C., 353.

(381) (381)

JAMES S. BATTLE v. BLAKE and GREY LITTLE, administrators of GREY LITTLE.

From Edgecombe.

What is due diligence is a question of law, and where a guarantor was bound after a due course of law against the principal creditor, neglect to enter a judgment against bail after two *nihils* discharges him.

COVENANT upon a deed executed by the defendant's intestate, whereby he had assigned several notes to the plaintiff, and bound himself "for the money due on them, provided said Battle failed to get it after a due course of law." The breach assigned was "that the plaintiff had failed to get, after a due course of law, the money called for in a note made by one John Drummond," which was one of those assigned by the deed on which the action was brought.

On the trial the record of a suit against Drummond on this bond was introduced, in which, after many continuances and much unnecessary delay, as was contended by the defendants, a judgment was obtained upon which a *ca. sa. issued.* After a return of *non est inventus,* two writs of *scire facias* were issued, which were both returned *nihil,* when, instead of taking judgment against the bail by default, a third was issued, upon which Drummond was surrendered in discharge of his bail.

Martin, J., instructed the jury that the plaintiff was bound to that diligence which a prudent man would use in his own business, and left it to them to say whether he had used that diligence or not. A verdict was returned for the plaintiff, and the defendants appealed.

Gaston for the defendants.
Hogg contra.

(382) PER CURIAM. We think whether due diligence had been used in endeavoring to collect the debt from Drummond was a question of

law, as it arose in this case. We also think, as the plaintiff did not take judgment against Drummond's bail upon the return of two writs of *sci. fa.* instead of issuing a third, he did not use that diligence which the case required. Let the judgment be reversed, and a new trial granted.

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(383)

Doe ex dem. of DAVID and WILLIAM M. CLARK v. ROE, SAMUEL HYMAN and WILLIAM R. BENNETT.

From Martin.

In a will, real estate does not pass by the words "all my property and possessions, consisting of both personal and perishable," with the further expressions, "that they should pay my debts out of it, and the residue to, etc., to have and to hold to them, their heirs and assigns forever."

EJECTMENT, tried before *Daniel, J.*, on the last fall circuit. The lessors of the plaintiff claimed by descent from William Darlet, the defendants as his devisees, and the only question was whether the land of which he died seized passed by his will.

The case stated that Darlet being seized of a large real and possessed of a considerable personal estate, made and published his will, duly executed to pass land, which had been proved in the county court, and was in the following words:

"In the name of God, amen. I, William Darlet, of, etc., being weak, etc., but, etc., do hereby constitute and appoint this my last will and testament (revoking and disannulling others heretofore made by me), in manner and form following, viz.: Item, I give and bequeath (after the payment of my just debts) all my property and possessions, consisting of both personal and perishable, to my much esteemed friends, Samuel Hyman and William R. Bennett, both of, etc., and it is my will and desire that they shall pay all my debts out of it, and the residue to be equally divided between them, *to have and to hold to them, their heirs and assigns forever.* In testimony whereof I have hereunto set, etc."

Daniel, J., informed the jury that the lands of the testator did not pass by the will, but descended to his heirs. A verdict was returned for the lessors of the plaintiff, and the defendants appealed.

Gaston for the defendants.

Hogg and Badger, on the other side, were stopped by the Court.

TAYLOR, C. J. The only question in this case is whether by the words "all my property and possessions, consisting of both personal and perish-

able," given to the defendants, with the further expressions, "that they should pay my debts out of it, and the residue to be equally divided between them, to have and to hold, to them, their heirs and assigns forever," the lands of the testator passed. If these words were sufficient to pass them, a verdict and judgment should have been entered for the defendant; if not, the plaintiffs as heirs at law are entitled to recover. That the words property, possessions, or estate are sufficient, if not qualified by the context, to bear a narrower signification, to carry real
(384) estate, is well settled by many decisions; but it is otherwise if it appear from the context that personal estate only was in the contemplation of the testator. It is argued for the defendants that the testator meant, by words "both personal and perishable," as referred to "property and possesions," two distinct kinds of property, viz., real and personal, for that personal property is in its nature perishable, and therefore the last word would be redundant and unmeaning if not confined to personal property. It is, strictly speaking, true that all personal property is perishable, but our acts of Assembly have often mentioned personal property as perishable and unperishable, and have rendered the terms familiar in common use. Thus the act of 1723, ch. 15, empowers the executor to sell, by the directions of the court, so many of the unperishable goods as will pay and satisfy the debts; and the act of 1762, Rev. ch. 69, directs the guardian to dispose of such goods and chattels of the ward as may be liable to perish, consume, or be the worse for keeping. There is a similar division of personal property in the civil law. A book or a horse is called inconsumable, in opposition to corn, wine, money, and those things which perish, or are parted with in the use.

The case before us would resemble *Wall v. Langland,* cited from 14 East, 371, provided the words of the will had been property and possession, personal and perishable; for then, according to the principle of that case, the words "possessions personal and perishable" might have been taken cumulatively, and not as descriptive of the kind of property the testator intended to give. The words in that case were "property, goods and chattels," and the Court said they would not read the will "property, namely or viz., goods and chattels," but they would consider the word property as unrestricted and efficient to carry the real estate. The plain difference between the cases is that here the testator declares by
(385) the words "consisting of" what he meant by property and possessions, and leaves no ground for a different construction. There are many other words which, if standing uncontrolled or no specification made that personal property alone was meant by them, will be sufficient to pass real estate, as "all I am worth." *Haxtep v. Brooman,* 1 Bro. Ch., 437. So, "all that I possess, both in doors and out of doors." *Tolar v. Tolar,* 10 N. C., 74. But even the word estate, which by itself

is the most comprehensive one that can be used, will, when coupled with other words indicative of personal property, be so restrained. *Cliffe v. Gibbons,* 2 Ld. Raymond, 1324. Where there was a devise of the residue of effects, after a partial disposition of real and personal estate, it was held not to carry real effects. *Camfield v. Gilbert,* 3 East, 516. The case of *Timewell v. Perkins,* 2 Atk., 102, bears a strong resemblance to the one before us. The words of the will were "all my freehold lands in the tenure of the widow L, and the residue of my estate, consisting in ready money, jewels, leases, mortgages, etc., or in any other thing wheresoever or whatsoever, I give to A. B. or his assigns forever." It was held that the residue of the real estate did not pass to A. B., because the word estate is expressly confined to personals. In conformity with these authorities, the case of *Harris v. Mills,* 4 N. C., 149, was decided in this court. There the testator gave and bequeathed to his soon Hood Harris, and his four daughters who lived with him, all the rest of his estate, consisting of various articles too tedious to mention.

The intention of the testator to devise his land is argued from the words "to have and to hold, to them, their heirs and assigns forever," being applicable to lands. They are so, but there is nothing to show that he was aware of it, for his want of information on such a subject is apparent from the whole will. Upon the supposition that he intended to pass land, it cannot be inferred that he knew the import of these terms, when he knew not the proper terms to devise real (386) estate. It is also said that direction to pay the debts out of it is indicative of his intention; but that pronoun is properly applicable to the bulk of the things bequeathed, as if he had said, to be paid out of my personal and perishable property. Taking, then, the rule to be clear that the heirs at law are not to be disinherited, unless the testator's intention to do so can be collected from the words of the will, which must convey a necessary implication, I cannot doubt that the judgment should be affirmed.

PER CURIAM. No error.

Cited: Fraser v. Alexander, 17 N. C., 351; *Harrell v. Hoskins,* 19 N. C., 481; *Foil v. Newsome,* 138 N. C., 117.

Distinguished: Champion, ex parte, 45 N. C., 250; *Bunting v. Harris,* 62 N. C., 15.

BENJAMIN H. MARTIN v. JOHN W. WILLIAMS, administrator of ALEXANDER LATHAM.

From Beaufort.

An agent, who has given a receipt for a judgment and collected the amount of it, may be subjected in *assumpsit* for money had and received, without producing the judgment on the trial.

ASSUMPSIT for money had and received, and on the trial produced an accountable receipt given to him by the defendant's intestate, for a justice's judgment against one Bowen. He then proved by one Judkins that the amount of the judgment had been collected from Bowen and paid to the defendant's intestate. The witness was asked what had become of the judgment, and answered that it had been delivered to Bowen. The plaintiff's counsel admitted that he could not produce the judgment, and that no attempt had been made to enable him to do so; whereupon *Strange, J.,* ruled that Judkins' testimony could not go to the jury in the absence of the judgment, unless that absence was accounted for, and directed a nonsuit, from which plaintiff appealed.

(387) *Hogg for the plaintiff.*
Gaston contra.

PER CURIAM. The substantial justice of the case is that the defendant's intestate received the money claimed by the plaintiff, and received it to his use; it was also received on account of the judgment against Bowen, a fact which could not be more satisfactorily established by the production of the judgment. But we cannot be ignorant of a very prevailing custom in the country of surrendering magistrates' judgments to the debtor, upon their being paid; and in most cases it would be impossible ever to obtain possession of them again. Besides, the defendant ought not to insist upon the production of it, after he had acknowledged the receipt of it, and must consequently have put it into Judkins' possession.

Let the judgment below be reversed.

JAMES TYLER v. JESSE HARPER.

From Randolph.

1. Single magistrates have jurisdiction far balances due upon executed contracts, for which debt or *indebitatus assumpsit* will lie, but they cannot give damages for the breach of an executory contract.
2. Where the defendant covenanted to pay a certain price per hundred for carrying goods, and to deliver a certain quantity, but delivered less, it was *Held*, that a justice of the peace had no jurisdiction as to that part of the contract which had not been performed.

THE plaintiff warranted the defendant for work and labor in carrying goods from Petersburg to Randolph County, and on the trial a letter from the defendant to the plaintiff was read, of which the following are the material parts:

"It is understood that I am to furnish you with 5,000 weight and pay you $1.50 per hundred, etc. All that remains for me to say is on the subject of the time for you to be in Petersburg. Mr. H. (388) and myself have set from the 1st of October to the 5th (1823) for our goods to be landed there, and I shall expect you there at that time. We allow five days for fear of some disappointment."

The plaintiff then proved that he, in pursuance of these instructions, went to Petersburg with two wagons, where he arrived on 3 October, 1823, and waited until the 7th, when the defendant's agent refused to pay his expenses or to give him more then 1,500 pounds to bring to Randolph, with which he left Petersburg, although he could have carried 6,000. A payment of $36 was admitted by the plaintiff.

The counsel for the defendant objected that the case was not of a kind over which a single magistrate had jurisdiction, but *Norwood, J.*, overruled the objection, and instructed the jury that the plaintiff was entitled to a verdict, which being returned accordingly, the defendant appealed.

Nash for the defendant.
Wilson contra.

TAYLOR, C. J. This is a warrant brought to recover the price of wagoning merchandise from Petersburg, according to a contract contained in a letter from the defendant to the plaintiff, in which the defendant undertakes to furnish the plaintiff with 5,000 pounds at a stipulated price per hundred. The defendant proceeded to the place, together with another wagon, which he had hired, and after several days detention was furnished with only 1,500 pounds, being about a fourth of the amount the wagons could have brought with convenience. For

the wagonage of the goods actually brought the defendant has overpaid the plaintiff, but as the latter has sustained damage, and been put to expense, by not being supplied with the quantity he had prepared to bring, he is manifestly entitled in justice to compensation for his (389) loss. The only question is, Can he recover it in this form, or must he resort to an action? An inspection of all the acts conferring jurisdiction on justices out of court shows that the Legislature designed only that they might take cognizance of such matters as were liquidated between the parties or might be reduced to certainty by some standard furnished by them, or one of familiar application. It is remarkable that in the first act of 1777, down to the act of 1794, the nature of the jurisdiction in regard to money contracts is described by the same words, "all debts and demands (of so many pounds and under), where the balance due on any specialty, contract, note, or agreement, or for goods, wares, or merchandise sold and delivered, or for work and labor done." All the acts contemplate that upon such debts and demands there must be a balance due, whether it arises from a specialty, contract, note, agreement, or the other enumerated causes of action. The evident meaning was to comprehend two classes of cases, such as the action of debt would have lain for before its disuse as to simple contracts; that is, for a sum of money due by certain and express agreement, where the amount is specific, and does not depend on any subsequent valuation to settle it; in which case the action of debt operates as a specific execution of the contract, whether the debt arise by specialty or a verbal agreement to pay a certain price for a certain parcel of goods. Secondly, that class of cases which could not be specificially performed, because the price of the goods, or the value of the labor, was not previously ascertained, but of which an estimate might be formed near enough to mark the demand as within the jurisdiction—those cases, in short, for which *indebitatus assumpsit* is brought to recover damages for the nonperformance of the contract. But there are cases of "specialty, contract, and agreement" by the violation of which a man may be injured to an amount perhaps less than the juris- (390) diction of the justice, who is nevertheless without the power to afford him redress. If a man covenants to go to a certain place by such a day, or not to exercise a trade at a particular place, and is not at the place at the time appointed or carries on his trade at the restricted place, these are breaches of his covenant, and may perhaps be to the loss of the covenantee. So in the case of a simple contract or agreement: if a builder undertakes to build a house for A within a time limited, and fails to do it, A can recover no satisfaction before a magistrate for the injury sustained by such delay; nor can the covenantees in the cases first put. The reason is plain, for although there

is a demand, there is no balance due, nor any certain rule or fixed standard by which alone the policy of our law will allow an individual to measure the injury sustained; it is a fit subject for the communication of many minds—in short, for the determination of a jury. A strong legislative exposition of these acts is furnished by the act of 1794, Rev., ch. 414, by which jurisdiction is first given to magistrates of contracts for specific articles. The value of all articles at the time they ought to have been delivered was of easy ascertainment; the creditor could assert beforehand the amount due him upon the contract, at least within a small sum. Yet it had been a question which for time immemorial was submitted to a jury; such is our habitual reverence for that institution, that though the summary jurisdiction is convenient to the country, the transfer of it was late and relunctant. What should be the proper estimate of damages in this case is a subject peculiarly fit for the consideration of a jury. The magistrate has allowed the amount of what would have been the carriage of 5,000 pounds, deducting the $36 paid by the defendant; wheras the labor and risk of returning with 1,500 pounds was less than with 5,000 pounds. On the other hand, it may be thought that the plaintiff is entitled to an allowance by way of demurrage for the time he was detained in Petersburg. This is mentioned to show the uncertainty of the rule by which dam- (391) ages are to be estimated. The result of the whole is that in my opinion the demand on this warrant is not within a single magistrate's jurisdiction, and that the judgment should be reversed and a new trial granted.

PER CURIAM. New trial.

Cited: Mann v. Kendall, 47 N. C., 193; *Webb v. Bowler,* 50 N. C., 363.

LOVETT BELL v. THOMAS BALLANCE.

From Beaufort.

Goods were sold to be paid for in notes, the vendee agreeing to take them back if not good. *It was held,* (1) That the insolvency of the payers authorized the vendor to return them immediately, and that upon tender and refusal he was remitted to his contract for goods sold. (2) That a justice of the peace had jurisdiction, notwithstanding the guarantee. (3) That the tender was good, although the vendor had parted with the notes, and got possession of them solely for the purpose of making the tender, under an engagement to return them again.

BELL *v.* BALLANCE.

THIS was a warrant in which "the sum of $25 due by account to his damage $10" was claimed by the plaintiff.

On the trial it appeared that one Bishop, as agent for the plaintiff, sold to the defendant a rifle for $25, who paid for it in a note made by John Warner, Joseph Warner, and Anthony Oneal, payable to one Farris, and also in a judgment against one Robert McKay, and agreed to take them back in case they could not be collected, and either return the rifle or pay the plaintiff $25. It was proved that at the time of the bargain both the Warners were dead, and their estates insolvent; that Oneal had moved away, and had not been heard of for some years, and that McKay was entirely insolvent. One Carrow proved a tender of the notes and judgment by the plaintiff to the defendant, before
(392) the warrant was issued, when the defendant refused to take them, affirming that he had dealt with Bishop, and had nothing to say to the plaintiff. Another witness, one Colson, proved that the plaintiff had passed the judgment against McKay to him; that it was in his possession the day the tender was made, and that the plaintiff, on that day, applied to him for it, and upon receiving it gave him an acknowledgment binding himself to return it to him.

Donnell, J., charged the jury that in order to entitle the plaintiff to recover he must either demand payment of the parties to the note and judgment or show a reasonable cause to excuse it, and that he must also prove a tender of the notes and judgment to the defendant. His Honor informed the jury that the death or insolvency of the parties to the note and judgment was a sufficient reason for not applying to them, and that if they believed the witness Carrow, a sufficient tender in law had been made by the plaintiff, and it was a matter of indifference in what relation the plaintiff stood to the witness Colson, or what were his liabilities to him, provided he had the note and judgment ready to deliver to the defendant if he would accept them.

A verdict was returned for the plaintiff, and the counsel for the defendant moved for a new trial on the ground of misdirection; which, being refused, a motion was then made in arrest of judgment, the subject-matter of the suit not being within the jurisdiction of a single justice of the peace; which being refused, and judgment rendered upon the verdict, the defendant appealed.

Hogg for the defendant.
Gaston contra.

(393) TAYLOR, C. J. The warrant in this case states a demand which in amount is within the jurisdiction of a magistrate, and this ought to appear in every case; but if upon the evidence the subject-

matter is shown to be without his jurisdiction the objection may be availed of at any time. The objections raised to the plaintiff's recovery are that his action for the sale of the rifle is extinguished and his remedy is on the undertaking to take back the notes. I apprehend the rule to be that where a particular mode of payment is agreed on, which is not complied with, the plaintiffs may sue on the original contract of sale, after the term of credit expired; as in *Brooke v. White,* 1 New Rep., 330. There goods were sold on two months credit, to be paid for by a bill at twelve months; and the goods not being paid for after the expiration of fourteen months, the vendor recovered in an action for goods sold and delivered. It was insisted in that case that the plaintiffs ought to have declared upon a special contract, for not having given the bill agreed upon; for that where anything is agreed to be done besides the mere payment of money the contract is not a sale, but a special agreement. But the Court said that if the bill be not given, he may bring an action on the special contract, because he is deprived of the particular security agreed upon; but when the whole time is expired, and no bill has been given, he may bring an action for the money which is then due. After the expiration of the period of credit it is of no use to give the bill, for the party is then entitled to receive his money. The qualified mode of payment being introduced for the benefit of the purchaser, while the contract is executory, an action must be brought on the special agreement; when it is executed, an action may be brought for the price of the goods. I understand the substance of the contract between these parties to have been that the defendant bought a rifle from the plaintiff for $25, for which he agreed to give him a note of Warner's and Oneal's, originally payable to Farris, together with a small judg- (394) ment against McKay. These papers the defendants promised to take back if they were not good, and restore the rifle or pay the money. Whenever, therefore, the plaintiff was able to show that the papers were not good, he might tender them to the defendant, and bring an action for the money. Some cases have been cited for the defendant to establish the point of extinguishment of the action for the price of the rifle; but on a careful examination of them they all appear to me to be decided on a distinct ground. *Whitlock v. Van Ness,* 9 Johns, 409, presented the question whether the seller of a horse, agreeing to receive the note of a third person payable in six months for the price, and the note not being paid, can recover against the purchaser. It was decided that he could not, because the circumstances of the case show that the seller considered himself as taking the note at his own risk, and the purchaser not indorsing it or guaranteeing it, clearly declined pledging his own responsibility. The opinion given is entirely consistent with the plaintiff's right to recover on the original sale, if the note had been taken

at the risk of the purchaser and had not been paid. *Breed v. Cooke,* 15 Johns, 241, turns on the same principles, and shows that if on the sale of the goods the vendee delivers to the vendor the promissory note of a third person, which he refuses to indorse, it is to be considered as payment, and the vendor cannot afterwards resort to the vendee, unless the note was forged, or there was fraud or misrepresentation on his part as to the solvency of the maker. The only question in the case was whether the note was a payment, and it being held to be so, the contract was of course at an end; no action of any kind could be brought. But if the note had not been a payment, the plaintiffs might have recovered for the property sold. The other case cited of *Pierce v. Drake,*
(395) 15 Johns., 475, proves only that if the vendor of goods is induced to take the promissory note of a third person as payment by a fraudulent representation of the solvency of that person, the note is no satisfaction, and he may maintain an action against the purchaser for the price of the goods. If the plaintiff in this case had taken the note and judgment at his own risk, this action would not have been sustainable, for the contract then would have been extinguished by performance.

The magistrate then had jurisdiction of the claim, and the nature of the inquiries necessary to be entered into as a defense to the claim cannot oust that jurisdiction. For though it has been held, and I think rightly, that the act giving jurisdiction to the magistrates excludes cases which sound in damages for the breach of a special agreement, yet if they have the jurisdiction of the principal subject of the cause it must draw after it the incidental matters of defense. A different principle would lead to the grossest injustice by giving to plaintiffs advantages which they would not have if they had brought a suit. In this view the defendant could not set off a judgment recovered in court against a debt claimed by warrant, because the justice could not take cognizance of a sum so large. Or suppose the parties had submitted all matters in dispute to arbitration, and the submission was by bond, the penalty of which exceeded the magistrate's jurisdiction: if the award had found a sum due to the defendant after crediting the plaintiff's account it would be unjust to allow the plaintiff to recover in the face of the award. On this part of the case nothing can be added to what was said by *Henderson, J.,* in *S. v. Alexander,* 11 N. C., 186: "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."

As to the charge of the court on the subject of diligence, it appears to me to have been highly favorable to the defendant, and requir-
(396) ing more from the plaintiff than the circumstances of the case duly considered could warrant. The defendant agreed to take

the papers back if they were not good, and as two of the parties to the note were certainly dead, and the other probably so, or had removed away—the party to the judgment insolvent as well as the parties to the note when it was given—it would have been sufficient to have ascertained these facts by a proper inquiry, and then to have returned the papers in a much shorter time than the plaintiff took. No injury or loss could arise to the defendant by the act of the plaintiff, for the papers were of no value when he received them.

In relation to that part of the charge which is connected with the alleged tender, and the law arising from Carrow's evidence, I think it was correct, since the defendant disavowed having anything to do with the plaintiff, when asked to take back the papers. *Read v. Goldring*, 2 M. & S., 85, is much in point. Nor can I perceive any incorrectness in the tender of the judgment if made, and this the jury have decided upon, for it was authorized by Colson delivering it to the plaintiffs. I am of opinion that the judgment should be affirmed.

PER CURIAM. No error.

Approved: Skinner v. Moore, 19 N. C., 156; *Adcock v. Fleming, ib.,* 227; *S. c., ib.,* 472.

(397)

THE PRESIDENT AND DIRECTORS OF THE STATE BANK v. JOHN HINTON and SAMUEL C. BRAME.

From Franklin.

1. The attachment laws are to be strictly construed, and the plaintiff must perform all the conditions required to entitle him to the benefit of them. Hence he must not only give bond and make affidavit, but must see that they are returned.
2. A plea is not bad for duplicity which alleges several facts dependent upon each other, tending to one point and triable upon one issue. Therefore, a plea in abatement to an attachment, averring that a bond and affidavit were not taken or returned, is good upon general demurrer. And it seems that an averment that no bond, etc., were taken, and the said bond, etc., so taken were not returned, is equivalent to an averment that they were not taken and returned, and that the repugnancy does not vitiate.
3. But the plaintiff having made affidavit and given bond, which the justice neglected to return, had leave to withdraw his demurrer and file them *nunc protunc.*

ORIGINAL ATTACHMENT commenced in the county court. The defendants filed special bail and pleaded in abatement as follows:

"And the said J. H. and S. C. B. in their own proper persons come and defend the wrong and injury which, etc., and pray judgment of the

said original attachment of the said president, etc., because they say that the justice of the peace of the county, etc., who granted the said original attachment did not before granting the same, to wit, on or before, etc., take bond and security of the said president, etc., for whom the said attachment was issued, or of their attorney, or agent, or factor, or any person whatsoever, payable to them the said J. H. and S. C. B. in double the sum of which complaint is made, to wit, in the sum of, etc., besides interest, etc., for satisfying all costs which shall be awarded to them, the said J. H. and S. C. B., in case the president, etc., shall be cast in this suit, and all damages which shall be recovered against the said president, etc., in any suit or suits which may be brought against them for wrongfully suing out the said attachment, and return the said bond so taken, together with the affidavit of the said president, etc., or of their attorney, etc., subscribed by them or him, with their or his proper name, to the court of pleas, etc., to which the said original attachment was returnable, to wit, to the court of, etc., and this the said J. H. and S. C. B. are ready to verify. Wherefore, because the said original attachment has been issued without bond and affidavit
(398) taken and returned as aforesaid, they the said J. H. and S. C. B. pray judgment of the original attachment, and that the same may be quashed."

To this plea the plaintiffs demurred generally, and the demurrer being overruled, the plaintiffs appealed to the Superior Court. On the last circuit *Martin, J.,* at the request of the counsel on both sides, *pro forma,* affirmed the judgment, and the plaintiffs appealed.

Badger for plaintiffs.
W. H. Haywood for defendants.

TAYLOR, C. J. The attachment law introduced a mode of proceeding unknown to the common law, and may operate injuriously in cases where the defendants reside in other governments and obtain no notice of its issuing. The case, therefore, furnishes additional reasons for the application of the rule of common law that the provisions of such statutes shall be strictly pursued and be so construed as to enforce on the plaintiff a compliance with those requisites which are provided for the security of the defendant. The making affidavit and giving bond are conditions precedent to granting the attachment; and returning the
(400) bond and affidavit to court are of consequence to the defendant to enable him to see how far the plaintiff has entitled himself to the attachment, and to obtain a compensation against him if it be wrongfully sued. Indeed, there is no law in the statute-book which more imperiously demands a strict construction, for the property of an

absentee may be all sold upon an attachment wrongfully sued out before he is apprised of the proceeding, and if then he should discover that no bond and affidavit were taken and returned, his remedy must at best be very imperfect. I take it, therefore, that the law, having imposed on the plaintiffs the duty of giving bond and seeing that it is returned with the affidavit to court, has made these three facts one condition, on which alone the plaintiffs can issue an attachment, and I apprehend that it will appear that separating them for the purpose of pleading will lead to a construction which destroys the text of the act, and tends to the elusion of its provisions.

Upon the demurrer to the plea of abatement the plaintiff has first objected to it on the score of duplicity. The proposition is this, that it is not allowable to plead several facts, either of which, if true, would be sufficient to abate the attachment. But this is correct in this sense only, that is, when the matters pleaded are distinct and unconnected with each other. This is shown by the cases cited of the two outlawries, or the two excommunications, that have no connection with each other, and either is sufficient to abate the action. Bac. Ab., title Abatement, P. It is shown still more decisively in the cases cited from 2 and 3 Johns., in the first of which the defendant pleaded a discharge under the act of insolvency; the plaintiff replied, setting forth all the grounds on which the discharge is made void by the act, in the words of the act. On demurrer the replication was held to be bad because the plaintiff had not specified the particular fraud on which he meant to rely. It
was not necessary that all the grounds of fraud should concur to (401)
avoid the discharge, for the act had given that effect to each of
them severally. So in the other case, to a similar plea, the plaintiff replied three distinct and independent grounds to avoid the discharge, which would require several distinct points to be put in issue. These replications were very properly held to be defective, on account of duplicity. I have examined all the other cases cited, to which I have access, and they all proceed upon the same ground, that the facts relied upon are separate and independent of each other, and that each, if true, would form a good defense. This is a sound rule of pleading, for it would be embarrassing to have as many issues as there were facts relied upon, when the trial of one would decide the question.

But the rule is very different where the several facts pleaded have a dependence on each other, where the whole form one point or one defense. Thus it is laid down, "If a man allege several matters, the one not having any dependence on the other, the plea is accounted double; but if they be mutually depending on each other, then it is accounted as only single." Sys. of Pl., 198. So it is said that "If one plea contain divers matters in it, upon which an issue may be taken, yet this plea is

not double if it could not have been good without alleging those matters in it. For although the law does not allow captious pleas, yet it will not delay the defendant to plead all such matters that the case affords for his just defense." *Ibid.*

I cannot understand that there is any limitation to the number of facts a man may rely upon in his plea, if they all converge to one point and may be tried upon one issue. If a man is sued upon an obligation, he may plead that he was illiterate, that it was falsely read to him, besides that it was delivered as an escrow, and the conditions not
(402) performed. All these do not make his plea double, for they may be tried on one issue, *non est factum.* Sys. of Pl., 200. The position is confirmed and illustrated by the modern cases. Thus in *Robinson v. Bayley,* 1 Burr., 316, the defendant in trespass pleaded a right in common for his cattle, *levant* and *couchant.* The plaintiff replied that they were not his own commonable cattle, *levant* and *couchant.* The defendant demurred specially, because the replication was multifarious; but the court held the replication good, the rule being not that issue must be joined on a single fact, but on a single point, and that it was not necessary that this single point should consist only of a single fact. And in a case which approaches nearly to this in principle the defendant demurred to the replication, assigning for cause that the plaintiff, by the replication, had attempted to put in issue three distinct facts, the act of bankruptcy, the trading, and the petitioning creditor's debt. The court held that these three facts connected together constituted but one entire proposition, and that the replication was good. Steph. on Pl., 274. In truth, it is difficult to find a special plea that is not made up of a variety of facts, all, however, tending to and making parts of the same point of defense.

The point in controversy here is whether the plaintiff has entitled himself to the attachment. The defendant says he has not, because no bond and affidavit are taken and returned. If these facts are traversed in the replication, and are found in favor of the plaintiff, he has done all that the law required, and it will appear to the court that he is entitled to the attachment. There is no other way of showing it to the court, and a different rule of pleading would have a manifest tendency to dispense with those safeguards which the act has placed around the property of absentees. It appears to me that the defendant is clearly entitled to call on the plaintiff to show that he has done all the
(403) law requires to entitle him. The consequences of a different doctrine may be of a most serious kind to defendants so situated. Suppose the defendant selects one fact, viz., that no affidavit has been returned to court, and the plaintiff takes issue upon it, and it is found against the defendant: the jury must assess damages, and the judgment

is peremptory that the plaintiff recover. Yet in such case no bond may have been filed; the attachment may have been sued out most injuriously, and the defendant's property taken from him under color of law, without the chance of redress. Let the consequences be traced, likewise, upon the supposition that the defendant relies upon the plea that no bond has been given and returned, which is found against him, although the affidavit be filed.

In whatever light I see this question, it seems to me that the taking the bond and its return with the affidavit constitute one point or qualification for the plaintiff to prosecute the attachment; that if he was sued for suing out the attachment maliciously, he would be bound to aver them, inasmuch as the act has connected them together.

As to the repugnancy, in whatever form the plea has been drawn, it is quite evident that the pleader meant to present the objection furnished by the act of 1777, that a bond had not been taken and returned; that the justice did not take a bond, and the bond which the act requires to be so taken was not returned. It is the separating the taking of a bond from the return of it that has created the apparent incongruity; for if the plea had simply stated that no bond was taken and returned, it would have been unexceptionable. Comparing the plea with the act of Assembly, no doubt can exist of the object and design of it. On the whole, we think the justice of the case may be obtained by giving the plaintiff leave to withdraw the demurrer and file the bond *nunc pro tunc*. If the bond and affidavit, heretofore taken,* be not returned, the demurrer must be overruled. (404)

PER CURIAM. Let the plaintiff withdraw his demurrer and file his bond and affidavit *nunc pro tunc*.

Cited: Skinner v. Moore, 19 N. C., 145; *Hall v. Thornburn,* 61 N. C., 160; *Leak v. Moorman, ib.,* 169; *Askew v. Stephenson, ib.,* 289; *Carson v. Woodrow,* 160 N C., 147.

*It was stated in argument, and not denied, that the plaintiffs had made affidavit and given bond, but the justice of the peace had neglected to return them.

THOMAS SHEWELL v. AMBROSE KNOX.

From Chowan.

1. Per TAYLOR and HENDERSON, Judges: A general letter of credit addressed to no particular individual is not a guarantee, but a proposal for one, and notice of an advance on the faith of it must be given to the guarantor.
2. Per HALL, Judge: Such a letter is an absolute guarantee, and notice of an advance is unnecessary to charge the guarantor.
3. What degree of diligence a creditor must use to bind a guarantor, *quære.* But loss from neglect on his part is a matter of defense for the guarantor, and if not shown by him in the trial a new trial will not be granted simply because indulgence has been shown to the principal debtor.

ASSUMPSIT. On the trial on the Fall Circuit of 1826 plaintiff read the following letter:

"William G. Burgess and Josiah Jordan, of Elizabeth City, being desirous of entering into the commercial business, and W. G. Burgess for the purpose of purchasing goods for the said concern is about going to the north, and subsribers having been long acquainted with them, and having full faith in their honesty and integrity, recommend them as entitled to the confidence of merchants in Philadelphia, and are willing to hold themselves responsible for the payment of purchases made at this time, not exceeding the amount of $2,000. "WILL T. MUSE.

"This 30 September, 1822." "AMBROSE KNOX.

He then proved that in the month of October, 1822, in consequence of this letter, he furnished Burgess with goods to the amount of $2,740, at six months credit. The following letter was then put in and read (405) by the plaintiff:

"ELIZABETH CITY, 18 September, 1823.

"MR. THOMAS SHEWELL.

"SIR:—Your letter addressed to William T. Muse and myself, informing us of the nonpayment of the debt contracted with you by Burgess & Jordan, of this place, so far as we are bound on our letter of credit given them some time in the fall of 1822, was received by Mr. Muse, who, having since died, I am at this moment without any correct information as to the amount of your claim against the said B. and J. Mr. Burgess expects to be in Philadelphia in a very short time, and I understand the house has made a shipment of wheat to your place, which I calculate is intended for the liquidation of the debt for which the late Mr. Muse and myself are responsible. The object of this letter is to request of you to use your best endeavors to obtain a full payment from Mr. B. for your claim against B. and J., or, in failure thereof, im-

mediately to transmit to some attorney here the amount and voucher of your claim, with directions to proceed on the receipt thereof to the enforcing of payment. My becoming responsible from motives of friendship to Mr. Jordan, of said firm, and hearing that a dissolution of partnership will take place, besides being very desirous of having their affairs, so far as I am responsible, settled, causes this request.

"I have also understood that a shipment of wheat has been made by them to New York, the proceeds of which, I doubt not, are now ready for their disposal, and perhaps you may make an arrangement with Mr. B. to obtain payment for your whole claim. Your immediate and particular attention will much oblige, Yours respectfully,

"AMBROSE KNOX."

Burgess was examined by the defendant, and proved that in (406) the fall of 1823 he shipped a quantity of wheat to New York and Philadelphia, nearly sufficient in amount to discharge the debt due the plaintiff; that directly after the shipment he went to the north, and called upon the plaintiff in Philadelphia, who informed him that his sureties had requested an action might be brought against him; that he stated to the plaintiff the shipment of wheat, and the utter impossibility of his doing anything until its arrival, or until it was lost, so as to enable him to call upon the underwriters; that he went on to New York, where he was arrested at the suit of the plaintiff, and was discharged upon delivering orders to the consignees of the wheat to pay the net proceeds of it to the plaintiff; that no directions were asked for by the plaintiff, or given by him, as to the application of those proceeds; that the wheat turned out to be damaged, and only netted $400, which was paid to the plaintiff, and that in the ensuing fall or winter the copartnership of Burgess & Jordan became insolvent.

Paxton, J., charged the jury that from the terms of the letter of guaranty the plaintiff ought to have given notice to the defendant that he held him responsible upon the guaranty. His Honor left it to them to say whether such notice had been given, and told them that if they inferred it from the letter of the defendant of 18 September, 1823, they ought to find for the plaintiff, as the notice was in law reasonable.

A verdict was returned for the plaintiff, and the defendant appealed.

Gaston for the defendant.
Hogg and Badger for the plaintiff.

HALL, J., dissenting. In this case it is objected to the plaintiff's recovery, that he did not give to the guarantors early notice that he looked to them for payment; and *McIver v. Richardson,* 1 Maule & Selwyn, 557, is relied upon. In that case *Lord Ellenborough* says there was only an

offer to guarantee, not a complete guarantee, and on that ground the case was decided. But in this case the guarantee is complete, and the parties so contemplated it, for it was their understanding of it that Burgess should procure the goods upon it before he returned, and in fact did so.

But the defendant Muse had notice that their guarantee was relied upon for payment; and this is evidenced from Knox's letter. At what time the notice was received does not appear. But the defendant thought it important; he had it in his power to show it, by producing the letter. This he has not thought proper to do. Besides, Burgess & Jordan resided in Elizabeth City, where, or near to which, it may be inferred that the defendant and Muse also lived; for Knox's letter bears date at that place, and it appears from that letter that Knox had a knowledge of their situation, when he informed the plaintiff of the shipment of the wheat as a means of payment. It may, therefore, be taken for granted that they had notice, and had it in their power to secure themselves against loss in case it was practicable.

It appears that the plaintiff made an effort to procure payment from Burgess in the fall of 1823, but failed in effecting it; that in that fall, or the winter following, Burgess & Jordan became insolvent.

(412) No objection was made on the trial, or evidence offered to show that an injury was sustained, either for the want of early notice to the guarantors that they were looked to for payment, or that the plaintiff had been guilty of neglect or laches in not endeavoring to procure payment from Burgess & Jordan.

This case is not to be tested by principles which govern negotiable instruments, but the principles of fair dealing and common sense. If no loss was sustained for want of early notice, such notice need not be proved. If no loss was sustained by not suing Burgess & Jordan, it was unnecessary to bring suit. This is established by *Warrington v. Furbor,* 8 East, 246; *Williams v. Collins,* 6 N. C., 47; *s. c.,* 4 N. C., 580; *Oxley v. Young,* 2 H. Bl., 613; *Peel v. Tatlock,* 1 Bos. & Pul., 419.

TAYLOR, C. J. This cannot be taken as a guarantee, but as a proposition for one, inasmuch as the address was general to the mercantile world, and not specific to any one individual; it was, therefore, incumbent upon the person who delivered goods upon the faith of the letter to give within reasonable time notice to the persons making the engagement. The guarantee became liable in point of law to make reasonable efforts to recover the money, and the guarantors became bound that those exertions should prove successful. That a notice was given at some time appears manifestly from the answer written to the plaintiff, in relation to the letter to Muse, by the production of which the defend-

ant might have shown when it was given, and the nonproduction of which furnishes a presumption that, in point of fact, the notice was given in due time.

The question whether due exertion would have procured satisfaction from the debtor, was not discussed in the court below, as may be inferred from the record; the propriety, therefore, of granting a new trial or of refusing it depends on whose duty it was to bring that subject before the court, and we think it was the duty of the defendant, for clearly it was a ground of defense, that due exertion had not (413) been made, and not the ground of charge that it had been made.

If the defendant can show that the debt has been lost through the plaintiff's neglect, it is an answer to this action, because the defendant undertook for no more.

As to the plaintiff's discharging one of the principal debtors, when arrested in New York, it must be taken for granted that no loss was sustained by the defendant, for he has shown none; the law does not in this case, as in negotiable instruments, require any specific acts of diligence, but puts the question on the broad and liberal ground of reasonable exertions, and loss through want of them. If we could collect from the case that these grounds of defense were offered to the court, and overlooked by it, we should be disposed for that reason to award a new trial; but this does not appear, and we must refuse it.

HENDERSON, J., concurred with the CHIEF JUSTICE.

PER CURIAM. No error.

Cited: *Farrow v. Respass,* 33 N. C., 174; *Crook v. Cowan,* 64 N. C., 753; *Straus v. Beardsley,* 79 N. C., 67; *Leach v. Flemming,* 85 N. C., 452; *Cowan v. Roberts,* 134 N. C., 421.

ALEXANDER S. MARTIN v. ROBERT MARTIN.

From Rockingham.

A decree in equity, directing a defendant to execute a deed and deliver possession of land, is a breach of a covenant for quiet enjoyment, and the fact that the decree is founded on notice to him, when he purchased, of an equity in the land, does not bar his action.

THIS was an action brought upon the covenant of quiet enjoyment contained in a deed of bargain and sale executed by the defendant and

another to the plaintiff, which was as follows: "and we the said Robert Martin, etc., do warrant unto the said Alexander S. Martin, his heirs, etc., the aforesaid land against the claim or claims of any person whatsoever."

(414) On the trial the plaintiff produced a bill in equity filed by one Thomas Overton, against the plaintiff and defendant, whereby he prayed a conveyance of the same land on the ground of a prior contract for the sale of it by the present defendant to him, upon which he had paid a part of the purchase money; and also a decree in that suit by which he (the plaintiff) was directed to convey the bargained and sold premises, and give possession thereof to Overton. It appeared from the plaintiff's answer to Overton's bill, and from the testimony in this cause, that he had full notice of Overton's equity when he received the deed which contained the covenant on which this suit was brought.

The counsel for the defendant requested the judge to instruct the jury that if they believed the plaintiff had notice of Overton's equity when he purchased, he was only entitled to nominal damages. But his Honor, *Judge Daniel,* refused to give these instructions; on the contrary, he informed the jury that the decree was equivalent to an eviction under a judgment in ejectment, and that the plaintiff was entitled to a verdict for his purchase money, with interest from the time he surrendered the possession in obedience to the decree.

A verdict being returned according to the charge, the defendant appealed.

No counsel for either party.

HALL, J. It is true in this case that the plaintiff had notice of Overton's claim to the land; but the defendant had a much better knowledge of its nature. It is not very likely that if the plaintiff had had a full knowledge of the extent of the claim, he would have laid out his money in the purchase. But if the defendant, with the knowledge he had, thinks proper to sell the land, warrant the title of it, and receive the purchase money, it is then but just that when the plaintiff lost the land in consequence of the defendant's having contracted to sell to

(415) Overton, that he should refund the purchase money with interest, as the judge, in my opinion, very properly instructed the jury.

It is true, the defendant conveyed the legal title to the plaintiff, but he conveyed it subject to Overton's equity, and the decree by which he lost it was tantamount to an eviction by process of law. I think the rule for a new trial should be discharged.

PER CURIAM. No error.

PATRICK HAMILTON v. SHADRACK PARRISH.

From Granville.

1. A justice's judgment must be evidenced by a written memorial, made at the time of its rendition.
2. Therefore, when a judgment was confessed before a magistrate out of his county, and entry thereof made on the warrant, and afterwards a new confession was had before the justice at a subsequent time within his county, but no written entry thereof made, and no alteration of the date of the old entry, it was *Held*, that there was in law no judgment.
3. One who enters himself as surety for the stay of execution before a justice is not thereby estopped to show that the supposed judgment is in law a nullity.

THIS action was originally commenced before a justice of the peace. On the trial the plaintiff produced a judgment in his favor confessed by one Gideon Wright, dated 12 October, 1821, which was stayed by the defendant, but there was no date of the time when the stay was entered. The defendant then proved by the justice before whom the judgment was confessed that it was given in Franklin; he, the witness, being a justice in Granville. *Vide Hamilton v. Wright,* 11 N. C., 282. The witness further proved that he retained the judgment in his custody, under an agreement between the plaintiff and Wright, in order to enable the latter to give surety for the stay; and that in November, after the date of the judgment, Wright came to him within the county (416) of Granville, accompanied by the defendant, when the judgment was produced, the stay written in the presence and with the assent of both parties, signed by the defendant, and attested by the witness. The plaintiff then offered to prove that Wright had at this time again confessed the judgment. But *Strange, J.,* being of opinion that in order to render a judgment valid as a judicial act of the justice it must be reduced to writing at the time of the act, refused to receive the evidence unless the confession had been judicially passed upon by the justice at the time it was made. The counsel for the plaintiff then requested the judge to instruct the jury that if from the facts they could infer that a judgment had been confessed in Granville County by Wright, they were at liberty to do so. But his Honor charged the jury that if they believed the witness, there was no judgment against Wright, the act of a justice performed out of the limits of his county being a perfect nullity, and as the defendant was only bound for the stay of execution on that judgment, as the principal debtor was not liable, neither was the defendant. In submission to this charge the plaintiff suffered a nonsuit and appealed to this Court.

Nash and Badger for the plaintiff.
W. H. Haywood for the defendant.

HALL, J. When the plaintiff offered to prove that Wright again confessed judgment, I understand that that confession was intended to be evidenced by the same judgment which the justice proved to have been confessed before him on 12 October, 1821, in the county of Franklin. That judgment is no evidence of a judgment confessed by Wright subsequently. When he offered the defendant as surety to stay it,
(417) if the date of the judgment had been altered to the day when surety was offered for the stay, it would have been proper to receive it. But as the judgment stands, it purports to be a judgment confessed at one time, and cannot be evidence of a judgment confessed at another.

There are other reasons why it should not be so considered. There is no date fixing the time when the defendant became a surety; but there is a date to the judgment confessed. It would follow that the time for which the judgment was stayed would be made to commence in fact before the surety for the stay was given, and interest might be charged upon the judgment from the same time.

I think for these reasons the rule for a new trial should be discharged.

TAYLOR, C. J. In looking at the several acts relative to the jurisdiction of justices, it seems clear that the liability of the principal and the security for a stay of execution is the same, and that in no case where the principal is not bound by the judgment can the surety be made liable. The party praying the stay shall, if required, give sufficient security, and the acknowledgment of such security, entered by the justice and signed by the party, shall be sufficient to bind him; and if the judgment shall not be discharged at the time to which the execution was stayed, then it shall be lawful for the justice, who has possession of the judgment, to issue execution as aforesaid against the principal and securities. Act of 1794, ch. 414. The security undertakes equally with the principal to pay the amount of the judgment, and its existence is not less essential to charge him than to charge the principal; it is all along presupposed in the act. It is clear that the endorsement on the warrant purporting to be a confession of judgment by Wright and signed by the justice was a nullity, as being transacted by the latter out of his county; and I think it follows that no obligation to pay
(418) it was incurred by the security undertaking to stay it, and that it was a valid defense for him on the trial of the cause. The parol evidence offered to prove a subsequent confession of judgment in the county was properly rejected, for the law requires some written evi-

dence of a proceeding on which the justice might issue execution at the expiration of the stay. The giving judgment by the justice, *ex vi termini,* imports that he shall make a written memorial of it, that it may be appealed from or stayed, and protect the defendant from the same demand. It would be extremely dangerous to admit the doctrine that while the warrant was in existence, on which there was no judgment, the justice should yet be allowed to prove it by parol. My opinion further is that whether there was a judgment or not was a proper question for the decision of the court, and that the evidence of a judgment against Wright was an indispensable ground for the plaintiff's claim against the surety. The judgment ought therefore to be affirmed.

PER CURIAM. Affirmed.

(419)

DAVID WORTH v. THOMAS FENTRESS.

From Randolph.

1. A plea of set-off is in nature of a cross-action, and the plaintiff may reply several matters thereto.
2. In practice, where no replication is actually entered, a general replication is understood.
3. Therefore, when the defendant pleaded a set-off and other pleas, and no replication to either was entered, and, after a verdict and new trial awarded, leave was given the plaintiff to reply the statute of limitations to the plea of set-off, it was *Held,* that this was no waiver of the general replication before presumed, but that the plaintiff might on the second trial insist on both.

DEBT upon bond, to which the pleas were *non est factum,* payment, and a set-off. There had been two trials in the court below: at the first, the plaintiff obtained a verdict, which has set aside and leave given him to reply the statute of limitations to the plea of set-off. There was no entry of any other replication to either of the pleas.

On the second trial the plaintiff proved that the debt attempted to be set-off had been taken to account by arbitrators upon some other dispute, and that the defendant had been allowed the full benefit of it. The counsel for the defendant objected to this evidence, insisting that by replying specially the plaintiff had waived the general replication, which was presumed to have been taken, and was estopped to deny the existence of the set-off. But *Daniel, J.,* being of different opinion, the plaintiff had a verdict and the defendant appealed.

Nash for the defendant.
Wilson contra.

HENDERSON, J. There was no special replication put into the defendant's pleas of payment and set-off. It was understood, according to our practice, that they were not confessed and avoided, but (420) denied; and under that impression the party went to trial. When afterwards the plaintiff, by leave of the court, added the special replication of the statute of limitations to the plea of set-off, I do not consider it was by any means an abandonment of the general replication to that plea—in other words, that the existence of the set-off was thereby admitted; but that it still remained denied under the general replication, which was presumed to have been enterd. It is true that if there could have been but one replication to the plea of set-off the special replication afterwards entered must have been an abandonment of the then existing general one. But the plea of set-off is viewed as an action on the part of the defendant authorized in that form, by the statute introducing it, and consequently the plaintiff's replication to it in the nature of a plea; and therefore the plaintiff may make the same defenses to it by way of replication as he could were an action brought on it against him. It is therefore no more a waiver of the former replication than, in an action on the set-off, the addition of the plea of the statute of limitations would be a waiver of the general issue.

PER CURIAM. No error.

Cited: Watts v. Greenlee, 13 N. C., 89; *S. v. Hankins,* 28 N. C., 430; *Hurdle v. Hanner,* 50 N. C., 361; *Battle v. Thompson,* 65 N. C., 407.

ROBERT A. JONES v. JOHN T. P. YEARGAIN.

From Johnston.

Where a purchaser of goods transfers, without endorsement, a note in payment, he thereby guarantees that the sum expressed in the note is due, and constitutes the seller his agent to sue for the same in his name; and if suit be fairly brought and duly prosecuted, and a set-off is established by the maker, the seller may resort to the purchaser for the price of the goods sold.

ASSUMPSIT for money had and received, and goods sold and delivered.

On the trial it appeared that the defendant, a resident of John- (421) ston, bought a horse of the plaintiff, a resident of Surry, and in payment delivered him a note made by one Hill, then residing in Wilkes, but before that time in Johnston. The note was payable to the defendant, and was handed by him to the plaintiff without indorsement,

with a request by the defendant to take out process against Hill, and if he could not pay the note his mother-in-law probably would.

The plaintiff produced a warrant issued by a justice of the peace for the county of Surry, at the instance of the defendant to the use of the plaintiff, against Hill, who had acknowledged service thereof, and on the same day a trial was had, upon which a set-off was established by Hill's oath, and a judgment given for a small balance. The plaintiff sought to recover in this action the amount of the set-off.

The defendant offered to prove that in fact no set-off existed in favor of Hill; but *Martin, J.*, rejected the testimony, and held the defendant to be bound by the judgment, unless he could impeach it for fraud in the plaintiff in relation to it. The counsel for the defendant admitted that he had no such evidence to offer, and a verdict was taken for the amount of the set-off, and judgment rendered accordingly, from which the defendant appealed.

Devereux for the appellant. (422)
Manly contra.

HENDERSON, J. The question which arose on the trial of this cause I do not think was the abstract one, whether in this contest with Jones, Yeargain was bound by the estoppel arising upon the judgment in his suit with Hill. We are, therefore, relieved from expressing an opinion upon the effect of the declaration on the face of the warrant that Yeargain sued for the use of Jones. Possibly that might have connected Jones with the transaction, as to have bound him by the estoppel, and upon that ground only can Yeargain be bound in this contest with him; for estoppels must operate mutually or not at all. Upon the exchange of the horse for the note, Yeargain became bound (unless there was an express agreement to the contrary, and there appears to have been none) that the sum called for in the note was due, and Jones was authorized by the nature of the transaction, if necessary, to sue for it in the name of Yeargain. It necessarily followed that a reduction of the sum called for in the note, by way of set-off or otherwise, would be a violation of the guarantee made by Yeargain, that the whole was due. These were the obligations which the nature of the transaction imposed upon Yeargain, and obligations of a corresponding nature were imposed on Jones, growing out of the relationship which he assumed to Yeargain; that as his agent in using his (Yeargain's) name, he would act fairly on those pionts in which he was interested. It is therefore necessary that we should ascertain that in this warrant, so far as regards the set-off, in which Yeargain was certainly interested, Jones acted as a faithful agent, at least to see if it does not appear that he acted otherwise. A short time after the exchange a warrant is taken out in the name of

Yeargain, to the use of Jones against Hill. The service is acknowledged by Hill; they went to trial on the same day, and the jus-
(423) tice found a set-off to the amount of $60. The note calls for about $11 more, including interest, for which a judgment was rendered, and Hill paid up that sum, at least he obtained a receipt upon the judgment for it. It does not appear that Yeargain was at all apprised of the defendant's claim to a set off, or that any attempt was made to continue the cause until he might enable his agent Jones to resist it. In fact, it is quite apparent that Jones went to trial with his own consent, nay, required a trial; for it is well known that only in cases where there is a friendly understanding between parties, and where the plaintiff takes an acknowledged service, instead of an arrest by an officer and a holding to bail, the justice would, without the consent of both parties, proceed to trial on the same day, and especially when one was acting as agent for a principal residing at the distance of one hundred and twenty miles at least, and the defendant offered evidence so vitally affecting the interest of that principal. The thing that carries upon its face a faithless agency, an agent entirely regardless of his principal's rights. But when to this is added, that, by having the set-off established, Jones exchanged an insolvent for a solvent debtor—Hill for Yeargain—it is full proof of the character of the transaction. I say an insolvent for a solvent debtor, for it appears that Hill's solvency was not much relied on; for Yeargain told Jones, when the exchange was made, to push Hill, and probably his mother-in-law would pay, if Hill could not; a thing, by the way, not much in favor of Yeargain, to extort from the mother-in-law the debts of her insolvent son-in-law. I think, therefore, the judge had abundant evidence that the finding of the justice was not conclusive between these parties; that the judgment was impeached for fraud if that was necessary, and that Yeargain ought to be let into proof that in point of fact there was no set-off, which he was en-
(424) titled to show before the justice, but of which his agent Jones deprived him.

HALL, J. Laying out of this case the question raised relative to the set-off, the only inquiry would be whether the defendant is at all liable to the plaintiff. He purchased a horse with Hill's note, instead of money. The horse, and the note without indorsement, were both delivered, the one for the other; and if this was done with good faith, it would seem that their liabilities extend no farther. This would be unlike the case of a note received on account of a prior debt, as a means to raise the money due, in discharge of it; if the money was not collected, the debt would still be due, unless it should be otherwise stipulated.

In this case it must have been the understanding of the parties that the money was due by Hill, and that the plaintiff was at liberty to use the defendant's name to collect it. It appears that Hill was warranted, and on the trial before a justice of the peace a set-off was allowed him; it does not appear that there was any fraud in the transaction. The question is whether the plaintiff or defendant must bear the loss.

If Hill was entitled to the set-off there can be no doubt that the defendant should bear the loss, because he impliedly, if not expressly, guaranteed that Hill owed the money. On the trial it appears that the defendant offered to show that Hill, in point of fact, was not entitled to a set-off. Opposed to this was the judgment rendered by the justice of the peace, to which the defendant was a nominal party. This brings us to a point of difficulty, to be cleared up only by the circumstances of the case.

It is a circumstance to be kept in view that whatever the dealings between the defendant and Hill were, which led to the giving of the note by Hill, they were known to themselves, but not to the plaintiff; and the probability is that, admitting that Hill was not entitled to the set-off, there was some foundation or color for it. This is evident from the fact that the justice of the peace allowed it. It (425) cannot be presumed that it was claimed and allowed without a shadow of a right. If there was any foundation for it, this was known to the defendant, and it was his duty to conceal nothing, but to make a full disclosure to the plaintiff when he passed the note to him.

It is said that the plaintiff should have given the defendant notice of the trial. This would have been very proper; but the parties live a considerable distance apart. Perhaps the plaintiff had not time to do so before the trial, after he knew that a set-off was claimed.

I am, however, inclined to think that it would tend to the better understanding of the case if the defendant was permitted to give testimony as to the set-off. Although the defendant is a party to the judgment, yet he was not privy to it when it was obtained. It is possible that he may show such a state of things as will enable the jury to decide as the relative merits of the parties require. My brethren seem to think, without doubt, that a new trial should be granted, and I am willing that the rule should be made absolute.

PER CURIAM. New trial.

(426)

THE JUDGES at the relation of WILLIS ROGERS v. WILLIAM P. WILLIAMS and JAMES HOUZE.

From Franklin.

Before the act of 1823, a payment of money by the sheriff to the clerk, and a receipt by him *as clerk*, were within the condition of his official bond, although the payment was made before the return day of the writ upon which the money was made payable.

DEBT upon the official bond of one Jordan Hill, given before the act of 1823, Taylor's Revisal, ch. 1212, as clerk of the Superior Court of Franklin. The condition of the bond was, "that the said J. H. should well and truly preserve and safely keep the records and papers and discharge and perform the duties of said office."

The breach assigned was the nonpayment by Hill of money paid into his office by the sheriff, upon a writ of *fieri facias* which issued in favor of the relator. Upon the trial it appeared that the payment was made to Hill the Saturday before the return day of the writ, and that he gave a receipt for it, which he signed as clerk.

Daniel, J., instructed the jury that a payment made to a clerk in the vacation was not a payment to him in virtue of his office, and therefore not within the condition of the bond. A verdict being returned for the defendant, the relator appealed.

W. H. Haywood for the appellant.
Badger for the defendants.

PER CURIAM. A payment to the clerk under the circumstances stated in this case was a payment to him in virtue of his office, and his receipt is direct proof in what character he received it, and how the sheriff paid it. This is strengthened by the time of payment, and by the execution against the defendant in the original suit.

New trial.

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(427)

JOHN BRADLEY v. JOSHUA SOUTHER and others.

From Rutherford.

A grant cannot be vacated without making the grantee or his heirs a party, although his interest in it has been assigned.

PETITION to vacate a grant which was issued to Andrew and David Miller. The petition charged that the defendants were in possession of

the land covered by the grant, claiming it under mesne conveyances from the patentees, but neither the latter nor their heirs were made parties defendant.

On the Fall Circuit of 1827, *Norwood, J.*, vacated the grant, for reasons which it is unnecessary to state, as they were not discussed in this Court and no opinion was given upon them.

The case came here upon the appeal of the defendants, and Badger, for them, objected that the patentees were not parties; he contended that this must be the case, because the judgment being *in rem.*, otherwise they might be affected by a suit which they had no opportunity of defending.

Wilson contra.

PER CURIAM. We think it is irregular and erroneous to vacate a grant without making the patentee a party, if he is living, or his heirs if he is dead, and that an allegation of the patentee having assigned all his rights under the grant, will not dispense with the necessity of making him a party.

Let the judgment be reversed*

(428)

ANN DANIEL and another v. JAMES M. PROCTOR and another.

From Currituck.

1. The wife of a sole executor of a will, her husband having renounced, is a competent witness to prove its execution as a will of land.
2. A wife is an incompetent witness when her husband is interested, upon principles of policy arising from the relation of husband and wife, not because she is interested in the suit, nor on account of her legal identity with her husband.
3. Whether an executor is entitled to commissions on the sales of land directed by the will to be sold, *quære.*

DEVISAVIT VEL NON as to the supposed will of one John Daniel.

By a clause of the supposed will the testator devised as follows: "I leave my land and tenements whereon I now reside, to be sold at the discretion of my executor, and my land at Black Hall, likewise, etc." One Adam Etheridge was appointed executor, and he, together with his wife and one Whitehead, signed the paper as attesting witnesses.

*Another case at the instance of the same plaintiff was decided upon precisely the same grounds.

When the probate was demanded in the county court, Etheridge renounced his right to the office of executor. On the trial in the court below, before *Ruffin, J.*, the execution of the paper as a will was duly proved by Whitehead, and the defendants in the *caveat* admitted it to be a good will of personal estate. The counsel for the plaintiff, contending it to be valid as to land, offered to prove its execution by the wife of Etheridge, the executor, who had renounced. But the presiding judge ruled her to be incompetent, notwithstanding the renunciation of her husband—holding him to be incompetent upon the score of his interest at the time of the execution of the supposed will, and that his interest at that time rendered his wife incompetent.

The jury having returned a verdict that the paper was a valid will of personal estate only, the plaintiffs appealed.

No counsel for either party in this Court.

(429) HENDERSON, J. A commission upon the sale of lands is an interest in the devise of lands, and disqualifies an attesting witness to the will from giving evidence in its support. The act of 1784, Rev., ch. 204, regards the competency of the witness at the time of his attestation, and therefore his competency cannot be restored by his afterwards becoming disinterested by a release or any other means. Both of these points were settled in *Allison v. Allison,* 11 N. C., 141, decided in this Court. There commissions were expressly given by the will to the witness; by this will commissions are not given. It is worthy of consideration whether the executor is entitled to any commissions for executing this will, so far as regards the sale of the lands; in doing this he acts as trustee, not as executor. The court may possibly allow commissions, but the act of 1799, Rev., ch. 536, is not imperative on the subject, for that act may be confined to such cases as fall within his office of executor. I may put too rigid a construction upon the act, for I confess that much observation on the effects of allowing commissions to those entrusted with the management of dead men's estates, and often seeing them eaten up by the managers, has induced me the more to approve of and admire the maxim of the common law, that compensation for services shall not be made unless there is a contract for it, express or implied; hence the rule in equity, that a trustee is entitled to no compensation, but only to a remuneration for actual disbursements. Taking it, however, for granted that this executor is entitled to commissions upon the sale of the lands, yet as his renunciation of the executorship operates as a release of them, he being the only person named executor in the will, the competency of his wife as a witness to the will is thereby restored. The attesting witness is excluded from giving testimony by the act of 1794, solely on the ground of interest. If, therefore, a person was infa-

mous at the time of attestation, and before giving evidence should be restored to credit, I presume that he is made compe- (430) tent; for the common law regards the situation of the witness, as respects his competency, when he gives evidence, and not at the time when he acquired his information. The wife of the executor in this case had no interest; she could claim nothing from the result of this suit. It is true, her husband independently of his release could; but what is his is not hers—it is at his and not at her disposal. It is true that she cannot be a witness in any case where her husband has an interest, and some have gone so far as to hold that she is incompetent to contradict what he had previously sworn. Her incompetency is not founded on the ground of her interest, but upon principles of policy; for she is as incompetent to swear against her husband (however willing she may be to do so) as to swear for him, unless in personal injuries to herself; her declarations are admissible against him; which they would not be if she was excluded on the ground of interest, and because they are one flesh, and if what was his was hers. It requires neither argument nor authority to prove that it is a reason of policy and not her interest which excludes her. Neither will I enter into an argument to prove that the relation of wife does not so pervert the heart or mislead the understanding as to render her attestation of a will of lands as unsafe as that of her husband. It is sufficient that I find the law plainly so written in the act of 1784; she is not interested in the devise of the lands.

I think, therefore, there should be a

PER CURIAM. New trial.

Overruled: Huie v. McConnell, 47 N. C., 457.

(431)

SILVANUS HOWETT v. HENRY ALEXANDER.

From Perquimans.

An infant is liable for the costs of a suit conducted by his *prochein amy,* and upon a judgment of nonsuit a *fi. fa.* may issue against his property.

TROVER for a negro, and on the trial the defendant claimed under a sale made by the sheriff upon a *fi. fa.* which issued against the plaintiff for the cost of a suit wherein he had been nonsuited. The plaintiff was an infant at the commencement of that suit and prosecuted it by his *prochein amy.*

The jury, under the instruction of *Martin, J.,* returned a verdict for the defendant, and the plaintiff appealed.

No counsel for the plaintiff.
Hogg for the defendant.

HENDERSON, J. I know of no distinction between an infant and an adult, as to their liability for costs, nor can I see any reason why one should exist. The officers of the court are equally entitled in the one case as in the other. In both they labor at the instance of the party. It is true that process is not applied for by the infant personally, (432) but it is by one who is appointed by law to represent him and to superintend his interest—his guardian or next friend. The suit is in his name and for his benefit; the costs must be paid by some one, and if they are thrown on the guardian or next friend, few would undertake to sue in behalf of infants. A due regard to the interest of infants, therefore, requires that they should be answerable. A guardian is selected by the court and gives bond, and the court should see that no one assumes the character of next friend but a person of responsibility and who it is probable has the interest of the infant at heart. If they abuse their office they are liable to the infant.

PER CURIAM. No error.

SAMUEL S. DOWNEY v. DAVID J. YOUNG.

From Granville.

1. After the defendant has pleaded to a warrant, so as to meet the case made by it, the plaintiff cannot, upon an appeal, declare in such a manner as to render the plea ineffectual.
2. Upon a *quantum meruit*, where the defendant pleaded a tender and paid money into court, it seems that he is not estopped to show a special contract.

THE plaintiff warranted the defendant "for the nonpayment of the sum of $60 due by account," and recovered judgment for $14, from which the defendant appealed. The memorandum of the pleas in the county court was, "General issue; tender of $10.50; money paid into court." In the county court the defendant obtained a verdict, and the plaintiff appealed. In the Superior Court a declaration was filed on a *quantum meruit*, whereby the plaintiff sought to recover for hauling fourteen sacks of salt. On the trial the defendant offered to prove that the salt was hauled upon a special contract for a less sum than (433) the plaintiff claimed under his *quantum meruit*. But *Strange, J.*, thinking that the defendant, by paying the money into court, had admitted the cause of action as set forth in the declaration, and had

reduced the contest simply to the amount which the plaintiff could claim under the contract declared on, rejected the testimony. A verdict being returned for the plaintiff, the defendant appealed.

Nash and Devereux for the appellant.
Badger for the plaintiff.

HALL, J. By the act of 1794, Rev., ch. 414, it is directed that all sums, and how due, shall be expressed in the warrants which shall issue for them. The warrant which issued in the present case would sustain a count for money due the plaintiff in the manner in which the defendant admits he is his debtor. According to this understanding of the warrant, the defendant, in the county court, pleaded a tender with a *profert*. It follows that he has a right to give anything in evidence which is consistent with the state of the pleadings, and that he is not deprived of this right by any gratuitous act of the plaintiff. If by filing a declaration in the Superior Court consisting of this solitary count, the plaintiff can deprive the defendant of a defense which he had already properly made, it should be considered as a nullity. On this ground alone I think that the rule for a new trial should be made absolute. But if the question was upon the *quantum meruit* alone, I think the evidence should have been received, because the effect of a special contract, if proved, would be either to defeat the plaintiff upon that count or to fix the value of the work and labor claimed under it. In both of which cases the plaintiff would be entitled to the money brought into court, although he might be subjected to the payment of the costs. But on this part of the case I give no opinion.

PER CURIAM. New trial.

(434)

RICHARD B. JONES et ux. v. ISAAC TAYLOR.

From Pitt.

A person who enters into the possession of land under an equitable title, with the consent of the legal owner of the fee, acquires no estate of any kind or degree in it, and the legal owner may maintain trespass *quare clausum fregit* for an injury.

TRESPASS *quare clausum fregit,* and on the trial the case was that the plaintiffs, by their attorneys, had sealed and delivered the following instrument to one John C. Stanly:

"Know all men by these presents, that we, Richard Jones and Frances Ann Jones, his wife, are held and firmly bound unto John C. Starly in

the just and full sum of four thousand three hundred and four dollars ($4,304) current money of the State aforesaid, to the payment whereof well and truly to be made to the said John C. Stanly, his executors, administrators, and assigns, we bind ourselves and our respective heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this 14 January, 1815.

"The condition of the above obligation is such that whereas the said Richard B. Jones and Frances Ann Jones, his wife, by certain letters of attorney, under their hands and seals, have made and appointed William Blackledge, Esq., and Hugh Jones their agents and attorneys to sell and dispose of two certain tracts or parcels of land lying in Craven County, and on Neuse Road, near the town of New Bern, the one patented by Nicholas Rutledge in 1744, for 400 acres, the other by Jeremiah Vail, in 1755, for 150 acres, more or less, in obedience to which letters of attorney the said William and Hugh have bargained and sold said tracts or parcels of land to the said John C. Stanly in fee simple at and for the price of two thousand and one hundred and fifty dollars, which said consideration the said purchaser has paid or secured to be paid: Now, therefore, if the said Richard B. Jones and Frances Ann, his wife, shall execute, seal, and deliver unto the said John C. Stanly, his heirs or assigns, a good and sufficient deed and assurance to convey and assure said two tracts of land to the said John C. Stanly, his heirs and assigns, in fee simple absolute, in such manner and form as the acts of the General Assembly of the State of North Carolina require for the conveying and assuring of lands of *feme coverts* or married women, and shall also cause the private examination of said Frances Ann Jones as to the execution of said deed or assurance to be had, obtained, (435) and recorded in the manner required by the laws of North Carolina for the sale and conveyance of the real estate of married women, then the above obligation to be null and void; otherwise, to remain in full force, virtue, and effect."

The *locus in quo* was included within the boundaries of one of the patents mentioned in the conditions of the bond. Directly after its execution Stanly, with the consent of Jones and Blackledge, entered into the premises and took actual possession of the cleared land, which included a part of both patents, and continued the entire and exclusive possession of it, cultivating it and claiming and using the timber on every part of the land within the boundaries of the patents, although not within his inclosure.

The trespass complained of was committed after the sale to Stanly, and before he had received a conveyance, viz., in January, 1818, when the defendant, claiming title adverse to that of the plaintiffs, entered upon the land and cut and used several timber trees growing thereon,

but on the outer side of the fences and inclosures of Stanly. Since the first entry of Stanly the plaintiffs have had no possession of the land, unless the possession of Stanly is in law their possessions, or unless they have a possession constructively by reason of their legal title.

Upon these facts *Ruffin, J.*, held the possession of the *locus in quo* to be in Stanly, and that the plaintiffs had not a possession sufficient to enable them to sustain this action. In submission to this opinion the plaintiffs suffered a nonsuit and appealed.

Gaston and Badger for the plaintiff.
Hogg for the defendant.

HENDERSON, J. I shall confine myself to a short discussion (437) of the principles to be extracted from the authorities which have been cited. There cannot be a possession of lands without some estate in them. If one enter on my lands and oust me, he thereby gains an estate in them and put an end to mine; for if he acquire it, I must lose it. It cannot exist in us both adversely at the same time. I may put an end to the adverse estate by action or entry, but it continues until an end is put to it. For trespasses, whilst in this state, the disseizor may bring his action; but I cannot, for I have no estate in the land; I have nothing but a right, not to the land, to speak properly, but to an estate in the land. If one enter by my permission, and I grant him no estate in the land, by which is meant an interest recognized in the law, he may be my bailiff, my agent, my receiver, or my guest; but he is not my tenant. He does not divest me of my possession; he may hold the possession for me, but he does not hold it against me. That no estate—that is, interest in the land—is created by this permission to enter is evident from the fact that there is no writ in the register prescribed for it, in case it should be divested, whereby it may be restored. We find in the register a variety of writs for the owners of estates, by which they may be restored to them, but none for such a claimant as John C. Stanly. There are the various writs for the tenant in fee, in tail, and for life; and since the time of Edward IV. and Henry VII. we have used the ejectment as a remedy for the termor, not only to recover damages, but the term itself. On this subject more shall be said hereafter. It is absurd for the law to recognize an estate, or an interest in land, and yet not provide a mode for the recovery of that estate or interest, should it be lost. If Stanly's interest is an estate, give it a name. Is it a fee simple? An answer in the negative is at once given, and perhaps with some petulance. But it has more of the character of a fee simple than of any other estate. (438) The former owners, Jones and wife, consented that Stanly should

be owner in fee, and unless upon the principle that the major includes the minor, it has not a single property of any other estate known in the law. To an estate at will, to which it is attempted to be reduced, it bears not the least resemblance; for if we take either the agreement itself or the understanding of it by the parties as our guide, we shall find that it was to continue forever, instead of being determinable at the will of the parties; it was never designed that either of them should put an end to it at his pleasure. The same objections may be made to it as an estate from year to year. If it is a tenancy, what services are due? The reply is that none were reserved; but if it is a tenancy, fealty is due of common right. I use the words tenant and tenancy in their modern acceptation, not in their feudal meaning. We may perplex ourselves in vain to find out a legal term to designate this interest, for it has in law no existence. It is unknown to the law; it is an equitable fee simple, and were it not for the notice of it in the courts of equity we should not, in the courts of law, be so perplexed with it. We should call it at law what it really is, a license to enter, which protects the person to whom it is given from an action for entering and occupying until the license is withdrawn. And although there is much said in the books on the subject, it amounts to only this: it protects the person both from an action of trespass *quare clausum fregit,* and the action of ejectment; and this upon common-law principles. I suppose it is upon principles of policy for the encouragement of agriculture that such license cannot be withdrawn but upon reasonable notice, say six months, and that the occupier should have the emblements. This rule, however, does not affect the rights of the owners as to strangers. Astute as we may be to make the interest of Stanly something like an estate, something like a possession, to protect the person who thus enters under a license from the actions of the owner,
(439) we have no such motive as regards strangers—mere wrongdoers.

If we are governed by principles of property, it is much more proper that the owner should bring the action than one who enters under a treaty for a purchase. From the contract, if it should be fulfilled, the owner is trustee for the purchaser. He therefore recovers for the whole injury. There can be no doubt upon the question whether the damages are not awarded to the wrong person. But the purchaser's claims to the damages is provisional; the purchase may not be completed, and in such cases the wrong person may pocket the recovery. This uncertainty would perplex the jury, and they would necessarily be influenced by the probability of the purchase being completed or not.

I have read, with great satisfaction, the very able opinion of *Chief Justice Parker* in the case of *Starr v. Jackson,* 11 Mass., 519, and it is no objection that his argument would lead to the same result if there

was a least for years as it stood before the time of Edward IV. For until that time a termor had no estate, and consequently no possession in the lands—I mean such a possession as ousted that of the owner. As to the world, the landlord had the ownership and possession. As between termor and landlord, their relationship existed in contract—in agreement; nothing passed in the land. It is true, the termor had his action of ejectment for his ouster, but before that time I believe he could not sustain trespass *quare clausum fregit*. But should I be mistaken in this, it weakens the argument but slightly; if not, it is conclusive.

Upon no principle can a mere tenant at will interfere with the lord's right of sustaining the action for a permanent injury to the freehold. This reasoning by no means goes to deprive such an occupier from maintaining trespass against a wrongdoer, for ousting him from the possession, or from recovering for a trespass on things more immediately in his possession; as for entering the house or inclosure, or treading down his corn or grass, or pulling down trees neces- (440) sary for shelter, shade, fuel, or repairs; and the right would also extend to a tenant at sufferance. But this is beside the owner's right to the action; it does not affect that. I repeat it again, that it is the countenance which a court of equity gives to such purchasers which perplexes us. Strip it of that, and it presents the simple case of one who enters on lands by the license of the owner, which certainly protects him for all acts done under that authority; but, like all licenses, it is revocable, and does not interfere with the possession of the owner.

We read of the plea of *liberum tenementum* for the landlord, but of none analogous to it for the termor. He defends his entry and possession under the estate of his landlord by showing a license or permission from him. Had he an estate recognized in the ancient law it would have prescribed to him a plea founded upon it. But we find that it gave him neither an action to recover his estate or interest nor a plea under which he might assert it. And it would be strange if the freeholder should lose his rights in the estate without another person's acquiring them. I speak of the law as it stood before the time of Edward IV., when the owner of an estate and the freeholder were synonymous terms. That an estate in the land is necessary to support trespass *quare clausum fregit*, see the following cases: *Hoe v. Taylor*, Croke Eliz., 413, also *Wilder v. Bridgewater, ib.*, 421.

HALL, J. It is contended on behalf of the defendant that the force of the trespass was spent upon John C. Stanly, and only reached the plaintiffs as an injury in its consequences, and that therefore they are entitled to redress by an action on the case, and not by an action of tres-

pass *quare clausum fregit.* This is true, if Stanly stood between the parties as tenant of the land.

(441) If Stanly was on the land vested with no rights or clothed with no authority whatever over it, his solitary existence upon it will not vary the rights of the parties nor the remedies by which those rights are to be asserted. It is therefore of importance to ascertain what the legal relative rights of Stanly are. I say legal rights, because we are examining the question in a court of law.

Stanly went into possession of the land by the consent of Blackledge and Jones, agents of the plaintiffs, and no doubt with the concurrence of the plaintiffs themselves. It was understood by all that the plaintiffs were under an obligation to make him a title to the land; but before that title was made he had no legal right either to the land or to the possession of it, which a court of law would notice, except that if an action of trespass was brought against him, he might justify under the license given him to enter, which would also protect his interest in the growing crop. In other respects, after the license to take possession had been countermanded and he had notice to depart, he was, in the view of the court of law, on the land as a stranger, and might be immediately ejected. If he was on the land as a tenant, either from year to year or at will, he had a title to the possession, and that title would be protected by a court of law; he must have six months notice to quit, and unless that notice was given he could not be ejected. Such a possession, under such a tenancy, would support an action of trespass, and while it existed the freeholder or owner of the land could not bring trespass, because, although the freehold was in him, he had not the possession of the land, which, either actual or constructive, is necessary to suppore the action. When, therefore, there is a possession supported by a legal right in one man, and the freehold or fee simple is in another, the latter cannot maintain trespass *quare clausum fregit.* So if A, tenant for years, makes a lease at will to B, and B is ejected, A cannot have this action upon that ouster because although the posses-

(442) sion of B is the possession of A, yet the trespass which is complained of must be against the actual possession, and that was in B. 2 Bac. Ab., 423, citing Roll., 3. But a person who is in possession, without any legal right, cannot maintain the action.

I admit that any right which Stanly acquired by taking possession may be asserted by this form of action in a court of law as if a mere *positum pedis* trespass was committed upon his crop or upon his inclosure. In fact, Stanly is in possession only under an equity, which this Court cannot notice, although in a court of equity he is considered as tenant in fee simple. But this equity does not divest the plaintiffs of that constructive possession which is necessary to maintain this ac-

tion, especially as Stanly had no special occupancy of the trees on which the trespass was committed. I think the nonsuit should be set aside and a new trial granted.

PER CURIAM. Reversed.

Cited: *Eaton v. George,* 48 N. C., 386.

MARY GREGORY v. JOHN HAUGHTON, administrator of STEPHEN R. HOOKER.

From Halifax.

1. Where the plaintiff fixes the defendant with assets for a part of his claim, he recovers that amount of assets and all costs, and is entitled to judgment *quando* for the residue.
2. If judgment *quando* is not entered up at the trial term, it may be afterwards, *nunc pro tunc*, if the third persons be not injured by it.

SEE same case, 4 N. C., 14, 215; 6 N. C., 250; 8 N. C., 394. The plaintiff on the Spring Circuit of 1825 obtained a verdict for £81 8s. 5d. She fixed the defendant with assets to the amount of ten shillings, for which, and all costs, execution was awarded; but there was no entry of judgment *quando* for the residue of the sum found by the jury.

The plaintiff, according to a previous notice, moved at Spring Term, 1827, for judgment *quando,* to be entered *nunc pro tunc,* (443) This was opposed by the defendant, but was allowed by *Ruffin, J.,* whereupon the defendant appealed.

Gaston for the plaintiff.
Hogg and Badger for the defendant.

TAYLOR, C. J. The principles of pleading at common law do not authorize a judgment *quando* against an administrator where issue is taken on the plea of *plene administravit* and it is found in his favor. The defendant is then out of court, and the plaintiff is forever concluded. The rule established in *Mary Shipley's case,* 8 Rep., 134 b., that upon such a plea the plaintiff may immediately take judgment of asset *quando,* continues to be the law at this day; and the form of replication to such a plea shows that the plaintiff must admit of it to entitle him to such a judgment. 2 Chitty, 613. If he takes issue upon the plea he is bound to prove that the executor has some assets in his hands, and, having done so, he is then entitled to a like judgment for

the residue of the debt which there are not present assets to pay. It is on this ground that the plaintiff was entitled in this case to a judgment *quando,* and as it was omitted at the term of trial, and it does not appear that there are any third persons likely to be injured by the amendment, it is reasonable and just that it now be made. The case of *Mara v. Quin,* 6 Term, 1, furnishes an example of a judgment being amended so as to attach upon the assets received between the time of suing out the writ and the judgment.

PER CURIAM. Affirmed.

Cited: Brady v. Beason, 28 N. C., 427.

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(444)

ARCHIBALD McEACHIN et al. v. WILLIAM C. McFARLAND et al.

From Richmond.

A levy upon land under a justice's judgment, made more than three months after the date of the execution, being void, a *sci. fa.* against heirs founded on it was dismissed.

THE plaintiffs obtained a judgment quando against the executors of Duncan McFarland, before a magistrate, who found the plea of fully administered in favor of the defendants. An execution on this judgment issued on 6 February, 1826, which was renewed on 8 July following. On 15 January, 1827, the renewed execution was levied upon the land which had descended to the heirs of Duncan McFarland, the present defendants, who were brought into court by writ of *scire facias* under the act of 1791, Rev., ch. 352.

On the last circuit *Norwood, J.,* dismissed the *sci. fa.* on account of the irregularity in the levy, and the plaintiffs appealed.

No counsel for either party.

HALL, J. The act of 1803, Rev., ch. 627, directs that all executions issued by a justice of the peace shall be made returnable within three months, and that in case it is not discharged, another execution shall be issued for what appears to be due. The execution in this case was renewed on 8 July, 1826; but it was not only not returned within three months, but it was executed after their expiration, viz., on 15 January, 1827, more than six months after it had issued. I therefore think the judgment of the Superior Court should be

PER CURIAM. Affirmed.

(445)

WILLIAM ANDERSON v. JOHN H. HAWKINS.

From Franklin.

1. Acts and declarations are not evidence against one who was not a party or privy to them.
2. Therefore, where the question was whether A had refused to guarantee a bank note to B, *it was held, Henderson, J.*, dissenting, that the refusal of A to guarantee the same note, on offering it to C immediately before it was passed to B, but not in his presence, was *res inter alios acta* and inadmissible.

AFTER the new trial had in this case, 10 N. C., 568, it came on to be tried before *Martin, J.*, on the last circuit, when the question was whether the defendant had not refused to guarantee as genuine a bank bill he had passed to the agent of the plaintiff, and which had turned out to be forged.

The defendant called a witness who swore that he was present when the note was passed to the agent, and that the defendant then told him that if he took it he must do so at his own risk. This statement was denied by the agent, who swore that no such conversation took place, and that the witness who deposed to it was not present when the note was passed to him.

The defendant then offered to prove that immediately before the transaction deposed to by the plaintiff's agent, he, the defendant, had offered the note to one Mitchell, and had refused to guarantee it unless Mitchell paid him a premium for the bill and his guarantee. Neither the plaintiff nor his agent was present at the time of the conversation. The presiding judge rejected the testimony.

A verdict being returned for the plaintiff, the defendant appealed.

Badger for the plaintiff.
Seawell and W. H. Haywood for the defendant.

TAYLOR, C. J. A person who receives a bank bill takes upon (446) himself the solvency of the bank, but he who pays or exchanges it guarantees the bill to be genuine. This is the general law of the land, subject to which the parties must be presumed to have acted if nothing passed between them at the time of the contract. But a witness was introduced in this case who testified on behalf of the defendant that the latter told plaintiff's agent at the time of the contract, the agent who made it, that if he took the bill he must do so at his own risk. On the other hand, the plaintiff's agent who made the contract testifies that no such conversation passed, and that he did not even see the witness who deposed to it, present at the time.

Evidence was then offered on the part of the defendant of a conversation of the defendant's respecting this bill, to wit, that of Mitchell, to whom he offered it; if he took it at par it would be at his own risk; if defendant guaranteed it he was to have a premium. This conversation is stated to have taken place in a storehouse immediately before the conversation given in evidence by the plaintiff's agent, and in the absence of the plaintiff and his agent. The record states this confusedly, and I have nearly transcribed it, but I understand it to have been that the defendant told Mitchell he would not guarantee it without a premium; that if he would not give a premium he (Mitchell) must take the bill at his own risk.

This evidence was rejected by the court, and the question now presented is, Was the evidence properly rejected or not? I am of opinion that it was properly rejected.

Without this evidence, and supposing the credibility of the two conflicting witnesses to be equal, which I must take for granted, the case stands upon the legal implication that the defendant guaranteed the bill and is liable to compensate the plaintiff, since it turned out to be a counterfeit.

(447) It is a rule of morals as well as of legal construction that a contract is to be carried into execution in that sense in which the promisor apprehended at the time the promisee received it. It is not the sense, says a writer of much observation, in which the promisor actually intended it that alwyas governs the interpretation of an equivocal promise; because at that rate a man might excite expectations which he never meant, nor would be obliged to satisfy. Much less is it the sense in which the promisee actually received the promise; for according to that rule the promisor might be drawn into engagements which he never meant to undertake. It must therefore be the sense (for there is no other remaining) in which the promisor believed that the promisee accepted his promise. And this, says he, will not differ from the actual intention of the promisor, where the promise is given without collusion or reserve. Paley, 96.

The application of this rule of natural justice appears to me to be decisive of this question. For which interpretation did Hawkins apprehend that Anderson put upon the contract? Clearly, as nothing passed between them in explanation, discharging Hawkins from his guarantee and placing the risk on Anderson, Hawkins must have believed that Anderson expected to be indemnified in the event of the note proving to be a counterfeit. But if this evidence is admissible, the rule is inverted, and Anderson is bound, not as Hawkins thought he conceived himself to be, but as a secret intention of Hawkins, which Anderson had no means of exploring, designed he should be.

It is argued in support of the admissibility of the evidence that it is a fact connected with the case; that the jury may draw their own inference from it, and as the scales of evidence hang *in equilibrio,* the introduction of this fact will make one of them preponderate.

But this argument is met by a stubborn and most wise and salutary rule of law, that the acts and declarations of others are not admissible in evidence against any one, as affording a presumption (448) against him, in the way of admission or otherwise. A man's privity to the acts and declarations of another may authorize the inference of his assent, and operate as an admission against himself. But where he is utterly a stranger to them, no inference or presumption can justly be made against him, founded upon his own admission or conduct. Were this evidence admissible, Anderson would certainly be bound by the declaration and act of Hawkins, to which he was no wise privy, and to which if he had been privy the presumption is he would not have made the contract in the manner he did. The only inference the jury could derive from the evidence is that Hawkins did not intend to guarantee the bill; but is it not contrary to the most obvious principles of justice that Anderson should be bound by the secret intentions of Hawkins, which intentions were contradicted by his conduct? The irrelevancy of the evidence is not the only objection to it, for that might do no other mischief than needlessly consume time, but its tendency is to impair the rights of Anderson by the *res acta* between Mitchell and Hawkins.

The argument that according to the ordinary motives of human conduct it is incredible that Hawkins should have passed the bill to Anderson with a guarantee, when he had a few minutes before demanded a premium for one, is answered in a manner satisfactory to my mind: that to establish such a principle of evidence would enable men knavishly disposed to create evidence for themselves by making an offer to one person different from a contract they would immediately afterwards make with another, and then adduce such evidence to destroy the contract actually made. In every view I have been able to take of the case I am compelled to believe that there ought not to be a new trial.

HALL, J., concurred with the CHIEF JUSTICE. (449)

HENDERSON, J., *dissentiente.* This evidence can be rejected only on the ground of its irrelevancy. There is no dispute as to the competency of the evidence by which the fact was to be proved. That fact is relevant which tends to elucidate the point in issue, or from which a rational inference can be drawn in relation to it. In this view of the case it is entirely immaterial whether Anderson or his agent was present

when Hawkins made the offer to Mitchell. Their presence does not affect the existence of the fact. If the evidence tended to impose upon Anderson terms or conditions which did not arise out of his contract or, what is the same, out of the transaction, then his presence would be all-important, for it would be unjust to vary or change his contract without his consent; and, if he knew not of this previous conversation with Mitchell, to superadd it to his engagement would be to do so without his consent, and consequently would be an act of injustice. But the difficulty in the case is what his contract was. Hawkins alleges that upon the exchange of the bank note he expressly refused to guarantee it without a premium. The agent of Anderson in this transaction swears that he did not expressly refuse to make the guarantee, inasmuch as nothing was said in relation to it. Hawkins proves by a witness who says that he was present when the exchange was made, that he (Hawkins) did expressly refuse to make the guarantee. Hawkins asks to have this fact thrown into the scale on his side (contending that it weighs something), to wit, that upon a treaty of exchange of the same note with Mitchell, which took place a few moments before the exchange with Anderson, he expressly refused to make the guarantee without a premium, on terms precisely the same in all other respects with those on which Anderson allows he afterwards closed with him; and therefore he asks the jury to believe the assertion of his witness; as he (Hawkins), judging by the ordinary motives of mankind, would not
(450) demand a premium in the one case and omit to do so in the other, in transactions so much alike that they may well be termed identical. He contends that there was no motive or inducement so to act, and it is therefore probable that he did not so act. In this view of the case, the absence of Anderson or his agent is unimportant. Irrelevant facts are those which do not relate to the issue, those from which a rational inference cannot be drawn in relation to it. They are rejected, therefore, upon two grounds: that an examination into them would be an unnecessary consumption of time, and, secondly, that they tend to mislead the jury by holding out to them false lights. The court therefore rejects all testimony which does not tend to throw light upon the subject—every one from which the jury cannot draw a rational inference in relation to the issue or which would tend to mislead. But if they are of an opposite characeer, if they do throw light on the issue, if they do not tend to mislead the jury, but are such that a rational inference can be drawn from them, they are to be thrown into the scale and weighed by the jury. It is the province of the court to determine the question whether they may have any weight, and of the jury to ascertain how much that weight is. Nor is it required that the fact be of such a nature that the jury must draw an inference from it; it is suffi-

cient that they may do so. In this case, were it the law that on the exchange of a bank note no implied guarantee arose that the note was genuine, but it required an express promise to create one, the inference would be stronger in favor of Hawkins; it is much weakened, to be sure, but not destroyed by the law being otherwise. But although weakened, it yet may weigh something, and should therefore have been considered by the jury.

I think that there ought to be a

PER CURIAM. New trial.

(451)

WILLIAM LENOIR, Chairman, v. JAMES WELLBORN and others.

From Wilkes.

1. By the act of 1819 (Rev., ch. 499), the sheriff who is in office on the 1st day of April in each year is bound for the taxes collectible during that year, although his term may expire before they can be collected.
2. Therefore, where a sheriff was elected after the 1st day of April, and resigned in February ensuing, he is not liable for the collection of any taxes.

DEBT upon the official bond of George W. Witherspoon, as sheriff of Wilkes, the condition of which was "that the said G. G. W., sheriff, etc., shall settle with the county trustee for the county, jail, and poor taxes for the year 1821, in the time prescribed by law."

The breach assigned was that G. G. Witherspoon had not collected the taxes imposed in the year 1820.

On the trial a verdict was taken for the plaintiff, subject to the opinion of the court upon the following case:

G. G. Witherspoon was elected in April, 1821, when he gave the bond on which this suit was brought; he held the office of sheriff until the ensuing February term of the county court, when he tendered his resignation, which was duly accepted and a successor appointed.

At April Term, 1821, sundry taxes were imposed for 1820, and at the same term, in 1822, sundry others for 1821, when the court directed that the tax books for 1821 should be delivered to the successor of G. G. Witherspoon. At April Term, 1821, the tax list for 1820 had been delivered to one Thomas Witherspoon, who was the predecessor of G. G. Witherspoon, Thomas Witherspoon being at that time acting sheriff.

No tax lists were ever delivered to G. G. Witherspoon, and his election took place after the first day of April, 1821.

(452) Upon this case *Norwood, J.*, set aside the verdict and directed a judgment to be entered for the defendants, from which the plaintiff appealed.

Wilson for the plaintiff.
No counsel for the defendants.

TAYLOR, C. J. The question in this case is whether the sureties for G. G. Witherspoon, late sheriff of Wilkes, are liable for the taxes of 1820, by virtue of their bond. It appears from the record that Witherspoon was elected sheriff at April session, 1821, and that the bond is conditioned for the taxes therein specified for the year 1821. To make the sureties responsible for any other taxes than those would be going beyond the bond. But the taxes laid in 1821 were collected only in 1822, with the exception of the case where persons were about to remove to avoid the tax; before that period the sheriff for 1821 had no power to act in that respect, and when that time arrived, he had resigned the office, as he is permitted to do by law. "The respective sheriffs are to proceed, after the first day of April in each and every year, to collect the texas." Act of 1819, Rev., ch. 999. Under the true construction of this act, the right to collect the taxes does not attach in the sheriff unless he remain in office after the first day of April, nor consequently can responsibility attach to his sureties. The consequence of a different construction would be to make two different sets of securities liable for the taxes of 1820, viz., the sureties of Thomas Witherspoon, who was sheriff for that year, and who remained in office until after 1 April, 1821, and to whom the tax bills were then delivered, and the present defendants, the sureties of G. G. Witherspoon. By thus remaining in office until the right to collect began, Thomas Witherspoon was bound to settle with the comptroller in October, 1821, and although out of office, is invested with various powers to enforce the col-
(453) lection of taxes. Acts of 1801, ch. 570; 1814, ch. 872; 1819, ch. 999.

The county court entertained a correct opinion of the orderly mode of proceeding, for they directed the tax bills to be delivered to the successor of G. G. Witherspoon, because he was in office when the tax became collectible; and the bills of 1820 were delivered to Thomas Witherspoon, because he was in office in 1821.

The act of 1819 can only mean that the sheriff then in office shall proceed to collect the taxes; not any one who had been sheriff during the preceding year; for then, if there had been several, which shall be selected? By confining it to this period much confusion is avoided; and though the sheriff should not be reëlected, or should resign imme-

diately after his election, he may proceed nevertheless to collect the taxes, that the public may be secured and his sureties indemnified. I am, therefore, of opinion that the judgment appealed from was correct.

PER CURIAM. Affirmed.

Cited: *Dickey v. Alley, post,* 455.

DAVID DICKEY, Chairman, v. JOHN H. ALLEY et al.

From Burke.

1. A sheriff who was elected in January, 1820, and to whom before the 1st of April ensuing the tax lists for 1819 were delivered, is bound for their collection.
2. If a sheriff is elected after the 1st of April, and voluntarily receives from his predecessor the tax lists then collectible, is he bound to collect them? *Quære.*

DEBT upon the official bond of Frederick F. Alley, sheriff of Rutherford, dated 12 January, 1820, with a condition that he should collect the "county taxes due for 1819." The breach assigned was the nonpayment of those taxes. Alley was reëlected sheriff at the date of the bond, having held the office for the preceding year. The tax (454) lists for 1819 were delivered to him some time between his reappointment in January, 1820, and the 1st of April ensuing.

Upon this evidence *Norwood, J.,* thinking that the defendants were not bound for the taxes of 1819, directed a nonsuit, from which the plaintiff appealed.

No counsel for plaintiff.
Wilson for defendants.

HENDERSON, J. The acts of Assembly which regulate the collection of the revenue are rather obscure, and in some points apparently contradictory; but I believe they are capable of being reconciled. A full exposition of them was given by the *Chief Justice* a few terms ago, in *Fitts v. Hawkins,* 9 N. C., 394. I would only add to that case that it is the duty of the sheriff who is in office, on or after the first day of April in each year during the time that the taxes are collectible, to collect those then due, provided the lists are delivered to him. I believe I shall be better understood by stating a case or two. A is in office on 1 April, he goes out on 1 May. The list of taxes due on 1 April have been

delivered to him, either before 1 April or before 1 May, that is, while in office; he is bound to collect those taxes; where the lists have not been delivered to him, he is not bound. A is appointed to office at any time during the period in which the taxes are collectible, say on 1 May. The list for taxes then collectible, due on first day of the preceding April, are delivered to him, not having been delivered to his predecessor; he is also bound to collect them. Should they have been delivered to his predecessor, I do not think that he is bound to receive them; but should he do so, I think that he is bound to collect them; for he may receive and execute process which his predecessor delivers over (455) to him, and I can see no reason why he cannot receive the tax lists. Should he be reappointed during the time of collection, say in May, he continues to collect under his former appointment, because unless in cases of necessity the act shall be entire, for it would be very inconvenient to divide it. Great difficulty would arise in ascertaining how much to charge to one set of sureties and how much to another. And the law, to avoid confusion, during the time the taxes are collectible, that is, before the day of the sheriff's accountability, gives him power to collect them, although his office may expire before that period. I wish it understood that I am not satisfied on the point mentioned above, as to the liability of the new sheriff if he should take the lists from the old sheriff who was in office on the first day of April. I mention it that the point may be settled. I know of no adjudication on the subject.

In this case Alley being in office on the first day of April, and the tax lists having been delivered to him, he was bound to collect the taxes due in 1819.

TAYLOR, C. J. According to the view taken of the subject in *Lenoir v. Wellborn, ante* 452, I apprehend that the defendants are liable for the taxes of 1819, as well because their bond so stipulates as because Alley was in office in 1820, when the taxes became collectible, and was consequently bound to collect them. As Alley had also been sheriff for the year 1819, the more regular way would have been for him to give a bond, at the time of his appointment, for the collection of the taxes; but there is no reason why a bond subsequently given, conditioned to do that which the law had previously imposed upon him as a duty, should not be obligatory. The nonsuit ought to be set aside.

PER CURIAM. Reversed.

JOHN GRANBERY, executor of JOHN H. FRAZIER, v. JAMES G. MHOON et ux.

From Northampton.

1. A judgment of the county court deciding who is executor of a will, is conclusive upon all other courts, and cannot be examined, although it be erroneous.
2. Therefore a copy of the will need not be attached to the letters testamentary, or produced, when they are given in evidence.
3. Slaves of an infant *feme* pass to her husband, *jure marito*, although they were hired out by her guardian before the marriage, and the husband died during the term.

DETINUE for several slaves, tried before *Daniel, J.*, on Fall Circuit of 1827. The plaintiff claimed as executor of John H. Frazier, and on the trial produced the following instrument:

"It having been certified to us that John H. Frazier, late, etc., is dead, and having made his last will and testament in writing, a copy of which is hereunto annexed, and therein appointed James Granbery executor thereof, who was duly qualified and took upon himself the burthen of the execution thereof: these are therefore to authorize and empower the said J. G., etc."

No copy of the will was annexed to the letters, neither was one offered in evidence.

It was objected by the defendant that a copy of the will was a necessary part of the plaintiff's title, and that the negroes in queseion did not, of course, vest in him if Frazier had title, solely because he had proved the will and qualified as executor. His Honor reserved the question and the plaintiff went on with his case, when it turned out that the slaves in dispute were the property of one Lucy Granbery, a minor, and were on 1 January, 1820, hired out by her guardian for one year. In April, 1820, Lucy Granbery intermarried with the plaintiff's testator, who died in the month of August following, leaving his wife surviving. The negroes never were in the actual possession of the plaintiff's testator, but continued in that of the persons who had (457) hired them from the guardian of the wife in January previous.

The defendant Mhoon intermarried with the widow of the plaintiff's testator.

His Honor instructed the jury that upon these facts the negroes never vested in the plaintiff's testator, and that the defendants were entitled to a verdict, which being returned accordingly, the plaintiff appealed.

Gaston for the plaintiff.
Hogg and Badger contra.

HENDERSON, J. It is not to be controverted that an executor derives all his powers from the will. But whether there is a will and who is the executor thereof are matters of ecclesiastical cognizance, and consequently the decision of the ecclesiastical courts on the subject is conclusive. They adjudicate that this is the will of A and that B is the executor thereof; and when in other courts it is necessary that B should sustain the character of executor, that adjucation is conclusive. The will is therefore improper evidence of that fact, for that adjudication is the only evidence competent to prove it. Suppose from the words of the will it is matter of doubt whether A or B is executor, and that court should decide in favor of B. If the probate of that will should be offered in evidence in another court and the whole will as well as the adjucation set forth, such other court, whatever it might think upon the subject, would be bound to consider B as the executor. The will, therefore, was entirely unnecessary to be produced in court; for whatever were its provisions, it could not affect the decision of the cause. The only question, therefore, which can arise in this case in regard to the plaintiff's character as executor is this, Do the letters testamentary, or the certificate offered in this case, prove that fact? I think that (458) they do. It is a testimonial given by the court that they have adjudicated the plaintiff to be the executor. It is wholly unnecessary to append a copy of the will to such a testimonial, for it can answer no purpose. It does not follow by any means that this certificate or letters testamentary are the only means by which it can be shown who is an executor. The adjudication can be proved by the production of the original records or minutes of the court, if they are shown to be such, or a copy under the seal of the court (as I take this to be, not a bare certificate), or by a sworn copy when offered to a jury as in this case, or by any other means by which the proceedings in one court are given in evidence in another, with this difference: when offered in evidence to the court, as under a profert, the record must be in that form which proves itself, that is, the original, proved to the court to be such, or a copy under the seal of the court.

The county court in this State, to which has been transferred the probate of wills, stands in the place of the ecclesiastical court of England, and what has been said in regard to the latter applies to the former.

As to the other point in this case, it falls completely within *Whitaker v. Whitaker, ante,* 310. The plaintiff is therefore entitled to a new trial. The defendant is not entitled to a nonsuit, for the evidence was properly received.

PER CURIAM. ERROR.

Cited: Navigation Co. v. Green, 14 N. C., 435; *Pettijohn v. Beasley,* 15 N. C., 513; *Miller v. Bingham,* 36 N. C., 425; *London v. R. R.,* 88 N. C., 588; *Pendleton v. Dalton,* 92 N. C., 191.

(459)

WILSON B. HODGES, administrator of JOHN MARRINER, v. HENRY N. JASPER.

From Washington.

The court in which an issue of *devisavit vel non* was finally tried is the proper one in which to demand a reprobate, and where the trial was in the Superior Court, a demand of reprobate in the county court was held to be erroneous.

DEVISAVIT VEL NON. On the trial it appeared that the supposed will had been offered for probate at October Term, 1804, of Tyrrell County Court, when an issue was made up, which by appeal was finally tried in the Superior Court for the district of Edenton, where the will was established. It remained undisturbed until the Spring Term, 1849, of Chowan Superior Court, when the defendant in the present issue filed a petition for a reprobate, upon which, at Spring Term, 1821, *Badger, J.,* set aside the former probate, and directed an issue of *devisavit vel non* to be tried in that court. On the next Spring Circuit, *Paxton, J.,* thinking that the Superior Court of Chowan had not jurisdiction to try the issue, set aside that part of the former order directing the trial to be had in that court. The supposed will was then offered for probate in Tyrrell County Court, when the present issue was made up, tried, and carried by appeal to the Superior Court, and then removed to Washington.

Before the trial in the court below the defendant insisted that the county court of Tyrrell had no jurisdiction to take the probate, but that it should have been demanded in the Superior Court of Chowan, where the record of the former trial remained. *Donnell, J.,* reserved the point, but did not decide it, as the defendant obtained a verdict. The cause came here on the appeal of the plaintiff upon other points which it is unnecessary to notice.

Badger for the plaintiff. (460)
Gaston and Hogg for the defendant.

PER CURIAM. The demand of probate must be dismissed, for that it should have been made in Chowan Superior Court, as the court in

which the will was established. It was the judgment of that court to which the case was regularly removed that established it, and not the judgment of the court in which it was first offered for probate; the judgment of the latter was vacated or annulled by the appeal. It would have been desirable to the Court that the parties should have agreed between themselves on some county for the trial of the matter in controversy, to prevent a further accumulation of costs, and we have accordingly advised it to them; but as they have not accommodated it, we are constrained reluctantly to render the above judgment.

PER CURIAM. Dismissed.

Cited: Sawyer v. Dozier, 27 N. C., 104.

(462)

ROBERT H. SMITH v. WILLIAM B. SHEPARD.

From Perquimans.

1. If a question of law be improperly submitted to a jury, and they decide it correctly, a new trial will not be granted.
2. The obligor must show, either that he has fully complied with the condition of his bond or has offered to do so. Therefore a condition to convey an equal and fair portion, a half of a certain tract of land belonging to the obligor, is not performed by an offer to convey a certain tract by metes and bounds, without proof of title or the fairness of the division. Neither is the condition performed by an offer to convey an undivided interest less in quantity.
3. If damages are given beyond the penalty, and that is the only error on the record, the judgment will be reversed as to the excess alone.

DEBT upon a bond for $3,000, dated 21 April, 1824, with the following condition: That W. B. Shepard shall, as soon as the thing is practicable and the situation of the country will admit, convey in fee simple to R. H. Smith one equal and fair portion, a half of a tract of land of 3,000 acres belonging to said Shepard and lying on the Obian River in the State of Tennessee."

The pleas were, "Conditions performed and not broken, and tender and refusal."

On the trial the defendant proved the tender of two deeds to the plaintiff before the commencement of the action. The first, dated 8 March, 1825, assured to the plaintiff in fee a tract of land "lying and being in the State of Tennessee in the county of Weakly, on the middle branch of the south fork of the Obian River, being a part of two patents granted to John G. and Thomas Blount, beginning, etc., containing 1,500 acres."

By the second deed, dated 18 April, 1825, a tract of land was conveyed to the plaintiff in fee, described as "one undivided half of the ninth part of a tract of land in the State of Tennessee, beginning, etc., on the south fork of the Obian River, running thence (462) etc., containing, by estimation, 24,000 acres."

It was in proof that the defendant had title to one-ninth of the land described in the last recited deed, that the land had been identified before the summer of 1824, and that the county of Weakly, within which the land was situate, had been established at that time, and courts of justice opened therein.

Martin, J., left it to the jury to determine whether the tender of the deeds was in substance and effect a tender of such a conveyance as was required by the condition of the bond, and informed them that they were to inquire into the value of the land, and were at liberty to give interest upon that value, provided it did not, with the damages, exceed the penalty of the bond. The jury returned a verdict for the plaintiff to the amount of the penalty, and gave interest thereon from the date of the writ, whereupon the defendant appealed.

Gaston for defendant.
Hoog and Badger for plaintiff.

HENDERSON, J. I think very clearly that the question whether (463) the deeds tendered were such as the condition of the bond required, was one of law; for what were the obligations of the defendant was a question of law, and the deeds being offered in performance of those obligations, the same tribunal, therefore, should decide both. What ought to be done was a question of law; what had been done one of fact. But as the jury came to the proper conclusion, the judge was right in refusing a new trial.

The bond required an equal and fair portion, a half of a tract of 3,000 acres, belonging to the said Shepard and lying on the Obian River in the State of Tennessee. The deed of 8 March, 1825, was for 1,500 acres lying in the State of Tennessee in the county of Weakly, on the south fork of the Obian River, being part of two patents, granted, etc. This may be a part of the lands owned by Shepard at the date of the bond and it may be an equal and fair portion, a half tract of 3,000 acres; but these facts do not appear. Shepard may not have owned the land at the date of the bond; it may not be half of a 3,000-acre tract, and, if it is, it may not be an equal and fair portion. It may be the most inferior part; *non constat,* therefore, that the obligations of the bond were offered to be performed. As to the deed of 18 April, 1825, it is still more defective. It is deficient in quantity, and it has all the

defects before pointed out, except that as tenant in common the grantee would be entitled to a fair partition. It is for one-half of one-ninth of 24,000 acres, less by nearly 160 acres than Shepard was bound to convey.

But as the jury assessed the damages beyond the penalty of the bond, and as a judgment has been rendered according to the verdict, the judgment must be reversed as to such excess in damages. The judgment therefore is that the plaintiff recover $3,000, with interest there-
(464) on from the rendition of the judgment in the court below, with costs to that court. This Court having reversed in part the judgment of the Superior Court, the plaintiff must pay the costs here.

PER CURIAM. Modified.

Cited: *Hathaway v. Hinton,* 46 N. C., 247; *Brock v. King,* 48 N. C., 48; *Chaffin v. Lawrence,* 50 N. C., 181; *Terry v. R. R.,* 91 N. C., 244.

ATHA LINDSEY v. BARTHOLOMEW LEE.

From Johnston.

1. New trials for surprise can only be granted in the Superior Courts, and a refusal to grant one, being the exercise of a discretionary power, cannot be examined upon appeal.
2. Notice to a particular agent to take the deposition of a nonresident witness to be read absolutely is not supported by a rule authorizing notice to that agent to take the deposition of the same witness *de bene esse,* the witness being at the granting of the rule a resident of this State.

DEVISAVIT VEL NON as to the supposed will of one Burchet Lee. The cause originated in Sampson and had been removed to Johnston.

On the trial the plaintiff offered to read absolutely the deposition of one John Lindsey, taken in the State of Tennessee, which was objected to by the defendant, as the notice of taking it had not been served upon him, but upon one Caleb Lindsey, who was not a party to the suit. In order to justify the notice to Caleb Lindsey, the plaintiff produced the following rule of Sampson Superior Court: "Ordered, that a commission issue to take the deposition of John Lindsey, on giving Caleb Lindsey twenty days notice. Deposition to be read *de bene esse.*" But *Martin, J.,* thinking that the order was intended for taking the deposition of a resident witness, to be read only *de bene esse,* and not that of a witness residing in another State, to be read absolutely, rejected the deposition. Whereupon the plaintiff submitted to a verdict against

him, John Lindsey being the subscribing witness, and moved for a new trial, first, on the ground of surprise, and secondly, (465) because of error in rejecting the deposition. His Honor discharged the rule, and the plaintiff appealed.

W. H. Haywood for the plaintiff.
Badger contra.

HENDERSON, J. It is argued that the judgment in this case be reversed, first, on the ground of surprise; secondly, because the deposition of John Lindsey was improperly excluded.

Upon the first ground this Court cannot act; it is matter addressed to the discretion of the judge below, over which we have no control. As to the second ground, we concur in the opinion of the judge that the deposition ought to be rejected. Notice to take it ought to have been served on the parties or on their agent. It does not appear that Caleb Lindsey was either their general agent or agent to receive notice to take this or any other deposition, except that of John Lindsey, *de bene esse,* under a rule made in Sampson Superior Court while the cause was there. The rule was special and contemplated the taking of a deposition of another character and at a different time and place from the one offered.

PER CURIAM. Affirmed.

Approved: *Wall v. Hinson,* 23 N. C., 277; *Thomas v. Myers,* 87 N. C., 33.

(466)

CARR DARDEN v. WRIGHT ALLEN.

From Hertford.

1. In detinue, if the defendant relies upon his possession either as a bar to action or as a part of his title, the burden of proving its length lies upon him.
2. Every possession is presumed to be upon the title, and for the benefit of the possessor, and he who avers the contrary takes the burden of proof.
3. No length of possession in a bailee will either destroy the title or bar the action of the bailor.

DETINUE for several slaves, tried before *Ruffin, J.,* on the last circuit. The defendant pleaded *non detinet* and the statute of limitations.

The writ issued on 1 October, 1825, and on the trial the case was that the slaves, being a woman and four small children, belonged to one

Robert Flinn, who died in September, 1820. In November ensuing, letters of administration upon the estate of Flinn issued to the plaintiff, who took the slaves into his possession, and kept them until January, 1822, when they were placed by him with one Wiggins, to be kept for the year 1822, at stipulated price. Martha Flinn, who was the widow of the plaintiff's intestate and the sister of Wiggins, resided with the latter during that year. In the fall of 1822 Martha Flinn left her brother's and went to reside on her own plantation in the neighborhood. Early in 1823 the slaves in dispute were in the actual possession of Martha Flinn, and so continued until July, 1825, when they were found in the possession of the defendant. On 20 September, 1825, the plaintiff demanded the slaves of the defendant, who refused to give them up, alleging that he had bought them from Martha Flinn, and declaring that he should hold them as his own. It did not appear with certainty at what time Martha Flinn left her brother's house and took
(467) the slaves into her possession. The defendant contended that it was before 1 October, 1822, and the plaintiff that it was after. Both parties called witnesses to this point. Those called by the defendant stated that it was in the fall of 1822; but whether in the month of September, October, or November none of them could say. The witnesses called by the plaintiff stated the the negroes remained with Wiggins until January, 1823, when the plaintiff settled with him for keeping them the year then past, and advised Martha Flinn, who was present, to take them home with her, and keep them herself for him, which she agreed to do.

His Honor instructed the jury that an adverse possession continued for three years would not only bar the plaintiff's right of action, but extinguish his title to the slaves; but that the plaintiff's original right ought to prevail unless the defendant showed such adverse possession in himself or those under whom he claimed; and that the burden of proving this length of possession was on the defendant, because he alleged it, either as a part of his title or in bar of the plaintiff's remedy, upon a clear and admitted previous right. The jury were further instructed that every possession is in law presumed to be on the title, and for the exclusive benefit of the possessor, until the contrary be shown; that if Martha Flinn did in fact receive the slaves from the plaintiff, or hold them upon a bargain made by him with her, then her possession was not adverse to the plaintiff, but under him, and for his benefit, and although this possession might continue for more than three years, the plaintiff would not thereby be defeated of his right of action, upon a demand and refusal; but that in relation to such a contract of bailment the burden of proof was upon the plaintiff who alleged it.

A verdict was returned for the plaintiff and the defendant appealed.

Hogg for plaintiff. (468)
No counsel for defendant.

HENDERSON, J. I think that the law was fully and correctly stated by the presiding judge. No objection is made by the defendant to the charge on the first point; he objects to the second.

I cannot well conceive how a possession is lost by one person unless it is gained by another; they are correlatives. If I lose my goods and they remain lost for twenty years, and are then found, I may maintain an action for them, and the finder will not be protected by the statute of limitations. So if my bailee possess my goods under the bailment for the same period of time, I can maintain an action against him, for I have not thereby lost my possession, his possession being my own. There must be a possession adverse to my title before my possession is destroyed. I speak not here of that actual possession which the owner should have to maintain trespass *vi et armis* or to make the goods the subject of larceny; for peculiar reasons, actual possession in such cases is required. But I speak of that possession which is the *indictum* of title, and which is absolutely necessary to constitute in law a perfect one. The judge was therefore perfectly correct in instructing the jury that title and possession having been shown to have been once in the plaintiff, that possession continued until another arose in some other person; and that it was not incumbent on the plaintiff to prove an actual possession in himself with in three years next before suit brought, but that it was incumbent on the defendant to show a divestment of that possession, by an adverse one in himself or some other person, with which he could connect his possession.

The judge was equally correct when he instructed the jury that every possession was presumed in law to be on the title, and for the exclusive benefit of the possessor, until the contrary be shown; and (469) that a possession being shown in Martha Flinn, such possession was presumed to be for her benefit, and consequently adverse to the plaintiff's right, until its fiduciary character was shown by the plaintiff; and if so shown, no length of time would either bar the plaintiff's action or vest the title in the defendant.

In using the expression, "with some other person with whom he can connect his possession," I have yielded to the common understanding of the profession. But I wish not to be understood as expressing any opinion on the subject, as it is entirely unimportant in the present case.

PER CURIAM. No error.

Cited: Green v. Harris, 25 N. C., 220.

DAVID JUSTICE v. THOMAS COBBS and SARAH JETER.

From Wake.

1. Where a parent puts a slave into the possession of a child, without an express parol gift, this possession is not adverse and does not divest the the title of the parent or bar his action.
2. But it seems that such a parol gift may be ripened into an indefeasible title by a possession of three years.
3. What title is necessary to enable the plaintiff to maintain detinue, *quære.*

DETINUE for a female slave. On the trial the case was that the slave had belonged to one High, whose daughter the plaintiff had married. Upon the marriage of the plaintiff, High sent the slave to his house, where she remained six or seven years, until the plaintiff's daughter intermarried with one Pullen, since the year 1806, when she was sent to the house of the latter, where she remained for many years, and was used and claimed by him as his own. No bill of sale or deed of gift from High to the plaintiff, or from the plaintiff to Pullen, was produced. It appeared that High died in 1813, having duly made his will; but (470) none of its provisions were given in evidence. The defendants claimed under Pullen, by a sheriff's deed, with notice of the plaintiff's title, and relied upon the possession of Pullen under the act of 1820, Rev., ch. 1055, and the statute of limitations.

Martin, J., informed the jury that if the plaintiff's title was derived from High by a parol gift before the act of 1806, it was complete; that if so derived since that act, it was possessory only; but in either event it was sufficient to enable the plaintiff to maintain this action. As to the statute of limitations, the judge instructed the jury that since the act of 1806 a parol gift of a slave operated as a bailment only; that in cases of bailment the statute of limitations did not run until the termination of that contract, and that the fact that the bailee claimed and used the property as his own would not terminate the contract of bailment. And further, that if Pullen claimed by a loan or parol gift from the plaintiff since the act of 1806, the defendants claiming under him with notice of the plaintiff's title were estopped to deny it.

The jury returned a verdict for the plaintiff, and the defendants appealed.

Gaston, Devereux, and W. H. Haywood for defendants.
Badger for plaintiff.

HALL, J. It is not a very easy task to lay down a general rule to decide what special rights in property will support this action, nor is it

necessary in this case. The judge properly stated to the jury that if the parol gift to Justice was prior to the act of 1806, Rev., ch. 701, it was good. I concur with him too in saying that if it was since, circumstanced as this case is, Justice can sustain this action.

High, who was the owner of the property in dispute, died in 1813. If he made no will, Justice was entitled to the slave as an advancement, under the act of 1806. If he made a will, as it appears he did, though it has not been given in evidence, it is likely that he either confirmed the title of the property in Justice or bequeathed it to some other person. If the latter is the fact, Justice, and Pullen claiming under him, have held the property adverse to such person for many years. So that in either event the jury were authorized to infer a title in Justice which, accompanied with possession, is sufficient to support this action.

As to the statute of limitations, it can be no bar in favor of Pullen. He held the property, both in fact and in law, under Justice. The act of 1806 declares that "When any person shall have put into the possession of his child any slave, etc., which shall remain in possession of such child at the time of the death of such donor, such slave shall be considered as an advancement to such child." The object of the act would be defeated if the child's possession could be ripened into (472) title by a continuance of three years.

But if an express parol gift was proved to Pullen, it would seem that a three years adverse possession would complete his title. But I give no opinion on this point, as the case does not require it. No gift is proved to Pullen; he relies upon an implied one, arising from possession.

As to the estoppel spoken of on the defendants, it may be observed that whether they had notice or not, they could not have a better title than Pullen himself had, as long as they claimed under him. The only difference between them would be that the defendant's right, although it would not be better than Pullen's when first derived from him, yet might be ripened into title by an adverse possession of sufficient length, whether they had notice of Justice's title or not.

PER CURIAM. No error.

Overruled: Palmer v. Faucett, 13 N. C., 243.

GEORGE BIRD v. SAMUEL J. ROSS.

From Rutherford.

1. An accountable receipt for a judgment under seal, which vests the equitable title in the receiver, in law only binds him to pay what he receives on it.
2. Upon such an assignment, if the assignee gives him the full value, and has no day of payment, without an agreement to the contrary, the assignor guarantees that the judgment can be collected. But if less than the amount is given, or day of payment had, the assignor only guarantees the existence of the judgment.

COVENANT upon the following instrument, on which a credit of $700 was indorsed:

"April 10, 1822, received of George Bird, an order to the Sheriff of Rutherford County for the amount of Peter Fisher's judgment that he obtained for Mark Bird, deceased, for thirteen hundred dollars, and for six months interest, which we will account for.

"ARTHUR CLARKE, [L. S.]
"SAMUEL J. ROSS, [L. S.]"

(473) The statement of the case was rendered exceedingly obscure by a transposition of some of the lines of the original in making out the copy for this Court. It is inferred that an execution on the judgment mentioned in the above deed had been levied on a tract of land called the High Shoals, which had belonged to Peter Fisher, and was alleged by the plaintiff and defendant to have been fraudulently conveyed to his son, Jacob Fisher; that an action of ejectment was prosecuted by the defendant for that land, in the name of the heirs of Mark Bird, of whom the plaintiff was one, and that if successful in the action the defendant was to have the land and pay the residue of the judgment; otherwise, it was to be lost by the plaintiff; evidence of this kind was offered to the jury. The plaintiff contended that Ross either had received full satisfaction from Fisher for the judgment or had so fraudulently conducted the action of ejectment as to prevent a recovery therein.

Norwood, J., however, instructed the jury that by the deed above set forth an equitable title to the judgment mentioned in it vested in Clarke and Ross, and that it gave them full authority to collect and recover the amount of it, and they were bound to pay the plaintiff the balance of the judgment, whether they collected it or not. A verdict was returned for the plaintiff, and the defendant appealed.

Hogg for the appellant.
Wilson contra.

BIRD *v.* ROSS.

HENDERSON, J. The deed of 10 April, 1812, with the indorsement, is evidence that Clarke and Ross had become the equitable owners of the judgment. But it furnishes no evidence of the terms and conditions of the transfer. They are left to be implied by law, from the circumstances of the transaction. If Clark and Ross advanced, or agreed to advance, the full amount of the judgment, with interest, without (474) having a day of payment given to them, this imposed on Bird a guarantee that the money should, or might with reasonable exertions, be collected; for it is not to be presumed that Ross and Clarke would pay or agree to pay the full amount without having day of payment given, or some such equivalent, and take upon themselves the risk of collection. In such case, therefore, the risk of collection must have been assumed by Bird, for the law always looks to the consideration in raising the promise. If less than its amount was given, something like its market value, the law placed the risk on Ross and Clarke, for they had been paid for it in the reduction of the price. If that was the fact, they would be bound, whether they collected the money or not. The only obligation imposed on Bird was that the money called for by the judgment was due, and I suppose that there was such a judgment. I think, therefore, that the judge erred in informing the jury that the defendant was liable to pay the whole amount, whether he collected the money or not. In the absence of all evidence as to the special price agreed to be paid for any article, the market value is the one which the law presumes to be understood, and fixes that as the price. But there is some evidence from which the jury might properly come to a conclusion what was the agreement, viz., the after conduct of the parties; for although the conduct of the parties cannot be used to explain a contract, it is the best evidence to prove what that contract is. I think, therefore, that there should be a new trial; for although the evidence might have satisfied the jury that Ross had or might have received the money, or was guilty of fraud in not attending to the suit for the High Shoals, these are facts of which the Court can form no opinion. Possibly the jury decided on the ground first mentioned by the judge, in which we think there was error, and for that it must go before a jury again.

PER CURIAM. New trial.

(475)

JOHN WASHINGTON, Chairman, etc., upon the relation of R. H. JONES v. WILLIAM HUNT, executor of JOSEPH TAYLOR.

From Warren.

1. Creditors have a right to assign the nonpayment of their debts as a breach of the administration bond, and to put it in suit.
2. The rule of damages is the amount of the judgment against the administrator, where one has been obtained.

DEBT upon the bond given by one John Brodie, upon taking out letters of administration on the estate of one Alexander Brodie, to which bond the defendant's testator was surety.

The condition of the administration bond was in the usual form, and the breach assigned was the nonpayment of a debt due the relator by the intestate, upon which he had obtained a judgment against the administrator, and *nulla bona intestati* was returned.

After *oyer* the defendant pleaded performance of the condition.

Upon the trial before *Martin, J.*, the plaintiff produced the record of the suit between him and the administrator, in which the latter was fixed with assets and from which it appeared that the original debt was secured by a bond for $1,333⅓, to be void upon the payment of half that sum; but the verdict and judgment were for the penalty of the bond, as the interest had increased the debt to that amount.

The jury, under the instruction of the presiding judge, returned a verdict for the plaintiff for the full amount of the judgment against the administrator, with interest up to the trial, and the defendant appealed.

Seawell for the defendant.
Gaston and Bedger on the other side.

HENDERSON, J. If we were now, for the first time, putting a construction upon the act of 1715, requiring administrators, etc., to give bond, I think we should have but little doubt that the bond required by that act should be confined to the administration of the estate so
(478) far only as regards the interest of the next of kin; that nothing could be assigned as a breach of it but what tended to their injury; and that all the duties prescribed in the condition would be regarded as subservient to their claims, and not to those of creditors. If any doubts could have been raised upon the point, I think that they would have been removed by the very able and lucid historical argument of the counsel for the defendant. And notwithstanding the case of the *Archbishop of Canterbury v. House,* I think such is and uniformly has been the rule, in the English courts, upon the statute of

Charles. *Lord Holt,* very soon after its passage, declared that it did not extend to creditors, and that it was made for the benefit of the next of kin only. *Greenside v. Benson* and *Thomas v. Archibishop of Canterbury* fully show what has since been the understanding of their courts. As to *Archbishop of Canterbury v. House,* it does not appear from it what was the breach assigned, although the bond had been delivered to a creditor, and he was carrying on the suit in the Archbishop's name; for aught that appeared, it might be for an act in which the next of kin were concerned, the more especially as otherwise we cannot reconcile what fell from *Lord Mansfield,* that he knew of no case or principle which prohibited the ordinary from delivering the bond to any person to sue upon, in his, the ordinary's name, with the case of the *Archbishop of Canterbury v. Wills,* as it cannot for a moment be believed that he was ignorant of the opinion delivered by *Holt* in that case. But be this case as it may, it is in opposition to all that has gone before or has come after it, if from it we are to understand that the nonpayment of a debt can be assigned as a breach of an administration bond. Upon principle a satisfactory reason can be assigned why administrators should give bond to distribute among the next of kin, and executors should not, and also that as executors were not to give bond to pay the debts, *a fortiori* administrators should not.

The legatee claims from the bounty and free will of the testator, (479) and it is the testator that appoints the executor, thereby directing who is to pay the legacy. The legatee must take as the testator gives, and as the testator has made the selection to whom he will confide the management of his affairs, and not having thought proper to require surety to pay the legacies, it would seem very unfit that a legatee should demand it, unless in a case where there is a disposition manifested by the executor to waste the estate. In this case a court of equity will compel the executor to give surety, but it is upon the ground that if the testator could have foreseen his unfaithfulness he would not have committed the trust to him. On the other hand, an administrator is selected by the court; the deceased had no hand in his appointment; the distributees do not claim from him as an agent appointed by the deceased, but one appointed by the court. It is proper, therefore, as he is put into his office by law, that the law should require surety that he will distribute according to law. As to the position that as executors are not required to give bond to pay debts, *a fortiori* an administrator should not, I think it follows from this: A creditor claims not under the will or bounty of the testator. There is therefore no reason why he should be bound to acquiesce in the appointment which the debtor may think proper to make. There is no check upon the claim of the debtor as to whom he may select as his executor. He may appoint the most worth-

less man in the community, who is not withstanding entitled by law to the executorship, and although it is true that a creditor may compel him, in a court of equity, to give surety for a faithful administration, yet that is an after thing, and affects not the principle. An administrator, however, is appointed by the court. It is true that the choice is confined to the widow or next of kin, and, if they refuse, to the creditors. Yet this affords some opportunity for a choice, and will generally enable the ordinary to make a more judicious selection than
(480) the most worthless man in the community, whom the testator may appoint executor if he pleases. This is the fair way of stating the question. If either the one or the other should be exempt from giving surety for the payment of debts, I think it ought to be the administrator. But at any rate this reason is sufficient for the purpose for which the subject was introduced, viz., to show that the reasons are equal to compel both to give surety, or to require it from neither. However, as far back as we have any knowledge of the construction put upon the act of 1715, with the exception of one case at Hillsboro, before *Judge McKay,* it has uniformly been considered by all persons, the people, the bar, the bench, and the Legislature, that the nonpayment of a debt was a breach of an administration bond. The Legislature has so considered it independently of and long before the act of 1807, requiring executors in certain cases to give bond, where a very plain opinion is expressed that administrators were bound by their bond to pay the debts out of the assets; for the construction put upon these bonds was a matter of notoriety, and they did not interfere.

After such an uniform opinion upon the subject for such a length of time, it would be the height of impropriety to give a different construction to the act. It would unsettle and render insecure too much property. In some cases this may be our duty, where the misconception is glaringly and manifestly wrong. But in this case it is not so; the breach by the nonpayment of a debt is within the words of the bond, without a very shrewd construction. The words are, "and the goods and chattels which shall come, etc., do well and truly administer according to law." And to show that a maladministration of the assets by failing to pay creditors is not within these words, we are under the necessity of going into a long historical argument, which may possibly lead us to a wrong conclusion. When we see the long and uniform custom of the country, so well—at least so firmly—established as
(481) this is, we have no moral right to disturb it, although we should be of opinion that the words were not originally correctly understood.

The judgment should be for the debt recovered in the original suit, with interest to the time of rendering the judgment in this case in the

court below. The failure to pay that sum, when thus judicially ascertained, was the default imputed to the administrator, and which he, having assets, ought to have paid; also the costs of that suit, but not with interest thereon, for plaintiff did not show that he had paid them.

PER CURIAM. Affirmed.

Cited: Smith v. Fagan, 13 N. C., 301; *McLane v. Peoples,* 20 N. C., 137, 140; *Strickland v. Murphy,* 52 N. C., 243.

JOHN CROW v. THE HEIRS OF JAMES HOLLAND.

From Haywood.

Fraud, which vacates a grant, being a compound question of law and of fact, a general verdict that a grant was fraudulently obtained is not sufficient foundation for a judgment of repeal.

PETITION to vacate a grant which issued to the ancestor of the defendants, upon the ground that it had been fraudulently obtained. The matters alleged in the petition were:

1. That the land had been surveyed by one Avery for himself; that one Walker fraudulently obtained possession of Avery's field notes, and made sundry entries from them for himself; that he gave the ancestor of the defendant the warrant and the survey upon which the grant sought to be vacated had issued, in consideration of aid rendered to him in defrauding Avery.

2. That the survey upon which the grant issued was never actually made by Walker, but was only signed by him as deputy surveyor; that this was known to the grantee when he sued out the grant.

3. That the survey, upon its face, appeared to have been made (482) by Walker for himself.

These facts were all put in issue by the answer, and on the trial testimony was offered to the jury by both parties.

His Honor, *Judge Daniel,* informed the jury that if the survey upon which the grant issued was never actually made, as required by law, and this fact was known to the grantee when he received it, such conduct was a fraud upon the State, and vitiated the grant; and also that if the survey was made by Walker for himself, and this fact was known to the grantee when he sued out the grant, it was a fraud upon the land laws, which likewise vitiated the grant. The jury returned a general verdict for the petitioner, and the defendants appealed.

Wilson and Badger for plaintiff.
Gaston for defendants.

TAYLOR, C. J. The grant is sought to be set aside on the ground that it was obtained by means of several fraudulent acts, which are particularly stated in the petition, and the jury have found that it was obtained by fraud. This may be an inference they have drawn from some of the facts alleged in the petition having been proved, but it is not a necessary implication that it arises from the proof of all of them. Fraud is a compound question of law and fact. The facts going to establish it are decided by a jury. Whether, when proved, they will amount to such a fraud as will vacate a grant is a question for the court to decide. Were this grant to be set aside on this general finding, it would be deciding in the dark; for we have no means of ascertaining of what the fraud found by the jury consisted, and the court ought to have a full assur-
(483) ance that the grant was fraudulently obtained, before it is vacated. The issues ought to be tried again, and the specific acts constituting the fraud ascertained by the jury, who may infer fraud; but then the court will be enabled to determine whether it be so in point of law.

PER CURIAM. New trial.

MOTT BEDELL v. THE PRESIDENT AND DIRECTORS OF THE STATE BANK.

From Wake.

Notice to take a deposition on a particular day of every week, for three successive months, is insufficient.

ASSUMPSIT, and upon the trial the plaintiff offered to read the deposition of one Richard Bedell. The notice to the defendant was that the deposition would be taken "on the Saturday of every week in July, August, and September, at, etc., in the city of New York." *Daniel, J.,* rejected the deposition, thinking the notice too vague, although the plaintiff proved that the witness was a seafaring man, and that it was impossible to give notice with any certainty of a particular day when he would be in New York, or in any other seaport.

The plaintiff was nonsuited, and appealed.

Devereux for the plaintiff.
Badger contra.

TAYLOR, C. J. It is impossible to consider a notice of this kind sufficient without opening a door to abuses of the most mischievous tendency. Testimony by deposition is, at best, inferior to that by witnesses, and ought to be so guarded that the court may have every reasonable assurance of its truth. Under a vague notice of this kind a man might be kept three months from home, if the witness did (484) not appear till the last Saturday in September. The utmost extent which has yet been allowed is one week, where the deposition was to be taken at a great distance from the residence of the parties.

PER CURIAM. Affirmed.

THE PRESIDENT AND DIRECTORS OF THE STATE BANK v. WILLIAM WILSON and JAMES PARKER.

From Gates.

1. The declarations of a creditor, or of his general agent, that his debt is discharged, is *prima facie* evidence of payment.
2. Mere delay of the holder in collecting a note will not discharge an indorser who has been duly fixed with the payment. But if the holder, by a new contract, varies the obligation of the maker, and prevents the indorser from having immediate recourse against him, upon paying the debt and taking an assignment of the security he discharges the indorser.
3. At law an indorser has the same right to an assignment of a judgment against the maker on the note that he has to the note itself.

ASSUMPSIT upon the indorsement by the defendants of the promissory note of one William T. Muse, for $4,700, which had been discounted at the office of the plaintiffs in Edenton. The defense was upon the general issue, and the following facts were in evidence: That Muse died in Pasquotank County in July, 1823; that at the next term one John B. Blount, who was the cashier of the plaintiffs at the Edenton branch, proved his will and qualified as executor thereof; that at March Term, 1824, of Chowan County Court, Blount confessed a judgment to the plaintiffs for the principal and interest of the note; that writs of *fi. fa.* issued on that judgment, and were directed to the sheriff of Chowan from every term until that of December, 1824, but none of the writs appeared to have been delivered to the sheriff; from December Term, 1824, a *fi. fa.* issued to the sheriff of Pasquotank, (485) who returned, "No property to be found but such as was sold under other and older executions." The defendants called upon J. B. Skinner, Esq., who proved that on 1 January, 1825, the defendant Wilson came from Pasquotank to see him, at his residence in Edenton, and in-

formed him of his endorsement of Muse's note, then held by the plaintiffs, and of his great uneasiness about it, because Blount had advertised the negroes belonging to the estate of Muse for sale, in Pasquotank, on the 13th of that month, and that he feared unless execution was issued and satisfaction obtained out of the negroes before the sale by the execution, that the executor Blount would waste the assets, and he, Wilson, be finally compelled to pay and lose the debt; that Skinner, having the money, agreed to advance cash sufficient to take up the debt, and advised the defendant Wilson to do so, and take an assignment of the judgment. That on the same day the witness and Wilson went to the office of the plaintiffs in Edenton and informed Blount, the cashier, of the object of Wilson, and then offered to pay the debt and take an assignment of the judgment, if it was not already satisfied; to which Blount replied that this was unnecessary, as the debt would be settled in a few days, the plaintiffs having agreed to take in payment of it notes which would be received upon the sale of the negroes then advertised. That the witness and Wilson, not being satisfied with this assurance, insisted upon Blount's calling a meeting of the directors, at which Skinner, who was a director, made a full statement of the views of Wilson, and offered for him then to pay the amount of the judgment and take an assignment of it; that the directors seemed anxious to prevent a sacrifice of Muse's estate by selling the negroes for cash, and expressed their willingness to receive notes from Blount for the debt; and they proposed that instead of making an assignment to Wilson, a *fi. fa.*
(486) should issue to Pasquotank, that one of the directors should attend the sale and receive in satisfaction of the judgment notes which might be taken at it; with which arrangment the defendant Wilson was satisfied.

The defendant then called the sheriff of Pasquotank, who proved that Muse left a large estate; that Blount, his executor, in January, 1825, sold slaves which had belonged to the testator to the amount of $14,500; that the sale was upon a credit, and for notes negotiable at the office of the plaintiffs in Edenton; that Blount conducted the sale, and that the member of the board of directors alluded to at the meeting in Edenton was present; that the notes were taken by Blount with the knowledge and consent of that gentleman; that the execution upon the judgment in favor of the plaintiffs was not delivered to him before or at the sale, nor ever in Pasquotank County, nor did he hear thereof until some weeks after it; that at the time of the sale he had sundry *fi. fas.* against Blount as executor, on which was due a balance of six or seven thousand dollars, and which were levied on the slaves; that at the request of Blount he relinquished the levy, and some days thereafter went to Edenton, when Blount paid him the amount of the *fi. fas.*;

there he first received the execution on the judgment for this debt, and was directed to make the return of *nulla bona testatoris*. The witness further proved that in the evening of the day when Muse's negroes were sold one of the defendants asked the director who attended the sale what was done with this debt, or whether it was satisfied. To which he replied: "You are safe, for the bank has agreed to take notes of Blount; some have been submitted to and approved by the board, and Blount is now taking others, which will cover the balance."

Mr. Skinner was again called, and proved that in May or June, 1825, he, on behalf of the defendant Wilson, applied at the bank to learn the situation of the debt for which the defendant was bound, believing that Blount could pay the debt if it was then placed under (487) their control, which the witness was willing to effect by advancing the money for their benefit. That to his inquiry what was the situation of the debt, and whether the indorsers were discharged, he was answered by the cashier, Blount, that they were, the debt having been paid by him, and the whole business settled. It was proved by Mr. Creecy, the bookkeeper of the plaintiff, that neither cash nor notes had been paid into the bank on account of the debt by Blount; and he further stated that the cashier was the only person who could receive cash and grant acquittances for debts due the bank; that no director had this power, and that the cashier was the general agent of the corporation. The witness also proved that some time in the summer of the year 1825 the defendant Wilson came to the bank and asked Blount what had been done with this note, and whether the debt had been settled, to which the cashier replied, "It is paid, and you are discharged"; that as soon as the defendant had gone out, the witness asked Blount "if the debt was settled, why not make the entries accordingly," to which Blount replied, "It is done, or it will or shall be done, which is the same thing, and then the entries can be made."

Blount died insolvent, and this suit was commenced in March, 1826.

Ruffin, J., charged the jury "that in point of law the declaration of a creditor that a debt to him was paid was *prima facie* evidence of that fact, and that the declartation to the same import of a general agent, such as the cashier had been represented by the witness Creecy to be, was within the scope of his authority, and would have the like operation with that of the principal himself. That in this case the jury were at liberty to infer the payment of the debt from the express words of the said Blount, unless the inference of fact should be re- (488) pelled, in their opinion, by the testimony of Creecy; in which latter case they could not find for the defendant upon the ground of an actual payment; and in that event it would be necessary for the jury to consider the other points of defense arising out of the testimony. In

relation to that insisted on by reason of time having been given by the plaintiff to John G. Blount, it was not true that every giving of time by the holder of a note to the maker would discharge the indorsers. Nor was it generally true, but was so only under particular circumstances and in a certain sense. On the contrary, the general rule was that after the holder had, by due diligence in demanding payment from the maker and giving the indorser notice of nonpayment, fixed the indorser, the contract of the indorser being separate and distinct from that of the maker, his obligation to pay became likewise independent, and the holder was not compelled to proceed further against the maker, but might sue the indorser alone. That in this case, therefore, the plaintiff was not bound to sue Blount in the first instance, nor were the defendants discharged by the mere delay of the bank in not suing the maker, or his executor, sooner; nor by not taking out execution on the judgment after it was obtained; nor by the bank merely not proceeding on the execution; nor by any other mere delay of the plaintiff to compel payment by Blount. But although such was the general rule of law, yet the indorsers had certain rights, arising out of the relations of the parties to the note, which the holders must take care not to interfere with by altering those relations to the prejudice of the indorsers. That one of those rights, for instance, was that of the indorsers to ultimate recourse against the maker after the former should have taken up the note from the holder. And, therefore, if the holder released the maker, or compounded the debt, by taking from the maker a new security in satisfaction of the fist note, these acts would discharge the indorsers.

(489) That another of these rights was that of the indorser to demand, at any time, of the holder to receive payment from the indorser, and to surrender to him the security in such a situation as to enable the indorser to have immediate recourse to the maker; and, therefore, if the holder, by way of compounding with the maker, or by any other new and independent contract with him, enlarged the time of payment for a definite period, before the expiration of which the maker could not be sued on the note or be compelled to pay the money due by reason of the note having been given, the holder must, in such case, look to the maker alone, on his own new contract; for that by such acts the indorser was discharged, seeing that thereby the remedy on the note against the maker was suspended and the right of the indorser instantly to enforce it interrupted. If, therefore, in this case there was, after the agreement of the bank with Wilson to send an execution to Pasquotank, as stated by Skinner, a new agreement made between the plaintiff and Blount, without the knowledge and concurrence of the indorsers, that the bank should not sue out the execution, but forbear the whole debt for some definite time, upon Blount's own engagement to pay the debt

with other promissory notes, and the plaintiff, trusting to such promise of Blount, and in consideration thereof, did not send out, but withheld the execution, and did forbear the said debt, that such a forbearance and giving of time were a discharge to the indorsers, and the more especially as in this case the witness proved (if believed) that the execution, if it had been sent out, would have been satisfied out of the slaves belonging to Muse's estate. The court further stated to the jury that such an agreement had not been directly proved by any witness, in express terms, and therefore, if it existed at all, was to be collected by inference only from other facts proved, and that to the jury it was left to draw or reject such inference of fact from the testimony. And the (490) court further instructed the jury that if they should not find such an agreement as above supposed, yet if an indorser, with the view of taking up a note and securing himself against the maker, apply to the holder and inform him of his intention, and offer to pay the sum due on the note, and demand the note or an assignment of a judgment on it, and the holder, knowing that it is not paid, inform the indorser that it is paid, and declare to him that he (the indorser) is discharged, and that the holder will no longer look to the indoser, and refuses to deliver up the security, such acts and declarations of the holder do discharge the indorser; and that the declaration of such a general agent as the cashier of a bank (with the powers and authority said by the witness Creecy to belong to him) to the said Skinner and to the said Wilson, to the effect proved by the witnesses, would have the same effect as if they had been made by the holder himself, being a natural person, though these declarations were false, in that the debt was not paid, unless the falsehood were known to the said Wilson or his agent, and such declarations were made through collusion between the defendants, or one of them, and said Blount, with intent to defraud his principal, the plaintiff. For the law would throw the consequences of the fraud of the plaintiff's agent, not known to the indorser, upon the plaintiff, who employed him, and not on the innocent indorser, and the more especially in this case, since the said declarations if found by the jury to have been made, in one instance were made to said Skinner, who was himself one of the directors, and in the other instance the said Wilson, in the presence of Creecy, the plaintiff's bookkeepr, who at the same time knew it to be false, and did not so inform the defendant."

A verdict was returned for the defendants, and the plaintiffs appealed.

No counsel for appellants. (491)
Gaston for defendants.

PER CURIAM. We think that the jury were not misdirected by the judge in his charge; the judgment must therefore be affirmed.

Cited: Smith v. R. R., 68 N. C., 115; *Womble v. Fraps,* 77 N. C., 200; *Summerow v. Baruch,* 128 N. C., 206.

In the matter of ROBERT SPIER.

1. A jury, when charged with the trial of a capital offense, cannot be discharged without returning a verdict, unless for some cause which human sagacity can neither foresee nor prevent.
2. Therefore, where a jury were charged with the trial of a prisoner for murder, and before they returned their verdict the term of the court expired, and the jury separated, *it was held* that the prisoner could not be tried again.
3. The provision of the Constitution, that "no person shall be subject for the same offense to be twice put in jeopardy of life or limb," not only forbids a second trial for the same offense after an acquittal, but also where the jury have been once charged upon a perfect indictment, and where not prevented from returning a verdict by the act of God, or at the request of the prisoner.

THE *Chief Justice* issued a *habeas corpus* to bring the application before him, upon the following affidavit:

"Robert Spier maketh oath that an indictment was found against him for the alleged crime of murder, at the Spring Term, 1827, of Beaufort Superior Court, which was traversed by this affiant, and at his instance and upon his affidavit the issue of traverse was removed to Craven Superior Court for trial; that to insure a trial and the punctual attendance of all the witnesses, at the time of the said removal general notice was given by directions of the court that the said trial would be had on the Wednesday of the next term of Craven Superior Court; that accordingly on that day the case was called for trial, when upon the allegation of the solicitor of the State that the State was not ready, it was at the request of the solicitor postponed until the succeeding day, Thursday; that on Thursday it was again at the request of the solicitor postponed until the next day, Friday; that on Friday, the solicitor being required by the State to try or show satisfactory cause on affidavit

(492) for a continuance, a jury was impaneled and sworn; that towards the night of Friday, by order of the court and by consent of the affiant and of the solicitor for the State, the jury was permitted to retire for the night, under the charge of officers sworn to keep them

together; that on the succeeding morning, Saturday, the trial was resumed; that all the evidence on both sides was delivered to the jury, and at a late hour of the night the counsel on the part of the State and this affiant began their comments on the testimony, in addresses to the jury; that while the counsel for this affiant were engaged in such address the hour of 12 at night arrived; that the judge who had been holding the court stated the term had expired, and retired from the bench without having made any order for the discharge of the jury or in relation to the said trial; that the jurors so sworn and impaneled then separated, and the sheriff reconducted this affiant to prison. This affiant further saith that at the succeeding term of said court, and on the Wednesday of said term, this affiant was again brought before the court, when a motion was made by his counsel for his discharge, which motion was overruled, and thereupon, etc.

'This affiant is advised that his life has been once in jeopardy; that no other jury can pass upon the question of his guilt or innocence but the jury heretofore elected, sworn, charged, and never yet discharged; that his confinement in prison, therefore, is illegal and oppressive. And this satement of facts is made on oath in order to obtain a *habeas corpus* to inquire into the legality of his imprisonment."

Attached to the affidavit was a copy of the record of Craven Superior Court, from which the following are extracts:

"Saturday, 27 October, 1827.

"PRESENT, THE HONORABLE JOHN R. DONNELL.

"Jury called, etc. The prisoner's counsel closed the defense at 12:30 o'clock, when the term having expired, his Honor retired from the bench, and the prisoner was remanded to jail."

"Fourth Monday after the Fourth Monday of
"March, A. D. 1828.

"PRESENT, THE HONORABLE ROBERT STRANGE.

"The prisoner being brought into court for the purpose of being tried on the charge which was submitted to a jury, and on which their verdict was not returned, it was moved by his counsel that the prisoner be discharged. On argument, this motion was overruled."

After which the cause was continued by the State.

The *habeas corpus* was returnable on the second Monday of June last, before his Honor, the *Chief Justice,* who requested the assistance of their honors, *Judge Hall* and *Judge Henderson,* and (493) the question arising upon the affidavit and the record was elaborately argued by *Gaston* for the prisoner and by *Taylor,* Attorney-General, for the State.

HALL, *J.* In this case the guilt or innocence of the prisoner is as little the subject of inquiry as the merits of any case can be when it is brought before this Court on a collateral question of law. Although the prisoner, if unfortunately guilty, may escape punishment in consequence of the decision this day made in his favor, yet it should be remembered that the same decision may be a bulwark of safety to those who, more innocent, may become the subjects of persecution, (494) and whose conviction, if not procured on one trial, might be secured on a second or third, whether they were guilty or not.

It is laid down by *Lord Coke* that the life of a man shall not be twice put in jeopardy upon the same charge for a capital offense. 3 In., 110; 1 do., 227; Foster, 16, 22, 30. In this maxim is manifested the great concern which the law has for the security of the lives of its citizens. It is intended as a barrier against oppression and persecution; and although it must have been known to the wisdom of the law that it would be a means by which the guilty may sometimes escape from merited punishment, yet it was thought better to adopt it than to leave it to the discretion of a judge to award a second trial when the jury, in whose hands the life of the prisoner had been placed on the first trial, did not return a verdict.

From the record in this case it appears that a jury was sworn and impaneled to try the prisoner on the charge contained in the indictment, but they failed to return a verdict. This was a jury of the prisoner's own choosing, and one, too, to which the State did not object. When the jury were thus charged with the prisoner, he certainly stood upon his trial—his life was jeopardized.

From this maxim there are some exceptions, but such exceptions as are under no human control—they are the offspring of necessity; as where a juror is taken suddenly sick, where a woman is taken in labor, where the prisoner becomes insane, or where the jury are discharged by consent of the prisoner or at his request.

The record states that the jury was impaneled in the case, but it assigns no reason why a verdict was not returned by the jury, and it would be worse than preposterous to say that this Court can be governed by anything else than the record. It is true, like other individuals, we are informed of the reason why the jury did not return (495) a verdict; that the term of the court expired before they had an opportunity of doing so. Let it be supposed that this fact was spread upon the record; it is certainly an event which might have been guarded against, though it was a case not without its difficulties. The trial might have been brought on sooner in the term. The jury might have been directed to withdraw and consider of the evidence after it was given in, and this the sooner if the prisoner refused to consent to

withdraw a juror. I beg to be understood as laying down no rules for the government of the courts; I am not competent to do so; if I was it would not become me. But I am proving that the reason why the jury did not return their verdict was an event which might have been guarded against; that it was not founded in uncontrollable necessity, and if it was not, it forms no exception to the maxim that a citizen shall not be twice put in danger of his life upon the same charge for a capital offense.

But this is not the first time this question has arisen in this State. It was decided in *S. v. Garrigues,* 2 N. C., 241, for murder, in the Superior Court of Halifax, in 1795. There the presiding judge retired from the bench, but did not adjourn the court, and the jury having been impaneled in the case, separated without giving any verdict. It was held by *Williams* and *Haywood, JJ.,* that the prisoner could not be put upon his trial a second time. The record there and the record in this case are alike. In both cases it appears that the jury were impaneled, but returned no verdict. It is true we learn, like other individuals, that the reason why they returned no verdict in the one case was that they could not agree; in the other, that the term expired before they considered of their verdict. But in both cases the record shows, and shows nothing else, that they were impaneled, and returned no verdict before the expiration of the term. It is certainly a difficult task to distinguish, on principle, the one case from the other. I may add that that opinion drew after it the approbation of the profession, and (496) I believe I shall not treat with disrespect the memory of the dead or the pretensions of the living when I say that a greater criminal lawyer than *Judge Haywood* never sat upon the bench in North Carolina.

It is stated in Hale that the practice was once otherwise; that where the prisoner was put upon his trial the court might discharge the jury if it appeared that the evidence was not sufficient to convict him, and remit him to jail for further evidence. It is stated, however, in a note in the same book, that the practice is now otherwise; that a jury once charged in a capital case cannot be discharged until they have given their verdict, and *Judge Haywood* says, in *S. v. Garrigues, supra,* that "this power was exercised for the benefit of the Crown only, but is a doctrine so abhorrent to every principle of safety and security that it ought not to receive the least countenance in the courts of this country." And *Haywood* is sustained in this opinion by *Foster,* who wrote long since *Judge Hale.* I say, therefore, in the present case, it was not in the power of the court to discharge the jury, unless for the intervention of some cause that could not be foreseen nor controlled.

I admit that if the jury had been charged upon an indictment which was in itself defective, so that judgment could not be given upon it, al-

though the prisoner was found guilty, it would be no bar to a second trial; because although such feelings of danger might have been awakened as are incident to human nature, and which such occasions are naturally calculated to excite, yet in reality the prisoner ran no risk; he was in no danger; he was tried as if upon no indictment. But in this case there is no objection to the indictment. If the prisoner had been found guilty he must have suffered the penalties of the law. He was placed upon his trial; his life was in the hands of the jury. His breast was occupied by a commixture of hope and fear; it throbbed
(497) alternately with both, and whether the struggle terminated in a verdict of guilt or innocence, it was certainly a guarantee against any future prosecution upon the same charge, and that guarantee need not claim to be bottomed upon any extraordinary maxim marked with tenderness for the life of man. It is a plain principle of municipal jurisprudence, regulating ordinary cases of property between man and man. It does not constitute the maxim that a man's life shall not be twice put in jeopardy for the same thing, to which Lord Coke, Foster, and others, fathers of the English criminal law, have given the sanction of their names.

TAYLOR, C. J. The prisoner has been brought up on the return of a *habeas corpus,* and now moves for his discharge, or to be admitted to bail, on the ground that his life has been once put in jeopardy for the same offense for which he now stands committed for trial.

The transcript of the record accompanying the return discloses only the fact that the prisoner was put upon his trial for the murder of Williams, and that no verdict was returned by the jury. An affidavit was annexed which, though *ex parte,* states other facts which have not been controverted at the bar, and which, therefore, it may be taken for granted, are correct. These are that the trial began on Friday morning; that in the course of it the witnesses on both sides were examined, the counsel on the part of the State heard, and that while the counsel for the prisoner was addressing the jury the hour of 12 of Saturday night arrived, of which the judge gave notice to the parties, and then left the bench.

The case has been ably argued on both sides, and certainly a more important principle could not be brought into discussion, whether we view on one side its connection with the interests of public justice, or, on the other, the important bearing it has on the personal se-
(498) curity of the citizens and their immunity from undue prosecution. As it is a case in which a court has no discretion, but is bound to yield obedience to the law, without regard to consequences, it is of primary importance to ascertain, amidst the conflict of opinions, on which side the weight of principle and authority rests.

A writer of established reputation on the criminal law remarks that it seems to have been anciently an uncontroverted rule, and hath been allowed even by those of a contrary opinion to have been the general tradition of the law, that a jury sworn and charged in a capital case cannot be discharged without the prisoner's consent until they have given a verdict. It is added that notwithstanding some authorities to the contrary, in the reign of Charles II, this hath been holden for clear law, both in the reign of James II, and since the Revolution of 1688. 2 Hawkins, P. C., 619. Lord Coke, who is cited as authority for the general position, lays it down in still broader terms, and so as to render the discharge of the jury in treason, felony, or larceny illegal, even with the consent of the prisoner. 3 Inst., 110.

Much more modern authorities have introduced the exception where the discharge takes place with the prisoner's consent and for his benefit; and this being reasonable and just, may be considered as now well settled.

In the remarkable case of the *Kenlocks,* Foster, 76, that eminent judge endeaveors to prove that the case quoted by Coke from the year-book of Edward III. does not show that the jury was sworn, but only that they were in court and the party arraigned. But Fitzherbert, in his abridgment, understands the case in the same way with Coke; for he alleges that the reason of the judgment was that the inquest, having been once charged, could not be discharged. A majority of the judges in that case admitted the authority of the rule as a good general one, but not as practically applicable to those cases where it would produce great hardships or manifest injustice to the prisoner. In the
case quoted, the power of the court to discharge the jury with (499)
the prisoner's consent seem to have been for the first time well considered; and they rejected with just animadversion the authority of those cases which had occurred in that period of misrule and persecution preceding the revolution. In one of these the court discharged the jury in a capital case, after evidence given on the part of the Crown, merely for want of sufficient evidence to convict, and in order to bring the prisoner to a second trial, when the Crown should be better prepared! In another, where the prisoner, unassisted by counsel, consented, to his own prejudice, that the jury might be discharged.

These stains upon the administration of justice show to what extremes, in a state of civil discord, the passions of men urge them to trample upon the most salutary principles of law, and in what degree judges, holding their office at the will of the sovereign, were eager to pander to his appetite for blood and forfeitures.

Certain exceptions have been incorporated with the rule by such authority as we are not at liberty to reject, even if we were inclined to do

so; but we cannot add to these exceptions without authority, unless the reason for them is equally forcible and conclusive. If the discharge take place with the prisoner's consent, and for his benefit, or where it is occasioned by an overruling necessity, beyond the reach of man's foresight and control, it cannot be the instrument of injustice or oppression to the prisoner. It is impossible to lay down a general rule which may be applicable to all cases that may occur; but to the exception sanctioned in the case of the *Kenlocks* may be fairly added that of Elizabeth Meadows, who was taken in labor during the trial. Foster, 76. The case where the prisoner became insane, and where a juryman fell down in a fit, *Rex v. Edwards,* 4 Taunton, 309, were decided on principles from which I do not see that any mischief could arise. Whether
(500) that class of cases where the jury have been discharged in consequence of undue practices having been used to keep back witnesses, or in consequence of a juryman's having become intoxicated, stands upon the same authoritative ground, I am not prepared to decide. There is danger to be apprehended from every exception arising from a fact which artifice and cunning may simulate. As at present advised, I think the exceptions, in addition to those I have mentioned, ought to be confined to those cases of extreme and positive necessity which are dispensed by the visitation of God, and which cannot by any contrivance of man be made the engines of obstructing that justice which the safety of all requires should be done to the State, or weakening the efficacy of and rendering illusive that maxim of civil liberty of which the prisoner claims the protection.

There is no case in the British authorities resembling the one under consideration, nor is it likely any such will ever occur. But some cases are furnished by American reporters which it is proper to notice.

In Massachusetts, Boden was indicted for a highway robbery, and the jury being impaneled, and having heard the evidence and the whole of the case, retired; and after being confined the whole night and part of the day, returned into court and informed the judge that they had not agreed on a verdict, and that it was not probable they ever could agree. A juror was withdrawn without the prisoner's consent, and he was afterwards tried and convicted by another jury, and it was holden a good conviction. *Com. v. Boden,* 9 Mass., 494. It may be collected from this case that the offense charged was not there a capital felony; the arguments of the counsel for the State and the opinion of the court seem to show this. The maxim of the common law, therefore, under which the prisoner seeks shelter in this case, was not violated. Whether the cases of inevitable necessity, cited from the British books, apply to the case of discharging a jury, because they say they have not
(501) agreed, and are not likely to agree, appears to me questionable.

Juries very often agree, after thinking and saying they could not agree. If the court possessed a discretionary power to discharge a jury in a capital case, upon their saying they could not agree, it is to be apprehended that very slight endeavors would be made among them to reason with and enlighten each other; and that a disposition would prevail to escape from a duty which every man considers painful. But the difficulties and disadvantages under which the prisoner would enter upon his second trial would probably expose him to increased danger.

It must be conceded that the case of *Goodwin,* 18 Johns., 200, if rightly decided, is an authority against the prisoner in this case; for although the offense charged was not a capital felony, yet the reasoning extends the whole length of showing that the jury may be discharged in any case, and the prisoner tried again. The distinguished judge who delivered the opinion of the court in that case thought the rule which declares that no person shall be subject for the same offense to be twice put in jeopardy of life or limb means that no person shall be twice tried for the same offense. But I cannot acquiesce in this opinion, for it would seem strange that a familiar maxim of the common law, admitted for ages without denial or controversy, should require a solemn constitutional sanction for the more effectual protection of the citizens. The pleas of "heretofore convicted" and "heretofore acquitted" are interwoven with our criminal law as essentially as the pleas of former judgment between the same parties or the pendency of another suit for the same cause are with our civil law. Could the amendment to the Constitution of the United States mean no more than this, when it provided that "no person shall be subject for the same offense to be twice put in jeopardy of life or limb"? Did the constitutions of several of the States mean no more when they adopted the same article?
As the common law of every State already protects the accused (502) against a second trial, not only in crimes of all descriptions, but in questions of civil right, it is to be inferred that the constitutions meant much more, and that their design was to protect the accused against a trial where the first jury had been discharged without due cause.

"Twice put in jeopardy" and "twice put on trial" convey to the mind several and distinct meanings, for we can readily understand how a person has been in jeopardy upon whose case the jury have not passed. The danger and peril of a verdict do not relate to a verdict given. When the jury are impaneled upon the trial of a person charged with a capital offense, and the indictment is not defective, his life is in peril or jeopardy, and continues so throughout the trial. And this is the legal understanding of the term as explained by *Mr. Justice Foster* in the case of the *Kenlocks:* "The discharge of the jury was not to bring the pris-

oners' lives twice in jeopardy, which is one great inconvenience of discharging jurors in capital cases, but merely in order to give them one chance for their lives," which it was apprehended they had lost by pleading to issue." This is a full admission that one inconvenience of discharging the jury is to put the prisoner twice in jeopardy, which he could not be if trial were meant. The same meaning is ascribed to the expression, I Chitty Cr. Law, 63.

Besides those cases in which juries may be discharged from the casual circumstances of illness, there are some others in which the Crown, at least by the consent of the prisoner, is at liberty to withdraw a juror in order to indict him again, or put off his trial. Thus it is laid down that to let him into a ground of defense which he could not otherwise have taken before evidence given, the court may by consent discharge the jury; but it does not seem the prosecutor has the right to bring the prisoner twice into peril of his life. In the same light has the (503) subject been viewed in the Supreme Court of Pennsylvania, in 6 Sergeant and Rawle, 6; and finally, I thought the law in this State to have been settled for thirty years, ever since *S. v. Garrigues,* 2 N. C., 241, conformably to which decision other cases have occurred of a similar kind, though not reported.

Under this impression of the subject I do not feel the authority of the law to add this additional exception to the rule, since the trial of a prisoner, its conduct and duration, are under the direction and control of the court and counsel, who may in general foresee or make a reasonable conjecture as to the time it may occupy. It would be a rule subject in its very nature to operate oppressively to the prisoner, without any exterior agency or the influence of sinister design. But it would be still more capable, if such were present, of being made an engine of persecution. Not that there is reason to apprehend any such influence in the present tranquil state of the country, and under the existing purity of the administration of justice; but a rule established in such times should be calculated to protect men when strife prevails and the angry passions are let loose, for it cannot be foreseen what may ensue in future; and the law, as now established, must be the rule for posterity, unless the Legislature should think proper to interfere. Should the rule, according to this opinion, facilitate the escape of some guilty persons, the addition of their exceptions might, in other times, lead to the punishment of innocent persons; and we are admonished by the law that it is better that ten guilty persons escape than that one innocent suffer. My opinion consequently is, that the prisoner cannot be tried again on this charge.

BY THE JUDGES. It seemeth to us that the said Robert Spier is detained in prison to be tried on an indictment, etc.; that on the said

indictment the said Robert hath already been tried; that the said Robert cannot be lawfully tried again upon the same indict- (504) ment, nor for the same offense. Therefore it is ordered by us that upon the said Robert entering into recognizance, etc., to appear, etc., the said Robert shall be wholly released and discharged.

J. L. TAYLOR,
JOHN HALL,
L. HENDERSON.

Cited: *S. v. Ephraim,* 19 N. C., 165, 167; *S. v. Woodly,* 47 N. C., 284; *S. v. Tilletson,* 52 N. C., 115; *S. v. Collins,* 70 N. C., 249; *S. v. McGimsey,* 80 N. C., 379; *S. v. Davis, ib.,* 388; *S. v. Washington,* 89 N. C., 538; *S. v. Hall,* 115 N. C., 819; *S. v. Savery,* 126 N. C., 1086, 1094.

Doubted: *S. v. Prince,* 63 N. C., 531.

STATE v. HUGH SIMPSON and JOHN FISHER.

From Bladen.

If three persons commit a trespass upon property in the presence of the person in possession, their number makes it indictable, although actual force is not used.

THE defendants were indicted for that they "with force and arms, and with strong hand, in, etc., into a certain cornfield, there, etc., in the peaceable possession of one Sarah McDaniel, did enter, and one bushel of corn, then and there with force and arms and with strong hand, from the possession of the said S. M. did take and carry away."

On the trial the case was that the prosecutrix, Sarah McDaniel, and her sister, were gathering the corn, when the defendants, with two other persons, entered the field with a cart, and demanded of the prosecutrix a portion of the crop, which was refused by her, whereupon they began to gather the standing corn, and take that which had been gathered by the prosecutrix, and although forbidden by her, carried it all away.

Norwood, J., informed the jury that if three or more persons go together to commit a trespass, and do commit it, the number constitutes the force, and renders the trespass indictable; and that if the person in legal possession is present and forbids the trespassers (505) from proceeding, which is disregarded and the trespass committed, this renders it indictable.

The defendants were convicted, and appealed.

No counsel for defendants.
Devereux, in place of Attorney-General, for the State.

TAYLOR, C. J. The indictment charges the offense sufficiently if the facts will warrant the inference of law that the act amounted to a trespass; for the words "with strong hand" import something criminal in its nature, something more than is meant by the words *vi et armis,* which are the mere formal words in an action of trespass. The others constitute a sufficient allegation of an actual force used, amounting to a breach of the peace, more especially when it is charged to have been committed by two persons. The inquiry, therefore, is whether the facts proved according to the case sent up, amount to an indictable trespass. In *Regina v. Soley* it is said by *Lord Holt* that "as to what act will make a riot or trespass, such act as will make a trespass will make a riot," by which he must be understood to mean, if committed by three or more persons. 11 Mod., 116. The converse of the proposition must be true, that a trespass committed by three or more persons will make a riot. In every trespass, as well as riot, there must be some circumstances, either by an actual force or violence, or at least of an apparent tendency thereto, as are apt to strike a terror into the people; but it is not necessary that personal violence should have been committed. *Clifford v. Brandon,* 2 Campbell, 369. Any resistance on the part of the prosecutrix must have led to an actual breach of the peace; but the resistance of two women to the four persons who came to take the
(506) corn must have been unavailing. They came there to take it, and would have used the necessary force if their numbers had not terrified the owner into submission. It is no answer to the indictment, therefore, that they quietly gathered the corn and put it into the cart, for acts of extreme violence, as robbery, are sometimes committed under a very civil appearance. I think this was more than a civil injury, and for the reason given by the judge who tried the cause, I am of opinion that the judgment should be affirmed.

PER CURIAM. No error.

Cited: S. v. Armfield, 27 N. C., 211; *S. v. Ray,* 32 N. C., 40; *S. v. McAdden,* 71 N. C., 209; *S. v. Davis,* 109 N. C., 811; *S. v. Lawson,* 123 N. C., 743; *Saunders v. Gilbert,* 156 N. C., 473.

STATE v. NICHOLAS HOOD.

From Guilford.

The act of 1787, authorizing persons convicted on indictment or presentment, and unable or unwilling to pay the costs, to be hired out by the sheriff, is repealed by the act of 1797. (Rev., ch. 484.)

THE defendant, a free negro, was convicted of an assault and battery, before *Daniel, J.*, on the last circuit. Being unable to pay the costs of the prosecution, the defendant prayed that he might be discharged upon taking the oath prescribed for insolvent debtors.

The solicitor general moved his Honor to direct the sheriff to hire out the defendant to any person who would take him for the shortest term and pay the costs of the prosecution. An order to that purpose being made, the defendant appealed, Mr. Solicitor General Scott waiving the surety required for the costs of this Court.

No counsel for defendant.
Devereux, in the place of the Attorney-General, for the State.

TAYLOR, C. J. The decision of this case depends on the question whether the act of 1787 is now in force. The act is entitled "for hiring out persons, convicted on indictment or presentment, not being able or willing to pay the fees of office and jailer's fees." The (507) mischief the act professes to remedy is that arising from persons who are convicted on indictment taking the benefit of the insolvent act, either neglecting or refusing to pay fees of office and sheriff's and jailer's fees. It enacts that all persons convicted on presentment or indictment who shall be unwilling or unable to pay the office or jailer's fees that may be consequent thereon shall be hired out by the sheriff of the county where such person is or may be convicted, for such time as any person will take him or them to serve for the said fees or charges. After this no person could be discharged under the insolvent law where he stood committed for office fees; and so it remained until 1797, when an act was passed for the purpose of prescribing a mode of authenticating claims against the State, and their mode of payment, so far as respects jailers, sheriffs, coroners, clerks of the Superior Courts, and witnesses for and in behalf of the State. After establishing detailed regulations relative to authenticating the claims of all these officers, the fourth clause is thus expressed, that no claim authorized by this act shall be allowed until a *fieri facias* shall have first issued to the county or counties in which the criminal may be supposed to have owned property, and the sheriff's return that no property is to be found; and if the

criminal is at large, without taking the oath of insolvency, it should be the duty of the clerk to issue his writ of *capias ad satisfaciendum,* and the duty of the sheriff to arrest the body of the said criminal, if to be found, and him confine until he either pays off the costs of prosecution or discharges himself by taking the oath of insolvency. This clause contains an unequivocal recognition of the legality of discharging a prisoner on his taking the oath of insolvency; and the unusual phraseology of the repealing clause seems to point at the act of 1787. (508) The common language of a repealing clause is, "That all acts and parts of acts that come within the purview and meaning of this act shall be and they are hereby repealed and made void"; whereas, the expressions of the repealing clause annexed to this are, "All acts, usage, and customs coming within the purview and meaning of this act are hereby repealed and made utterly null and void." Martin's Revisal. But independently of this, an act which entitles a prisoner to his discharge upon taking the insolvent oath is inconsistent with an act which requires him to be hired out, and consequently operates as a repeal of it; for where two acts are affirmative, though there be no negative words, yet the latter being contrary to the former, amounts to a repeal of the former. I am consequently of opinion that the defendant is entitled to take the oath of insolvency for the office fees, the regulations of the act of 1797 being observed, and that the judgment be

PER CURIAM. Reversed.

STATE v. JIM, a negro slave.

From Brunswick.

The testimony of a witness who is corruptly false in any particular should be entirely disregarded by the jury; and where they were instructed that they might, exercising a sound discretion, reject part of the testimony which they did not believe, and act on part which they did believe, it was held to be erroneous.

THE prisoner was indicted under the act of 1823, Taylor's Revisal, ch. 1229, for an assault with an intent to commit a rape upon a white female.

On the trial the only witness who directly proved the assault was one Mary Rittenhouse, whose general moral character was seriously impeached; but there was no evidence of her character for truth (509) when upon oath. Mr. Holmes, a gentleman of the bar, was called to impeach her, which was effected by his proving a mate-

rial variance between her evidence on the trial of this indictment and that given upon a former trial of the prisoner for the same offense. *S. v. Jim, ante,* 142.

Norwood, J., instructed the jury that a general character such as had been given of the witness Rittenhouse "was a circumstance against her credibility, and should be taken into consideration by them, and might, if accompanied by other circumstances against her credit, be thought by them sufficient to induce them to disregard her testimony; but that such general character was not entitled to as much weight as a general character bad in respect to truth when speaking on oath; and on either case, as their duty was to ascertain the truth, they might, exercising a sound discretion, reject part of a witness's testimony which they did not believe and act on such part as they did believe."

The prisoner being convicted, motions were made, on several grounds, for a new trial and in arrest of judgment; which being overruled, and judgment of death awarded, the prisoner appealed.

No counsel for the prisoner. (510)
Devereux, in place of the Attorney-General, for the State.

HENDERSON, J. I understand the judge as distinctly informing the jury when discussing the want of credit in a witness arising from corruption or immorality, that although they should discredit a witness in part, because that in such part they thought the witness both false and corrupt, yet they were at liberty, if they thought proper, to believe him in other parts of his testimony. I have always understood the law to be otherwise; for although it is true that if the jury should ascertain that a witness is incorrect in his testimony as to one or more facts, yet if he is not corruptly so, but is merely mistaken in judgment, or by reason of a failure in memory, the witness is not discredited further than would arise from the want of reliance on the correctness of his conception or from a distrust in his powers of memory; and if the jury think proper they may believe him as to other parts of his testimony. But when once they are satisfied of the witness's corruption, they are bound, in obedience to the law, to disregard all that he swore to. For the law does not act upon a jury's bare belief, their bare opinion of the fact; their belief must be founded on that which is regarded in law as testimony. Hence the jury are not permitted to hear a witness who is not sworn, although they might possibly believe him. So also they might believe persons convicted of an infamous crime—perjury, for instance; but such persons are not allowed to be heard before a jury. I can see no difference in principle, and if so, there should be none in practice, between a person heretofore convicted and one who stands convicted be-

fore a jury, in the case they are trying. Hence the maxim, *falsum in uno, falsum in omnibus.* Were it otherwise, the law would be untrue to itself. It is not every conjecture which floats in a juror's mind that should guide him in the formation of his verdict. His will is not (511) the law. He is bound to pronounce his solemn convictions after weighing the evidence, and if he cannot arrive at this state of mind he should find against that party who holds the affirmative, that is, against him whose duty it is to produce satisfactory evidence to a jury. Nothing is more difficult than to prescribe rules of faith; perhaps every man has one peculiar to himself. But in some cases the law has prescribed the rule, and I think this is one of them; and it is the duty of the jury to yield to the law, and not to set themselves above it. Whether any of the witnesses were placed in the situation above mentioned before the jury I have not the right to say; it belonged exclusively to them. But they should be satisfied that such was the fact before they acted under it. There should be such evidence of falsehood and corruption that they, as jurors, would convict the witness were he on trial before them; if they doubt upon the subject, the law does not forbid them to believe the witness. As the jury may have been misled by the charge, I think that there should be a new trial.

TAYLOR, C. J. There are many exceptions taken in this case which I think it is unnecessary to notice, for I suppose they would not be seriously insisted on. The prisoner being without counsel, I have felt it to be a duty to examine the record attentively, to ascertain whether there are any points which ought to have been ruled differently.

The only direct evidence of the assault was that of Mary Rittenhouse, whose credibility was assailed on the ground of her immoral character; and Mr. Holmes has pointed out some important variations in her testimony since the time she gave evidence on the first trial. All the rest of the evidence on the part of the State was supplemental, and intended to be confirmatory of hers. Whether she was entitled to belief was a question altogether for the determination of the jury, and (512) whether they have decided right or wrong, this Court cannot interfere with their verdict. But the prisoner was entitled to the full benefit of that advice from the court to the jury which should enable them to weigh the evidence according to the principles which the law has established. Now, the court instructed the jury that "a general character such as that of Mary Rittenhouse was a circumstance against her credibility, and should be taken into consideration by the jury, and might, if accompanied with other circumstances against the credit of the witness, be thought by the jury to be sufficient to induce them to disregard her testimony. But that such general character was not enti-

tled to as much weight as a general character bad in respect of truth when speaking on oath." The correctness of this direction it is not my purpose to inquire into; it is cited to show that the jury was thereby prepared to have their confidence in the credibility of the witness weakened on the score of her corruption or immorality of character. The court then proceeds to state, "that in either case, as their duty was to ascertain the truth, they might, exercising a sound discretion, reject part of a witness's testimony which they did not believe, and act on such part as they did believe." And it is in this respect I think the prisoner has not received the full benefit of such legal advice as the judge ought to have given to the jury.

I believe that all the writers on the law of evidence lay down the rule that a witness who gives false testimony as to one particular cannot be credited as to any, the maxim being *"falsum in uno, falsum in omnibus."* And it is very reasonable that it should be so, for the general presumption that a witness will tell the truth is overthrown when it is shown that he is capable of perjury. Our faith (says an accurate writer on evidence) cannot be partial, or fractional; where any material fact rests on the testimony of a witness, the degree of credit due to him must be ascertained, and according to the result his testimony (513) is to be credited or rejected. A witness whose misinterpretation results from mistake or infirmity, and not from design, is of course not within the operation of the principle; his integrity remains unimpeached, though his character for ability may be impaired. On this ground, therefore, and especially in a case affecting the life of a prisoner, I feel bound to give my opinion in favor of a new trial. As I give no opinion upon the other objections, it will, of course, be considered that I do not regard any of them as tenable.

PER CURIAM. New trial.

Overruled: S. v. Williams, 47 N. C., 258, 260, 273.

Cited: S. v. Peace, 46 N. C., 256; *Ferrall v. Broadway,* 95 N. C., 557; *S. v. Peak,* 130 N. C., 717; *S. v. March,* 132 N. C., 1002.

STATE v. JESSE UPTON.

From Guilford.

1. Upon a conviction of murder, the proper and formal entry of the verdict is "Guilty *of the felony and murder* in the manner and form as he stands charged, etc."; but when the jury thus responded, and the entry was "Guilty in manner and form as charged," the finding was held sufficient, and the prisoner not entitled to his clergy.
2. The deputy clerk of the court from whence a cause is removed may amend the transcript by the original record produced in court.

AFTER the new trial granted in this case (*ante,* 268) the cause was removed to Guilford, where it was again tried on the last circuit before *Daniel, J.* The only point made in the court below arose from the entry of the verdict, which was in the following words:

"Look on the prisoner, ye that be sworn, what say ye? Is he guilty or not guilty of the felony of murder whereof he stands indicted? When G. W., one of the jurors aforesaid, delivered the verdict guilty; when the verdict was recorded in the following words, 'Find the defendant Jesse Upton guilty in manner and form as charged in the bill of indictment.' "

In the court below the counsel for the prisoner moved in arrest of judgment, contending that the verdict was defective. This motion was overruled by the presiding judge. The prisoner then prayed the
(514) benefit of the clergy; and his counsel insisted that the verdict was only equivalent to a conviction of manslaughter. The prayer for clergy was disallowed, and judgment of death awarded, whereupon the prisoner appealed.

In this Court several other reasons were assigned in arrest of judgment, but the *Chief Justice,* in his opinion, has given so full a statement of them, and of those parts of the record upon which they were founded, that any addition to it would be superfluous.

W. H. Haywood for the prisoner.
Devereux, in the place of the Attorney-General, for the State.

TAYLOR, C. J. The transcripts of the record in this case, coming from three several Superior Courts, are multifarious, and can only be understood by an attentive examination. It will, therefore, materially facilitate the decision of the case, and enable us duly to estimate the objections made by the prisoner's counsel, to exhibit a concise history of the cause from its commencement, as extracted from the several records sent up.

At September, 1825, the bill of indictment purports to have been found a true bill by a grand jury of Randolph County, in which the offense is laid to have been committed. This copy of the bill is free from the objection made to it, with respect to the Christian name of the deceased, for it is spelt "Anne" throughout. It is also free from the objection that it does not appear, except inferentially, upon what part of the person of the deceased the strokes were given; for it is directly charged that the mortal wounds were given upon the sides of the head of the deceased. But the defect of the transcript consists in not setting forth the name of the judge, or of the grand jurors—I should rather say, it omits to state them; for whether it is erroneous on that account I do not give any opinion, and the sequel will show it (515) to be unnecessary.

The cause was continued until Fall Term, 1826, when the prisoner was arraigned, and pleaded not guilty, and upon his affidavit the case was removed to Davidson Superior Court. Nor does the transcript of the term when the removal was ordered state the presence of any judge.

The cause being thus tried in Davidson, the prisoner was tried and convicted at the Fall Term of that court, in 1826, upon which he moved for a new trial and in arrest of judgment, which motions were not disposed of at that term. But the prosecuting officer having suggested a diminution of the record, a *certiorari* was directed to Randolph to send up a complete one.

At the following term of Davidson Superior Court a transcript was sent up from Randolph, which stated the name of the judge and of the grand jurors. In one repetition of the name of the deceased in the copy of the indictment it is spelt Anny. By this transcript it also appears that the prisoner was arraigned, and pleaded as it is first above set forth. But it appearing to that court still defective, a *subpœna duces tecum* was ordered to the clerk of Randolph to produce the original record, which was done at the same term, and the deputy clerk of Randolph permitted to amend the transcripts before sent by the originals then produced. In the indictment copied into this transcript there is one misspelling of the name Anny. The reasons in arrest of judgment were then overruled, and the prisoner appealed to this Court, where a new trial was awarded. At October Term, 1827, of Davidson the cause was continued on the prisoner's affidavit.

At Spring Term, 1828, it was removed to Guilford Superior Court, on the prisoner's affidavit, where, during the same circuit, it was tried and the prisoner convicted, who then moved in arrest of judgment, which being overruled, he appealed to this Court. (516)

Several objections have been here taken in arrest of judgment, and it is fit, in a case of so much importance, that they should be duly considered.

The first relates to the manner of recording the verdict. It appears from the record that the foreman was called upon to say whether the prisoner was guilty or not guilty of the felony and murder whereof he stood indicted, and he answered guilty. This is the established form, and is responsive to the question asked. The entry of the verdict is a formal act of the clerk, and it is here, substantially and in effect, that the jury find the prisoner guilty of the felony of murder whereof he stands indicted; for with that he is charged in the indictment. They must necessarily find him guilty of the felony and murder, as charged in the indictment, when they find him guilty in manner and form as charged in the bill. The three first exceptions relating to this point are clearly untenable.

The fourth exception denies the jurisdiction of Guilford Superior Court. But the transcript from Davidson County shows that an affidavit for removal was filed by the prisoner, that there was a judge present, and that he made an order for the removal. It is difficult to conceive in what manner the court of Guilford could be more completely possessed of jurisdiction, according to the act of Assembly.

The arraignment is distinctly stated in the transcript both before and after the amendment, and each time it is stated to have taken place at September, 1826.

Other objections are: The omission of the conjunction *"that,"* and the court's having permitted the deputy clerk to produce the original record and amend the transcript by it. As to the first, the omission of the word in no respect alters the sense. It is designed as a note of connec-
(517) tion; but whether we say, that Jesse Upton is presented, or, Jesse Upton is presented, the same idea is conveyed to the mind.

The deputy clerk is an officer recognized by the law, acting under oath, and competent to do any act which his principal, were he present, might do; and it was certainly proper in the court, when they saw that the transcript was imperfect in omitting the name of the judge and the names of the grand jurors, to have it amended by the original; for the indictment could not have been found and returned unless there had been a judge and a grand jury. It would be a serious obstruction to the administration of justice if transcripts sent from one court to another, sometimes loosely made up, could not be amended by the original record. It is every day's practice to do so, and it is consonant with principle.

The misspelling of the name is immaterial, since it appears throughout the indictment to be the same person; the Anny murdered is "the said Anne" upon whom the felonious assault was made, and who was hit and struck. The name with the final *e* is as often called Anny as Ann; and misspelling in a name, where the sound is not altered, is unimportant.

Upon the whole, the conviction appears to be right, and the Superior Court must award the sentence of the law.

PER CURIAM. No error.

Cited: *S. v. Patterson,* 24 N. C., 360; *S. v. Barfield,* 30 N. C., 353; *S. v. Henderson,* 68 N. C., 349; *S. v. Buckley,* 72 N. C., 361; *S. v. Underwood,* 77 N. C., 504; *S. v. Collins,* 115 N. C., 719.

(518)

STATE v. MAJOR BARDEN.

From Wayne.

1. It seems that a witness may speak of information derived from a negro, upon which acts are predicated, in explanation of those acts.
2. One who is privy to a petty larceny before the fact is a principal.

THE defendant was indicted for petty larceny in stealing a bag of cotton.

On the trial a witness stated, without any objection on the part of the defendant, that he was informed by a negro that the cotton was in a house on the premises of the defendant; that he searched that house and found the information of the negro to be correct.

Strange, J., informed the jury that if they believed from the testimony that the stealing was the joint act of the defendant and the negro who had given the information, their verdict ought to be for the State; that if they believed it to be the act of the negro alone, but committed under any previous concert with the defendant, they ought also to find the defendant guilty. But if they believed that the negro had taken the cotton without any previous concert with the defendant, they ought to return a verdict for the defendant.

The defendant was convicted, and moved for a new trial, first, because the witness had given in evidence the information of the negro; and, second, because of error in the charge of the judge.

No counsel for appellant.

Devereux, in place of the Attorney-General, for the State.

HENDERSON, J. The conversation with the negro, or rather the fact that the negro directed the witness to a particular place to search for the cotton, is a circumstance of which the witness might speak, especially as it was not objected to. I wish to express no opinion as to what would be the case if the evidence had been objected to. I rather (519)

think that the isolated fact is proper, if for no other purpose, to explain the motive of the witness. I cannot see how it could affect the defendant otherwise than to support the credit of the witness by showing that he had a motive for his conduct. In that view it went to show, not that the cotton was in the house, but that the witness had been told it was there. As to the other parts of the case, there is no doubt but the opinion of the court was correct. All who are concerned in a petty larceny are principals. Whoever procures a felony to be done, although it be by the instigation of a third person, is an accessory before the fact; and that which in felony makes a person an accessory before the fact in petty larceny and misdemeanors makes him a principal.

PER CURIAM. No error.

Cited: S. v. Cheek, 35 N. C., 121; *S. v. Gaston,* 73 N. C., 94; *S. v. Stroud,* 95 N. C., 630.

STATE v. KEZIAH MUMFORD.

From Anson.

1. In an indictment for perjury it is sufficient to charge generally that the false oath was material to the trial of the issue upon which it was taken; it is not necessary to show particularly the manner in which it was material.
2. A general averment falsifying the testimony is not sufficient; every fact falsely deposed to must be distinctly negatived.

THE defendant was tried on the last circuit before *Norwood, J.,* upon the following indictment:

"The jurors, etc., that heretofore, etc., in, etc., K. M., late, etc., came before Hugh McKenzie, Esq., then and yet being one of the justices, etc., and then and there upon her oath, charged one Alfred Noble before the said H. M., the justice, etc., with having assaulted, stricken, and bruised one Henry Mumford. And the jurors aforesaid, etc., do further present, that upon the examination of the said K. M. before, etc., upon her oath aforesaid, touching and concerning the alleged assault by the said
(520) A. N. in and upon the said Henry Mumford, certain questions then and there became and were material, that is to say, whether A. N. did strike her husband, Henry Mumford, with a stick across the back at the last time he and V. P. wrestled, and whether the blow across the back with a stick was given immediately as they fell. And the jurors, etc., do further present that the said K. M. wickedly, devising, and intending unjustly to aggrieve the said A. N. and procure him to be im-

prisoned, and kept in prison for a long space of time, on, etc., at, etc., before the said H. M. then being, etc., she the said K. M. did then and there take her corporal oath, and was sworn upon the Holy Gospel of God before the said H. M., justice, etc., he the said H. M. then and there having sufficient and competent power and authority to administer an oath to the said K. M. in that behalf, and that the said K. M., not having, etc., but being moved, etc., then and there before the said H. M., justice, etc., upon her oath, etc., falsely, etc., did depose, say, swear, give and make information among other things, in substance and to the effect following: that is to say, that N. (meaning the said A. N.) did strike her husband, Henry Mumford, with a stick across the back, at the last time he (meaning the said Henry Mumford) and V. P. (meaning a certain V. P.) wrestled, and that the blow (meaning the blow with the stick across the back of the said Henry Mumford) was given immediately as they (meaning the said Henry Mumford and the said V. P.) fell, whereas in truth and in fact the said A. N. did not strike her husband, Henry Mumford, with a stick across the back, at the last time he, the said Henry Mumford, and V. P. wrestled, and whereas in truth and in fact the blow was not given as they (the said Henry Mumford and the said V. P.) fell. And so the jurors aforesaid, etc., etc."

After a verdict for the State, the counsel for the prisoner moved in arrest of judgment, contending that the assignment of perjury was not sufficiently certain, and in effect was nothing more than a negative pregnant. His Honor, the presiding judge, being of that opinion, arrested the judgment, whereupon Mr. Solicitor Troy appealed.

No counsel for appellant.
Devereux for the State.

TAYLOR, C. J. The objection taken in arrest of judgment is (521) founded on the assumption that the only material inquiry before the justice was whether Noble had assaulted Mumford or not, on the day specified, and that whether he struck him on the back or not, at the last wrestle, was irrelevant and unconnected with that question; that the assignment of perjury in the circumstances is consistent with the belief that the defendant might have sworn truly as to the principal fact, viz., the assault. This presents two questions: whether the materiality of the inquiry is sufficiently stated in the indictment, and whether the assignment of perjury is properly and distinctly made.

It is laid down as a rule, which I find nowhere controverted, that it should appear on the face of the indictment that the oath taken was material to the question depending, not by setting forth the circumstances which render it so, in describing the proceedings of a former trial, but by

a general allegation that the particular question became material. In *Aylett's case,* a leading one on this subject, it is stated that it became a material question on the hearing of the complaint, and the hearing of that is stated in general terms. 1 Term, 66. In *King v. Dowling* the the question was much debated. It is there stated that the question became material on the trial in the same general terms that it is stated here; and the trial is referred to in this manner, that "at such a court J. R. was in due form of law tried upon a certain indictment then and there depending against him for murder." Dowling was a witness against J. R. on that trial, and the perjury was assigned in his swearing that "he had never said he would be revenged of the said J. R. and would work his ruin." On this part of the case it was argued on behalf of Dowling that all those facts ought to be stated in the proceedings against J. R. which were necessary to show that the jurisdiction was competent; that there was something to be tried: the materiality of the question to
(522) that point, and falsity of the oath. This objection is thus directly met by *Lord Kenyon*: "But it has been objected that it was necessary to set forth in the indictment so much of the proceedings of the former trial as will show the materiality of the question on which the perjury is assigned. If it were necessary, and if the question arose on the credit due to the witness, the whole of the evidence given before must be set forth; but that has never been held to be necessary, it always having been adjudged to be sufficient to allege generally that the particular question became a material question. But here it is averred that the question on which the perjury was assigned was a material question, and the jury have found it so by the verdict." 5 Term, 319.

In this indictment the warrant and examination before the magistrate are stated, and the general allegation of the materiality of the question is in conformity with the best forms, and, considered in reference to the act on this subject, Rev., ch. 383, appears to me unexceptionable.

The matter sworn to by the defendant is contradicted in the assignment of perjury, specially and particularly, and in the words in which it was sworn. A general averment upon the whole matter, that the defendant falsely swore, is not sufficient; it should be specific and distinct, to the end that the defendant may have notice of what he is to come prepared to defend. 2 M. and S., 385. And the whole matter of the defendant's false testimony must be set forth; and if the least part of one entire assignment be unproved, she could not be convicted. The offense charged consists in the whole and not in any one part of the assignment. And this, in my opinion, obviates the necessity of any opinion as to how far perjury may be committed, if the false oath has a tendency to prove or disprove the matter in issue, although but circumstantially; or how far the fact sworn to, though not material to the issue, must have

such a connection with the principal fact as to give weight to the (523) testimony on that point. The views of the subject could, in this case, only be properly presented to the court trying the cause. I think the conviction is right.

PER CURIAM. Reversed.

Cited: *S. v. Davis,* 69 N. C., 496.

STATE v. JOHN M. GREENLEE.

From Burke.

At common law, to constitute forgery, the intent to defraud must either be apparent from the false making or become so by extrinsic facts. Therefore, an indictment which charged the false making to have been in the alteration of an order given by the defendant, without charging that the alteration was made after it was circulated and had been taken up by him, was held to be fatally defective.

THE defendant was tried upon the Fall Circuit of 1827, before *Norwood, J.,* on an indictment consisting of two counts, the second of which only is material, and is as follows:

"And the jurors aforesaid upon their oath aforesaid do further present, that the said John M. Greenlee, of, etc., on, etc., with force and arms, in, etc., being indebted to one William Ainsworth in the sum of thirty dollars and having funds in the hands of one James Avery, of, etc., did then and there write an order to the said J. A. requesting him, the said J. A., to pay to him, the said W. A., the said sum of thirty dollars; the particular date of which said order is to the jurors now here sworn unknown, which said order, as near as the jurors now here sworn can describe, was as follows, that is to say:

"Mr. J. A.—

"Please to pay W. A. thirty dollars, and this shall be your order for for the same. JOHN M. GREENLEE.

"With a memorandum thereunder written and signed by the said John M. Greenlee, in his own proper name, which said underwriting is as follows, as near as the jurors now here sworn can describe, that is to say:

"N. B.—Mr. A. has receipted James Greenlee for the same.

"JOHN M. GREENLEE.

"And the jurors aforesaid, upon their oath aforesaid, do further present, that the said John M. Greenlee afterwards, etc., with force and arms in, etc., the said order and memorandum aforesaid feloniously did alter and cause to be altered by them and there feloniously and
(524) falsely making, forging, and adding the word *to* between the words *has* and *receipted,* and that he, the said John M. Greenlee, did then and there obliterate the letters *e* and *d,* the two last letters in the word *receipted* before written, in the said written memorandum aforesaid, whereby the said order, and writing under the same, became altered, and the word *receipted* before written in the same, by destroying the said two last letters *e* and *d* so falsely destroyed and forged as aforesaid, became *receipt,* and also by then and there falsely and feloniously making, forging, and adding the word *to* between the word *has* and the word *receipted,* before also written in the said order and memorandum, by reason of which said forging and adding so falsely made, forged, and added as aforesaid, the said underwritten memorandum became in fact and did signify that the said W. A. had thereafter to give the said James Greenlee an acquittance and receipt for the same thirty dollars aforesaid, which said order and memorandum thereunder written, so feloniously and falsely altered and caused to be altered, is as follows, as near as the jurors now here sworn can describe, that is to say:

"MR. J. A—.

"Please pay to W. A. thirty dollars.

"JOHN M. GREENLEE.

"N. B.—Mr. A. *has to* receipt James Greenlee for same.

"JOHN M. GREENLEE.

"With intent to defraud the said W. A. of the sum of thirty dollars, contrary to the statute in that case made and provided, and against the peace and dignity of the State."

The defendant was found "not guilty of the forgery whereof he stands charged, but guilty of the forgery in manner and form as charged against him, at common law."

Judgment for the State was rendered upon the verdict, and the defendant appealed.

Badger for the appellant.
Devereux for the State.

HENDERSON, J. The false making of certain writings mentioned in the statute, with an intent to defraud, constitutes the offense of forgery under the statute. At common law, the writing must have a tendency to

injure. That tendency must be apparent to the court; it may be (525) apparent upon the face of the transaction, or it may be made so by the aid of additional facts. To forge a deed is an instance of the kind first mentioned. Its tendency to injure is apparent; it requires the statement of no additional fact to make that appear. An instance of the latter is where I make a deed to A, and afterwards one to B, for the same property, and antedate the latter deed so as to overreach the date of the former. The making the former deed is part of the offense at common law, and must be shown, otherwise the tendency of the latter deed to injure does not appear. But perhaps this case affords a better illustration of the principle. The defendant's altering an order drawn by himself on Avery, in favor of Ainsworth, does not, upon its face, import an injury, neither in its tendency does it injure any one. It may be a proper and necessary act; but to alter it after it has been circulated and then to alter it so as to make it different from the truth, as in this case, and thereby to entitle himself to a double credit for its amount, one upon giving the order to Avery and another upon Ainsworth's receiving the money from him, shows that the alteration tends to the injury of Ainsworth; and if these be the facts, they should have been averred in the indictment and proved on the trial. Whether they were proved before the jury we do not know, and it is entirely unimportant whether they were or not—they are not charged. The indictment is therefore defective, for in them, in connection with the alteration of the order, the criminality consists. Without them the act is harmless. With them it is highly criminal. I think, therefore, that the judgment should be arrested.

PER CURIAM. Judgment arrested.

Cited: S. v. Thorn, 66 N. C., 645; *S. v. Weaver,* 94 N. C., 838.

IN MEMORIAM

JAMES FAUNTLEROY TAYLOR, ATTORNEY-GENERAL.

It is our mournful duty to record the death of JAMES FAUNTLEROY TAYLOR, Attorney-General of the State, which occurred during the present term, after an illness of a few days continuance which seemed not, to his medical attendants and family, to have any very alarming symptoms until a few hours before his dissolution. He was born in Chatham County, in July, 1791, at the residence of his father, Colonel Philip Taylor, who had served with distinction in the Revolutionary Army and at the close of the war bore a captain's commission in the line. He died when the subject of this memoir was about three years old, the youngest of a numerous family of children, who were thus consigned to the care of their surviving parent. But it pleased Providence that these arduous duties should devolve on a mother of singular discretion and exalted piety, whose moral strength was fully adequate to her increased burdens and who has reaped the harvest of all her cares and labor in the constant affection and gratitude of her children. She still lives to shed tears of affection over the early grave of her son; but it is not doubted that her grief is tempered and consoled by higher considerations than any which mortal wisdom can afford.

He received the rudiments of a classical education at the Pittsboro Academy, then under the direction of the Reverend William Bingham, a teacher well qualified to raise its reputation by the extent of his acquirements, the purity of his life, and the judgment by which he accommodated the discipline and instruction of the school to the various talents and dispositions of the youth. It is but common justice to those who have been instrumental in forming the minds of useful and eminent public men to pay a passing tribute of respect to their (528) memory. This worthy man left a son who pursues with undiminished reputation the same honorable profession with his father.

From the academy the subject of this sketch was transferred to the University, where, in 1810, he received the degree of A. B., and left that institution with the reputation of "a ripe and good scholar."

His legal education was received in the office of Judge Nash, at Hillsboro, a gentleman to whom he was always devotedly attached, and for whose kindness, friendship, and instruction he cherished the liveliest gratitude to the last moment of his life.

He was admitted to the bar in 1812, and in a short time found himself in possession of an extensive practice, which may in general be considered a misfortune to a young lawyer whose term of study has been brief and limited; for though it may lead him to wealth, it interrupts that regular course of synthetic study on which only the solid reputation of science can be founded. A quick perception of the merits of a

case, a retentive memory, and a remarkably sound and discriminating judgment, enabled him in some degree to overcome this difficulty. What he did not accurately perceive he knew where readily to find, and as a genius can take large strides in every science, he could prepare himself for every emergency by disentangling the most complicated and digesting the most abstruse subjects. His voice was clear, sonorous, and well adapted to command the attention of a large audience; in some of its keys it was peculiarly harmonious; his pronunciation was distinct, nervous, and impressive; his mode of argument close, connected, and usually conclusive; and as he sought to inform the understanding, he was seldom diverted from his object by the meteors of imagination:

> "His words bore sterling weight: nervous and strong,
> In manly tides of sense they roll'd along."

(529) The office he held was conferred upon him by the Legislature of 1825, and he entered upon its duties at a time when the criminal justice of the circuit to which he was attached was greatly relaxed from causes which it is not our province to detail. He knew what exertions the duties of his office required from him, and how much public expectation had been awakened by his appointment. He resolved to use every effort of study and attention to scientific details to render the law triumphant, and to act upon the maxim of the profound patriot of antiquity, who concludes an eloquent description of law and liberty by saying:

> ——*Legum denique idcirco omnes servi sumus*
> *ut liberi esse possimus.* Cic. pro Cluen.

He continued during his brief passage through this perishable state to discharge the duties of the office with a zeal for the interest of justice and an enlightened energy of which the efforts were soon manifest in the increased security of life and property and the consequent advancement of the public happiness. But though the sepulcher shrouds from mortal view the decaying relics of humanity, it should record the claim of public services to distinction and point out the dignity of virtue to imitation. It belongs to Biography, which is "History teaching by example," to enshrine the memory of the patriotic and the good, that the impressive lessons afforded by their lives may enlighten and animate those who are advancing in the same career of excellence.

His loss to the public will be severely felt; but to his family and friends it is irreparable—for all who were intimately connected with him feel that with him one great charm of their existence is gone, leaving a void in their hearts which can never be filled up. In the domestic

scene, and the intercourse of friendship, he was in the highest degree engaging and affectionate. Here the warmth of his heart, the activity of his benevolence, and the buoyancy of his spirit displayed themselves in the most attractive forms. On his many virtues as a (530) husband, a father, and a friend we could expatiate with feelings of sincere conviction of their existence and profound grief for their premature loss; but our limits forbid, and we must close this imperfect sketch, in the belief that his character has become the property of the country, and will receive ample justice from the future historian.

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STATUTES CONSTRUED OR COMMENTED UPON—*Continued.*

STATUTE OF LIMITATIONS.

1. A residence in another State is not a residence *beyond seas*, within the saving of the act of limitations. *Earle v. Dickinson*, 16.

2. The saving clause of the act of 1715 preserves the right of one of several coheirs who is within the proviso, although the other coheirs are under no disability, and although they are barred. Therefore, in ejectment by three coheirs, upon a joint demise, two of whom were free from disability, but the other under coverture, judgment may be