[Annotations Include 164 N. C.]

NORTH CAROLINA REPORTS

VOL. 13

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FROM DECEMBER TERM, 1828, TO DECEMBER TERM, 1830

BY

THOMAS P. DEVEREUX

(VOL. II.)

ANNOTATED BY

WALTER CLARK

(2D ANNO. EDITION)

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RULES OF COURT

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JUDGES

OF THE

SUPREME COURT OF NORTH CAROLINA

DECEMBER TERM, 1828, TO DECEMBER TERM, 1830.

JOHN LOUIS TAYLOR,* *Chief Justice.*
LEONARD HENDERSON.†
JOHN D. TOOMER,‡ JOHN HALL,
THOMAS RUFFIN.§

ATTORNEY-GENERAL :

ROBERT H. JONES.**
ROMULUS M. SAUNDERS.††

REPORTER :

THOMAS P. DEVEREUX.

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*Died January, 1829. †Elected Chief Justice June, 1829. ‡Appointed May, 1829. Term expired December, 1829. §Elected December, 1829. **Commission expired December, 1828. ††Elected December, 1828.

JUDGES

OF THE

SUPERIOR COURTS

JOSEPH J. DANIEL, Halifax.
JOHN R. DONNELL, Craven.
WILLIAM NORWOOD, Orange.
JAMES MARTIN, Rowan.
THOMAS RUFFIN,* Orange.
ROBERT STRANGE, Cumberland.
WILLIE P. MANGUM,† Orange.
DAVID L. SWAIN,‡ Buncombe.

SOLICITORS

First District	JOHN L. BAILEY	Pasquotank
Second District	SAMUEL T. SAWYER	Chowan
Third District	R. M. SAUNDERS, Atty.-Gen., *ex officio*	Wake
Fourth District	JOHN SCOTT, Sol.-Gen., *ex officio*	Orange
Fifth District	W. J. ALEXANDER	Mecklenburg
Sixth District	STEPHEN MILLER	Rutherford

*Elected to Supreme Court December, 1829. †Elected December, 1829. Resigned December, 1830.
‡Elected December, 1830.

NAMES OF CASES

REPORTED IN THIS VOLUME

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

CASES CITED

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1828

THOMAS D. WATTS v. THOMAS SCOTT.

FROM ORANGE.

A warrant for the penalty imposed by a town ordinance is sufficient, after verdict, if it be "to answer for violating the 28th section, etc," without setting forth the provisions of that section, or the facts alleged to be a breach of it.

After the new trial granted in this cause, at December Term, 1827 (*Watts v. Scott,* 12 N. C., 291), it was again tried before RUFFIN, Judge, on the last circuit, when the case upon record was, that the plaintiff, as treasurer of the town of Hillsborough, had sued out the following warrant against the defendants: "To the constable, etc.—You are hereby commanded to take the body of T. S., to answer the complaint of T. D. W., treasurer, etc., for the sum of ten dollars, for violating sec. 28, of the ordinances of said town. Given, etc."

A verdict being returned for the plaintiff, the defendant moved in arrest of judgment—

1. Because the warrant did not state as a fact the existence of the ordinance mentioned in it—nor the contents of such ordinance, or any part thereof.

2. Because the warrant did not allege any act or omission of the defendant, by which any penalty given by the ordinance had been incurred, or any other fact upon which the debt demanded in it (2) had arisen.

For these reasons the presiding judge arrested the judgment, and the plaintiff appealed.

No counsel appeared for the plaintiff, and the cause was submitted without argument, by *Badger,* for the defendant.

HALL, J. It cannot be expected that the cause of action should have been set forth at large in the warrant. "The amount claimed, and how due" is shown. It is stated to be for ten dollars' for violating the 28th section of the ordinances of said town. This is enough, I think, to give the defendant notice of what the complaint was, so that he might have been prepared for trial; on the trial he should be at liberty to prove the ordinance, as well as a breach of it, by the defendant.

PER CURIAM. Reversed, and judgment entered for plaintiff.

Cited: S. v. Merritt, 33 N. C., 678.

BENJAMIN BRILEY and another, Executors of Joseph Briley, v. JOHN CHERRY.

FROM PITT.

1. Privies in estate are those who succeed only to the rights of their vendor. A purchaser at a sheriff's sale is not privy to the defendant in the execution, as he succeeds also to the rights of the plaintiff.
2. Where, pending an action of detinue for a slave, that slave was sold at execution sale as the property of the defendant, a subsequent recovery in that action is not evidence of title in another, brought against the purchaser at sheriff's sale.
3. What is the effect of a judgment of detinue, *Quere?*

DETINUE for a slave, and on the trial the defendant set up the title in one Jackson, against whom he produced a judgment rendered before a single magistrate, with an execution thereon, and a bill of sale
(3) for the slave in question, made by the constable to whom the execution was directed.

The plaintiffs then produced the record of a recovery made by them as executors, in an action of detinue brought for the same slave against Jackson, under whom the defendant claimed, and proved that the sale to the defendant was made during the pendency of that suit.

DANIEL, J., instructed the jury that the record produced by the plaintiff of the verdict and judgment obtained by them against Jackson for the negro in controversy was not any evidence to impair the title of the defendant to the slave, as the latter was neither party nor privy to that record; and that the fact that the action against Jackson was pending at the time of the defendant's purchase of the slave, yet the judgment therein did not make the defendant such a privy under Jackson as estopped him from showing that the plaintiff's testator

had no title to the slave, but that the defendant was at liberty to show that the title to the slave was in Jackson at the time of the purchase made by him.

A verdict being returned for the defendant, the plaintiff appealed.

HENDERSON, J. A verdict and judgment in an action of detinue are conclusive as to the title between the parties and their privies. And I think that the action of detinue is an affirmance of a continuing title to the thing detained, and that the plaintiff does not, as he does in an action of trover, disaffirm a continuance of title in himself, but may sustain an action for the same chattel against a third person, or even against the same party, although he may have obtained a judgment for it before, provided that judgment has not been satisfied; and I am at a loss to understand *Wethers v. Wethers,* 6 Mumf., 10, cited at the bar, where the executor of a former plaintiff brought an action of detinue against the executor of a former defendant, in which the plaintiff had recovered the same slave, and offered that verdict and judgment as evidence of title, which was rejected; because, as is said by the Court, it was not declared on. I think that it was *evidence* of title as much as a bill of sale. And a plaintiff in such case, and in fact in every other, declares not upon the evidence, but upon the fact.

Privies in estate are those who come in *under* the owner, and the estate stands burthened in their hands with those incumbrances (5) created by him before he parted with it. Therefore, if a suit was pending against him for the property when he parted with it, in which there afterwards was a judgment, that judgment relates to the commencement of the suit, and binds subsequent purchasers.

But one who comes in under a sheriff's sale at execution cannot be called a privy, for he is not only clothed with the title of the defendant in the execution, but also with the rights of the creditor, which may be paramount to those of the debtor *quoad* the thing sold. It is to his rights also that such purchaser succeeds, and therefore he is not privy in estate to the former owner. The verdict and judgment in this case, therefore, are not evidence against the defendant.

HALL, J. I do not consider that the defendant is a privy under Jackson. He claims under a sale made by a constable. When the title was acquired by him under the execution there was no judgment against Jackson, and his purchase did not make the defendant a party to the suit depending against Jackson; he ought not therefore to be bound by its determination. It may be that the rights of creditors to

the negro in question are superior to that of the plaintiff, although the plaintiff's title be better than that of Jackson.

Suppose the plaintiffs had a bill of sale from Jackson, but upon a consideration, quite inadequate, they might recover against him; but a *bona fide* creditor of his may have an execution levied upon the property conveyed by the bill of sale, and thereby establish a right to it, which would be superior to that of the vendor or vendee, when at the same time, a subsequent vendee of Jackson had no better claim than Jackson himself.

Suppose, again, that after the plaintiffs had sued Jackson in detinue the present defendant had also brought an action of detinue
(6) for the same property, and had recovered a judgment and taken possession under it of the property sued for, and then the plaintiff had obtained a judgment against Jackson for the same property; would it be thought for a moment that in a third suit by the plaintiffs against the defendant the plaintiffs' judgment against Jackson would be conclusive evidence against the defendant? It certainly would be considered as a proceeding to which the defendant was not a party, and by which, of course, he ought not to be bound.

In the present case the defendant does not claim under a judgment in an action of detinue, but he claims under a judgment rendered Jackson *in invitum,* and an execution which issued upon it.

I think that the charge of the judge below was right, and that the rule for a new trial should be discharged.

PER CURIAM. No Error.

Cited: Paul v. Ward, 15 N. C., 249; *Vines v. Brownrigg,* 18 N. C., 240; *Sanders v. Ferrill,* 23 N. C., 103; *Cates v. Whitfield,* 53 N. C., 269; *Dancy v. Duncan,* 96 N. C., 116.

THE JUSTICES OF PASQUOTANK on the relation of Benjamin and Reuben Davis v. THOMAS SHANNONHOUSE and WILLIAM WILSON.

FROM PASQUOTANK.

1. A guardian bond executed by an acting justice of the peace "to A, B, and the rest of the justices," etc., is nugatory.
2. Such bonds should be made as prescribed by the Act of 1762, ch. 69, sec. 7, to the justices present in court granting the guardianship.

DEBT upon a bond given by one Muse, as guardian, to the relators, to which the defendants were sureties, payable to "John Mullen and Am-

brose Knox, and the rest of the justices of Pasquotank." The writ was "to answer John Mullen and Ambrose Knox, and the rest of the justices assigned to keep the peace, etc."

Upon the trial on *non est factum,* it turned out that the defendants were two of the acting justices of Pasquotank, at the (7) date of the bond; whereupon his Honor, Judge STRANGE, holding that the same person could not be both plaintiff and defendant, directed a nonsuit, from which the relators appealed.

No counsel for the relators appeared in this case.
Kinney, for the defendants.

HALL, J. The bond in this case should have been taken to the justices present in court, and granting such guardianships, as is prescribed by the Act of 1762, chap. 69. But being taken to "Mullen and Knox, and the rest of the justices, etc.," and the defendants being two of them, the bond is nugatory, and of no effect as to them.

PER CURIAM. Affirmed.

Cited: *Justice v. Armstrong,* 14 N. C., 287; *Justice v. Bonner, Ib.,* 289; *Dickey v. Allen,* 15 N. C., 44; *Vanhook v. Barnett, Ib.,* 269; *Davis v. Somerville, Ib.,* 383; *Newson v. Newsom,* 26 N. C., 389; *Bank v. Griffin,* 107 N. C., 174.

COX, MAITLAND & CO. v. ALFRED M. SLADE.

FROM WASHINGTON.

A bill of exchange expressed to be for value is prima facie evidence of an executed consideration, and without proof of its being drawn for the accommodation of the payee, will not support an action by the drawer against the payee, or a set-off in favor of the former against an action by the latter. But if the drawer was indebted to the payee when the bill was drawn it is evidence of a payment.

ASSUMPSIT for the balance of an account.

On the trial the plaintiffs introduced an account, at the foot of which there was a memorandum signed by the defendant in the following words:

"June 10, 1826.—I have today examined the above account with Cox, Maitland & Co., and find a balance due them of five hundred and seventy-nine dollars seventy-two cents. And I am under the impression they have not credited me with a draft on Wilson & Binney, drawn in March,

1825, for $600. This matter is, therefore, to be investigated, and I am to have credit for that amount as soon as it shall appear I am entitled thereto. A. M. SLADE."

On the trial the defendant, under the plea of set-off, introduced two bills of exchange drawn by him on Wilson & Binney, for $300 and $400. The bills were payable to the plaintiffs, and were expressed to be for value received. It turned out, upon an inspection of the account, which was part of the case, although it did not appear to have been noticed in the court below, that in March, 1825, the balance on account was considerably in favor of the defendant.

STRANGE, J., instructed the jury that a promissory note, or a bill of exchange, and especially one which on its face acknowledged the receipt of value was *prima facie* evidence of a past consideration, or payment at the time, and that it was incumbent on the defendant, in order to avail himself of the bills under his plea of set-off, to prove that
(9) no consideration had ever been given for them, or that they were given in payment of the plaintiff's account.

A verdict being returned for the plaintiffs for the amount claimed, the defendant appealed.

Gaston for the defendant.
Badger & Devereux, contra.

HENDERSON, J. I agree with the judge before whom this cause was tried, that a bill of exchange, and especially one expressed to be for value, is *prima facie* evidence of a past or present consideration; and without evidence that nothing was given for it, money received upon it can neither be the ground of an action against the payee, at the instance of the drawer, or make the foundation of a set-off on the part of the drawer, in an action brought against him by the payee. But had the drawer been indebted on account to the payee at the time the bill was drawn, I think that the extinguishment of that account, to the amount of the bill, would, *prima facie,* form what the judge calls the past consideration, and thus the bill would be taken as a payment of the account *pro tanto*. But without something to rebut the *prima facie* evidence, it could not be allowed as a set-off. In the present case it appears from the account which forms part of this case, that at the time when these bills were drawn, as stated in the defendant's written acknowledgment at the foot of the account (the only part of the case in which that time is stated), the plaintiffs instead of being the creditors of the de-

fendant, were his debtors to a considerable amount, which necessarily repels all idea of this account forming any part of the past or present consideration of the bills in question. The defendant having failed in making this essential proof, it is entirely unnecessary to examine any other part of the judge's charge.

PER CURIAM. No Error.

(10)

JOSEPH LOFTIN v. WILLIAM HUGGINS.

FROM LENOIR.

In an action by a sheriff for property levied on by him his endorsement on the execution is competent evidence to prove the levy.

TROVER for a slave, brought by the plaintiff, the Sheriff of LENOIR, against the defendant, the sheriff of JONES, both parties claiming under levies made by them upon the same slave. On the trial before his Honor, JUDGE MARTIN, on the last circuit, the plaintiff introduced a judgment against one White, and an execution thereon directed to him, upon which he had endorsed a levy upon the negro in question. This evidence was objected to by the defendant, but was admitted by the judge.

After a verdict for the plaintiff the defendant obtained a rule for a new trial, upon the ground that incompetent evidence had been received. But his Honor retaining his original opinion, discharged the rule, and gave judgment upon the verdict, from which the defendant appealed.

No counsel appeared in this Court for the appellant. The cause was submitted without argument, by *Gaston,* for the plaintiff.

HALL, J. The levy endorsed upon the execution was an official act of the sheriff, and one which it was his duty to make. But it was an act *in pais,* and the truth of it might be impeached by evidence on the other side. It was the plaintiff's interest to establish a seizure or a levy in fact. But in the absence of such proof the indorsement of a levy, or any legal circumstancial evidence which tended to the same end, was competent.

PER CURIAM. No Error.

Cited: Miller v. Wowers, 117 N. C., 220.

Dist: S. v. Vick, 25 N. C., 491.

(11)

JOHN H. ALLEY v. NOAH HAMPTON.

FROM RUTHERFORD.

When a verdict is against the evidence a new trial can be granted only by the judge who tried the cause.

ASSUMPSIST, tried on the last circuit, before DANIEL, J.

On the trial one Jones swore that he applied to the defendant for twenty-five dollars which he owed him. The defendant went with the witness to the plaintiff and requested the latter to pay the witness the money; this was refused, and the plaintiff then said to the defendant: "You are greatly indebted to me now"; to which the latter replied: "I admit I owe you at least five hundred dollars, and if you will pay this sum to Jones for me I will settle all with you before I leave the country." The plaintiff then paid the witness the money.

After the charge of the presiding judge the jury returned into court, and said: "that they found for the plaintiff for the twenty-five dollars paid Jones, and that the parties as to the residue should produce their books and papers, and that their verdict for the residue would depend on a settlement."

His Honor informed the jury that such a verdict could not be received, as it did not finally dispose of the cause; upon which the jury retired and returned a verdict for the plaintiff for five hundred and twenty-five dollars.

A rule for a new trial being overruled, and judgment rendered according to the verdict, the defendant appealed.

A copy of an affidavit made by one of the jurors was made part of the case, but its contents are not necessary to this statement.

The cause was submitted by *Badger,* for the appellant. No counsel appeared for the plaintiff.

(12) HALL, J. Where the jury have found a verdict against the evidence, this Court has not power to set it aside. That can only be done by the judge in the court below. It appears that when the jury first came in with a verdict, they had not finally made it up from the evidence which they had heard. The Court sent them back, and told them such a verdict could not be received, as it did not finally settle the question. There appears to be nothing objectionable in this. It is not proper to read the affidavit of the juror. If it was, it would

only prove that the jury had been balancing upon the testimony of Jones, one of the witnesses.

PER CURIAM. No Error.

Cited: Redmond v. Stepp, 100 N. C., 219; *Edwards v. Phifer,* 120 N. C., 406.

WILLIAM P. WILLIAMS and another v. THOMAS and JAMES YARBROUGH.

FROM FRANKLIN.

A bond given under the Act of 1822 (Rev., ch. 1131) for the appearance of an insolvent to court, is good if it is for double the original debt, exclusive of interest and costs, and judgment, on motion, may be rendered on it.

Per HENDERSON, Judge—This Court, with all others, have gone too far in enforcing the rule that a bond required by a statute must in all respects conform to the regulations of that statute, otherwise it can be enforced only as a voluntary bond.

The plaintiffs obtained judgment before a magistrate, against the defendant, Thomas Yarborough, for the sum of $60.67½. A *ca. sa.* issued thereon, and upon its being executed, the defendant gave bond under the act of 1822, payable to the plaintiffs in the sum of $121.35, with a condition to be void if the defendant Thomas should appear at the next term of the County Court.

Default being made, judgment upon the bond was moved for, but the County Court disallowed the motion, and dismissed the proceedings, because the bond taken was not double the amount of the (13) debt, interests and costs. From this judgments the plaintiff's appealed to the Superior Court, when his Honor, Judge NORWOOD, affirmed the judgment of the Court below, and the plaintiffs appealed to this Court.

W. H. Haywood for the plaintiffs
Badger, contra.

HENDERSON, J. The exception taken by the defendant to this bond is not that it was taken in a sum larger than was authorized or required by law, or that it imposes on him other or greater obligations than the act of assembly justifies, but that the sum is less than it ought to be, it being for double the original debt, excluding both interest and

costs, which he says ought to have been included. If we had been told that such exceptions were taken, we should naturally have expected that they were made on the part of him for whose benefit the sum was required to be thus large, that he might have a full indemnity for his debt, damages and costs; and should not for a moment have believed that he for whose ease, in case there was a loss, such diminution would operate favorably, had taken it. To allow this objection from the person who may be benefited by the omission, and cannot possibly sustain any injury, would be sacrificing the legislative will to something worse than mere form. For no person can doubt for whose benefit such regulation was made. Besides, since all our judgments now bear interest until paid, it is next to impossible to execute the law in its very words. No two men, where the calculation of interest is in any degree complicated, will agree to the fraction of a mill, or even to the fraction of a cent. But it may be said, have the penalty large enough, and then this objection is removed in such case the party may still object, and say that other and harder terms are imposed than the law authorizes, that the bond was extorted (14) from him, and he submitted to it to save a friend from jail. I am satisfied that almost all Courts, and this with others, have gone too far in enforcing the rule that a bond required by statute must in all respects conform to the regulations of the statute, otherwise it is void; or that it cannot be treated as a statute bond, but must be enforced, if at all, as a voluntary one. I perfectly agree that, in all essential points, the statute must be observed—that no other or greater obligations must be imposed by the bond than the statute authorizes. But I think that he who is called on to fulfil it cannot say that the bond is void, or even without the statute as to the obligations which the bond imposes, because there are other obligations which ought to have been imposed on him, and which have been omitted. I cannot believe such to be a sound construction. Such objections, to be sure, might be made by him for whose benefit such omitted obligations ought to have been inserted. But I think it by no means follows that if the one party could reject it that the other is not bound by it. *Quisque potest renunciare jure, pro se introducto.*

PER CURIAM. Reversed, and judgment for plaintiffs.

Cited: *White v. Miller,* 20 N. C., 53.

(15)

THE GOVERNOR v. ROBERT MCAFEE and others.

FROM WAKE.

1. Under the Act of 1790 (Rev., ch. 327) justices of the peace are liable to an action of debt only when they take no bond from the sheriff; they are not liable where they have committed an honest mistake in the form of it.
2. The acts of limitations of 1715 and 1814 (Rev., chs. 2 and 879) do not bar the action against the justices given by the Act of 1790.
3. Where the clerk certified that "the following and none other" were the bonds executed by the sheriff, the certificate was held not to be evidence that no other bond was given.

DEBT, brought against the defendants as justices of the peace for Rutherford, upon the act 1790 (Rev., ch. 327), for not taking the bonds prescribed by law, from Frederick F. Alley, upon his election as sheriff of that county on the second Monday of January, 1819. The action was commenced in August, 1823. The pleas were *nil debet* and the statute of limitations.

On the trial, before NORWOOD, J., the plaintiff produced a duly certified copy of the minutes of Rutherford County Court, setting forth—

1. The appointment of Alley, and the fact that the defendants were on the bench at the election.

2. The qualification of Alley, who, in the words of the copy, "enters into the following bonds, and none other."

Copies of the bonds were then inserted, which are:

1. A bond for two thousand pounds, payable to the "Chairman and the rest of the justices composing said County Court," with a condition to be void upon the collection and payment by Alley of all public, county and other taxes.

2. A bond to the governor for five thousand pounds, with a condition to be void if Alley should make due return of all process and pay and satisfy all moneys by him collected as sheriff, etc.

The defendants objected to the admissibility of this copy because it contained matters manifestly forming no part of the (16) records of Rutherford County Court, and particularly because it was not competent evidence to prove that no other bonds had been taken but those copied into the transcript, which fact they contended could not be proved by the transcript. This objection was overruled by the Judge, and the copy admitted to be read.

There was no other evidence offered, and the counsel for the defendants insisted that they were not, upon the true construction of the act of

assembly, liable for an error of judgment committed in an honest endeavor to discharge their duty. That if they failed to take *any* bond, they were liable; but that it appeared in this case that they had taken a bond intended to secure the public taxes, and if the bond was insufficient to accomplish that purpose it was from a want of skill in the use of artificial language, in the person who drafted it, for which the justices were not liable, unless guilty of *mala fides,* or that gross negligence which is evidence of it. They also insisted that the clerk's certificate was not proper evidence to prove that the bonds copied by him were the *only* bonds taken, and that as the law presumed a public officer to perform his duty until the contrary appeared, that presumption ought to operate in behalf of the defendants. It was further contended that the action was barred by the statute of limitations.

The presiding Judge instructed the jury that a failure to take the bonds as required subjected the defendants precisely as if they were bound as sureties, that the question before them was, whether such a bond payable to the governor as that required by the act of assembly had been taken, and that upon this question they must look to the copy of the record produced in evidence—which the act had made full and complete proof—and that as the clerk had certified that "none other" bonds were taken his certificate must be regarded as true; that although one of bonds taken was conditioned for the payment of taxes, yet
(17) it was made payable to the justices and not to the governor, as the act required, and that the only question was, had the act been complied with. For although it was true that by the common law justices of the peace are not answerable for errors of judgment committed in an honest attempt to discharge their duty, yet in the present case that rule could not aid the defendants, because the legislature had by the act of 1790 altered it, and extended the liability of a justice of the peace to such errors of judgment; and in the present case, it being shown by the certificate of the clerk that no other bond was taken, and that certificate being full evidence to that point, the bond taken was not the bond required by law, and that it was the duty of the justices to inform themselves of its insufficiency.

A verdict being returned for the plaintiff, the defendants appealed.

The cause was submitted, without argument.

Seawell & Badger for the appellants.

W. H. Haywood for the plaintiff.

HALL, J. The bond taken for the collection of the public taxes is not such as the act requires, but it is one on which an action at law can

be maintained, according to *Bank v. Twitty,* 9 N. C., 1; and the *Governor v. Witherspoon,* 10 N. C., 42. It is very unlike the case where the justices neglect to take any bond. I think, in the language of the defandants' counsel, they are not, upon the true construction of the acts of assembly, liable for an error of judgment committed in an honest endeavor to discharge their duty, but are so only in case they are guilty of *mala fides,* or of that gross neglect which is evidence of it; and upon this ground and distinction I think the case ought to have been submitted to the jury.

An objection was taken to the certificate offered in evidence, because it contained matters *dehors* the record, the certificate (18) of the clerk being that the sheriff entered into the bonds copied into it, and *none other.* Whether proof that no other bonds had been entered into was indispensable on the trial of the cause it is not necessary to consider. But if it was, the clerk's certificate is not admissible evidence of it. The act of 1790 (Rev., ch. 327), directing the duty of justices in taking bonds of sheriffs and others, declares that a copy of the record of the Court, attested by the clerk, to be legal and sufficient evidence, and shall be admitted as such, and judgment shall be thereon accordingly. Therefore that which the clerk attested as a record was admissible, but that which he certified, not as a record, but as a fact, viz., that no other bond was given, was not admissible; he did not do it officially.

It has also been insisted by the defendant's counsel that the defendants are protected by the statute of limitations. It is to be observed that this is an action of debt, and cannot fall within the operation of the act of 1814 (Rev. ch. 879), That act bars all actions of debt grounded upon any *leading* or *contract* without specialty. This is not an action of that description, nor is it barred by any clause of the act of 1715 (Rev., ch. 2); *Johnston v. Green,* 4 N. C., 129.

PER CURIAM. Judgment reversed, and new trial.

Cited: Bank v. Davenport, 19 N. C., 48; *Cunningham v. Dillard,* 20 N. C., 487; *Peavey v. Robbins,* 48 N. C., 341.

(19)

THOMAS M. BLOUNT v. WILLIAM H. DAVIS.

FROM CHOWAN.

1. A purchaser at a sheriff's sale can assign his bid, and a deed by the sheriff to the assignee vests the title in him.
2. An executor can purchase the goods of his testator at an execution sale.

DETINUE for a slave, tried on the last circuit, before STRANGE, J. The plaintiff produced a judgment and execution against one John B. Blount, as executor of one Muse, and a bill of sale from the sheriff to him. The defendant claimed under a bill of sale made to him by the administrator *de bonis non* of Muse. For the defendant it was proved that the plaintiff was not the purchaser at the sheriff's sale, but that the negro had been stricken off to one Hoskins, who swore that he was requested by Blount, the executor, and the defendant in the execution, to bid off the slave for him; that he, Hoskins, being unwilling the purchase should stand in his name, applied to Blount to substitute another, who told him that he, being the executor, could not buy at the sale, and if the witness was unwilling the execution should be returned with his name as the purchaser, that of Blount's son, the present plaintiff, should be substituted. The sheriff stated, that the execution was discharged by John B. Blount—and that after his death, under the advice of counsel, the bill of sale to the plaintiff was executed.

His honor instructed the jury that the production of the judgment, execution and bill of sale, with proof that the slave was the property of the defendant in the execution, *prima facie* vested the title in the plaintiff, and that if they could infer from the testimony that Hoskins was the real bidder, and had assigned his purchase to John B. Blount, by whom it had been transferred to the plaintiff, and that the sheriff had executed the bill of sale in pursuance of these transfers, it vested
(20) the legal title in the plaintiff, as the fact that John B. Blount was the executor of Muse, did no prevent him from purchasing the assets at an execution sale.

A verdict being returned for the plaintiff, and judgment entered according to it, the defendant appealed.

No counsel appeared for the appellant.
Kinney for the plaintiff.

HALL, J. It must be taken for granted that more was proved on the trial than appears upon the record, and it is unnecessary to send up any

statement of facts unconnected with those questions of law which are made by the case. From the facts set forth it does not appear that the plaintiff has any title to the property in question. The sheriff made him a bill of sale, but he did so only because he was advised to do it. It does not appear that the plaintiff bid off the property, or paid for it. But I presume there was more evidence offered, because the Judge instructed the jury, that if they could infer that the real bidder (21) transferred his right to the plaintiff, and that in consequence thereof the sheriff made him a bill of sale that gave him the legal title. The jury have passed upon the facts under this charge, and have found for the plaintiff, and as no exception can be taken to the charge, and as the Judge was not dissatisfied with the verdict, the rule for a new trial must be discharged.

PER CURIAM. No Error.

Cited: *Clarke v. Clarke,* 17 N. C., 412; *Bailey v. Morgan,* 44 N. C., 356.

JOHN PARKER, Administrator of William Parker, v. EXUM LEWIS, Administrator of Richard H. Dicken.

FROM EDGECOMBE.

1. Funeral expenses are a charge upon the assets, independently of any promise by the administrator, and if proper to the estate and degree of the deceased, must be preferred to all other debts.
2. The question of propriety involves in it the inquiry whether funeral expenses were unnecessarily and officiously incurred by a stranger.

Per HENDERSON, Judge—*Gregory v. Hooker,* 8 N. C., 394, was decided upon the ground that notice was not given the defendant of a charge for funeral expenses, and does not affect their priority in a course of administration.

ASSUMPSIT to recover the balance of an account, including the sum of $37 for the funeral expenses of the defendant's intestate.

On the issue of fully administered, it appeared that the defendant had notice of the claim before the action was brought, and the only question was, whether the defendant could retain the assets in his hands to satisfy a judgment he had obtained against the intestate in his lifetime.

His Honor, Judge NORWOOD, informed the jury that funeral expenses were preferred to debts of record, that the administrator was liable for them in his character of administrator, without a pre- (22) vious request or promise.

Under this charge the jury returned a verdict for the plaintiff, and the defendant appealed.

No counsel appeared for the appellant.
Mordecai for the plaintiff.

HENDERSON, J. Funeral expenses are to be paid in preference to any other debt, out of the assets of the deceased, not excepting debts due by record, even to the sovereign. They form a charge upon the assets, independently of any promise by the executor or administrator, upon the ascertainment of the fact that they are of that description, and proper for the estate and degree of the deceased. These enquiries, however, of course leave open the question whether they were *unnecessarily* or *officiously* incurred by a stranger. We disclaim the intention of weakening the claim of these expenses to a priority when we decided *Gregory v. Hooker,* 8 N. C., 394. But we should say again, in a case like the one alluded to, that notice of the fact that a pillow had been furnished, and was claimed as a funeral charge, should have been given before the action was brought and the assets exhausted. For although the pillow might have been entered in the account, yet it contained a great variety of articles, and was not presented as for a funeral charge, or any part thereof; nor was it made known that it contained any such item. In that case we did not pretend to say what would have been the rule if the executor had taken no orders for the interment of the deceased. But that an individual, who had contributed in so small degree to those expenses, could not, without previous notice, sustain an action against an administrator. For if the rule of law was different the administrator might, without any default on his part, be subjected to as many actions as there were items, of which the funeral bill was composed.

We concur in opinion with the Judge below, that these funeral
(23) charges had a priority in a course of administration over the debts set up as a protection to the assets in the hands of the defendant.

PER CURIAM. No Error.

Cited: Ward v. Jones, 44 N. C., 130; *Ray v. Honeycutt,* 119 N. C., 512.

RICHARD F. YARBOROUGH and NATHAN PERRY v. THE PRESIDENT AND DIRECTORS OF THE STATE BANK.

FROM FRANKLIN.

1. A levy made and returned is waived by taking out an alias *fi. fa.* A *venditioni* with an alias *fi. fa.* clause is the proper writ to keep up the lien created by the levy, and the relation of the process to the *teste* of the original *fi. fa.*
2. An alias *fi. fa.*, although founded on one which was returned "too late to hand," has a lien on goods from the *teste* of the first.
3. A sheriff has a right, at his own peril, to apply money raised under final process, to any writ in his hands. Therefore, where a sheriff had a number of *fi. fas. in his hands*, of equal *teste*, one of which was an alias founded on a prior return of "too late to hand," and being indemnified by the plaintiff in a junior *fi. fa.* sold property, and returned that he would not have acted under any of the writs without an indemnity. It was held that the sheriff, by his return, had appropriated the money made to the writ on which he was indemnified, and that the plaintiff in the junior *fi. fa.* was entitled to it, not only in preference to those writs which were in all respects equal to his, but also as to the alias.
4. Is the sheriff bound to act under an execution at his own peril, and can he in any case demand an indemnity? *Quere?*
5. If bound thus to act, is the above return false as to the other writs in his hands? *Quere?*

At June Term, 1828, of Franklin County Court the sheriff of that county had in his hands the following writs of *fieri facias*, all, except those issued by a justice of the peace, tested of the preceding term of that Court, viz.:

No. 1. In favor of the State Bank, against Thomas Yarborough, Lark Fox and James C. Jones, issued 17 March, 1828.

No. 75. In favor of the same plaintiff, against Thomas Yarborough and Henry Y. Houze, issued 4 April, 1828. (24)

No. 76. In favor of Samuel Robinson, against Thomas Yarborough, also issued on 4 April, 1828.

No. 10. In favor of Richard F. Yarborough, against Thomas Yarborough, issued 27 March, 1828.

No. 8. In favor of Sylvester Sledge, against Thomas Yarborough, issued 27 March, 1828.

All of these were original writs, except No. 10, which was an *alias fi. fa.*, the original of which had been returned "too late to hand." At the same time the sheriff had in his hands two *alias fi. fas.* in favor of Nathan Perry, issued by a justice of the peace on 16 May, 1828, and returned as levied upon a colt, which was sold for $25, to the plaintiff

in the execution. The last mentioned writs were founded on two *fi. fas.* issued 18 February, 1828, which were returned "levied 19 February, 1828, on one negro man Edmund, and on 12 May, 1828, on a wagon and colt."

On these several writs, the sheriff made the following return: "All the above writs of *fi. fas.* (setting them out specially) came into my hands before I took any steps on any of them. No. 1, the first, No. 10 next, No. 8 next, Nos. 75 and 76 together, and before I levied. With all of them in my hands, I was requested by Lark Fox and James C. Jones to seize upon the property of Thomas Yarborough, to satisfy the execution No. 1, and to induce me to do so, they gave me an indemnity on 1 April, 1828, and accordingly on 4 April, 1828, I seized the following negroes, having in company with Fox and Jones, spent several days in pursuit of them." (The return then set forth the names of the negroes, and the result of the sales, showing the sum of $615 as all received, which was paid into Court, but was far short of the
(25) aggregate amount of the executions, and that no other property of the defendant was to be found.) The sheriff then returned that "without an indemnity," I should not have levied any of the aforesaid executions on the said negroes, because they were claimed by J. L. as a trustee.

On the day of sale, Lark Fox and James C. Jones called out aloud, and expressed a willingness that any other persons might join in the indemnity who pleased. No one did join. Whether the plaintiffs were present or not I cannot say, but I think they were not, except D. M. Lewis, the agent of R. F. Yarborough, who refused to enter into the general indemnity given by Fox and Jones, but offered an indemnity for selling to the amount of R. F. Yarborough's execution. At the time of the above levy I had in my hands the two executions herewith returned, issued by a justice of the peace (those set forth above); with them I also return the sum of twenty-five dollars, and submit the whole case to the Court."

On a rule obtained by R. F. Yarborough and Nathan Perry, the County Court directed the sum of six hundred and fifteen dollars paid into office by the sheriff, to be applied exclusively to the satisfaction of execution No. 1, and the sum of twenty-five dollars made by the sale of the colt, to be applied exclusively to the satisfaction of R. F. Yarborough's execution (No. 10); from which judgment R. F. Yarborough and Nathan Perry appealed to the Superior Court.

On the last fall circuit, his Honor, Judge NORWOOD, reversed this judgment, and directed that the money paid into the office by the sheriff should be applied first to the satisfaction of the execution in favor of

Richard F. Yarborough (No. 10), next to the two executions issued by the justice in favor of Nathan Perry, and that any balance should be applied ratably to the discharge of all the other executions. From this judgment, the president and directors of the State Bank appealed to this Court.

Badger for the appellants.
W. H. Haywood, contra.

HENDERSON, J. I understand very distinctly from the sheriff's return, taking it all together, that he raised the money brought into Court, except twenty-five dollars, upon the execution in which he was indemnified in acting by Fox and Jones, and which he identifies in the return as No. 1. For although he sets out at large all the executions which came into his hands, he expressly says that he required an indemnity before he would act in any, and that when he did act it was in consequence of the indemnity. Thus, in my opinion, he exclusively appropriated the proceeds of the property seized to that execution under which he declares that he acted; and that as to the other executions he returns that he found no property of the defendant Yarborough wherewith to satisfy them. We can in no other sense understand his return; for he still holds to his indemnity, which he cannot do without thus appropriating the money. To make his return consistent throughout we must so understand him; and if it be false as to the other executions he is liable for its falsity to the plaintiffs in them; and if subjected, according to his own declarations, he will have no right to complain, for he expressly says that had he not been indemnified he would not have seized the property which produced the six hundred and fifteen dollars. He will then be placed in the situation in which he would have placed himself, as he says, but for the indemnity, and as the indemnity given by Fox and Jones put him in action, it is but fair to give them on whose behalf they acted the benefit of that action. In cases where the sheriff has in his hands more than one execution it is cer- (28) tainly competent for him to act under either, and subject himself for an improper preference. In this case the sheriff has attempted to retain his indemnity, and not to secure to those who indemnified him the benefit which was to result to them, as he still clings to the indemnity, and will not appropriate the proceeds of those acts, which he acknowledges arose solely from it, to the benefit of those who gave it. I wish to express no opinion, whether the sheriff can even in cases of doubt and difficulty require an indemnity: whether he is not bound to act at his

peril. It is sufficient that in this case he has accepted and acted under one.

As to the indemnity offered by Lewis as agent of R. F. Yarborough, it is sufficient to say, as far as these appellants are concerned, that it was not given. As to the twenty-five dollars, I think that it should be applied to the *alias* execution in favor of R. F. Yarborough, for although the original execution issued too late to enable the sheriff to act under it, yet I think that it created a lien on the goods from the *teste,* according to the decision of this Court in the case of *Brasfield v. Whitaker,* which lien was continued by the *alias.* Although there is something like an appropriation by the sheriff of this money to the justice's executions—for he returns it with them—yet it is not sufficiently explicit to warrant us in saying that he has done so; for I infer that he has left that matter to the Court. The priority acquired by the levy of the first justice's execution I think was lost by taking out another general *fi. fa.*

HALL, J. The money made by the sheriff was first directed to be applied to the discharge of the *alias* execution of Richard F. Yarborough; the original execution which preceded it was returned by the sheriff *too late to hand.* It does not appear that it had been
(29) put into his hands in time for him to act under it; if not, it created no lien, and of course, the *alias* execution must share the fate of those with which it bears equal *teste.* The second application of the money by the sheriff was directed to the discharge of Nathan Perry's executions. They are dated 16 May, 1828; had each been preceded by an original execution bearing date 18 February, 1828, which were returned "levied upon one negro man, Edmund, a wagon and a colt, the property of Thomas Yarborough." If a *venditioni exponas* with an *alias fi. fa.* clause had afterwards issued, such process would have continued the lien upon the defendant's property from the *teste* of the first writs, provided they had not been satisfied by the proceeds of the sales under the *venditioni exponas,* which might have been the case. But as no *venditioni exponas* issued, the *alias fi. fas.* can have no preference over executions bearing equal *teste,* and must yield to those which are before them.

The return of the sheriff is made part of the case, and must be taken as true. In deciding upon that, it is not intended to decide any question between the sheriff and the creditors, but only those arising between the execution creditors.

Then it is assumed as a fact that in case the indemnity had not been given, the sheriff would not have levied upon the property, because it

was too doubtful whether the defendant had any title to it—whether the title had not passed from him. As the State Bank, or its agents, indemnified him, and must suffer in case the property proves not to be the defendant's, so they ought to be gainers, and have their execution satisfied in case it turns out to be his. This seems to be the justice of the case, and no principle of law has been shown that impugned it.

PER CURIAM. Let the judgment be reversed, and apply $615 of the money in office solely to the satisfaction of the execution (30) in favor of the State Bank against Thomas Yarborough, Lark Fox and James C. Jones, and applying the remaining $25 to the satisfaction of the execution in favor of R. F. Yarborough.

Cited: *Washington v. Sanders, post* 345; *Ramsour v. Young,* 26 N. C., 135; *Harding v. Spivey,* 30 N. C., 65; *McIver v. Ritter,* 60 N. C., 607; *Bates v. Lilly,* 65 N. C., 233; *Isler v. Brown,* 66 N. C., 562; *James v. West,* 76 N. C., 291; *Pasour v. Rhyne,* 82 N. C., 150.

GEORGE WILSON v. STEPHEN B. FORBES, Administrator of Thomas O. Bryan.

FROM CRAVEN.

1. The English rule for determining whether a river is navigable or not, viz., the ebb and flow of the tide, is not applicable in this State.
2. What general rule shall be adopted to determine the character of a water-course? *Quere?*
3. But a stream eight feet deep, sixty yards wide, and with an unobstructed navigation for sea vessels from its mouth to the ocean, is a navigable stream, and its edge at low-water mark is the boundary of the adjacent land.
4. A covenant of *seizin* is broken if the vendor has no right to sell all the land within the boundaries of his deed.
5. The measure of damages upon a covenant of *seizin* is the price paid for the land and the interest upon it.
6. But if the vendee goes into possession under the deed, and his title is rendered perfect by the act of limitations, he is only entitled to nominal damages for a breach of the covenant of *seizin.*

COVENANT tried before MARTIN, J., on the last circuit.

The defendant's intestate on 7 September, 1818, conveyed to the plaintiff a tract of land "beginning at the mouth of North or Jimmy's creek, and thence running down Trent river to the line of land formerly belonging to Mrs. Edwards; thence along that line north, 5 degrees east, 400 poles, to the back line of Castage's patent; thence west with said

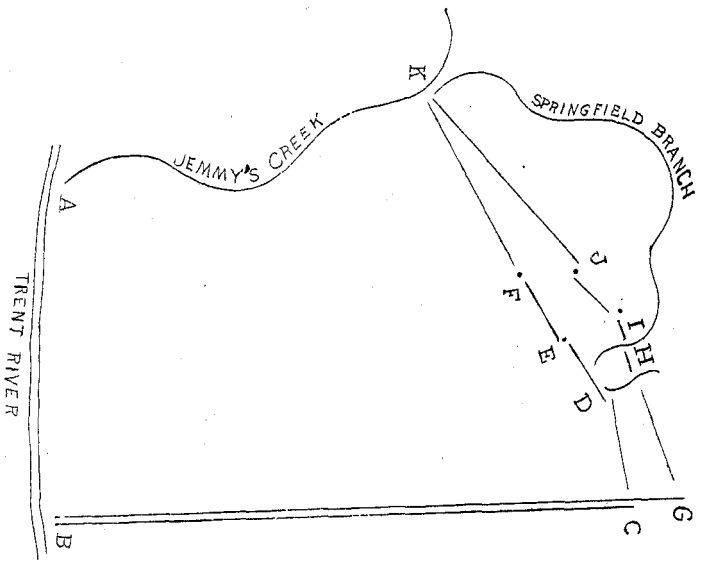
patent line to a branch now called Springfield branch; thence
(31) down said branch to a cypress at the mouth thereof—Castage's corner; thence down the various courses of said North or Jemmy's creek to the beginning, being part of the land granted to James Castage by patent bearing date 12 November, 1713."

The deed contained the following covenants:

"And the said Thomas O. Bryan, for himself and his heirs, doth covenant with the said George Wilson, his heirs and assigns, that he hath good right and absolute authority to grant, bargain and sell the premises aforesaid; that the said premises are free and clear from every incumbrance; that there are within the lines aforesaid hereby granted and conveyed not less than 387 acres of land, and that he will warrant and defend the same to the said George Wilson, his heirs and assigns, against the lawful claims of all persons. And the said George Wilson covenants with the said Thomas O. Bryan that upon a resurvey of the premises hereby granted, should there be a greater quantity of land than the said Thomas O. Bryan hath herein warranted, that is to say, than 387 acres, the said George Wilson will pay to the said Thomas O. Bryan for every acre above the said quantity herein warranted at the rate of $20 the acre."

The only breach was of the covenant of *seizin*.

A survey of the land was made, and a plat of it was part of the case, which is represented by the annexed diagram:



Castage's patent was produced on the trial; the back lines of (32) it were as follows: "From a hickory (contended by the defendant to be either at C or G in the diagram) S. 80 degrees W. 100 poles to a poplar at the side of a branch, thence S. 35 degrees W. 40 poles, S. 51 W. 40 poles, thence S. 82 W. 36 poles, to the mouth of the creek, then, etc."

The plaintiff contended, that the lines denoted in the diagram by the letters A, B, C and D, and Springfield branch to its mouth at K, and thence down Jemmy's creek to its mouth at A, was the boundary described in the deed, and that the covenant of *seizin* applied to all the land within those limits.

The defendant contended that the back lines of his deed were the back lines of Castage's patent, wherever they were, and that (33) those lines were designated on the diagram either by the letters A, B, C, D, E. F and K, or by the letters A, B, G, H, I, J and K, leaving out of the boundaries of the deed the land in the bend of Springfield branch. Between these two boundaries there were two plantations, one of which had been cleared for 25 years, and the other for a longer period —both held adversely to the title of the defendant.

By the survey it appeared that there were within the boundary contended for by the plaintiff 400 acres of land, and within those designated by the letters A, B, C, D, E, F and K, measuring to the margin of Jemmy's creek, 348 acres, the title of which was undisputed; that between the thread or middle of the creek, and its margin at low-water mark, there were 7 acres of land covered with water, and consequently, that by measuring to the middle of the creek, there were within the last-mentioned boundaries 355 acres.

Jemmy's creek enters into Trent River a few miles above Newbern; it is 60 yards wide at its mouth; becomes wider higher up, and its average width to the mouth of Springfield branch, is from 60 to 100 yards. The depth of water at its mouth is 12 or 15 feet, and from 6 to 8 feet to the mouth of Springfield branch. There exists in it no regular ebb and flow of the tide corresponding to that of the ocean. But the tide ebbs and flows in it in the same way that it does in the Neuse and Trent rivers. It is navigated by the owners of the adjacent land with flats loaded with wood.

It was in proof that the plaintiff had cleared and cultivated a field in the bend of Springfield branch, for 10 or 12 years before the trial in the Court below.

His Honor instructed the jury that Jemmy's creek was a navi- (34) gable water-course, and that the true boundary of the land on the side of the creek was the edge of the water at low-water mark, and not the thread of middle of the channel; that the boundary of the land

conveyed by the deed, and which was within the covenant of *seizin,* was the lines of the plat until it struck Springfield branch, and then the meanders of that, and that if adverse possession of any of the land included within that boundary was held by any person at the date of the deed the covenant of *seizin* was broken; and further, that if the defendant had not title at the date of his deed to all the land within the meanders of Springfield branch, there was also a breach of his covenant; that if they found for the plaintiff, the rule of damages, if the land had been paid for, was the price paid for it, and the interest; that if the land had not been paid for, the rule was to give the difference between the price to be given and the real value, if it was greater than the agreed price; that if the plaintiff, availing himself of the deed, and of a continued possession under it for 7 years, had thereby acquired an undefeasible title, the damages should be nominal.

The jury returned a verdict for the plaintiff, and assessed the damages $780 principal, and $473.85 interest; and judgment being rendered accordingly, the defendant appealed.

The case was argued at length by *Badger* for the appellant, and *Gaston, contra.*

HENDERSON, J. It is clear that by the rule adopted in England, navigable waters are distinguished from others, by the ebbing and flowing of the tides. But this rule is entirely inapplicable to our situation, arising both from the great length of our rivers, extending far into the interior, and the sand-bars and other obstructions at their
(35) mouths. By that rule Albemarle and Pamlico sounds, which are inland seas, would not be deemed navigable waters, and would be the subject of private property. What general rule shall be adopted, this case does not require me to determine, were I competent to it. But I think it must be admitted that a creek or river, such as this appears to be, wide and deep enough for sea vessels to navigate, and without any obstruction to this navigation from its mouth to the ocean, and the limit of whose waters is not higher nor as high as the flowing of the tides upon our sea coasts, is a navigable stream within the general rule. I therefore concur with the Judge below that the margin of the water was the boundary of the grant, and that the land covered by the water, to the middle of the stream, was not to be taken into computation in ascertaining the quantity.

I concur also with the Judge that the covenants of the deed were broken if the deed covered lands of which the grantor was not seized—

that is, authorized to sell and convey at the date of the deed, yet that the grantee was entitled to nominal damages only if the plaintiff's possession under the deed had ripened into a good title under the statute of limitations. And from the clear and explicit manner in which he makes the latter declaration, and his refusal to grant a new trial, I must understand that the adverse possession spoken of, for more than 25 years, between the two lines C, E, K, and C, H, K, was accompanied with color of title, embracing all the lands comprehended in the deed to which the grantor had not title, and especially the lands lying in the bend of the branch; for without such color the doctrines of the Judge would have led to a different verdict, and it seems he approved of the verdict in this case, for he refused to grant a new trial. This view of the case is much strengthened by the fact that these possessions were *adverse,* which presupposes color of title, at least beyond the limits of actual occupancy. But at most this was matter of evidence, and we will presume that it tended to establish such facts as support the (36) verdict. It is unnecessary to examine into the correctness of the charge making the actual value of the lands and not the price given the measure of damages—that is, enabling a plaintiff to recover damages for the fancied loss of a good bargain, as in this case it produced no practical results. I am of opinion, therefore, that the rule for a new trial should be discharged.

HALL, J. The covenant sued upon must be taken as a covenant of *seizin,* and the question submitted to the jury was whether the defendant's intestate had *seizin* in the lands sold to the plaintiff.

The plaintiff contended that one line of the boundary of the land—the only one in dispute—runs from the letter C in the plan until it strikes Springfield branch at the letter D, and thence along the branch, as it meanders, to the mouth thereof at the letter K. The defendant contended that the boundary set forth in his deed was the back line of Castage's patent, which was designated in the plan either from the letter C by H to K or from the letter C by E to K—either line leaving out the land in the bend of the branch. There are 400 acres within the lines contended for by the plaintiff, and 348 acres within those contended for by the defendant, of which it is admitted his intestate had *seizin.* But if he conveyed as the plaintiff contends, and was not seized of the land between C, D, E, K, and the Springfield branch, there was a breach of the covenant of *seizin* as to 52 acres.

There is another covenant in the deed besides the one sued on, viz., that there was not less than 387 acres conveyed by the deed. The jury may have taken that as their guide, and deducting three hundred and

forty-eight acres from three hundred and eighty-seven thirty-nine acres would remain; for a want of *seizin,* in which the jury may have given their verdict. Be that as it may, the evidence offered to the jury
(37) is not made part of the case sent here. It was placed before them; they have acted upon it; the presiding Judge approved of it, and it is not for this Court to disturb their verdict.

One remark may be made (though the case does not require it): If the line C, D, E, K, was the true line, as the defendant contended, he conveyed only 348 acres; whereas, he covenanted that the lines of the deed contained 387 acres. So that he would, in case he was sued upon that covenant, be answered for thirty-nine acres; in which case he would stand precisely as he now does.

There does not appear to be any part of the Judge's charge at variance with the defendant's rights, unless the following objections are sustainable:

The Judge instructed the jury, that Jemmy's creek was a navigable stream, and that the true boundary was its water edge at low-water mark, and not the thread or middle of the channel. On this subject it becomes necessary to examine the acts of assembly on the subject of entering and surveying lands. The act of 1715 (Rev., ch. 6, sec. 3) directs surveyors in "surveying and laying out all lands that lie on navigable rivers and creeks, that they shall run a full mile in a direct course, into the woods, and each opposite line shall run parallel with the other, if it can be admitted for other persons' lines or rivers or creeks." The fourth section declares that no surveyor shall survey or lay out more than 640 acres in one tract. The act of 1777 (Rev., ch. 114, sec. 10), directs that "no survey shall be made without chain carriers, who shall actually measure the land surveyed, and such chain carriers shall be sworn to measure justly and truly; that every survey shall be bounded by natural boundaries, or right lines running to the cardinal points, unless such lines interfere with lands already granted or surveyed, or unless when the survey shall be made on any navigable water, in which last case the water shall form one side of the survey,
(38) provided that nothing herein contained shall be construed to prevent any person from entering a claim to any island or islands in navigable waters, etc." By the law of England, generally speaking, waters are only considered to be navigable where the tide flows and ebbs. I think that part of the English law is not applicable to the waters and streams of this State. But few of them could be marked by such a distinction. There can be no essential difference for the purposes of navigation, whether the water be salt or fresh, or whether the tides

regularly flow and ebb or not. And of this opinion the legislature seems to have been, when they passed the laws above recited. When they speak of actual admeasurement by chain carriers on oath, they did not contemplate an actual admeasurement of the land forming the bed of such a stream as Jemmy's creek. When they speak of a survey containing 640 acres, made on a navigable water or creek, and the water forming one side of the survey, they did not intend that the bed of the river, to the middle of it, should be part of the survey. When they direct surveyors to run a mile into the woods from a water course, and to run each opposite line parallel with the other, so as to include six hundred and forty acres, it is preposterous to suppose that the bed of the river is to be a part of it, as there would be the required quantity without it. I have no doubt that the charge of the Judge was right, that Jemmy's creek is such a navigable stream as the before recited acts of assembly contemplated.

It may be asked of what size a creek must be to make it navigable? I answer, that in the solution of this question embarrassment may be encountered; but when it is necessary to give it, we will do it as well as we can. The decision of this case does not call for it. Neither is it necessary in this case to inquire, what are rights of the proprietors of lands on navigable waters, to the thread or middle of the stream. Such inquiry is not called for, and, at best, would be only speculative.

Secondly, when the Judge instructed the jury that an adverse possession of the land sold, at the time of the sale, would be a (39) breach of the coverant of *seizin,* I understand him to mean that kind of adverse possession which only could amount to a breach, viz., an adverse possession under a color of title.

Thirdly, when he directed the jury to give the value of the land at the date of the covenant, if he meant the value of the land without regard to the purchase money, it was contrary to the opinion of the Court in the case of *Phillips v. Smith,* 4 N. C., 87, and *Hoodenpyle v. McDowell,* 4 N. C., 872. In those cases the purchase money, with interest, was established as the rule of damages in case of eviction.

However, that cannot be a ground of objection here, because the jury allowed the amount of the purchase money, with interest, in assessing damages. And it is thus proved; the land stipulated to be sold was 387 acres, for which $7,740 was given—that is $20 per acre. The jury valued the 39 acres of which the defendant had not *seizin,* at $780, with interest, which was $20 per acre.

Fourthly, the Judge further directed the jury that if the plaintiff, availing himself of the defendant's deed, had continued possession

under it for 7 years, and had by that means acquired a valid and indefeasible title, they should give only nominal damages. To this part of the charge no objection is taken. Whether the fact was so proved or not this Court has no means of ascertaining.

I therefore think there was no misdirection given the jury as to the facts on which they have found their verdict, and that the rule for a new trial should be discharged.

PER CURIAM. No Error.

Cited: Dowd v. Faucett, 15 N. C., 94; *Cowan v. Silliman,* Ib. 47; *Williams v. Buchanan,* 23 N. C., 40; *S. v. Benbury,* 25 N. C., 282; *Collins v. Benbury,* 27 N. C., 128; *Fagan v. Armistead,* 33 N. C., 435; *S. v. Dibble,* 49 N. C., 110; *S. v. Glenn,* 52 N. C., 325; *Price v. Deal,* 90 N. C., 294; *Hodges v. Williams,* 95 N. C., 334; *Britton v. Ruffin,* 123 N. C., 70; *S. v. Baum,* 128 N. C., 605; *S. v. Twiford,* 136 N. C., 606; *Wall v. Wall,* 142 N. C., 389.

(40)

Den ex. dem. of HOWELL L. RIDLEY and WILLIAM M. SNEAD v. JOSEPH M. MCGEHEE.

FROM CASWELL.

1. It seems that a deed of trust made after the passage of the Act of 1820 (Rev., ch. 1037), and before the 1st of June, 1821, need not be registered within six months.
2. But deeds of trust of the above date are by that act placed upon the footing of mortgages in respect to creditors and purchasers, and are not included within the usual acts extending the time for the registration of grants, *mesne* conveyances, etc.
3. Where a deed of trust proved within the prescribed period, and an entry made of the probate and order of registration, but the fees not being paid, the clerk informed the person who brought it that it should not be registered, and offered it to him again. It was *Held,* that while the entry remained parol evidence was not admissible to contradict it, and that the default of the clerk in not handing it to the register did not affect the right of the vendee.

EJECTMENT for a lot in the town of Milton, tried on the last circuit before RUFFIN, J. The lessors of the plaintiff claimed under a deed made by one Sims to one Smith, dated 26 March, 1821, in trust to indemnify them as sureties of the vendor in an injunction bond. The deed was in common form, contained the usual power of sale, and on

it was endorsed a certificate of probate and an order for its registration, dated of the July Term, 1821, of Caswell County Court, and also a certificate of its registration, which was without a date.

The defendant claimed under a sheriff's deed dated 9 May, 1822, which was founded on a judgment obtained against Sims at July Term, 1821, of Caswell County Court, from which term a *fi. fa.* issued, was levied upon the lot, and had been followed by regular issues of *venditionis* until the sale.

The defendant then proved by the deputy clerk of the County Court that he and the clerk were both in Court when the deed to John Smith was brought in by Farley, one of the attesting witnesses, for probate; that after the probate was taken the principal clerk (41) asked Farley for the fees of the clerk and register, to which he replied that no money had been sent by him for that purpose, and that he should not pay them; that thereupon the clerk refused to keep the deed, and offered it to Farley, who declined having anything to do with it; that witness—the deputy—took the deed, with many others which had been proved at the same term, and wrote on it the usual certificate of probate, and inserted in the minutes of the Court the probate and the order of registration; that a few days after July Term, 1821, the clerk examined the deeds which had been proved at that term, for the purpose of seeing if the certificates were properly made and of handing them to the register; that when he found the deed in question among them he became angry with the witness for certifying the probate, and ordered him not to give it to the register, as the fees had not been paid; and that accordingly the deed was kept until 10 April, 1822, when the witness saw Smith, the vendee, and informed him of the facts above mentioned—upon which he paid the fees, and the deed was handed to the register and immediately registered.

The lessors of the plaintiff then produced and read in evidence, from the minutes of the County Court of July Term, 1821, the entry of the probate of the deed, and the order for the registration thereof. The counsel for the defendant moved the Judge to instruct the jury that the lessors of the plaintiff could not recover, because the deed of trust to Smith, being dated on 26 March, 1821, was not registered within twelve months of its date, and that consequently the lien created by the judgment obtained at July Term, 1821, and the execution thereon, was in law preferable to it. This motion was opposed by the opposite counsel, who contended that the deed in question, being executed before the first day of May, 1821, was not within the act of 1820 (Rev., ch. 1037). That the deed was not a mortgage, within the mean- (42)

ing of the act of 1715 (Rev., ch. 7), because it had no proviso for redemption, but was an absolute conveyance in fee simple, with a power of sale, and because there was no debt due to the lessors of the plaintiff, or to Smith, but only a right in Smith, upon a contingency, to sell and raise certain money to indemnify the former, in case they should be compelled to pay anything for Sims; that mortgages and deeds of trust, being distinguished from each other by the act of 1820, and other statutes, the deed to Smith was a conveyance of land, *other than a mortgage,* within the meaning of the act of 1715, and the act of 1821 (Tayl. Rev., ch. 1087), entitled "An act to extend the time of registration of grants, *mesne* conveyances, powers of attorney, bills of sale, and deeds of gift." That the order of the County Court was conclusive that the fees on the deed were paid, and was imperative on the clerk and register to have the same registered, without anything else to be done by the vendee therein; and that if the act of registration was not performed until April, 1822, it did not affect the operation of the deed so as to injure the rights of those claiming under it. And further, that if the registration was to be taken against the lessors of the plaintiff, to have been made in April, 1822, only, yet that it was good and sufficient under the acts of 1715 and 1821, inasmuch as it was within two years from the passage of the latter; and that the lien under the execution was not preferable, because, by the act of 1715, twelve months from the date of the deed was allowed for its registration, and there was no interval between the expiration of the first twelve months after its date and the operation of the act of 1821 during which the judgment and execution under which the defendant claimed could create a lien on the land in dispute, because the act of 1821 was in force before the expiration of twelve months from the date of the deed.

His Honor, being of this opinion, refused to give the instruc-
(43) tions asked for by the counsel of the defendant, but gave those prayed for by the counsel for the lessors of the plaintiff, which were excepted to; and the jury having returned a verdict for the plaintiff, the defendant appealed.

(44) *Badger* for the appellant.
Gaston, contra.

HENDERSON, J. The deed, as regards its registration within six months from its date, is not affected by the act of 1820, because it was executed before 1 June, 1821; but it is affected by that act so far as deeds of trust are by it excepted from the general registry act, and placed, in respect to the rights of creditors and purchasers, upon the

footing of mortgages as to the time of their registration. It is, therefore, together with all other deeds of trust and mortgages, not within the operation of the acts giving further time for the registration of deeds. Every principle which can apply to except a deed executed after 1 June, 1821, from the operation of those acts, applies with equal force to deeds of trust executed before that time, and not registered. The policy which induced the legislature to except deeds executed before 1 June, 1821, from the operation of the act of 1820, as to the time within which they should be registered, does not apply to give them the benefit of the acts allowing further time for the registration of deeds. The act of 1820 places deeds of trust and mortgages, as regards the time in which they should be registered, as to creditors and purchasers, into a distinct class; and although, for peculiar reasons, deeds executed before 1 June, 1821, were excepted out of the operation of the act, yet the exception does not affect their classification, and they shall, not by construction, be embraced by the general words of the acts (45) giving further time, because the mischief as to them is in all respects similar to that of those executed after 1 June, 1821.

I am inclined also to think that the fair construction of the act of 1820 is that all deeds of trust executed before 1 June, 1821, shall be registered within six months after that time. The time was given for the purpose of diffusing a knowledge of the law. It could not be given for any other reason, and none can be assigned why a deed executed on 31 May should have twelve months thereafter allowed for its registration, and a deed executed on the next day, 1 June, in all respects similar except in its date, should only have six months. I would not take this liberty with the words of the act, could any possible motive be assigned for postponing its operation, but that its enactment might be known before they became a law. I express this opinion with great diffidence. But as there is another point in the case which I think is decisive for the plaintiff, any error into which I may have fallen in the two preceding points cannot be prejudicial to him, and may be reconsidered in other cases. The point alluded to is as follows: It appears that at July session of Caswell Court, next after the date of the deed, it was duly proved and ordered to be registered. The vendee then had done all that by law he was required to do. It then became the duty of the clerk to deliver the deed within ten days to the register, and it was his duty to register it. As to the vendee I must consider the ceremony as complete, for he had done all that the law required of him. And if not done, he who has been merely a passive stranger, and who has received an injury by the nonperformance, must have recourse to that officer who has been to blame in the omission, not to him who has

been active and followed the path pointed out by law, and has done all that was required. Such has been the language of our Courts on several occasions, where the party had done what the law re-
(46) quired, and the officer who was then to act had omitted to perform his duty. I do not think that it is even a balancing point, when the question is which of two persons is to suffer—a stranger who has been passive, and one who has been active and done what was required of him. If in this case the defendant has sustained any injury from the want of actual registration, let him seek redress from the defaulting officer. It will be perceived that I have disregarded the parol evidence that the fees due on the probate of the deed had not been paid, and that the clerk offered to return it to the person who handed it in, and apprised him that it would not be registered unless the fees were paid. The record is at variance with this; it states that the deed was duly proved and ordered to be registered. No parol evidence should be heard to contradict it. It would place all that we hold dear in jeopardy, when the records of our Courts can be thus contradicted. If a clerk, upon a deed's being handed in and proved, makes an entry on his docket to that effect, and even endorses the entry on the deed, under a belief that the fees would be immediately paid, and should find himself mistaken, upon his mentioning this to the Court, the entry would be impugned by their order. By this means the clerk would be protected from impositions. Having failed to do this, but having permitted the entry to remain on the record, and even endorsed on the deed, no matter what words passed, they must, in opposition to the record, be considered as mere idle talk. In fact the evidence should not have been received, and when heard entirely disregarded.

PER CURIAM. No Error.

Doubted: *Moore v. Collins*, 14 N. C., 140, 143.

Cited: *Moore v. Collins*, 15 N. C., 391, 393, 394.

(47)

THE STATE v. ISAAC, a slave.

FROM JONES.

Where a slave has been confined in jail upon an indictment for murder, and a *nolle prosequi* is entered, the owner, having had due notice of the charge, is liable under the acts of 1793 and 1795 (Rev., chs. 381, sec. 2, and 438, sec. 7) for the jail fees as well as the court costs.

AN INDICTMENT for murder had been found against the prisoner, a slave.

On the last circuit a *nolle prosequi* was entered, and upon the motion of the owner, who had been duly notified of the charge, the prisoner was discharged. But MARTIN, J., ordered the jail fees and other costs to be paid by the owner, from which the latter appealed to this Court.

R. H. Jones, Attorney-General, for the State.

No counsel appeared for the appellant.

HALL, J. By the act of 1793 (Rev., ch. 381, sec. 2) it is declared that where a slave is charged criminally, his owner, provided he has notice of it, is bound to pay all costs attending the trial, provided also, that the slave, if a freeman, would be liable to pay them.

By the act of 1795 (Rev., ch. 433, sec. 7) it is declared that every person who shall be committed to a public jail, by lawful authority, for any criminal offence, or misdemeanor against the State, shall bear all reasonable charges for carrying and guarding them to the said jail, and also for their support therein until lawfully released. And all the estate which the person possessed at the time of committing the offense shall be subject to the payment of the aforesaid charges and other prison fees, in preference to all other demands.

From these acts of the legislature it appears that Isaac, if a free man, would be liable for his prison fees, and consequently (48) his owner is bound for them.

PER CURIAM. Affirmed.

Cited: *S. v. Peter,* 53 N. C., 347.

THE STATE v. CARTER JONES.

FROM NORTHAMPTON.

An owner who has notice of a capital charge against his slave, in case of a conviction, is not only bound to pay the prison fees, but also the fee allowed by Act of 1797 (Rev., ch. 484) for carrying the sentence into execution.

NEGRO CHARLES, the property of the defendant, had been convicted of rape, and executed.

A question was made before his Honor, Judge NORWOOD, on the last circuit, whether the defendant, as the owner of the slave, was liable to his prison charges, and to the fee of $10 allowed for carrying the sentence of death into execution. Both questions were decided for the State, and the defendant appealed.

Badger for the appellant.

R. H. Jones, Attorney-General, for the State.

HALL, J. From the two acts of assembly recited in *S. v. Isaac,* decided at this term (*vide* the last case), the defendant Jones, the owner of the slave, is liable for the costs of prosecution against him, because if the slave had been a free man his estate would be liable.

With respect to the fee of five pounds for executing Charles, it is included, I think, in the costs of prosecution. In the act of 1797 (Rev., ch. 484), amongst other fees to which the sheriff is entitled for apprehending and carrying criminals to jail, ten shillings is allowed for carrying any sentence or decree of the Court into execution, where the
(49) convict is to be corporally punished, and $5 for the execution and decent burial of any one.

By the same act provision is made for the payment of such fees by the State, provided they cannot be got out of the estate, or body of the prisoner. But it declares that no such claim shall be allowed until a *fieri facias* shall have issued to the county in which the prisoner may be supposed to have owned property, and the sheriff's return thereon that nothing was to be found, nor until a *capias ad satisfaciendum* shall have issued, and if it was executed upon the body of the criminal, not until he discharged himself by taking the oath of insolvency. From this act it appears that the estate of the slave would be liable in case he was a free man, it follows, of course, that the owner is so.

PER CURIAM. Affirmed.

THE STATE v. JOHN CHITTEM.

FROM CURRITUCK.

1. The record of the conviction of a principal felon is admissible on the trial of the accessory, and is conclusive evidence of the conviction of the principal and *prima facie* evidence of his guilt.
2. The rule is the same where the principal felon is a negro and the accessory a white man, although the conviction was procured by the testimony of negroes, incompetent against the accessory.
3. On the trial of a white man charged as accessory, the principal felon being a negro, the testimony of negroes is admissible upon the question of the principal's guilt, but not to prove the incitement by the accessory.
4. The rules of law respecting principal and accessory commented upon.

The prisoner was indicted as an accessory before the fact to the murder of Joseph S. Lindsey. The indictment charged March, a negro slave, to be the principal felon. On the trial before STRANGE, J., on the last circuit, the prosecuting officer offered in evidence the record of the conviction of March, which was objected to by the counsel for the prisoner. The objection was overruled by the presiding (50) Judge, who charged the jury that the record was conclusive evidence of the conviction of March, and *prima facie* evidence of his guilt; but that the prisoner was at liberty, if he could, to show that, in fact, the principal, March, was not guilty.

The jury found the prisoner guilty, and a motion for a new trial being overruled and judgment of death awarded, the prisoner appealed.

A copy of the record of the conviction of March was made a part of the case. On the indictment against him "negro Lamb" was endorsed as a witness.

Gaston, for the appellant.
R. H. Jones, Attorney-General, for the State.

(54)

HENDERSON, J. It seems not to admit of a question but that the record of the conviction and attainder of the principal is *prima facie* evidence against the accessory that the principal committed the crime, which the accessory is charged with inciting. This is the case, although the conviction may have been had upon the confession of the principal; the only doubt seemed to be whether the conviction was not conclusive. If the actual guilt of the principal is essential to the criminality of the accessory, it is difficult to see upon what principle the record of his conviction can prove the fact; for it is perfectly *res inter alias acta.* The accessory has no opportunity upon the trial of the principal, when

they are separately tried, of producing, confronting and examining witnesses. If, therefore, we were from this practice to ascertain what the principle is, it would seem that the guilt of the accessary is independent of that of the principal. But that the law was satisfied with the *conviction* of the principal; which fact the record in controversy established to all the world, as well strangers, as parties and privies. This idea is much strengthened by the fact that in cases where the principal has been convicted before the indictment is preferred against the accessary the indictment against the latter need not charge the guilt of the principal, but only that he has in such a Court been duly *convicted* of the crime, *prout patet per recordium,* and if such an indictment is good it is sufficient to prove the facts as laid; it seems, then, as there is no charge of the guilt of the principal, but only an allegation of his conviction, that the indictment is fully supported by proving the incitement, and the conviction of the principal, without offering any evidence of his guilt. Yet it seems agreed on all hands that the
(55) conviction of the principal, either by outlawry or judgment, must precede the conviction of the accessory, unless the accessory waives such prerequisite, and even then judgment shall not be pronounced upon the accessory until the principal is convicted; and if afterwards the principal is acquitted, the accessory is thereby discharged. Even in cases where the principal has been outlawed, and the accessory has been tried, convicted, attained and executed, and afterwards the principal appears, reverses the outlawry, and pleads not guilty to the felony, and it is found for him, this acquittal *ipso facto* reverses the attainder of the accessory, and his heir may enter upon the lord who has seized his ancestor's lands as an escheat, and is not put to his action, but may show all this, in an action brought against him by the lord, for his entry. (*Lord Sanchar's case,* 9 Coke, 117, citing 4 Edw. III.) I cannot pretend to unravel all this, nor to decide whether Lord Coke is right, when he says that the statute of West. I, ch. 14, which enacts "that none be outlawed upon appeal of commandment, force aid or receipt, until he that is appealed of the deed is attained," is but in affirmance of the common law; I must administer it as I find it laid down, and I know of no case, or even *dictum,* where it is said the record of the conviction is not admissable as *prima facie* evidence of the guilt of the principal, upon the trial of the acessory.

But we are startled in this case, because negro testimony may have been, and I presume was, admitted against the negro, the principal felon—as it appears that a negro is endorsed as one of the witnesses on the bill of indictment. This does not vary the case from others. For if the principal is convicted upon his own confessions, or by the testimony of one who is incompetent against the accessory, as, for instance,

the wife of the accessory, the record is admissible in the same manner as if it had been founded on testimony which the accessory could not object to. And the present case is nothing more, for (56) the confessions of the principal, or the evidence of the wife of the accessory, are as inadmissible against the accessory as the testimony of negroes within the fourth degree; and yet we never heard of those objections. The fact is, they, by law, are admissible against the principal, and are competent to produce his conviction, and this is sufficient. I admit with the counsel for the defendant that this doctrine leads to the introduction of negro testimony on the trial of a white man; that it would have been competent in this case for the prisoner to have proved by negro testimony that the principal felon was not guilty. For as by law the conviction is only *prima facie* evidence of the guilt of the accessory, and may have been procured by negro testimony, that presumption may be repelled by the same kind of evidence by which it was created, or strengthened by it when attacked. But the incitement, which constitutes the moral guilt of the accused, must be proved by testimony admissible against him.

I will not hazard an opinion what the common law upon the subject was before the statute of West. I, and what *apparent* effect, in the nature of accessorial crimes, the regulations of the statute might have produced.

HALL, J. By our laws slaves are considered to be human beings and capable of committing crimes, and upon the maxim *noscitur a sociis*, negro testimony is admissible evidence against them. Upon such evidence, in part, has the negro March been convicted, and that conviction was lawful.

An accessory cannot be tried before the principal is convicted, if amenable to justice; in this case, therefore, the prisoner could not be tried before March was convicted, because there can be no accessory without a principal, and proof that there is a principal can only be established by the record of his conviction.

The principal is guilty of one offense and the accessory of another. They are essentially different in their characters; of (57) course, the guilt of the one is not the guilt of the other. The record of March's conviction was no proof of the prisoner's guilt, and it was not read for that purpose. It was read for the purpose of establishing the fact that a murder was committed by March as a prerequisite to the trial of the prisoner. For if the murder was not committed the prisoner could not be tried as an accessory, although, in a moral point of view, he might be as guilty, if it was not committed owing to some accident not under his control, as if it had been. But if it is shown by

the record that a murder has been committed, then an investigation of the charge against the accessory takes place, on which evidence of his guilt must be adduced. But of what kind? Not the record of the conviction of the principal, that only proves the conviction of March; it neither adds to nor takes from the guilt or innocence of the prisoner. Competent evidence must be adduced; not the testimony of slaves, but such as in law is admissible against white citizens.

But the prisoner, on his trial, not only had the right of contesting the question of his own guilt, but also of proving, if he could, the innocence of March, because if he could establish *that,* the law would shield him from further risk, however guilty he may have been, in endeavoring to procure the murder. And as he might disprove March's guilt (a question in point of fact quite different from that of his own), so he might do it by the same kind of testimony—that of negroes—by which, in part, it was established. If such evidence was used against March it might be resisted by evidence of the same kind, either by him or by any other person authorized by law to controvert the question of his guilt. I therefore think that the record of the conviction of March, although in part procured upon negro testimony, was properly received to prove the fact of his conviction, so as to make it lawful to go
(58) into the trial of the prisoner as accessory, and, as far as depended upon that record, to decide upon his case.

PER CURIAM. No Error.

Cited: *S. v. Duncan,* 28 N. C., 102.

STATE v. JOHN H. ROANE.

FROM BURKE.

1. A homicide may be justified when it takes place to prevent a threatened felony, but not when inflicted as a punishment of one already committed.
2. To justify the homicide of a felon, for the purpose of arresting him, the slayer must show not only a felony actually committed, but also that he avowed his object, and that the felon refused to submit.

The defendant was indicted for the murder of Levin, the slave of one McIntire.

On the trial the evidence was that the deceased, a waiter in the tavern of his master, at twelve o'clock of the night of his death, went to the lot of the defendant about one-fourth of a mile from McIntire's house. The defendant and his family were in bed, the house was locked, and

the gate of the yard shut; that the defendant was awakened by the sharp barking of his dog—got up, seized a gun, opened the door, and saw the deceased going from the kitchen towards the gate, which opened into the public road; that the defendant called and asked who was there, and no answer being returned, he fired and killed the deceased as he was opening the gate. All these facts were voluntarily disclosed by the defendant upon his examination. He further stated that after the deceased fell, he procured a light and went to the body, when he first ascertained it was Levin; that he did not intend to strike the negro, but to fire above him and frighten him. After ascertaining who the deceased was the prisoner immediately went to the house of McIntire, the master, and informed him of the above circumstances. No animosity or ill will was proved to exist between the (59) defendant and the deceased, who was not in the habit of visiting the defendant's kitchen, and had no business there.

It was in proof that several out-buildings in the neighborhood had been broken open and robbed about the time that the deceased was killed, and that a good deal of alarm existed in the neighborhood, caused by depredations committed by runaway slaves.

The counsel for the defendant moved the Court to instruct the jury:

1. That if the defendant had reason to believe that a felony had been committed on his property they ought to find him excused, and not guilty of any crime, if the killing took place in endeavoring to arrest the deceased for the supposed felony.

2. That if the defendant had reason to believe that the deceased was one of the felons who had committed depredations in the neighborhood, or had committed any other felony, and refused to answer when hailed, the killing was excusable, if it became necessary to an arrest of the deceased.

3. That if the defendant found the deceased in his lot at the late hour of twelve o'clock at night, after the defendant and his family were in bed and after he had heard of the felonies committed in the neighborhood —if these circumstances, added to the fact that the person of the deceased was then unknown to the defendant—formed a reasonable ground for the defendant to believe that a felony was about to be perpetrated, the killing was excusable, notwithstanding the mistake under which the defendant labored.

4. That if the defendant did not intend to kill, but only to frighten the deceased, they should find him not guilty of offense.

His Honor, Judge DANIEL, refused to give the instructions prayed for, but charged the jury that if the defendant discharged (60) his gun in a careless, negligent and heedless manner, and thereby

caused the death of the deceased, he was guilty of manslaughter, although he did not intend to kill.

The jury found the defendant guilty of manslaughter, and, sentence being pronounced, he appealed to this Court.

Badger, for the appellant.
R. H. Jones, Attorney-General, *contra.*

(62) HENDERSON, J. If the facts stated are true, the defendant has no cause to complain of the verdict; for although the state of alarm in which the neighborhood was thrown by the frequent breaking open of out-houses might have palliated the homicide, if the negro had been coming into the yard, it cannot have that effect in this case, when it appears he was going out of it. For the law authorizes the killing of one who is in the act of committing a forcible felony, and even one who *appears* to be in the act of doing so, for the purpose of *prevention,* not by way of punishment. As little grounds has the defendant to contend that his object was to arrest the person. In the first place, when an individual commits a homicide upon the ground of making an arrest, he must show a felony committed, if not by the person killed, at least by some one; and secondly, that he made known his object, to wit: *that it was only to arrest*—that the criminal, or supposed criminal, refused to submit, and that the killing was necessary to make the arrest. Neither can the defendant object to the charge of the Judge in regard to using dangerous weapons without due care, such as firing the gun in the present case, and causing death, although perhaps not actually intended.

But upon the whole, I am disposed to think this rather an unfortunate than a wicked case; for it appears that the whole of it is taken from the defendant's free and voluntary statement, and without which there would have been no evidence against him. I am therefore disposed to think, from what the defendant said, that there was no actual intend to kill, but only to frighten; but he certainly executed the intent in a
(63) careless manner. It is, therefore, manslaughter.

PER CURIAM. No Error.

Cited: S. v. Dixon, 75 N. C., 281; *S. v. Vines,* 93 N. C., 495; *S. v. Campbell,* 107 N. C., 953; *S. v. Stancill,* 128 N. C., 610.

STATE v. SIMEON COCHRAN.

FROM WARREN.

1. Belief is yielded more readily to a probable than to an improbable proposition.
2. Upon this principle less strong and irrefragable proof will justify a jury in convicting of a misdemeanor than of a capital felony. But in both cases there should be a rational doubt of the guilt.
3. Common reputation is the best evidence of the state of a man's property where it is collaterally questioned.

The prisoner was indicted for passing counterfeit bills purporting to be issued by the Bank of Augusta, in Georgia. On the trial the only question was the *scienter* of the prisoner. On this point he proved that had formerly been a resident of Person County, in this State, and had but recently removed to Georgia. The sheriff of Person was then asked by the counsel for the prisoner whether it was not generally understood and believed by the neighbors and acquaintances of the prisoner that he was a moneyed man, and that he carried considerable money with him on his removal to Georgia. This question was objected to by counsel for the State, and the objection was sustained by the Couert.

His Honor, Judge NORWOOD, was requested by the counsel for the prisoner to instruct the jury that the law required, to justify a conviction, such proof as would leave no rational doubt upon their minds of the guilt of the defendant, and did not permit them to weigh the evidence as in other cases, but when such doubt existed, required an acquittal. But his Honor charged the jury that there was a difference between civil cases and those ordinary misdemeanors, on the one hand, and cases affecting life on the other. In the former, the jury were (64) at liberty to weigh the testimony and decide according to the preponderating probabilities; but in the latter they were not allowed to do so—the law requiring the highest evidence—such as excluded every fair doubt and left the mind clearly and satisfactorily convinced of the prisoner's guilt.

But in a case like the one before them, not involving the life, but very seriously affecting the prisoner, neither of these rules applied—that a *medium* degree of proof was sufficient; but that they ought to be well satisfied of his guilt before they convicted him.

A verdict being returned for the State, and a rule for a new trial discharged and judgment pronounced, the prisoner appealed.

Seawell & Badger, for the appellant.
Devereux, for the State.

HENDERSON, J. It is difficult to prescribe a rule which shall regulate the judgment in forming a conclusion in matter of faith; the same evidence does not always produce the same effects upon the understanding of the same person. It varies according to the state of the mind. As we cannot prescribe a rule for ourselves, much less can we do it for others. But in this I believe all agree, both in and out of Court, that the strength of evidence required to produce belief is in the ratio of the improbability of the fact to be believed. And this is all I understand the Judge to mean; when he uses the expression *medium proof,* he is speaking of the nature and quantum of evidence. But when he speaks of its effects upon the mind, he says that the jury should be well satisfied of the prisoner's guilt; by which I understand that although less
(65) strong and less irrefragable proof would produce that belief which would justify a conviction in a misdemeanor, such as they were then trying, than in a capital case, yet in either case the mind arrived at the same point, *not having a rational doubt.* The evidence must, therefore, be such as to exclude a rational doubt, for he tells the jury that they must be *well satisfied* of the prisoner's guilt.

I think, however, that the evidence offered by the prisoner of the common reputation and understanding in the neighborhood that he was a moneyed man, and carried considerable money to Georgia with him, was improperly rejected by the Court. For such facts, if true, tended to throw light upon the subject the jury were then trying, viz., the defendant's knowledge that the notes were bad. And this seems to be admitted from the manner in which the case is stated. The objection seemed to be to the mode of proof, to wit., common reputation. I think it the best and almost the only proof by which such facts can be established. They exist in reputation, for although proof may be had that a person had much property in his possession, yet when the question arises collaterally, recourse must be had to common reputation as to his being the owner, and not to the title deeds, and especially whether he is a moneyed man. Such a character consists of so many distinct facts—as how much had he, was it his; would not his necessities compel him to use it and not keep it; could he soon replace it; what were his habits, that of keeping and dealing in money or realizing it—that I think it almost impossible otherwise to prove it. Besides it is of such a character that it is almost impossible for it to become reputation unless the fact be so. There is, therefore, very little danger of imposition in receiving it. and the prisoner certainly had a right to the benefit of it before the jurv. For upon a question of *scienter* there is more probability that a vaga-
bond, found in possession of one thousand dollars in bad money,
(66) knew it to be bad, than if such a sum is found in the possession of a moneyed man. In the first case we cannot well account

for the vagabond's having so large a sum, otherwise than by its being bad, or of his knowledge of it, unless he shows how he got it; whereas, in the other case, the reverse may happen. And if it weighed ever so little, the prisoner was entitled to its weight before the jury.

PER CURIAM. New Trial.

Cited: *Smith v. R. R.*, 68 N. C., 116; *Leak v. Covington*, 99 N. C., 565.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1829

(67)

JOSEPH F. FARIBAULT v. HORACE ELY et al.

FROM WASHINGTON.

The contents of a letter directed to an endorser of a bill of exchange at his residence, giving him notice of its dishonor, may be proved by parol, without notice to produce the original.

Per TOOMER, Judge.—Notice to produce papers in the possession of the opposite party is unnecessary in three cases:

1. Where a duplicate original is offered.
2. Where the instrument to be proved is a notice.
3. Where the action is of a kind to give the opposite party notice that he is charged with the custody of the paper, as in trover for a note.

ASSUMPSIT against the defendants, as the drawer and endorsers of a bill of exchange drawn by the defendant Ely upon his correspondent in New York, which was regularly protested for non-acceptance and non-payment. To prove notice to the defendants the plaintiff introduced the deposition of a notary, who swore that he addressed to each of the defendants, at the proper postoffice, a letter giving them notice of the dishonor of the bill. The defendants objected to this evidence, and contended that notice should have been given them to produce those letters upon the trial, before the plaintiff could give secondary
(68) evidence of their contents. The objection was overruled by his Honor, Judge DONNELL, and a verdict returned against the defendants, who appealed to this Court.

The case was submitted, without argument, by *Hogg,* for appellants, and by *Iredell,* for plaintiff.

TOOMER, J. It is a general rule that secondary evidence shall not be admitted to prove the contents of any written document in the posses-

sion of the adverse party, unless notice has been given to produce it on the trial. From the operation of this rule are excepted notices which have been served during the pendency of the suit—for the obvious reason that if they were not excepted the rule would extend to every successive notice *ad infinitum*. In principle it would seem that the exception was limited to notices given, pending the suit, to produce some document for the purpose of evidence on the trial of the cause, and that the general rule would embrace other notices (2 Starkie Ev., 974.). But modern decisions have extended the exception, and it now appears to embrace three descriptions of cases.

A notice given during the progress of the cause to produce a paper for the purpose of evidence is *formal* in its *character,* and comes within the reason of the exception. But a notice which has been given before the commencement of the suit, which makes an essential part of the cause of action, which is a link in the chain of plaintiff's right to recover, is of a *different character,* and would seem to require the best evidence the nature of the case would admit and all the cautions which the rules of evidence prescribe.

The application of this principle to a notice given by letter to the endorser of a promissory note, informing him of its dishonor by the maker, was sanctioned by Lord Kenyon, at *Nisi Prius,* in (69) *Shaw v. Markham,* Peake, 165, where he said: "No evidence of the contents of the letter can be received without a notice to produce it." The same rule was also applied by Lord Ellenborough, in *Langdon v. Hulls,* 5 Esp., 156, to the drawer of a bill of exchange, who had been notified by letter of the dishonor of the bill. But latter decisions have included within the *exception* to the *general rule* notices given by letter to drawers and endorsers, of the dishonor of bills and notes. These recent adjudications are referred to in 2 Starkie Ev., 260, and in Chitty on Bills, 406; in each of which the subject is spoken of as doubtful, and the practitioner is advised, from abundant caution, to give notice to produce the letter. In *Ackland v. Pearce,* 2 Camp., 601, LEBLANC, J., admitted secondary evidence against the drawer of a bill; and in *Roberts v. Bradshaw,* 1 Stark., 28, Lord Ellenborough was of opinion that a letter acquainting a party with the dishonor of a bill was in the nature of a notice, and that it was unnecessary to prove a notice to produce such a letter; thereby overruling his decision in *Langdon v. Hulls, supra;* but the case was decided upon another ground. And in *Lindenberger v. Beall,* 6 Wheat., 104, the judges of the Supreme Court of the United States unanimously decided that against the endorser of a promissory note "it was unnecessary to give notice to the defendant to produce the letter" notifying him of the dishonor of the note, and

sanctioned the admission of secondary evidence to prove the contents thereof, without giving notice to produce the letter on the trial. These adjudications expressly bring within the *exception* to the general rule, notices to drawers and endorsers of bills and notes, they directly decide the point now before this Court. They emanate from too much wisdom and judicial experience, to be rashly disregarded. They are entitled to high respect, and I must allow them the weight of authority.

In *Colling v. Treweck,* 6 Barn. & Cress., 394—18 Eng. C. L.,
(70) 208, it was decided by the Court of King's Bench, in 1827, that the copy of an attorney's bill, not signed by the attorney, the original of which, duly signed, had been delivered to the defendant, may be given in evidence, without notice to produce the original. BAYLEY, J., in delivering the opinion of the Court, distinctly points out those cases in which it is unnecessary to give notice to produce a document in the possession of the adverse party to justify the admission of secondary evidence. He says there are three descriptions of cases, where notice to produce an instrument is unnecessary. First, where the instrument poduced and that to be proved are duplicate originals; secondly, where the instrument to be proved is a notice, as a notice to quit, or a *notice of the dishonor of a bill of exchange;* thirdly, where, from the nature of the suit the adversary must know that he is charged with the possession of the instrument, as in an action of trover for a bond or note. In *Kine v. Beaumont,* 3 Brod. & Bing., 228, the Court of Common Pleas, after consulting the judges of the other Courts, held that the copy of an original letter, giving notice of the dishonor of a bill, was admissible, without notice to produce the original; and DALLAS, C. J., said he could not perceive the difference between a duplicate original and a copy made at the time.

The holder must show that he has used due diligence to give notice of the default. If the party to be served with notice reside in a different place or city, notice may be sent by letter through the postoffice. Putting the letter in the office in due season, properly directed and containing legal notice, is sufficient. The holder is not responsible for the safe carriage of the letter; he is not bound to prove that it came to the hands of the defendant. If the defendant received the letter, and it did not contain proper notice, or was not put in the office in due time, as may
be ordinarily ascertained by reference to the postmarks, or there
(71) was any circumstance appearing upon the face of the letter, or connected with it, to discharge him, he would certainly have it at the trial to shield himself from the claim. If it never reached the defendant, notice to produce it could not avail him, for then the secondary evidence would be admitted, of the introduction of which he now

complains. In neither event could the defendant be injured without gross negligence on his part. The bringing of the action is also of itself a species of notice to the defendant to produce the letter, or to be bound by secondary evidence. The notice to produce the letter may then be considered more as a matter of form than of substance. These are the reasons which occur to me for excluding from the operations of the *general rule* notices to drawers and endorsers of the dishonor of bills and notes, and for bringing them within the sphere of the *exception* to that general rule.

This country is daily becoming more commercial; every impulse to agriculture gives new impetus to commerce. As you promote the interest of one you augment the prosperity of the other. This practice may tend to facilitate the legal investigation of mercantile controversies, where the drawers or endorsers of bills or notes are to be charged, and may thereby give increased facility to the negotiation of this kind of commercial paper, and it is done without any possible prejudice to the interest of the drawers or endorsers.

HALL, J. The deposition of the notary states that letters addressed to the defendants, giving them notice of the dishonor of the bill, were by him put into the postoffice in due time. I can not see the necessity of requiring the plaintiff, as a prerequisite to reading that deposition, to prove notice to the defendants to produce those letters. It was unanimously held by the Supreme Court of the United States, in *Lindenberger v. Beall,* 6 Wheat., 104, the evidence of the letter con- (72) taining notice, put into the postoffice, directed to the defendant at his place of residence, was sufficient proof of the notice to be left to the jury, and that it was unnecessary to give notice to the defendant to produce the letter before parol evidence could be admitted. Such evidence is only indispensable when the plaintiff would be bound to produce a copy of the letter which he had not in his possession; it would then be, of course, to give notice to produce the letter before parol evidence of its contents could be received, as seems to have been held in *Kine v. Beaumont,* 3 Br. & Bing., 288; 7 Serg. & Low, 440. So it is necessary to give notice to produce any instrument in the possession of the opposite party before *parol evidence* of its contents can be admitted. But if it is of course to give such evidence, why give notice? If in this case the defendant received the letter it informed him if the money was not paid of an approaching suit; and he had it in his power to produce it without notice, if it would serve his purpose to show a defect in the notice to him of the dishonor of the bill. If he had not received it the plaintiff is not placed in a worse situation on that account. He may

still prove that it was put into the postoffice, and go on trial upon that proof.

The question in this case really is, ought the plaintiff to be permitted to give parol evidence of the contents of the letter? If he has the right, notice to produce it is unneccessary. If he has not, but ought either to produce a copy or give notice to produce the original, notice is indispensable. The affirmative of the proposition has been held by the Supreme Court of the United States, as before observed. Of course in this case the judgment of the Superior Court must be affirmed.

PER CURIAM. No Error.

FRANCIS T. LEAKE v. ANGUS GILCHRIST.

(73)

FROM RICHMOND.

1. Debts due by specialty follow the person of the obligee, and are assets where he has a domicile.
2. Where a decedent has no fixed residence, administration on his estate is properly granted by the courts of the State where he died.
3. An administrator appointed in another State has no right to sue in the courts of this, but where he has the possession of a bond due his intestate, and assigns it, his assignee can maintain an action in his own name.
4. Principles of the *lex fori* and *lex domicilii* discussed by TOOMER, J.

DEBT upon a single bond, made by the defendant, payable to one Daniel McKennon, and assigned to the plaintiff by one John McLeod, the administrator of the obligee.

The defendant, besides the pleas of payment and a set-off, pleaded "that the writing obligatory declared on is of right the property of Archibald Gilchrist and Polly McKennon, to whom letters of administration on the estate of Daniel McKennon, the obligee, issued from the Court of Common Pleas, etc., of Richmond County."

On the trial it appeared that McKennon, the obligee, died in Marion District, South Carolina, in February, 1825; that in March following letters of administration on his estate were issued by the ordinary of that district to John McLeod, who, in September, 1825, assigned the bond in suit to the plaintiff; that in April, 1825, letters of administration upon the estate of McKennon, the obligee, issued to Archibald Gilchrist and Polly McKennon, from the county court of Richmond; that the defendant at the date of the bond, and ever since, had resided in Richmond county, where it was executed, and that Daniel McKennon had at that time, up to the period of his dath, no fixed habitation, but

that he resided some times in this State and some times in South Carolina.

His Honor, Judge DANIEL, instructed the jury that the plea must be taken to be a denial of the validity of the assignment, (74) and that the administrator appointed by the ordinary in South Carolina could not make a legal assignment of the bond, so as to enable the assignee to maintain a suit in the courts of this State.

In submission to this opinion of his Honor the plaintiff suffered a non-suit, and appealed to this Court.

Ruffin, for the appellant.

No counsel appeared for the defendant.

(77)

TOOMER, J. Real property is governed by the law of the country where the land lies, personal estate by the law of the country where the owner has his domicil (2 Ves. & Bea., 131). The succession to the personal property of an intestate is regulated by the law of that place which was his domicil at the time of his death. For that purpose there can be but one domicil (*Somerville v. Somerville,* 5 Ves., 750). These are settled principles of international jurisprudence. They are founded on public policy, and are conducive to public convenience (2 Kent Com., 344). To ascertain, then, the right of succession to the personal estate of an intestate it is necessary to inquire where was his domicil at the period of his decease. If it were in South Carolina the laws of that State must furnish rules for the succession to and the distribution of his personal estate. For these purposes there can be but one domicil; although there is some times difficulty in ascertaining that domicil, when the deceased has had more than one place of residence, at each of which he continued occasionally to reside to the period of his death. (78)

The statement made by the presiding Judge shows that the intestate had no *fixed residence,* but resided occasionally in South Carolina and occasionally in this State, and that he died in Marion District, in South Carolina, where McLeod, the assignor, was duly constituted administrator of his estate. If the intestate had a fixed domicil the laws of that country must control the right of succession to his personal estate, without regard to the laws of the place where he may have casually been at the moment of his decease. The intestate being at a place, and dying there, is *prima facie* evidence that he was domiciled *there;* and the presumption is much strengthened when it appears that he had no domicil of a more permanent or fixed character than that at which he died. The circumstance of the intestate's death occurring in South

Carolina, if it were not his home, might be explained and the presumption rebutted. But unexplained, and in the absence of other testimony, we must take that place to have been his domicil, at the time of his death; and the laws of that State will furnish rules for the succession to and the distribution of his personal estate. The administrator appointed in South Carolina would be entitled to all the effects of the deceased in that State, including the bond, to be distributed according to the laws of the intestate's domicil. The deceased dying in South
(79) Carolina, and having the specialty *there,* he who obtained possession of it would disregard the claims of an administrator appointed in this State, and would only notice the title of an administrator appointed there.

By the laws of England debts due by specialty are deemed the goods of the intestate in that diocese where the securities happen to be at the time of his death. Debts due by simple contract follow the person of the debtor, and are esteemed goods in that diocese where the debtor resides at the time of the creditor's death. Bac. Abr., Title Executors, E. 2; Com. Dig., B. 4; 3 Salk., 70, 164; Cro. Eliz., 472. "An administrator appointed in Ireland released a bond debt due to the intestate from a person in Ireland; but the bond being in England at the death of the intestate, an administrator appointed in England maintained an action there on the same bond against the obligor, because the administrator appointed in Ireland had no control of the debt, and no authority to release it." Dyer 305; 11 Mass., 268. Why is this principle not applicable in our country? Why should not a specialty belonging to the intestate be assets in that State where it was at the time of the intestate's death? And why should it not become the property of the administrator duly appointed in that State? It is to be inferred from the statement of this case that the bond which is the subject-matter of this controversy was in South Carolina, in the possession of the intestate, at the time of his decease.

If South Carolina were the place of the intestate's domicil at the period of his death, and the specialty was also there at that time, administration duly granted by competent authority in that State would give the administrator right to take possession of the specialty, and he would acquire good title thereto. Having acquired possession of the bond he could receive payment and give an acquittance, or he could release the debt and discharge the obligor. *Doolittle v. Lewis,* 7
(80) Johns. Ch., 49. Authority to collect the debt and discharge the obligor certainly implies power to assign the obligation, if it be negotiable. By the principles of universal law he who has the title to

property may sell and dispose of it; and he who obtains it from the owner may assert and exercise the rights of ownership.

As the plaintiff claims under the assignment of McLeod, the administrator of the obligee, it is necessary for the plaintiff to show the title of the assignor. To establish this fact the domicil of the obligee and the place where the bond was at the time of his death were subjects of inquiry. The testimony was not full on these points; but the plaintiff may have omitted to introduce more evidence to prove these facts, by discovering that the presiding judge thought the plaintiff's case defective on another and distinct ground.

It was admitted on the trial that McLeod, the assignor, was duly constituted administrator of the deceased obligee, in March, 1825, in Marion District in South Carolina, *where* the intestate had died in the preceding month of February; and that the bond had been executed in this State in October, 1824, and the assignment was made in September, 1825, but it does not appear at that place. Nor do I think the place where the assignment was made material; if the specialty were negotiable, and the administrator had title thereto, it was assignable by him in either State.

The law of the place where the contract was made is the law of the contract; by which it is to be expounded, and by which its incidents and properties are to be ascertained. *Harrison v. Sterry,* 5 Cranch, 289, 298, 302. This specialty was executed in our State. By our laws it is negotiable, and all the rights and interests of the obligee can be transferred by endorsement. If, then, the specialty were in South Carolina at the time of the intestate's death, and that was the place of his domicil, and it thus became the property of McLeod, the administrator, and being negotiable by the laws of the place (81) where it was made, like promissory notes, and having been regularly transferred by endorsement to the plaintiff, the property is vested in him.

But it is correctly said that the administrator appointed in South Carolina can not bring an action in his representative character in our Courts. Administration granted in another State gives no authority to sue here. *Morrell v. Dickey,* 1 Johns. Ch., 156; Anon. 2 N. C., 355; *Butts v. Price,* 1 N. C., 289; 1 Cranch, 259; 3 P. Wms., 369. Hence it is contended, that although the specialty rightfully came to the hands of the assignor, was his property, was negotiable, and was duly transferred to the plaintiff, yet the assignee claiming under the assignment could claim no other right or interest than that enjoyed by the assignor; that the assignee sits in the seat of the assignor. From which it is insisted, as the assignor could not sue in this State in his representative

capacity on a grant of administration made in South Carolina that the plaintiff, his assignee, can not sue here. But questions of property, rules of distributions and rights of succession are the points involved in this case, and not the ability of a foreign administrator to maintain actions in our courts.

The plaintiff labors under no disability to sue in our courts; they are open to him. If, then, he acquire title to the specialty, he has both a right of property and a right of action. A union of these rights will certainly enable him to stand erect in our courts. Why should he be deprived of a remedy to enforce the payment of the money secured by the specialty? It is not pretended that he is subjected to any personal disability which closes our courts of law against him; nor is there anything in the subject-matter of the controversy of which our courts have not jurisdiction; neither can it be transferred by the administrator. Although it be admitted that the plaintiff might acquire the right of
(82) property from the administrator, yet it is averred that the plaintiff could not acquire from the administrator a right of action. But it is replied, if the plaintiff acquire the right of property by the act of parties, the right of action attaches by operation of law.

Let it be conceded that the right of property was transferred to the assignee, still it is contended that the assignor having no right to sue here on the specialty, his assignee can not have any remedy. It is asked if an assignee can do that which his assignor can not. The act of Congress, ratified 24 September, 1789, prescribing the jurisdiction of the Circuit Courts of the United States, gives them cognizance of all suits of a civil nature when the matter in dispute exceeds the sum of $500, and the suit is between a citizen of the State, where the action is brought, and a citizen of another State. Under this act of legislation, *unrestricted,* it was supposed if two citizens of the same State should enter into a contract, and one should give the other a negotiable promissory note for a sum exceeding $500, that the payer could assign that note to a citizen of another State, and thereby give to the Courts of the United States cognizance of the matter, and thus deprive the maker of the note of the privilege of having any dispute growing out of the transaction adjudicated by the tribunals of his own State. This exposition was given to the statute by a Congress composed of enlightened statesmen and able lawyers; and to prevent the apprehended evil they exprssly limited the jurisdiction of the Circuit Courts, in cases of suits on promissory notes in favor of an assignee, to those notes only on which actions could have been sustained in such courts by the assignor before the assignment was made. Had it not been for this *restrictive provision* which is added to the statute the

assignee, after the endorsement of the note, could have maintained an action on the note in a court in which the assignor could have sued. But the evil was guarded against by sagacious legislators. (83) The payee transferred by endorsement the right of property to the endorsee; and had it not been for this restrictive provision in the statute the endorsee would have had by law a right of action which was not possessed by the endorser. This appears to be a parallel case; the same principle applies in each case, and must lead to a like conclusion.

The defendant pleaded "payment, set-off," and a special plea, which the presiding judge considered in substance "as denying the validity of the assignment." There was a general replication to each plea, on each of which issue was joined. The judge instructed the jury that "the administrator appointed in South Carolina Could not make a legal assignment of the bond, so as to enable the assignee to bring suit and recover the money in North Carolina." The plaintiff then submitted to a nonsuit. In *Doolittle v. Lewis,* 7 Johns. Ch. 49, the cancellor held that a bond being in the State of Vermont at the time of the death of the intestate, and where he resided, and he being the obligee, an administrator, being duly appointed in that State, became in law the owner of the bond, although the obligor resided in New York, and that the administrator so appointed could receive payment in New York of the bond from the obligor, where the administrator could not sue in his representative capacity, and such payment would be valid, and would discharge the obligation; and that such administrator could sell the land in New York which had been mortgaged to secure the payment of the debt, and that such sale could be made under the power given in the mortgage to the *mortgagee* and his *executor* or *administrator.* That the administrator could receive payment and give an acquittance, or release the obligor and discharge the debt, and that such acts might be done in a State where the administrator could not sue in his representative capacity. This specialty having been executed in North Carolina, and being negotiable by our law, if it were in South (84) Carolina at the time of the intestate's decease, and he had his domicil *there,* it became the property of the administrator appointed *there;* and it is believed he could legally assign it.

When a suit is brought by an administrator in his representative character on a contract made by his intestate he makes a *profert* of his letters of administration. If the defendant intend to contest the plaintiff's right to sue in his representative capacity, it must be done by plea in abatement, and can not be done by evidence under the general issue, or any other plea in bar; for such a plea puts in issue the cause

of action, and not the character in which the plaintiff sues. *Moore v. Suttrill,* 2 N. C., 16; *Ex'rs. v. Oldham,* 166; *Butts v. Price,* 1 N. C., 69; 1 Saund., 273, n. 3; 1 Salk. 285; 7 Mod. 141; 2 Ld. Raym. 824.

If the administrator appointed in South Carolina had brought suit on the bond in his representative capacity in our courts he would have made *profert* of his letters of administration; and if defendant had pleaded in bar, he could not have objected to the character in which the plaintiff sued. The defendant in this action has pleaded in bar. If, then, he contends so zealously that the assignment casts all the disabilities of the assignor upon the assignee, it is but fair to concede that it transfers all the rights and privileges of the assignor. Can the right of the assignor to sue in our courts be inquired into in the present state of the pleadings? The cause of action is put in issue, and not the character in which the plaintiff sues, or his assignor might sue. The true inquiry is, has the specialty been assigned by a person having authority to make the assignment? We have nothing to do with the ability of the assignor to sue in his representative capacity in our Courts. If the administrator of a payee of a negotiable promissory note endorse it the endorsee, in an action on the note against the maker thereof, never makes *profert* of the letters of administration; nor
(85) is he required to do so, because he has not the same in his power or custody. *Stone v. Rawlinson, Willes,* 559; 3 Wils., 1.

If the proof satisfy the jury that the specialty was in law, the property of the administrator appointed in South Carolina, that it was negotiable, and was so assigned as to pass the title to the plaintiff, then the issue should be found for him. And it did not involve the inquiry as to the disability of the administrator to sue in his representative character in our courts, but only his ability to transfer the title by assignment. The judge considered the special plea of the defendant as denying in substance the validity of the assignment; and so I have viewed it, for the purpose of meeting the merits of the case, however defective and insufficient that plea may be found, on further examination.

The rule of law which prevents an administrator appointed in another state from maintaining actions in his representative capacity in our courts is founded in reason, justice and good policy. It is also founded on reasons of a technical character; but the great object of the rule is to prevent the assets being drawn out of our State, to the injury and inconvenience of domestic creditors, our own citizens, who may have contracted with the intestate on the faith of those assets. It is said that if the expedient of assigning the specialty will answer the purpose, and will enable the assignee to sue, when the assignor could

not, that much inconvenience will arise; and *that* which could not be done directly will be done indirectly. This mischief it is in the power of the Legislature to prevent. They can adopt the provision which has been inserted in the act of Congress of 1789, or they may obviate the inconvenience in some other way. This court is to expound, not to make laws. But the evil can not be alarming; it can arise only in this class of debts, and, generally speaking, they form a small portion of the assets of an intestate's estate. And it is believed that a creditor—one of our own citizens, using due diligence, and applying (86) in due season to a Court of Equity—may prevent the removal of assets of this kind to his injury. He may at least prevent any combination of the administrator with another person to withdraw the assets. Confederating for this purpose, or any other like contrivance, to defeat the operation of the law, and to injure creditors, would be fraudulent.

The bond was the evidence of the debt; it was in the hands of the administrator appointed in South Carolina. No administrator here could, under such circumstances, enforce payment of the debt.

I think the nonsuit should be set aside, and a new trial granted.

HALL, J. I think the plaintiff is entitled to recover on the bond on which this suit was brought.

It does not appear that the intestate was a citizen of any one State or country; but that previous to his death he sometimes lived in North Carolina and sometimes in South Carolina, and that he died in the latter State. That circumstance must be considered as a substitute for a prior domicil or citizenship. The letters of administration on his estate were therefore properly issued in South Carolina, and the administrator had a right to assign over the bond on which this suit was brought.

It is necessary to take out letters of administration in this State to enable him to sue, but not to enable his assignee to do so.

PER CURIAM. Reversed.

Cited: Lee v. Gause, 24 N. C., 447; *Grace v. Hannah,* 51 N. C., 95; *Moorefield v. Harris,* 126 N. C., 627; *Hartness v. Pharr,* 133 N. C., 573; *Holshouser v. Copper Co.,* 138 N. C., 258; *Hall v. Railroad,* 146 N. C., 346, 349.

(87)

CATHERINE WATTS v. JOHN M. GREENLEE.

FROM BURKE.

1. The jury should by their verdict respond to the issues joined between the parties, and they can not negative a fact admitted by the pleadings.
2. Where the defendant, in an action for words, pleaded that they were spoken more than six months before the commencement of the suit, and the plaintiff replied "infancy at the time of speaking the words and bringing the suit," a verdict that the words were spoken within six months before the writ sued out was held to be ill, and a *venire de novo* awarded.
3. A plaintiff is not permitted to reply several matters to any plea, except that of a set-off.
4. Several replications to a plea of set-off are allowed.

CASE for slanderous words spoken by the defendant of the plaintiff.

The writ was returnable to the fall term of 1822, when a memorandum of the following pleas was entered by the defendant: "Not guilty," and "the action was not brought within six months after the words were spoken." At March Term, 1827, the plaintiff replied specially to the statute of limitations that "she was, at the time of speaking the words mentioned in the declaration, an infant, and continued so to the bringing of this suit."

On the last circuit, before his Honor Judge MANGUM, a general verdict was returned for the plaintiff upon the plea of "not guilty"; and upon that of the statute of limitations, the jury returned that "the words were spoken before the issuing of the plaintiff's writ, and within six months thereof." Upon this verdict judgment being rendered for the plaintiff the defendant appealed.

Gaston and *Badger* for the appellant.

(88) *Devereux, contra.*

TOOMER, J. This is an action on the case for slanderous words. The defendant pleaded "not guilty," and "statute of limitations." To the first plea no replication was entered; but according to our practice a general replication is always understood when there is no special replication; and it is considered that issue was joined thereon.

The second plea, of which the foregoing memorandum was made on the docket, is "that the action was not brought within six months after the words were spoken." To this latter plea there was a special replication "that the plaintiff was, at the time the words were spoken, an infant under the age of twenty-one yeears, and so continued until the bringing of the suit," and issue was taken thereon. By this replication

the fact set forth in defendant's plea is not denied; it is thereby virtually admitted that the cause of action did not accrue within six months before the bringing of the suit; but the plaintiff confesses, and avoids it by replying infancy.

To try these issues a jury was empaneled who found "the defendant guilty of speaking the words charged in the plaintiff's declaration, and that they were spoken before the issuing of the plaintiff's writ, and within six months." To the second issue the jury did not respond, but contradicted by their verdict a fact which was confessed by the pleadings. That the words had not been spoken within six months before the bringing of the action was not denied by the pleadings. The jury was empaneled to try the issue of infancy—to inquire whether the plaintiff was an infant under the age of twenty-one years when the words were spoken, and so continued until the bringing of the suit. To this issue there was no response. The verdict should be set aside and a *venire facias de novo* awarded. (89)

The special replication to the plea of the statute of limitations was not entered until several terms had elapsed after the plea had been pleaded. A general replication was then understood to have been filed to this plea; and a special replication could not have been subsequently entered, unless with leave of the Court, by motion to amend the pleadings. The entering of the special replication was a waiver, or abandonment of the general replication; for the rules of pleadings forbid two replications to the same plea, *except* to the plea of *set-off*, which is in its nature a new action—a statutory substitute for a cross-action. And as the defendant may, by our court-law, "plead as many several matters as may be necessary to his defense," should he, instead of bringing a cross-action, avail himself of his statutory privilege, and plead a set-off, the plaintiff would be permitted to make the same defense to the plea, as he could have made to the action. And as he could plead several matters he must be permitted to reply several matters. *Worth v. Fentress,* 12 N. C., 419.

PER CURIAM. *Venire de novo*

Cited: S. v. Moody, 98 N. C., 672.

GEORGE DELIUS and G. W. GLOSTEIN v. GORDON CAWTHORN.

(90) FROM WARREN.

1. An agent acting under a parol power can not bind his principal by deed.
2. But a bond executed by an agent thus constituted is not the bond of the agent, and the fact that he exceeded his authority does not subject him to an action as the obligor. The only remedy against him is by a special action on the case.
3. A bond is the act of the person whose name and seal are affixed to it, and can not be rendered the deed of another by the averment of a collateral fact. Per HENDERSON, C. J. But he who makes a parol contract in the name of another, without sufficient authority, and receives the consideration, may be declared against as a contracting party, because the promise attaches to the consideration.

DEBT upon bond, and on the trial before STRANGE, J., on the last circuit, on the plea of *non est factum,* the case was that the defendant, being the clerk of one Robert R. Johnson, in the town of Warrenton, was sent by him to Petersburg, in Virginia, to purchase goods. The defendant, as agent of Johnson, purchased goods from the plaintiffs upon the credit of Johnson, and executed to them a bond, of which the following is a copy, and on which this action is brought:

"Six months after date I promise to pay G. D. and G. W. G., or order, $78.25 in North Carolina money, for value received, as witness my hand and seal, this 3 June, 1826. ROBERT R. JOHNSON,
By Gordon Cawthorn."

The bond was entirely in the handwriting of the defendant, who had no written authority, under seal or otherwise, from Johnson to execute it; neither did he at the time say or pretend he had such authority. The goods purchased by the defendant, and for which the above bond was given, came to the possession of Johnson.

The jury, under the directions of his Honor, returned a verdict for the plaintiff, and the defendant appealed.

Seawell, for the defendant.
(91) Badger, contra.
Hillman in reply.

TOOMER, J. This is an action of debt, and the plaintiffs declare upon the instrument, as the writing obligatory of the defendant, who pleads *non est factum,* and issue is thereon joined. The contract must be set forth in the declaration in the terms of it, or according to its legal effect.

1. Chitt. Pl., 299. It is usual to follow the words of written contracts. *Ib.*, 302.

Every contract should be so construed as to give effect to the intention of the contracting parties, if such intent can be ascertained from the face of the instrument and be not repugnant to any principle of law. Agreements should be enforced according to the sense in which they were mutually understood, when they were made. This rule for the exposition of contracts tends to advance the ends of justice, (97) and to subserve the purpose of the parties. The nature of the transaction, the language of the specialty, the mode of its signature and sealing, all conclusively show that it was clearly understood by the parties to this suit that the defendant was not to be personally bound by the deed. The defendant did not intend to bind himself, nor did the plaintiffs believe that he was bound. It is said the inquiry is not as to the intent with which the act was done; but what was the nature of that act, and what are its legal effect and consequences Let it be observed that the act frequently receives its impress and character from the intention of the parties at the time of its execution. It is true, if there be any stubborn principle of law which makes this instrument the deed of the defendant contrary to the intent of the parties, the hardship of the case cannot prevent its application.

This instrument is technically and formally drawn to bind Johnson, the principal, and on its face he appears to be bound. The specialty, on its face, gives no cause of action against the defendant. The intention to find the principal is obvious; and the manner of executing the instrument is in strict accordance with the technical form prescribed, both by law and usage, to give effect to such intent. *Wilks v. Back,* 2 East., 142. But Johnson, the principal, was not bound by the specialty, because the authority of the agent was not created by deed, and power to bind the principal by an instrument under deed can only be delegated by deed. Coke Lit., 52, a; *Shamburger v. Kennedy,* 12 N. C., 1; 7 Term, 209. "The attorney who executes a power by giving a deed must do it in the name of his principal; and the attorney is not bound, even though he had no authority to execute the deed, when it appears on the face of it to be the deed of the principal." 2 Kent Com., 498. Here the specialty was executed in the name of the principal, and (98) on the face of the instrument that principal was bound. These positions lead to the conclusion that the instrument having been executed in the name of Johnson, without proper authority, is void.

But the plaintiffs were not without remedy against that person with whom they intended to contract. The defendant had been constituted by Johnson, his agent, to purchase goods. In the execution of that agency he bought goods of the plaintiff in the name of Johnson and for

his benefit, and they subsequently came to his use. The plaintiffs could have recovered the value of the goods in an action of *assumpsit* against Johnson. The defendant had authority to make the purchase for his principal and to bind him by the contract; and the subsequent acts of Johnson would have confirmed and ratified that contract had the precedent authority been defective. There was nothing, I apprehend, either in the making of the instrument, or in the receiving of it by the plaintiffs, which could extinguish the contract or defeat their right of recovery in an action of *assumpsit.*

Had the defendant been guilty of any fraud in making the contract—had he, to obtain the goods, corruptly concealed the truth, or knowingly represented a falsehood, there is no doubt he would have been personally liable to the plaintiff in an action on the case. 2 Kent Com., 494; *Long v. Colburn,* 11 Mass., 97; 16 *Ib.,* 461. But the statement of the case imputes no moral guilt to the defendant. The execution of the instrument is ascribable to mistaken notions of his power. But it is to be inferred from some of the cases that the assuming to act without authority is a fraud in the eye of the law. If the mistake be mutual—if it be common to the parties to this suit, each possessing a full knowledge of all the facts and circumstances connected with the transaction—then the plaintiffs, consenting thereto, and being actors and participators therein, cannot complain, *volenti non fit injuria.* But if the act be exclusively the effect of
(99) defendant's mistake, and the plaintiffs, being ignorant of the circumstances, have sustained damage thereby, it is believed a special action on the case can be maintained against him for assuming to act without power. 2 Kent Com., 494; 11 Mass., 97; 16 *Ib.,* 461. But on this point it is not necessary to express a judicial opinion.

The specialty was signed, sealed and delivered in the name of Johnson, for his act and deed, by the defendant, as his agent. It was accepted by the plaintiffs, and on its face it appears to be the deed of Johnson. The present action can only be sustained by making the instrument the deed of the defendant. Is there any principle of law which can so entirely defeat the intentions of the parties and pervert the truth of the transaction as to change the nature and character of the instrument, and make it the deed of the defendant? The plaintiffs say the instrument is not a nullity; it is the deed of some person; and if not the principal's, it must be the agent's; that the defendant had no authority to execute a deed in the name of Johnson, and by exceeding his power, or by assuming to act when he had no power, he is not only personally liable to make compensation to the plaintiffs, but the instrument becomes his deed, or he is bound in the same way, and responsible in the same form of action, as the principal would have been, had the

deed been duly executed with full power, and was obligatory on him. It is admitted that the defendant had no authority to bind Johnson by deed; and that the defendant for thus assuming to act, had it been done without the full knowledge and consent of the plaintiffs, would be personally liable to compensate them for the loss sustained; but it is denied that the instrumnt becomes the deed of the defendant *because* it is not the deed of Johnson; and the action cannot be maintained on the pleadings, unless the instrument is the deed of the defendant.

It is believed the elementary writers, in speaking of the personal liability of the agent, because he has no responsible princi- (100) pal, do not mean to convey the idea that the instrument becomes the deed of the agent when it had been signed, sealed and delivered in the name of the principal, who was bound on its face, merely because the agent had exceeded his authority, or had acted without authority. But they intend simply to declare his personal responsibility, which may be enforced by bill in equity on the ground of fraud or by special action on the case. 2 Kent Com., 494. Formerly the remedy was by bill in equity; latterly by action on the case. This appears to be the ground of proceeding in *Horsley v. Bell,* Ambler, 769, 772; *Meriel v. Wymondsel,* Hard., 205; *Cullen v. Duke of Queensbury,* 1 Bro. Ch. 101; *Johnson v. Ogilby,* 3 P. Wms., 277; 1 Fonbl., 295.

There are many decisions, both English and American, in which the agent has been personally bound, on the ground that the language of the contract created a personal undertaking—imported a personal responsibility; where the agent bound himself personally, although in the contract he gave himself the description or character of an agent. *Appleton v. Binks,* 5 East., 148; *Tippetts v. Walker,* 4 Mass., 595; *White v. Skinner,* 13 Johns., 307. But it is not pretended that this principle applies to the case now before the Court.

The two cases of *Dusenberry v. Ellis* and *White v. Skinner,* which have been referred to by the plaintiff's counsel to support the position that the defendant, having acted without authority, is personally bound by the specialty in the same way as if he had executed it in his own name, without any allusion to his principal, are entitled to much respect; and I differ from them with much hesitation. *Dusenberry v. Ellis,* 3 Johns. Cases, 70, is a case of parol contract; but otherwise not to be distinguished from the case now under adjudication. It is there said that if the agent sign a note in the name of the principal, (101) but without authority, the agent shall be bound in the same manner as the principal would have been had it been duly made with full power; and the name of the principal shall be rejected as surplusage. Was there no circumstance to make me question the correctness of this decision I should refuse it my assent with great reluctance, and would

most unwillingly ascribe to it a departure from principle. But this case was decided in 1802; and in 1814 *Long v. Colburn,* 11 Mass., 97, was decided on a note signed in this manner: "Pro William Gill, J. S. Colburn"; and Judge PARKER, in giving the opinion of the Court, says: "The defendant is not the promisor"; "the plaintiff's remedy is against Gill, if Colburn had authority to make the promise for him; and if he had not, a special action on the case might make Colburn answerable;" and a nonsuit was entered. Judge PARKER did not think that Colburn could be made liable as a *promiser* on the *note,* had he acted without power in making it; but he must be made responsible in a *special action* on the case. This decision occurred twelve years after that of *Dusenberry v. Ellis,* and is, at least, of equal weight and authority. I can not suppose the New York adjudication was unknown to Judge PARKER. I must, therefore, look upon it as virtually overruled by him.

White v. Skinner, 13 Johns., 307, was an action of covenant, brought on a specialty, signed and sealed in this manner: "For the directors, Reuben Skinner, L. S." There was a private association or firm known by the style of "The Granville Cotton Manufacturing Company," of which Skinner was president and director. On the face of this instrument no person was bound but Skinner, the defendant. He did not sign the name of each director and annex the seal to each name. If he had full power to bind them the mode of executing the instrument (102) did not make it obligatory on them. The contract purported on its face to bind the defendant. No other person was bound by its terms. The defendant personally undertook that others should perform, and the judgment was correctly rendered against him. And if you view the defendant as a partner the result must be the same. The name of the firm was not signed; and if signed, copartners have no common seal; the name and seal of each should be affixed by some person specially authorized to do the acts. For being a partner gives no authority to execute a deed for the other members of the firm. The case is unlike the one now under the consideration of this Court. But Judge PLATT, in delivering the opinion of the Court, extra judicially observes: "If a person execute a bond as attorney for another, without authority, such person, so assuming to act, is personally bound as though he had covenanted in his own name." I have found no English adjudication to support this *dictum* of Judge PLATT. He refers to 7 Term., 206, and 5 East., 148. They appear to me to furnish no basis for such a doctrine. However respectable the source from which it flows, I must question its correctness; and the more especially as the decision was made in 1816, and Chancellor *Kent* published in 1827 the second volume of his commentaries, in which it is said: "The attorney is not bound, even though he had no authority to execute the deed, when it appears on the

face of it to be the deed of the principal"; "there is a remedy against him by a special action on the case for assuming to act when he had no power."

White v. Skinner, supra, so far as it bears on the one now before the Court, contains only an *obiter dictum* of Judge PLATT. I have found no English decision supporting it; and it seems that eleven years after the opinion was expressed it was not recognized as authority by Chancellor *Kent* for the purpose for which it has been cited.

The Supreme Court of Massachusetts, at October Term, 1820, in *Ballou v. Talbot,* 16 Mass., 461, expressly decided that the (103) defendant having signed a promissory note, and added to his signature the words, "Agent for David Perry," did not make the defendant liable as on his own promise; and if he acted without authority from Perry, that circumstance could not make it the promise of defendant; but he would be responsible for a special action on the case. The decision in *Long v. Colburn* is reëxamined and confirmed. Chief-Justice PARKER delivers the opinion of the Court, and supports it with able reasoning. Let it also be remarked that this adjudication was made more than four years subsequently to the decision of Judge PLATT in *White v. Skinner,* which had been decided at August Term, 1816.

Under these impressions, and with this view of the cases on the subject, I cannot consent to render judgment against the defendant.

HALL, J. There is no dispute in this case about the sealing and delivery of the bond, but only in regard to signing it. He who signed his name to it, *as his deed,* adopted the seal.

If a name appears to be signed to a deed adopting the seal, it must be the deed of such person or the deed of no one. It cannot be the deed of one whose name is not signed to it.

When the principal's name appears to a deed or other instrument, written by his agent, purporting to adopt the seal, that instrument must be the deed of the principal, or the deed of no one. If the agent was authorized to sign it, it is the deed of the principal; if he was not so authorized, it is not his deed. It cannot be the deed of the agent, because it does not purport to be so. On the contrary it purports not to be his deed, and he does not adopt the seal. The terms in which it professes to have been executed declare it to be the deed of the principal, and not that of the agent. Therefore to make it the deed of the (104) agent is against the evidence furnished by the instrument itself.

It has been insisted that the want of authority in the agent to sign the principal's name makes it the deed of the agent.

I have always understood that the question whose a particular deed is (if anybody's) must be collected from an inspection of the paper itself.

But if the rule contended for be correct, the question who is the obligor or grantor depends not upon the instrument itself, but upon matter of fact unconnected with the real execution of the deed. The evidence admissible under the pla of *non est factum* should be confined to the point whether things apparent on the face of the deed, so far as relates to the execution of it, were true and genuine as they appeared to be. If they were not, in any essential point, it was not the deed of the person it purported to be; and as it was not his deed it could be the deed of no other person, because it did not purport to be so.

It is difficult for me to understand how a deed which has but one seal shall be considered to be the deed of one person or another, as facts shall turn out, which are not connected with the two essentials of a deed, signing and sealing—I mean so far as they appear upon its face.

I am aware that there are authorities the other way. It is said to be right that an agent who signs for another without authority should be answerable himself. As a pinciple of ethics I subscibe to this rule; but it appears to me that he should be answerable in some other action than in one upon the instrument which he has signed as agent in his principal's name. *Long v. Colburn,* 11 Mass., 97.

I can raise no objection to *White v. Skinner,* 13 Johns., 307. The defendant in that case signed for the directors in his own name, (105) and of course he was bound—he undertook for them. If he had signed the name of the directors, and had affixed a seal to each name, and stated that he did so as *agent,* that case would have resembled this.

Nor in this case like *Appleton v. Binks,* 5 East., 148. There the agent signed and sealed the covenant in his own name and with his own seal.

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

HENDERSON, C. J. The question whether an instrument, allowing it to be genuine, be a deed must be determined from its face by an inspection of what it imports to be, not from evidence *dehors* the instrument. So whether it be the bond of A or the bond of B must be decided in like manner. No change of character can be given to it by extrinsic evidence. If this instrument be genuine it is the deed of him whose seal it bears, and as seals at present bear no distinguishing mark it is the seal of him whose it purports to be. If it is not his it is not the seal of another, for that would be to change its character by evidence of a collateral fact. If, therefore, it is not the seal of Robert R. Johnson it is the seal of no one; for it purports to be his seal, and not that of another. If he who affixed the seal of Robert R. Johnson to the paper had no authority to do so the person who has been injured by that act may or may not have a remedy against the party thus affixing

it, according to the circumstances attending the transaction. If he who sealed the bond falsely and fraudulently alleged that he had a power to do so I think that he would be responsible for the fraud. But if in fact he pretended to nothing more than a bare verbal authority, and this was understood by the plaintiffs, they have not been defrauded. It was a mere misconception of the powers flowing from a verbal authority, in which misconception they all participated. I cannot assent to the proposition, supported by some very high modern authori- (106) ties, that if this is not the deed of the principal, for want of power in the agent to seal for him, it is therefore the deed of the agent; although I can well assent to the proposition that in all *parol* contracts if the principal be not bound by the agreement the agent is. I mean lawful agreements; for when the consideration, which is necessary to support all parol contracts, passes from the party to the agent, if from any cause it cannot be carried to the principal so as to bind him, it must of necessity rest with the agent; and with whomsoever the consideration rests from him a promise arises. If in truth a person represents himself to be the agent of another, whether under a mistake or with a design to deceive, and he is not, so that the *consideration* never gets to the principal to *bind him,* then it *rests* with the agent, and he is bound. If in truth he was not the agent, but the principal knowingly receives the consideration, he thereby ratifies the contract, takes the liability upon himself, and discharges the agent. But this is only in cases where the creditor treats with the agent *as agent;* for if the agent treats with the creditor without disclosing his character of agent, he is personally bound, whatever he may do with the consideration. But the creditor may, if he will, even in such case, treat the contract as one made by the agent *as agent,* and follow his consideration to the hands of the principal—to him who receives benefit from it. It is in this way I understand what is to be found in the English books upon this subject—that if the principal be not bound, the agent is—that if the agent does not disclose his character he is personally bound—that if his power be defective to bind his principal the agent is bound. I say this with great deference to the decisions of some of our sister States, who have extended the principal so far as to make a deed executed by procuration the deed of the agent if from defect in the power it be not the deed of the principal. I assent to the proposition that if a parol contract be made by an agent be not the contract (107) of the principal, from a defect in the powers of the agent, it becomes the contract of the agent for the reasons above given. I have examined every English authority which is referred to in support of the

above-mentioned cases. I think that they do not support the position for which they were cited.

PER CURIAM. New Trial.

Cited: *Hite v. Goodman,* 21 N. C., 365; *Sellers v. Streator,* 50 N. C., 262; *Brown v. Bostian,* 51 N. C., 3; *Fisher v. Pender,* 52 N. C., 486; *Bryson v. Lucas,* 84 N. C., 683; *Burwell v. Linthicum,* 100 N. C., 148; *Russell v. Koonce,* 104 N. C., 241; *LeRoy v. Jacobosky,* 136 N. C., 448.

THE PRESIDENT AND DIRECTORS OF THE STATE BANK v. AMBROSE KNOX and WILLIAM MARTIN.

FROM PASQUOTANK.

Where an agreement was made that one of two similar suits should abide the event of the other, upon a dispute as to the terms of that agreement, it was *Held*, that the decision of the Judge of the Supreme Court thereon was conclusive, and a judgment entered acording to the facts ascertained by him was affirmed.

ASSUMPSIT upon a promissory note made by one Muse, endorsed by the defendants for his accommodation, and negotiated to the plaintiffs. At the fall term, 1826, this cause, together with that of the same plaintiffs against Wilson & Parker (12 N. C., 484), stood for trial. An affidavit was made by the attorney of the plaintiffs for the removal of both causes, and an order entered transmitting them to Gates.

In consequence of an arrangement made by the counsel on both sides this cause was not removed to Gates, but it was agreed, as the defendants contended, that only the suit against Wilson & Parker should be removed, and that this should abide the event of that. No entry was made of this arrangement, but this cause continued in Pasquotank, and was brought forward on the trial docket, with the following entry: "To await the decision of a case removed to Gates Superior Court."

At Spring Term, 1828, upon affidavit filed the following rule
(108) was made, *nunc pro tunc* as of fall term, 1826: "It is agreed between the plaintiffs and defendants' attorneys, that whatever decision shall be made in the suit *State Bank v. Wilson & Parker,* removed at this term to Gates for trial, the like decision shall be made in the other suit—*State Bank v. Knox & Martin*—and that the order to remove the last-mentioned suit be rescinded, and the same is rescinded. And the said last-mentioned suit is retained in this Court to await the decision of the case *State Bank v. Wilson & Parker.*"

At the Fall Term of 1828, before his Honor, Judge STRANGE, the plaintiffs move to rescind this rule, and several affidavits were filed in support of and against the motion. It is thought that it is not necessary to present a statement of them.

His honor having refused to set aside the rule, the defendants produced a regularly certified copy of the record in the case of *State Bank v. Wilson & Parker,* and moved for judgment in their favor, which being entered, the plaintiffs appealed.

The case was submitted, without argument, by *Ruffin,* for the plaintiffs, and *Gaston,* for the defendants.

HALL, J. Upon the affidavits offered to the Court at April Term, 1828, the order for the removal of this suit to Gates Superior Court for trial was rescinded; and the entry of the agreement that it should await the decision of the suit *State Bank v. Wilson & Parker,* removed from Pasquotank to Gates Superior Court, was made as of April Term, 1826, that being the term at which the agreement was entered into, as appears from affidavits then offered to the Court, and of which that Court was the only competent judge.

No objection appears to have been made to these entries at that time. At the Supreme Court in June, 1828, where the suit *Bank v. Wilson,* 12 N. C., 484, had been carried by appeal from the Gates Superior Court, judgment was given for the defendants. Afterwards, (109) at October term of Pasquotank Superior Court, a motion was made in this suit to rescind the entry directing it to await the decision to be made in the suit *Bank v. Wilson.* This was refused by the Court, and the same judgment was entered in it which had been given in the suit *Bank v. Wilson.* In this I think the Judge acted correctly. It is to be observed that the last-mentioned motion was not made until the judgment of this Court in the suit against Wilson was known, and then to have permitted the motion to prevail would have been to permit the plaintiff to try his fortune a second time, contrary to his agreement. I say *agreement,* because the Superior Court, judging from the affidavits, considered that there was one.

PER CURIAM. Affirmed.

Cited: Carroll v. Haywood, 64 N. C., 482.

ELIZABETH DOLBY v. YOUNG JONES and JAMES WATSON.

FROM WAKE.

1. Sureties for an appeal from the judgment of a single magistrate are sureties to the action, and are bound to satisfy any judgment which may be rendered in it against the appellant.
2. Where the judgment of a justice was affirmed in the County Court, and the suit went from that to the Superior Court, and final judgment was entered against the appellant, his first sureties are bound for its satisfaction.

The defendants were sureties for one Utley in an appeal prayed by him to the Court of Pleas and Quarter Sessions from the judgment of a justice of the peace. The judgment of the justice was affirmed, and judgment rendered against the defendants for the amount recovered in the County Court. From this judgment Utley prayed an appeal to the Superior Court, and gave other sureties, with the usual condition. (110) In the Superior Court the judgment of the County Court was affirmed, and judgment rendered against the sureties last given, but not against the defendants.

The plaintiff having failed to obtain satisfaction from Utley and the sureties on the appeal to the Superior Court, on the fall circuit of 1828 moved his Honor, Judge NORWOOD, for judgment *nunc pro tunc*, against the defendants, which being entered, they appealed to this Court.

W. H. Haywood, for the defendants.
Manly, contra, submitted the cause without argument.

HALL, J. The act of 1794 (Rev., ch. 414, sec. 17) declares that in all cases where appeals shall be granted from the judgment of a justice of the peace, the acknowledgement of the surety for the appeal, subscribed in his own handwriting, attested by the justice, shall be sufficient to bind the surety to abide by and perform the judgment of the Court. They are bound in an obligation similar to that which sureties enter into for appeals from the county to the Superior Courts. They are both, like special bail, sureties to the action, but are more strongly bound. For they cannot, as special bail can, surrender their principals in discharge of themselves.

In a suit brought to the County Court, if special bail be taken and the plaintiff appeal to the Superior Court from a judgment rendered against him, if the plaintiff obtain a judgment in the Superior Court, no doubt can be entertained but that the special bail would be liable, although it should be stated in the bail bond that they were bail in a suit brought to the County Court. They are bail to the action and

liable to any judgment obtained in it. So the surety for an appeal from a justice is bound for the action, and is obliged to (111) perform whatever judgment is obtained in it. If it be asked why it is necessary for a defendant to give sureties for an appeal to the Superior Court when his special bail are liable? the answer is, that the law requires additional security for the performance of the judgment, from which the sureties cannot exonerate themselves by a surrender of their principal, and against whom judgment can be *instanter* entered up, together with the principal. Suppose the surety in question only bound to perform the judgment of the County Court, and the defendant, prevailing in that Court, the plaintiff appealed and obtained a judgment in the Superior Court, the plaintiff would have no security—and this without any default on his part—a predicament in which the law never contemplated placing a creditor.

PER CURIAM. Affirmed.

Cited: Wilson v. Murchison, post, 491; *Carroll v. McGee,* 25 N. C., 15.

JAMES FERRELL, Executor of William Ferrell, v. JEPTHA UNDERWOOD *et ux.*

FROM WAKE.

1. Under the powers conferred by the Act of 1794 (Rev., ch. 414) a single justice of the peace has jurisdiction of implied contracts. Where upon the death of a man his wife appropriated money belonging to his estate to her own use, *Held*, that it might be recovered by warrant, without proof of an express promise to pay it.

Per HENDERSON, C. J.—The jurisdiction of a single Justice extends to all cases where a general *indebitatus assumpsit* will lie.

2. A judgment "that the plaintiff pay costs" is not a judgment on the merits, because it may be upon matter collateral to them.

3. Evidence of what the justice meant by such a judgment is improper, as the entry must speak for itself. But it is otherwise as to the fact whether the merits were inquired into upon rendering it.

This was an action commenced by a warrant before a single justice.

On the trial before his Honor, Judge NORWOOD, the case was that the wife of the defendant, Jeptha, being the widow of the plaintiff's testator, took of the money on hand at his death, the sum of (112) forty-seven dollars and fifty cents.

The defendants produced and read a former warrant brought by the present plaintiff against the wife of the defendant Jeptha, before her intermarriage with him, and proved by the magistrate who tried it that

on the day of trial the plaintiff appeared, produced witnesses to support his claim, who were examined by the magistrate, and upon consideration of the evidence, he, the witness, thinking that the plaintiff had failed in making out his case, entered the following judgment:

"In this case the plaintiff pay costs. Given under my hand, etc.
JOHN SHAW, J. P."

The witness was asked by the counsel for the plaintiff whether the defendant offered any evidence on that trial, to which he answered in the negative. The counsel then asked him whether he considered the judgment as anything more than a nonsuit. This question was objected to by the counsel for the defendant, but the objection was overruled, and the witness answered that he intended to enter a nonsuit, and considered the judgment as one.

Upon this evidence his Honor being of opinion that the plaintiff should recover, a verdict was entered accordingly, and the defendants appealed.

Badger, for the defendants.
Seawell, contra

HENDERSON, C. J. It is said that this claim is founded neither on a specialty, note, contract or agreement; that it is not for goods, wares, and merchandise sold and delivered, nor for work and labor done, and, therefore, that a single justice has no jurisdiction; the act of 1784 (to which all subsequent acts, except that of 1822, refer, and the latter not affecting the case) expressly confining the jurisdiction to cases of that description.

Contracts are of two kinds, express and implied. The first (113) are, where an obligation is expressly assumed; the latter, when it arises from the transaction, without any express undertaking, being according to the obligations imposed by law, the performance of which every person is presumed to undertake, independently of and without an express promise. As if A receives the money of B, a promise is implied that A will repay it. If A pays money for B, at the request of B, the law implies a promise on the part of B that he will repay it. Even in cases where A receives the money of B *tortiously,* or under a claim of right, B may waive the *tort,* and presume that A received the money for his use, if in fact the money belonged to B; and A is not permitted to allege that he received the money *tortiously,* and by wrong, if *ex equo et bono,* as Lord Mansfield says, he ought to repay it. If this be the rule in the exposition of acts by Courts, emphatically called

Courts of Justice, proceeding according to the course of the common law, I can see no reason why it should not be applied to Courts of limited and special jurisdiction, proceeding, it is true, not according to the forms of the common law, but according to its principles; the law being the same in both Courts, varying only in the mode of administration, that which is law in one Court being so in the other, as far as regards the subject-matter of the contract. I must, therefore, say, that if this money in the hands of the defendant (the *feme*) is the money of the plaintiff, the defendants have agreed to pay it to him. A contrary exposition of the act is at variance, I think, as well with its letter as with its spirit; a contract implied being as much a contract as a contract expressed. This opinion is in accordance with the uniform understanding ever since the act was passed. I should suppose that the jurisdiction of a single justice extends to all cases where a general *indebatus assumpsit* will lie

As to the bar of a former judgment, I think the defendant has failed to establish it. The bar does not arise from the fact that (114) there has been a former suit upon the subject, but there must have been a former investigation of this very claim upon its merits by a competent tribunal, which has adjudicated upon the subject. The judgment produced in this case shows, it is true, that there was a suit, and that it is at an end; but whether the justice who put an end to it entered into the merits of the claim and adjudicated upon the right does not appear. The entry is that the plaintiff should pay costs; this consequence may follow from a judgment on the merits, as well as something collateral to them and not affecting them. If it was to be allowed as a bar it might happen that the plaintiff would be put out of Court without ever having had his claim passed upon.

I think, also, it was improper to receive evidence from the justice to explain what he meant by the entry. It must speak for itself. As it stands, it is either a judgment or not; it cannot have its character determined by the testimony of the justice. If so, any other person is as competent to do this as he is. But if the entry imports a judgment I think it is proper to prove by the justice, or any other person, that the merits were gone into, if the testimony be consistent with the judgment. I am induced to say this from the analogy it bears to cases where trespess has been brought for taking property, and, on the plea of not guilty, a general verdict is found for the defendant. In an action of *detinue* or *trover* afterwards brought for the same property, if the verdict and judgment in trespass be pleaded in bar, evidence may be given to prove that the verdict in that action was rendered for the defendant, from the fact that there was no forcible taking, and that it was not given on the title. This is brought in under a replication averring these facts.

But here the justice was asked what he meant by the entry; not whether he went into an examination of the merits. But in this case the (115) entry neither was, nor did it import to be, a judgment. It did not profess to decide the cause.

This is not one of the cases where a new trial should be granted because improper evidence was received on behalf of him in whose favor judgment was rendered—for the defendant offered no sufficient bar. There was nothing, therefore, for the justice's evidence to do away.

Upon the question of jurisdiction this case is stronger than where one man receives or takes the money of another. Here the possession devolved on the wife on her husband's death; she held it for those to whom it belonged.

PER CURIAM. Affirmed.

Cited: Justice v. Justice, 25 N. C., 60; *Massey v. Lemon,* 27 N. C., 559; *Mitchll v. Walker,* 30 N. C., 246; *Davis v. Davis,* 108 N. C., 502.

MARY WATTS v. JOHN M. GREENLEE.

FROM BURKE.

1. In declaring for slander, the office of an *innuendo* is to correct words not in themselves actionable with some precedent fact formally averred which explains their meaning.
2. Words not in themselves actionable can not be rendered so by an *innuendo* without a prefatory averment of extrinsic facts which explains their meaning and make them slanderous.
3. Hence, when the words were "all W's girls are big," and the declaration contained no averment of a fact affixing a slanderous meaning to the words, an *innuendo*, affirming the meaning to be "big with child to negro B," was held to be insufficient, and the declaration to be defective.
4. The word "publish" is insufficient in a declaration for slander, without charging the words to be spoken in the presence and hearing of others.

The Act of 1808 (Rev., ch. 748) has given a precise meaning to the term incontinent," and having rendered a charge of it against a woman actionable, a count, charging the defendant with saying the plaintiff is "incontinent," without prefatory matter and without an *innuendo*, is good.

After the new trial granted in this cause at June Term, 1827 (12 N. C., 210), it was again tried on the last circuit before MANGUM, J. A verdict was returned for the plaintiff, and after discharging (116) rules for a new trial and in arrest of judgment, judgment was rendered for the plaintiff. It is unnecessary to state the grounds upon which these rules were discharged, as the cause was disposed of in

this Court, upon a point not brought to the notice of his Honor, on the circuit.

The declaration was in the following words:

"Mary Watts complains of John M. Greenlee, in custody, etc., of a plea, etc., and whereupon the said Mary, by, etc., complains that she, being a person of good fame and reputation, and so esteemed by all persons, and never having been guilty of the infamous acts imputed to her by the said J. M. G., as hereinafter stated, nevertheless the said J. M. G., being an evil-minded person, and intending to slander her in her good name, fame and character, on, etc., in, etc., did falsely and maliciously publish of her, the said M. W., the following scandalous words, to wit: "She, the said M., is big (meaning big with child to his negro Ben). That all Watts's girls (meaning the said M. W. as one of said girls) is with child to negro Ben." He, the said J. M. G., knowing, etc."

There was another count, similar to the one above in all respects, charging the words as being "she" (meaning the said M. W.) "is incontinent."

Gaston and *Badger* moved in arrest of judgment.

Devereux, for the plaintiff.

HENDERSON, C. J. Words not in themselves actionable may be rendered so by a *colloquium,* or by something extrinsic, with the aid of an *innuendo.* In such cases it is necessary that the *colloquium* and extrinsic facts, commonly called introductory matter, should be put upon the record, that the Court may see that the jury have drawn (118) a rational and probable conclusion. For, notwithstanding the jury are the judges of the facts, and of all inferences to be drawn from facts, yet it is the province of the Court to decide whether one fact can be inferred from another. Hence arises the distinction between relevant and irrelevant evidence. The Court decides the question whether one fact *can or may* be inferred from another. The jury determine whether the inference insisted on be correct or not in the particular case. The words are "all Watts' girls are big." There is no *colloquium* charged by which any other than the ordinary meaning of the words can be given to them. They are to be taken abstracted from any context, for none appears. The *innuendo* is, "thereby meaning big with child to his negro, Ben." It is going far enough, and perhaps too far, without a *colloquium* or introduction to say that *big* means *big with child;* but there cannot be the least pretense for saying it means big with child *by negro Ben.* The *innuendo,* therefore, which the jury have inferred was quite unwarranted; at least there is nothing stated which shows that it was warranted. That must appear, or the declaration is bad; for

otherwise juries would be quite arbitrary in giving to words such a meaning as they pleased. If this was the defendant's meaning, the words are actionable; and had a *colloquium* or introductory matter been stated, which showed that this might have been his meaning, it would have sustained the *innuendo* which the jury have affirmed. The verdict being general upon all the counts, and this being defective, the judgment must be arrested.

Other objections were made, which I will only slightly notice, the one before mentioned having put an end to the case. It is objected by the defendant that it was not stated that he gave publicity to the charge; that the word *"publish"* does not sufficiently convey that idea. (119) But for my part, I can scarcely conceive a word in our language which more definitely conveys the idea requisite in law to support an action for speaking slanderous words. *Publish* is to proclaim, to make known generally. It needs not the epithet *palam,* which was relied on, for *palam promulgare* is to publish.

It is objected that the words "the plaintiff is incontinent" required a *colloquium* or introduction to make them actionable. *Incontinent* is the word used in the statute; it would be strange that the Court should require the jury to tell them the meaning of a word thus used, and the argument amounts to that. It is true that where a statute declares that he who commits a certain crime—murder, for instance—shall suffer death without benefit of clergy, in an indictment on that statute it is not sufficient to say that the defendant committed murder, but it must be shown how. But in a civil action the rule is different; it is not necessary to show how the plaintiff is incontinent—with whom, for instance—there being no prosecution against her for incontinence. This would have been a more apt illustration than the case of murder. But the question is, what did the defendant mean by the word *incontinent,* which cannot be understood, when generally applied to a female, to mean anything else but that she is unchaste? If there were facts or circumstances which showed such was not his meaning the defendant should have shown them. It was not incumbent on the plaintiffs to prove the reverse. But the errors in the count before mentioned are fatal.

PER CURIAM. Judgment arrested.

Cited: Briggs v. Byrd, 33 N. C., 355.

(120)

PHILIP BRITTAIN v. JAMES ALLEN.

FROM BUNCOMBE.

1. In a declaration for slander the *innuendo* must contain a rational inference from the *colloquium* oro ther introductory matter.
2. The *colloquium* and introductory matter are put on the record that the court may see if the jury have made a reasonable construction of the words.
3. The usual and formal mode of pleading is first to set forth the *colloquium* then the words, drawing a slanderous meaning from them by a proper *innuendo.*
4. But a declaration in which the words spoken and the *innuendo* were first set forth, and then a fact necessary to warrant the *innuendo,* was held sufficient.
5. Other words besides those charged as slanderous may be proved on the trial as evidence of the malicious intent of the defendant, and this as well where they are actionable as where they are not.
6. General hostility between a juror and a party, without any connection with the action to be tried, is good cause of challenge.
7. But the fact that a juror and one of the patries are stockholders in an incorporated company, as a turnpike company, is not good cause of challenge.

The plaintiff declared against the defendant in case for slander, as follows:

Philip Brittain complains of James Allen, in custody, etc., of a plea of trespass on the case, etc.; for that, whereas, the said Philip now is a just, honest and correct man and citizen of this State, and as such hath always, etc.; and until the committing of the several grievances by the said James, as hereinafter mentioned, was always reputed, etc., by all his neighbors, etc., to whom he was in any wise known, to be, etc.; and whereas, also, the said Philip hath never been guilty, nor until the committing of the several grievances by the said James, etc., ever been suspected to have been guilty of the infamous crime of passing counterfeit money, hereinafter mentioned to have been charged upon, and imputed to said Philip, by means of which, etc., he, the said Philip, before the committing of the said grievances by the said defendant, had deservedly obtained, etc. Yet the said defendant, well knowing, etc., and greatly envying, etc., and contriving, etc., to injure the said Philip in his good name, etc., and to bring him into public scandal, etc., and also cause him to be suspected by, etc., to be guilty of passing counterfeit money, and that he had subjected himself to the pains, etc., and to harass and ruin the said Philip heretofore, to wit, on, etc., at, etc., then and there in the presence, etc., falsely and maliciously spoke and published of (121) and concerning the said Philip these false, scandalous, malicious and defamatory words, to wit: "Our former senator" meaning thereby the said Philip, he the said Philip having been before that time a senator in the Legislature of this State) "used vigilance and diligence in prosecuting Welsh for passing counterfeit money" (meaning thereby one William Welsh, who was guilty of passing counterfeit money), "in order to prevent suspicion from falling upon himself" (meaning thereby the said Philip); "he" (meaning the said Philip) "procured Roadman" (meaning one William C. Roadman, who

prosecuted the aforesaid William Welsh for passing counterfeit money), "to prosecute him" (meaning the aforesaid William Welsh); "to extricate himself" (meaning the said Philip); and that "he" (meaning the said Philip) "was as deep in the mud as Welsh" (meaning the aforesaid William Welsh) "was in the mire," meaning and intending thereby that the said William Welsh was guilty of the scandalous and felonious crime of passing counterfeit money, and that he, the said Philip, was also guilty of the scandalous and felonious offense of passing counterfeit money. By means of the committing of which said several grievances by the said James as aforesaid he, the said Philip, hath been and is greatly injured in his said good name, etc., and brought into public scandal, etc., with and among his neighbors, to whom the falsity of the said charge was unknown, and who thence have believed him guilty of the infamous and felonious offense of passing counterfeit money. Wherefore, the said Philip saith, etc."

The issue was on the plea of *not guilty,* and was tried before his Honor, Judge MANGUM, on the last circuit.

In making up the jury, the defendant having exhausted his presumptory challenges, challenged a juror for cause, assigning for cause: 1st, That the juror and the plaintiff were stockholders in the Buncombe Turnpike Company; 2d, That there had been hostility between the juror and the defendant.

The last assignment was general, without reference to any opinion formed or expressed by the juror touching this suit. The challenge was overruled by the Judge, and the juror was sworn.

After proving the speaking of the words charged in the declaration the plaintiff offered evidence of other words spoken by the defendant, both before and after the commencement of the action. This (122) testimony was objected to by the defendant, but was admitted by the judge.

His Honor left it to the jury to show whether the defendant, by the words set forth in the declaration, falsely and maliciously intended to charge the plaintiff with passing counterfeit money, and told them if they should find that he did they ought to return a verdict for the plaintiff.

A verdict being returned accordingly, the defendant appealed.

Gaston & Badger, for the defendant.
Devereaux, on the other side.

HENDERSON, C. J. The words charged to have been spoken are not actionable of themselves, but may be made so by a *colloquium,* or by introductory matter, with an *innuendo.* The *colloquium* is the subject matter in reference to which the words were spoken. What is commonly called the introduction contains foreign or extrinsic facts, known to the hearers and alluded to by the speaker, by which a slanderous

character may be given to words ambiguous in themselves, or apparently harmless. The *innuendo* avers the meaning of the words as intended by the speaker, and as understood by the hearers. It must be warranted by the *colloquium* or by the introductory matter; that is, it must be a rational inference that they are so meant and so understood. The *colloquium* and introductory matter must be put upon the record; otherwise juries would be left at large to construe the words as they pleased. They are required to be placed upon the record that the jury may be kept within the bounds of reason and common sense. For although they are triers of the facts, it is the duty and province of the Court to see that their inferences are such as are reasonable and probable. Hence irrelevant evidence is withheld from them. Hence also in murder, the wound, which the jury affirm to be the cause of death, should be described by its breadth and depth, that the Court may see, not that it did occasion the death—for that is the province of the jury to decide—but that it is probable that it did, which is the province of the Court. The words are: "Our former senator used vigilance and diligence in prosecuting Welsh for passing counterfeit money in order to prevent suspicion from falling upon himself. He procured Roadman to prosecute him to extricate himself; and he was as deep in the (124) mud as Welsh was in the mire"—with an *innuendo,* that the defendant intended to impute, and did impute, to him, the crime of passing counterfeit money, and to support this *innuendo,* or to render it probable, there is an averment that the plaintiff had been a senator from the county, and another that Welsh had been guilty of passing counterfeit money, which supports the *innuendo* that by saying that the plaintiff was as deep in the mud as Welsh was in the mire he meant to impute to him the crime of passing counterfeit money. The jury, by their verdict, have affirmed both the averments and *innuendoes.* It is therefore the same thing as if the defendant had said in so many words that the plaintiff *was guilty of passing counterfeit money.* It is true these averments are not found where, according to the approved forms, they should be, that is, preceding the words alleged to have been spoken; but it is sufficient if they are found anywhere. I therefore think that the declaration is substantially good, and that the judgment should not be arrested. But there is a motion for a new trial for improperly overruling a challenge to a juror. And if the challenge was improperly overruled it is good cause for a new trial.

I do not think that there is anything in the cause first assigned, viewing it either as a cause for a principal challenge or one for favor. For from that alone I do not think it is inferable that the juror is not indifferent. I mean that the plaintiff and juror were both stockholders in a turnpike company. For those companies or associations spoken

of in the books, which disqualify the members from serving as jurors, where another member is a party, mean such associations as unite men much more intimately than being stockholders in the same incorporated company. They are such associations as impose personal obligations on the members—obligations arising from benevolence and good-
(125) will towards each other, not a mere partial union of funds for profit. The funds are united, but the individuals are entirely distinct. But it appears to me that there is something in the second cause, to-wit, that there was hostility between the juror and defendant. For although the word *had* implies that the hostility had passed away, yet from the reasons assigned for overruling, it is plain that it was used by mistake. It seems that the Judge disregarded all kinds of hostility but that which related to the particular suit then to be tried. I think that the law is otherwise. The juror should be perfectly impartial, and indefferent causes, apparently very slight, are good causes of challenge, and that which is good cause for quashing the array is good cause of challenge to the polls. I mention this, as most, at least many of the cases, are challenges to the array. If the sheriff be liable to the distress of either party, or if he be his servant or counsellor, or if he has been godfather to a child of either of the parties, or either of them to his, or if an action which implies malice, as assault and battery, slander, or the like, is depending between them, these all are causes of principal challenge. (Bac. ab. Jurors, F. 1.) From these cases, particularly the one which states a suit pending, which implies malice, it appears that general hostility, by which I mean that which is not confined to the particular suit, is cause of challenge. From these causes the law of itself implies a want of indifference, which the defendant offered to show. I think he ought to have been permitted to do so, and if he succeeded, that the juror should not have been sworn. For this cause, and for this cause only, there should be a new trial.

As to the other words which were given in evidence, I think it is proper to show that the degree of malice by any words or acts of the defendant, whether spoken or done before or after the action brought.

We will presume that they, under the charge of the Court, had
(126) that effect, and that effect only. No regard ought to be paid to the old rule, that these words must be such as were not actionable, that rule having yielded to common sense. For damages are not given for these words, but for the words charged. They only tend to show the degree of malice entertained by the defendant against the plaintiff.

PER CURIAM. New Trial.

Cited: *S. v. Mills,* 116 N. C., 1052.

Den ex dem. of WILLIAM R. SMITH et al. v. JOHN M. GREENLEE.

FROM RUTHERFORD.

1. Auction sales, particularly those made by a sheriff, under a *fi. fa.*, are founded upon the idea of a fair competition between the bidders. And as the employment of puffers is a fraud upon the vendee, so an association of bidders, designed to stifle competition, is a fraud upon the vendor. A sale effected by such means is void even at law, and a deed executed in consequence of it conveys no title.

2. But the rule is different when the association has for its object a fair competition, and is formed because one, from the magnitude of the purchase or the like, can not bid on his own account.

EJECTMENT for a tract of land situate in Buncombe, originally commenced in that county, and removed to Rutherford.

On the trial before DANIEL, J., the lessors of the plaintiff, who were William R. Smith, James M. Smith and Phillip Brittain, produced a judgment and execution thereon against one James Greenlee to the defendant, and impeached it as fraudulent.

The defendant contended that the purchase of the lessors of the plaintiff, at the sheriff's sale, was fraudulent, and relied upon his possession alone, against this defective title. To show the purchase fraudulent, the defendant proved that the land in dispute was more (127) valuable *per acre* than any other tract in Buncombe County; some persons estimated it at $5,000, others at $8,000, and some were as high as $10,000; that Brittain, one of the lessors of the plaintiff, was the agent of the plaintiff in the execution, and had the control of it; that the two Smiths, also lessors of the plaintiff, were men of considerable wealth, and had the command of money; that when the biddings opened, one of the Smiths bid $200; that the other Smith bid on him, as also did one other person; that then the lessors of the plaintiff went apart to themselves, and agreed that they should not bid against each other, but that one should purchase the land for the joint benefit of the three; that the land should be cried off to them, and a deed given to them for it; that the sheriff was informed of this arrangement, and instructed to consider the bid of any one of the three as the bid of all. Under this arrangement only one of the lessors of the plaintiff bid, and the land was stricken off to them at $400.

His Honor instructed the jury that if the lessors of the plaintiff, after the biddings had commenced, entered into a combination no longer to bid against each other, in consideration of an agreement that one was to make the purchase and let the others have an interest in it as partners—if in consequence of this agreement, the two persons who were to be admitted as partners desisted from bidding, and all this was known

to the Sheriff before the sale was closed, and was sanctioned by him—the arrangement would be against the policy of the country, and a fraud either upon the person whose property was to be sold, or upon the law regulating sales of property by the sheriff at vendue, and that any deed executed on such sale would be void.

A verdict was returned for the defendant, and the plaintiff appealed.

The case was argued by *Swain* for the lessors of the plaintiff, (128) and by *Gaston* and *Badger* for the defendant.

HENDERSON, C. J. A sale at auction is a sale to the best bidder, its object a fair price, its means competition. Any agreement, therefore, to stifle competition is a fraud upon the principles on which the sale is founded. It not only vitiates the contract between the parties, so that they can claim nothing from each other, but also any purchase made under it, their claims against the vendor being weaker than those against each other—policy alone forbidding that the last mentioned should be enforced, but both policy and justice uniting to condemn the former. If this be the rule with regard to auctions instituted by private individuals, *a fortiori* should it be as to those public auctions instituted by law for great public purposes—such as execution sales, where the object is to secure the creditor, if possible, the satisfaction of his debt, and at the same time to obtain for the debtor a fair price for his property. Men may, from the very worst of motives, both towards the creditor and debtor, abstain from bidding, without incurring any legal censure. They have a right to obstain from action—they may act or not, at their pleasure, but if they do act, they must do it fairly. They cannot claim to themselves any benefit from a sale, the first principles of which they have violated, fair competition being the very essence of an auction sale. Puffing or by-bidding is a fraud on the vendee. So, on the other hand, an agreement not to bid, for the purpose of paralyzing competition, is a fraud upon the vendor, and vitiates the sale—at least so far that no party to such agreement can claim any benefit from it. I presume it is good as to those who did not participate in the agreement. I think, also, that the fraud is of such a character that it vitiates the sale at law.
(129) There is no part of the transaction which should be preserved, and which, therefore, may render it more proper for the interposition of a court of equity; the transaction being totally void, so much so that even the purchase money paid cannot be recovered back.

But it should be clearly understood that it is not intended to intimate an opinion that persons may not associate together and unite in their biddings from any other cause or motive than that of destroying, stifling or paralyzing competition. Persons may unquestionably unite in their

biddings under a great variety of circumstances. As where the whole article, for any reason, does not suit the individuals of the association, as being of more cost than one would wish to purchase, or, where it consists of parts, some suitable to one and some to others of the association; or where the purchase might involve a risk, which they, as individuals, are not willing to encounter, as a disputed title, or the like; or the case of a loss upon a resale, where the profits may be very great, and so may the loss; or if the association acts from motives of humanity and benevolence to some individual whom they intend to benefit, and by a joint bid equalize the burden. But it is much easier to point out cases where the rule operates than where it does not. It is confined, I think, to the cases before mentioned, where the agreement is designed to affect and does affect fair competition, paralyzing the bidding.

I have but little doubt, from the charge of the Judge, that he entertained the same notions of the law of the case as this Court does. And his charge, as far as it goes, is correct. But I am not quite certain that the jury may not have understood that the sale was vitiated by an association for an object deemed both by the Judge below and by this Court perfectly justifiable. In other words, I fear that the charge was not sufficiently explicit, for it is by implication only that I can make it embrace the principles declared in this opinion. I am not satisfied that the case was left to the jury under the influence of these principles. I think, therefore, that there should be a new trial, (130) and I more readily assent to it because very little injury can result, as the defendant remains in possession.

The case should be left to the jury under the influence of the principles above expressed, with a caution to them to disregard the mere assertion of the parties that they united because of the disputed title, but to ascertain the real motives, if they can; and if it was to destroy or impair competition, to find for the defendant.

PER CURIAM. New Trial.

Cited: Goode v. Hawkins, 17 N. C., 397; *Bailey v. Morgan,* 44 N. C., 356; *Whitaker v. Bond,* 63 N. C., 293; *Davis v. Keen,* 142 N. C., 504; *Henderson v. Polk,* 149 N. C., 108.

BURTON W. DOWD v. FLORA WADSWORTH.

FROM MOORE.

1. Where a writ was to answer "A, guardian of B," the words "guardian of B," was held to be but matter of description, and the suit to be the suit of A, not of the ward; evidence of the ward's title is therefore irrelevant.
2. Possession accompanied with a claim of title is a conversion. But a mere bailee who claims no title either for himself or his bailor, and upon a demand of possession only asks for time to surrender the property to his bailor, is not guilty of a conversion.
3. One who is in possession of the property of another is bound to surrender it upon the demand of the owner; but if he does not know the applicant to be the owner, he has a right to reasonable proof of that fact.

Principles of law in respect to what constitutes a conversion discussed by HENDERSON, C. J.

TROVER for a horse, brought by the plaintiff in his own name as "guardian of Daniel Blue."

The cause was tried, on the plea of not guilty, before his Honor, Judge DANIEL, on the last circuit.

The plaintiff proved a gift of the horse to his ward, Daniel Blue, by his grandfather, John Wadsworth, the late husband of the de-
(131) fendant, and that he had by his will bequeathed all his personal estate to the defendant during her life. The executor of John Wadsworth lived at a distance from the defendant, and in another county. All the property of the estate, together with the horse in dispute, was left by him on the plantation where the testator died, where also the defendant continued to reside—she contending that the horse had never been given to Blue by the testator, but that it continued to be part of his estate. It was in proof that after the death of her husband the defendant used the horse about the plantation; that she lent it to one of the witnesses to go to Fayetteville, and also to another person to go a short journey.

The plaintiff demanded the horse of the defendant for his ward; she answered that it was not in her possession, but in that of the agent of the executor, who lived some miles off; that she should do nothing until she saw the executor, and that she did not know that she would give it up at any rate. There was no proof of the plaintiff's appointment as guardian.

His Honor instructed the jury that if they were satisfied that the plaintiff had title to the property, their next inquiry should be the fact of a conversion by the defendant. That on this point it was not necessary for the plaintiff to prove a demand by him and a refusal by the defendant, when the horse was in her possession; that it was sufficient

if he proved to their satisfaction that the defendant had, since the death of her husband exercised acts of ownership over it inconsistent with his title.

Under this charge a verdict was returned for the plaintiff, and the defendant appealed.

Ruffin, for the defendant.

No counsel appeared for the plaintiff.

HENDERSON, C. J. I am somewhat at a loss to say what this Court, as a reviewing court, should do as to the error in bringing (133) the suit. No doubt it was intended to be the infant's suit; it was so considered throughout. The trial was upon the infant's title, yet it is the suit of the guardian—it is brought by him in his own name; for although he describes himself as guardian of the infant, that is but matter of description, and does not make it the suit of the infant. The Court below, I think, should have rejected the whole of the evidence as irrelevant; for it did not tend to establish title in the plaintiff, but in his ward. I do not know what else we can do but to grant a new trial. The Superior Court may, under our act for the amendment of the law, and particularly under our construction of that act, permit an amendment upon terms, if it should be thought proper.

The counsel for the defendant made a very ingenious argument to show that there was no conversion; but he has not satisfied me that there was none. It is evident the defendant claimed a life estate in the horse, under the will of her husband, to which she was entitled, if there was no valid gift to the infant.

The executor left the horse with the other property on the plantation, where the widow continued to reside, and she no doubt exercised acts of control and ownership over it; for it appears that she lent him to one of the witnesses to go to Fayetteville, and once to another person to go a short journey. That when demanded she said the horse was not there; that he was in the possession of the agent of the executor, who lived three or four miles off. She said she would do nothing until she could see the executor, and that she did not know that she would give up the horse at any rate. This is very unlike the conduct of the possessor of a chattel, who, not knowing the owner, claims no property in it, but is willing to give it up, so that he is exonerated. On the contrary, it is very much like a claim, especially when coupled with her acts of ownership and her concluding remark that she did not (134) know that she should give him up at any rate, which seems like disclaiming the authority of the executor. All this looks much like a claim for herself, and when coupled with her interest under the will, shows that she held adversely.

The general rule is that any person who is in the possession of another's property is bound to surrender it upon demand. The exceptions are where a person really and *bona fide* does not know that the applicant is the owner. By which I do not mean that he can not judge whether his title is good or bad, as it were upon the law or intricate facts of the case—as if a man find property, before the finder can be put in the wrong there must be some grounds to believe that the applicant is the owner; not full proof, but something that would satisfy a reasonable man. Or, if one neighbor bails property to another, if it is demanded of the bailee, and he, thinking it is the bailor's, requests a delay until he can see the bailor and return it to him, this will not be evidence of a conversion. All these exceptions are founded in good sense, and it must appear on the transaction that the bailee neither claims possession for himself nor even for his bailor, but only that he wished a delay to enable him to return it to the bailer, that the latter might exercise his free will, and not condemn the bailee for not doing so, and that the bailee might thus avoid a law suit. If this defendant held for the executor, it appears that her motives were different from these. I rather suppose she considered that he held title for her, and that she held possession for herself—that she held possession for herself, that she was mistress, and could direct and act as she pleased; for it seems that when matters came to an extremity she would follow her own and not his will. When one is in possession under a bailment, by holding for the bailor and refusing to deliver the thing bailed upon demand, he identifies his possession with the title of the bailor;
(135) and if that is bad the possession is a conversion, and he becomes personally chargeable. I think, therefore, the judge was right in the instruction given and in the manner in which he left the case to the jury.

As to the demand made by a person who does not show that he was guardian, or authorized to make it, I perfectly concur with the counsel that the defendant might well refuse to deliver up the horse on such a demand; but this should have been done on that ground, and not on the claim of right on her part; it is the claim of right which gives to her possession an adverse character.

I think the defendant has no pretence to shelter herself under the bailment from the executor; for she identifies herself with him, and if his title is bad her possession is wrongful. But the judgment must be reversed and a new trial granted, for the cause first mentioned.

PER CURIAM. New Trial.

Cited: Powell v. Powell, 21 N. C., 380; *Savage v. Carter,* 64 N. C., 197; *Smith v. Durham,* 127 N. C., 419.

(136)

JOURDAN DENSON v. JOEL SLEDGE.

FROM FRANKLIN.

1. A promise made to a sheriff to indemnify him for doing an unlawful act, or for omtiting to perform his official duty, is void. The rule, however, is subject to the exception that the act be not one which is apparently lawful in furtherance of the sheriff's duty.
2. Hence a promise to indemnify a sheriff for neglecting to levy a *fi. fa.*, or for postponing its execution, is bad. But an indemnity to him for levying a *fi. fa.* against A upon goods in the possession of B is valid.
3. Where the sheriff was a surety to the principal defendant and a party to the writ, which for that cause improvidently issued to him, it was held that the promise of a stranger to pay the debt on the return day of the writ, if the sheriff would not proceed under it, was void, although the writ improperly issued to the sheriff, and he was surety for the debt.
4. The Act of 1777, sec. 8 (Rev., ch. 331), and the statute 23d Hen., 6, ch. 10, apply only to bonds given by persons in the ward of the sheriff, not to bonds given upon writs of *fi. fa.*, and the latter are good unless given upon a consideration bad at common law.
5. The Act of 1807 (Rev., ch. 731), authorizing sheriffs to take forthcoming bonds, does not interfere with the rules of the common law touching the duty of a sheriff; it is merely permissive, and no agreement can be enforced under it which is not strictly in pursuance of it.

ASSUMPSIT upon a special contract. On the trial before his Honor, Judge NORWOOD, on the last fall circuit, the case was that the plaintiff, being the sheriff of Franklin, had in his hands sundry writs of *fieri facias* against one Jeffreys. The defendant, in consideration that the plaintiff would suspend proceedings thereon, and wait with Jeffreys, promised that he, the defendant, would pay the amount due upon the judgments. Three judgments and executions against Jeffreys were produced; and it appeared that the plaintiff was a party to two of them, being the surety of Jeffreys, and sued in the same action with him.

The jury, under the directions of his honor, returned a verdict in favor of the plaintiff for the amount of the judgments, and (137) the defendant appealed.

Badger & W. H. Haywood, for the defendant.
Seawell & Hillman, for the plaintiff.

TOOMER, J. The sheriff is the officer constituted by law to execute the process of the Court. It is his duty to execute it with due diligence and reasonable promptitude. It is laid down in Bac. Abr., Sheriff, N., and the position has been recognized by this Court in *Lindsay v. Armfield,* 10 N. C., 548, that he is bound to execute all process which

(141) comes to his hands with the utmost expedition, or as soon after receiving it as the nature of the case will admit.

The plaintiff, being sheriff of Franklin County, had in his hands certain executions, and the defendant, in consideration that the plaintiff would forbear to levy those executions, and would wait for the money due thereon, promised to indemnify him. The plaintiff alleges the forbearance took place, and he has sustained damage thereby; and now asks the aid of the Court in obtaining indemnity for disobeying its process and violating his duty. This is the substance of the transaction, whatever coloring ingenuity may have given it. The consideration was an omission by a public officer to perform the duties of his office; the promise of the defendant was to induce him to omit the performance of that duty.

The consideration is illegal and the promise void, being repugnant to the general policy of the common law. An agreement to induce a public officer to omit the performance of his duty is void. Chitty on Contracts, 221. A contract to indemnify a sheriff for doing that which he ought to do is good; a contract to indemnify him for doing that which he ought not to do is void. *Blackett v. Crissop,* 1 Ld. Ray., 278; Plowden, 64. The agreement of the plaintiff to forbear making the levy—to suspend proceedings on the process, and wait for the money due thereon—was in violation of his duty and contrary to law. The contract implies a power and ability to levy the execution, which it was his duty to do, but which he omitted, at the instance and request of the defendant, and under the inducement of a promise of indemnity.

The act of 1807 (Rev., ch. 731) authorizes the officer, when he has levied an execution, to permit the property so levied on to remain with the possessor—the officer taking bond for the forthcoming thereof to answer the process—and he remaining, in all respects, liable to the claims of the plaintiff, as before the enaction of the law. This (142) act is predicated upon the common law principles recognized by this decision. It sanctions the positions that it is the duty of the sheriff to execute final process expeditiously; that when he seizes property under an execution, and by virtue of his office, he must take it into the custody of the law—he must be its keeper; and that any agreement to omit the performance of his duty by postponing the period of levy, or to permit the defendant in the execution to retain the possession and enjoy the use of the property levied on, after the seizure, would, at common law, be illegal and void. The sheriff can now, by taking bond and pursuing the directions of this act, permit the property levied on to remain with the person in whose possession it was found at the time of the levy. The bond would have been void before the passage of this act, but is now rendered obligatory. The act is permissive in its

provisions, and all the former liabilities of the officer still continue. The mischiefs intended to be remedied were the inconveniences to which the possessor of the property levied on was exposed by being deprived of its use until the day of sale, and of being subjected to the expense of its being kept in *custodia legis*—inconveniences which were particularly oppressive to the unfortunate debtor when slaves were the subjects of the levy. This act does not interfere with the common-law rule prescribing the duty of the sheriff in making the levy; neither does it authorize any postponement thereof, nor does it sanction any stipulation of forbearance in discharge of this part of his duty. No agreement can be enforced under this act which is not strictly in pursuance thereof. This contract is not within its purview.

The three executions which are comprehended by the agreement that is the subject-matter of this controversy were against one Wm. Jeffreys; two of them were against Jeffreys, the principal debtor, and embraced others, who were his sureties, one of whom was a party defendant, as the surety of Jeffreys, in each of the two latter executions. It has been said these two executions issued irregularly to the sheriff, as he was a party defendant in each; and they imparted no power to him, and he could exercise no authority under them. The sheriff, in his ministerial capacity, is bound to execute all process issuing to him from a court of competent jurisdiction. If the court possess jurisdiction the officer is bound to obey the mandate of the writ, although it may be improvidently issued. It is true the ministerial office of the coroner is to act as the sheriff's substitute. If just exception can be taken to the sheriff, as when he is interested in the suit, or of kindred to either of the parties, then the process should be awarded to the coroner. 1 Bl. Com., 344, 349. Our acts of 1777 and 1779 only provide for the issuing of process to the coroner when there is no person properly qualified to act as sheriff in the county. The plaintiff in each of these executions was willing to confide in the sheriff; the court had jurisdiction, and issued the process to him; he received and recognized the writs in his official character, and although they may have improvidently issued, he was bound to execute them. *McAuley's case,* Cro. Jac., 299; *Bull v. Steward,* 1 Wils., 225; 1 Str., 509. (143)

It has been intimated that this is a promise by the defendant to pay the debts due on the executions, and not an undertaking to indemnify the sheriff. I perceive no difference; they are in principle the same. The consideration was the omission of the officer to discharge his duty, and is illegal. The promise was an inducement to the sheriff to omit that which the process commanded, and the law required him to do, and is void.

Beaufage's case, 10 Coke., 99b, has been much relied on by plaintiff's

counsel. A writ of *fieri facias* had issued to the sheriff, and he took from the defendant in the execution a bond for the payment of
(144) the money into court at the return of the writ. In declaring on a bond it is not necessary to aver any consideration. It is true that if it be given on an illegal consideration the obligor can show the illegality and avoid the obligation. But it does not appear that there was anything illegal in the transaction; there was no attempt to show the illegality. There was no stipulation or undertaking on the part of the sheriff to omit his duty, or to forbear its performance; no agreement to postpone the making of a levy, or to suspend the proceedings under the execution. The taking of the bond was not disadvantageous to the plaintiff; it furnished additional security for the payment of the debt, without interfering with the execution of the process or the duty of the officer, and, under such circumstances, was not contrary to the policy of the law. The case does not state what was the inducement of the obligor for executing the bond, or whether the bond was taken by the sheriff with the knowledge and consent and under the direction of the plaintiff in the execution. There was no attempt, however, to show any illegality in the consideration. The doubt entertained and expressed by the case was whether the bond was not void by the statute of 23 Henry, 6. But it was decided that the statute only extended to bonds taken from persons in the ward of the sheriff. *Dawson, Sheriff of B., v. Burman,* referred to in *Beaufage's case,* is of the like character, and was decided upon the same principles.

The case now before the court is an action of *assumpsit,* on a parol promise. It was necessary to set forth in the declaration the consideration upon which the promise was founded. The sheriff by his agreement tied his own hands; he stipulated to omit the performance of his duty; he undertook that he would not be quickened to action, either by the mandate of the law or the request of the plaintiffs in the executions.

These stipulations were the consideration of the promise; the
(145) consideration is illegal, and the promise void. It is not contended by defendant's counsel that either statute, 23 Henry, 6, or our act of 1777 (ch. 18, sec. 8), has anything to do with the case before the court; they only refer to persons in the ward or custody of the sheriff.

HALL, J. Perhaps, in the present case, the end of justice would be answered by affirming the judgment of the Superior Court. But if the general policy and justice of the country is concerned in the precedent which such a judgment would establish it ought to be examined.

It is universally true that all contracts and promises which have a tendency to impair the administration of justice are void. Com. on Contr., 23; Fonb., 227; *Turner v. Vaughan,* 2 Wils., 339; 3 Term, 17;

Plowden, 64; *Blackett v. Crissop,* 1 Ld. Ray., 278; Hob., 14; 5 Mass., 385. Many more authorities might be cited in support of this general position.

To what did the promise of the defendant tend in the present case? Certainly to a laxity of official duty in the plaintiff. The consideration of the promise was that the plaintiff should suspend proceedings on the executions and wait with the defendant for the money due. It is asked why returns upon those executions were not made to Court as usual; the answer is that they were suspended by the promise; of course the plaintiffs in them were kept out of their money in consequence of the promise, and therefore the promise became an impediment in the administration of justice, and on that account should be considered void, but not on account of the defendant, for he is entitled to no favor.

HENDERSON, C. J. It is impossible to support this action, taking it as a promise to indemnify the plaintiff, the sheriff, for forbearing to levy the executions, or a promise to pay their amount at Court. In either case, without the promise of forebearance on the part (146) of the sheriff, they are mere nude facts, and will not support an action; and taken with the consideration either promise is void, for the general rule is that no promise, and more especially one to an officer of the law, to indemnify him for doing a wrongful or unlawful act, is binding; for such acts can not form the consideration of a lawful promise. This is the general rule, and I am satisfied that this case does not come within any exception. Exceptions there are, for we know that there may be an indemnity given for acts which are in the abstract wrongful. As if a sheriff has in his hands an execution against A, at the suit of B, and B points out property in the possession of C, as belonging to A, and requests the sheriff to levy on it, and gives him an indemnity for so doing, this promise is good, and if C sues the sheriff for seizing the property, alleging it to be his, and not A's, and recovers of the sheriff on that ground, B is answerable to the sheriff, upon his promise of indemnity. Yet this act in the sheriff is wrongful, for he had no authority under the execution against the property of A to seize the property of C. The execution warranted no such seizure, and he stands exposed as a trespasser to the action of C. The counsel for the defendant contended that the rule is that if the act would be lawful, taking the facts to be as represented by the person who gives the indemnity, then the indemnity is good. But if upon those facts, taking them to be true, the act would be unlawful, then the indemnity is not good; as in the case put, if the goods were really the property of A, as B represented them to be, then the seizure would be lawful and the indemnity good. But I think that is not the rule. For change the case thus: There is property in the

possession of A, and C informs the sheriff that it is not the property of A, but his (C's) property, and indemnifies the sheriff for omitting to levy on it, and upon a return of *nulla bona,* B, the plaintiff in the execution, recovers of the sheriff by showing that it was the prop-
(147) erty of A, and was liable to be taken on his execution. It is admitted, I believe, on all hands, that this indemnity is bad, for an officer can not be indemnified for omitting to do his duty. The rule I take to be this: The sheriff or other officer may be indemnified for doing an act apparently lawful, in furtherance of his duty, and in giving a character to the act facts represented by the person who gives the indemnity are to be taken as true, but in no case can he be indemnified for omitting to do what the event proved to have been his duty to have done. As in the case last put, if the goods were the property of A, and therefore subject to B's executions, the sheriff could not be indemnified for omitting to levy upon them and for returning *nulla bona.* That is, the sheriff may, under the circumstances before mentioned, be indemnified for doing an act which turns out to be unlawful. But in no case can he be indemnified for omitting to do what it was his duty to have done. In the first case it is in furtherance of the percept of his writ, and to obtain the end designed by it. In the latter, it tends to thwart the object, and by a series of indemnities, *ad infinitum,* the payment of the money to the creditor might be indefinitely postponed. I have examined a written argument filed by one of the counsel for the plaintiff. I think that the authorities relied on do not impugn the grounds of this decision, but tend rather to strengthen them. The principle case relied on is Beaufage's case, 10 Rep., 99. That was a case where the sheriff had taken a bond of the defendant in a *fieri facias* to pay the money into Court at the return of the writ. It was held that the bond was not void by 23 Henry VI, ch. 10, or by the common law. In that case there was no agreement to forbear, as the consideration of the bond. It does not appear that the sheriff either omitted to perform or promised to omit to perform any part of his duty as the consideration of the bond. That bond, was, therefore, only accumulative, the sheriff being left free
(148) to perform his duty. And the bond being good without any consideration, and not having a bad one, was supported. *Lenthall v. Cooke,* 1 Saun., 161, I think is much at point. A bond taken by a sheriff of a prisoner that he will be a true prisoner is good if not taken for ease and favor; that is, if its consideration is not any relaxation of his duty as sheriff, it is good. But if it is taken for ease and favor, the bond is bad. Apply that rule to the present case, and it determines the question. I give no opinion on the other points.

PER CURIAM. New Trial.

Cited: Roberts v. Scales, 23 N. C., 93; *Grady v. Threadgill,* 35 N. C., 229; *S. v. Tatom,* 69 N. C., 37; *Griffin v. Hasty,* 94 N. C., 441.

ABEL SHEPHERD v. ISAAC LANE.

FROM RANDOLPH.

1. Deputy clerks can be appointed only in the mode prescribed by the Act of 1777, sec. 86 (Rev., ch. 115).
2. A writ signed by an attorney under a verbal deputation of the clerk to all the members of the bar is a nulltiy, and the sheriff is not liable for not acting under it, nor for making a false return on it—and this, notwithstanding he treated the writ as valid, and, upon his return of it, it was recognized to be so by the clerk whose name was signed thereto.

CASE against the defendant, the sheriff of Randolph, in two counts: First, for neglecting to arrest one Shubal Gardner, upon a *capias ad respondendum,* in debt, at the instance of the plaintiff, sued out by the plaintiff; and, second, for making a false return to that writ. Upon the plea of not guilty, the plaintiff, on the trial before RUFFIN, J., made out his case by proving the issue of a writ of *capias ad respondendum* in debt from the County Court of Randolph, in which he was the plaintiff, and Gardner defendant—that the defendant had been guilty of negligence in not serving that writ, and had made a false return thereon.

The defense set up was that the paper, which purported to be (149) a writ in that cause, was a nullity, and upon this point the defendant proved that it was not written, signed or issued by the clerk of the County Court of Randolph, but that it was signed by a gentleman of the bar. This gentleman testified that the clerk was not present when the paper was signed and issued, and that the whole of it was in his (the witness') handwriting; that he had been an attorney of the County Court of Randolph, whence the writ purported to issue, for twelve years; that the person whose name was signed to the paper as clerk had filled that office during the whole of that time; and that from his admission as an attorney, he, together with all the other attorneys of the Court, had been expressly authorized by a verbal deputation of the clerk, to fill up and sign writs of *subpoena* and of *capias ad respondendum,* which writs had always been recognized by the clerk as valid and lawful, and that the writ in question was, upon the return thereof by the defendant, put upon the files of the Court as a writ by the clerk, who ratified and confirmed the act of the witness; and that the writ was now in the record of the County Court.

Upon this testimony the jury, under the instruction of the presiding Judge, returned a verdict for the plaintiff, and the defendant appealed.

Gaston, for the defendant.
Ruffin, contra.

TOOMER, J. The plaintiff alleges that he sued out a writ of *capias ad respondendum* in an action of debt from the County Court of Randolph, against one Shubal Gardner, which came to the hands of the de-
(150) fendant as sheriff of Randolph, who neglected to execute the same, and made a false return thereon. This is an action on the case to recover damages. The plaintiff declares in two counts—first, for the neglect of duty, and, secondly, for the false return. The defendant pleads not guilty. The validity of the writ is the question for the decision of this Court; it is expressly averred in the declaration, and is the gravamen of the action.

The Constitution, sec. 36, directs that all writs shall run in the name of the State, and bear test, and be signed by the clerks of the respective Courts. The defendant says the paper purporting to be a writ was void, and gave him no authority to make the arrest therein required; that it was neither signed, nor issued by the Clerk of Randolph County Court. A gentleman of the bar was introduced as a witness, on the trial below, who testified that the paper had been written, signed, and issued by him, in the name of the clerk, but in his absence; that he had been practicing as an attorney in the Court for twelve years, and on his admission to the bar he and the other members thereof had been verbally authorized by the clerk to write, sign and issue, in his name, writs of *capias ad respondendum;* and they, and each of them, continued to exercise the authority from that period to the time of giving testimony.

The clerk is selected for his "skill and probity"; his appointment is made by the jurdicial officers of the Court, and is recorded on its minutes. He has the custody of the archives of the Court. He is, by virtue of his office, to issue writs, and by constitutional injunction must sign his name thereto. A writ of *capias ad respondendum,* by our court law, forms a part of the record of the suit, which it is issued to commence. In our State, the issuing of the writ is the commencement of the action. The writ of a Court of record, having a seal, is known by that seal, which is in the keeping of the clerk, and is impressed by
(151) him. The affixing of the seal was a constituent part of the writ, until the act of 1797, dispensed with its use, in process issued to the county in which the clerk officially acts. Dispensing with the seal does not change the character of the writ. It possesses the same dignity and solemnity now as when clothed with that emblem of justice. It imparts the same power and authority to the officer to whom it is directed. It is equally beneficial to him who sues it out, and equally dangerous to the citizen against whom it issues. It commands the sheriff to take and safely keep him who is named therein as the subject of the arrest. The loss of personal liberty, with all the privations and inconveniences

incident to confinement in a public jail, may be the consequence of this exercise of authority.

The seal of office, and the signature of the clerk, are the testimonials by which the authenticity of writs is to be known. Remove these *indicia* of authenticity and you endanger the peace of society, and lessen the security of the citizen by leaving him in doubt as to the genuineness and character of the instrument which commands his arrest; and you thus augment the responsibility and danger of the officer to whom it is directed. By dispensing with the seal, as to process to be confined to the county in which it issues, the Legislature have increased the necessity for a strict compliance with the constitutional requisition that all writs should be signed by the clerk of the Court from which they are issued, whose writing may have a marked character, and whose signature may be generally known.

By Laws 1777, ch. 115, sec. 86, the clerk of every Court may appoint a deputy, "who shall take the oath appointed for the qualification of public officers, and an oath of office; and in case of the death of the clerk of any Court in the vacation his deputy shall hold the office of clerk until he or another shall be appointed agreeably to law." It cannot be pretended that the gentleman who signed and issued this writ was the deputy whose appointment was sanctioned by this (152) act. It does not appear that he had taken either of the prescribed oaths, or that he had undertaken the duties and responsibilities of a deputy. He was one of a whole bar, who claimed and exercised equal authority. The case shows that he was claiming to act as an agent, and not assuming the character of the deputy authorized by law. The act of legislation contradicts the idea of any other agency in the discharge of the clerical duties than that prescribed by law. So far as assistance to the incumbent or provision for his disability was in the contemplation of the Legislature, the selection of a competent deputy will meet every emergency, and will supersede all necessity for any other agency. The legislative body thought that no man should be called to the exercise of these functions without performing them under the obligation of solemn oaths. If the Legislature did believe that without this clause in the Act of 1777 the clerical functions could be performed by agency, at the will of the incumbent, then they must be understood, by irresistible implication, as restricting the agency to the deputy appointed and qualified in the mode prescribed by law.

The same act of the general assembly which provided for the appointment of clerks prescribed the mode of constituting deputies. But it is said that the signing and issuing of writs are ministerial duties, which the clerk can perform by agency, and that this legislative enactment on the subject of deputies was principally to authorize some agent to act, in

the event of the clerk's death in vacations, and was not intended to restrict the exercise of this common law right, *nam qui facit per alium, facit per se.* Let these positions be conceded, and it will then be necessary to inquire whether the agent on this occasion had authority to sign and issue the writ. It is not sufficient to ascertain that the clerk had power, and could delegate it. But did he so delegate it as to au-
(153) thorize its exercise. If the paper be issued without authority, if it be not a writ, the execution of it would make the sheriff guilty of false imprisonment. The plaintiff directing and participating in its execution, would be a trespasser; and the party to be arrested could repel force by force, and resist the officer even unto death.

For the ordinary purposes of business and commerce, authority verbally given is deemed sufficient. But the clerk could not, as an individual, authorize an agent to transfer his freehold, or to bind him by deed, unless by an instrument of writing under seal, on account of the dignity and solemnity of the acts in legal contemplation. Power to bind the principal by deed can only be given by deed; authority should generally be delegated by acts, commensurate in dignity and solemnity with the acts to be done. Recollect, that the document to be signed and issued would, except for the acts of 1797, have the impress of an official seal, as well as the name of a public officer; that it now has, from the signing, all the authority it had when bearing the seal; that it forms part of a record; that it is the act of a Court of record, by its agent duly constituted, and that it is the command of the law to a public officer to arrest a free citizen. Should such power be given by an instrument of less dignity than a deed? There should at least be some written evidence of the delegation of such authority. The repose of society, the security of the citizen, and the safety of the officer, require some written memorial of the transfer of such power. The authority in this case was verbally given to the agent, and he was not authorized to perform an isolated act. He was not directed by the clerk to sign in his name a single writ. But the agent was one of several, or many persons, authorized to do acts, indefinite in number, and unlimited as to time.

In England, when an original writ is sued out of the ordinary Court of Chancery, the *capias,* which is mere leading process, is put
(154) into the hands of the sheriff, and he issues his warrant to the bailiff, who executes it. There the sheriff delegates his power by a written precept. In *Dick v. Stoker,* 12 N. C., 91, it was held by this Court that bail to authorize the arrest and surrender of their principal by an agent must give him the authority "by writing at least."

It is said the defendant, as sheriff, received and returned to court the paper as a writ, and should not now be heard as denying its validity. He was the officer of the law to execute process, not to issue it.

He had no authority to make a writ. His recognition of it could not give a character to the document which it did not posses at the time of its issuing. His mistake could not cure any defect in the paper, nor was he estopped from showing that the paper was a nullity. The decision of this Court, in *Governor v. McRae,* 10 N. C., 226, removes this objection. A paper purporting to be a writ of *capias ad respondendum* was issued from the Superior Court of Craven, but without the seal of the court, and was directed and came to the hands of McRae, as sheriff of Cumberland, which he returned to Court with the endorsement "too late to hand," and signed in his official capacity. The action was brought against the administrators of McRae on his official bond; and the breaches assigned were for neglect of duty in not executing said writ, and for making a false return. It appeared that the paper came to the hands of the intestate in due time, and he could have executed it. But the defendant contended, as it had no seal, it was not a writ, and the sheriff had no authority to execute it. This was the opinion of the Court, and it was decided that the intestate, by his recognition of the paper, could not make it a writ, nor were his representatives and sureties estopped from showing that it was not a writ, and the plaintiff was nonsuited. The signature of the clerk and the seal of the court are two of the component parts of a writ. In *Governor v. McRea,* the seal was wanting; here it is defective (155) for the want of the signature of the clerk.

It is also said that the clerk subsequently recognized and adopted the act of the agent, by receiving the paper as a writ and filing it among the records of the court. The subsequent acquiescence of the clerk in the act of the agent could not give the document a character which it did not possess when it was in the hands of the sheriff. And if a new character could be thus imparted it could not have a retrospective effect, so as to make the officer liable for the non-execution of a paper, which was inoperative while in his hands. Had the sheriff attempted to exercise power under the paper, and was in the act of making the arrest when the authority was denied, and force met with force, and death ensued, could the grade of the homicide be affected by the subsequent assent or refusal of the clerk to confirm the act of the agent in signing and issuing the paper? Such a position can not be assumed.

It is supposed a practice has prevailed in many counties of the State which authorizes gentlemen of the bar to write and sign writs of *capias ad respondendum* in the name of the clerk, and then to issue them; and that declaring such paper so issued not to have the character of a writ will be productive of serious inconvenience, and extensive mischief. It is believed such a practice has been confined to few counties, and is circumscribed in extent. But the more extended the error the greater

necessity for arresting its progress. Much inconvenience is not apprehended from the decision; at least, no great public mischief. If a paper thus issued be executed, and the defendant appears and pleads in chief, he will thereby waive the objection. The defendant may come into court without process, and make himself party to a suit; he can by appearance dispense with process to bring him in. If he submit to the arrest, and give bail, he can then plead in abatement to the writ, and the defect will be fatal. But if he plead in chief it will be (156) a waiver of the defect, and be equivalent to an acknowledgment that he had been brought into court by proper process. *Dudley v. Carmolt,* 5 N. C., 340.

Cited: Worthington v. Arnold, post, 363; *Garner v. Lane,* 14 N. C., 54; *Marsh v. Cohen,* 68 N. C., 288; *Taylor v. Taylor,* 83 N. C., 118; *Henderson v. Graham,* 84 N. C., 501; *Miller v. Miller,* 89 N. C., 405; *Piland v. Taylor,* 113 N. C., 3; *Redmond v. Mullenax, Ib.,* 511.

DANIEL GLISSON, JR., v. DANIEL and WILLIAM HERRING.

FROM DUPLIN.

1. In England no advantage can be taken of a variance between the original and the declaration except upon oyer of the writ, because the writ issues from another court, and does not become a part of the record unless oyer be had of it.
2. But here the writ issues from the court to which it is returnable and where the action is to be tried, and is part of the record without oyer. A variance between it and the declaration is fatal, even after verdict.
3. Where the writ was in trover and the declaration in detinue the judgment was arrested.
4. And the writ being upon the title of the plaintiff's intestate, and the declaration upon that of the plaintiff himself, the variance is equally fatal.
5. In such a case the Supreme Court has no power to amend, notwithstanding the Act of 1824 (Rev., ch. 1233).

In this case the writ was sued out in the name of the plaintiff, as "administrator of Nancy Glisson"; by it, the sheriff was commanded to take the bodies of the defendants "to answer Daniel Glisson, Jun., administrator of Nancy Glisson, of a plea of trespass on the case, to his damage $5,000."

The declaration was in the following form:

"D. H. and W. H. were attached to answer D. G., Jun,, of a plea of trespass on the case, and thereupon the said D. G., Jun., by, etc., complains for that, whereas, the said D. G., Jun., heretofore, to wit, on, etc.

at etc., was lawfully possessed as of his own property of certain negro slaves, to wit, Mary, etc., of great value, to wit, of the value, etc., and being so possessed thereof, he, the said D. G., Jun., afterwards, to wit, on, etc., at, etc., casually lost the said slaves out of his possession, and the same afterwards, to wit, on, etc., at, etc., came to (157) the possession, of the said D. H. and W. H. by finding. Yet the said D. H. and W. H., well knowing the said slaves to be the property of the said D. G., Jun., have not as yet delivered the said slaves to the said D. G., Jun., although often requested so to do, and have detained, and still do detain the same, to wit, at, etc., to the damage of the said D. G., Jun., and therefore, etc."

After a verdict for the plaintiff the defendant moved in the court below in arrest of judgment, on the ground of a variance between the writ and the declaration—the former being to answer the plaintiff on the title of his intestate, Nancy Glisson, and the latter counting upon the title of the plaintiff himself. The rule obtained on this motion was discharged by his Honor, Judge NORWOOD, and judgment rendered for the plaintiff, from which the defendants appealed.

In this Court, *Badger,* for the defendants.
Gaston, for the plaintiff.

TOOMER, J. The writ is in case, in the name of the plaintiff as administrator of Nancy Glisson; the declaration is in detinue, in plaintiff's own right. For these variances it is insisted by the defendant that judgment should be arrested.

In England, for the trial of suits at common law, writs issue from the Court of Chancery, and they never are of record in the Court in which the cause is tried, except upon oyer. All original writs issue out of the *officina justitiae,* from which they are issued *ex debita justitiae,* to suit the exigency of every case. Variances between the writ and declaration are only noticed when oyer has been had of the original. In the English Courts oyer is refused, to prevent objections for variance between the writ and declaration. There the *capias* is considered as mere leading process, to bring the defendant into Court, to be notified of the cause of action, and when it has performed this office, it is *functus officio.* It forms no part of the record, and no advantage is taken of its defects, or its variances from the declaration, unless on a motion to set aside the proceedings, which is addressed to the discretion of the Court, and is only granted for the attainment of justice. No inconveniences occur in England from this practice. Neither the defendant nor his bail can sustain injury, because no step is taken in the cause until (159) after the appearance of the defendant, when the declaration is

served on him, and he can then obtain time to plead if he be taken by surprise; and the bail to the writ are discharged by the principal's appearance.

This notice has been taken of the practice in the English Courts to point out the great difference between legal proceedings in that country and in our State. They differ upon fundamental principles. By the organization of our Courts the original writ issues from the Court in which the suit is instituted, and stands for trial. It forms part of the record of the cause. A prayer for the oyer of the writ is unnecessary, and is unknown to our practice. It answers the double purpose of writ and process. It executes the offices of both, and all its functions are not executed by bringing the defendant into Court. Here, by the construction of our Court law, judgment may be rendered by default against defendant, as well before as after appearance, and in some cases final judgment. Our bail to the writ is also to the action. Hence great inconvenience might arise, and much injury result, from considering our original writ as mere process, and viewing it as no part of the record. For a more enlarged and able view of this subject I refer to *Stamps v. Graves,* 11 N. C., 102, in which these points have already been adjudged by this Court.

It has been decided in *Stamps v. Graves, supra,* that the writ being in debt, and the declaration in *assumpsit,* the variance is fatal. Here the writ is in case, and the declaration in detinue. The variance is equally fatal. There is an essential difference between the two actions. Trover is to recover damages for the unlawful conversion of chattels. Detinue is to recover the specific articles, and also damages for their unlawful detention. In trover the judgment is that the plaintiff do recover his damages; in detinue, that he do recover the goods (or the value
(160) thereof; if the plaintiff cannot have the goods) and his damages. In which should judgment be rendered?

But it is said the declaration, though not technically drawn, is substantially good in trover. It begins by stating that the defendants were attached to answer the plaintiff of a plea of trespass on the case, and thereupon the plaintiff, by his attorney, complains, and then proceeds to set forth the cause of action. The recital of the writ, at the commencement, forms no part of the declaration, and cannot alter the character thereof. It is also said that the averments of possession by plaintiff, and of finding by defendants, are common to both motions, and comport with a declaration in trover; and no departure is observed, until near the close of the declaration, when, instead of averring the conversion, according to the precedents in that form of action, it is averred that the defendants "have detained, and still do detain," in conformity to the precedents in detinue. And it is contended, with much ingenuity,

that these words, *ex vi termini,* import a wrongful detention; and a wrongful detention is a conversion, and not merely evidence of it, and thus the declaration is substantially good in trover. Conversion and detention are not convertible terms. Detention may be evidence of conversion, but it is not conclusive of the facts. Setting forth a detention is not an averment of the facts of conversion, and conversion must be averred in a declaration in trover. It is the gist of the action. The declaration accords with the precedents in detinue, and is different from the forms prescribed in trover. The same declaration will not answer for either action. This is a good declaration in detinue; it cannot be admitted that it will answer in trover. To avoid confusion the boundaries of actions should be distinctly marked and carefully preserved. The variance is fatal.

The plaintiff issues his writ as administrator of his intestate, Nancy Glisson, and then declares in his own right. The writ and declaration are parts of the record of the same suit. Each sets (161) forth a different right of action, and they are repugnant to each other. Establishing the position that the writ is a part of the record forbids this departure from it in the declaration. By confounding different and distinct rights in the same action the important purposes of pleading may be defeated and confusion may be introduced. It is believed this also is a fatal variance.

It is contended that the variance between the writ and declaration are cured after verdict, by statute 5, Geo. I, ch. 13. In *Dudley v. Carmolt,* 5 N. C., 340, the writ was tested in the name of the clerk, and it was signed by the deputy clerk in his own name; and it was decided that the statute of 5 Geo. I, is in force in this State, and cures the defect in the writ. The defendant should have taken advantage in that case of the defect in the writ, by plea in abatement; but he pleaded in chief, and thereby waived the right of subsequently making this objection. The decision of the Court to render judgment for the plaintiff is deemed correct, upon the general rules of pleading, without invoking the aid of the statute of Geo. I, to cure the defect after verdict. In *Stamps v. Graves,* where the writ was in debt, and the declaration in assumpsit, this Court, with much deliberation, decided that the variance was fatal, even after verdict, and was not cured by the statute of 5 Geo. I. That the statute was, for certain purposes, in force here, and as to all matters of form was to have full effect and complete operation; but this was such matter of substance as could not be aided here by that statute.

As to the motion to amend the pleading, under the act of 1824, ch. 3, so as to make it an action of trover, in the plaintiff's own right, the question has been settled by this Court in *Matlock v. Gray,* 11 N. C., 1.

(162) It is there decided that this Court has not power to make the amendment. The party can take nothing by the motion.

PER CURIAM. Reversed.

Overruled: West v. Ratledge, 15 N. C., 41.

MATHIAS IDOL v. BENJAMIN JONES.

FROM STOKES.

1. A qualified property in bees and honey exists in the owner of the soil whereon they are found.
2. The words "he has stolen my bee tree" refer to the tree and not to the bees or honey, and if a standing tree is meant, they are not actionable.
3. The word "tree" without explanation, *ex vi termini,* means a standing tree.
4. The words "he was a rogue, and kept at home a rogue-hole, and harbored rogues," are not actionable.

CASE for words tried on the fall circuit of 1827, before STRANGE, J.

The declaration contained two sets of counts. In the first the words were alleged to be "he," (the plaintiff) "has stolen my bee tree"; in the second, "he" (the plaintiff) "was a rogue, and kept at home a rogue-hole, and harbored rogues."

On the trial, after proof of the publication of the words, the case turned out to be that the plaintiff came to some young men who lived in his family, when they were in the act of cutting down a tree which contained honey, and which was claimed by the defendant, although it was not upon his land. That the plaintiff knowing the honey to be claimed by the defendant, gave him notice that it had been gathered, and invited him to partake of it, which he refused. His Honor instructed the jury that a standing tree, whether it contained bees or anything else, was not the subject of larceny, and that if in the charge made by the (163) defendant a standing tree was meant, the words were not actionable. That if they thought the charge of harboring rogues referred to the plaintiff's maintaining and harboring the young men who had assisted him in cutting down the tree, and that the defendant did not refer to the plaintiff's harboring any other rogues, if the persons referred to were only charged with being rogues on account of their agency in the affair of the tree, they ought to find for the defendant upon this set of counts if they found for him upon the first. His Honor reserved the question whether a tree *ex vi termini* did not mean a standing tree, unless otherwise expressed, and whether the words charged in the second set of counts were actionable in themselves. But a verdict being re-

turned for the defendant, these questions were, of course, not again stirred. Judgment being rendered upon the verdict, the plaintiff appealed.

Nash, for the plaintiff.
No counsel for the defendant.

TOOMER, J. Things which adhere to the freehold, as trees, are not, at common law, the subject of larceny. The severance of them from the soil, without the consent of the owner, is a mere trespass. If they be severed at one time, and left on the land, so as to become personalty, and to be in the constructive possession of the proprietor, and then be subsequently taken away, such removal may be felonious. 4 Bl. Com., 232. Bees are *ferae naturae,* but when hived and reclaimed by the art and industry of man, he has a qualified property in them, by the law of nature. But it has been said that in England the only ownership of bees is *ratione soli;* and the charter of the forest, which allows every man to be entitled to the honey found within his own woods, sanctions the doctrine that a qualified property may be also had in bees, in consideration of the property of the soil whereon they are found. 2 Bl. Com., 392. The same rights of ownership in bees and (164) honey, by reason of the ownership of the soil whereon they are found, are supposed to obtain in this country.

This is an action of slander, and the first count in the declaration alleges that the defendant had said "plaintiff has stolen my bee-tree." The charge refers to the larcenous taking of a tree, and not of bees or honey. But the matter was submitted to the decision of a jury, of whose verdict the plaintiff now complains. The Judge instructed the jury "that a standing tree was not the subject of larceny, and if they thought the charge of stealing referred to a standing tree, the words were not actionable"; "they were also directed to inquire whether the words spoken contained a charge of felony in stealing honey." And the Judge reserved the question whether "a tree," *ex vi termini,* did not imply a standing tree, unless otherwise expressed. The law was correctly stated, and it was left to the jury to decide what was the meaning of the expressions used. The jury believed from the evidence that the words referred to the cutting down of a standing tree, and found defendant "not guilty." If a man should say to another, "you are a thief, for you stole my tree," it is not actionable, for it appears that he had a trespass and not a felony in his contemplation. *Minors v. Leeford,* Cro. Jac., 114; Bull., N. P., 5; *Thompson v. Bernard,* 1 Camp. N. C., 48. These authorities seem to sanction the opinion that when a tree is spoken of, without any explanation, it implies *ex vi termini,* a standing

tree. But it was properly left to the jury in this case to ascertain the meaning of the words. So where the words said were, "you are a thief"; and the words proved, "you are a thief, you stole hoop poles, and saw-logs from off Delancy's land." The Judge left it the jury to decide, whether the defendant meant to charge a felony or only a trespass.

There was a verdict found for defendant, and on motion for a
(165) new trial the case was carried before the Supreme Court of New York, and the instruction to the jury was approved. *Dexter v. Faber,* 12 Johns., 239.

The other count, "that the plaintiff was a rogue, and kept at home a rogue-hole, and harbored rogues," was tried under circumstances advantageous to the plaintiff. The Judge gave to this allegation the most favorable construction for plaintiff, and he has no cause of complaint. The jury were instructed that if the defendant was not guilty on the first count, and they believed that the accusation of being a rogue and harboring rogues, referred only to cutting down the tree, and to harboring the young men who assisted in that affair, and to their and plaintiff's agency therein, and no allusion was made to the commission of any other felony, or the harboring of any other rogues, the words were not actionable. The Judge reserved the question whether the words charged in this count were in law actionable; and the verdict of the jury rendered it unnecessary to be decided. Were there any cause for complaint on this trial it could not proceed from the plaintiff. The only doubt was whether there was anything in this count to be submitted to a jury. It is believed the words set forth in this count, in their ordinary acceptation, are not actionable, and that an action cannot be maintained on them. The use of mere abusive epithets by defendant, and by him spoken of, or to the plaintiff, is not actionable. It has been held not actionable to say of plaintiff, "he is an arrant rogue, he is a cheating rogue, a runagate rogue." 1 Com. Dig., Action for Defam., F. 7; 2 Lev., 214; Hard., 8. They are abusive, and contain imputations of misfeazance, but not accusations of crime, and are not actionable without special damage arising from them. Harboring thieves and pirates would not be a crime, unless the person harboring them knew that they were thieves and pirates. And the words spoken should charge such

knowledge, or it must be imported from the words used, as by
(166) saying they were harbored against law, or the words are not actionable. *Morgan v. Kiffe,* Cro., Eliz., 52. *A fortiori,* it cannot be actionable to charge a man with harboring rogues.

In the instruction given the jury there is

PER CURIAM. No Error.

DUNCAN McRAE v. JAMES O'NEAL.

FROM ANSON.

1. In an action for a malicious prosecution, can the defendant give in evidence what he swore to when suing out the warrant or upon the trial of the indictment? *Quere?*
2. But where a witness was permitted to give this in evidence, without objection from the plaintiff, and a part of the defendant's oath when suing out the warrant, detailed information given by a negro. *Held*, that the plaintiff, having permitted a part to be given in evidence, the defendant had a right to have the whole stated.
3. On a question whether there was probable cause for an arrest, evidence of suspicious behavior in the plaintiff the day before it was made is admissible, although there was no proof that the defendant knew of that conduct at the time of the arrest.

CASE for maliciously prosecuting the plaintiff for stealing a negro, tried on the last circuit, before DANIEL, J.

The following is an abbreviation of the statement made up by the presiding Judge and attached to the record:

The plaintiff was a resident of Anson, and took a female slave belonging to him and started on foot to the State of Missouri, for the purpose, as he said, of selling the slave, and securing the titles to some land he owned there. On the way, he and the slave stopped at the shop of the defendant, six miles west of Morganton. The plaintiff and defendant were perfect strangers to each other; the former applied to the latter to purchase the slave, offered her at a very low price, (167) and agreed to take a horse at a very high price; said he owned land, slaves and horses in Anson, yet was on foot, and without clothes, except those he had on. The plaintiff stayed all night at the house of the defendant, who caused the arrest complained of to be made in the morning.

One of the magistrates who issued the warrant was examined. On the trial he proved that the defendant made oath to the above mentioned facts, and, further, that he (the defendant,) having his suspicions awakened, went during the night to the house where the negro slept, and examined her as to the truth of the story told by the plaintiff. The negro informed the defendant that she did not belong to the plaintiff, but had been taken by him from Anson county by stealth. The counsel for the plaintiff objected to this testimony, so far as it related to the conversation with the negro, but the objection was overruled by his honor. Two witnesses were examined by the defendant without objection. One of them proved that the plaintiff and the negro passed his house, two miles east of Morganton; that the plaintiff and the negro were on foot, the former appeared to be drunk, and was behaving in an unbecoming

manner towards the latter. The other witness swore that he was in Morganton when the plaintiff arrived there; that both himself and the slave were on foot, and had no clothes, except those they had on; that the manner and appearance of the plaintiff excited suspicion, and a man had talked of having him arrested on a charge of stealing the negro; but that he disturbed no person, and then next morning paid his bill and departed. The arrest complained of took place the succeeding morning.

His Honor left the credibility of the witnesses to the jury and instructed them that if they believed the facts deposed to, there was probable cause for the arrest, and that they might take into consideration the conduct and action of the plaintiff before he arrived at the de-
(168) fendant's house as circumstances to aid them in forming their opinion as to the truth or falsity of the facts deposed to by the plaintiff before the magistrate.

A verdict being returned for the defendant, a rule was obtained by the counsel for the plaintiff to show cause why a new trial should not be granted.

1. Because the Judge permitted the magistrate to give in evidence the defendant's declaration as to the conversation between him and the negro.

2. Because as there was no proof that the defendant knew the facts deposed to as to the conduct of the plaintiff before he reached Morganton, and while he was in that place, it was an error in the Judge to instruct the jury that they might estimate it in ascertaining the truth of the other facts, upon which the defendant might, or might not be pronounced, in law, to have had a probable cause for the arrest. The rule was discharged, and the plaintiff appealed.

The warrant and the proceedings formed part of the case. By them it appeared that the trial was postponed from 5 May, 1824, to 5 June following, and the plaintiff gave bail to enable him to return to Anson and procure testimony. On the day to which the trial was continued two justices gave judgment "that the said Duncan McRae shall be discharged on his paying a fine of ten shillings and all accruing costs."

No counsel appeared for the plaintiff in this Court.
The Attorney-General, for the defendant.

TOOMER, J. This is a suit for malicious prosecution. In this action it is necessary for the plaintiff to aver in his declaration, and to prove on the trial, that a prosecution was instituted against him by the defendant with malice and without probable cause. There
(169) must be both malice and a want of probable cause. *Johnson v. Martin,* 7 N. C., 249. Malice is a question of fact, and is

usually inferred from the absence of probable cause. *Ib.* 2; Starkie on Evi., 912. Malice is either express or implied. Express malice is not alleged in this case; the record of the trial below shows that the parties were strangers to each other until the evening of the arrest; and there was no evidence of any dispute or ill-will between them.

Malice alone is not sufficient; a just accusation may be founded on malicious motives. It has been decided in this Court in *Johnston v. Martin,* 7 N. C., 248, that the discharge of the plaintiff from the prosecution, by competent authority, after full examination, is *prima facie* evidence of the want of probable cause; and the burden of proving the probable cause is then thrown upon the defendant. This decision has been confirmed by this Court in *Bostick v. Rutherford,* 11 N. C., 83. The correctness of this position is questionable; the innocence of the plaintiff does not prove the absence of probable cause, and the decision conflicts with English authorities, as appears from *Purcell v. McNamara,* 9 East., 361. But the expediency of interfering at this time with the subject, and thus unsettling that which has long been considered settled, is very doubtful. The inquiry is not necessary in this case; the defendant does not complain of the verdict, and he alone could have been injured by the application of the principle.

The warrant, the affidavit on which it was issued, and the Judgment rendered on the warrant were given in evidence, and copies thereof are appended to the record, and form a part of this case. The affidavit states that the defendant believed from the conduct of the plaintiff, and of the negro woman accompanying him, that he had stolen her. The warrant is issued, the arrest made, and the plaintiff is brought with the process by a lawful officer, before two magistrates, on 5 May, 1824. The examination is postponed, at the instance of the plaintiff, until 5 June, and he is permitted to go at large on giving bail for his appearance at that day. On the appointed day the examination took (170) place. There is no written memorial of any discharge of the plaintiff from the accusation of felony; but a judgment was rendered by the examining magistrates, and by them entered on the warrant, that the plaintiff "shall be discharged on paying a fine of ten shillings and all accruing costs." Thus it would appear that the charge of felony had been abandoned, and that the magistrates proceeded to render judgment under the act of 1784, ch. 213, being an act for the restraint of idle and disorderly persons, commonly called "the vagrant act." But it is to be inferred from the record, and it is the only construction which can be given to it, that the magistrates did absolutely discharge the plaintiff from the prosecution for felony, although there is no written memorial thereof, and that such discharge was proved on the trial, or admitted by the defendant. From the statement of the evidence made

by the presiding Judge, which forms part of the record in this case, it is believed the jury were warranted in finding that there were well-grounded suspicions of the commission of the felony by the plaintiff, and that there was probable cause for commencing the prosecution. The justice of this case being in accordance with the verdict, the Court are not disposed to disturb it, unless there has been some infraction of a rule of evidence, or some violation of a principle of law, which imperiously requires their interference.

One of the examing magistrates was introduced as a witness on the trial of this case, and stated what had been sworn by the defendant on the examination of the charge of felony. The witness detailed those circumstances in the conduct and conversation of the plaintiff which had induced the defendant to believe that the felony had been committed, and which he had declared on oath at the examination, and was proceeding to state those matters which had been communicated
(171) to defendant by the negro woman accompanying the plaintiff, but not in his presence. To the latter part of this evidence, viz., that coming from the negro, the plaintiff's counsel objected, but made no objection to the residue of the testimony of that witness. The presiding Judge admitted the testimony, and the defendant now moves, on that ground, for a new trial. It does not distinctly appear from the record by whom this witness was introduced. It has been decided in one of our Superior Courts, *Moody v. Pender,* 3 N. C., 29, that the defendant, in an action for malicious prosecution, may give in evidence what he swore on the trial of the indictment. Whether this decision be justified by the principle of necessity, or rest on the ground of the *res gestae,* is not at present to be determined. It is not necessary now to inquire into the correctness of this decision; but on the spur of the occasion it seems to be a violation of that cardinal rule of evidence and fundamental principle of justice which prohibits any man from being a witness in his own cause, and should it be confirmed, may be productive of inconvenient and deleterious consequences. 2 Starkie on Ev., 916, 917.

If the plaintiff introduced this witness to give in evidence the statement made by defendant before the examining magistrates the plaintiff could not garble that statement. If he gave in evidence a part, the defendant had a right to insist on the production of the whole. If the witness was brought forward by the defendant, as is inferred from the record, let it be recollected that the plaintiff made no objection to his introduction, and permittd him to detail all the circumstances deposed by the defendant, without obecting to their admissibility, until the witness reached that part of the statement which emanated from the negro; to the admission of this part the plaintiff's counsel objected.

It is not necessary now to inquire whether it were competent for the defendant to give in evidence this statement. The plaintiff did not object to the testimony, but acquiesced in its admissibility, (172) and has, therefore, waived all right at this period to complain of its introduction. It is said, however, that the plaintiff did object to the admissibility of that part which has been sworn to by the defendant, as having been communicated to him by the negro, and that the Court admitted it notwithstanding the objection. The plaintiff had no right to a mutilated or garbled statement of that testimony. If a part be given in evidence the whole should be received.

Two other witnesses were introduced by the defendant, who had seen the plaintiff and the negro woman together on the day preceding that on which the warrant was issued, and in the same neighborhood; and they gave in evidence circumstances calculated to excite well-grounded suspicions unfavorable to the plaintiff, and even to produce a belief that there was probable cause for the accusation on which the plaintiff was arrested. But there was no evidence to show that these circumstances came to the knowledge of the defendant before the arrest was made, or to show at what time he obtained information of them. It is true the inquiry is as to the defendant's having probable cause for making the accusation, and those facts and circumstances which did not come to his knowledge before the commencement of the prosecution, although they had previously occurred, are not evidence of his having probable cause to make the accusation. But the plaintiff did not object to this testimony. He virtually assented to its introduction, and acquiesced in its admissibility, and has thereby waived all right to complain of its introduction, even if it had been improvidently received by the Court, which is by no means conceded. It appears that this testimony was not introduced for the purpose of showing that the defendant had probable cause for instituting the prosecution, but to corroborate the statement which had been made by the defendant on oath before the examining magistrates, and which was given in evidence to the jury, who (173) were to pass on its truth or falsity. The defendant having sworn before the examining magistrates that on the day of the arrest the declarations of the plaintiff were strange and incredible, his deportment and conduct singular and unbecoming, and detailed the particulars thereof, all of which were well calculated to excite a belief of probable cause for the accusation made, and these two witnesses on the preceding day having heard the plaintiff make the like, or very similar declarations, and having seen him exhibit the same deportment and conduct, their testimony might be taken into consideration by the jury in their search after truth, as a mere circumstance in ascertaining the credit to which the statement was entitled that had been made by the defendant

before the examining magistrates; and the more particularly as their testimony was confined to the acts and declarations of the plaintiff himself.

The presiding Judge instructed the jury that in forming their opinion of the truth or falsity of the statement made by the defendant before the examining magistrates they might take into their consideration the circumstances deposed to by these two witnesses. No particular instruction was requested by the counsel to be given to the jury, who were told that they were the exclusive judges of the credit of the witnesses and of the truth or falsehood of the circumstances deposed. The verdict accords with the justice of the case. The Court regret that the plaintiff has been here without counsel, and that they have had to look into his case without the benefit of argument.

PER CURIAM. No Error.

(174)

JOHN DOE, ex dem. of FRANKLIN GORHAM, v. CATHARINE BRENON and JESSE H. MOORING.

FROM PITT.

1. Where one, upon his own motion, procures himself to be made a defendant to an ejectment brought against another, and offers no new plea nor evidence of title in himself, it is presumed that he adopts the plea and defends the title of his co-defendant.
2. Although the plaintiff in ejectment is bound to prove the person whom he makes defendant to be in possession, yet where one procures himself to be made a defendant, the plaintiff is not bound to prove him in possession; and if such a voluntary defendant is proved not to be in possession, the plaintiff is, notwithstanding such proof, entitled to a verdict.
3. A widow who continues the possession of her husband is bound by an estoppel which would bind him were he alive.

EJECTMENT originally commenced in the County Court, at May Term, 1823, against the defendant Brenon alone. At November Term, 1824, of the County Court, Mooring, upon his own motion, was made a defendant.

On the trial before his Honor, Judge NORWOOD, on the last fall circuit, the lessor of the plaintiff produced a judgment and execution against John Brenon, and a sheriff's deed to him for the premises in dispute. He then proved that John Brenon died in possession of the land, and that the defendant, Catherine, was his widow, and it was admitted that she continued the possession as his widow upon his death, until her own, which happened during the pendency of the suit. There was no other

evidence of title in the plaintiff. The death of Catherine Brenon was suggested at March Term, 1827, but there was no entry of the abatement of the suit, nor of the award of process, to make her heirs parties; neither was there any entry of a plea by the defendant, Mooring, at the time he was made a party.

The defendant, Mooring, had never been in possession of the premises, and offered no testimony. His counsel moved his Honor to strike the suit from the record, there being no issue in it since (175) the death of Catherine Brenon, but his Honor overruled the motion. The counsel for the defendant then moved his Honor to instruct the jury that there was no evidence of title against the defendant, Mooring, and to direct thatt he plaintiff should be nonsuited. But his Honor instructed the jury that if defendant Brenon continued the possession of her husband and the defendant, Mooring, came in and defended her title and possession, he was estopped to deny the title of the lessor of the plaintiff. A verdict being returned for the lessor of the plaintiff, the defendant Mooring appealed.

The case was submitted without argument.

Gaston, for the lessor of the plaintiff.
Hogg, for the defendant.

HENDERSON, C. J. I think that the presiding Judge was right in all his positions—first, as to the want of an issue between the plaintiff and the defendant Mooring. When the latter, upon his own motion, was made defendant after issue joined between the plaintiff and the other defendant, and offered no new or additional plea, he very clearly adopted her defense and her plea. Secondly, as to the advice which the defendant called on the Court to give to the jury, that the lessor of the plaintiff took no estate by his deed from the sheriff, I also think that the Judge was right. For, as the widow of Brenon, who it is admitted continued the possession of her husband as his widow, and showed no other estate, she was estopped to say that nothing passed by the sheriff's deed. Her husband, whose possession she continued, being defendant in the execution, would have been estopped to make such allegation, had he been alive, and what is an estoppel upon him is equally so upon her. The defendant Mooring, coming in on his own motion, and never having been in the actual possession, must be taken as defending (176) her possession upon her title, he neither showing nor attempting to show title or possession in himself. The decision of the old Supreme Court, in *Albertson v. Redding,* 4 N. C., 28; S. c., 6 N. C., 283. That the plaintiff must show the defendant is in possession, notwithstanding the defendant enters generally into the common rule, I think, does not

govern this case. There the defendant is called into Court by the plaintiff, and upon the plaintiff's allegation that he is in possession. Here the defendant, of his own motion and free will, comes in, and admits himself in possession with the defendant already in Court, and who is shown to be in possession. In this case the defendant Mooring would not be entitled to a verdict, if it was shown on his part that he never was in possession. Much less is the plaintiff bound to prove it.

So far as regards the plaintiff's deed passing the estate by estoppel against the defendant in the execution, it has long been considered the law in this State, both in this Court and on the circuits, although formerly it was held otherwise; and that the widow continuing her husband's possession as widow, and showing no title, is bound by estoppel of her husband, was ruled in *Bufferlow v. Newsom,* 12 N. C., 208, in this Court.

PER CURIAM. Affirmed.

Cited: Duncan v. Duncan, 25 N. C., 318; *Davis v. Evans,* 27 N. C., 531, 532; *McDowell v. Love,* 30 N. C., 504; *Atwell v. McClure,* 49 N. C., 376; *Wilson v. James,* 79 N. C., 352.

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

FROM RUTHERFORD.

Where a cause was dismissed without any apparent reason, the judgment was reversed and the cause remanded.

After the arrest of judgment in this cause, 12 N. C., 153, it continued on the trial docket of the Superior Court of Rutherford, without any entry of judgment in arrest.

(177) The counsel for the relators obtained leave to amend the writ and pleadings at the last fall term; and on the last circuit, before his Honor, Judge MANGUM, a motion was made to dismiss the suit, which was allowed, and the relators apealed.

No entry of the judgment of this Court appeared on the transcript of the record.

The case was submitted without argument.

Ruffin, for the relators.
Gaston, for the defendants.

HALL, J. The reason why this suit was dismissed in the Superior

Court does not appear on the record sent here, so that it is impossible to form any opinion respecting it. It is not credible that the suit was dismissed without any cause.

PER CURIAM. Reversed and Remanded.

CHARLES PHELPS v. JAMES BLOUNT.

FROM WASHINGTON.

1. One claiming title under a party who is estopped to deny the title of the plaintiff is also bound by that estoppel.
2. He who claims a title by estoppel, as to those estopped, in the constructive possession of the land, and may maintain trespass.

TRESPASS *quare clausum fregit,* tried before STRANGE, J., on the last fall circuit.

The *locus in quo* was a cypress swamp, which had never been in the actual possession of any one.

The plaintiff offered no evidence of title, but the will of one Eleazer Swain, by which the land was devised to his son, Thomas Swain, and a judgment and execution against the latter, with a sheriff's deed to himself. He then offered to prove that Thomas Swain and the defendant, under his pretended title, entered upon the land, and (178) got a large quantity of shingles, for which trespass the action was brought.

But his Honor, thinking that the plaintiff, to entitle him to recover, ought either to prove an actual possession or a good and sufficient title, to give him a constructive possession, and that although Thomas Swain might be estopped to deny his title, yet that the estoppel did not extend to the defendant; nonsuited the plaintiff, who appealed to this Court.

No counsel appeared for either party in this Court.

HENDERSON, C. J. I think the Judge erred in not extending the estoppel to Blount, for the case states that Swain and the defendant, under Swain's pretended title, entered upon the land. Now it appears to me that if Swain is estopped from setting up title in himself, that Blount, who acted under that title, or to use the words of the case, pretended title of Swain is equally estopped; and that a title by estoppel will, as to them estopped, as well as a title against the world, drawn to it the possession. Which constructive possession, according to our notions, supports the action of trespass.

PER CURIAM. New Trial.

Cited: Sikes v. Basnight, 19 N. C., 157; *Drake v. Howell,* 133 N. C., 165.

(179)

CHARLES BIRD v. WILLIAM BENTON.

FROM LENOIR.

1. A sale or pledge of property by one who has no title, in the presence of the owner, without objection on his part, estops the latter from impeaching the transaction on the ground of his better title.
2. And it seems that such an act of ownership, not objected to by the owner, would authorize any bystander to deal with the pawner, if the pledge was satisfied.
3. In a verbal pledge to a surety a power to sell the property and repay himself and return the balance to the pawner, authorizes the surety to sell whenever he is in danger of being forced to pay the debt for which he is bound, and before actual payment by him.

TROVER for a horse, tried before MARTIN, J., at Fall Circuit of 1828.

The plaintiff claimed title through his father, Lemuel Bird, by a sale made in August, 1823. The defendant claimed under Josiah Bird, a brother of the plaintiff, to whom the property was bailed by Lemuel, the father. It appeared that in April, 1823, Josiah Bird (being then in possession of the horse under the bailment of Lemuel, the bailee, in the presence of the bailor, delivered it to one Dawson, upon condition that if Dawson had the money to pay, for which he was bound as surety of Josiah, that then he (Dawson), was to sell the horse, and, after reimbursing himself, pay the residue of the money arising from the sale to Josiah. At the time this delivery was made, Lemuel Bird, the father, was present, and did not object. The defendant then produced a judgment and execution against Josiah and Dawson, and proved a satisfaction of it by Dawson in April, 1824.

His Honor instructed the jury that whenever the owner of property was present and did not object to a sale of it by a third person, he was precluded from setting up his title in opposition to that thus acquired.

That they ought to inquire whether the defendant purchased the
(180) property from Dawson or from Josiah Bird; whether the delivery to Dawson, in the presence of Lemuel, was a delivery in pledge, with authority to sell upon a contingency; whether, if Dawson had sold, the event upon which he was authorized to do so, had taken place; that if Dawson had not sold to the defendant, or if he had done so before the event occurred upon which he was authorized to sell, then the principle which prevented the owner from disputing a sale made in his presence did not apply, so far as the contract with Dawson was concerned.

A verdict being returned for the plaintiff, the defendant appealed.

Badger, for the defendant.
Gaston and *Mordecai, contra.*

HALL, J. From the testimony of Lemuel Bird it appears that Josiah Bird had the horse on loan from him from the spring of 1823, until after August of the same year. But in the intermediate time, after the loan to Josiah, and before Lemuel conveyed to the plaintiff, in April, 1823, Josiah delivered the horse to Dawson, upon the agreement that if Dawson had the debt to pay, for which he was bound as Josiah's surety, then he was authorized to sell it, pay himself, and return the balance of the money to Josiah. At that time Lemuel Bird was present and made no objection, although the title of the property was in him. The Judge properly told the jury that Lemuel, or any one claiming under him, were precluded from setting up any title adverse to the one thus acquired.

It would also appear that if in consequence of Lemuel's silence, and of the acts of ownership which Josiah exercised over it by his consent impliedly given, any bystander had afterwards purchased from Josiah (the transfer to Dawson being done away), a jury would be at liberty to infer from such silence and permission that Josiah had the right to sell. It would be natural to infer that if a person had (181) the power and right to convey property in trust he had the right to convey it absolutely. Had Lemuel disclosed the fact that the horse was his, and that he authorized Josiah to convey it in trust to Dawson, but that he had no further right to it, there would have been no room for misunderstanding the facts of the case. But as things stood, it was natural to suppose that the title was either in Josiah, the pawner, or in Dawson, the pawnee. These were facts, however, which might properly be left to a jury to judge of. Under these circumstances they might, perhaps, say that the title under Josiah was good.

If Dawson sold the horse before he actually paid the money for Josiah, but for the purpose of honestly paying it in his own defense, as surety for Josiah, although he had not suffered, I am not prepared to say that a title thus acquired from Dawson was not good. My impression is that it was. I think the rule for a new trial should be made absolute.

HENDERSON, C. J. The pledge being made by Josiah of the horse, as his own property, in the presence of Lemuel, estops the latter from setting up his title, to impugn that transaction. It is true that as to all other transactions his silence is only evidence of the want of title. The terms of the pledging (which was by parol) are stated in the case to be that if Dawson had to pay the money, for which he was bound as Josiah's surety, then Dawson was authorized to sell the horse, and after reimbursing himself, to pay the balance to Josiah. By a literal construction of these words the actual payment of money as Josiah's surety by Dawson must precede the sale; and the Judge, before whom the

cause was tried, understood it in that manner. I understand the agreement more liberally, viz., that the words "to have the money to pay," in a parol contract, between the principal and surety, may well (182) mean "to be about to suffer." For the obligation of the principal to his surety is not that he will repay any money which the surety shall pay for him, but that he will save the surety from harm, and I understand that the property was delivered to Dawson that the obligation of the principal to his surety might be fulfilled, or rather that Dawson might have the means of their fulfilment in his own hands. A sale was the means; the time, whenever the obligation arose. If payment by the surety was to precede a sale the contract did but half answer the end designed. Instead, therefore, of instructing the jury to adhere to the mere words of the witness, they should have been told that if Dawson had actually suffered, or was about to suffer, and sold for the purpose of securing himself, the sale was valid, notwithstanding the words used; for that was their spirit. To test the propriety of the sale, suppose that the horse had been Josiah's (and in this transaction it is his, to all intents and purposes), and he had brought an action either against Dawson for breach of duty for selling before he had actually paid the debt, or against Benton, his vendee, and it appeared that there was an execution in the hands of an officer, or even a judgment obtained against Dawson for one of those debts, and that he had sold the horse to raise money to prevent his own property from being sold, could a recovery be effected because in this verbal agreement as to the manner he was to act, to save himself out of the indemnity, payment of the debt was to precede the sale? It is true that in a mere naked power, where all the rights grow out of the power and its execution, such strictness should and would be observed. But here the pawnee had a special property for his indemnity; he had an interest. It is also true that such terms might have been imposed; but it should appear that they formed part of the agreement, and that without them the agreement would not have been made.

Here I do not think that they entered into the design of the parties, but that the words "should pay" and "should reimburse" were (183) used more to ascertain the sum to be paid and that to be reimbursed than a previous condition to the sale.

PER CURIAM. New Trial.

Cited: Mason v. Williams, 53 N. C., 480.

Overruled: Governor v. Freeman, 15 N. C., 474; *West v. Tilghman,* 31 N. C., 165.

Distinguished: Lamb v. Goodwin, 32 N. C., 322; *Smith v. Chetwood,* 44 N. C., 448.

SAMUEL WALES and ABIJAH ERWIN, Executors of William Erwin, v. JOHN COOKE.

FROM IREDELL.

1. The holder of a note payable in specific articles is not bound to receive them at a place or on a day different from that appointed in the note.
2. If such a note be assigned as collateral security to a bond, and the assignee makes a new contract with the maker, the note becomes his own, and all parties to the bond are discharged.

DEBT upon a single bond, executed by the defendant as surety of one Abner Carmichael, payable to the plaintiffs' testator.

The only defense relied on was the plea of payment; and upon the issue joined on that plea the defendant proved that Carmichael, the principal debtor, had assigned the following instrument to the testator in his life-time:

Ten months after date I promise to pay A. Carmichael, or bearer, three hundred and fifty-one dollars and seventy-four cents, to be discharged in good whiskey, bar lead or castings, at the customary price given by wholesale, to be delivered at Reuben McDaniel's house where he now lives, for value received. This 10 June, 1816. REUBEN MCDANIEL.

It was contended by the defendant that the assignment of this obligation to the testator was absolute, and in payment of the bond. The plaintiffs contended, on the other hand, that their testator had received it only as a collater security to the bond. The defendant also insisted that if the assignment was a collateral security for the debt, the testator had made it his own by his *laches,* and thereby dis- (184) charged the bond on which the suit was brought.

Upon this point there was a contrariety of evidence. All offer by McDaniel to pay the note in castings, before it fell due, and at a distance from the place of payment, was proved; to which the testator Erwin replied that he had never dealt in that article, and had rather wait longer than take such a payment; at the same time he offered to make a discount, if McDaniel would pay in cash. It was also in proof that the testator Erwin came to the house of McDaniel, the maker, the day the note became due, but was informed by him that he could not on that day make payment in any of the articles specified in the note, or in cash.

His Honor, Judge DONNELL, instructed the jury that a day and a place being specified when and where the note was payable, either in whiskey, bar lead, or castings, the creditor was not bound to receive the payment in any of those articles before the day the note became due; and that the plaintiffs should not be deprived of their claim on the note in suit, because Erwin, their testator, refused to receive the castings before

the day the note fell due. If, however, they could collect from the evidence that Erwin had entered into any arrangement with McDaniel for extending the time of payment, or for his (McDaniel) disposing of the castings, he thereby made the debt his own, and deprived himself of recourse to the defendant on the note in suit.

The case was submitted without argument.

Badger, for the defendant.
Devereux, for the plaintiffs.

HALL, J. From an examination of the facts stated in this case, and the charge of the Judge thereupon, we are of opinion that the charge was correct, and that the rule for a new trial should be disregarded.

PER CURIAM. Affirmed.

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(185)

BENJAMIN SUTTON, Executor of William R. Sutton, v. HENRY HOLLOWELL.

FROM PERQUIMANS.

A slave was given by deed to A, "saving and reserving the use of said slave during my (the donor's) natural life, and the natural life of my (the donor's) beloved wife." Held, that the limitation over after the life estate was too remote, and therefore void at common law.

DETINUE for several slaves, the issue of the negro woman Celia, mentioned in the bill of sale hereinafter mentioned.

On the trial a special verdict was found, setting forth the following facts, viz., that Thomas Baker, being the owner of the slave, Celia, on 2 October, 1802, executed the following bill of sale:

"Know all men by these presents, that I, T. B., in consideration of the affection I have for my daughter, Elizabeth Baker, together with the sum of five shillings, etc., have and do give and sell my said daughter Elizabeth one negro girl slave named Celia (saving and reserving the use of said slave during my natural life and the natural life of my beloved wife). To have and to hold said negro girl slave to my said daughter Elizabeth, her heirs and assigns forever. In witness, etc."

Elizabeth Baker, the donee, afterwards married the plaintiff's testator, William R. Sutton. After the death of Thomas Baker, his wife put the slave into the possession of the plaintiff's testator, saying that she would belong to him at her death; but she did not relinquish any right to the slave which she had for her life, and the plaintiff's testator held the slave only under the authority of the wife of Baker. Sutton, the

husband of Elizabeth, the donee, died, leaving his wife and the wife of the donor surviving him. After his death the widow intermarried with the defendant.

Upon these facts his Honor, Judge STRANGE, thinking that (186) the case came within the principle of *Vass v. Hicks,* 7 N. C., 493, and not within that of *Graham v. Graham,* 9 N. C., 322, rendered judgment for the plaintiff, from which the defendant appealed.

The case was submitted without argument.

Devereux, for the defendant.
Kinney, for the plaintiff.

HALL, J. The cases on this subject are not altogether reconcilable. Parol gifts by delivery, reserving life estates, are contradictory and inconsistent, in the nature of things. Property cannot be delivered, and retained at the same time. If there is a delivery there can be no reservation of a life estate. Of this kind were *Duncan v. Self,* 5 N. C., 466, and *Vass v. Hicks,* 7 N. C., 498.

At common law there could not be a limitation of personal chattels after a life estate created by deed. It was also held that in a gift or limitation of slaves, after a life estate reserved by the donor, the limitation was not good, because the life estate might be lawfully reserved, and the limitation over on that account was too remote, and this was in conformity (as was supposed) with the principle before laid down, that there could not be a limitation of personal chattels after a life estate. *Black v. Beattie,* 6 N. C., 240; *Graham v. Graham,* 9 N. C., 322; *Foscue v. Foscue,* 10 N. C., 538.

Whether it would not have been more correct to say the reserved life estate was void, as being inconsistent with the grant, and that the gift or limitation passed the property in *praesenti,* it is too late, and, of course, unnecessary to decide, because too much property depends upon those decisions, and because the Legislature have authorized limitations of slaves after life estates.

We must, therefore, conclude that the limitation over, after an estate reserved to the donor, Thomas Baker, and his wife, for their lives, is void; and, therefore, that nothing vested in Elizabeth, (187) the daughter. The judgment must be reversed, and judgment entered here for the defendant.

PER CURIAM. Reversed.

Cited: Morrow v. Williams, 14 N. C., 264; *Hunt v. Davis,* 20 N. C., 37; *Newell v. Taylor,* 56 N. C., 376; *Dail v. Jones,* 85 N. C., 225.

Den ex dem. of JOSEPH RHEM v. JOHN JACKSON.

FROM CRAVEN.

1. The act of 1791 (Rev., ch. 346) making twenty-one years' possession, under visible boundaries, without a grant, conclusive against the State is founded upon the supposed loss of title papers setting forth those boundaries.
2. But possession for twenty-one years, up to a visible line, although it may be evidence in ascertaining the boundaries set forth in a deed, is not conclusive that the visible line is the true boundary.
3. An interest in the event of a suit acquired after the commencement does not render a witness incompetent, unless that interest was acquired from the party offering him.

EJECTMENT, tried on the last circuit, before NORWOOD, J. The lessor of the plaintiff and the defendant both claimed, under one Pollok, and the only question on the trial was the boundary of a lease made by Pollok to one Coart, in 1756, for the term of 75 years, under which the defendant held the premises in dispute.

Upon the question of boundary the defendant offered the testimony of one Russell, which was objected to by the lessor of the plaintiff, upon the ground of interest. Upon his examination it appeared that he had purchased since the commencement of this action an interest in the residue of the term. His Honor, thinking that this purchase did not render the witness incompetent, as to facts within his knowledge before it was made, overruled the objection. This witness and others introduced by the defendant testified that soon after the lease made to Coart, (188) in 1756, another was also made by Pollok of the adjoining lands to one Pope; that the reversion had been assigned to the lessor of the plaintiff, and the lease had expired; that both Pope and Coart, and those claiming under them, had for more than 40 years cultivated up to the line contended for by the defendant, and had uniformly admitted it to be the boundary between the two leases.

The act of 1791 (Rev., ch. 346), entitled "An act for quieting ancient titles, and limiting the claim of the State," was read to the jury. His Honor, after instructing the jury as to the rules relative to boundaries of land, and the law of presumption and inference from facts in proof, informed them that if the line contended for by the defendant was a known and visible boundary, and there were other known and visible lines and boundaries, designating the land claimed by the defendant for 21 years before the commencement of the suit, the act of 1791 would protect the defendant during the residue of the term created by the lease, under which he claimed.

A verdict was returned for the defendant, and the lessor of the plaintiff appealed.

Badger, for the lessor of the plaintiff.
Gaston, for the defendant.

HENDERSON, C. J. The defendant's counsel admits that this case does not fall directly within the operation of the act of 1791 (Rev., ch. 346), entitled "An act for quieting ancient titles, and limiting the claim of the State." In making this admission he is certainly correct; for that act relates exclusively to persons claiming under different titles, derived from the sovereign, and was made to supply the loss of grants and *mesne* conveyances, substituting for them a possession of 21 years by known and visible boundaries. This, I think, is quite evident, both from the preamble and enactment of the statute. But he alleges (189) that the statute was read to the jury, and commented on, to show the great weight attached by law to long posessions, under known and visible boundaries, and that by analogy only the statute had a bearing on the case. Had the statute been left to operate on the case in this manner only, there certainly would be no ground for complaint. But I collect from the charge of the presiding Judge that he understood the case differently, and so instructed the jury. For he states that he informed them that if the line claimed by the defendant was a known and visible boundary, up to which he had possessed for 21 years or more, and there were other known and visible boundaries designating the land claimed by the defendant 21 years or more before the commencement of this suit, the act of 1791 would protect the defendant during the residue of his term, created by the lease to Coart. From this charge I am compelled to understand the Judge as instructing the jury, not that the long possession up to this line was matter of evidence to be considered by them, as tending to prove the real boundaries of the lease to Coart, and liable to be repelled by higher and more satisfactory evidence of that fact, but that the fact of such possession entirely protected the defendant from the claim and action of the plaintiff during the residue of the term; thereby discharging the jury from the real question between the parties, to wit: the actual boundaries of the lease, and substituting for it 21 yars' possession, under known and visible boundaries, however well satisfied they might be that such boundaries were not those of the leased lands. I think this was a misapprehension of the operation of the act of 1791, and that there should be a new trial.

As to the admission of the witness, Russell, the case in that particular is so imperfectly stated that no opinion can be formed thereon. It does not appear whether he purchased an interest in the lease from the defendant or from some other person. If he purchased (190) from the former, he was clearly inadmissible; for then the de-

fendant participated in the act giving him an interest. If he purchased from a stranger, according to the modern rule, he is admissible.

PER CURIAM. New Trial.

Cited: *Graham v. Houston,* 15 N. C., 235; *Hafner v. Irwin,* 26 N. C., 534.

JUSTIN L. EDWARDS v. STAPLETON POWELL.

FROM MARTIN.

Property delivered to an agent, under a contract made by his principal with a third person, cannot, without the consent of the principal, be applied by the agent to the payment of a debt due to himself from that person —and the fact that the agent was indebted to the principal, and the principal to the party delivering the property, does not alter the rule.

DEBT for the balance of an account for goods and wares sold and delivered, tried before his Honor, Judge STRANGE, on the last spring circuit. The plaintiff having established the balance due to him, the defendant, on the plea of payment, proved that in January, 1825, one William Wilson and himself entered into the following written agreement:

"This agreement, made by the undersigned parties, witnesseth, that for the consideration of six hundred dollars paid by the said William Wilson in notes to said Stapleton Powell, the said Powell agrees, and does by these presents agree, to bind himself, his heirs and assigns, to deliver William Wilson, his heirs and assigns, four hundred barrels of turpentine, to wit, one hundred barrels of dipped to be delivered, etc., by 1 August, and three hundred of mixed, to be delivered, etc., by 1 January, 1826. In witness whereof, etc., this January, 1825. In addition to the above the said William Wilson agrees to take the balance of said Powell's crop, say one
(191) hundred barrels, more or less, for which the said Wilson is to allow and pay the said Powell one dollar and fifty cents per barrel, in goods out of Justin L. Edwards' store, or in some note of hand against a good person.

"Witness WM. R. BENNETT. "WILLIAM WILSON,
"STAPLETON POWELL."

The subscribing witness to this agreement testified that it was executed in the counting-room of the plaintiff's store, who was also present, but whether he was privy to its contents did not appear; that Wilson removed to the State of New York in February, 1825, having sold out his stock of goods to the plaintiff, who still owed him for the price of them; that on 1 August, 1825, the defendant delivered to the plaintiff 100 barrels of turpentine; on 15 November following 250 barrels, and on 17 December of the same year 265 barrels, amounting to 615 barrels, for all of which the plaintiff gave written acknowledgments, stating the receipt to be either on account of William Wilson, or as his agent.

A good deal of testimony, consisting of admissions by the parties, was offered on both sides, which it is unnecessary to state. The plaintiff proved on attachment sued out by the defendant against Wilson for the turpentine delivered, over and above the $400, in which he (the plaintiff) was summoned as a garnishee.

His honor informed the jury that if the plaintiff had furnished the goods under an express agreement that they were to be paid for by Wilson, and that he was to depend upon Wilson only for payment, or if, knowing the terms of the contract between Wilson and the defendant, he believed they were taken up by the latter upon the faith of that contract, and that Wilson was to be looked to for pay- (192) ment, they ought to find for the defendant; otherwise they ought to find for the plaintiff.

The counsel for the defendant requested the judge to charge the jury that if the plaintiff had furnished the defendant with the goods before 17 December, 1825, and on that day, without a knowledge of the contract, had received the surplus of the defendant's crop under the contract, its receipt was in payment for the goods. But his honor, thinking that if the goods were furnished the defendant on his own credit, and were understood by him to be so furnished, the debt being then due to the plaintiff in his own right, and the turpentine delivered to him as the agent of another, the one was not a payment of the other, without evidence of an actual application of it in that way, refused to give the jury such instructions.

A verdict was returned for the plaintiff, and the defendant appealed.

Hogg, for the defendant.
Attorney-General, for the plaintiff.

HALL, J. I think that the charge of the judge below was correct. Although the defendant might have expected that his account with the plaintiff would have been settled by the turpentine delivered to him under the contract with Wilson, yet it ought to have occurred to him that Edwards could not apply it to that purpose without the consent of Wilson, although he might have been disposed to do so.

Neither could the plaintiff have applied the surplus turpentine delivered to him on 17 December to the discharge of the defendant's account, because he received that also as the agent of Wilson, under the same contract which Wilson and Powell, the defendant, had entered into. It is true that it was to be paid for in goods from the plaintiff's store, or by a note on some good person. But the parties to this contract had not agreed to the specific mode of payment. If they had, it does not appear that it was made known to the plaintiff; and if it had (193)

been, I see it nowhere stated that he was bound to take turpentine, in discharge of defendant's account. I can not see that the fact that plaintiff was Wilson's debtor can alter the view I have taken of the case, or the view which the defendant himself took of it when he procured an attachment to be issued against Wilson.

I think that the judgment of the Superior Court should be affirmed.

PER CURIAM. No Error.

MARY SANDERS, administratrix of John Sanders, *v.* DAVID W. SANDERS, executor of Isaac Sanders.

FROM ONSLOW.

Under the act of 1807 (Rev., ch. 723) where the land of a testator was sold under a judgment against the executor, as executor and the purchaser was evicted by the heir, he cannot recover his purchase money from the executor, against whom the judgment was rendered.

SPECIAL ACTION on the case founded upon the act of 1807 (Rev., ch. 723), entitled "An act for relief of purchasers at execution sales in certain cases," which provides that where any property shall be sold under any execution, etc., and the sale be legally and *bona fide* made, if the property so sold be not the proper goods and chattels, lands or tenements of the defendant in the execution, by reason whereof the purchaser at such sale may be deprived of the same, it shall be lawful for such purchaser, his executors, etc., to sue the defendant in the execution, or his legal representatives, in an action on the case.

Upon the trial before MARTIN, J., on the last fall circuit, it appeared upon the opening of the case that one Foscue had recovered sev-
(194) eral judgments against defendant's testator as the executor of one Frederick Wood; that upon these judgments execution issued against the goods and chattels of Wood in the hands of his executor, which were satisfied by a sale of Wood's land; that John Sanders, the plaintiff's intestate, had, at the sheriff's sale, purchased those lands, and was evicted therefrom by the heirs of Wood.

Upon these facts the presiding judge being of opinion for the defendant, the plaintiff suffered a nonsuit, and appealed to this Court.

Gaston, for the plaintiff.

No counsel appeared for the defendant.

HALL, J. I think the act of 1807 (Rev., ch. 723) can not support an action against Isaac Sanders in his own person, nor against his executor after his death; because the money paid for the land by John San-

ders was paid for the benefit of the estate of Frederick Wood, and not for that of Isaac Sanders. If any person is liable, it ought to be the representative of Wood's estate.

PER CURIAM. Affirmed.

(195)

JOHN DOE, ex dem. of RICHARD C. RHODES, v. JOHN BROWN.

FROM ROBESON.

1. Possession by one having only an equity in land is considered as the possession of him who created that equity.
2. Hence, where a vendee under articles for a purchase was in possession, claiming for himself, his possession enures to ripen the defective colorable title of the vendor; and a subsequent purchaser of the legal estate from the vendor can recover in ejectment against the vendee.

EJECTMENT, tried on the last spring circuit, before DANIEL, J. The lessor of the plaintiff produced a grant to one Thomas Pitman, of the premises in dispute, dated November, 1779, and a deed of bargain and sale from Thomas Pitman, the grantee, to Isham Pitman, for the same land, dated in 1792. He then offered in evidence a deed of bargain for the land from one Jesse Lee to William Brown, dated 26 October, 1814, a judgment and execution thereon against William Brown, together with a sheriff's deed to Jacob Rhodes, and the will of Rhodes, whereby the land was devised to him.

The defendant contended that Isham Pitman had a better title to the land than the lessor of the plaintiff. To establish this, and to rebut the possession under Lee's deed to William Brown, by evidence of a possession in himself adverse to the latter, he proved that on 23 October, 1821, William Brown by a written agreement, not under seal, sold the land to him; since which time William Brown has had no possession of the land, except as a member of his family, in the capacity of a day laborer.

The plaintiff proved that seven years' continued possession, adverse to Isham Pitman's title, had existed before the judgment against William Brown and the sheriff's deed to Jacob Rhodes; but this possession of seven years was composed of the possession of William Brown for five or six years, and for the residue of that of the (196) defendant since the date of the agreement between him and William Brown.

His honor charged the jury that if there had been a continued possession held under the deed from Jesse Lee for the space of seven years before the judgment was rendered against William Brown, then the title of Isham Pitman was destroyed, and his right of entry

taken away by the act of 1715; that if they believed the defendant claimed the possession under the deed from Jesse Lee to William Brown, that deed was color of title for those who claimed under it. That the fact that the defendant, after the date of his agreement with William Brown, set up a title adverse to the latter made no difference; if his possession was consistent with the possession of those who claimed under Lee's deed to William Brown; that if the possession under his deed was for seven years held adverse to Pitman's title, although part of that time might be made up of the defendant's possession, then Pitman's right of entry was lost; and as the defendant had no conveyance of the legal estate, his possession enured to confirm the legal title, which, being in William Brown, was at law subject to be sold under an execution against him, and that the defendant's title was purely equitable, and could not avail him as a defence to this action.

A verdict was returned for the lessor of the plaintiff, and the defendant appealed.

The case was submitted, without argument.

Gaston, for the lessor of the plaintiff.

HALL, J. Whatever title William Brown had to the land in dispute has been transferred to the lessors of the plaintiff, and on that title he rests his right to recover in the present action. That title is thus deduced.

(197) In 1779 a grant issued from the State to Thomas Pitman for the land in dispute. Jesse Lee, by deed bearing date 1814, conveyed the same land to William Brown, who had an uninterrupted possession of the land for seven years under that conveyance before it was levied upon and sold to Jacob Rhodes. Jacob Rhodes, the purchaser, devised it to the lessor of the plaintiff, and his title must be good, unless it has been weakened or destroyed by the claim set up by the defendant.

If William Brown had conveyed the legal title in the land to the defendant in 1821, and they both remained in possession so long as to make an uninterrupted possession of seven years from the time William Brown first took possession under the deed from Lee, the title of the land would be in the defendant; for he and William would have had an uninterrupted possession for seven years under the color of title.

But it appears that the legal title had not been conveyed to the defendant; that he had an equitable claim to the land under an agreement with William Brown, which is not made part of this case, and that he and William remained in possession of the land, as before

stated. As the defendant has no title which can be noticed in a court of law, his title avails nothing, as being adverse to William, but must be taken to enure to William Brown's color of title; for in truth what equitable claim the defendant had would have availed nothing without it.

I therefore think, as William Brown had seven years' possession under color of title that his title is sufficient to enable the lessor of the plaintiff to recover, having been transferred to him. The rule for a new trial should be discharged. If Rhodes, the purchaser, had notice of the defendant's equitable title, a court of equity will consider him as a trustee for defendant.

PER CURIAM. No error.

(198)

THE STATE v. NEIL SHAW.

FROM CUMBERLAND.

An indictment on the acts of 1798 and 1816 (Rev., chs. 501 and 906), prohibiting the retailing of liquor by a measure less than a quart, which charges the retailing to be "by the small measure," is defective; the words "less than a quart" should be superadded to the description of the offence.

The defendant was indicted for retailing spirituous liquors without a license, in the following manner:

The Jurors for, etc., on, etc., present that N. S., of, etc., on etc. and divers other days, etc., in, etc., did retail spirituous liquor by the small measure without having a license according to law, contrary, etc.

After a verdict for the State, his Honor, Judge DANIEL, on the motion of the defendant's counsel, arrested the judgment, because the indictment charged a retailing by the small measure generally, without showing what the measure called small was, or in any manner describing a sale by quantities less than a quart, except by the word small, which his honor thought too indefinite; whereupon Mr. Solicitor *Troy,* for the State, appealed to this Court.

Badger, for the State.

No counsel appeared for the defendant.

HALL. I think the judge in the Court below was correct in thinking the words of the indictment, describing the offence charged, were too indefinite.

The act of 1798 (Rev., ch. 501), enacts that any person undertaking to sell spiritous liquors by the small measure, or by any other ways or

means, where the quantity is less than a quart, shall forfeit 48 shillings, and shall be further liable to presentment or indictment for the same offense.

The act of 1816 (Rev., ch. 906) enacts that if any person shall retail spirituous liquors by the small measure, contrary to the true intent and meaning of that act, without license, etc., he shall be subject to indictment.

(199) Now the word small is a relative term. We cannot decide whether a thing is great or small without comparing it with something else. And when we use the words small measure, we have no distinct idea of their meaning without comparing it with some other measure. In the present case, when the indictment uses the words small measure we do not judicially know its precise import unless we had before us some standard measure to compare it with. If the retailing was charged in the indictment to be by a measure less than a quart, which the act of 1798 declares to be the standard by which a small measure is ascertained, we could understand with legal certainty that the defendant was charged with selling spirituous liquors by a measure prohibited by these acts, and which they declare to be an indictable offense.

PER CURIAM. Affirmed.

Cited: *S. v. Gallimore,* 24 N. C., 377; *S. v. Bradley,* 132 N. C., 1061.

STATE v. MOSES JUSTICE.

FROM IREDELL.

A fraud perpetrated upon an individual, without the use of false tokens, or any deceitful practice affecting the community at large, and without the aid of a conspiracy, but the result of a false assertion, is not indictable.

The defendant was indicted in the following form:

"The Jurors, etc., that Moses Justice, being an evil-disposed person, and designing fraudulently to cheat and impoverish one Anne Fox, on, etc., did become the surety of the said Anne Fox in a bond then and there executed by her for the faithful performance, etc. And the jurors, etc., that the said Moses Justice afterwards, to wit, on, etc., did write and cause to be written a certain deed of bargain and sale from her, the said Anne to him, the said Moses Justice, purporting to sell and convey a certain tract of land belonging to her, the said Anne, situate, etc., to him, the said Moses Justice, in fee simple etc., and also purporting to be in consideration of the sum of three hundred dollars, then and there well and truly paid by him, the (200) said Moses Justice, to her, the said Anne Fox. And the jurors, etc.,

that the said Moses Justice did then and there fraudulently, etc., pretend to said Anne that the same deed of bargain and sale was nothing but a receipt to him, acknowledging that he was the security of the said Anne, etc., by means of which false, etc., the said Moses Justice did fraudulently, etc., procure the said Anne to sign, seal and deliver the said deed of bargain and sale to him, the said Moses Justice, for the said tract of land, containing, etc., and the value, etc., and so the jurors, etc., that the said Moses Justice, her, the said Anne, of the land, etc., of the value, etc., fraudulently, etc., did cheat, deceive and defraud, to great damage, etc., and against the peace and dignity of the State."

After a verdict for the State, his Honor, Judge MANGUM, on the motion of the counsel for the defendant, arrested the judgment, and Mr. Solicitor *Wilson* appealed to this Court.

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

TOOMER, J. The defendant having become the surety of Anne Fox on a bond given for the guardianship of her son presented to her an instrument of writing to be executed by her, representing it as a mere receipt, acknowledging that defendant had become her surety. She executed it without reading, or requiring it to be read; and when executed it was an absolute deed conveying land to the defendant in fee for the consideration of three hundred dollars.

The indictment sets forth these circumstances in technical form, charging the defendant with a cheat at common law. It is not pretended that the transaction involves any fraud on the public at large, nor has it been perpetrated by the aid of any deceitful practice or false token which might affect the public at large. Had it been a direct and immediate fraud on the public it might have been indictable, although effected without the use of any false or (201) public token. But on this point it is unnecessary to express an opinion. 2 East. P. C., 821; 2 Chitty, Crim. Law, 559; 3 M. & S., 11; 1 Dal., 47; 6 East. 136; 3 Chitty, 701, 704; 5 Mod., 179; 2 Camp., 269; 4 Bur., 2106; 3 Chitty, 666; 1 Leach, 208.

This fraud is flagrantly marked with moral turpitude, and an individual has been the victim of base imposition. But to the subject of criminal prosecution it should have been effected by the use of some false token or deceitful practice calculated to defraud numbers, and against which ordinary prudence could not provide. Common care, ordinary vigilance, would have prevented its commission. Indeed, it could not have been practiced without gross negligence on the part of the person injured. It does not even appear that the prosecutrix was an illiterate person, and could not read. It is an instance of mere false assertion, deceiving confiding credulity. There was not even

any artful contrivance to lull suspicion and impose on prudence; no false token was used. Cheats of a private nature, effected without the use of false tokens, are indictable, when the result of conspiracy—when practiced by two or more persons who conspire to effect them. 2 Ld. Raym., 1179. No conspiracy is charged in this indictment. *Rex v. Skirret,* 2 East. P. C., 823, cited in behalf of the prosecution, was for conspiracy.

This is a mere civil injury, for which the suffering party has a civil remedy; and if the fraud can be proved, without the testimony of the prosecutrix, redress may be obtained. It is a foul fraud, and in civil action an honest jury will give ample damages.

Civil injuries should not be the subjects of criminal prosecutions. Good policy does not require the multiplication of public offences.

PER CURIAM. Affirmed.

(202)

THE STATE v. WILLIAM R. POOL.

FROM WAKE.

Where one statute creates an offence, imposes a penalty and gives an action to recover it, and another makes the offence indictable, it was held (HENDERSON, C. J., dissentiente) that an indictment for the offence should conclude, "against the form of the statutes." Therefore, as the act of 1784, sec. 14 (Rev., ch. 227), prescribes the duty of overseers of the road, and the act of 1786, sec. 4 (Rev., ch. 256), makes the omission of the duty indictable it was held that an indictment against an overseer, concluding "against the form of the statute," was defective.

Per HENDERSON, C. J.:—Where it is necessary ot have recourse to two statutes to show the criminality of the act charged in the indictment, it should conclude in the plural. But when that act is an infraction of one statute only, and the mode of prosecution and measure of punishment is prescribd by another, it should conclude in the singular.

The defendant was indicted in the following form:

The jurors for the State upon their oath present, that W. R. P., late of, etc., on, etc., and for a long time as well before as, etc., being overseer of that part of the public road leading from, etc., to, etc., did permit the said public road of which he was overseer as aforesaid in, etc., to become ruinous, miry, broken and in great decay, for want of due reparation thereof, and the same so to be and remain during, etc., negligently did permit and still doth permit, to the great damage and common nuisance of all the citizens of the State and others, the same road passing and repassing, against the form of the statute in such case made and provided, and against the peace and dignity of the State.

After a verdict for the State it was moved for the defendant that the judgment should be arrested, and the causes assigned was, that by the act of 1784 (Rev., ch. 227), the duties of an overseer of the road

were prescribed, and a penalty, recoverable by warrant, prescribed in case of neglect; and by the act of 1786 (Rev., ch. 256) a neglect of these duties was made indictable; yet the indictment in this case concluded "against the form of the statute," and not "of the statutes," in the plural, which it was contended was the proper conclusion.

His Honor, Judge MARTIN, overruled the motion, and judg- (203) ment being rendered for the State, the defendant appealed. The case was argued at June term, 1828.

Badger, for the defendant.
Devereux, for the State.

There being a difference of opinion in the Court, the cause was held under advisement until the present term, when the argument of the counsel was shortly recapitulated, as his Honor, Judge TOOMER, was not present at the former meeting.

HALL, J. It appears to me that the authorities on this subject are somewhat perplexed and unsatisfactory. 2 Hawkins, ch. 25, sec. 117, says that where the same offence is prohibited by several independent statutes there are some authorities that you must either conclude *contra formam statutorum,* or *contra formam* of the particular statutes, naming them; and that if you barely conclude *contra formam statuti,* the indictment will be insufficient for not showing on which of the statutes it was taken. But there are strong authorities for the contrary opinion, which is also most agreeable to precedents. The same doctrine is laid down in 1 Chitty Cr. Law, 291. But I do not think it applies to the case now before the Court, because the act of 1786 cannot be taken to be independent of that of 1784, because if the act of 1784 is kept out of view there is no offence committed. That act creates the offence; the act of 1786 only gives the remedy.

Hawkins, in the section above referred to, says that where a later statute ordains that a former statute shall be executed in a new case, not mentioned in the former, as that of 8 Henry VI, ch. 9, provides, that the statute of 15 Rich. II, ch. 2, shall be executed in the case of a forcible detainer, which is not mentioned in it; or where a new statute adds a new penalty to an offense prohibited by a former statute, as the 23 Eliz. does to that of the 20 Eliz. for a month's absence from church, contrary to the tenor of the 1 Eliz., it seems that it may be argued with great reason that if the indictment conclude *contra* (204) *formam statuti* it will be insufficient, because the offense is not punishable by any one statute only. Yet considering that the precedents in these cases generally conclude *contra formam statuti,* and the prosecution in truth depends upon the later statute, which seems itself

alone sufficient to support it, it may be reasonably argued, and seems agreeable to the later opinions, that such a conclusion may be allowed in these cases. Chitty lays down the same doctrine in the page above referred to.

As to the first branch of the proposition, that where a new penalty is added by a later statute to an offense prohibited by a former, it is proper to conclude *contra formam statutorum. Dingley v. Moore,* Cro. Eliz., 750, is relied upon. By that case it appears that it was by the 1 Eliz., enjoined as a duty upon all subjects to go to church on Sundays and holidays, on pain of punishment by the censure of the church, and forfeiture of twelve pence for every offence, to be recovered by the wardens of the parish, for the use of the poor, etc. By the 23 Eliz., ch. 1, sec. 5, it is enacted, that every person above the age of sixteen, who shall not repair to the church, contrary to the statute of 1 Eliz., shall forfeit twenty pence, for every month they shall forbear, to the Queen's majesty, and shall be bound with security in the sum of two hundred pounds for their good behavior. *Broughton v. Moore,* Cro. Ja., 142, is an authority in support of the same doctrine. 2 Hale, P. C., 173, lays down the same rule, and founds his opinion upon *Dingley v. Moore. Dormer's* case, 2 Leo., 5; *Rex v. Simmons, Aleyn,* 49, 50, and Owen, 135, are also cited for the same purpose. Archbold Cr. Pl., 28, lays down the law to be that when one statute creates the offence and another inflicts the penalty the indictment for the offence must conclude *contra formam statutorum,* and cites 2 Hale, 173, and *Broughton v. Moore.* In addition to these authorities there is (205) one of modern date—*Lee v. Clark,* 2 East., 333—in which Lord Ellenborough says that if one statute prohibits a thing and another statute gives a penalty, then, upon an information upon a penalty, both statutes ought to be recited and to conclude *contra formam statutorum.* It is true that in a subsequent case—*Earl of Clanricarde v. Stokes,* 7 East., 516—he dispenses with the necessity of such a conclusion provided the statutes are sufficiently referred to in the body of the information. As that is not done in this indictment, both those cases are authorities that the conclusion should be *contra formam statutorum.*

Andrews v. Parish of Luwknor, Cro. Ja., 187, does not shake the ground on which these authorities are based. That was an action against the hundred, upon the statute of Winton (13 Edward I, ch. 2), of hue and cry. It was objected that the declaration should have concluded *contra formam statutorum,* because it was against the statute of 27 Eliz., ch. 18, as well as against the statute of Winton. The Court held otherwise, because the action was founded upon the statute of Winton, which gave the penalty and remedy; that of Eliz.

only regulated the manner of the examination, and limited the time within which the action should be brought.

In support of the last branch of the proposition laid down by Hawkins and Chitty, that a conclusion *contra formam statuti* is sufficient by more modern authorities, where one statute creates an offence and another adds a new penalty. *Warren v. Sayre,* 1 Mod., 191, is cited. In that short case it was decided that an information upon the 25 Eliz. only reciting the clause in it, which has reference to the 1 Eliz. was good. To dispose of this case it may be asked if the judges would have so decided, if no reference to the 1 Eliz. had been made in the body of the information, which last statute made it a duty to go to church on Sundays and holidays, the omission of which was not an offence at common law. This case is not reconcilable with another case cited for the same purpose. In *Parker v. Webb,* (206) 3 Lev., 61, it is held that an information will lie upon the 23 Eliz. alone, because that statute only gives the penalty of twenty pence per month, etc. Now, in this case it does not appear that there was any reference in the body of the indictment to the 1 Eliz. as there was, and which was held insufficient, in the case of *Warren v. Sayre.*

For my own part I feel bound to subscribe to those opinions which consider the 23 Eliz. dependent upon the 1 Eliz. Keep the latter statute out of view, and I am at a loss to perceive how a recovery of the penalty can be had on the former. The 23 Eliz. does not make it a duty to go to church at any particular time, but gives a penalty for not going to church, as the 1 Eliz. points out. How is this to be ascertained without having recourse to it?

To apply these principles to the case now before the Court, by sec. 14 of the act of 1784 (Rev., ch. 227), it is declared that the overseers of the road shall keep the same in repair, and in default thereof shall forfeit forty shillings, over and above such damages as shall be sustained, to be recovered by a warrant before any justice of the peace by any person taking out the same, and to be applied to his own use. By the act of 1786 (Rev., ch. 256), amendatory of the act of 1784, it is declared that all offences committed or done against the purview of the act of 1784 shall be hereafter prosecuted by indictment in any Court having cognizance thereof, and all forfeitures shall be recovered by action of debt. By this act the remedy by indictment is given, to which, upon conviction, an additional punishment by fine is annexed. The result in my mind is that the act of 1784 creates the offence; the act of 1786 gives an additional remedy and punishment; consequently that the indictment should conclude in the plural—*contra formam statutorum.*

This may appear to be a trivial objection. Be it so; but if it (207)

has been sustained as well founded, for centuries, by able and learned judges, it would be presumption in me, as well as a disregard of my duty, to overrule it.

TOOMER, J., concurred.

HENDERSON, C. J., *dissentiente*. The act of 1784 (Rev., chap. 227) prescribes the duties of overseers of roads, and it is declared in sec. 14 of the act that all overseers who shall fail or neglect to do their duty as by that act directed shall forfeit forty shillings for every offence, to be recovered by warrant. By the act of 1786, sec. 4 (Rev., ch. 256), it is declared that all offences, or acts done against the purview of the act of 1784, shall thereafter be prosecuted by indictment.

The defendant is indicted for doing acts prohibted by the act of 1784, and omitting to perform duties enjoined by it, and the indictment concludes against the form of statute, in the singular, and it is objected that as it is founded on both statutes, it should conclude against them both in the plural.

If we have recourse to authorities I scarcely know of a question more complexed. The books are confused, and, I think, irreconcilable. It is said by many that where recourse must be had to two or more statutes to punish as by the law directed, the indictment should conclude against "the form of the statutes." I think that is not the rule, for we know that where clergy is ousted by statute, either from a common law or a statute offence, the statute ousting clergy is never referred to; neither are our modern statutes which change the proceeding and inflict punishment upon the allowance of clergy; this is a very strong case, for by those statutes the punishment is changed. I am inclined to believe that this is the rule, that where it necessary to have recourse to two or more statutes, to show that the acts imputed as crimes are in fact so—that is, acts forbidden or duties enjoined

(I am not inquiring now whether they should not be acts or
(208) duties of a public nature), there both or all the acts must be referred to. It may then truly be said that the defendant did those acts contrary to the prohibitions or injunctions of the statutes. But it cannot be said that the defendant did an act contrary to the prohibition of a statute, when the statute did not prohibit it, in fact, was silent in regard to it, and only prescribed the mode of prosecution and the punishment upon conviction. It may be asked which statute has the defendant violated. The answer is, as I think, that statute which prohibited the acts which he has done, or enjoined the duties the performance of which he has neglected. The statute prohibiting or enjoining the acts is the major prohibition; the acts imputed, or the omission

alleged, the minor, and the guilt or innocence of the accused, as his acts may or may not fall within the statute, the conclusion. The defendant cannot be said to act contrary to a statute, which prescribed nothing to be done, but only fixes the mode of proceeding against and the measure of punishment to those who have violated another.

It would be more rational to consider that sec. 4 of the act of 1786 re-enacted that of 1784, as if the latter had been set out at large, and thereby that the act of 1786 was violated, and not the act of 1784. I say this construction would be more reasonable than that both statutes must be resorted to in order to show that the acts charged are criminal.

It is with great deference and much reluctance that I differ from my brothers; but my opinion is that the indictment is sufficient.

PER CURIAM. Reversed, and judgment arrested.

The principle of this case has been *Overruled. S. v. Kirkman,* 104 N. C., 911.

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(209)

THE STATE v. EPHRAIM BOSWELL et al.

FROM WAYNE.

1. Proof may be offered of the bad moral character of a witness in order to discredit his testimony.
2. The discrediting witness should not express an opinion founded upon a knowledge of particular facts; nor upon the hearsay of strangers to the witness, whose testimony it is intended to discredit. But if his information is derived from proper sources, he may be asked whether he would believe the other upon his oath, or whether the other is worthy of credit upon oath.

The defendants were indicted for a riot, and on the trial before NORWOOD, J. on the last circuit, the defendants introduced witnesses for the purpose of discreiting the evidence offered by the State, and proposed to ask whether from their knowledge of the general character of the witnsses for the prosecution, they would believe them upon oath; and this before the discrediting witnesses had expressed any opinion respecting the general character of the witnesses for the prosecution as to truth and veracity, when testifying upon oath. The presiding judge was of opinion that the question was improper at that stage of the examination, as it would enable the discrediting witnesses to express opinions unfavorable to the credibility of the witnesses offered by the State, founded rather on the general moral character of the latter than on their character for truth and veracity when speaking upon oath; or their testimony might be founded upon particular facts, or private prejudices, or

the malicious motives of injuring the reputation of the witnesses for the prosecution. By the directions of his Honor the witnesses introduced by the defendants were examined—first, as to the general character of the witnesses for the State for truth, when upon oath; secondly, (210) as to their general character for truth in common conversation; and thirdly, as to their general moral character. The defendants were convicted and appealed to this Court.

No counsel appeared for the defendants.

The cause was submitted, without argument, by the *Attorney-General,* for the State.

TOOMER, J. One mode of impeaching the credit of a witness is to introduce evidence showing that he is not worthy to be believed on oath. The credit of the witness may be impeached by general evidence that he is not worthy to be believed upon his oath. 1 Starkie Ev., 146. The old rule of practice, laid down by Ld. Chief Baron Gilbert, confined the inquiry to the general character of the witness as a man of veracity. In the year 1804 it was decided, in this State, that to discredit a witness you might prove him to be of bad moral character; and the question was not confined to his character for veracity. *S. v. Stallings,* 3 N. C., 300. This decision established a rule of practice which has prevailed since that period in our Courts and has governed their proceedings.

I perceive no necessity for any change in this rule; it enables juries, whose peculiar province it is to weigh the credit of witnesses to do it more correctly. A like practice has been adopted by the Courts of Kentucky. 3 March., 261. Should a witness, whose general character is proverbially bad as to licentiousness and lewdness, who is, in his habits regardless of the precepts of religion, and reckless of the consequences of vice, be entitled to the same credit as another, whose character is without stain, and whose whole life has been marked by piety, virtue and truth? And how could the jury know the character of the vicious and immoral without evidence? Witnesses in our country are frequently strangers to jurors. An unprincipled man, although grovelling in other vices, which he has long practiced, may, for selfish purposes, artfully conceal the weakness of his character on the score of (211) veracity. Should not such habits lessen the weight and impair the credit of a witness, although he may have established no general character bad as to truth? Should not a jury have access to such information when suspending the scales of evidence to weigh the credit of a witness?

This mode of examination tends to elicit truth, and thus advances the administration of justice; and, when the rule is known, can be productive

of no evil or inconvenience, for the witness is not taken by surprise, but is presumed to come prepared to defend not only his general character for veracity, but also his general moral character.

A witness introduced to impeach the general character of another should not be permitted to give evidence of particular facts, nor repeat hearsay of strangers to the witness, whose testimony is intended to be discredited. He should only speak of the general moral character of the witness, as known among his neighbors and acquaintances. The discrediting witness should not express an opinion founded on his knowledge of particular facts, nor upon the heresay of strangers to the witness intended to be discredited. The discrediting witness may be asked, "whether he would believe the other upon his oath," or "whether the other was worthy of belief on oath." 1 Starkie Ev., 146; *Watmore v. Dickinson,* 2 Ves. & Beam., 267. But the Court should first ascertain that the discrediting witness is acquainted with the general character of the other, and has derived his information from proper sources, before he should be permitted to express his opinion of the credit to which the assailed witness is entitled. If his opinion be formed upon a knowledge of particular facts, or on the hearsay of strangers, then the discrediting witness should not be asked whether the other, whose general character is intended to be impeached, "is worthy of belief on oath," or "whether he would believe him upon his oath." (212)

The previous questions to be settled are, whether the discrediting witness is acquainted with the general moral character of the other, and whether his knowledge has been derived from proper sources. The first question to be asked appears to be, are you acquainted with the general moral character of the witness, whose credit is to be impeached? 1 Phil. Evi., 212; 4 Esp., 102. He may then be interrogated as to the means of obtaining his knowledge. Swift's Ev., 143. It is true, that, in 1 Stark. Ev., 147, it is said, "when general evidence of this nature has been given to impeach the credit of a witness the opposite party may cross-examine as to the grounds upon which that belief is founded." But it is then too late to correct the error; the injury has been done. An impression has been made on the minds of the jury, which neither the charge of the Court nor the remarks of counsel can entirely remove. Thus may artifice gain an advantage to which honesty would disdain to stoop. A witness may be introduced, and express his opinion, when it may be known to the party offering him that his knowledge did not authorize its expression. Justice could be perverted and the rights of parties sacrificed by testimony which the rules of evidence were designed to exclude.

Let it not be said that the error can be corrected, and the injury redressed by granting a new trial, because of the introduction of improper

evidence. Increased expense, delay and inconvenience, must be the consequence. The opinion of the witness is forbidden ground on which the Court should not tread until it be ascertained that it rests on a firm foundation.

PER CURIAM. No Error.

Cited: *Downey v. Murphy,* 18 N. C., 84; *S. v. Parks,* 25 N. C., 297; *Howell v. Howell,* 32 N. C., 83; *S. v. Dove, Ib.,* 473; *S. v. Efler,* 85 N. C., 588; *S. v. Daniel,* 87 N., 508; *S. v. Garland,* 95 N. C., 672; *S. v. Bullard,* 100 N. C., 488; *S. v. Spurling,* 118 N. C., 1253; *S. v. Castle,* 133 N. C., 776.

Overruled: *Hooper v. Moore,* 48 N. C., 430; *Coxe v. Singleton,* 139 N. C., 362; *S. v. Cloninger,* 149 N. C., 578.

(213)

THE STATE v. HARVEY SAWYER.

FROM CURRITUCK.

By the act of 1791 (Rev., ch. 354) neglecting to keep up a sufficient and lawful fence is rendered indictable; but the defendant must be convicted upon the testimony of three "indifferent" witnesses. Held that the act introduced no new rule of evidence, but that the indifferent is synonymous with the word competent.

The defendant was indicted under the act of 1791 (Rev., ch. 354) for not keeping up a lawful fence, as prescribed by the act of 1777 (Rev., ch. 121). On the trial, the case for the prosecution was made out by three witnesses; but one of them, on his cross-examination, admitted that he was the owner of the land occupied by the defendant, and which was charged in the indictment as defectively fenced; that he had leased it to the defendant, and that his stock had broken into the enclosures of the defendant, and had been injured by him. His Honor, Judge STRANGE, ruled that the witness was indifferent, within the meaning of the act of 1791, and left the case upon the facts to the jury, who returned a verdict for the State, and the defendant appealed.

The case was argued at December Term last, by Mr. Attorney-General *Jones,* for the State, and by *Gaston,* for the defendant, but was continued over until this term on account of the illness of the late Chief Justice.

HALL, J. The objection in this case is that a witness was examined who was not competent under the act of assembly, because he was not indifferent (Rev., ch. 354). It is true the act requires witnesses to be indifferent, but unfortunately it gives no exposition of this term.

Neither does it set forth its import. For my own part I see too small a shade of difference between that term and the term competent, to undertake to give either of them a meaning essentially distinct from the other. The import of the term competent is well known to (214) the profession. I must take it that the legislature meant the same thing when they used the term indifferent. If so, it may be said that three witnesses were introduced on the trial, and that the requisition of the act was complied with. It is not to be believed that the legislature intended to introduce a new rule of evidence.

PER CURIAM. No Error.

THE STATE v. PHILIP RAIFORD.

FROM WAYNE.

1. Appeals to this Court can only be brought for errors in law. The determination of the trial of an issue of fact, whether tried by a judge or a jury, cannot be reviewed. Therefore the decision of the judge below on the plea of *nul tiel* record is conclusive.
2. Per TOOMER, J., a *scire facias* which sets forth that the defendant "was fined *nisi* according to act of assembly," is not supported by an entry that the defendant being under recognizance "was called and failed."

SCIRE FACIAS in the usual form, upon a recognizance for the appearance of the defendant at the spring term, 1828, of WAYNE, to answer the State upon a charge for an assault and battery. The *scire facias* recited that the defendant "was duly called and failed to appear, and was fined *nisi,* according to act of assembly." Upon the plea of *nul tiel record,* Mr. Solicitor *Miller* produced the following entry made at Spring Term, 1828: "Phillip Raiford, who was bound to appear at this term to answer the State on an indictment against him, was called and failed." Upon this evidence his Honor, Judge NORWOOD, (215) found the issue in favor of the defendant, and Mr. Solicitor *Miller* appealed.

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

TOOMER, J. It is a judicial maxim that to matters of law the Court replies; to matters of fact the jury. The issue joined on a plea of *nul tiel record* involves a question of facts as to the existence of a record. This is not a matter of law, but it is such a question of fact as must be tried and decided by the Court. Should the jury in the Court below, on the trial of an issue of fact, find a verdict contrary to the weight of

evidence, this Court cannot, for that reason, disturb the verdict. If the Court below, in trying a question of fact as to the existence of a record, which is properly to be tried by that tribunal, draws incorrect inferences from the evidence, this Court does not see the evidence, and cannot interfere with the decision. *S. v. Isham,* 10 N. C., 185; *S. v. Graton, Ib.*, 187.

It is not necessary to inquire whether the Court below had authority to mend this *scire facias,* as in proceedings between individuals, parties to a civil suit. If the authority be conceded, the State can derive no benefit from the concession. Motions to amend the pleadings are addressed to the discretion of the Court, and a refusal to exercise such discretion is not a decision which can be revised in this Court. *Armstrong v. Wright,* 8 N. C., 93; 5 Cranch, 15; 6 Cranch, 253.

The following opinion is extrajudicial, but as I concur with the judgment of the Court below, there can be no impropriety in expressing that concurrence.

I think there was no such record as that set forth in the *scire facias.* The judgment of the Court was correctly rendered on the plea of *nul tiel record.* The *scire facias* states, "was fined *nisi* agreeably to act (216) of assembly." No judgment *nisi* was rendered. No act of the general assembly prescribed the penalty; no fine was imposed. The record of one term showed the recognizance; the record of the succeeding term exhibited this entry, "Defendant called and failed." *S. v. Dickinson,* 7 N. C., 10, has not been overlooked, but is considered not applicable to the present proceedings. There a recognizance was duly entered into; the cognizor failed to appear; the recognizance was forfeited; judgment *nisi* was rendered against him, for the sum specified in the recognizance. When the *scire facias* issued, calling on the cognizor to show cause why execution should not issue against him, for the sum of eight hundred pounds for a fine on a forfeited recognizance, in failing to make his appearance, as he was bound to do, the Court decided that the word fine might be rejected as surplusage; but retaining it did not obscure the sense of the *scire facias.* And the facts affirmed in the *scire facias* substantially agreed with the record. There was a forfeiture recorded, and a judgment *nisi* for the sum of eight hundred pounds agreeably to the recognizance, and as set forth in the *scire facias.* And the only variance between the record averred in the *scire facias* and the record offered in evidence to support the averments, consisted in the insertion of the word fine in the *scire facias.*

PER CURIAM. Affirmed.

Modified: Trice v. Turrentine, 35 N. C., 214; *S. v. Green,* 100 N. C., 422.

(217)

THE STATE v. ARTHUR, a Slave.

FROM ONSLOW.

1. The right of challenge is intended to secure an impartial trial, by excluding objectionable persons from the panel, and not to enable the accused to select a jury of his own choice. Therefore, where a juror was challenged for cause by the prosecution, and the challenge allowed, and the jury completed before the peremptory challenges were exhausted, this Court refused to examine into the sufficiency of the cause of challenge.
2. On a trial for murder, proof that a written paper found near the body of the deceased was given to the prisoner's son for the use of his father, is sufficient ground to permit the paper to go to the jury, with instructions to disregard it unless satisfied that it actually came to the prisoner's possession.

The prisoner was indicted for murder, and tried on the last circuit, before NORWOOD, J.

In making up the jury it was alleged on the part of the State, and assented to by the counsel for the prisoner, that the jury ought to be entirely composed of slave-owners. The question being considered doubtful by his Honor, he consented to the adoption of that rule in this case, especially as it could not operate injuriously to the prisoner. Two jurors were challenged by the prisoner for cause, and the cause shown was that they were not slave-owners; under the rule adopted the challenges were allowed. Afterwards a challenge for the same cause was made by the State, and objected to by the counsel for the prisoner, but was allowed by his Honor. A jury was made up from the panel without exhausting the peremptory challenges of the prisoner.

Upon the trial it was proved that the body of the deceased was found on the morning of Thursday, 27 November, 1828, on the side of the road. There were appearances of a fierce conflict between two men for the distance of thirty-five yards, within which space, and within twelve yards of the body, the following paper was found: (218)

"Permit Arthur to pass and repass till Monday morning next, 23 November, 1828. HENRY SHEPPARD."

Sheppard, the person who signed the paper, testified that he wrote this permit by the direction of the prisoner's master, and that he delivered it to a little boy, the son of the prisoner, to carry it to his father. On this evidence the counsel for the prosecution moved to read the paper to the jury, which was objected to by that of the prisoner. His Honor, thinking there was sufficient evidence of the receipt of the paper by the prisoner to entitle the State to read it to the jury, overruled the objection; but his Honor at the time the paper was read informed the jury

that if they should believe the prisoner actually received the permit when it was written they would give to that circumstance such weight as they thought proper; but if they should think that the prisoner never received it, then that they should exclude from their consideration all the evidence relative to it.

The prisoner was convicted of the charge, and appealed to this Court.

The *Attorney-General* for the State.

TOOMER, J. Trial by jury is one of the boasted privileges of our country. The law secures to every man accused of crime a fair and impartial, by a jury of good and lawful men, free from all exception. By a jury of this character was the prisoner tried and convicted. When put upon his trial he did not exhaust his right of peremptory challenge; and accepted, according to the usage and practice of our Courts, every juror who passed upon his guilt.

(219) The State, by the solicitor, challenged for cause one of the individuals named on the panel, and assigned as cause for challenge that he was not the owner of slaves; "the prisoner's counsel objected to the legality of the challenge," but it was allowed by the Court. Two of the panel had been previously challenged by the prisoner for the same cause, and the challenge allowed. It is not pretended that the prisoner had not a fair and impartial trial, or that the jury by whom he was tried was not of his choice—accepted by him, and free from all exception.

It is held that the State need not assign cause of challenge, till the panel is gone through; and then the prosecuting officer must show the cause, and if not allowed by the Court, the juror must be sworn. 4 Bl. Com., 353; 2 Hale P. C., 271. This has been the usage of our Courts; and it is in accordance with the practice of the Courts of that country from which our legal notions have been derived. Had the panel been gone through, the prisoner could then have claimed the right to have on his trial the juror who had been challenged by the State; and the prisoner might have had reason for complaint, if the juror were discharged, and the cause assigned did not disqualify him. The prosecuting officer could not at any antecedent stage of the proceedings be required to assign the cause, or the Court to pronounce its decision. The juror was to stand aside, until the panel had been gone through, when the cause of challenge and the decision of the Court could be required.

The prisoner accepted a jury, meeting his approbation and free from all exception, before it was necessary for the prosecuting officer to assign the cause of challenge, or for the Court to decide on its sufficiency. This challenge by the State was in conformity to two challenges,

previously made by the prisoner for the same cause and allowed by the Court. The precedent was established by the prisoner; (220) it was only followed by the State. Very different would have been the aspect of this case, and very different my conclusions, had a juror been imposed on the prisoner of whose qualification there was the least doubt.

The purposes of justice and the end of criminal proceedings are attained when a fair and impartial trial is secured to the accused. The right of challenge is given to prisoners, not that a particular individual may be put on the jury, but that the prisoner may have a jury free from all objection. The prisoner could have arbitrarily and capriciously challenged, without assigning any cause, thirty-five jurors. The circumstance of accepting a jury without exercising to its full extent this right of peremptory challenge shows that the jury was of the prisoner's choice, and free from all exception.

This view of the case dispenses with the necessity of expressing any opinion as to the qualification of the juror. That point does not now require the decision of the Court. And any construction given by me to the act of 1816 (Rev., ch. 912), as to its effect in repealing that part of the act of 1793 (Rev., ch. 381), prescribing the qualifications of jurors for the trial of slaves, would be a mere *obiter dictum,* and could furnish no rule for the government of future trials. The opinion on this subject, expressed by that eminent jurist and accomplished scholar, the late Chief Justice TAYLOR, in *S. v. Jim,* 12 N. C., 144, was not the decision of the Court. The question is considered open for adjudication. That opinion is entitled to respect, for the reasons which accompany it; but still more for the judicial reputation and high character of the individual who expressed it; but I wish not to be understood as concurring in it.

I perceive no error in the admission of evidence, or in the Judge's instructions to the jury.

HENDERSON, C. J. The motion for a new trial is founded on (221) a mistaken notion of the law as to the formation of juries in capital cases. The rule is not that the prisoner shall be tried by a jury of his own choice or selection, but by one against which, after having exhausted his peremptory challenges, he can offer no just exception. He has not the right of claiming that every person drawn as a juror, and tendered to him, shall be of his jury. The Court, to be sure, cannot arbitrarily withdraw a juror from him without any cause. But if in the exercise of this judgment it should improperly allow a challenge made by the State it is no cause for a new trial. That this is the case is most conclusively shown, by the practice under the act of Hen. 8, allowing the King to challenge for cause. Under the statute the uniform prac-

tice has been not to pass upon the cause of challenge until the panel is gone through. The challenged jurors stand aside until that is done, and if a jury is formed without them the cause of challenge is not examined. But if the prisoner had a right to the juror, unless the cause of challenge was good, the Court must have passed upon it before another was drawn. As to the question whether the challenge was properly allowed or not, it is unnecessary to give an opinion, and none is intended to be intimated. The permit, I think, was properly received in evidence, and the law properly laid down by the Judge.

PER CURIAM. No Error.

Cited: *S. v. Benton,* 19 N. C., 204; *S. v. Shaw,* 25 N. C., 535; *Whitaker v. Cover,* 26 N. C., 468; *S. v. Lytle,* 27 N. C., 61; *S. v. Taylor,* 61 N. C., 514; *S. v. Holmes,* 63 N. C., 21; *Capehart v. Stewart,* 80 N. C., 102; *S. v. Efler,* 85 N. C., 587; *S. v. Washington,* 90 N. C., 667; *S. v. Hensley,* 94 N. C., 1028; *S. v. Freeman,* 100 N. C., 432; *Ives v. R. R.,* 142 N. C., 137.

(222)

THE STATE v. THOMAS NORMAN.

FROM GUILFORD.

An indictment on a statute need not negative a proviso which merely withdraws a case from its operation; *aliter* where the proviso adds a qualification to the enactment so as to bring a case within it, which but for the proviso would be without the statute. Therefore an indictment on the statute of 1790 against bigamy, which avers that the first wife was living at the time of the second marriage, is good, without an averment that the first marriage then subsisted.

The prisoner was tried on the last circuit before MARTIN, J., on the following indictment:

The jurors, etc., on their oath present, that T. N., late of, etc., on, etc., in, etc., did marry one, M. B., spinster, and her, the said M. B., then and there had for his wife, and that the said T. N. afterwards, to wit, etc., with force and arms, in, etc., felonously did marry and take to wife one P. S., spinster, and to her, the said P. S., then and there was married, the said M. B., his former wife being then alive, and in full life in, etc. Against the form of the acts of the general assembly in such case made and provided; and against the peace and dignity of the State."

After a verdict for the State the counsel for the prisoner moved in arrest of judgment, which motion being sustained by his Honor, Mr. Solicitor-General *Scott* prayed an appeal to this Court.

The form in which the record of the cause was certified constituted an objection in this Court. After setting forth the names of the jurors, the words of the transcript were "who being sworn, charged and empanelled true deliverance to make between the State and the prisoner at the bar,

Thomas Norman, and having heard their evidence, both of law and the fact, the counsel for the State and the prisoner, and also the charge of the Court, returned to the Court (in manner and form as the custom is) their verdict, guilty, when the Court recorded the verdict in the words following, to wit: "Find the defendant, Thomas Norman, (223) guilty of the felony and bigamy, and of taking to himself a second wife, his former wife being still living, as charged in the bill of indictment, and that the second marriage was after 1 April, 1828, but before the finding of the bill of indictment."

The dates set forth in the record were also in figures, and not in letters, as is usual in records.*

Attorney-General, for the State.
Winston, for the prisoner. (226)

HENDERSON, C. J., We find in the acts of our legislature two kinds of provisoes—the one in the nature of an exception, which withdraws the case provided for from the operation of the act, the other adding a qualification, whereby a case is brought within that operation. Where the proviso is of the first kind it is not necessary in an indictment, or other charge founded upon the act, to negative the proviso; but if the case is within the proviso it is left to the defendant to show that fact by way of defense. But in a proviso of the latter description the indict-

*Act of 1790.

1. If any person now married, or who hereafter shall be married, doth take to him or herself another husband or wife, while his or her former wife or husband is still alive, every such offence shall be felony, and the person so offending shall suffer death as in cases of felony. Provided, always, That this act shall not extend to any person or persons whose husband or wife shall continually remain beyond sea for the space of seven years together, nor to any person or persons whose husband or wife shall absent him or herself in any other manner for the space of seven years together, such person not knowing his or her said husband or wife to be living within that time.

2. This act shall not extend to any person or persons who are or shall be at the time of such after-marriage divorced according to the mode established, or which hereafter shall be established by law, nor to any person or persons whose former marriage is declared by law to be void and of no effect, nor to any person or persons for or by reason of any former marriage had or made within the age of consent.

Act of 1809.

An act to amend the first section of an act passed at Fayetteville, in the year one thousand seven hundred and ninety, entitled "An act to restrain all married persons from marrying again whilst their former wives or former husbands are living."

1. If any person now married, or who hereafter shall be married, doth take to him or herself another wife, while his or her former wife or husband is still living, every such offender shall be adjudged a felon, without benefit of clergy, and shall suffer death.

ment must bring the case within the proviso. For, in reality, that which is provided for, in what is called a proviso to the act, is part of the enactment itself. If this case is tested by these rules it will be found that the proviso, which exempts from the operation of the act persons who have been divorced, is one of the first class. It withdraws such a case from the operation of the act. If, therefore, it be the fact, that the defendant had been divorced from his first wife, it lay on him to show it as a defense. All the precedents produced are so, except that in the *Duchess of Kingston's case.* The form of the indictment in that case was, I presume, settled by Lord Thurlow, and it being a case of great excitement, I suppose the averment that she had not been divorced from her former husband, was made from great caution.

Although the act of 1809 contains no proviso, and is in itself a complete enactment on the subject, yet as it is an amendment to and
(227) explanatory of the act of 1790, and was designed only to oust the offender of his clergy, I have considered this case as if every proviso contained in the first act was incorporated in that of 1809, for such I believe to be its just exposition.

The exception that the dates are in figures, not writen, nor in Roman numerals, has been, I believe, disallowed in the old Supreme Court more than once.

It is objected that the transcript sent up from the Superior Court is a mere certificate of what was done, and not a copy of the record. It is somewhat of that character, but a sufficiency appears as a copy to warrant a judgment for the State.

PER CURIAM. Judgment reversed. The Court below will proceed to judgment of death.

Cited: *S. v. Tomlinson,* 77 N. C., 529; *S. v. Club,* 100 N. C., 482; *S. v. Turner,* 106 N. C., 694; *S. v. Pool, Ib.,* 700; *S. v. Davis,* 109 N. C., 784; *S. v. Downs,* 116 N. C., 1067; *S. v. Melton,* 120 N. C., 596; *S. v. Call,* 121 N. C., 649; *S. v. Newcomb,* 126 N. C., 1106, 1110; *S. v. Yoder,* 132 N. C., 1117; S. *v. Goulden,* 134 N. C., 746; *S. v. Burton,* 138 N. C., 576; *S. v. Connor,* 142 N. C., 702, 703, 707, 709; *S. v. Long,* 143 N. C., 677; *S. v. Hicks, Ib.,* 694; *Rabon v. R. R.,* 149 N. C., 60.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1829

(229)

THOMAS FENTRESS v. DAVID WORTH.

FROM MOORE.

Where a defendant promised to pay a debt as soon as he had collected certain notes, it was held that a special action on the case was the only remedy for neglect in the collection, and that a single magistrate had no jurisdiction of the matter, without proof of the receipt by defendant of the money due on the notes.

ASSUMPSIT, originally commenced by a warrant before a justice of the peace.

On the trial before STRANGE, J., upon the general issue, the case was that the defendant promised the plaintiff to pay him the amount of a debt due him by one Rigan, if the plaintiff would give him, Rigan, some time, as soon as the defendant should collect certain notes, which had been put into his hands by Rigan, and which the defendant represented to be good. Twenty-one months had elapsed between the promise and the commencement of this action.

The plaintiff contended that he had a right to recover without proving the collection of the money, and that the burthen of disproving collection lay upon the defendant. But his honor instructed the (230) jury that, by the contract, the collection of the notes was a condition precedent to the liability of the defendant, and unless there was direct or circumstantial evidence to satisfy them that the defendant had collected the notes they ought to return a verdict for him. His Honor left the jury to presume a receipt of the money due on the notes by the defendant from the time which had elapsed since the making of the promise.

A verdict was returned for the defendant, and the plaintiff appealed.

Gaston & Winston, for the plaintiff.
Nash, for the other side.

RUFFIN, J. It is objected to the charge of the Judge below that he erred in considering the collection of the money by the defendant a condition precedent, because, since Worth himself was to do the
(232) act, it would render the promise nugatory, or leave it altogether to his will, which is the same thing. Technically speaking, it is certainly not generally true that an act, to be previously done by the party promising, is a strict condition precedent to another act to be done by the same party. It is consequently here insisted by the plaintiff that this promise must be held to include an engagement on the part of the defendant, that he would endeavor to collect. It is unnecessary to consider that point very attentively. For admit the position to be fully true, the inquiry remains, what would be the proper remedy upon such a promise expressly made? The remedy must be the same on this, considering it constructively a promise of that nature. It is clear that it could be only an action on the special agreement for not collecting or using diligence to collect. Now the Judge, in trying this appeal from a justice of the peace, must consider it as if it were still pending before the justice, and decide it by the same principles which properly pertained to it when pending there. Of such a question a justice of the peace has no jurisdiction. It sounds in damages; it does not rest upon a promise to pay. Cases have been cited, however, in which actions have been sustained by principles against their agents for money had and received, without proving the actual receipt of the money, upon the presumption, from lapse of time or other circumstances, that they have received it, or that they might have received it but for their negligence. The Court left the effects of the time to the jury as evidence of the collection. And as to the other matter, that the defendant is chargeable as having received the money, because he neglected to receive it, it may be so held by a tribunal competent to weigh and appreciate the duty of diligence and the penalties of *laches.* That is a power not confined to justices of the peace, as was held by this Court in *S. v. Alexander,*
(233) 11 N. C., 182; and this decision has been followed up by several others, in affirmance of the positions there taken. In effect, therefore, the charge is substantially correct. For in this method of proceeding nothing but the actual receipt of the money would sustain the plaintiff; and therefore the collection was a condition precedent—if not to any remedy of the plaintiff, to bringing this suit.

PER CURIAM. No Error.

Cited: Clark v. Dupree, post, 412.

John Den, ex dem. of ANN MORRISON, v. GEORGE CONNELLY.

FROM BURKE.

1. The proviso in the sixth section of the statute of limitations (Act of 1715, Rev., ch. 2), whereby the operation of the act is suspended upon a judgment for the plaintiff and its reversal for error, or upon an arrest of judgment upon a verdict in his favor, provided he bring a new action within a year, has been extended by construction to the cases of an abatement and a non-suit.
2. The proviso is founded upon the idea of merits in the plaintiff, although inartificially ascertained; its extension by construction, upon the fact that the merits are indifferent, and the plaintiff has been diligently endeavoring to assert them.
3. It seems that the proviso extends only to "actions and suits," and does not include a right of entry or claims to land, and as the action of ejectment depends upon the right of the lessor of the plaintiff to enter, that it is not within the proviso.
4. But if the action of ejectment be within the proviso, yet the pendency of a former action between the same parties, for the same premises in which the plaintiff recovered only a part of them, will not prevent the operation of the statute as to that part of which a verdict passed in favor of the defendant.

EJECTMENT for 400 acres of land, tried on the last circuit, before MARTIN, J.

The defendant having protected himself by showing seven years' actual possession, with color of title, the lessor of the plaintiff, to avoid the bar, produced the record of a former ejectment between the same parties for the same premises, in which the plaintiff had recovered a verdict and judgment for two acres of land, and proved (234) that the present action was brought within a year of the determination of the former.

His Honor instructed the jury that the pendency of the former suit did not prevent the operation of the statute of limitations, and a verdict being returned for the defendant, the plaintiff appealed.

No counsel for the appellant.
Gaston, for the defendant.

RUFFIN, J. It is the settled course in personal actions to allow a new suit to be brought after a nonsuit in a former action, though the time of limitation hath expired, provided the first was commenced in due time, and the second within a year after the determination of the former. This is not within the words of the act, but it is established by a long train of decisions to be within the equity of it.

The idea of the plaintiff seems to be that this case is within the like reason, because in ejectment a verdict in one suit is not a bar to another action.

The doubt (if indeed there be a doubt) is whether the equity alluded to extends to ejectment at all. Had there been a nonsuit in the first action, would the plaintiff have been better off? The reason why the statute is suspended during the pendency of a personal action, which has abated or terminated by nonsuit, is that the new action is a continuation of the former. In legal contemplation both make but one. It is precisely the reverse in ejectment. This is the very cause why a verdict in one ejectment is not a bar to another ejectment. Both are fictitious; and the new demise laid in the second action gives the fictitious plaintiff a new and different title. If, then, the real plaintiff in ejectment claims to elude a bar, arising out of a former verdict, upon the ground that John Doe is now suing on a different title from that stated in his
(235) first declaration, shall he be allowed to impugn a distinct bar of the defendant to the present action, by showing that this John Doe is the same person who was before plaintiff, and the title the same that he before had? The two privileges are incompatible. They cannot stand together. Ejectments cannot be connected together for any purpose. Hence it follows that the mode of the termination of one cannot help as it cannot injure another. There is a difference between this and other cases. The action of ejectment is not barred by time. In other cases the right is held to continue, though the remedy be barred. It is not so with ejectment. It is not mentioned in the statute. The entry, the right itself on which the action is founded, is divested. The proviso in section 6 speaks only of actions or suits, and is silent as to entries of claims to land. It seems to refer to the actions mentioned in the section immediately preceding, to which it is a proviso. It cannot refer to the action of ejectment; for that is nowhere mentioned in the act. Indeed, in the nature of things, it could not so refer; for in ejectment the question is not whether that action is barred, but whether the lessor could enter. He could have no right to enter unless he, or some one under whom he claimed, had been in possession within seven years. It is not sufficient to show that John Doe, upon the demise of the same lessor, had sued the defendant for a term in the land. It has already been observed that being by a distinct demise, it is a different title. It is the same as if the demise had been made by another lessor. If it be said that the confession of lease, entry and ouster in the first action admits the possession within seven years, the answer is that such confession has never been held to affect the statute of limitations. If it did, we need not go back to the first action; for the same confession is made in the second. And so the statute could never bar a plaintiff in ejectment. Besides this reason would itself fail if the first
(236) action pended seven years; and thus would be most inefficient where the greatest need for the rule existed.

A case easily supposed may put the position that one ejectment cannot be aided by another in a clearer light. Suppose seven years to expire pending the first action; that the defendant leaves the possession, and that a third person enters, not in privity with the defendant, and then the plaintiff is nonsuited. No new ejectment can be brought against the former defendant because he is not in possession. The tenant now in possession cannot be affected by the first action, being neither party nor privy. This stranger, then, would protect himself by showing the former possession, by means of which the lessor of the plaintiff had been prevented from entering within seven years. Why should not the same possession form a bar in favor of the possessor himself? It seems, upon good authorities, that it does. Mr. Justice *Buller* says (*Nisi Prius,* 102), that if an ejectment be brought and the plaintiff be nonsuited, the case is not brought out of the statute of limitations; for there must be an actual entry for that purpose. This passage is commented on and explained by Sergeant *Williams* in his note to *Clerk v. Pywell,* 1 Saund., 319, b. He shows, indeed, that an actual entry is not necessary to prevent the operation of the statute of limitations in the sense in which it is required to avoid a fine—that is to say, that it must be made in every case of an adverse possession before an action can be brought at any period. A fine divests the estate; and the statute of fines expressly requires an entry to revest it. No action can, therefore, be instituted at any time before an entry to avoid the fine, because until an entry the estate is out of the plaintiff. Not so under the statute of limitations. A possession does not divest the estate until by a lapse of the whole time the right of entry is taken away, and then even an actual entry is unavailing, because made without right. The meaning, therefore, of the passage in Buller is, not that an actual entry must appear (237) in every case in ejectment under the statute of James, to have been made after the defendant's possession commenced; but it is to be understood that in every case an actual or legal possession in the lessor of the plaintiff, or one under whom he claims, within twenty years before suit brought, must be shown; and, therefore, if the twenty years are near expiring the claimant ought actually to enter to avoid the operation of the previous lapse of time, and take twenty years more to assert his right by action. That such would be the consequence of the entry is shown by statute 4 Anne, ch. 19, sec. 16, by which it is enacted that no claim or entry upon lands shall be sufficient within the statute 21 Jac., I, unless an action shall be commenced within one year thereafter, and prosecuted with effect. It was seen that without such a provision the statute of limitations might be rendered useless by entries made every nineteen years forever. To prevent that the statute 4 Anne limits again the time upon this new entry to one year for bringing suit, and requires

suit to be prosecuted with effect, thereby cutting off the claimant from any further entry or action. Hence, although the actual entry is not, in the opinion of Sergeant *Williams,* necessary in ejectment, under statute 21 Jac., as it is under statute 4 Hen., VII; yet it is advisable, when the twenty years are nearly out, so as to give the party; for the suit, given after the twenty years, is not one to be commenced within a year, after a former suit brought within the twenty years, but within a year after an actual entry, made within the first twenty years.

It is to be regretted here, perhaps, that any claim of reasoning should reach this result; since the period fixed by our statute of limitations is so short, and the statute of Anne, being one of those for the amendment of the law, is in force in this State. It will operate severely here; for it confines us to eight years, as the utmost limit of time, (238) though the party be prosecuting his claim at law during the whole period, unless the suit pending at the expiration of the seven years, or brought within one year after an entry within the seven years, be effectually prosecuted. A century ago the period of seven years was probably wisely fixed on. The state of the country required that titles should be settled by a short possession; and wild lands being abundant, not much was lost to the true owner. But things have since much altered. And it is likely that the conviction of that led the Courts to create the doctrine of color of title, with the view of rendering the statute less effectual and injurious. It is to be doubted whether the remedy is not the greater of the two evils. And after all it may be found necessary for the legislature once more to interfere, by enlarging the term beyond seven years, and abolishing the notion of color of title, or explaining what it is. An enlargement of the time seems to be thought necessary by the profession generally. But the restriction in the statute of Anne is certainly salutary; for but for that, except in the case of the entry being tolled by descent cast, the party out of possession would be set at large without any effectual limitation, since his power to sue would be renewed continually by entries from seven years to seven years.

If, therefore, in the case before us the first action had terminated by nonsuit, the defendant would have been protected by the statute of limitations.

But being by verdict the point is still clearer. The Court does not feel the force of the suggestion that a new ejectment after a verdict stands upon a footing with personal actions after a nonsuit; because the former suit is not a bar to the second in either case. That principle relates to a matter very different from the present. The cases specified in the proviso in the act of 1715, section 6, are where there has been a verdict for the plaintiff and the judgment has been arrested,

or where a judgment for the plaintiff has been reversed for (239) error. Both of these instances imply merits on the part of the plaintiff, which the law does not allow to be defeated merely by the time flowing while he is in the act, though inartificially, of prosecuting his claim. By construction Judges have raised a further equity in the cases of a nonsuit and an abatement; but it is an equity analogous to the rule of the statute. It is founded upon this, that the merits stand indifferent between the parties, as far as judicial proceedings show them. The plaintiff, therefore, shall be heard until he can get a trial on the merits, provided he was diligent enough in the first instance to sue before time barred him, and renews his suit in a reasonable time. But this can never apply to a case in which the merits have been tried and a verdict given. This precise question can never arise in a personal action, because the right of the plaintiff is barred by the verdict in the first action. No adjudication is found adopting it as to ejectments. And the reason of the rule in other cases shows that it ought not to be applied to this. The failure must be presumed to have arisen from defect of title, when a verdict is rendered against the plaintiff. It is wholly unlike a nonsuit, or an abatement, or arrest of judgment, or reversal of judgment. In these last the right has either been found for the plaintiff or has not been tried at all. The Court does not, therefore, perceive that the plaintiff failed to recover, under any circumstances, which will allow the second suit to be benefited by the first.

PER CURIAM. No Error.

Cited: Long v. Orrell, 35 N. C., 127; *Straus v. Beardsley,* 79 N. C., 64; *Wharton v. Comm'rs,* 82 N. C., 15.

(240)

MARTIN PALMER v. JOHN A. FAUCETT.

FROM ORANGE.

1. The seventh section of the act of 1784 (Rev., ch. 225), requiring sales and gifts of slaves to be in writing, attested by a witness and registered, was passed for the protection of creditors and purchasers only. Under it a gift or a sale is good between the parties without a deed properly attested, and if by deed thus attested, without its being registered.
2. But the act of 1806 (Rev., ch. 701), avoiding gifts of slaves unless in writing, attested by a subscribing witness and registered, is a statute of frauds made for the protection of donors, and under it a deed is inoperative against the donor, unless duly attested and registered.
3. The act of 1820 (Rev., ch. 1055), for quieting the titles of persons in possession of slaves, does not pass the title to a donee who has been in possession three years under a gift void by the act of 1806.

DETINUE for a slave, tried on the last spring circuit, before MARTIN, J.

After the plaintiff had made out his case the defendant proved that upon his marriage with a daughter of the plaintiff, in 1812, the slave in question had been put into his possession by the plaintiff, that this possession continued until 1825, when the plaintiff received the slave again, and hired him out for a part of 1825 and 1826. After which the slave was again permitted to go into the possession of the defendant.

There was proof that the plaintiff sent to the defendant a writing respecting the negro, but whether it was a letter or a bill of sale the witness did not know. There was also proof of the loss of this instrument, and it never had been registered.

The defendant relied upon his possession for three years under the act of 1820 (Rev., ch. 1055) as a validation of his title, supposing it to be defective. His Honor instructed the jury that as the act of 1806 avoided all gifts of slaves unless in writing, signed by the donor and attested by a witness, so a possession of a slave (241) for three years, held under a gift not evidenced as that act required, would not confer a title under the act of 1820; that every possession of property must either be consistent with or in opposition to the title. Where the possession is acquired with the consent of the owner it constituted the contract of bailment; where the parties intended to convey the titles, but made use of a mode inoperative and void, the ownership remained unchanged, and the possession being still taken by the consent of the owners, forms a bailment, and that, supposing such contract to have been constituted when the negro was first received by the defendant, it must have been ended, and three years' possession have occurred since its dissolution to enable the defendant to acquire a valid title under the act of 1820.

Upon the other point his Honor charged the jury that the plaintiff having shown a title in himself, it was incumbent on the defendant to show that it was divested; and as the latter claimed under a gift since the act of 1806 he ought to satisfy them that the gift was in writing, signed by the donor and attested by a witness subscribing it—and, further, that in law a circumstance not made to appear was taken as not existing.

A verdict was returned for the plaintiff, and the defendant appealed.

Nash and *Winston,* for the plaintiff.
Badger, for the defendant.

HALL, J. The act of 1784 (Rev., ch. 225, sec. 7), from its preamble and the adjudications upon it, was passed principally for the protection of creditors and purchasers. The preamble is as follows: "Whereas, many persons have been injured by secret deeds of gift to children and

others, and for want of formal bills of sale for slaves, and a law for perpetuating such gifts and sales." It then provides for (242) the registration of such deeds, and that they shall be attested by one credible witness at least. The construction put upon the act, that it was made for the benefit of creditors and purchasers, is evident from *Knight v. Thomas,* 2 N. C., 289; *Cutler v. Spiller,* 3 N. C., 61; *Lynch v. Ashe,* 8 N. C., 338; *Rhodes v. Holmes,* 9 N. C., 193; *Bateman v. Bateman,* 6 N. C., 97.

Consistently with this construction of the act, the act of 1792 (Rev., ch. 363), declares that all sales of slaves *bona fide* made, and accompanied with actual delivery, shall be good without any bill of sale. According to the cases before cited it was not necessary, as between the parties, that there should be a bill of sale, or if there was one, that it should be attested by a subscribing witness; or if so attested, that it should be registered.

But the act of 1806 (Rev., ch. 701), "declaring what gifts of slaves shall be valid," was made, as it emphatically declares, "for the prevention of frauds," and may be fitly called a statute of frauds. It declares that no gift of slaves hereafter to be made shall be good or available in law or in equity unless the same be made in writing, signed by the donor, attested by at least one subscribing witness, and shall be proved or acknowledged as conveyances of land, and registered within one year. This act was made not only for the benefit of creditors and purchasers, but also for that of donors.

It must be well remembered what a fruitful source of litigation parol gifts and pretended parol gifts were before the passage of this act; and that too in many cases where creditors and purchasers were not concerned. To remedy that mischief the law was passed for the benefit of donors. And in proportion as any of the requisites of the act are dispensed with, so in proportion will the mischief be left without remedy.

In the present case, between the donor and donee, if there had been a deed of gift, and that deed had been registered, although (243) the deed were lost, there would no no difficulty in procuring a copy of it. If deeds of gift have been *bona fide* executed, injury is done to no one by registering them. Mischief may be done by concealing them until after the death of the donors.

But the act is positive that such deeds shall be registered as conveyances of land. This clears the question of doubt; because nothing passes by conveyances of land, or shall be good and available in law, unless the same shall be acknowledged or proved, and registered.

I am therefore, of opinion, after full reflection, that the instructions given by the judge to the jury on the trial in the Court below were correct. It is true that what I said in *Justice v. Cobbs,* 12 N. C., 469,

on the question of adverse possession, was extrajudicial. The question involved in the decision of that case did not require it. That was the case of a possession, where there was no parol gift proved. But it is a warning lesson not to speculate on supposed cases.

PER CURIAM. No error.

Cited: Atkinson v. Clarke, 14 N. C., 173; *Hamlin v. Alston,* 18 N. C., 481; *Green v. Harris,* 25 N. C., 220; *Baxter v. Henson,* 35 N. C., 460; *Weeks v. Weeks,* 40 N. C., 117.

(244)

WILLIAM CASEY v. JAMES HARRISON.

FROM ROWAN.

1. Whether the pendancy of a suit in another State, between same parties for the same cause, is ground of abatement. Qu.?
2. But held clearly that the pendency of a suit, at the instance of a different plaintiff for the same demand, is not matter of abatement, whether the suits be pending in the Courts of this or another State.
3. Where the endorser of a note sued the maker in South Carolina, and pending that suit the payee took up the note and brought an action in his own name in this State, it was held that the pendency of the suit in South Carolina could not be pleaded in abatement of the action thus brought.
4. Upon sustaining a demurrer to a plea in abatement the proper judgment is *quod respondeas* ouster.

DEBT upon two promissory notes, made by the defendant to the plaintiff. Plea in abatement, "that another action is pending on the same in the Court of Common Pleas for Fairfield District, in South Carolina." Demurrer by the plaintiff and joinder.

From a copy of the record of the Court of Common Pleas in South Carolina it appeared that the action in that Court was brought in the name of one Daniel Casey, the endorser of the plaintiff. On the last circuit, NORWOOD, J., overruled the demurrer, and the plaintiff appealed.

Gaston, for the plaintiff.
No counsel for defendant.

RUFFIN, J., (after stating the case as above). The plea does not state who is the plaintiff in South Carolina, and for that reason is, strictly speaking bad. But in our loose practice we will aid the plea by considering it as referring to and incorporating the records from Fairfield, which are filed with the plea. They show an action pending there on the same notes in the name of Daniel Casey, to whom the present plaintiff, William Casey, had endorsed them.

It is unnecessary to say whether under our Constitution and (245) act of Congress the pendency of an action in a sister State can hinder the same plaintiff from suing the defendant in our Courts. There are very respectable authorities and strong reasons both ways. The Court does not choose to intimate an opinion upon the point until it be brought directly into judgment.

This, however, is a very different question. Here the two actions are brought by different plaintiffs. It seems to be against principle that the suit of one person should be abated because another has thought proper to demand the same thing in another action. A popular action is subject to that rule. The reason is because the right of action to the thing sued for attaches with the priority of the action. The defence may be taken either by plea in bar or abatement. *Combe v. Pitt,* Bur., 1423. But in actions founded upon tort or contract the right of action depends upon the wrong done, or the title under the contract—with this restriction, that the same plaintiff shall not sue the same defendant twice for the same thing. All the precedents aver that "the parties aforesaid to and in the plea aforesaid in the said Court, etc., and the said A, the now plaintiff, and the said B. the now defendant, are the same persons and not different." Story Pl., 65, 66, 67; 2 Ch. Pl., 419. In truth, although each plaintiff may be suing for the same debt, it is not in the same right. And, therefore, the claim of one shall not impede the progress of the other. When the parties are the same, and the thing sued for is the same, the right shown in both actions must be identical. In such case the second action is useless, and, therefore, shall not be prosecuted. This case happily exemplifies the propriety of the distinction. It is this: The payee of a note endorses it, and the endorsee sues the maker. Afterwards the endorser, we must presume (*Dook v. Caswell,* 2 N. C., 18; *Strong v. Spear,* 214), pays the assignee and takes up the note. He may have been compelled to pay by suit, for aught that we know; or he may have paid to avoid a suit. Shall he be defeated of his immediate ac- (246) tion against the maker because the endorsee brought suit on the note while he owned it? That would be to punish the endorsee for honesty, and promptly performing his engagement. The assignee is not obliged to return the note unless the endorser pay him the costs of the suit against the maker as well as of that against himself, and principal and interest. It is to be supposed that such is the fact. If it be not, it is between themselves. For by reason of the assignee's parting with the note he must fail in his action against the maker, and thus be liable for the costs of it. But that forms no bar or impediment to the suit of the payee, who again acquires the property in the note and debt. If, therefore, the action of Daniel Casey had been instituted in this

State, instead of another, it would have been no hindrance to the present.

The judgment below must be reversed, the demurrer sustained, and judgment *respondeas ouster* entered. *Euchorn v. Le Maitre,* 2 Wils., 367; *Bowen v. Shapcott,* 1 East., 542.

PER CURIAM. Reversed.

Cited: McCready v. Kline, 28 N. C., 247; *Pettijohn v. Williams,* 55 N. C., 307; *Howell v. McCracken,* 87 N. C., 402; *Propst v. Mathis,* 115 N. C., 528.

(247)

JOSEPH L. REID v. THOMAS M. D. REID.

FROM MOORE.

A receipt for a specific sum of money, which it states to be in full of all demands, is not conclusive evidence that the specific sum was paid, or that it was in full of all demands. But such a receipt is prima facie evidence of a settlement between the parties, and of a payment of the sum mentioned in it.

ASSUMPSIT for money had and received by the defendant to the use of the plaintiff, for the sale of a slave of which the plaintiff and others were tenants in common. The pleas were *non assumpsit* and payment. Upon the trial before his Honor, Judge STRANGE, several points arose, but the following is the only one necessary to be presented.

On the plea of payment the defendant read in evidence the following receipt, signed by the plaintiff, and dated after the sale of the slave by the defendant:

"Received July the 20th, 1826, of Thomas M. D. Reid, seven dollars, in full of all notes and accounts, or any claim or demand that ever existed between us up to the date above written."

His honor instructed the jury that the receipt might be and was evidence of payment; but that a receipt, although expressed to be in full, was only good for the amount actually paid on it, and that if the plaintiff was entitled to more than seven dollars, the receipt being only for that sum, it was only evidence of a payment to that amount; and the plaintiff was entitled to recover any balance that might be due him from the sale of the slave, over and above the amount of the receipt.

A verdict being returned for the plaintiff, the defendant appealed.

Seawell, for the defendant.

No counsel for the plaintiff.

(248) RUFFIN, J. Several points were made in this case in the Court below. But as it seems to turn chiefly upon the effect of

a receipt, given in evidence by the defendant, and the opinion of the Court on that point is decisive of the cause, the others will not be noticed.

The plaintiff claims a share of the price of a slave belonging to him and others, which the defendant, as their agent, sold. On the trial the defendant gave in evidence a receipt from the plaintiff, dated after the sale and receipt of the price, for seven dollars, in full of all notes and accounts or any claim or demand, that ever existed between them up to that date. The defendant's counsel contended that the receipt was conclusive evidence of the payment of the money sued for in this action. But the judge very properly held the contrary. It certainly is not conclusive, in the sense of admitting no proof to the contrary. The Court, however, proceeded to instruct the jury that although the paper was evidence of payment, it proved the payment of seven dollars, the sum expressed in it, and that sum only. So I am abliged to understand the judge's words. They are, "the receipt being only for that sum, it is only evidence of payment to that amount."

I think the receipt *prima facie* evidence that an account was stated between the parties and the balance of seven dollars then paid. It certainly is not conclusive that full payment was made. It is not conclusive of anything, *Stratton v. Rastall,* 2 T. R., 366, not even that the seven dollars were paid. Why this instrument, more than other writings should be subject to correction by proof *aliunde* it is too late to inquire. The rule is well established. For instance, the effect of this receipt would be repelled as conclusive proof of the payment of seven dollars, by showing that the payment was in counterfeit bank notes, or in a promissory note, which turned out to be bad. In either case the plaintiff might recur to his original debt, unles it was expressly agreed that it should be extinguished by the receipt of the notes. *Hargrave v. Dusenberry,* 9 N. C., 326; *McKinsley v.* (249) *Pearsall,* 8 Johns., 319; *Tobey v. Barber;* 5 Johns., 68. The receipt is open to proof that there was a mistake in stating the account, or in striking the balance, a mistake in telling the money, a mistake in the nature or value of the thing paid, and the like. All that these cases prove is that when the errors are made to appear the receipt shall not still stand as a bar. In one case, indeed, this Court has gone the length of saying that such a mistake in a receipt under hand and seal, if there was a subsequent express promise to pay the money, might be corrected; that notwithstanding the receipt, the mistake was a sufficient consideration for the promise. *Smith* v. *Amis,* 10 N. C., 469. The receipt, however, remains evidence of the facts stated in it until those facts be clearly disproved and a mistake shown. I see no reason to limit this operation of it, so as to make it evidence of one of

those facts more than another. It is presumptive *prima facie* proof of the whole. There must be particular circumstances to prevent its so being. Why in this case it is held by the judge to be evidence of the payment of seven dollars? Clearly because the parties say so in it. Do they not likewise say that it was in full—that seven dollars was all the defendant then owed the plaintiff? Shall this declaration go for nothing? If so, why? I admit that the payment of a less sum is not a satisfaction of a larger then due, even if it be received as such. But it appears to me that a receipt for a particular sum, expressed to be in full, is in good sense evidence that the debt itself was no more than the specific sum. If it be proved to be more than the receipt is evidence that there had been prior payments, that the parties have accounted, and that the specific sum is the balance due. This is, however, all open to proof that they had not accounted, or that they accounted touching particular dealings which did not include
(250) the matter now in dispute. It is impossible to enumerate all possible cases wherein the force of the receipt might be impaired or destroyed. They do not, however, affect this case, which depends upon the effect of the receipt unexplained. *Per se* it proves that the defendant owed the plaintiff nothing. In *Henderson v. Moore,* 5 Cranch., 11, it was held that the parol acknowledgment of the plaintiff, that a small sum paid him was in full of a larger sum due on the bond sued on was evidence, on the plea of payment, that the whole was paid; and that on it the jury might and ought to presume full payment, unless such presumption should be repelled by other evidence; for a part of the money might have been paid before; and the acknowledgment is good evidence to show, not that more than a particular sum was then paid, but that the whole was satisfied by payments then and before made. And this has been carried so far as to make the payment of one debt evidence of the payment of another, and under certain circumstances conclusive evidence. Chief Baron *Gilbert* says, if one give a receipt for the last rent, the former is presumed to be paid; especially if the receipt be in full of all demands, then it is plain there were no debts standing out. If this be under hand and seal, the presumption is so strong that the law admits no proof to the contrary. No doubt this last is, because it is constructively a release. Gilb. Ev., 42. Cases are found in which the receipt in full, as by the judge below, has been allowed only as proof of the specific payment, and not of a general discharge. But they turn on peculiar grounds and particular circumstances. There is an instance in *Middleditch v. Sharland,* 5 Ves., 87. But plainly the master of the rolls refused to consider it an absolute bar, by reason of the situation of the parties, their relation to each other, and the suspicious circumstances apparent

on the answer. It was a bill filed by a devisee against a steward, who relied on a receipt in full from the textatrix. The bill charged the weakness of the testatrix; that the receipt was (251) obtained by imposition upon her, and without any accounts kept, stated or settled. The defendant denied the fraud, it is true. But he could not deny her imbecility, nor that there was no account stated, and he exhibited no account with his answer. This was of itself a fraud; and the cause was decided on that ground. He was bound to keep an account, and, with such a principal, to show that it was fairly settled. Therefore, a general account was there ordered, in which the receipt was to be evidence of the particular sum mentioned in it; and nothing could be juster. But there is no such case before us; and, therefore, the general rule must prevail.

PER CURIAM. New Trial.

Cited: Harper v. Dail, 92 N. C., 397; *Keaton v. Jones,* 119 N. C., 45.

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John Doe, ex dem. of DAVIS DUNETT et al. v. HUDSON C. BARKSDALE.

FROM SURRY.

Where a judgment below was rendered upon a point reserved, which did not appear upon the record, the remedy is to grant a new trial.

The jury returned a verdict for the plaintiff, subject to the opinion of the Court upon a point reserved, and judgment was rendered for the defendant by MARTIN, J., from which the plaintiff appealed, but upon the transcript sent to this court the question reserved did not appear. Upon a suggestion of diminution, a *certiorari* was awarded, to which the clerk of the court below returned that the point reserved did not form a part of the record of the cause in that court.

Gaston, for the plaintiff.
Badger, contra.

HALL, J. (after stating the case as above.) From this statement of facts it appears that the rights of the parties litigant depended upon a question reserved; and that question was submitted to this Court for its decision. To decide for either of the parties, when that question can not be understood, would be to decide in the dark without regard to their rights. To get clear of this difficulty we can take but one course, and that is to grant a new trial; by which means the question

may be again made, if those concerned think proper. This has been heretofore done. *Hatton v. Dew,* 4 N. C., 137.

PER CURIAM. New Trial.

Cited: Brown v. Kyle, 47 N. C., 443.

BENNETT SMITH v. JAMES ROAN, executor of John Burch.

FROM CASWELL.

Where two persons sign a receipt for money, and jointly promise to refund it if not legally paid, in an action by one of them against the person to whom the receipt was given for money had and received, the other is a competent witness for the plaintiff, there being no proof of the identity of the money sued for and that mentioned in the receipt.

ASSUMPSIT for money had and received by the defendant's testator, to the use of the plaintiff.

On the trial before NORWOOD, J., upon the general issue, the plaintiff offered one Jesse A. Dollerhide as a witness to make out his case. The defendant objected to the competency of the witness, alleging that the witness was a partner of the plaintiff; and also that he was interested in proving the debt the plaintiff sought to recover equal or greater than the sum mentioned in the following receipt, which was proved and read to establish the interest of the witness. After stating the re-
(253) ceipt of sundry notes, it proceeded: "Received also eleven hundred and twenty-three dollars eighty-six cents, which is the balance due agreeable to a statement this day made, and which the undersigned receive, and agree to account for to the said executor, in any settlement that may hereafter be made of the said estate, and refund the same, provided the estate is not legally responsible to us, or either of us, for the same, or any part thereof."

This receipt was signed by the plaintiff and the witness, Dollerhide. The objection was overruled by his Honor, and upon his testimony a verdict was returned for the plaintiff, and the defendant appealed.

Winston, for the plaintiff.
The Attorney-General, contra.

HALL, J. The objection which the defendant makes to the competency of the witness Dollerhide, is not founded on his examination in chief, nor on his *voir dire,* but rests for its support altogether on the receipt which had been given by the witness and the plaintiff to the defendant, in which receipt they promise to return certain money then

paid to them in case it should appear that the testator's estate did not legally owe it. Afterwards this suit was brought for money had and received by defendant's testator to the plaintiff's use; and on the threshold of the trial, objection is made, on the ground of interest, to the competency of Dollerhide.

So far as appeared to the Court at that stage of the trial (and we are placed in the same situation), the money sued for had no connection with the money for which the receipt was given. Whether the plaintiff recovers in this action or not, that fact neither increases nor diminishes the responsibility of those who gave the receipt.

If the present defendant had sued Smith, the present plaintiff, to recover the money recited in the receipt as "not being legally due by his testator," and Dollerhide had been offered by Smith as a witness, his incompetency would have been apparent. But it can (254) not be taken for granted without proof that Dollerhide is a partner with Smith in this transaction, because it appears from a receipt that he was in a former. When that shall be made to appear, his incompetency will be established.

PER CURIAM. No Error.

JOHN MOORING, administrator of John L. Mayo, v. WILLIAM JAMES and JESSE H. MOORING.

FROM EDGECOME.

1. Sureties to a ca. sa. bond taken under the act of 1822 (Rev., ch. 1131), for the relief of insolvent debtors, to protect themselves by a surrender of their principal, must make it in the Court to which the ca. sa. is returnable, or to the sheriff of that county; where the writ issues to another county, a surrender to the sheriff of it is a nullity.
2. The right of the plaintiff in the execution to a summary remedy survives to his personal representative.
3. Acondition "to appear and claim the benefit of the act, etc., and not depart without leave," is substantially the same as that prescribed by the act.
4. Where the defendant in the ca. sa. appeared at the return day of the writ, and upon an issue being made up, the cause was continued, and afterwards the defendant made a default: Held, that the condition was broken, and the plaintiff entitled to judgment.

John J. Mooring, having been arrested by the sheriff of PITT on a *ca. sa.* at the instance of the plaintiff's intestate, returnable to the fall term, 1827, of EDGECOMBE, gave a bond with the defendants for his sureties, with a condition for his appearance at the return day of the writ, then and there to claim the benefit of the act of assembly for the relief of honest debtors, passed in 1822, and not to depart from said

Court without leave thereof." At the day specified in the condi-
(255) tion, John J. Mooring duly made his appearance, and offered to take the oath of insolvency, but an issue of fraud was tendered by the plaintiff, and the cause was regularly continued until spring term, 1829, when the death of the plaintiff's intestate was suggested, and the plaintiff made himself a party. At the same term the defendants pleaded since the last continuance, a surrender by them of John J. Mooring, to the sheriff of Pitt, and his discharge under the act of 1773 (Rev., ch. 100). John J. Mooring failing to appear at that term, the plaintiff moved for judgment against the defendants according to the act of 1822 (Rev., ch. 1131). This was opposed by the defendants, the facts above stated being admitted to be true.

1. Because the surrender by them of John J. Mooring to the sheriff of Pitt, and his subsequent discharge under the act of 1773, was a performance of the condition of the bond.

2. Because John L. Mayo had died pending the suit, and although the right upon the bond might survive to his administrator, yet this was not the case as to the right to judgment upon motion.

3. Because John J. Moring at the return day of the writ of *ca. sa.* had appeared in Court and offered to take the oath of insolvency pursuant to the condition of the bond.

Upon the first point STRANGE, J., held the surrender to the sheriff of Pitt, after the return day of the *ca. sa.*, to be a nullity, and that to be effectual it should have been in open Court or to the sheriff of Edgecombe during the recess. His Honor also held that both the right and the remedy survived to the plaintiff. But upon the third ground he held that there had been a compliance with the condition of the obligation, and accordingly overruled the motion for judgment, whereupon the plaintiff appealed.

The Attorney-General, for the plaintiff.
Gaston & Hogg, for the defendants.

(256) HALL, J. I concur in opinion with the judge of the Superior Court that the surrender of the defendant in the *ca. sa.* to the sheriff of Pitt was a nullity, because the act of assembly (Rev., ch. 1131), on which this proceeding is founded, directs that the surrender by the surety shall be made "in open Court of the county to which the *ca. sa.* is returnable, or to the sheriff or other officer, as the case may be, of said county." It is further added that "the surety is hereby authorized to exercise all the power which by law special bail have over their principal." It is certainly not to be understood by this clause that the surety is at liberty to surrender his principal to the sheriff who made the arrest,

as special bail, by the act of 1777 (Rev., ch. 115), might do, because it would expressly contradict the plain words of the clause which preceded it, as before recited. But I understood it as giving power to the surety, as the act of 1777 gives to special bail, "to arrest the body of the principal and secure him until they shall have an opportunity to surrender him in open Court of the county to which the *ca. sa.* is returnable, or to the sheriff of said county.

I also concur in the opinion that the remedy upon the bond survived to the representatives of the original plaintiff.

With respect to the remaining question it is to be observed that the condition of the bond directed to be given by the defndant is "for his appearance at the next Court, at which the execution shall be returnable, then and there to stand to and abide by such proceedings as may be had by the Court in relation to his taking the benefit of this act." The bond given by the defendants in this case is conditional "that he shall make his personal appearance, etc., and then and there claim the benefit of the act of assembly for the relief of insolvent debtors, passed in 1882, and not depart from the said Court without leave thereof."

To claim the benefit of this act when the defendant in the *ca. sa.* (257) appears in Court is to act conformably to the mode pointed out by it as regards the rights of both parties. The plaintiff is authorized to suggest fraud or concealment of property, money, etc., by the defendant, in which case a jury must pass between the parties. The Court are authorized to contiue the issue thus made up at the instance of either party. If the issue is tried at a subsequent term it is the duty of the defendant to attend the Court. He is liable to be examined on oath, and in case the jury shall find the issue against him, or he shall refuse to be examined on oath upon the trial, he shall be deemed in custody of the sheriff, and be imprisoned, etc., until a full disclosure, etc. It was in such a proceeding as this that Mooring claimed the benefit of the act, and during the time it was carrying on that he stipulated not to depart the Court without leave. I, therefore, think, as he failed to attend Court, and was called out, and offered no legal excuse for so doing, the bond was forfeited, and judgment should be rendered upon it as the act directs.

PER CURIAM. Let a judgment be entered for the debt, interests and costs.

Cited: Arrington v. Bass, 14 N. C., 96; *Wilkings v. Baughan,* 25 N. C., 89; *Williams v. Floyd,* 27 N. C., 658.

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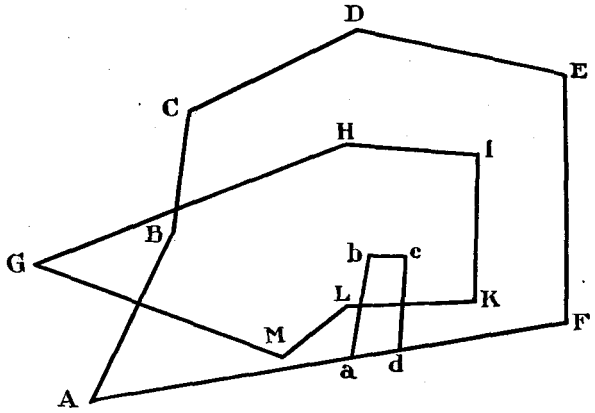
John Doe, ex dem. of THOMAS B. SMART et al. v. ARTHUR SMITH.

FROM MECKLENBURG.

The doctrine of estoppel has been beneficially applied to prevent tenants from denying the titles of their landlords, during the continuance of the lease, and also of the possession gained under it. But the estoppel is dependent upon the estate, and the possession consequent upon it, and after the lease has expired, and the possession fairly surrendered, the lessee is remitted to any title he had in the land before the relation of landlord and tenant commenced.

The lessors of the plaintiff claimed title to the lands represented in the annexed plot by the lines A, B, C, D, E, and F, under a sheriff's deed, dated 25 June, 1795, reciting a sale for the taxes. The defendant claimed title to the lands represented in the plot by the lines G, H, I, K, L, and M, under a deed from the sheriff to one Purser, dated 26 October, 1795, and also reciting a sale for taxes.



One the part of the lessors of the plaintiff it was proved that their father, George Smart, died in 1810; that Purser was then in possession of a field containing about three acres, which is laid down in the
(259) plat, and represented by the lines a, b, c, and d; that the executors of Smart being about to commence a suit against him, he, on 16 July, 1814, executed the following instrument:

"On or before 1 January next I promise to pay or cause to be paid unto the executors of George Smart, deceased, their order or assigns, at the rate of one dollar per acre for the rent of a certain piece of land under my enclosure, belonging to the heirs of said deceased, supposed to be about three acres."

The defendant then offered to prove that after 1814, and up to the time of the deed of Purser to him, in 1823, the possession of the land included within the lines G, H, I, K, L, and M had been abandoned; that the defendant took possesson after receving his deed, and that Purser had been in the actual adverse possession of the land represented by the last mentioned lines for more than 7 years before 1814. But his Honor, Judge NORWOOD, being of opinion that Purser, and all claiming under him, after the year 1814, were estopped to deny the title of the lessors of the plaintiff, rejected the evidence.

Upon this, as the title of the lessors of the plaintiff was the oldest, and 7 years' possession by the defendant under his deed from Purser was not pretended, a verdict was returned for the plaintiff, and the defendant appealed.

Gaston, for the plaintiff.

No counsel appeared for the defendant.

RUFFIN, J. The Court below held the lease by Purser conclusive evidence against the defendant. I think that was erroneous, though it was probably evidence to some purpose.

It is not to be clearly gathered from the bond whether the land leased by Purser in 1814 was within the lines of his own deed or not. The words are, "for the rent of a certain piece of land under my enclosure, belonging to the heirs of Smart, supposed to be about (260) three acres." The field, as laid down in the plat, included a small portion within Purser's lines, and another small portion without them, but within the lines of Smart's deed. The bond does not specify for which of those two pieces the rent was to be paid; nor does the other evidence make it more specific; for the case states only that the land leased is situate within Smart's boundaries. But that is the fact with respect to both parts.

If, in fact, Purser did not lease any part of the land covered by his own deed, his lease was not evidence to any purpose in this suit. It proved nothing touching the tenure or title to his own tract, as it related to one wholly distinct.

But I suppose it is a fair inference, from the opinion of the Judge, that the land leased was that part of the field lying within Purser's lines. In that case the lease was evidence. It forms a circumstance in a question of boundary. It also proves a fact, from which, in a question of title, a jury may infer, as it is supported or rebutted by other circumstances, the true nature of the previous possession by Purser of that and other parts of the tract. The inference would be very strong or very weak, according to those attendant circumstances, and

as it might be applied to the particular part leased, or other parts of the land. If, for instance, it were proved that Purser had at a previous time treated with Smart for the occupation of the very same field, the bond would be very cogent proof that he always held that field under Smart, although the precise contract of lease might not be proved. But when applied to other parts of the tract, the whole force of it would be repelled by proof that Purser was actually living on and improving large portions of it independent of Smart. Purser might rather surrender three acres than be involved in litigation. His doing so is no evidence that he held the whole as tenant of another. On the
(261) contrary, the lease is evidence, and strong evidence, if he was actually occupying the residue, that he held that residue in his own right. For why create a tenancy, expressly for a small part, if it was not intended to exclude the rest? In this point of view the contract of 1814 was evidence in this suit. But for aught that appears it might be as effectual on one side as the other.

But it by no means follows that because it is evidence it is conclusive evidence, even as to the three acres; much less as to the whole tract. The doctrine of estoppel has been applied very beneficially to the relation of landlord and tenant, whether created by indenture or parol. It has been properly extended to embrace all cases. It is intended to insure honesty and protect the landlord against the faithlessness of the tenant. The principle is that a possession acquired under a particular person shall not be used to defeat the right of that person. It shall never be turned against him while the term, according to the express words of its creation, continues; or, after its expiration, while the same possession continues; as if the tenant holds over, the tenant shall not be permitted to deny the right under which he entered by showing a better right in another, or even himself. Honesty forbids that he should obtain possession with that view, or after getting it, thus use it. Until, therefore, the tenant yields back the possession he shall not be heard in asserting that possession, derived under his landlord, to be adverse to him. But the utility and fairness of the rule go no further. For if good faith forbids the tenant from perverting a possession gained by another's permission, into the means of defying the landlord, the latter is equally restrained by it from alleging that the true owner of the land forfeits it, or passes his title to it, by ignorantly leasing his own land. Having parted with the possession for a certain term, upon a contract that at end of the term that possession should be restored to him, he can ask such restoration. But he can ask nothing
(262) more. He then gets back all he parted from. He can properly claim that his right shall not be impaired by his tenant. But he cannot claim that it shall be enlarged by the previous and independent

title of the tenant himself. Whenever, therefore, the term expires, and the relation of landlord and tenant ceases by the surrender or abandonment of the possession, the parties are set at large again. They then stand upon their original rights—or rather, upon their rights as in fact existing, and not as resting in estoppel. The tenant can then sue the landlord upon his own title. The same reason holds for defending himself upon that title, if he acquires a new possession, independent of his *quandam* landlord. It will be readily perceived that when I speak of the surrender of the possession by the tenant I mean a real and not a colorable departure by the tenant—not merely going out one day, *animo revertendi,* and coming back the next.

There is, however, no room for a cavil upon that point here. For Purser leased in 1814, and at the end of that year left the land, and the possession remained vacant for nine years. It is impossible to say that the possession gained or taken under Smart had not determined. The estate created by the lease expired, and the estoppel growing out of it expired with it.

PER CURIAM. New Trial.

Cited: *Williams v. Wilson,* 32 N. C., 484; *Freeman v. Heath,* 35 N. C., 500; *Farmer v. Pickens,* 83 N. C., 552; *Davis v. Davis, Ib.,* 73; *Campbell v. Everhart,* 139 N. C., 514.

(263)

STATE v. JOHN MANN.

FROM CHOWAN.

1. The master is not liable to an indictment for a battery committed upon his slave.
2. One who has a right to the labor of a slave, has also a right to all the means of controlling his conduct which the owner has.
3. Hence one who has hired a slave is not liable to an indictment for a battery on him, committed during the hiring.
4. But this rule does not interfere with the owner's right to damages for an injury affecting the value of a slave, which is regulated by the law of bailment.

The defendant was indicted for an assault and battery upon Lydia, the slave of one Elizabeth Jones.

On the trial it appeared that the defendant had hired the slave for a year; that during the term the slave had committed some small offense, for which the defendant undertook to chastise her; that while in the act of so doing the slave ran off, whereupon the defendant called upon her to stop, which being refused, he shot at and wounded her.

His Honor, Judge DANIEL, charged the jury that if they believed

the punishment inflicted by the defendant was cruel and unwarrantable, and disproportionate to the offense committed by the slave, that in law the defendant was guilty, as he had only a special property in the slave.

A verdict was returned for the State, and the defendant appealed.

(264) No counsel for the defendant.

The Attorney-General, for the State.

RUFFIN, J. A Judge cannot but lament when such cases as the present are brought into judgment. It is impossible that the reasons on which they go can be appreciated, but where institutions similar to our own exist and are thoroughly understood. The struggle, too, in the Judge's own breast between the feelings of the man and the duty of the magistrate is a severe one, presenting strong temptation to put aside such questions, if it be possible. It is useless, however, to complain of things inherent in our political state. And it is criminal in a Court to avoid any responsibility which the laws impose. With whatever reluctance, therefore, it is done, the Court is compelled to express an opinion upon the extent of the dominion of the master over the slave in North Carolina.

The indictment charges a battery on Lydia, a slave of Elizabeth Jones. Upon the face of the indictment, the case is the same as *S. v. Hall,* 9 N. C., 582. No fault is found with the rule then adopted; nor would be, if it were now open. But it is not open; for the question, as it relates to a battery on a slave by a stranger, is considered as settled by that case. But the evidence makes this a different case. Here the slave had been hired by the defendant, and was in his possession; and the battery was committed during the period of hiring. With the liabilities of the hirer to the general owner for an injury permanently impairing the value of the slave no rule now laid down is intended to interfere. That is left upon the general doctrine of bailment. The inquiry here is whether a cruel and unreasonable battery on a slave by the hirer is indictable. The Judge below instructed the jury that it is.

He seems to have put it on the ground that the defendant had but (265) a special property. Our laws uniformly treat the master or other person having the possession and command of the slave as entitled to the same extent of authority. The object is the same—the services of the slave; and the same powers must be confided. In a criminal proceeding, and indeed in reference to all other persons but the general owner, the hirer and possessor of a slave, in relation to both rights and duties, is, for the time being, the owner. This opinion would, perhaps, dispose of this particular case; because the indictment, which charges a battery upon the slave of Elizabeth Jones, is not sup-

ported by proof of a battery upon defendant's own slave; since different justifications may be applicable to the two cases. But upon the general question whether the owner is answerable *criminaliter* for a battery upon his own slave, or other exercise of authority or force not forbidden by statute, the Court entertains but little doubt. That he is so liable has never yet been decided; nor, as far as is known, been hitherto contended. There have been no prosecutions of the sort. The established habits and uniform practice of the country in this respect is the best evidence of the portion of power deemed by the whole community requisite to the preservation of the master's dominion. If we thought differently we could not set our notions in array against the judgment of everybody else, and say that this or that authority may be safely lopped off. This had indeed been assimilated at the bar to the other domestic relations; and arguments drawn from the well-established principles which confer and restrain the authority of the parent over the child, the tutor over the pupil, the master over the apprentice, have been pressed on us. The Court does not recognize their application. There is no likeness between the cases. They are in opposition to each other, and there is an impassable gulf between them. The difference is that which exists between freedom and slavery—and a greater cannot be imagined. In the one, the end in view is the happi- (266) ness of the youth, born to equal rights with that governor, on whom the duty devolves of training the young to usefulness in a station which he is afterwards to assume among freemen. To such an end, and with such a subject, moral and intellectual instruction seem the natural means; and for the most part they are found to suffice. Moderate force is superadded only to make the others effectual. If that fail it is better to leave the party to his own headstrong passions and the ultimate correction of the law than to allow it to be immoderately inflicted by a private person. With slavery it is far otherwise. The end is the profit of the master, his security and the public safety; the subject, one doomed in his own person and his posterity, to live without knowledge and without the capacity to make anything his own, and to toil that another may reap the fruits. What moral considerations shall be addressed to such a being to convince him what it is impossible but that the most stupid must feel and know can never be true—that he is thus to labor upon a principle of natural duty, or for the sake of his own personal happiness, such services can only be expected from one who has no will of his own; who surrenders his will in implicit obedience to that of another. Such obedience is the consequence only of uncontrolled authority over the body. There is nothing else which can operate to produce the effect. The power of the master must be absolute to render the submission of the slave perfect. I most freely confess my

sense of the harshness of this proposition; I feel it as deeply as any man can; and as a principle of moral right every person in his retirement must repudiate it. But in the actual condition of things it must be so. There is no remedy. This discipline belongs to the state of slavery. They cannot be disunited without abrogating at once the rights of the master and absolving the slave from his subjection. It constitutes the curse of slavery to both the bond and free portion (267) of our population. But it is inherent in the relation of master and slave.

That there may be particular instances of cruelty and deliberate barbarity where, in conscience, the law might properly interfere, is most probable. The difficulty is to determine where a Court may properly begin. Merely in the abstract it may well be asked, which power of the master accords with right? The answer will probably sweep away all of them. But we cannot look at the matter in that light. The truth is that we are forbidden to enter upon a train of general reasoning on the subject. We cannot allow the right of the master to be brought into discussion in the courts of justice. The slave, to remain a slave, must be made sensible that there is no appeal from his master; that his power is in no instance usurped; but is conferred by the laws of man at least, if not by the law of God. The danger would be great, indeed, if the tribunals of justice should be called on to graduate the punishment appropriate to every temper and every dereliction of menial duty. No man can anticipate the many and aggravated provocations of the master which the slave would be constantly stimulated by his own passions or the instigation of others to give; or the consequent wrath of the master, prompting him to bloody vengeance upon the turbulent traitor—a vengeance generally practiced with impunity by reason of its privacy. The Court, therefore, disclaims the power of changing the relation in which these parts of our people stand to each other.

We are happy to see that there is daily less and less occasion for the interposition of the Courts. The protection already afforded by several statutes, that all-powerful motive, the private interest of the owner, the benevolences towards each other, seated in the hearts of those who have been born and bred together, the frowns and deep execrations of the community upon the barbarian who is guilty of excessive and brutal cruelty to his unprotected slave, all combined, have produced a (268) mildness of treatment and attention to the comforts of the unfortunate class of slaves, greatly mitigating the rigors of servitude and ameliorating the condition of the slaves. The same causes are operating and will continue to operate with increased action until the disparity in numbers between the whites and blacks shall have rendered the latter in no degree dangerous to the former, when the police now

existing may be further relaxed. This result, greatly to be desired, may be much more rationally expected from the events above alluded to, and and now in progress, than from any rash expositions of abstract truths by a judiciary tainted with a false and fanatical philanthropy, seeking to redress an acknowledged evil by means still more wicked and appalling than even that evil.

I repeat that I would gladly have avoided this ungrateful question. But being brought to it the Court is compelled to declare that while slavery exists amongst us in its present state, or until it shall seem fit to the legislature to interpose express enactments to the contrary, it will be the imperative duty of the Judges to recognize the full dominion of the owner over the slave, except where the exercise of it is forbidden by statute. And this we do upon the ground that this dominion is essential to the value of slaves as property, to the security of the master, and the public tranquility, greatly dependent upon their surbordination; and, in fine, as most effectually securing the general protection and comfort of the slaves themselves.

PER CURIAM. Reversed and judgment entered for defendant.

Cited: *S. v. Will,* 18 N. C., 159, 171; *S. v. Hoover,* 20 N. C., 503; *S. v. Cesar,* 31 N. C., 402, 421; *S. v. Levi,* 44 N. C., 8.

(269)

STATE v. JOHN MERRILL.

FROM IREDELL.

1. Provoking language does not justify a blow, and if an instrument calculated to produce death be used, the slayer is guilty of murder.
2. Malice is presumed from the nature of the instrument and from the want of a legal provocation, and it is a matter of indifference whether the temper of the prisoner be mild or violent.
3. But as the State has no right to inquire into the temper of the prisoner unless it be put in issue by him, where proof was received of the prisoner's violent temper, it was held, per HENDERSON and HALL, that as this question may have affected the verdict, a new trial should be granted.
4. But RUFFIN, *dissentiente*, held that as the evidence, although improper, could not vary the result, it was useless to disturb the verdict.

The prisoner was charged with the murder of one Hoover, and on the trial before MARTIN, J., it appeared that the deceased had hired the prisoner to attend a still; that the prisoner had been drinking, and while under the influence of liquor was accused by the deceased of having stolen some cider; that the prisoner, upon this provocation, had seized

a weapon calculated to produce death, and with it had given the deceased a mortal blow. The counsel for the prisoner introduced witnesses who deposed that he, the prisoner, was a very weak man, but not insane. The prosecuting officer proposed to ask if he was not a man of violent temper; this question was objected to, but the objection was overruled by his Honor, upon the ground that it was competent for the State to prove the temper of the prisoner after he had offered evidence as to his understanding. The witnesses were directed to speak of their own knowledge, and not of the general character of the prisoner. It was then proved that the prisoner was of a violent temper.

His Honor informed the jury that malice aforethough was an indispensable ingredient to the crime of murder; that it meant a (270) wicked, depraved and diabolical temper, moving the party either deliberately to kill his fellow, or to kill without a legal provocation. That in cases where the prisoner had a right to use force, as in that of a parent correcting his child, the exact degree of force necessary to attain the object in view was not measured with golden scales, but that the like reason did not apply to the present case, as the prisoner had no right to use any degree of force. That if they believed the prisoner was moved to perpetrate the homicide by the provoking language of the deceased he was guilty of murder.

The prisoner was found guilty of murder, and judgment of death being awarded, he appealed to this Court.

Seawell, for the prisoner.
Attorney-General, for the State.

(277) HALL, J. It cannot well be denied that the circumstances attending the homicide set forth in this record, legally speaking, constitute a case of murder; and if so, it is contended with much strength of argument that the testimony offered in relation to the prisoner's violent temper ought not to influence the decision of the case, because if it had been proved that he possessed a mild and peaceable disposition it would still be a case of murder. I am not disposed to controvert this proposition. But in the consideration of this case it must be kept in view that by the Constitution of the State it is declared that no freeman shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men, delivered in open Court.

Now if it could be reduced to a moral certainty that juries could and would at all times, in the discharge of their duties, strictly adhere to the law which defines murder the reasoning would be unanswerable. But, from the nature of things, this is not to be expected. It is the nature of man to lean in favor of an unfortunate criminal when he is

surrounded with a good character. Our feelings are too often indulged at the expense of the understanding, whether friendship or hatred be the food they feed upon. It is, therefore, of much importance that the rules of evidence should be strictly adhered to—one of which is that evidence of the prisoner's general character shall not, against his consent, and at the instance of the prosecutor, be given in evidence against him unless the nature of the charge renders it necessary. This, however, is not that case.

I am pretty well persuaded that it was not the object of the Judge to impugn this rule. The question, which I think a departure from it, was put upon the heels of one which was asked by the prisoner's counsel, which was intended to establish the fact that the prisoner, on account of weakness of mind, was not altogether an accountable being. The question asked respecting the violence of his temper related more to the qualities of the heart and the nature of disposition. I am (278) of opinion that the prisoner's counsel, by asking that question, did not put the defendant's character in issue. The question that followed did so, to a certain extent. It brought forth the answer that he was a man of violent temper. This might have had an effect with the jury unfavorable to the prisoner. It may seem to be a small circumstance for which to grant a new trial, but it possibly may be one on which the prisoner's life depends. The rules of evidence in favor of life cannot be too closely adhered to. I am of opinion that a new trial should be awarded.

HENDERSON, C. J., concurred.

RUFFIN, J., *dissentiente.* I have endeavored to overcome my own impressions in this case, and accede to the majority of the Court; but I have been unable.

I will take for granted that the evidence of temper ought not to have been received, and yet I think the judgment of the Suprior Court right. If evidence, incompetent merely by reason of its irrelevancy, be received I do not see that the verdict ought to be nullified. If improper evidence is seen by the Court to have had its effect, or is such that it could by possibility have prejudiced the party against whom it is given, a Court of Errors is bound to grant a new trial; because it cannot be known upon what the jury proceeded. But here the evidence must have been altogether inoperative. If it had improperly proved a fact necessary to the prisoner's conviction, or went to sustain the credit of a witness for the State, or to impair the credit of a witness for the prisoner, or the like, then the verdict ought not to stand. But the record states a case in which it is apparent that it could not in reason have had any

such effect. It went to the prisoner's character and temper. If with a good character or good temper he would have been better off, then I would agree that he ought to have a new trial. But here the
(279) jury had nothing to do with the character or temper, or the actual disposition with which the act was done. The law determined that from the circumstances, if the jury found those circumstances to exist. It is a case of malice implied by the law. If the best disposed and most pacific man on earth, without provocation, and words are not provocation, assaults another with an instrument likely to produce death, and death ensues, he is guilty of murder. The law infers the malice from the fact. It must be so—else there is no rule; and all is left to the discretion of the jury. The law infers it, because every man of well regulated mind is obliged to say that in every case the slayer is a man of dark, malignant heart, of ungovernable passions, regardless of social duty, and bent on spilling human blood. In a case of express malice, or of provocation, the question is for the jury. They are to determine whether the accused acted on the provocation on the sudden or had the partcular ill-will. But where there has been no provocation, or none shown, the only question for the jury is the credit of the witnesses—the perpetration of the fact. It is not put to them whether the accused did the act by deliberation and with calm intent, or in a sudden gust of passion. For whether it be the one or the other, in such a case it is murder. For passion is no excuse, unless by reason of ordinary human frailty it was justly excited. Where there has been a killing without a legal provocation, and by means of an instrument fitted for that end, whether the passions were roused or not is immaterial. They ought not to have been. There was nothing which ought to have provoked a sudden transport of anger and dethroned reason. If the anger did in fact exist, and was of a sudden, yet without reasonable cause, and under impulse of it the party killed another, his guilt is not mitigated. Such a rage, though ever so sudden, if to be appeased only by taking life, is a brutal ferocity, and the very state of his pas-
(280) sions aggravates his guilt. He is too dangerous to live. The safety of his fellow men requires that he should be cut off from among them. Hence the jury could not have been misled in the case before us. The Judge was bound to tell them that the prisoner was guilty of murder, if they believed the witnesses. I am not questioning the right of the jury to pass on the law of the case—that is, their power. But the Court has a right, and was bound to instruct them on it; and they might follow or not, as they pleased. They have done so here, and I am not for disturbing their verdict. For although they may decide the law, if they choose, that is not to prevent the Court from expounding the law to them. And they were not misled as to the law in this case by the

admission of the evidence. For in law the guilt of the prisoner stands precisely the same, were that evidence struck out of the case, or if his good temper had been proved by a thousand uncontradicted witnesses. Indeed, my brethren, I am happy to say, find no fault with the charge of the Judge; so that the rules of the law respecting homicide are not intended to be altered. We differ only as to the consequence of the admission of the evidence. A Court is not bound to hear irrelevant testimony, but if by a slip it gets in, and cannot by possibility have, in reason or in law, an influence on the trial, I think it ought not to affect the judgment. And I must say that it cannot have influenced the trial, where in law, the offense is the same, with or without the evidence. It cannot then have done harm.

PER CURIAM. New Trial.

Cited: *S. v. Lipsey,* 14 N. C., 493; *S. v. McNeill,* 92 N. C., 817.

(281)

THE STATE v. SIMON PEMBERTON and JOHN A. SMITH.

FROM ANSON.

It is not an offence either at common law or by statute to gamble with a slave.

The defendants were indicted as follows: "The jurors, etc., present that S. P. and J. A. S., late of, etc., on, etc., at, etc., unlawfully did play at cards with certain slaves, to wit, with, etc., to the evil example of all others in like case offending, and against, etc."

After a verdict for the State STRANGE, J., arrested the judgment, being of opinion that the fact charged as an offense was one which never could have existed in England, and, therefore, could not be deemed an offense at common law, as no law could be supposed to exist against that which could not be done. And as there was no statute prohibiting it, or if there was, as the indictment did not conclude *contra formam,* it could not be taken as an offense against the statute law.

From this judgment Mr. Solicitor *Troy* appealed.

The *Attorney-General,* for the State.
No counsel for the defendant.

PER CURIAM. For the reasons given by the Judge below the judgment must be Affirmed.

MEMORANDA.

At the last session of the General Assembly, THOMAS RUFFIN, Esq., of Raleigh, was elected a Judge of this Court to supply the vacancy occasioned by the death of JOHN LOUIS TAYLOR, Esq., late Chief Justice.

At the same session WILLIAM J. ALEXANDER, Esq., of Charlotte, was elected Solicitor of the Sixth Circuit, vice JOSEPH WILSON, Esq., who died during the recess.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1830

(283)

Den ex dem. of JOHN DUNN et al. v. JAMES KEELING.

FROM FRANKLIN.

1. The words "after all my debts are paid," annexed to a devise of land do not confer upon the executor a power to sell.
2. The act of 1789 (Rev., ch. 311) avoids all devises for the payment of debts, and renders words of the kind above mentioned nugatory.

EJECTMENT for land, of which William Keeling died seized.

William Keeling, by his will, devised as follows: "I give and demise and dispose of, in the following manner and form, after all my just debts are discharged." He then gave the land in controversy to the defendant, and appointed Dunn, one of the lessors of the plaintiff, his executor.

Dunn, the executor, supposing that the will gave him power to sell the real estate, advertised and sold the land in dispute to the other lessors of the plaintiff, and the only question was whether that deed passed the title.

NORWOOD, J., informed the jury that upon the death of the testator, the title vested in the defendant; but that the will gave the executor a power to sell, which power was annexed to the execu- (284) torship, and that a legal sale by the executor would divest the title of the devisee. A verdict was returned for the vendees of the executor, the other lessors of the plaintiff, and the defendant appealed.

Gaston, for defendant.
Badger, for plaintiff.

RUFFIN, J. Unquestionably this will would not, in England, confer on the executor a power to sell land. A power is a legal term, and the

words which will create it are well known at the common law. Under the execution of it the legal estate passes, and the purchaser is in, not under him who executes it, but under him who created it, and under the instrument containing it. The words "after my just debts are (285) paid" would create a charge on the land in favor of creditors. *Shalcross v. Finden,* 3 Ves., 739. But this is in equity. At law they are nugatory. They do not prevent the estate vesting under the devise. Nor do they enable a debtor by simple contract to reach his debt at law. For that very reason equity gives relief. And it being a principle of that Court that all debts, however evidenced, are alike in conscience, there arises the doctrine of equitable assets. At common law lands devised were exempt from all debts paid, strove to apply the real estate to their satisfaction, since otherwise they would remain unpaid. This was effected by holding the devisee to be a trustee for creditors, if the testator gave any intimation that such was his wish. The slightest expression was sufficient—as, "if he talks about his debts in the beginning of his will"—for it is considered that he meant to go beyond the law in making a provision; else why not leave it to the law by being silent. *Williams v. Chitty,* 3 Ves., 552. But this does not clothe the executor with authority to make the sale. He is the last person who should have it; for he is entitled to the surplus of the personalty and the question whether the debts are to be raised out of the land is to be litigated with him, since, although liable, they are not primarily liable. The personal estate remains the natural and first fund, unless it be expressly exonerated. Indeed lands devised are subject only in the third degree; for those descended stand before them. This makes the executor and the heir necessary parties to a bill filed by a creditor against the devisee; because the latter is liable only in default of the funds in the hands of the other two. But upon such a bill the decree is not that the executor shall sell, but that the devisee make the title, and sometimes it has included the heir, to prevent his contesting the will at law. (286) The lands, therefore, remain real and equitable assets. There was formerly some difference of opinion upon the effect of a devise to the same person who was executor in trust to sell to pay debts. But Lord *Camden,* in *Silk v. Prime,* 1 Bro., C. C., 138, reviewed all the cases, and finally came to the conclusion that the only instance in which lands devised are legal assets is, where there is a naked power to the executor, *qua* executor, to sell. The simple contract creditors can not complain of this, because they can in any event take only by the bounty of the testator, and they must take it upon his terms. In the case of such a power the assets remain legal, but they cease to be real. When the land is sold the price becomes personal assets. It comes to the executor's hands *virtute officii,* as money. The land is converted out and into

personalty by the express direction of the will. The testator mixes the funds and turns both into one, in the hands of the executor, as such. Upon the same footing of intention it is exactly the reverse, with a charge of debts simply. The testator does not mean that the executor shall interfere with the land in such case, because he does not mix the funds, but makes the land liable after the executor has exhausted the personality. And it can not be supposed he intended his devise to be defeated until the fact be judicially ascertained, that his debts can be paid in no other manner than by the land. Equity, therefore, whose creature this doctrine is, will not suffer the lands to be sold in the first instance, as might be done, if it construed these words as creating a general power of sale in the executor. It requires a bill against the devisee, that he may contest the debt, and when its existence is ascertained may show that the executor or heir is liable before him, or may pay off the incumbrance without a sale.

In this same spirit are our statutes regulating the proceedings against heirs and devisees conceived, when they give the *scire facias* and collateral issue. There is, however, an important difference between our law and that of England. Their statute of fraudulent devises (287) (3 W. & M., 14), exempts lands devised for the payment of debts from its operation. It left the principle of equity entire; because such lands can still be reached only in that court. Hence, up to this time the chancellor looks out for some expression in the will which can enable him to lay hold of the land. Their statute has been said to have been sent to Parliament by the chancellor. With the same property ours of 1789 (Rev., ch. 311, sec. 2) may be said to have been the work of a strict common lawyer. For it makes all devises void as against creditors. The necessity for the interposition of equity is, therefore, removed. The whole substratum of the jurisdiction is demolished, since the law, without the testator's help, has made the land subject to debts generally. There is nothing for equity to do. If the testator create an express trust for the payment of his debts I will not say that it is absolutely void; but it certainly is, except in those cases where it is for the benefit of all the creditors to consider it not so; for the act makes the devise void as against creditors, and consequently the lands are legal real assets, to be liable according to the course of law. Equity can not, against this statute, confer the power on the testator of making them liable in a different order. The case of a power in the executor may be as at common law, because the assets then remain legal, though they are changed to personal. And as a sale by the devisee makes him personally liable, and discharges the land at law, a case may arise by the insolvency of the devisee in which the only relief of the creditor would be to pursue the land in the hands of the purchaser, upon the idea of

the trust expressed in the will, which would be notice to the purchaser. With these exceptions I know not a single case in which a court of equity could find room to act in this State. Such words, therefore, as are in this will mean nothing here; or, at most, are an idle declaration
(288) that the testator knows he cannot give away his property before his debts are paid. They are just as futile, when applied in realty in North Carolina as they are in England, if used in relation to personalty. If, then, in England they only create a charge, to be enforced in equity against the land, as a fund subsidiary to the personalty, the argument against their giving a power to the executor to sell is still stronger here; because they do not here even constitute a charge in equity, since the lands are liable at law as legal and real assets—that is to say, after the insolvency of the personal estate or of the executor. What reason can there be to give, by a strained construction of the will, the authority to the executor to sell the lands before he had fully administered, or after he has become insolvent? Such would be the effect of saying that he had a power. The position would be equally prejudicial to the creditor and the devisee.

Of course this discussion cannot affect the doctrine of marshalling the real and personal estates, as between the legatees and devisee. That is quite a different question, being betwen volunteers and the creditors to be paid at all events.

Upon the whole, we all think, nothing passed by the will to the executor, nor by his sale to the other lessors of the plaintiff.

PER CURIAM. New Trial.

Cited: *Henderson v. Burton,* 38 N. C., 265.

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(289)

MARY CHOAT v. JOHN WRIGHT.

FROM SURRY.

1. Executed contracts are not within the act of 1819, relating to contracts for the sale of lands and slaves. (Rev., ch. 1016.)
2. A sale of a slave accompanied by a delivery is valid, and transfers the title, notwithstanding no bill of sale is executed, nor any memorandum of the contract signed by the parties thereto.

TROVER for a slave, and on the trial before DANIEL, J., the defendant, under the general issue, gave in evidence that an execution against one Isham Choat, came to his hands as sheriff of Surry, under which he seized the slave, and the only question was whether the defendant in that execution had a title to the slave.

CHOAT *v.* WRIGHT.

On the evidence it appeared that the slave had been the property of one Sybert Choat, and was by the plaintiff, as his executrix, set up at public auction, and stricken off to Isham Choat at $600; that the slave was delivered to the vendee, but no bill of sale, nor any memorandum of the sale in writing, was executed by the plaintiff.

His Honor charged the jury that the sale of a slave, accompanied with delievery of possession, passed the title, notwithstanding the act of 1819 (Rev., ch. 1016). A verdict was returned for the defendant and the plaintiff appealed.

No counsel for the plaintiff.
Devereux, for the defendant.

RUFFIN, J. We should lend a ready ear to any plausible argument tending to prove that this case is within the statute of frauds. Laws 1819, Rev., ch. 1016. For we feel that all the mischiefs are as apt to arise out of executed as executory contracts. But the words are too strong and plain to be got over. We think it extremely probable that the draughtsman considered, when he put lands and slaves on the same footing, that he required all contracts respecting each to (290) be in writing. If he did, it was a great mistake. However, the words of the act might be construed, if applied to slaves alone; they cannot embrace executed contracts, when applied to both. The act says that "all contracts to sell or convey lands or slaves shall be void and of no effect unless such contract, or some memorandum or note thereof, be put in writing, and signed by the party charged, except contracts for leases not exceeding three years." The question is, what sort of contracts is here meant? Certainly only such a contract, respecting slaves, is within the act as would also be within it if it respected land; for the two subjects are placed side by side. It is perfectly clear that executory contracts alone can be meant when land is the subject. For before that time a conveyance of freehold land could be by deed only, and it is absurd to talk about "a note or memorandum in writing" as a thing that can pass such lands. In relation, therefore, to realty, not only the words of the act, "a contract to sell," but the state of law before restrains the statute to executory contracts. This ties us down, against our wills, to the same construction as regards slaves. Therefore a sale of slaves by parol, that would have been good before the statute, is still good.

We are aware of the great inconveniences that will arise from this construction; and that has made us very reluctant to adopt it. For the same fraud and perjury will be practiced in the dispute, whether the contract was one "to sell" or "of sale" as in ascertaining the particular

terms of a contract to sell; and thus all the benefits intended by the legislature be defeated. But the framing of the act compels us to pronounce the judgment we do.

PER CURIAM. No Error.

Cited: *Epps v. McLemore,* 14 N. C., 347; *Mushat v. Brevard,* 15 N. C., 77; *Tate v. Greenlee, Ib.,* 154; *White v. White,* 20 N. C., 564; *Massey v. Holland,* 25 N. C., 198; *Rice v. Carter,* 33 N. C., 300; *Gwynn v. Setzer,* 48 N. C., 383; *Smith v. Arthur,* 110 N. C., 402; *Hall v. Fisher,* 126 N. C., 208; *McManus v. Tarleton, Ib.,* 792; *Brinkley v. Brinkley,* 128 N. C., 506; *Brown v. Hobbs,* 15 N. C., 547; *Herndon v. R. R.,* 161 N. C., 654.

(291)

THOMAS HEMPHILL et al. v. JAMES HEMPHILL et al.

FROM BURKE.

1. It is not necessary to the valid execution of the will of a blind or illiterate person that it should be read over to him in the presence of the attesting witnesses.
2. The fact that a will was not read over to the testator is evidence to be left to the jury of his incapacity, or of undue influence, or of fraud. But upon proof of the due execution of a will, the law presumes the testator to have been aware of its contents, and the onus of proving the contrary is thrown upon him who alleges it.

DEVISAVIT VEL NON as to the will of Thomas Hemphill, senior.

On the trial before DANIEL, J., the proof was that the will was in the handwriting of one Logan, who was a subscribing witness, and who was dead; that the testator was very old and infirm, and had nearly lost his sight; that the other subscribing witness came to the house of the testator on the day that the will was executed, and saw the testator and Logan upstairs, and was asked not to go away, as they would want him presently; that the witness was told the testator was making his will, and he heard Logan's voice in a low tone, as if he was reading, but could not distinguish the words; that when the witness went upstairs he was asked by the testator to attest a paper, which was already attested by Logan. It was not read over in the presence of the witness, neither was he informed by the testator that it was his will; but the testator simply acknowledged his signature, and asked the witness to attest it. The handwriting both of Logan and the testator, and the sanity of the latter, were proved.

It was objected, in the Court below, that the will was not properly proved, because the mental weakness of the supposed testator, and his loss of sight had disabled him from knowing whether the writing was

his will or not, and having to depend upon the witness for that knowledge, he should be able to swear that the paper was read to (292) the supposed testator, and also that it was truly and fairly read.

The presiding Judge instructed the jury that the law did not require proof that the will was read to the testator in the presence of the witness; that if the testator acknowledged the paper to be his will, and was in his senses, and the will was subscribed by the witnesses in his presence and at his request; in law it was properly executed. A verdict being returned in the affirmative, the *caveators appealed.*

Winston, for appellants.

Gaston, contra, cited *Longchamp v. Fish,* 2 New Rep., 415.

RUFFIN, J. *Longcamp v. Fish,* 2 New. Rep., is an authority directly in point against the objection in this case. It is not necessary that the will should be read over in the presence of the subscribing witnesses. The statute requires the attestation of two witnesses to the execution of the will, and, so far, they are indispensably requisite. But every other fact may be proved by other witnesses as well as by them. Even their own attestation, if denied by themselves, may be shown by the testimony of others. So, if reading be necessary, may that be shown also?

Another question has been made at the bar here, on which, (293) perhaps, more can be said. It is, whether the reading of the will must not be proved in some way, supposing the testator to be blind, or that his sight was so decayed, that he could not himself read it. I do not know that we are at liberty to enter into that; both because there is a legal presumption that the will was read to him; and because the point was not made below. It is clear that if both subscribing witnesses were dead the will would be well proved by proof of the handwriting of them and the testator. For after that event the law takes everything to have been duly done. Now, although one be living, and says that it was not read in his presence, yet if it appear that the one who is dead wrote the will—was alone with the testator just before the paper was signed—that the testator was in his right mind, and that the draughtsman likewise witnessed it, the legal presumption from these facts is, that it was read to the testator before he signed it. Since Logan might have read it, since it was his duty to do it, since, in all human probability, no testator in his senses would fail to require it to be read, the inference, from the experience of human conduct, is almost irresistible that he did read it. As to a true reading there can be no doubt. Fraud is never imputed without a motive and evidence to show it. In this light the subject seems to have been viewed by the counsel and the Court below. For feeling that there was in these legal and reasonable presumptions abundant evidence that Logan had read the will, the *cav-*

eators contended that the will was not duly executed under the statute because it had not been read in the presence of both subscribing witnesses. This was the point of the objection, and it is in reference to it that the opinion of the Court was given and must be understood. If, therefore, the Judge laid down a proposition which, as an abstract proposition, may not be critically correct, but is correct in the particular case, and with reference to the instruction prayed for, it would (294) seem unfair to him and to the successful party before the jury to set aside the verdict. It is very different from an objection arising on the record itself—that is to say, the pleadings. They speak the same language everywhere, and contain all the allegations of the parties, and must be sufficient to sustain the judgment in every Court. But of the *viva voce* proceedings at the trial another Court can know only so much as is put down in the party's exception, or the case stated; and everything found by the jury or ruled by the Court ought to be held for right, unless it be complained of at the trial. If it be excepted to, it then distinctly appears; if it be not, it must be presumed that the party acquiesced under the conviction; that if he made objection, other parts of the charge or of the evidence would be given, which would remove his objection. *Rowe v. Power,* 2 Bos. & Pul., New Rep., 36. Here it is no part of the exception that the Judge instructed the jury that the will need not be read to the testator. On the contrary, the instruction prayed for seems to admit, and the Court, on that admission, to assume, that it had been read by Logan; for the *caveators* contended that the reading in the presence of one witness was an insufficient execution. But if we are at liberty to scan the charge of the Judge in all its parts, though there might be some doubts, yet I believe it is correct, as a general proposition, that the execution of every written instrument, by every man having competent intellectual capacity, is evidence in law that he knew its contents, and binds him. It is true that Swinburne (vol. I, p. 166) does say that "a blind man may make his testament in writing, provided the same be read before witnesses, and in their presence acknowledged by the testator for his will. But if a writing were delivered to the testator, and he, not hearing the same read, acknowledged the same for his will, this would not be sufficient; for it may be that if he should hear the same read he would not acknowledge the same (295) for his will." But this, I apprehend, is only a rule of the civil law, and adopted by Swinburne as that of the Ecclesiastical Courts. It is certainly prudent and right to read the will, and to read it in the presence of witnesses; because it rebuts the imputation of fraud, of undue influence and incapacity. But the question is, whether it be indispensable, and whether the *onus* is on him who offers the will. I think there is no such rule in the common law of England. It is a

mere question of fraud; and the want of proof of the reading does not destroy the will in the law. It is clear that if a deed or other written contract be read falsely to a blind man or to an illiterate man, even by a stranger, it avoids it. If it be not read, but one undertake to state its contents, and do it falsely, that likewise avoids it. But, says Lord Coke, if the party who should deliver the deed doth not require it to be read he shall be bound by it, though he be blind or illiterate. *Thoroughgood's case,* 2 Rep., 9; *Shulter's case,* 12 Rep., 90. The presumption is, indeed, that every instrument is read by or to the maker before its execution; because men seldom bind themselves by a contract without taking the precaution through some friend able to read and in whom the party has confidence, to have its contents communicated to him. Hence, in good sense, the fact of execution implies a knowledge of what the party is doing. If it be said, with Swinburne, that if it were read he might not like it, and refuse to acknowledge it, the answer is that we have no more assurance that it would be truly read than that it was truly written. And Lord Coke goes so far as to say, in the passage just quoted, that the deed is good, not only where it is presumed that it was read, from the contrary not appearing, but that it is good where the contrary doth actually appear. That it is a strong badge of fraud; an evidence of an overbearing influence over the maker of the deed in some quarter, or of the great imbecility of his mind, when he executes a writing of consequence, without asking for and having it read, is very certain. And deeds have, under such circumstances, been set aside. *Bennett v. Vade,* 2 Atk., 326. But at last it is a ques- (296) tion of fraud; and here the whole matter of the testator's capacity, and of imposition on him, was left to the jury. I can see no ground for distinction between wills and instruments *inter vivos* in this particular. That illiterate and blind men are liable to be imposed on, and that they are sometimes imposed on, cannot be denied. But not more so in making wills than other writings. At all events, they are allowed to make contracts and wills without the law laying down any inflexible rule that the validity of their acts depends upon its being proved that they were read to them. The want of such proof is left with other circumstances, to be weighed by the jury when fraud is imputed. We know in every day's experience that conveyances and bonds of men who cannot read or write are enforced upon the bare proof of execution. So, I think, it is with a will, unless there be some ground laid by other evidence to suspect imposition.

PER CURIAM. No Error.

Cited: Atkinson v. Clarke, 14 N. C., 174; *S. v. Gallimore,* 29 N. C., 149; *King v. Kinsey,* 74 N. C., 263.

JAMES ALLISON v. JACOB HANCOCK.

FROM ORANGE.

1. After a verdict in a cause commenced in the County Court, of which a single magistrate had jurisdiction, judgment of nonsuit cannot be entered, as is provided by the act of 1777 (Rev., ch. 115, sec. 10), respecting suits commenced in the Superior Courts.
2. Under the acts of 1804 and 1820 (Rev., chs. 650 and 1045), the only mode of taking advantage of the want of jurisdiction is by plea.
3. Under the act of 1777 the Court will not order non-suit, unless on motion of the defendant.

The plaintiff sued out his writ in *assumpsit* for goods sold and delivered to the defendant 16 May, 1828, returnable to the County Court. The amount of the plaintiff's claim was originally $114.85; but on the day the writ issued the defendant rendered an account against (297) the plaintiff for $85.70, which the plaintiff instantly passed to the credit of the defendant. The case was tried in the Court below, before NORWWOD, J., upon the general issue, and the plaintiff obtained a verdict for $26.95. After the verdict the defendant obtained a rule to show cause why a new trial should not be had. Upon the discharge of which, he appealed to this Court.

Winston, for the defendant.
Nash, contra.

RUFFIN, J. This suit was commenced in the County Court, and brought by appeal to the Superior Court. Upon the question of juristion it is to be treated in the latter Courts as if still pending in the Court below. By Laws 1804 (Rev., ch. 650) and of 1820 (Ib., ch. 1045), suits brought in any Court for sums less than therein mentioned are to be abated on the plea of the defendant. A plea is, therefore, the only method of taking advantage of the want of jurisdiction. We do not find any statute giving the power of nonsuiting the plaintiff if he recover less than a particular sum, as is provided respecting the Superior Courts by the act of 1777 (Rev., ch. 115, sec. 10). But if this were in the Superior Court the plaintiff would still be entitled to judgment. For the Court does not, *ex officio,* order a nonsuit. It acts only on the defendant's motion to that effect; for it may be that the defendant would prefer the bar to a verdict for a certain sum to letting the plaintiff at large again; and the provision is not to be construed in favor of the plaintiff, but the defendant only. And if there be such a motion the plaintiff is permitted to avoid its operation by his affidavit that more was really due.

Here no motion is made for a nonsuit, but only a for a new trial. We see no ground for saying there ought to be a new trial; for it does not appear that the plaintiff recovered more than in law and jus- (298) tice was due him. Had there been a specific motion for a nonsuit the plaintiff, by his affidavit, might have explained the true time of entering the credit on his account, and showed that it was after suit brought, or the Court might, from the Judge's notes, have modified the verdict so as to give the defendant the advantage of his account by way of set-off instead of payment. We cannot tell how the facts might have been made to appear. There was no motion for a nonsuit, and there is ground for a new trial.

PER CURIAM. No Error.

Cited: Kingsbury v. Hughes, 61 N. C., 331; *Brown v. King,* 107 N. C., 316.

JOSEPH LEWIS, Chairman, etc., on the relation of Nathaniel Smith, executor of Nathan Smith, v. LEVI FAGAN and JOSIAH FLOWER, administrators of Joseph Webb.

FROM WASHINGTON.

1. A *scire facias* is a proper remedy against an administrator to revive an unsatisfied judgment against his intestate.
2. An action on an administration bond may be sustained without a previous judgment against the administrator for a devastavit.
3. The word "debts" in the act of 1789, relating to joint obligations (Rev., ch. 314), includes judgments; therefore the remedy upon a judgment against several will survive against their personal representatives.
4. Where A, as the agent of B, received money from C to pay B, and neglected to do so, C, upon paying B in full has no right without a specific application, to offer these facts as an evidence of the payment of another debt due from him, in which A, the agent, is beneficially interested.

DEBT upon an administration bond, executed by the intestate of the defendants as to the surety of one William B. Harramond, as administrator of one Benjamin Fessenden. The breach assigned was that Harramond had not paid a judgment which the testator of the relator had obtained against both Fessenden and Harramond, in the lifetime of the former, for $1,350.50.

After *oyer* the defendants pleaded: 1. *Non est factum testatoris.* 2. Payment. 3. Set-off. 4. Performance of the condi- (299) tion of the bond by Harramond, the administrator. 5. That the judgment against Harramond, as administrator of Fessenden, was obtained by fraud.

Issue was taken on all the above pleas by the plaintiff, and the cause was tried before DANIEL, J., on the fall circuit of 1829. The plaintiff, having fixed Harramond with assets of Fessenden, to prove the breach as assigned, produced a certified copy of the record of a judgment obtained in Craven Superior Court against both Harramond and Fessenden, in the lifetime of the latter, by the testator of the relator; and also the record of a *scire facias* on that judgment brought by the relator; in which the death of his testator and of Fessenden was suggested, and whereby the relator sought to have execution as well against the goods of Harramond as against those of Fessenden in his hands. On the return of this *scire facias,* there being no plea by Harramond, the entry was, "final judgment by default, according to the said writ of *scire facias.*"

The defense in the Court below was very discursive, but it is unnecessary to present any but the following: The defendants proved that the judgment against Harramond had been assigned to Thomas Cox, and that Cox was also the agent of David Clark in the collection of a judgment in his, Clark's, favor against Harramond, as administrator of Fessenden, for $583; that Harramond had sold to Cox a negro, the property of Fessenden, in his lifetime, for $245, which Cox undertook to apply to the judgment in favor of Clark. The execution on this judgment was produced, from which it appeared that no credit for that sum was given, but the whole of the judgment had been satisfied by a sale of the assets of Fessenden in the hands of Harramond. The defendants contended that, under these circumstances, the price of the
(300) negro ($245), should be applied to the satisfaction of the judgment in favor of the relator.

The jury, under the direction of the presiding Judge, returned a verdict for the plaintiff, and the defendants appealed.

Gaston, for the defendants.
Badger, contra.

RUFFIN, J. Several objections are made to the recovery effected in this case, none of which, I think, are tenable. The first is, that there was no judgment against Harramond, as administrator of Fessenden; for that he was not sued on the judgment obtained against Fessenden in his lifetime, but only a party to it by *scire facias,* in which the judgment is *quod habeat executionem,* and not *quod recuperet.* The answer is that in effect it is precisely the same thing. For by a judgment of recovery what is recovered but the debt, to be levied of the goods of the intestate in the hands of the administrator? Upon the *scire facias* the same execution goes. But it cannot go in either case until the administrator has been made a party, so as to have an opportunity of showing that

there are no assets in his hands against which the plaintiff ought to have execution. The administrator can plead *plene administravit* in both cases; for that it would be a sufficient cause why the party should not have the recovery or execution. This is the uniform course upon all writs of *scire facias* to make the executor a party to a (301) judgment against the testator. *Noel v. Nelson,* 2 Saund., 219, note 2. And if he fail to plead fully administered the executor is concluded as to assets. *Rock v. Leighton,* 1 Salk., 310; *Parker v. Stevens,* 2 N. C., 218. There is, therefore, a judgment against the assets of the intestate on which an action could be brought against Harramond for a *devastavit.* This suit on the administration bond may be sustained, without a previous judgment against the administrator in debt, for the *devastavit. Williams v. Hicks,* 5 N. C., 437; *Washington v. Hunt,* 12 N. C., 475.

Another objection is that the debt did not survive against Fessenden, and, therefore, that there ought not to have been judgment against his administrator for it; and so the sureties are not bound. And to obviate the consequence of a judgment being in fact so rendered, and its remaining good until reversal, it is said that here is no judgment —for the judgment is, "according to *scire facias,*" after our loose practice, which means such a judgment as ought to have been rendered. This last is a minor point, and it is not necessary to say what is the import of the entry; though we suppose it to mean "according to the prayer of the *scire facias,*" which is a judgment against both. If it is so to be understood it would seem to be conclusive, not of the assets, but of the debt, as against the sureties. *Washington v. Hunt, supra.* Other creditors or distributees have an interest to contest the debt, and it is open to them; but the sureties have none. Their sole concern is with the assets. They are liable only for a due accounting for them, and they shall have an opportunity of showing that the administrator had none; but if he has assets, to them it is not material whether they are paid to this or that creditor, unless they can show that the debt was recovered by fraud, which is to injure them by making them answer over.

If this was open to the defendants in this case they have not (302) availed themselves of it; for they have not put the fraud in issue; which ought to be by special plea, giving the plaintiff notice.

The general question whether judgments against two survive, upon the death of one defendant, against his executor, is of more consequence, and has been much considered by the Court. The act of 1789, Rev., ch. 314, sec. 4, it is true does not, in so many words, embrace judgments. It is, altogether, inaccurately penned. And it was seriously debated several times whether in the case of obligation a joint suit could be maintained against the surviving obligor and the executor of a

dead one—it being contended that a several action survived against each. But the Courts considering it a remedial law, and putting a fair construction on it, held affirmatively. *Brown v. Clay,* 2 N. C., 107; *Davis v. Wilkinson, Ib.,* 334. This was followed by the act of 1797, Rev., ch. 475, directing how the judgment should be entered in such joint suit, and permitting the creditor to treat the contract as both joint and several in the same suit. These legislative and judicial proceedings show that it is the policy of the authorities of the country to extend the principle of the act of 1789 as far as will completely remedy the evils at common law, both for the benefit of the creditor and the surviving debtor. To show how little the writer of the statute had considered the subject, it is only necessary to remark that in the preamble he adverts but to the single rule of the common law, by which a surviving "obligor" was oppressed and injured by becoming the sole debtor; yet afterwards it is enacted that the joint "debt or contract" shall survive, and that all joint obligations and assumptions of copartners and others shall be joint and several. It seems to us to be the spirit of this act that all debts, however due, should survive. There seems to be no reason for the exception of a judgment. If a bond is in suit against two and
(303) one die, the executor may be brought in. Why not also after judgment? So if upon a joint bond a judgment be recovered against one of the obligors, and he die, that judgment may be enforced against his executor, and at the same time suit brought on the bond against the surviving obligor. Or, if several judgments be rendered against both obligors, and both die, the executor of each will be liable. We can perceive no possible reason why in the case of a joint judgment it should not be so likewise. We think this is a fair construction of the statute, and we know it is the one long acted on; for we are not apprized of a single instance in which a creditor has filed his bill to reach the estate of the deceased defendant, though in numerous cases the survivor must have been solvent, and the debt been paid by the executor of the dead defendant.

There is nothing in the point made upon Cox's receipt of the money. If he did receive it it was as agent of Clark; and if he has not applied it to Clark's debt it has never been applied to this by Harramond, who alone could do it.

PER CURIAM. No Error.

Cited: Grier v. Fletcher, 23 N. C., 419; *Jackson v. Hampton,* 32 N. C., 592, 593, 602, 603; *Kelly v. Muse,* 33 N. C., 191; *White v. Grffiin,* 47 N. C., 4; *Strickland v. Murphy,* 52 N. C., 243.

JOSIAH TURNER et al. v. RICHARD PEACOCK et al.

FROM ORANGE.

1. The act of 1788 (Rev., ch. 284), for suppressing excessive gaming, is construed liberally; and if any part of the consideration of a bond be money won at play, the bond is void in toto.
2. So, if upon the compromise of an action upon a gaming contract, a bond be taken, it is void, notwithstanding the compromise, if money won at an illegal game form a part of the consideration.

DEBT upon a single bill made by the defendants and assigned to the plaintiff. The defendants, among other defenses, pleaded the act of 1788, Rev., ch. 284, avoiding securities given upon gaming (304) contracts.

The defendants having made out their case, the plaintiffs proved that the obligee in the bond had, before its date, commenced an action against the defendant Peacock; that pending that suit the obligee and Peacock had compromised their differences, and the bond in question was, upon that compromise, given to the obligee.

The counsel for the plaintiffs insisted that the bond, being given to compromise the former action, was upon a valid consideration, and was not avoided by the statute, although the first action might have been brought upon a gaming contract. But his Honor, Judge NORWOOD, charged the jury that although the bond was taken upon a compromise of the first action, yet if the sum secured by it, or any part thereof, was won at an illegal game, the defendants were entitled to a verdict. A verdict being returned for the defendants the plaintiff appealed.

Gaston & Winston, for the appellants.
Badger, contra, was stopped by the Court.

RUFFIN, J. The instruction given to the jury, I think, was right. By the statute every contract to secure money won at any of the forbidden games, is void. And if the bond be contaminated by including in it, however small the portion, money of that kind, it is invalid; because the Court cannot apportion it, and hold the security good for a part, since the statute makes it void for the whole.

The statutes against gaming and usury have always been liberally construed, since they are made for the protection of the unwary and the distressed. Hence, no shift or device is permitted to defeat them. And, however, a transaction, once tainted, may be disguised, whatever mutations in the securities may take place, the whole, as between (305) the same parties, and while continuing in contract, remains forever void. It is true, though once held to the contrary, that the injured

party may waive his privilege, as the Court cannot inquire into the facts, and apply the law, unless it be brought to their notice by the plea of the defendant. But the inquiry is, how long may he plead this matter? When is he deprived of this defense? The cases all show that this is a good one as long as he can make any; that is, until the matter has become *res judicata.* It would continue then to be good, if it could be reached; and the party is precluded from it only because a judicial sentence estops him from alleging anything against it. From the necessity of the case, too, it follows that whatever be done under such a judgment must be sustained, since to impeach that would be to impeach the judgment itself.

The case of an award has been put in argument, as an instance of a valid security, to which the statute could not be pleaded. Without saying yea or nay to that, I reply that if it be so, it must be because it does not stand on the mere act of the parties, but the facts and the law have been passed on and decided by competent judges of their own choosing. An award is *quasi* a judgment, so far as it operates to conclude the parties upon the point submitted. With these exceptions the rule is universal that as between the parties all gaming contracts never cease to be void. The compromise here could make no difference. It is not like the case of *Turner v. Hulme,* 4 Esp., 11. That is a very short note, and I have no doubt that the new bond was given for the true debt. If so, there could be no doubt in the case; for the debtor is bound in morals to pay the real debt and interest, and that will support a bond given for it. The law allows parties to repent and turn back to what is right. If the bond was for the unlawful interest it is against principal and all the other cases. It is impossible that a new
(306) security can be taken or given upon the compromise of a suit without having reference to the preëxisting rights of the parties, or their claims in that suit. If, indeed, a bond be given for a sum due for goods sold, and also for money won at cards, and the creditor corrects that by a surrender of the old bond, and taking a new one for the just debt, that would be good; for the true debt was never sunk in the first bond, for that was void; or, at all events, it would be revived by the new bond. But the present case is one in which either the whole or a part of the sum is the gaming debt itself; and, therefore, the bond is still void.

PER CURIAM. No Error.

John Den, ex dem. of CORNELIUS BURGESS et al., v. WILLIS WILSON.

FROM CAMDEN.

1. The certificate of the clerk of the County Court is evidence of the probate of a deed; but it is supposed to be the result of the facts proved by the record—and where it is contradicted by the record, it must be controlled by the latter.
2. By the act of 1715 (Rev., ch. 30), as explained and amended by the act of 1751 (Rev., ch. 50), a deed to convey the lands of a feme covert must, except in the case of her inability to attend, be acknowledged by the husband and wife in open Court. Proof by witnesses of the execution is not sufficient.
3. Under these acts the proper mode to bar the wife, she being able to attend, is for the husband and wife to acknowledge the deed personally in open Court, and then for one of the Court to take the private examination of the wife.
4. When the wife cannot attend, the deed must be first proved as to the husband, and then a commission issued to two or more commissioners to take the acknowledgment and privy examination of the wife.
5. Where a justice was directed to take the private examination of the wife before the deed was proved as to either the husband or the wife, who, upon making his report, proved the execution of the deed by the husband and wife, and also certified as to her private examination—held, that the deed was inoperative, and did not bar the heir of the wife.

EJECTMENT, tried before STRANGE, J., on the spring circuit of 1827. The lessors of the plaintiff claimed, as heirs at law of one Sarah Burgess; the defendant, under a deed from the said Sarah, and (307) Lemuel Burgess, her husband, to one Dempsey Sawyer; and the only question was whether that deed was acknowledged so as to bar the *feme covert*. Upon the deed was the following endorsement, signed by the clerk of the County Court: "Camden County Court, November Term, 1812.—The foregoing deed of bargain and sale from Lemuel Burgess and Sarah Burgess, his wife, to Dempsey Sawyer, was exhibited in open Court, and proved by oath of Caleb Perkins, a subscribing witness thereto. And on motion ordered, that Caleb Perkins, Esq., be appointed to take the private examination of the said Sarah Burgess, *feme covert,* touching her free consent to the execution of the said deed, and report thereon, under the direction of an act of the general assembly, in such case made and provided. Pursuant to said order the said Caleb Perkins proceeded to take the private examination of the said Sarah, separate and apart from her husband, and reported that she, the aforesaid Sarah Burgess, *feme covert,* acknowledged that she executed the the said deed of her own free will and accord. All done in due form of law, and on motion, ordered to be registered."

To explain and control this certificate the lessors of the plaintiff produced the minutes of the County Court, from which the following are extracts.

"Monday, 2 November, 1812. On motion, ordered that Caleb Perkins, Esq., be appointed to take the private examination of Sarah Burgess, a *feme covert,* touching her free consent to the execution of a deed of bargain and sale to Dempsey Sawyer, of certain lands, etc."

"Tuesday, 3 November, 1812. A deed of bargain and sale for certain lands from Lemuel Burgess and Sarah, his wife, to Dempsey Sawyer, was exhibited in open Court, and proved by the oath of Caleb Perkins, a subscribing witness thereto. And further, said Caleb Perkins, agreeably to an order of this Court, reports that he proceeded to privately examine said Sarah Burgess, touching her free consent to the execution of said deed, and that she says it was done with her free will, consent and accord."

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Under the directions of his Honor a verdict was returned for the plaintiff, and the defendant appealed.

Gaston, for the defendant.
Hogg, for the plaintiff.

RUFFIN, J. The clerk's certificate on the deed states that it was proved by Mr. Perkins; and that the same person being appointed by the Court to take Mrs. Burgess' privy examination reported that she acknowledged that she executed it freely and of her own accord. From this it does not appear when Perkins proved the deed; whether before or after he had examined the *feme;* nor whether she acknowledged the deed at Court; nor whether the same was proved in Court, as to her or not. It is, indeed, to be *prima facie* inferred that the proof was as to both the husband and the wife, and that it was proved before Perkins was delegated to take her privy examination. The certificate of the clerk is evidence by the act of assembly. But it is not higher evidence of what the Court did than the record of the Court itself; nor so high. The certificate is made evidence because it is presumed the clerk will be guided as to the facts stated in it by the record, and that they will accord. They are often made after Court, and it would be dangerous to consider them as overruling the record when contradictory, or as not to be construed with it when reconcilable. Both documents may be read together legitimately. By reference to the record it is seen that in fact the acknowledgement of the *feme* was not taken in Court, nor was it proved as to either husband or wife until after Perkins had been appointed to take the privy examination, and had taken and reported it. He was appointed on Monday, and the deed was not proved until Tuesday, and at the same time he made his report.

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It is argued that under the acts of 1715 (Rev., ch. 3 and 7), taken together, everything was done which is required, and that the

order of doing it is immaterial. The course of reasoning is that the validity of the deed of a married woman depends upon her privy examination, and not upon the acknowledgement in Court by herself or her husband. These last acts are held to relate only to the formal execution, and as testifying the husband's assent. That his acknowledgement in Court is sufficient under chapter 3; and that as by chapter 7 proof is made tantamount to acknowledgment, as far as formal execution and an order for registration are concerned, the proof by witnesses is all sufficient to authorize the wife to be privily examined, out of Court, by any justice of the peace. I do not think the two statutes are *in pari materia.* They relate to distinct subjects. Being passed at the same session it cannot be supposed that the legislature would adopt contradictory enactments on one and the same matter. But if these provisions had been contained in the same chapter each must be construed according to the subject matter. The last act provides generally for the proof and perpetuation of deeds, and enacts that they may be either acknowledged or proved. The third chapter relates exclusively to the particular subject of deeds made by husband and wife. The special ceremonies prescribed for these deeds are not dispensed with, because they are not requird with regard to other deeds. The conveyance by husband and wife is a peculiar one, and stands by itself. We can, therefore, resort only to the third chapter for light on the subject. That requires the deed to be acknowledged in Court. But it is said that this may mean an acknowledgment by the husband alone; and ought to be so held, because the wife's acknowledgment in Court is superfluous, since that would be to require her to acknowledge it twice; for it is clear she must be privily examined by one member of the Court. I (310) think otherwise; and that the inference is irresistible that the acknowledgment in Court must be by all the persons whose deed it is. By the act the deed cannot be registered upon proof, but only upon acknowledgment. Surely it is of much more consequence that this acknowledgment should be that of the wife than of the husband; since it is her freehold that passes, and she it is who stands in need of the guardian care of a Court of justice to see her fairly dealt by. But whatever doubt might be raised on the act of 1715 is removed by that of 1751, Rev., ch. 50, which is in *pari materia.* The second section says that conveyances sealed by husband and wife, and by them personally acknowledged in the Court of the County, the wife being privily examined before some member of the Court, appointed for that purpose, etc., shall be good and valid. Here is a positive injunction that the deed shall be acknowledged by both, and that in Court. Superadded thereto is the provision for her privy examination by one magistrate. But this does not supersede the acknowledgment in Court, and vest the power in a

single person to take the acknowledgment out of Court. It would be strange that no such authority is confided as to other deeds, which are to be proved or acknowledged in Court; and yet should be in the instance of deeds by a *feme covert,* which the legislature intend to surround by especial and cautious safeguards. It has always been understood that such deeds were to be acknowledged by the wife in open Court. The late Chief Justice TAYLOR explicitly lays it down so, in *Whitehurst v. Hunter,* 3 N. C., 401. It is true that the privy examination is not in open Court; for that would be an absurdity in terms. But it is to be within its verge, as it were; and by a justice of the peace—not by virtue of his office, but as "a member of the Court." It might be by the whole Court; but for convenience's sake it is permitted to
(311) one. After open confession in Court she is then to be examined, when in privacy, and with the self-collection which a timid female, in the presence of a crowd and overawed by the authority of her husband, might not be able to command in public, that she may have an opportunity of retracting her deed after her interests have been weighed by her and her rights explained by an intelligent and upright judicial officer. This being done all at once, there is not so much apprehension, though certainly some even here, of malversation in the examining magistrate. The danger of immediate detection would subdue his disposition to aid in the undue machinations of a cruel husband. But the facility for practicing abuses on the wife would be great indeed if the trust of receiving her acknowledgment were reposed in a single justice of the peace, as matter *in pais.*

The two methods do not differ then more in form than in substance. It is true that the acts authorize a Judge of the Superior Court to take the acknowledgment of the husband and wife, and the privy examination of the latter; and this being to be done by one person, the whole is necessarily one act. It has been seriously doubted by respectable lawyers whether the construction of the statute does not require this to be done in Court. But the usage to the contrary has been so uniform and long that it cannot now be questioned. But the law very properly relies more upon the intelligence and integrity of the high judicial officers selected by the legislature from the whole profession than on any single inferior magistrate of a county. But my own practice has always been to take the acknowledgment of both the husband and wife together, and immediately after to examine her privily. I never take the acknowledgment of the wife first, nor of the husband, until the deed purports to have been executed by the wife. This I have done upon the idea that there is a peculiarity in their deed which rendered it necessary.

In others each party acknowledges the deed as his own. But as
(312) the validity of the wife's deed depends not only upon her hus-

band's executing it as his own, and upon her freely executing it also, but likewise upon her having so executed it by the husband's consent, it has occurred to me that they are to acknowledge it as their deed, and not simply as his or her deed. Be this as it may, it is clear that it ought to be fully executed before it is acknowledged or proved as to either. For by the third and fourth sections of the act of 1751 provision is made for the case of a woman who cannot personally travel to Court, when, upon proof of its execution in Court, or on the acknowledgment of the husband, a commission is to issue to take her acknowledgment. This recites that "whereas F. G. hath produced a deed made to him by H. I. and K., his wife, and procured the same to be proved (or acknowledged by the said H. I.) in the Court, etc." Now, unless the wife had before executed it the deed could not be produced, nor be said to be made by them—much less proved.

In the case before us no deed was brought into Court until the day after the Court took the first order on it; and by possibility it may have been executed by the wife without the privity of the husband. The provisions of these two sections likewise prove the necessity of an acknowledgment in Court, except when a commission issues. For under the second section the magistrate, after her acknowledgment, is to examine her "whether she doth voluntarily assent thereto." But when the commission issues it is "for receiving the acknowledgment of the wife," which had not been previously given. This change of phraseology evinces a difference in office. The commission also is to be directed to two or more, and is to issue only when the wife cannot travel to the Court. This shows that the power of taking the acknowledgment of the deed was a greater one than the legislature was willing to confer upon a single surbordinate magistrate. And, further, that the acknowledgment in Court is to be dispensed with, not for any trivial inconvenience, but only for necessity—when the wife is kept away (313) by age, sickness, or residence abroad.

The provisions of the statutes seem therefore plain and precise. The deed is to be acknowledged by both of the parties in Court, except in the single case of a commission issuing, as provided in the latter clauses of the act of 1751. There seems to be no reason for relaxing the provisions of the statute by a liberal construction. The scrupulous regard with which the Courts of Westminster search into the motives of a married woman for suffering a recovery or acknowledging a fine is worthy of all praise and imitation. We but follow their example in holding to the letter of our law. It is true the acts were passed to facilitate alienations by married women, but not to encourage them, and especially not to furnish temptations nor opportunities to the husband to extort from the wife a conveyance, which he might do if a public

as well as a private exhibition of the instrument were not required. The presumption of the law, that the will of the wife is subdued to that of the husband is, so far as regards the disposition of her estate at least, but too fully verified by our experience. Every ceremony, however formal, which has the least tendency to interpose the protection of the law, or the advice of an additional judicial character, ought to be adhered to, substantially and literally.

PER CURIAM. No Error.

Cited: Barfield v. Combs, 15 N. C., 518; *Fenner v. Jasper,* 18 N. C., 37; *Ives v. Sawyer,* 20 N. C., 181; *Gilchrist v. Buie,* 21 N. C., 359; *Jones v. Lewis,* 30 N. C., 73; *Pierce v. Wanette,* 32 N. C., 455; *Malloy v. Bruden,* 88 N. C., 308; *McGlennary v. Miller,* 90 N. C., 219; *Wynne v. Small,* 102 N. C., 136; *McKaskill v. McKinnon,* 121 N. C., 222; *Lumber Co. v. Leonard,* 145 N. C., 349; *Bryan v. Eason,* 147 N. C., 291.

Distinguished: Joyner v. Faulcon, 37 N. C., 390, 391; *Etheredge v. Ferebee,* 31 N. C., 317; *Pierce v. Wanette,* 51 N. C., 167; *Kidd v. Venable,* 111 N. C., 539.

(314)

TERREL B. BLEDSOE v. Den ex dem. of THOMAS W. WILSON.

FROM WILKES.

1. A writ of error can be brought only by parties and privies. Hence, in ejectment, the tenant, before he is made defendant, cannot bring error.
2. In ejectment, judgments by default against the casual ejector are set aside, when the declaration has not been served on the tenant.
3. A return of execution by the sheriff, on a declaration in ejectment, is not sufficient foundation for a judgment by default against the casual ejector. Affidavit should be made of personal service on the tenant.
4. When a declaration in ejectment is served by leaving a copy at the house, or with the servant of the tenant, judgment by default against the casual ejector should not be enterred without a rule upon the tenant to show cause why such service should not be sufficient.

EJECTMENT, returnable to the fall term, 1829, of WILKES. The notice upon this declaration to the defendant was returned by the Sheriff "Executed 1 September, 1828." At the return term judgment by default was entered up against the casual ejector under which the lessor of the plaintiff was put in possession.

In the vacation following the defendant applied to MARTIN, J., and made an affidavit of merits—stating further that there were but eight days between the service of the process and the return day; that during the whole period between the issuing of the process and the return day the defendant was confined in prison in Virginia, and had no oppor-

tunity of defending the action. Upon the acts thus disclosed and prayer of defendant, his Honor directed a writ of error for error in fact, and also a writ of *supersedeas,* to issue.

On the last circuit the cause came on before MARTIN, J., when "the judgment heretofore entered in the cause was reversed for error in fact, and that the same be reinstated on the trial docket. It is (315) further ordered by the Court that a writ of restitution issue, commanding, etc."

From this judgment the defendant in error appealed.

Devereux, for the defendant in error.
Badger, contra.

HALL, J. It may be admitted that a writ of error is not the proper remedy in this case, because Bledsoe has not made himself a party to the suit by coming into Court and confessing lease, entry and ouster, and being admitted to plead. No person can have a writ of error, but a party or privy to the suit. Run. on Eject., 421. Yet he discloses such facts in his affidavit as entitle him to relief. (316)

If Bledsoe was not a party to the suit the only parties to it were the plaintiff and the fictitious casual ejector. Thus situated, if judgment was entered against the casual ejector, and a writ of *habere facias possessionem* was issued against him, every person in possession claiming title to the land, and who might have had a good title to it, would be turned out of possession. This would be iniquitous and oppressive, and a gross violation of the principle that no man shall be deprived of his property without a hearing or an opportunity of making his defense. Hence it is in order that the fictions in this section shall do no wrong, that the Courts will not permit judgment to be entered against the casual ejector unless it is made to appear that notice has been given to the tenant in possession, and a declaration served on him, whereby he may become a defendant in the suit if he thinks proper. The affidavit setting forth the facts should be positive that the person on whom the notice has been served was the tenant in possession, or acknowledged himself to be so. (Run. on Eject., 158.) Has this been done in the present case? Or if it is not, ought a judgment by default to have been entered against the casual ejector? Or ought a *habere facias possessionem* to have been entered against the casual ejector? Or ought a *habere facias possessionem* to have issued, and thereby dispossessed the tenant in possession?

Sec. 14 of the act of 1777, Rev., ch. 115, directs that all writs and other process shall be executed at least ten days before the beginning of any term. The declaration in this case, as appears from the record sent here, was served eight days before the beginning of the Court to

which it was returnable. And if it was served in sufficient time the particular manner of executing it does not appear. It may have been served on the tenant, or on his wife, or on some other of the family, or it (317) may have been fixed to the door of the house. In the latter case it would have been proper to procure a rule against the tenant to show cause why such service should not be sufficient before judgment should be entered against the casual ejector. *Sprightly v. Dunch,* 2 Bar., 1116. I therefore think that there was not sufficient service of the declaration on Bledsoe.

I have taken it thus far for granted that Bledsoe was the tenant in possession. But did that fact appear judicially to the Court, when judgment was entered against the casual ejector? The sheriff's return, to make the most of it, only proves that notice was served on Bledsoe, but not that Bledsoe was the tenant in possession. Suppose that A. B., and not Bledsoe, was the tenant in possession and had a good title to the land, and the plaintiff and Bledsoe had fraudulently combined to dispossess him of it, their object might be effected by a proceeding like the present.

Although the affidavit of Bledsoe cannot be received to contradict the sheriff's return, it may be received to influence the discretion of the Court in setting aside the judgment against the casual ejector. Indeed, it does not appear that there is a contradiction between them. The notice might have been served on Bledsoe's wife, or left at his house, and at the same time Bledsoe might have been in jail in Virginia. He swears to that fact, and thereby furnishes an irresistible reason why the judgment should be set aside. I think the judgment of the Superior Court, which placed the suit upon the trial docket and ordered restitution to be made, was correct, and ought to be affirmed.

PER CURIAM. Affirmed.

Cited: Judge v. Houston, 34 N. C., 115.

(318)

Doe ex dem. of ANDREW HOYLE et al. v. LEROY STOWE.

FROM LINCOLN.

1. In ejectment the title must be truly stated in the declaration. A joint demise can only be supported by showing a title in each of the lessors of the plaintiff to demise the whole.
2. Tenants in common may recover on a joint demise, because a lease for years is but a contract for the possession and their possession is joint.
3. The case of Doe ex dem. of Nixon v. Potts, 8 N. C., 469, explained and approved by RUFFIN, Judge.

4. Although the succession is not destroyed by words excluding the heir, without making a disposition of the estate, yet that rule applies only where there is a single heir—because by law he takes what is not effectually disposed of by the will. But in partible inheritances, one of a set of heirs may be excluded in favor of the others, without a valid disposition of the estate. Hence, where a father, by will, gave one child a specific legacy, and added "with which she must be contented, without receiving any further dividend from my estate," and then devised his land "to my children," it was held that the words "my children," were to be construed "the rest of my children." Whether in that case, the children take by descent, or as devises. *Quaere?*

5. Where a testator directed that his widow should cultivate as much of his land during her life or widowhood as she pleased, and "the balance" was to be rented out by his executors—held, that the power of leasing extended to the whole estate, upon the determination of the widow's estate for life.

EJECTMENT upon the joint demise of Andrew Hoyle and the heirs at law of Mason Huson.

The defendant claimed under the will of Mason Huson, the material parts of which were as follows:

"My will is, that my said wife, Mary Huson, have her maintenance off my land, during her natural life or widowhood.

"I give and devise to my daughter Elizabeth a certain negro girl named, etc., and as my said daughter Elizabeth Huson has another negro girl, willed to her by her grandfather, my will is that with this negro and the property that I have bequeathed she be contented, without claiming or receiving any further dividend out of my estate." (319)

The testator then made sundry specific legacies of slaves to his other children, with cross remainders between them, and proceeded: "And further my will is, that if any of the negroes which I have bequeathed to either of my children shall die before the child to whom such a negro is bequeathed becomes of age to receive the bequest, then in that case I will that the loss shall be made up to the child or children out of the residue of my estate which is not particularly bequeathed in such a manner as will equalize their portions." After directing certain negroes to be hired out for the purpose of defraying the expenses of the education of his children until their ages of twenty-one for males and eighteen for females, he proceeds: "And the balance of said hire, if there be any, shall be reserved to meet accidental occurrences, if these should happen; and if no such occurrence should arise to call for a particular distribution of the above money, then, in that case, my will is that it be equally divided amongst my children, paying due respect to the foregoing reservations." He then directed the negroes themselves to be divided equally among his children, unless required to make up deficiencies by death, and proceeds: "I will that my wife shall have such a part of my land as she, with her children and negroes which are left

to her care, can attend under crop annually during her natural life or widowhood, and the balance of cleared 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 testator appointed his wife executrix, associating another with her.

After the death of the testator his widow and children continued in possession of the land until the marriage of the former; after which, and before the full age of any of the children, the widow and her husband leased the land in question to defendant, who entered into
(320) possession of the whole of it, including the late residence of the testator. No title was shown in Hoyle, one of the lessors of the plaintiff.

The defendant contended in the Court below:

1. That Elizabeth, one of the lessors of the plaintiff, had no title to the land in controversy, and as the demise was joint, that consequently the plaintiff could not recover.

2. That upon the marriage of the widow of the testator the land vested in the executors, upon trust, to rent until the children, except Elizabeth, become of age, and that the lease to the defendant gave him a right to enter.

His Honor, Judge MANGUM, charged the jury that, according to his view of the case, it was unnecessary to decide, whether Elizabeth, the daughter, had title to any part of the premises in question at the time of the demise laid in the declaration; for if any of the lessors of the plaintiff had title at that time, it would enable the plaintiff to recover. That by the true construction of the will the inheritance in the land was undisposed of, and descended to the heirs at law; that particular estates were carved out of the inheritance by the will, viz., a freehold estate to the wife, determinable upon her death or marriage, and the residue of the cleared land to the executors, to be rented until the children became of age; that upon the determination of the estate of the widow her estate in the land coalesced with the fee and immediately vested in the heirs at law, and did not go with the balance of the cleared land to the executors, as trustees, to be rented out annually by them.

A general verdict was returned for the plaintiff, and the defendant appealed.

Badger, for the defendant.
Gaston, contra.

RUFFIN, J. The declaration contains but one count, which
(321) is on the joint demise of seven, of whom Andrew Hoyle and Elizabeth, the daughter of the testator, are two. It is for the whole

tract of land of which the testator died seized; and there is a general verdict for the plaintiff. The Court below held that it was unnecessary to decide whether Elizabeth had title or not under her father's will, as it would be sufficient to enable the plaintiff to recover if the lessors or any of them had the title. The case sets out the title, and none is attempted to be shown in Hoyle.

If Elizabeth had title this defect of it in Hoyle would render the judgment below erroneous. It is a universal rule that the title must be stated in the declaration. A joint demise, therefore, can only be supported by showing a title in each to demise the whole. If one of the lessors has no title the plaintiff must fail. This is well settled in England. I need not cite the cases, as it is common learning, and they are collected in all the text writers. The rule has never been departed from in this State. *Nixon v. Potts,* 8 N. C., 469, has been relied on to the contrary. If that case has been so regarded it is entirely misunderstood. It is the other way. There a joint demise by tenants in common was sustained, contrary to the rule in England, which is that as their title is several, their demises must also be several. The doctrine of *Nixon v. Potts* is that heir demise may be joint, because although they cannot jointly convey the land they may jointly demise for years, since a demise for years is but a contract for possesion, and their possession is joint. The position, therefore, is not that the title of the plaintiff need not be truly stated in pleading, but that in cases of tenants in common their lessee's title is truly stated when it is alleged to be on the joint demise of the lessors. The reason of that case directly applies to the present; for there is neither a joint right to convey the land nor a joint right to possess it or to let the possession, shown, when one of the lessors has no title. What would be the effect of it? The verdict (322) cannot separate the title alleged by the plaintiff and say he has right under part of his lessors against his own statement of the title; and then, upon this verdict, not only the true owner gets a writ of possession, but one is also let in who has no manner of right. It, therefore, was essential to determine Elizabeth's title; because if she had none this count must fail. And whether she has or not, it cannot be supported, because no title is shown in Hoyle, another of the lessors. This would dispose of the case before us, and compel us to reverse the judgment. But as the case has been pending a considerable time, and the parties are anxious to have the construction of the will, the Court will dispose of the other questions made.

The case states that the testator's widow and executrix cultivated parts of the plantation for several years, and then married again; and that she and her second husband then let the whole tract to defendant, who entered and is now in possession under them. All the lessors of

the plaintiff, except Hoyle, are the heirs and children of the testator, mentioned in the will. The will is set out at large, and makes a part of the case.

The first inquiry presented is, whether Elizabeth is entitled to any share of the land. The testator bequeaths to her a slave and other small things, and then declares that with a negro which her grandfather had given her, and the property then given by the testator, "she must be contented, without claiming or receiving any further dividend out of his estate." By the clause immediately preceding he directs that his wife shall have her maintenance out of his land during her natural life or widowhood. And in the last clause he gives a further explanation of the devise of the land to his wife, and makes a disposition of it.

The words: "I will that my wife shall have such a part of my
(323) land as she, with her children and negroes left to her care, can attend under crop annually, during her life or widowhood; and the balance of cleared land I will shall be rented out annually by my executors until my children come of age to take it in their own possession." It is argued, that there is no express devise of the land to the other children, and therefore that it descended to all, as heirs, including Elizabeth; and the clause excluding her is void because the heir cannot be shut out by bare words of exclusion. It is true that where land is devised to the heir at law, in the same estate which he would take as heir, the devise is inoperative, and the heir takes by descent, as the better title. But that does not apply to a question of intention in a will as to which of the heirs a part or all of the land shall go. It only determines the nature of the estate, and not the extent of the acquisition. It is equally true that the mere exclusion of the heir by the words of the will, however express and direct, will not be efficacious to destroy his succession. There must be a disposition to some other person capable of taking; because, in the very nature of inheritances, the heir takes whatever is not given away. Manifestly, however, this rule can only apply where there is a single heir. He cannot be barred by words of exclusion barely; because if he takes not, there is nobody else who can. When there is a class of heirs the exclusion of one leaves others who may take. The necessity which imposes the estate on a single heir—for the want of another owner—ceases when there are more heirs. Whether these words operate simply to exclude him, and leave the land to descend to the others, or operate by implication, as a disposition to the others, is an inquiry more nice than useful. I suppose the latter, like the case in the books of a devise to the heir after the death of the testator's widow, which is held to give a life estate to the latter. Be it the one way or the other, the exclusion is effectual, because the estate is not left without an owner. This is the doctrine touching the

succession of the next of kin to the personalty. The same reason (324) extends it to our partible inheritances; for although an heir is favored, yet he may be shut out by a reasonable implication short of a necessary one. If, therefore, this case stood singly on the words of exclusion, the opinion of the Court would be adverse to Elizabeth. But this conclusion is there aided by other parts of the will. The testator had not forgotten his land. Nor did he mean to die intestate as to it. He mentions it twice in connection with his wife; and in the last clause directs it to be leased until his children come of age to take. There is a disposition, then, to the children. The only difficulty is, what children? It is purely a question of intention. And in that point of view the case is plain enough. The testator must mean those children not before excluded. This goes throughout the will; for when he orders certain negroes to be hired out, and the proceeds, after answering certain contingencies, to be divided amongst his children, he adds: "Paying due respect to the foregoing reservation." What reservation? There is none but that which says Elizabeth shall have nothing more, and that the children should have it only at certain ages. We are bound to read this will so as to make all the parts consistent, if we can. This is effected by construing "my children," in the devise of the land, "the rest of my children, Elizabeth excepted." For why is she expressly excluded in one clause if the testator meant to take her in by a general subsequent description? We are obliged, too, to extend the exclusion of the land, because the testator could have used no larger word than he has—"estate"—and there is nothing in the context to control it.

The remaining question is whether the executors have authority to lease those parts of the land which were occupied by the widow. The Court has heretofore decided, *Hoyle v. Huson,* 12 N. C., 348, that each child is entitled to his or her share at their arrival at the ages specified—the girls at eighteen and the boys at twenty-one years. (325) No lease of the executors can interfere with that provision. Subject to that the authority is with the executors. It is expressly given as to the "balance of the land" not occupied by her. We should agree with the Judge below on this point if, in our opinion, it depended upon the nature of the estate taken by the children. That is unquestionably a fee in the whole tract, subject to the occupation of the widow, and, we think, also subject to a power of leasing for the benefit of the children by the executors instead of a guardian. The widow is not restricted to the cultivation of any particular parts of the land, but is at liberty to occupy any parts she may select, and as much as she may choose from year to year, according to the increase of her hands. Is the first or last year's occupation to determine that part which is called the balance? But suppose her confined to half, or that she actually worked but half,

and then married. Is there any reason why different parts of this small estate—and that undivided—should be under the management of different curators, when the profits in each case are to belong to the same persons? We cannot think the testator so intended—especially when it is seen that the negroes and other legacies given to the same children are to remain with the executors until their ages of eighteen and twenty-one. The words too are that the balance of the land is to be rented out until the children shall come of age to take it into their own possession; which certainly refers to the periods before specified, and negatives the idea that the executors were not to manage the whole property. "The balance," then, we take to mean whatever parts of the land were not occupied by the widow, without reference to the particular reason for that—whether it was that she did not need it, or could not work it, or by death or marriage ceased to be entitled to it.

PER CURIAM. New Trial.

Cited: Rogers v. Mabe, 15 N. C., 196; *Bronson v. Paynter,* 20 N. C., 530; *Banner v. Carr,* 33 N. C., 45; *Elliott v. Newbold,* 51 N. C., 10; *Foster v. Hackett,* 112 N. C., 552; *Allred v. Smith,* 135 N. C., 449; *Cameron v. Hicks,* 141 N. C., 35.

(326)

SARAH PETERSON v. GEORGE WILLIAMSON.

FROM CASWELL.

1. The proviso in the act of 1820 (Rev., ch. 1055) extends not only to gifts void by the act of 1806 (Rev., ch. 701), but also to those which are void by the act of 1784 (Rev., ch. 225).
2. Where a parent before the year 1806, being unembarrassed, made a parol gift of a slave to a child, and the child and slave resided in the family of the parent—held that the gift was void as to creditors of the parent, whose debts were contracted twenty years afterwards.
3. The gift is so absolutely void against purchasers and creditors that an open and notorious adverse possession by the child, together with perfect bona fides in both the parties, cannot validate it against creditors of the donor, without respect to the time when their rights accrued.

Per RUFFIN, Judge.—The construction of the act of 1784 (Rev., ch. 225), by which parol gifts of slaves were held to be valid between the parties, but void as to purchasers and creditors, was founded in error, but has prevailed so long as to be beyond the reach of judicial correction.

DETINUE for a female slave, Hannah, and her four children. The defendant pleaded the general issue, and on the trial before his Honor, Judge DONNELL, it appeared that in 1801 James Peterson, the father of

the plaintiff, made a parol gift of the slave Hannah to her—the slave being then only a few days old, and the plaintiff a child aged fifteen years; that the father at the time of the gift owned one other slave, the mother of Hannah; was then unembarrassed, and so continued until 1820; since then he had been gradually failing, and had become wholly insolvent. At October term, 1828, of Caswell County Court, judgments to an amount greater than the whole of James Peterson's estate were entered up against him, upon which executions issued to the defendant, the sheriff of Caswell, who seized and sold the slaves mentioned in the declaration. It was in proof that Hannah and her children, as they were successively born, lived in the (327) family of Peterson, the father, and worked as the other negroes belonging to him did. There was also evidence that the plaintiff exercised control over them.

In the Court below it was insisted for the plaintiff that her possession under the act of 1820 (Rev., ch. 1055), gave her an indefeasible title.

His Honor instructed the jury that the parol gift under which the plaintiff claimed was void as to the creditors of Peterson, the donor, and their rights not having accrued until the levy under the execution issued in the year 1828, and the defendant being clothed with all the rights of the plaintiff in these executions, the present was not a case in which the act of 1820 would have availed the plaintiff had she been defendant in an action claiming under that parol gift, and therefore was not within the operation of that act, regarding either its words or the spirit of the enacting clause, or the proviso.

A verdict was returned for the defendant, and the plaintiff appealed.

Gaston and *Winston,* for the plaintiff.
Nash, for the defendant.

RUFFIN, J. The propriety of the instructions depends altogether upon the correctness of the assumption that the gift, being by parol, was void as against the creditors who had executions. For nothing can be more certain than that the statute of limitations cannot run until the right hath accrued or the action arisen. I do not speak of the gift being fraudulent within the statute of 13 Eliz. It is indeed plainly so; for it is past my conception how a father, although not indebted at the time, nor for a long time after, can honestly give an infant child, living with him, a slave a few days old, and honestly keep the (329) possession of the slave, using her as his own, supporting her and several of her children through the long period of twenty-seven years, eight of which were those of pecuniary embarrassment, which ended in insolvency. Such a possession was so manifestly deceptive to the

world as to be covenous and fraudulent as to his creditors. If it be said that it is doubtful whether the father or the daughter had the possession, that doubt is a fraud upon the donor's creditors; to which I should think it hard to make a jury shut their eyes. The donee ought to have a clear, separate, and unequivocal possession, so that nobody could be either deceived or mistaken.

But the Court took the point out of the case by informing the jury that the gift was void because it was by parol. So that we are to view the case as if the daughter had such an exclusive possession as would indicate a *bona fide* gift. I confess that the best convictions of my understanding are opposed to the position, and that it is revolting to my feelings. Yet under the construction put upon our act of 1784 (Rev., ch. 225, sec. 7) I believe the Judge was right. I have not a doubt that the act was intended to be one of frauds and perjuries, and to declare that all conveyances of slaves, whether voluntary or for value, should be void to all intents and purposes. It, unfortunately, did not get that meaning put on it at first; and conveyances by parol were held to be good between the parties. This has often been since lamented by several able judges; and the legislature has by successive acts attempted to correct it. The omnipotent one of 1806 goes to the root of the evil, as far as relates to gifts of slaves; and that of 1819 (Rev., ch. 1016) was probably intended to embrace sales, though its words extend only to contracts to sell. One error naturally leads to another. When the act of 1784 was held not to void the contract altogether, it seems to me that it resulted in this—that it had no meaning whatever in (330) connection with creditors. Possibly it might be strained to supply the defect in the Stat., 27 Eliz., in favor of purchasers, because that statute did not extend to personal chattels, and a purchaser from one in possession (as the vendor must be) of such a chattel ought not to be postponed to a prior voluntary alienee. But even this was a hard, very hard, measure of justice where the gift had been *bona fide* and by one not indebted, and the donee had taken and held the possession for a great length of time. It would be a fraud in the donor, greater than that committed in making the gift, to avoid it by a sale, upon any freak, and after the donee had settled in life, reared a family, bred up a numerous progeny of the slaves, and got credit on them as his property. The express words of the English statute compelled their courts to put this interpretation on it, as to lands. But two of the most eminent of the judges (Lord Mansfield and Lord Ellenborough) have expressed earnest complaints of the rule which the letter of the statute imposed on them. I do not see a reason why our Courts, without such a legislative mandate, but by mere construction, should have adopted it. But it has been by repeated decisions, and particularly after able arguments, in

McCree v. Houston, 7 N. C., 429, and *Watford v. Pitt, Ib.,* 468. In reference to creditors, however, there was no necessity for a new rule, because if the conveyance was not *bona fide* their interests were sufficiently protected by the 13 Eliz., and our own act of 1715. Rev., ch. 7, sec. 4.

When it was determined that the gift was not merely void as a parol gift—that such a gift was in form sufficient to pass the title—it seems to me that the only thing then remaining which ought in reason to affect it was that it was founded in bad faith; in other words, that it was fraudulent. How could it be fraudulent as to creditors when the donor had no creditors at or near the time of the gift; or if he had, he had likewise ten times as much other property as would (331) satisfy them, and the donee took immediate, exclusive, and notorious possession? Without such possession in the donee, and such ability in the donor, the gift, though made in the most approved and solemn form in writing, could not and ought not to stand. With them it ought to stand in any form that will in law pass the title. For there is no medium which my reason can appreciate as just between those laws which declare that stipulations, except in a certain form, shall not constitute a valid contract to any purpose, and those which declare a contract, in whatever form, void as against particular persons to whose injury it was designed or had a tendency to operate. Yet, as it was obvious that creditors were sufficiently secured before against fraud, as the statute recited that many persons had been injured by secret deeds of gift and for the want of formal bills of sale, and as the parties were said not to be within the mischief, it became necessary to put some other meaning on the act. Then came the construction that a parol gift, good between parties, and without fraud as to creditors, was, nevertheless, as to the latter void. This turns the act into the legislative anomaly of being neither a statute of frauds nor of fraudulent conveyances. It avoids contracts which are good, so far as their validity depends on the intent; and it avoids them in favor of a class of persons having no more merit than he, the donor, has, against whom they are valid. As to the donor, the parol gift stands firm; as to his creditor, it is void for want of form, and for that only. The consequence is that a creditor whose debt is contracted at any distance of time, and not on the faith of this property, may defeat the gift; because, as to him, it is void for want of form, precisely as a parol gift, since 1806, is void as against the donor himself. Even the death of the donor would not convert the gift into an advancement as against a debt contract thirty years afterwards, for the want of such a proviso as is contained in the third section of the statute of 1806. Thus the act is turned (332) into a statute of frauds and perjuries, as relates to the creditor,

while it is not so as to the donor, and while the gift is *sine mala fide* with respect to the whole world, being from a parent amply ably to pay his debts, and made in the discharge of the first natural duty, that of advancing his child, who takes possession and retains it for thirty years. And what is stranger still, if anything can be, the same doctrine must, until the act of 1792 (Rev., ch. 363), have been applied to parol sales; for gifts and sales were put upon the same footing. Yet such is the law as it hath been too often adjudged for us now to deny. Without mentioning other cases, it will be sufficient to cite the remarkable and leading ones of *Knight v. Thomas,* 2 N. C., 289, and *Sherman v. Russell,* 4 N. C., 79. However erroneous the original construction may appear to our minds, at this day, it is too thoroughly settled to be disturbed. I am firmly convinced that it was palpably erroneous. But I subdue myself into a practical obedience to the authority of a long train of the decisions of my predecessors, although my own understanding rejects the reasoning upon which they are founded, and I see them now productive of evils which were not and probably could not have been foreseen. The Court below was bound to lay down the law as it did, and this Court is bound to follow. And the act of 1820 (Rev., ch. 1055) does not alter it. Probably the proviso was pointed solely at the act of 1806, and intended to prevent possessions, under gifts absolutely void, from ripening into title. But it is more extensive, and embraces "the law then in force, which required all gifts of slaves to be in writing." So that as to those against whom, by any law, a parol gift was invalid a possession under it remained inoperative by the express words of the act of 1820.

PER CURIAM. No Error.

Cited: Pickett v. Pickett, 14 N. C., 10, 15.

Dist.: Jones v. Young, 18 N. C., 354.

(333)

FRANCIS WILLIAMS, executor of William Mosby, v. NATHAN CHAFFIN.

FROM SURRY.

1. The consideration of a promise by an executor to pay the debt of his testator is his liability, and as that depends upon his having assets, if he has none, the promise is void.
2. But if such a promise is founded upon any other consideration, as a benefit to the executor, or an injury to the creditor, it is binding.
3. But the inconvenience or injury to the creditor must be the result of express stipulation, not in consequence of a reliance upon the promise.
4. Therefore, where an executor not having assets, promised to pay the debt of his testator, and in reliance upon that promise the creditor neglected to prosecute his claim, held that he had no right to recover.

WILLIAMS *v.* CHAFFIN.

ASSUMPSIT for breach of an express promise. The defendant pleaded the general issue, and on the trial before DANIEL, J., the case was that the plaintiff's testator was surety for William Chaffin in a bond to one Dalton for seven hundred dollars; that William Chaffin was dead, and the defendant had taken out letters of administration upon his estate; that a suit had been commenced in the County Court on the bond, and the plaintiff's testator wished a judgment to be taken against the defendant's administrator of the principal debtor as well as against himself, but the defendant refused; that when the judgment was entered up the defendant said to the plaintiff's testator, "that there was enough assets of his intestate in his hands to pay the debt, and that he, Mosby, should not suffer, as the debt should be paid, either out of the assets or out of his, the defendant's pocket." He added: "You and I understand one another."

Judgment being rendered against Mosby alone, the defendant, two days afterwards, prayed an appeal, the bond for which was executed by the plaintiff's testator, and was signed by the defendant and another, at the request of the defendant as sureties. (334)

The judgment was affirmed in the Superior Court and the plaintiff's testator had discharged the whole of it. At the time of his promise the defendant had fully administered all assets of his intestate which had come to his hands, and since then had received no other.

In the Court below it was contended for the plaintiff, first, that he had a right to recover the whole debt upon the promise of the defendant; and second, that the plaintiff's intestate was injured by the appeal, as in consequence thereof he had an additional amount of costs to pay, and also was prevented from taking steps against the defendant to subject him, as administrator, to the amount of the debt. His Honor informed the jury that if the plaintiff's testator had been injured, or put to inconvenience, or delayed from proceeding against the defendant, as administrator, by the promise of the defendant, he was entitled to recover in this action. That if the defendant had no assets of his intestate at the time of making the promise, then so much of the consideration of that promise which depended upon his having assets failed, and the plaintiff would be entitled to damages only to the extent of the injury he had sustained in consequence of the appeal and of the delay incident thereto.

A verdict was returned for the plaintiff for the costs of the Superior Court.

Upon a rule for a new trial his Honor expressed himself dissatisfied with the verdict, as he thought the plaintiff had recovered too much;

but as the defendant acquiesced in the finding the rule was discharged, and the plaintiff appealed.

No counsel for plaintiff.

The *Attorney-General* and *Badger,* for the defendant.

RUFFIN, J. (after stating the case as above). A promise by an executor to pay a debt to a creditor of the testator is void unless the
(335) executor have assets; for his liability to pay, which depends upon the having assets, is the consideration of the promise. *Sleighter v. Harrington,* 6 N. C., 332. This is, however, where the assets form the sole consideration, and the obligation to pay can never exceed the amount of the assets in the executor's hands. The executor may, however, render himself personally liable for the testator's debt by a promise founded upon another adequate consideration, although he have no assets. As if the promise in consideration of the creditor's doing any other act causing benefit to the promiser or loss to the other party. This act, which constitutes the consideration, is not required to appear to the Court as adequate in point of value. The parties are the judges of that, and unless it be so grossly inadequate as to show palpably the whole contract is founded on a mistake all around, or that one has not a capacity to make a bargain, the stipulations will be enforced. An instance where they will not be is given in the sale of a horse, for a penny for the first nail in his shoe and doubling each time for the others. But, with such exceptions, the rule is general that an act to be done by one party to his own prejudice or to the advantage of the other will support a promise by the latter. If I promise to give A one thousand pounds if he will go to Philadelphia, I am bound to pay, though the compensation is enormous. If I agree with B that if he will bring suit and fail in it I will pay the costs, or any other sum of money, it binds me; for it may be a prejudice to B to sue. If, therefore, in this case it had appeared that the defendant's promise was that if Mosby would appeal, he, the defendant, would pay the debt, it would not be material whether Chaffin had assets or not. There would be a sufficient consideration to support a promise, and the only question would be one of fact,
(336) whether the promise, as made, extended to the debt or to the costs only. If the promise expressly embraced the former, it must be enforced as to that as well as the costs. For any consideration is sufficient to support the whole promise. But the Court would not strain the construction of what passed between the parties so as to transfer an act done under and in faith of a void promise into a consideration for that promise, and thereby charge an innocent man to pay the debt of another. The plaintiff in such case ought to prove the agreement, including the consideration, very clearly. There ought to

be no doubt about the extent of the contract, or of the inducement. Here the agreement of Chaffin to pay was, at the time of making, declared explicitly to be founded on the assets in his hands, and nothing else. There was no talk of an appeal, or of Mosby's doing anything else but what he was before bound to do—namely, paying the money to Dalton. It was an agreement to indemnify. It turned out afterwards that Chaffin had then no assets. There was no delay on the part of Mosby, nor other act stipulated for. It rested solely on the assets. How, then, has Mosby been injured or Chaffin benefitted by anything he was, according to the contract, to do? It is true that Chaffin said they understood each other; and if that means that there had been a private agreement between them, that if Mosby would appeal, or join in an appeal, Chaffin would pay all, it might be sufficient. But the inference is very remote and hard, and ought not to be drawn without apparent compulsion between parties situated like these. Nor was it so treated by the counsel in the Court below. In opening the plaintiff's case, the appeal is not stated as the consideration upon which the promise was made, but as an inconvenience which Mosby sustained by acting on the promise previously made. In like manner was viewed the "delay of Mosby in taking steps against the administrator of William Chaffin." This is a very distinct thing from these acts being the consideration stipulated by Mosby upon which Chaffin promised. If a party take my *assumpsit* without consideration he cannot afterwards (337) recover from me because he trusted to the promise, and will be incommoded if I do not perform it. It is void in law, and the party is bound to know it. If he acted on it, it was upon the faith of my honor, and to that alone he must appeal. The law cannot help him.

Here the parties did in fact appeal, but no connection is proved between that transaction and the agreement. Nothing is proved respecting it, nor any communication between the parties, after the time of the promise to the praying of the appeal, which was two days afterwards. Indeed, the appeal, as prayed, was necessarily that of Mosby, and as far as appears to us Chaffin made no promise, not even as to the costs, upon that footing. That fact gave the plaintiff no right, and his verdict is wrong for the small sum recovered by him, unless Chaffin's promise was founded upon Mosby's agreement to appeal. Every probability leads us to suppose that Mosby having Chaffin's undertaking to indemnify him, which he (though he ought not) thought good, made himself easy and allowed Chaffin to manage the business in his name to his own liking. If he has suffered loss, it is his own folly or misfortune; for he ought not to have gone on without Chaffin's promise, founded, not upon assets which he had not, but upon that act, to pay him whatever he should be compelled to pay in that suit.

I agree, therefore, with the Judge below that the plaintiff recovered more than he was in law entitled to.

PER CURIAM. Affirmed.

Cited: *Norton v. Edwards,* 66 N. C., 369; *Leroy v. Jacobosky,* 136 N. C., 451.

(338)

ELIJAH RAYNOR, Chairman, etc., on the relation of David Freeman, v. JOSEPH WATFORD et al., heirs of William Watford.

FROM BERTIE.

1. There being in the act of 1715 (Rev., ch. 10) no saving of the rights of persons under any incapacity, that act is a bar to the claim of an infant creditor of the decedent, preferred more than seven years after his death.
2. The act of 1715 is a protection both to the executor and the heir, and the acts of 1784 and 1809 (Rev., chs. 205 and 763), directing the surplus to be paid into the Treasury and to the University, do not affect the real assets, but apply only to the personal estate, and give a remedy to the creditors, etc., against the State and the University, without affecting the protection given to the executor by the act of 1715.
3. Where a cause of action accrues against the estate of a decedent after his death, when does the limitation prescribed by the act of 1715 begin to run. Qu.?

DEBT upon an administration bond, executed by the ancestor of the defendants, as surety of Edward C. Outlaw, upon his taking out letters of administration on the estate of John Freeman, the father of the relator. The breach assigned was the nonpayment of the distributive share of the intestate's estate, to which the relator was entitled.

After *oyer* of the condition which was in the common form, the defendant pleaded, among other pleas, the act of 1715 (Rev., ch. 10, sec. 7), whereby claims, not made against the estate of a deceased debtor within seven years after his death, are barred. On the trial it appeared that the relator was an infant at the death of his father and at the commencement of the present action, and that more than seven years had elapsed between the death of the ancestor of the defendants and the issuing of the writ.

A verdict was returned for the plaintiff, subject to the opinion of the presiding Judge upon the question of law arising upon these (339) facts; and his Honor, Judge MANGUM, being of opinion that the statute was a bar, set aside the verdict and directed a nonsuit to be entered; whereupon the plaintiff appealed.

No counsel appeared for plaintiff.

Hogg, for defendant.

RUFFIN, J. The act of 1715, Rev., ch. 10, sec. 7, is in terms an unqualified bar, without saving or exception in favor of any incapacity or case whatsoever. It seems to have been designed to be emphatically a statute of repose in favor of dead men's estates, without a single exception. It is founded upon the policy that the few instances of private injustice arising under it had better be tolerated than that heirs who had improved their inheritances should lose them, and executors and administrators be subjected to debts after the lapse of so long a period from the debtor's death. If this did not appear from that part of the statute now remaining in force, and to be found in our Revisal, it is made manifest from the residue of the section, as it originally passed. For that enacts that all such money as may remain in the hands of the administrator after the term of seven years, and not recovered by any next of kin or creditor of the deceased in that time, shall be paid to the church wardens and vestry, to and for the use of the parish, where the said money shall remain. It is impossible to suppose that the administrator could be held liable, therefore, under any circumstances, to anybody but the parish after the seven years. And if he was not, neither was the heir; for the act goes to the whole estate. It is true that by a subsequent law (1784, Rev., ch. 205) the administrator is to pay the surplus into the Treasury; and it is to be subject to creditors or representatives without limitation of time. But this creates no liability on the part of the administrator, much less the heir. For (340) the recovery from the Treasury is not to be made through the administrator, and is therefore a mere public bounty bestowed by legislative sanction, in each case, under a sense of justice, and not by judicial sentence, since the State cannot be sued. It is likewise true, that by the act of 1809 (Rev., ch. 763) the University is substituted in the place of the Treasury, and a term of ten years more is given for claim by creditors, legatees, and next of kin. But here again the demand must be held to be one directly against the University, and not against the executor; for the trustees are put in the place as well of legatees as creditors. But both of these acts are subject to the decisive observation that they extend to the personal estate only. The case of the heir remains untouched since the act of 1715. I am aware of the conflicting decisions in *McLellan v. Hill,* 1 N. C., 595, and *Jones v. Brodie,* 7 N. C. 594, and must say I am not satisfied with the latter, for the reasons I have just given, although I gave similar decision on the circuit anterior to that case. There is a difficulty I am now unable to get clear of. Unless the death of the debtor be the *terminus,* if I may use the expression, from which the time runs, there is no limitation whatever. For, suppose a debt to fall due eight years after the debtor's death, there is nothing in the act to restrain the creditor to seven years from that time.

The only limitation in the statute is from the debtor's death; and if the period begin not then it can have no beginning nor ending with this act. These observations are, however, exclusively my own. This case does not require that we should decide between the two cases mentioned. For the plaintiff, although an infant, was in existence, and the debtor also, during the whole term of the seven years; and if there were no other breach of the bond that of not returning an account was one (341) for which the bond might have been put in suit and ripened into a judgment.

That is the point of the present decision, and to that alone will the case be authority.

PER CURIAM. Affirmed.

Cited: Goodley v. Taylor, 14 N. C., 182; *McKeithan v. McGill,* 83 N. C., 519; *Rogers v. Grant,* 88 N. C., 443; *Syme v. Badger,* 96 N. C., 208; *Daniel v. Grizzard,* 117 N. C., 111.

In the matter of SAMUEL KING and JAMES M. MORRISON.

1. A seizure of goods upon an execution is a constructive payment only where unless so considered an injury will occur—as where the sheriff has seized, but will not sell.
2. But in all cases where the defendant has recovered possession of the goods, either with or without the consent of the sheriff, the seizure is no payment, and a new execution may issue—and this as well where there are several defendants as where there is but one.

PETITION for *Supersedeas.* The petition set forth the fact that the petitioners had been sureties for one Cooke in an appeal to this court; that the judgment below had been affirmed, and judgment entered up against them; that execution issued, which was levied upon sundry slaves the property of Cooke, sufficient in value to satisfy it; that the sheriff took a forthcoming bond for the delivery of the slaves at a day appointed for the sale of them; that Cooke, the defendant in the execution, had forfeited that bond; and that the plaintiff in the execution had proceeded against the property of the petitioners.

Nash & Hogg, for the petitioners.
Devereux, for the plaintiff in execution.

RUFFIN, J. The idea upon which this petition goes is that the seizure of property under a *fieri facias* is a discharge of the debt. It is constructively so in certain cases—that is, where the sheriff really takes sufficient to pay the debt, and will not dispose of it; and to debt on the

judgment it may be pleaded; for it would be wrong to enforce the judgment by a second suit, and also keep the property on (342) the first execution. But if the defendant was never deprived of his property by the sheriff, or if he was, and has got it back again, either with or without the consent of the sheriff, it would be monstrous to say that in such a case the defendant had paid his debt. The levy on property is not actual payment which the law always aims at. It is only constructively so to prevent wrong. It is deemed a payment in those cases where if it were not the defendant would be twice deprived of his property on the same judgment. In all other instances it is no payment. Without citing other authorities these positions will sufficiently appear from *Clark v. Withers,* 1 Salk., 322, and *Taylor v. Baker,* 2 Mod., 214. It will be seen from this that it must follow that the petitioners can have no relief; for the plaintiff has received his money from no quarter. All the defendants are but one to this purpose. Payment by one is payment by all; but there must be payment by some one. Here there is none.

PER CURIAM. Petition dismissed.

Cited: Binford v. Alston, 15 N. C., 353; *Eason v. Petway,* 18 N. C., 46; *Shaw v. McFarlane,* 23 N. C., 218; *Gatewood v. Burns,* 99 N. C., 360; *Aldridge v. Loften,* 104 N. C., 126.

(343)

JOHN WASHINGTON and DAVID THOMSON v. RANSOM SANDERS. JAMES FRELICK and RAY HELME v. THE SAME.

FROM JOHNSTON.

1. Where a sheriff has raised money under several executions, and is at a loss how to distribute, the Court will, in a summary way, upon the facts stated in the return, advise how it should be distributed.
2. But where a sheriff voluntarily makes an appropriation of money in his hands to one of several executions, the Court will not, upon a rule, deprive the plaintiff in that execution of the money thus paid him, but will leave the persons aggrieved to their action against the sheriff.
3. Where A sued out an original attachment directed to the sheriff or any constable, and returnable to the County Court, or before any justice, but at no certain day, which was levied by a constable, and afterwards B sued out an attachment against the same person and levied upon the same property, which was in all respects regular, obtained the first judgment, and issued his *venditioni exponas,* upon which the sheriff returned a sale and paid the money into Court; and afterwards A obtained judgment and had execution; upon a rule to distribute the money, held—

1. That the return of the sheriff was an appropriation of the money to the first execution.
2. That the attachment of A, being returnable at no certain day, and before no certain Court, was void.

3. That although an appearance by the defendant cured many defects in the process, yet in cases of original attachments, where there was no appearance of the defendant, both a legal seizure of the property levied on, and a due advertisement, were necessary to render the judgment valid; and as a constable was not, without special order, authorized to make the seizure, it was illegal, and the judgment a nullity.

These were rules obtained on the defendant to compel him to pay to the plaintiffs certain moneys received by him from the sheriff of Johnston on a writ of *venditioni exponas* sued out by the State Bank against Yeargain.

The case was that the State Bank, by their agent, the defendant, he being surety for the debt, sued out an original attachment against (344) one Yeargain, on 3 November, 1828, directed to the sheriff of Johnston County, and returnable to the County Court on the fourth Monday of the same month, which was levied by the sheriff on the day it was issued, and regularly prosecuted to judgment at the February Term, on which the sheriff sold the property seized by him, and returned that it sold for the sum of five hundred and twenty-three dollars and sixty-three cents, "which is paid into office."

Washington & Thomas and Frelick & Helme had each taken out original attachments also against Yeargain on 28 October, 1828, for sums exceeding $100, the former directed to the sheriff, or any constable of Johnston county, and returnable before a justice of the peace, or the County Court, without saying at the next term; the latter directed to the sheriff, or any lawful officer, and returnable to the next County Court. Both these writs were placed in the hands of a constable, who, on the same day, levied them on the same property afterwards levied on at the instance of the State Bank. Both were also returned to the County Court at November term; advertisement was made in the State Gazette before February; and at May term verdicts and final judgments were had, and thereupon writs of *vend. exp.* issued to the sheriff, commanding him to sell the property (specifying it) which was levied on by virtue of the attachment. At May term both of the plaintiffs gave notice to Sanders, who was the clerk, and also to the sheriff, that they claimed the money raised on the execution of the State Bank; and one of them at that term, and the other at August term following, obtained a rule on the defendant, as agent of the State Bank, to show cause why the money raised on that execution should not be paid to them. The sheriff returned on each of the executions of the plaintiffs that he had before levied upon the property at the instance of the bank, and (345) also that he had sold it under that execution and paid the proceeds into Court at May term. The County Court discharged the rules; the plaintiffs appealed to the Superior Court, where, before MARTIN, J., the judgments were reversed, and the money ordered to be

paid ratably to the plaintiffs; and from that judgment the defendant appealed to this Court.

Gaston, for defendant.
Seawell & Badger, for the plaintiffs.

RUFFIN, J. His Honor, after stating the case as above, proceeded: If the sheriff ought to distribute money between two plaintiffs, or ought to apply it to the one writ, and misapplies it, the person injured has his redress by action. The Court is under no obligation to superintend, by this summary method, his administration. They never refuse to advise an officer who is in difficulty and asks their advice upon facts stated by himself. And where the right of a party is clear as against an officer the Court will proceed by rule and attachment against its officer, so as to prevent the defeat or delay of justice. But where a sheriff does not apply to the Court, but of his own head does actually apply to one execution the money which of right belonged to another, the Court will not disturb the creditor who receives the money by laying him under rule. The Court can assume no such jurisdiction; for there is no distinction between such a controversy and any other that might arise *in pais.* The only remedy is against the sheriff, and not against the party. *Sanford v. Roosa,* 12 Johns, 162; *Yarborough v. Bank,* 12 N. C., 25. We cannot take the money back after the sheriff has paid it to the party. And an application of it to a particular execution and payment of it into Court on that execution is payment to the party, because it satisfies and discharges his judgment. Here such are the facts;
for although the sheriff does not say that he pays the money on (346)
the execution of the bank, yet he returns it with that execution,
and he had no other in his hands at the time. That money, therefore, is beyond the control of the Court, even if the plaintiffs had just cause of complaint against the sheriff.

But they have not. The sheriff acted in entire accordance with his duty. The plaintiffs are not entitled to anything; for their proceedings are entirely irregular and void. Washington & Thompson's attachment was returnable before a justice of the peace of the County Court, without a return day mentioned in it. It is original process without any certain day, place, or Court, to which it is to be returned. In *Parsons v. Lloyd,* 3 Wils., 341, it was held that a writ of *capias ad respondendum,* tested in Trinity term, and returnable in Hilary term, omitting the intervening Michaelmas term, was void; and the Court set it aside for irregularity, and the defendant, who had been arrested under it, maintained trespass *vi et armis* for the imprisonment against the plaintiff in it. Surely this attachment is much more vicious. It

is to be recollected that none of the defects of the process are cured by the defendant's appearance. It is an absolute nullity, and afforded no justification to anybody concerned in it.

But there is another objection applicable to this attachment, in common with the other, which also vitiates it. They were directed to a constable, and executed by him. The sheriff is the proper officer to execute all writs returnable to Court, unless another be appointed by special order. He is the person entrusted by the law with authority to arrest persons, let to bail, seize property and replevy it. To him the writ of *vend. expo.* issued to sell the estates levied on. How is he to get at them in the hands of another person? He cannot return to that writ that the property is not to be found, because it is supposed to be in his hands. But when the first seizure is made by another, he cannot have it, but that other. By the lawful seizure the (347) property in chattels is vested in the officer. How is it to be divested out of the first and vested in the second? It is said that an attachment is a proceeding *in rem,* and that the property is in the custody of the Court, and they may order any one to sell. That is a fallacy, I think. The property is in the custody of the of the law and not of the Court. It is vested in the officer of the law, and he, and not the Court, is to bring *trover* for it. The execution upon proceedings such as these must therefore be inefficient, which proves their irregularity and invalidity. I do not say that every slip in pleading or defect of form will ever abate an attachment, much less render the judgment on it void. The appearance of the defendant will cure many defects. But due service of the attachment is indispensable; for by that only is the defendant brought into Court. It has been argued that it is immaterial how or by whom the process is executed; for the advertisement gives the notice to the defendant, and that is the real service. To that I answer, first, that advertisement is only required where the debtor is out of the State; secondly, that the law requires both a seizure of property and advertisement. If not, why not advertise at once as the leading process? Every man is expected to look after his property, and therefore if it be attached, that he will appear to claim and get it again. That is the principal ingredient in the service of this process. If the defendant be a nonresident, the statute superadds notice in a newspaper, that he may have certain and speedy information at whose suit his estate is taken, and where and when he may release it. If either the notice be omitted, or the seizure be void, the proceedings are irregular, and not merely erroneous; and the Court will set them aside at any stage of the business or at any time after judgment. The defect is in the service of the process which causes the defendant not to be in Court. It is in the nature of things that he should not be bound by proceedings to

which he is not a party. If a writ is served on John by the name of James, it is not cured by declaring against the party by his (348) true name John; and the Court will set the whole aside, "because it is the same thing as no service." *Doe v. Butcher,* 3 Term, 611; *Greenslade v. Rotheroe,* 2 New Rep., 132. A defendant never pleads that the writ is not served; he is not put to that. If the party had appeared, then it would be different. This answers the remark, that if the Court accepts the return and acts on it, the judgment is good until reversed. The Court looks into no such things, until they are brought regularly to its notice. The plaintiff must proceed regularly at his peril to get the defendant before the Court; when there, each party takes care of himself, and if the defendant appears to the process, he accepts it, but not the Court.

But if it were otherwise, and the judgment must stand until set aside, it cannot operate by relation to the illegal seizure, so as to affect third persons. In any event, therefore, the plaintiffs have no claim on the sheriff. But I have a very strong opinion that every step taken by the plaintiffs was wrong, and their judgments absolutely void, because there was no cause against Yeargain in Court. The judgment, therefore, of the Superior Court must be reversed, and those of the County Court affirmed, with costs in all the Courts.

PER CURIAM. Reversed.

Cited: Sanderson v. Rogers, 14 N. C., 39; *Clark v. Quinn,* 27 N. C., 176; *Houston v. Porter,* 32 N. C., 175; *Symons v. Northern,* 49 N. C., 243; *Dewey v. White,* 65 N. C., 228; *Bates v. Lilly, Ib.,* 233; *Millikan v. Fox,* 84 N. C., 110.

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JAMES IRWIN v. JOHN SLOAN.

FROM MECKLENBURG.

1. Where a justice of the peace finds the plea of *plene administravit* in favor of the defendant and issues a *fieri facias,* which is levied on the land of which the debtor died seized, upon a return thereof to the County Court, and an award of a *venditioni exponas* on a *scire facias* against the heir, the levy is mesne process in the new suit against the heir, and creates no lien upon the land.
2. But where the *fieri facias* is against a living debtor, the subsequent return is only a mode of placing the proceedings upon record, and the levy binds the land from the time it was made.
3. On several writs of *scire facias* against an heir the creditor who first obtains judgment and execution, and proceeds thereon is entitled to a priority.

RULE *nisi* against the defendant, the sheriff of Mecklenburg, to show

cause why an amercement *nisi,* for not returning an execution in favor of the plaintiff, should not be made absolute, the following facts were stated for the opinion of the Court; and it was agreed that if the plaintiff was entitled to all the money in the hands of the defendant, the rule was to be made absolute; if otherwise, it was to be discharged.

The plaintiff sued out a warrant against the administrator of one Miller, who had pleaded *plene administravit,* which plea was by the justice found for the defendant. An execution was issued by the justice, which, in default of chattels, was levied on the lands which had descended to the heirs of Miller. A return thereof was made by the constable to November term, 1826, of the County Court; writs of *scire facias* regularly issued to the heirs to show cause why the land should not be sold, and final judgments were obtained thereon at the August term following, when the execution upon which the amercement *nisi* was obtained came to the hands of the defendant.

At February session, 1827, of the same Court verdicts were obtained by other creditors of Miller against his administrator establishing
(350) the amount of their debts; but in those cases the issue of fully administered was also found for the defendant.

Writs of *scire facias* also issued on these verdicts against the heirs of Miller, and were regularly prosecuted to judgment at the following May term—the term before the plaintiff obtained judgment against the heirs. On these judgments executions were issud to the defendant, under which the lands were sold.

His Honor, Judge DANIEL, holding that the lands were bound from the levy of the plaintiff's execution, so as to give him a preference over the other executions, made the rule absolute, and the defendant appealed.

No counsel for either party.

RUFFIN, J. Considering the numerous tribunals from which executions emanate in this State, and the diversity of officers to whom they are directed, it is not surprising that new questions respecting them should often arise, calculated to puzzle the bar and the bench. The present is one which is brought before this Court for the first time; but it does not seem to us to be so difficult as it is novel or important. It is contended by the plaintiff in this rule, and sodecided by the Court below, that a *fieri facias* issued by a justice of the peace against the administrator of Miller, and by the constable levied on the land in the hands of the heir, on which, after the *scire facias* from Court, a judgment was given against the land, is entitled to preference over another creditor, who gets his judgment in Court after the levy by the consta-

ble, and before the final judgment in Court in the suit founded on that levy. We should think so, too, if the justice's execution could be regarded as process of execution against the land. In *Lash v. Gibson,* 5 N. C., 266, it was held that the execution of a justice first levied is to be first satisfied, as against other executions of the same character, and also against executions issuing from Court after such (351) levy. There the proceedings were altogether between living persons, and the justice's execution expressly runs against lands and tenements in default of chattels. There is no new judgment rendered in Court; it is not a *lis pendens,* in which the party can make defense; and all the Court does is to see whether the papers be regular, and if so, award a *venditioni exponas.* The only purpose of this return is to put all the proceedings upon record, on which a change of the title to land takes place. Laws 1794, Rev., ch. 414, sec. 19. But in the present case the justice's execution is not directed against the land, but only against the goods of the intestate in the hands of the administrator. If the latter, indeed, deny that he hath goods, the constable is directed to levy on the lands and return it to Court. But this is not by way of execution against the land, or against the heir. After such return a new process issues to the heir, and he is let into a full defense, just as much as he is when the judgment has been in Court, and no levy is made on the land. It is, therefore, not so much a record on which process shall issue to the heir with the view of getting a judgment against him. How can that be regarded as creating a lien on the land, which precedes the judgment against the heir? In attachment it is so, because the party does not personally appear, and the property stands in his stead without further personal process. But in the case before us, the justice's execution, levy, return, and *scire facias* issued thereupon are parts of *mesne* process, and not of execution, against the heir. It is like the case of two writs of *scire facias* against the heir, founded on judgments in the Court. They create a lien from their issuing, as against the heir himself and purchasers from him, but not as against each other. That creditor who first gets his final judgment and execution (352) against the lands and proceeds thereon will be first satisfied. So it is here. We are obliged to consider the whole as *mesne* process, as far as the heir is concerned. In each a *scire facias* issues to the heir, and a new judgment after the same defense is given in each case. The levy of the execution does not create a specific lien on a particular part of the lands, for upon the return of a levy on a particular tract in the hands of one heir or one devisee the *scire facias* is not to the heir or the devisee who owns the part levied on, but the heirs and devisees generally, and the judgment and execution are not against that land in particular, but against the lands descended generally. We therefore think that the

executions issued from May term are to be first satisfied; consequently the judgment below is reversed.

PER CURIAM. Reversed.

Cited: *Ricks v. Blount,* 15 N. C., 139; *Hamilton v. Henry,* 27 N. C., 220.

THE GOVERNOR, for the use of the State Bank, v. EDWARD GRIFFIN et al.

FROM MARTIN.

Money advanced by a stranger for the purchase of a judgment is not a satisfaction of it, and the assignee has a right to receive the money made thereon, and in case of default of the sheriff to maintain an action in the name of the assignor.

DEBT upon the official bond of the defendant, Griffin, as sheriff of Martin.

The breach assigned was the nonpayment by the sheriff of the amount of an execution in favor of the relators which he had collected from the executors of Jeremiah Slade.

A verdict was returned for the plaintiff, subject to the opinion of the presiding Judge, upon the following facts:

The execution upon which the money was made by the sheriff was returnable to May Term, 1827, of the County Court. On 27
(353) March, preceding the return day, the relators, by their cashier, had assigned their interest in the judgment and execution to Henry Slade and Samuel Hyman. From the date of that assignment the account of Jeremiah Slade on the books of the relators was closed, and he owed them nothing.

MARTIN, J., rendered judgment for the plaintiff, and the defendants appealed.

Gaston, for the defendants.
Hogg, contra.

RUFFIN, J. The extinguishment of the debt to the bank depends altogether upon the intent with which the money was advanced—whether by way of payment or purchase. Upon that there can be no doubt, and the plaintiff is entitled to recover. To this point may be cited the case of *Carter v. Sheriff,* 8 N. C., 483.

PER CURIAM. Affirmed.

Cited: *Harrison v. Simmons,* 44 N. C., 81.

See Hodges v. Armstrong, 14 N. C., 253; *Sherrod v. Collier,* Ib., 380.

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AMOS PALMER and COMPANY v. ELIJAH CLARKE.

FROM CRAVEN.

1. Where the conduct of the parties is bona fide, a *fieri facias* of a senior *teste* is entitled to a priority, and those of equal *teste* to an equality in dividing the proceeds of sales made by the sheriff, without reference to the time of their delivery to the sheriff, provided all are delivered before the return day and before the sale.
2. But where a plaintiff prevents his execution from being acted on, he is guilty of a legal fraud, and is postponed as to creditors who have endeavored to enforce their judgment.
3. If a plaintiff instructs the sheriff not to sell under his execution unless some other creditor forces a sale, he loses his priority.
4. But these rules apply only between judgment creditors; as between them and the vendee of the defendant all executions have the preference.
5. When several writs of *fieri facias* have been issued on the same judgment, and have all been *bona fide* acted on without producing satisfaction, the last of them relates to the *teste* of the first, and binds the property of the defendant from that time.
6. But where the original, or any intermediate writ, never was delivered to the sheriff, the lien is not carried back beyond the one on which the sheriff proceeded.
7. Upon rules on the sheriff to apply money in his hands to particular writs, the Court proceeds solely on the facts stated in his return. Affidavits of extrinsic facts will not be heard.

The plaintiffs at November Term, 1828, of Craven County Court, obtained a judgment against one Harvey. From the ensuing Februay term a writ of *fieri facias,* purporting to be *alias,* issued upon that judgment. Other judgments were entered up against Harvey at the same term, upon which original writs of *fieri facias* issued. The sheriff returned upon the execution of the plaintiffs and upon those which first issued from February Term that he had sold all the property of Harvey; that after satisfying other executions which were prior to that of the plaintiffs he had in his hands a sum equal to the satisfaction of the latter, if it had a priority, and that he never had in his hands (355) any other execution upon the judgment in favor of the plaintiff, except the one above mentioned.

A rule was obtained by the plaintiffs upon the defendant, the sheriff, to show cause why the money in his hands should not be applied to the satisfaction of their execution. Upon the return of the rule affidavits were filed on both sides subject to all just exceptions. From them it appeared that the attorney of the plaintiffs had agreed with Harvey for a judgment at the return day of the writ of the plaintiffs (November term, 1828) upon condition that the execution should not go into the hands of the sheriff until after February term following; that in pursuance of this agreement the attorney took out an original execution returnable to February term, 1829, which he retained in his own possession

until the return day, when an *alias,* the writ in question, issued, which was delivered to the sheriff. It further appeared that the object of this arrangement was to give to the plaintiffs a priority without subjecting Harvey to the costs of levying the execution.

At the request of the parties his Honor, Judge DONNELL, *pro forma* discharged the rule, and the plaintiffs appealed.

Gaston for the plaintiffs.
Badger, contra.

(356) RUFFIN, J. Although my opinion would have coincided with that of the dissenting judge, in *Green v. Johnson,* 9 N. C., 309, and for the reasons given by him I surrender it in deference to the majority of the Court. The rule then established has since been several times acted on; and repeated decisions of the Court have an authority which a judge has no rightful power to disregard. But I can not carry the rule further by following out its supposed analogies, so as to work injustice to parties, afford facilities to fraud, encourage delays, and annul other rules equally well established. Before that case the law was understood to be that as against alienations by the debtor himself *fieri facias* bound from the *teste;* but as between creditors, that first delivered to the sheriff had the preference, or, rather, that it created an obligation on the sheriff to apply the money to it. I admit that it is now altered to this extent: that where the conduct of the parties is fair and *bona fide* an execution of elder *teste* is entitled to the preference, and executions of equal *teste* to an equality; and the time of the delivery makes no difference, where nothing else appears; provided, all were delivered before the return day and before the sale. But this can not apply to a case in which the party keeps his writ in his pocket, for the very purpose of preventing its being acted on. Such conduct constitutes a legal fraud, and he who is guilty of it must be postponed to him who has duly and diligently enforced his judgment by process. I should have thought indeed that this principle applied to executions of any *teste* which the creditor failed to deliver to the sheriff. His negligence merited the loss of his debt, as against another creditor, who, being more vigilant, delivers his writ and takes the risks of seizure. Besides, the sheriff has a right to some reasonable rule arising upon the facts within his own knowledge, for the application of the money. But certainly *Green v. Johnston,* 9 N. C.,
(357) 309, altered that in a certain degree; and I submit thus far; but I can not extend it. It is well settled that if a plaintiff deliver his writ to the sheriff and order him not to proceed until some other creditor press him on further execution, when he is to enforce the lien created by the first writ, the creditor giving such orders loses his preference *ipso facto.* (*Kellogg v. Griffin,* 17 Johns., 274). This rule was recognized by

this Court in *Carter v. Sheriff,* 8 N. C., 483. For the law does not encourage men to try experiments, how long they may indulge their debtors in safety to themselves, when in so doing they give them a delusive credit, at the expense of others. Fair dealing consists not in keeping incumbrances hanging over a debtor's property of which he is left in possession, but in proceeding at once to the satisfaction of the debt, and leaving the balance unfettered to answer others. Now, in every case where the execution is not delivered, this presumption is much stronger than where it is delivered accompanied by orders not to sell. For it cannot but be that the suing out the execution is a mere cover to the property, by means of a lien not intended to be enforced. There is not the least purpose of obtaining that satisfaction which is the fruit of the law, and for which the writ was given. This is very different from the case of alienation by the debtor. There, indeed, the property is bound. *Stamps v. Irvine,* 9 N. C., 232; *Gilkey v. Dickerson,* 10 N. C., 293. The reason is that as to a purchaser the law says *caveat emptor.* The estate is bound as against the defendant in the execution, and so it shall be as against his vendee, because he can sell more than he has, and every purchaser is presumed to buy on the responsibility of the seller. But it is very different with another execution creditor. He claims against both the defendant and the prior execution; and the law will not endure that its process shall be defeated by such acts as inevitably enure chiefly, if not entirely, to the advantage of the debtor. If the judgment creditor indulges in such case, he trusts the debtor, and he must trust him at his (358) own risk. When other creditors are concerned delay tends to deceive and embarrass them, by protecting the property for the defendant's use.

The fact that Palmer & Co.'s execution purports on its face to be an *alias* makes no difference. It would, if the first had been *bona fide* acted on; for if the party does all he can, issues his execution, but cannot find property to seize or bidders to buy, he is not to blame. In that case all the subsequent writs relate to the first. Such has been the facts in all the cases heretofore in this Court. If in any of them it had appeared that the original or any intermediate execution had not been delivered, the lien would not have been carried back beyond that one on which the party last proceeded. In plain terms, priority of judgment or execution shall give no preference where the plaintiff takes no steps effectually to enforce them, or after issuing execution arrests by his own act the progress of the sheriff in the discharge of his duty. Palmer & Co. are, therefore, only entitled to a *pro rata* application of the money.

The case is decided entirely on the return of the sheriff; for he makes

it at his peril, and if false, we do not intend to preclude the parties from their redress. But if we felt at liberty to look into affidavits, our views of the law would only be sustained by the facts disclosed in this case. The plaintiff's attorney explicitly states that the agreement between him and Harvey was that he might take out execution, but not serve it before the next Court. What is this but a bargain between the debtor and creditor to create a lien, but not to use it? This would suit Harvey, if it remained so forever. He keeps the undisturbed possession, and has the full enjoyment of his property. If this were permitted, undue preferences would be constantly given for the sake of the debtor's ease, and just creditors defeated. Retaining (359) the execution is conclusive of the intent; and the evidence here expressly shows that the general inference of law is in this case justified by the fact.

PER CURIAM. Affirmed.

Cited: Arrington v. Sledge, post, 360; *Dawson v. Shepherd,* 15 N. C., 498; *Goode v. Hawkins,* 17 N. C., 401; *Roberts v. Scales,* 23 N. C., 91; *Smith v. Spencer,* 25 N. C., 267; *Harding v. Spivey,* 30 N. C., 66; *Spencer v. Hawkins,* 39 N. C., 291; *Watt v. Johnson,* 49 N. C., 193; *McIver v. Ritter,* 60 N. C., 607; *Roberts v. Oldham,* 63 N. C., 298; *Dewey v. White,* 65 N. C., 228; *Millikan v. Fox,* 84 N. C., 110; *Worsley v. Bryan,* 86 N. C., 345.

JOHN DOE, ex dem. of PETER ARRINGTON, v. JOEL SLEDGE.

FROM FRANKLIN.

If the plaintiff in an original *fieri facias* grants indulgence to the defendant, and afterwards issues an *alias*, this indulgence does not affect the lien of the first writ as to the defendant or his vendee.

EJECTMENT, in which both parties claimed under one Jeffries. The lessor of the plaintiff produced a judgment in his favor against Jeffries, upon which an original writ of *fieri facias* issued, tested of the February term, 1820, of Nash County Court, which was returned, "stayed by the plaintiff." From the ensuing May term an *alias* writ issued, under which the land in question was sold to the lessor of the plaintiff.

The defendant offered in evidence a deed of bargain and sale for the same land, executed by Jeffries to him, dated between the February and May term, 1820, of the Court from which the execution above mentioned issued.

MARTIN, J., instructed the jury that a writ of *fieri facias* created a

lien upon the property of the defendant from its *teste;* and where a succession of such writs issued the lien related to the *teste* of the first, so as to invalidate an alienation by the defendant as against the subsequent sale under the writ.

A verdict was returned for the lessor of the plaintiff, and the defendant appealed.

Seawell & W. H. Haywood, for the defendant. (360)
Badger, for lessor of the plaintiff.

RUFFIN, J. The principle laid down by the Court below is a very old one. It is considered as thoroughly settled that, as against the defendant in the execution, and all claiming by his alienation a *fieri facias* binds from its *teste.* Without entering at large into the subject, it will sufficient to refer to what was said by me on this point in *Palmer v. Clarke, ante,* 356. Numerous cases also support the opinion, as to the relation of an *alias* duly issued.

PER CURIAM. Affirmed.

Cited: Harding v. Spivey, 30 N. C., 65; *McIver v. Ritter,* 60 N. C., 607.

ANN HOSKINS, adminstratrix of Richard Miller, v. CHARLES G. MILLER.

FROM NEW HANOVER.

1. The statute 22 and 23 Charles II, giving to the husband the whole of the personal estate of his deceased wife, is in affirmance of the common law.
2. A grant of administration as follows: "Administration on the estate of A, granted to B, he giving bond, etc.," is to be construed as unconstitutional. Letters of administration are only a copy of the minutes certified under the seal of the Court.
3. An administrator *de bonis non* is barred by a possession adverse to the first administrator continued for three years.

DETINUE for several slaves. The defendant pleaded the general issue and the statute of limitations.

On the trial the plaintiff offered one Herring as a witness, who, being sworn on his *voir dire,* deposed that he had married a granddaughter of the plaintiff's intestate; that both the parents (361) of his wife, as well as his wife herself, were dead intestate. The counsel for the defendant objected to the competency of the witness, and the objection was sustained by the presiding judge.

To rebut the defence arising under the plea of the statute of limitations, the plaintiff produced her letters of administration, which were issued in 1826, within three years of the date of her writ, and proved

that the intestate died in 1798, and offered evidence to show that the defendant had taken possession of her slaves after the death of the intestate, but before the grant of administration to her. The defendant produced the minutes of New Hanover County Court of June term, 1799, and read in evidence an entry in the following words: "Administration on the estate of Richard Miller, deceased, granted to William Taylor, giving bond in six hundred pounds, with I. M. and O. B. as sureties," and contended that the slaves were in his possession adverse to the title of Taylor, the first administrator, after the grant of administration to him, and before his death. The plaintiff insisted that the grant of administration to Taylor was conditional; that the defendant should show a performance of the condition by producing the bond, and that the qualification of the administrator should also be proved, and the letters of administration exhibited. But His Honor, Judge NORWOOD, ruled that the record was evidence of the administration; that the grant was unconditional, and that it was not incumbent on the plaintiff either to produce the bond or the letters of administration, or to prove the qualifications of the administrator. Upon the issue of fact, his Honor instructed the jury that if they were satisfied that the defendant, or those under whom he claimed, had possession of the slaves during the life of Taylor, and held them ad-
(362) versely to his title, that they ought to find for the defendant.

A verdict was returned accordingly, and the plaintiff appealed.

No counsel for plaintiff.
Gaston, for defendant.

RUFFIN, J. The witness offered by the plaintiff was properly rejected. It was the husband of the distributee of the intestate; and, although his wife was dead, that made no difference. The declaratory act of 22 and 23 Charles II., is only in affirmance of the common law, and the husband, *jure maritali,* is entitled to the wife's personal estate, let who will administer.

The opinion of the Court below was clearly right on the other point also. The letters of administration do not contain any matter distinct from the record. They are a mere copy of it, with the addition only of a certificate that they are a copy, verified by the seal of the Court. If the order had been that administration would be granted to William Taylor upon his giving bond, it would have been conditional and nugatory. The Court can make no such order, for they would still have to judge of the bond and administer the oath. But the words "granted" and "giving" in this order, plainly mean "is granted," and "now giving bond;" for the bond, its amounts, and the sureties are

specially set forth. In making *profert* letters, the administrator avers only that he has them, and does not show forth his bond or his oath that he has duly obtained them. That is all merged in the fact of his being the administrator by order of the Court, which is held to do everything rightly.

If there was a previous administrator, during whose time the defendant held the slaves adversely, he is clearly protected. For as a bailment from the first administrator would enure to the benefit of the administrator *de bonis non,* so shall a bar against the (363) former operate against the latter.

PER CURIAM. No Error.

Cited: Davis v. Lanier, 47 N. C., 311; *Hughes v. Hodges,* 94 N. C., 60; *Iron Co. v. Abernathy, Ib.,* 548; *Hamerton v. Sexton,* 104 N. C., 86.

Dist.: Spencer v. Cahoon, 15 N. C., 227; *Spencer v. Cahoon,* 18 N. C., 28; *Wooten v. Wooten,* 123 N. C., 223.

JOHN WORTHINGTON v. WILLIAM ARNOLD.

FROM RANDOLPH.

After verdict it is too late to object that the writ was not signed by the clerk.

DEBT upon bond, originally commenced in the County Court, where the plaintiff prevailed, and the defendant appealed.

After a verdict for the plaintiff in the Superior Court, the defendant moved in arrest of judgment, because the original writ was signed by the plaintiff's attorney in the name of the clerk of the County Court.

NORWOOD, J., overruled the motion, and entered judgment according to the verdict, and the defendant appealed.

No counsel for either party.

HALL, J. This suit was commenced in the County Court, and after a judgment rendered therein against the defendant, he appealed to the Superior Court, and after a verdict against him in that court, the judgment is attempted to be arrested, because the original writ was not signed by the clerk of the County Court.

Had this defect been pointed out by the plea in abatement, it must have been held fatal, and the suit must have shared the fate of *Shepherd v. Lane,* ante, 148. But the defendant has not thought proper to avail himself of this defect in the writ at an early stage of the proceedings; and now it is too late; and justice as well as law re-

(364) quires that it should be so considered. The defendant has pleaded to the merits of the suit in the County Court, and after incurring the costs of a trial there, has done the same thing in the Superior Court, and then for the first time objects to the validity of the writ. *Caswell v. Martin,* Str., 1072; Anonymous, 2 N. C., 405. *Dudley v. Carmolt,* 5 N. C., 339 is an authority in point. In that case the Court would not arrest the judgment after verdict, because the writ was tested by the clerk, and signed by the deputy clerk. It was held that the Statute 5 Geo. I., ch. 13, was in force, which cures such defects in writs after verdict. (Bac. Ab. Amendment and Jeofails, 152.)

PER CURIAM. No Error.

JOSEPH GRAHAM v. WILLIAM REID.

FROM LINCOLN.

1. Where lands were sold upon the vendee's agreeing to discharge sundry executions levied upon it, and paying the balance to the creditors of the vendor as he should direct, upon a sale by the sheriff, under one of the executions, a promise by the vendee to pay the debt of a creditor if he would not bid, provide the vendor would consent, is not binding without such consent.
2. Such agreement is not void, as against public policy.

ASSUMPSIT upon a special agreement. On the trial before DANIEL, J., the case was that the plaintiff at January term, 1824, of Lincoln County Court had obtained a judgment against one Cox; that the defendant had in November preceding bought Cox's land at $500, and had agreed to discharge several executions which were levied upon it, and to pay the balance of the purchase money to such of Cox's creditors as he, Cox, should direct.

At January term, 1824, of the County Court, the sheriff exposed the land of Cox for sale under the execution which the defend-
(365) ant had agreed to satisfy, and at the defendant's request stated to the bystanders the bargain which had been made between him and Cox. After the land had been cried some time, the plaintiff came up, and, upon being informed by the sheriff that he was selling Cox's land, said he must bid for it to save his debt. The defendant requested the sheriff to inform the plaintiff of the purchase he had made, upon which the plaintiff offered not to bid, if the defendant would pay his debt, and the defendant agreed to do so, if he had funds in his hands after satisfying the prior liens, and if Cox was willing. Upon this arrangement the plaintiff ceased bidding, and the defendant purchased the land. Cox died in the course of that week, and the defendant refused to pay the plaintiff his debt.

His Honor instructed the jury that so much of the consideration of the defendant's engagement as rested on the benefit he derived from the agreement of the plaintiff not to bid at the sale was against public policy and void in law; that a discharge of Cox by the plaintiff would be a good consideration for the promise of the defendant. Verdict for defendant. Appeal by plaintiff.

Gaston, for the plaintiff.
No counsel for defendant.

HALL, J. It appears from the case stated for the opinion of this Court that the plaintiff was desirous of bidding for the land, unless his debt was secured. And I think he is entitled to the benefit of any proposition which the defendant made to him that may have induced him not to bid; because I think no person has a right to complain that he was injured by the proposition made, as tending to prevent a fair competition in bidding for the land. The proposition made by the defendant may therefore be considered on its own merits freed from any consideration of public policy. The defendant had purchased the land of Cox, and the plaintiff had no lien upon it (366) for his debt. But the defendant told the plaintiff that he would as soon pay his debt as any other, if Cox was willing, and he had enough left after paying off the liens on the land. For it appears that the land was bound for some debts before the defendant purchased it. At this stage of the proceedings what was the defendant's liability? It was not absolute, because a main ingredient was wanting—namely, Cox's assent, and that was indispensable, because Cox surely had a right to the purchase money after the land was released from the liens upon it, and as certainly the sheriff had a right to the money which the defendant bid for it at the sheriff's sale. It is true the plaintiff might have bid for the land and run it up so as to make it a hard bargain to the defendant; but public policy did not require this. It appears that the plaintiff chose not to bid for the land, and thereby acquired the defendant's good will, although he ran the risk of getting Cox's assent that the defendant should pay his debt. By this proceeding the plaintiff's right against Cox was not impaired.

PER CURIAM. No Error.

(367)

ETHELDRED J. PEEBLES, executor of John Peebles, v. LITTLEBURY MASON.

FROM NORTHAMPTON.

1. In order to take a case out of the statute of limitations, the new promise of acknowledgment must be an express promise to pay a particular sum, absolutely or conditionally; or an admission of facts, from which the Court can infer an obligation; or that the parties are willing to account and to pay the balance when ascertained.
2. Where the defendant admitted that there ought to have been a settlement between him and the plaintiff, but added, that "little if anything was due"—held, that the statute was a bar to the action.
3. In cases where there has been an acknowledgment of a debt within three years—Qu. Whether the action should be brought on the new promise, or whether that only repels the bar of the statute?

ASSUMPSIT, upon an accountable receipt for sundry notes, dated in 1814. This suit was instituted in the year 1827. On the trial before his Honor, Judge MANGUM, upon the issue under the plea of the statute of limitations, the plaintiff introduced a witness who testified that about two years before the trial he heard a conversation between the plaintiff and defendant, in which the defendant acknowledged that he had collected all the claims mentioned in the receipt, except one; but alleged that the plaintiff's testator was indebted to him; and that a settlement ought to have taken place between them, upon which there would be little if anything due. The plaintiff relied upon this as a sufficient acknowledgement to take the case out of the statute. A verdict was rendered for the plaintiff, subject to the opinion of the Court. The judge being of opinion that such declaration of defendant was not sufficient to take the case out of the statute, set aside the verdict, and entered a judgment of nonsuit, from which the plaintiff appealed.

(368) *Badger*, for the defendant.
No counsel for plaintiff.

RUFFIN, J. A very important and unsettled question has been discussed in this case, which it is not necessary to decide for the purposes of the judgment we are to give. It certainly has been ruled of late by Courts of the very greatest ability that in every case where a new promise takes a case out of the statute of limitations, the old duty is to be regarded solely as the consideration of the new engagement, and the action is founded on the latter. Whether this be so, or whether the bar of the statute against the first promise be simply repelled by a subsequent acknowledgment, it is not incumbent on us to say. For whether it be the one or the other, the new promise or acknowledgment must be an express promise to pay a particular sum, either absolutely

or conditionally; or such an admission of facts as clearly shows out of the party's own mouth that a certain balance is due, from which the law can imply an obligation and promise to pay; or that the parties are yet to account, and are willing to account and pay the balance then ascertained. Mere vague declarations, from which a Court and jury can only surmise that possibly the defendant meant to admit himself a debtor for some undefined amount, and without reference to anything that can make it certain, are not sufficient. The admission must at least be so distinct as not to leave the jury to grope in the dark as to the intention of the parties. We cannot impose on the defendant the necessity of proving a full defence against a stale demand, unless by his own admission that demand appears to be a just one. Here the defendant admits that a settlement had not taken place. He said it ought to have been made. But he did not agree to enter (369) into it, nor did he acknowledge that anything was due from him. So far from it, he said there would be little, if anything, due. Can any subsisting debt be inferred from this? If it can, every man must subject himself to the suspicion of dishonesty by refusing to give any explanations to an executor of the dealings with his testator; or he must be actually dishonest by giving a false representation of them. He must be absolutely silent or tell a falsehood; or he subjects himself to the difficulty of proving the satisfaction of a demand, which the law presumes to be satisfied, or rather not to exist. There is not an acknowledgment that anything is due; but if there be, it is very little. Shall this take the whole demand out of the statute? If it does not help the whole, it does not any, for the jury cannot say how much "very little" is, and therefore it is no measure of the debt. Its only use must be to repel the statute. And the effect is to revive the whole debt upon an express declaration that very little is due; from which it is necessarily inferred that the whole is not due. Every evil which the statute was meant to remedy would follow such a construction. No promise can be implied from such a communication to pay anything; and without such a promise, express or implied, the statute remains an absolute bar.

PER CURIAM. Affirmed.

Cited: Smallwood v. Smallwood, 19 N. C., 335; *Sherrod v. Bennett,* 30 N. C., 310; *Smith v. Leeper,* 32 N. C., 88; *Arey v. Stephenson,* 33 N. C., 88; *Moore v. Hyman,* 35 N. C., 275; *Shaw v. Allen* 44 N. C., 60; *McRea v. Leary,* 46 N. C., 93; *Long v. Oxford,* 104 N. C., 409.

(370)

JOSEPH ALLEN v. JAMES GREENLEE.

FROM HAYWOOD.

Case for malicious prosecution lies for the abuse of valid process; but for an arrest under process void in itself, or issued by a Court having no jurisdiction, trespass is the proper remedy.

CASE for a malicious prosecution. The defendant pleaded the general issue, and on the trial before DANIEL, J., the following facts were given in evidence.

The defendant had procured the plaintiff to be arrested under a State's warrant for beating and harassing the cattle of the defendant and driving them from their range on his, the defendant's land. While the plaintiff was under arrest the defendant abused him very grossly, struck him, and spit in his face. Upon the examination the plaintiff was discharged by the magistrate. The defendant proved that the plaintiff had beaten his cattle, and had driven them from their range on his, the defendant's, land.

His Honor charged the jury that if the facts alleged by the defendant were true, there was no probable cause for suing out the warrant; that if he did sue it out, and they were satisfied it was maliciously done, the plaintiff was entitled to a verdict.

The jury found for the plaintiff, and the defendant appealed.

Badger, for the defendant.
Swain, for the plaintiff.

RUFFIN, J. It is proper that the boundaries of actions should not be confounded; but that for every wrong the appropriate remedy should be pursued. An action of trespass lies for all injuries of which force is the immediate cause, and for which the defendant cannot produce a justification. If one person cause another to be arrested with-
(371) out process, it is a trespass and false imprisonment. So, if he arrest him upon process that is void in itself, or is issued by a Court or magistrate having no jurisdiction. An action for malicious prosecution, on the other hand, is a special action on the case, for the abuse of the process of law from malicious motives. It presupposes valid process, and case is given because trespass will not lie. It is given against the party suing it out, because the hand which executes the process is justified by it, and it is not guilty of a trespass. There being no other remedy, this special action is provided.

In the case before us, the propriety of this rule is made very manifest. The charge in the warrant is for a mere civil injury, of which a justice of the peace has no jurisdiction. It constitutes no crime.

But every fact alleged in the warrant is fully proved. That did not justify Greenlee in taking it out; because admitting the facts to be true, the magistrate could not take cognizance of the case, since it was not an indictable offense, nor a private wrong which he could redress. The prosecutor, magistrate, and sheriff were, therefore all guilty of a trespass. But how can malicious prosecution lie? That can only be sustained where the party has been lawfully arrested, and where the prosecutor had no probable cause to believe the party guilty of the acts charged to him. Now, every fact charged here was prroved. If that does not constitute probable cause, nothing can. It is true, they do not constitute probable cause to think that Allen was guilty of a crime, but no crime is charged, and they do make probable cause to thing that he did the acts charged, since it is in proof that he, in fact, did them. The judge confounded two distinct principles when, in order to maintain this suit for what, it appears, to have been insulting and oppressive conduct on the part of the defendant, he told the jury that there was no probable cause. There was full proof. Had the action been trespass, he would have been perfectly right in saying the evidence proved no justification. This action cannot be main- (372) tained, and there must be a new trial.

PER CURIAM. Affirmed.

Cied: Baldridge v. Allen, 24 N. C., 208; *Zachary v. Holden,* 47 N. C., 453.

MORGAN HUDSPETH v. WILLIAM B. WILSON.

FROM SURRY.

Trover will lie for a judgment rendered by a justice of the peace. A judgment won at cards, and delivered to the winner, cannot be recovered back, under the act of 1784, Rev., ch. 284.

TROVER, and after not guilty pleaded, the jury returned the following special verdict: "That the plaintiff was the owner of a judgment obtained before a magistrate; that the plaintiff and the defendant played at a prohibited game, at which the plaintiff staked the said judgment, which was fairly won by the defendant, and delivered to him by the plaintiff; and that the defendant had received the amount of the judgment from the person against whom it was rendered."

DANIEL, J., on fall circuit of 1828, gave judgment for the defendant, and the plaintiff appealed.

Devereux & Winston, for the plaintiff.
The Attorney-General, contra.

HALL, J. The first question is whether trover will lie in this case. Trover will not lie to cover a record, but it will lie to recover letters patent, being but the copy of a record. (Hardress, 111.) It lies for a bond, without alleging that it was due to the plaintiff. *Wilson v. Chambers,* Cro. Ca., 262. It also lies for a note, in which the plaintiff has no legal interest. *Murray v. Burling,* 10 Johns., 172.
(373) It will lie against the finder of a bank bill, but not against his assignee. Anon., 1 Salk., 126. It lies upon a special property. A stranger may maintain it upon a special property by bailment, as well as the obligee himself. And a stranger, as well as the obligee, may declare in trover, *ut de scripto suo obligatorio;* and the *scriptum suum* is not inserted, to declare that the defendant has converted the duty, or chose in action, which belonged to the plaintiff, but to show what sort of a deed it is which is converted. *Arnold v. Jefferson,* 1 Ld. Raymond, 275, S. C., 2 Sal., 654. It is stated in *Watson v. Smith,* Cro. Eliz., 723, that trover will not lie for a bond. But the author of Bac. Abra., Trover D, says that other authorities, besides being modern, seem to be the better opinion.

I think the principle to be extracted from authorities on this subject is that trover will lie upon a general or special property. The plaintiff had a property in the judgment in question, and therefore this action will lie.

The next question is whether in law the plaintiff is entitled to recover, it being a gaming transaction. The first section of the act relates to executory contracts, and declares that all such entered into to pay, deliver, or secure money or other thing won or obtained by playing cards or other games shall be void. In the last clause of the same section the transfer of property to satisfy or secure money so won is declared to be void. On the construction of this clause depends the present controversy.

In *Hodges v. Pitman,* 4 N. C., 276, it was held that money won by gaming and paid could not be recovered back, because it could not be considered personal estate transferred to satisfy or secure money so won. In this case the judgment won is personal estate, and may be transferred; but it has not been transferred to secure or satisfy money which has been won. Therefore, it is not within the words of
(374) the act. The judgment itself has been won, and on principle, if money cannot and ought not to be recovered back, I see no reason why any other property should be recovered back.

I regret such a narrow construction of the act, but I feel myself bound by it as heretifore made. I think a more liberal construction, authorizing the recovery back of money and other property lost at gaming and delivered to the winner would better answer the end which

the legislature had in view when they enacted it. Acting on the principle that the gamesters are each *particeps criminis,* falls short of furnishing a remedy commensurate with the evils arising from gambling.

PER CURIAM. Affirmed.

Cited: Cobb v. Cornegay, 28 N. C., 359; *Teague v. Perry,* 64 N. C., 41.

LEWIS TAYLOR v. ROBERT HARRISON, administrator of DANIEL PECK.

FROM WAKE.

Actions on judgments obtained before a justice of the peace which are barred by the act of 1820 (Rev., ch. 1053) are not revived by the act of 1825 (Rev. ch. 1296), which extends the time of limitation to seven years.

THE plaintiff in March, 1828, sued out a warrant against the defendant upon a judgment rendered against his intestate in May, 1821, and on which the last *fieri facais* issued in September following. Upon the plea of the defendant, the only question was whether he was protected by the act of 1820 (Rev., ch. 1053), entitled, "An act limiting the time within which the judgments before a justice of the peace may be revived."

MARTIN, J., holding that the act of 1820 was repealed by the act of 1825 (Rev., ch. 1296), required seven years to form a bar, the plaintiff had a verdict, and the defendant appealed.

Badger, for the defendant. (375)
W. H. Haywood, contra.

HALL, J. By the act of 1820 (Rev., ch. 1053), where a judgment obtained before a justice of the peace lay dormant for three years, all process issued to revive it after that time was declared to be void and abateable on the plea of the defendant. In the present case the judgment was obtained in 1821, and the last execution issued upon it was in the same year. Three years after that time, by act of 1820, all process issued to revive the judgment was void and might be abated on the plea of the defendant. By the lapse of three years, therefore, the judgment was barred; for the act means that when it uses the word abated. By the act of 1825 (Rev., ch. 1296) actions of debt upon the judgment of a justice shall be commenced within seven years. It is evident that the act of 1825 altered the law of 1820, and made seven years instead of three a bar to justices' judgments, in case they lay dormant during that time. But is it credible that the legislature, by

passing the act of 1825, intended to disturb rights which had been put to rest by the act of 1820? The fair construction of the act is that it was intended it should operate in cases arising after its passage, or, perhaps, upon cases where a three years' bar had not run; but not upon cases which the act of 1820 had already barred. Suppose in this case, a warrant had been brought given by the justice of the peace more than three years after its date and before the passage of the act of 1825, and it had been abated on the plea of the defendant under the act of 1820; would not this be a bar to a warrant brought after the act of 1825? If the act of 1820 was a bar in such a case, was it indispensable that it should be called into action before the bar was completed? But a plea in abatement founded on the act of 1820 is not a plea to the merits, and is only authorized by that act. Now, if the (376) legislature found fault with that act, and wished to alter it, the act of 1825 would permit a warrant to be brought on a justice's judgment not more than seven years old, although it had been abated or barred (which is the same thing) under the act of 1820; because not only that act was repealed, but all abatements of suits under it. If this would be improper (as I am confident it would be), so I think it would be improper not to consider the defendant protected by the act of 1820, and not let his protection depend on the casualty, whether he had been warranted or not, and had an opportunity of pleading the last mentioned statute.

PER CURIAM. Error.

Cited: *Phillips v. Cameron,* 48 N. C., 391.

SAMUEL PEMBERTON v. ROSWELL KING.

FROM MONTGOMERY.

1. Erections made by a lessee for years, for the better enjoyment of his term, become part of the realty. But if made for the exercise of a trade, or for the mixed purposes of trade and agriculture, they belong to the tenant, and may be removed by him during the term, or after its expiration. If the removal is made after the expiration of the term, the tenant is, in respect to his entry only, a trespasser.
2. Between the tenant and his creditors a fixture which cannot be moved without injury to the premises is, until severed, a part of the realty. Therefore a sale of it by a constable is a nullity, and a levy by a sheriff is not such a severance as will give him a special property in it.

DETINUE for a steam engine. Plea *Non detinet.*

On the trial before NORWOOD, J., a verdict was returned for the plaintiff, subject to the opinion of the Court upon the following facts:

The plaintiff claimed title to the engine under a levy made by him

as sheriff of Montgomery upon a *fieri facias* against one Bosworth. The defendant claimed under a sale made by a constable (377) upon an execution against the same person.

At the time of the plaintiff's levy and the sale to the defendant the engine was standing upon land which Bosworth held for a term of years. The engine was then prepared for operation; the boilers were placed in a pit and nearly covered with masonry, and the whole mill was under cover of a house, which it would be necessary to pull down in order to remove the machinery.

Judgment was entered up for the plaintiff, and the defendant appealed.

Nash, for the defendant.
Gaston, contra.

RUFFIN, J. The principal question made at the bar cannot be decided on the case in this record; for it does not appear whether Bosworth or his landlord erected the engine, nor the purpose for which it was erected. The old law was more strict in regard to things becoming part of the freehold by being affixed to it than it is in modern times. Since trade and the mechanic arts have become such important pursuits, there has been a relaxation in their favor. It is unnecessary to consider the question between the executor and heir, or that between the owner of a particular estate and remainderman, because that between the landlord and tenant stands upon its own grounds. The general rule is that any erection, even by the tenant, for the better enjoyment of the land becomes part of the land; but if it be purely for the exercise of a trade, or for the mixed purpose of trade and agriculture, it belongs to the tenant, and may be severed during the term, or after its expiration, though in the latter case the ten- (378) ant will be guilty of a trespass in entering the land for that purpose, and in that respect only. We should, therefore, be obliged to grant a new trial at all events, because it does not appear here when, by whom, nor for what this engine was set up, nor whether Bosworth's lease had expired or not.

There can be no doubt, however, that as between the tenant and his creditors an engine of this sort, actually fixed to and in the soil, and which cannot be removed without tearing down the mason's work and house which covers it, is, until severance, a part of the realty. There is no necessity for drawing nice distinctions between the two kinds of property here. If the creditor could not reach it as realty, the Court would go far in his favor in holding it to be of that species, which would render it liable to sale. But it is equally liable to execution

as the one or the other. But until it is parted from the soil such fixture loses its distinctive character of personalty. For this reason the sale by the constable is absolutely void; for he can in no case sell lands. For the same reason the seizure by the sheriff is ineffectual to the end of vesting the property in him as a personal chattel. Although the sheriff can sell the land, yet he must sell it as land. He cannot sell a house that stands on it as a matter distinct from the soil, and to be removed by the purchaser. He must sell the property in the state and as the kind it is at the time of the sale. The single act of levying an execution does not change the nature of the property. And although the tenant might have a right to sever the fixture from the freehold, until that right be exercised by him or the officer, the thing is merged in the soil. Even the tenant himself before severance could not bring *detinue*. Although the law may confer upon him the power to reconvert the engine into a personal chattel, until that power be exercised it is not reconverted. Whether the sheriff may not
(379) do it in his stead, it is unnecessary to say. He has not done it; and therefore this action of *detinue* will not lie.

PER CURIAM. Reversed.

Cited: R. R. v. Deal, 90 N. C., 112; *Overman v. Sasser,* 107 N. C., 436.

ROBERT McKEE v. THOMAS HICKS.

FROM CASWELL.

1. A deed must be perfect in all respects before delivery. Where a blank was left in a bond for money, to be filled up when the sum was ascertained, and after the delivery the blank was fairly filled up by a stranger—held, that the instrument was void.
2. Held also, that a subsequent payment on the bond, or a subsequent delivery would not validate it, unless so intended.

DEBT upon a single bill executed by the defendant as the surety of one John Campbell, payable to the plaintiff. Upon the plea of *non est factum,* the defendant proved that he signed and sealed the bond in blank; that he delivered it to a son of Campbell, who carried it to the plaintiff, and after agreeing upon the amount of the loan, filled up the blank with that sum. Campbell shortly afterwards died insolvent, and the defendant went to the plaintiff and asked him to look at the bond; he took it in his hand and handed it back to the plaintiff, and on the same day said he had been to learn the amount of his bond and to obtain indulgence as to the time of payment.

NORWOOD, J., charged the jury that to the valid execution of a bond it was necessary it should be fully written and filled up before it was

signed, sealed, and delivered; that if the defendant had signed, sealed, and delivered the paper as his act and deed with a blank therein to be filled up with the amount of the sum to be advanced by the plaintiff, and the blank was afterwards so filled up, it would not be the deed of the defendant, unless the person filling up the blank, (380) on delivering the paper, had at the time of the delivery authority under the hand and seal of the defendant to do so. And further, that if the paper was not the deed of the defendant at the delivery of it to the plaintiff, the defendant, by speaking of it as his bond, or paying a part of the sum intended to be secured thereby, did not give it validity; and the delivery of it by the defendant to the plaintiff, as proved, would not in law make it the deed of the former, unless he intended to make it his deed at the time he returned it to the plaintiff.

A verdict was returned for the defendant, and the plaintiff appealed.

No counsel for either party.

HALL, J. The opinion of the judge of the Superior Court on the question raised in this case is so full and so correct that with all the deliberation with which it is our duty to examine it, nothing can be added. We therefore think the rule for a new trial should be discharged. Whatever injustice may be done to the plaintiff in this case, is attributable to his own oversight in taking a security for his debt which the law cannot recognize as a legal one. If an instrument with a seal to it is not completely executed by signing, sealing, and delivering, it cannot become more so by any act of an unauthorized agent. It would be dangerous if the law were otherwise. Suppose the son of Mr. Campbell, or any other unauthorized agent, had filled up the bond with ten times the sum actually borrowed, it would be thought a great hardship upon the obligors. And so it would be, if they were compelled to pay it.

PER CURIAM. No error.

Cited: Davenport v. Sleight, 19 N. C., 382; *Graham v. Holt,* 25 N. C., 302; *Humphrey v. Finch,* 97 N. C., 306; *Martin v. Buffaloe,* 121 N. C., 36; *Rollins v. Ebbs,* 137 N. C., 359; *S. c.,* 138 N. C., 148; *Moose v. Crowell,* 147 N. C., 552.

(381)

THE PRESIDENT AND DIRECTORS OF THE STATE BANK v. JOHN W. LITTLEJOHN.

FROM CHOWAN.

The surety of a delinquent cashier is not a competent witness in an action brought to recover money improperly paid by his principal, and for which the latter is chargeable.

ASSUMPSIT, for the balance of an account due the plaintiffs for an alleged overchecking by the defendant of his account at the Edenton office of the plaintiffs.

To prove their case, the plaintiffs called their cashier, who, upon his *voir dire,* stated that he was the surety of Pullen, the former cashier of the Edenton office; that the balance sought to be recovered in this action had accrued while Pullen was cashier; that Pullen's bond was then in suit, and if a recovery was effected of the defendant, the amount thus recovered would diminish the sum demanded by the plaintiffs of the sureties of Pullen.

MANGUM, J., overruled an objection to the competency of the witness, and permitted him to be examined in chief. He testified that he had drawn off the account and handed it to the defendant, who promised to pay it. A verdict was returned for the plaintiffs, and the defendant appealed.

Hogg, for the defendants.
Badger, contra.

HALL, J. This case may be simplified by considering Pullen himself the witness objected to. It appears to me that when the cause of action in this case is considered, Pullen's interest is obvious. The case states that the suit is brought upon a promise by Littlejohn to pay the amount of overcheckings by him made upon the bank whilst Pullen was cashier thereof; that is, that Littlejohn received money of the bank from the hands of Pullen, for which Littlejohn had no (382) right to check, and Pullen had no authority to pay. Therefore, as he ought not to have made such payments without authority, he is liable to the bank for them. But if this recovery can be made of Littlejohn, the bank will have no demand against Pullen. It follows that Pullen is interested in the event of this action.

This is not like the case where an agent is permitted to be a witness from the necessity of the case where, from the nature of the transaction, it is not likely that witnesses altogether disinterested can have a knowledge of it. In such cases the agent may be a witness as to things transacted within the scope of his authority. But when he acts beyond the limits of his authority, and thereby becomes liable himself, he cannot be a witness without release. (2 Stark., 753, 767, 768.) And in that situation Pullen appears to be, because he paid over the money to Littlejohn without authority from the bank. It is further to be considered that when agents are permitted to become witnesses from necessity as to transactions of which it is presumed they only have a knowledge, the rule is not extended further. They cannot be examined as to facts of which one person as well as another may have

a knowledge, and which, from the nature of their employment are not presumed to be confined to their knowledge. Thus in the present case, Littlejohn is charged with a debt due to the bank. Knowledge of the fact that he at a future day promised to pay it, is not necessarily confined to the cashier of the bank. The *assumpsit* should be proved by disinterested testimony, as in ordinary cases.

Every objection which could be made to Pullen may be made to the witness, because he was Pullen's surety as cashier, when, it is alleged, Littlejohn received the money sued for in this action.

Per Curiam. New Trial.

(383)

THE GOVERNOR, for the use of Murdoch M'Rae, v. JOSIAH EVANS.

From Cumberland.

1. The acts of 1777 (Rev., ch. 118) and 1785 (Rev., ch. 233), requiring the obligees of official bonds of sheriffs and coroners to assign them to persons injured by a breach of their conditions, was intended to facilitate the remedies of these persons, and not to take from them any rights which they had at common law.
2. A bond given to a trustee, with a condition to secure the rights of others, may, at common law, be put in suit in the name of the trustee, and an injury to a *cestui que* trust assigned as a breach.
3. Per Henderson, Chief Justice, arguendo, the statute 8 and 9 Wm. III, chap. 11, was intended to authorize courts of law to ascertain the actual damage incurred by the breach of the condition of a bond, and to prevent the defendant from being driven to have them assessed by an issue of *quantum damnificatus* awarded by the chancellor.
4. The act of 1793 (Rev., ch. 384), authorizing official bonds to be put in suit by persons injured by the misconduct of the officers, without an assignment, is in affirmance of the common law; and although coroners' bonds are not mentioned in it, they may be sued in the same manner.

Debt upon the official bond of Thomas Evans, coroner of Cumberland county, to which the defendant was surety. The writ was, "to answer James Iredell, Governor and successor of Jesse Franklin, late Governor, who sues for the use, etc."

The bond was payable to "Jesse Franklin, Governor, etc.," and the condition was to be void, "if Thomas Evans shall well, truly, and faithfully execute the office of coroner." There was no assignment of the bond to the relator.

In opening his case, the relator proposed to show as a breach of the condition an injury to himself by the coroner's not returning process sued out by him; but the defendant objected, and insisted that unless a breach of the condition was shown whereby the Governor was injured the defendant must have a verdict. Norwood, J., being of this opinion, in submission to it judgment of nonsuit was entered, and the relator appealed. (384)

W. H. Haywood, for the relator.
No counsel appeared for the defendant.

HENDERSON, C. J. This action is brought on the official bond of the coroner of Cumberland county, in the name of James Iredell, Governor, etc., and the successor of Jesse Franklin, late Governor, etc., to whom, as Governor, the bond was made payable.

No objection is taken to the form of the bond, neither is it urged that the Governor does not, by virtue of his office, succeed to all the official rights of his predecessors. But it is objected that although the Governor may sustain this suit for a breach of official duty by the coroner in a matter in which the Governor is concerned, yet he cannot where the breach alleged is the injury of another, because there is no assignment of the bond to such person.

If the bond had been actually assigned under the act of 1785 (Rev., ch. 233), and the act of 1777 (Rev., ch. 118), relating to the assignment of sheriffs' bonds, to which the former act refers, I think an action could not have been sustained in the Governor's name. For by virtue of the assignment the Governor's interest in the bond would have been divested so far as he was a trustee for the assignee, as by the operation of the two acts the assignee could sustain an action on the bond in his own name. But that case does not arise here. There is no assignment, and the Governor stands as he did from the first, a trustee for all persons injured by a breach of the bond.

If this question stood at the common law, could there be a doubt that by a violation of official duty (no matter to whom the injury was done) the bond would be forfeited, and the penalty incurred? For the condition is not that the coroner shall perform his duty in (385) things only in which the Governor is concerned, but in general that he will in all things well and truly perform his duty as coroner, no matter who may be concerned therein. But it may be said that under the statute of William the plaintiff will be confined to nominal damages, and that under that statute he obtains a judgment for the penalty to be discharged by such nominal damages. That is a begging of the question. If the plaintiff is to be thus restrained, it proves that the case is not within the statute. For that statute was made to confine the party to such damages as in equity he was entitled to, and to compel the plaintiff to ascertain them at law, and not to drive the defendant into equity for relief. If, therefore, the statute of William does not permit a trustee to show the damages sustained by his *cestui que trust,* it does not embrace the case, and it is left as it was before the passage of the statute. But I think that the statute does embrace the case; that it was intended to confine persons to the actual

damage in a Court of Law, as well as in a Court of Equity; to substitute the trial at law for a *quantum damnificatus* in equity. If in this case the Court of Equity would not relieve the defendant from the penalty without satisfying the damages incurred by those for whom the Governor was trustee, such damages ought to be permitted to be shown under the statute.

I have taken it for granted that if the defendant was driven into a Court of Equity for relief, he could obtain it only by paying the damages sustained by those for whose benefit the bond was taken, and for whom the Governor was a trustee; as I am at a loss to see how, or on what principle, equity would entirely remit a penalty without compensating the very injury the penalty was intended to remedy.

I suppose that when the legislature, by act of 1793 (Rev., ch. 384), provided for bringing suits on official bonds in the name of the persons to whom they were given at the instance of the persons injured, the coroner's bond was left out by oversight. The coroner, how- (386) ever, is included in the act of 1819 (Rev., ch. 1002), giving a summary remedy against certain officers and their sureties for the recovery of money received by them by virtue of their office.

I have in this case considered the acts requiring the Governor and other persons to whom official bonds were taken to assign them to the party alleging that he had been aggrieved as tending to facilitate the remedy on those bonds, and not to take from such persons any right which they might have without or independently of the assignment. For such, I think, was very clearly the intention of the legislature.

PER CURIAM. Reversed.

Cited: Branch v. Elliott, 14 N. C., 89; *McRae v. Evans,* 18 N. C., 244; *Coggins v. Harrell,* 86 N. C., 320; *Machine Co. v. Seago,* 128 N. C., 160.

THE GOVERNOR, for the use of the State Bank, v. ALLEN TWITTY et al.

FROM RUTHERFORD.

1. After an appeal to this Court the Court below can take no further order in the cause unless a new trial is awarded here.
2. If judgment be arrested in this Court the Court below can only collect the costs incurred there.
3. Upon an arrest of judgment, neither party recovers costs.
4. Where an error was committed in engrossing the judgment of this Court it must be corrected by the minutes.

After the arrest of judgment in this case (12 N. C., 153), the clerk of this Court below that the judgment of this Court was, "that the

judgment of the Superior Court of Rutherford be reversed, and that the judgment be arrested, and judgment against the relators for the costs of this Court and the Court below."

Upon this certificate the cause stood for several terms upon the docket of Rutherford Court, and several rules were made in it. (387) (Ante, 176.) On the last circuit, on the motion of the defendants, his Honor, Judge DANIEL, thinking the cause was finally disposed of by this Court, directed judgment to be entered according to the certificate. Upon which the relators appealed.

Badger, for the relators.
Gaston, contra.

PER CURIAM. In this case the judgment of the Court below must be reversed; because after the appeal to this Court in 1826 the Superior Court of Rutherford could take no further order in the cause, unless a new trial was directed by the Supreme Court. By the appeal the whole case is removed, and never gets back but for the purpose of a new trial. Here the judgment was arrested, and consequently the case came to an end here. The certificate sent down by the clerk of this Court is rendered necessary by the act of 1825, that the costs below may be collected. And in such case as this that is the sole purpose of it.

The clerk, however, made a mistake both in the certificate sent to Rutherford and in drawing out the judgment here. When judgment is arrested, neither party recovers costs, but each pays his own. The original entry on the minutes is right. The error was committed in engrossing it. It must now be corrected by the minutes, and certified again to the clerk of Rutherford Superior Court, which is ordered accordingly.

PER CURIAM. Reversed.

Cited: Pasour v. Lineberger, 90 N. C., 161.

See Bledsoe v. Nixon, 69 N. C., 81; *McRae v. Com'rs,* 74 N. C., 415.

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(388)

DAVID COBLE v. WILLIAM WELLBORN, executor of Wm. Bell.

FROM GUILFORD.

1. An actual eviction is indispensable to sustain an action upon a covenant of quiet enjoyment. Therefore, where there had been a recovery in ejectment, upon title paramount, and before the issuing of a writ of possession, or any actual disturbance of his possession, the defendant in the ejectment purchased from the plaintiff—held, that there was no breach of the covenant for quiet enjoyment.

2. But a recovery in trespass *quare clausum fregit* is tantamount to an eviction—as judgment in that action implies that the plaintiff is in possession, and the entry of the defendant a trespass, which the law compels no man to commit.
3. Semble, that a recital in a deed purporting to convey a fee, from which it appears that the vendor has but an estate for life—but which was intended only to describe the land conveyed, does not qualify a covenant of quiet enjoyment, so as to confine it to the life of the vendor.

COVENANT for the breach of a covenant of quiet enjoyment contained in a deed executed by the defendant's testator to the plaintiff, the material parts of which are as follows: "Have granted, bargained, etc., unto D. C., his heirs, etc., all that tract of land, situate, etc., the same being a tract purchased by John McGee from Hugh Smith, and by the said McGee willed to his daughter Jane, and by her husband, John Wellborn, conveyed to me, the said W. B.; and I, the said W. B., do hereby covenant, promise, and agree to, etc., with the said D. C., his heirs, assigns, to warrant and forever defend the said granted premises against me, my heirs, and against the lawful claims of any other person, etc."

After the death of John Wellborn, and before the commencement of this action, Jane Wellborn, his widow, the person mentioned in the deed as Jane, the daughter of John McGee, brought an ejectment against the plaintiff and obtained a verdict and judgment for the premises conveyed by the deed above recited. After this recovery the (389) plaintiff purchased the land from Jane Wellborn, who never sued out a writ of possession; neither was the plaintiff ever evicted, unless the said recovery was an eviction.

For the defendant it was objected that these facts did not in law amount to an eviction.

NORWOOD, J., reserved the point, and a verdict was taken for the plaintiff. Upon which judgment for the plaintiff was afterwards entered, and the defendant appealed.

Nash & Badger, for the defendant.
Gaston, for the plaintiff.

RUFFIN, J. The want of an eviction of the plaintiff is decisive of the case against him, and makes it useless to consider the other points debated. I strongly incline, indeed, to the opinion that there is a general warranty in the deed. For the history of the deeds and devises does not relate to the title, but to the identity of the land, as it appears to me from the words, "the same being a tract purchased," etc. They are words of more perfect description.

But the plaintiff cannot recover without showing an eviction. Our warranty is construed to be a covenant for quiet possession, and not

of seisin. Nothing but a disturbance of the possession is a breach of it. It is not a covenant that another has no right, but that if he hath, he will not use it to disturb the bargainee's possession. The eviction may be with or without legal process; but there must be an
(390) eviction in one way or the other, and upon paramount title. The mere judgment in ejectment only establishes the title, which existed before. For anything we know, the warrantor may, after such recovery, satisfy the true owner, and so the vendee may never be disturbed in his possession. This point was directly ruled in *Kerr v. Shaw* (13 Johns., 236), and the difference between a covenant for quiet possession and one for title or against encumbrances, is strongly exemplified by that and another case in the same book. (*Hall v. Dean,* Ib., 105.)

Williams v. Shaw, 4 N. C., 630, has been cited for the plaintiff. But that differs from this. There was a recovery of real damages in an action of trespass *quare clausum fregit;* which is evidence of a disturbance in itself, since that action implies that the plaintiff is in possession, and the recovery implies that the defendant's entry was a trespass on the possession, and that he cannot re-enter without committing another trespass. No man is compelled to be a trespasser, and therefore when it has been judicially ascertained that another is *in* better title, it follows that he is kept out; which is equal to being turned out. The whole turns on the nature of this covenant, technically considered.

PER CURIAM. Judgment of the Court below reversed, and judgment of nonsuit entered.

Cited: Grist v. Hodges, 14 N. C., 200; *Carson v. Smith,* 46 N. C., 107; *Parker v. Dunn,* 47 N. C., 204; *Jackson v. Hanna,* 53 N. C., 190; *Hodges v. Wilkinson,* 111 N. C., 61; *Britton v. Ruffin,* 123 N. C., 69.

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(391)

JOHN DOE, ex dem. of Eliz. M'Pherson, v. JESSE M'COY.

FROM CAMDEN.

1. Where the lessor of the plaintiff in ejectment claims title under a summary judgment entered up in his favor, he must prove that the judgment was regularly obtained.
2. Where the mother of a bastard obtained judgment against the putative father, under the acts of 1740 (Rev., ch. 30) and 1799 (Rev., ch. 531), and purchased his land under an execution thereon—held, that in the ejectment for the land, she must prove the father had notice of her intention to move for judgment, or that the sheriff had returned *non est inventus.*

EJECTMENT, in which the lessor of the plaintiff claimed title under a sheriff's deed made upon her purchase of the premises in dispute

at a sale under an execution issued upon a judgment of the County Court in her favor against the defendant. The entry of the judgment was as follows:

"Ordered, that Jesse McCoy pay unto Elizabeth McPherson the sum of ten pounds for the first year's support of a bastard child charged by the said Elizabeth to the aforesaid Jesse, and in default of payment, that execution to enforce the collection thereof issue, etc."

The defendant objected—First, that this entry was not the entry of a judgment on which execution could issue. Second, That there was no proof of notice to the defendant according to the act of 1799 (Rev., ch. 531); and third, that the whole proceeding was unconstitutional, irregular, and void.

A verdict was taken for the plaintiff subject to the opinion of the Court upon the points made for the defendant. Afterwards his Honor, Judge Mangum, gave judgment according to the verdict, and the defendant appealed.

No counsel for either party.

Hall, J. The plaintiff has set forth a sufficient order against the defendant, upon which an execution could legally be issued, provided the perequisites to making such order had been complied (392) with. The act of 1740 (Rev., ch. 30, sec. 10) declares that the reputed father of any bastard child, when ascertained, shall stand charged with the maintenance of the same, as the County Court shall order, and shall give security to the justices of said Court to perform the said order, and to indemnify the parish.

The act of 1799 (Rev., ch. 531) declares that when any person shall be charged as the reputed father of any bastard child, and shall refuse or neglect to pay the amount due therefor, as ascertained and allowed by the County Court, it shall be lawful for such Court, on notice served on such defendant at least ten days before the sitting of such Court, or such notice being returned by the sheriff of the county, that the defendant is not to be found, to order an execution to issue against the goods and lands of the reputed father sufficient to discharge the amount adjudged by the Court for the maintenance of the bastard child.

The objection in the present case is that the defendant is not shown to have ever been chargeable with the maintenance of the bastard child in question; that it does not appear that any process ever issued against him to make him answerable for such maintenance, and that it has not been made to appear that ten days' notice was given to him, or any process issued to the sheriff for that purpose, that the execution was about to issue against him. These requisites of the act may have been faithfully observed before execution issued. If such has been the case,

it might be easily proved. If it was omitted, the execution issued very improperly; for it is a fundamental principle not to be dispensed with that no citizen shall be deprived of his property without being heard in his own defense. There are other objections made, relating
(393) to the rights of the lessors of the plaintiffs, which I think it unnecessary to decide.

PER CURIAM. Reversed.

JOHN DOE, ex dem. of Hector M'Neil, v. JOHN M'NEIL.

FROM CUMBERLAND.

1. Upon the probate of a will in the Superior Court, under an issue of *devisavit vel non*, the clerk of the Superior Court, should return the will with a certificate of its probate to the County Court. A copy of the will and of this certificate, under the seal of the County Court, is a sufficient attestation of the probate.
2. A certificate, under the seal of the County Court, that a will was proved in the Superior Court, and afterwards ordered by the County Court to be recorded, is not a sufficient attestation of the probate.
3. Per HALL, Judge.—A copy of the record of the Superior Court, certifying that a will was proved in that Court, with a copy of the will, is sufficient.

EJECTMENT, in which the lessor of the plaintiff claimed under the will of one Archibald McNeil. To entitle him to read the will, the lessor of the plaintiff produced the following entry from the records of Cumberland County Court:

"Whereas, The will of Archibald McNeil was offered for probate in this Court many years since, which was contested, and an issue of *devisavit vel non* made up according to law; and, whereas, there was an appeal from the decision here to the Superior Court; and, whereas, on the trial of the issue in the Superior Court, it was legally established as the last will and testament of Archibald McNeil, and ordered to be there recorded, and then transmitted to this Court for record; it is therefore ordered, that the said will being now produced be recorded in this Court, and filed among the records thereof."

The defendant objected that this entry was not a probate of
(394) the will. His Honor, Judge STRANGE, sustained the objection, and nonsuited the plaintiff, who appealed to this Court.

Gaston, for the lessor of the plaintiff.
Badger & W. H. Haywood, for the defendant.

HALL, J. If the will in question had been proved in the County Court of Cumberland, an authenticated probate of it from that Court would have entitled it to be read. But when an issue was made up to

try the validity of the will, and an appeal was taken to the Superior Court from a decision upon that issue, the County Court by such appeal lost its judicial character as to the question of probate, and could only act afterwards ministerially in having the will recorded in the County Court, according to the directions of the act of 1777. (Rev., ch. 115, sec. 57.)

It was, therefore, necessary, in case the will was established in the Superior Court, that an authenticated record of that fact should have been transmitted from that Court to the County Court, together with the will thereby established, in which case the County Court should direct the will to be recorded, as well as the record from the Superior Court, as their authority for so doing. A copy of the record from the Superior Court establishing the will, and a copy of the will, both authenticated by the clerk of the County Court, would entitle the will to be read.

In the present case the clerk of the County Court recites, "that the will was established in the Superior Court, and ordered to be there recorded, and then transmitted to this Court for record. It is therefore ordered that the said will, being now produced, be recorded in this Court and filed among the records of the Court agreeable to law." But in this certificate the clerk does not state upon what authority he makes that recital, or upon what authority the will was directed to be re- (395) corded. I will not say that an authenticated copy of the records of the Superior Court, by which it would appear that the will was established, would not entitle it to be read. I think otherwise. I also think if it was authenticated in the way I have pointed out by the clerk of the County Court, it would be sufficient; but that the will, as at present authenticated, ought not to be read, I feel confident.

There can be no reason for being too strict in examining certificates of this description. But when it is recollected that the records of the County and Superior Courts of Cumberland are kept at the same place, and that the one can be procured as readily as the other, nothing of hardship can be alleged against requiring them to be made out in regular form.

PER CURIAM. Affirmed.

Cited: *Sawyer v. Dozier,* 27 N. C., 104; *Bryan v. Moring,* 94 N. C., 691.

JOHN DOE ex dem. of Jason Smith, v. JOHN T. GRADY.

FROM DUPLIN.

Where A, for a valuable consideration and for the love he had to his grandson B, by deed of bargain and sale conveyed land to B, "reserving an estate for life to C," the son of the bargainor—held, that C, under the deed, took an estate for life.

EJECTMENT tried on the last circuit before STRANGE, J. A verdict was taken for the plaintiff, with liberty to set it aside and enter a nonsuit, if his Honor should be of opinion that John T. Grady, who was the son of Alexander Grady, took no estate under a deed executed by Alexander Grady to his grandson, Alexander H. Grady, the (396) material parts of which were as follows:

"Know ye, that I, Alexander Grady, have given, etc., unto Alexander Hampton Grady one tract of land, etc., for the sum of ten pounds, to me in hand paid, but more especially for the love I have to him as my grandson, to have and to hold, etc., reserving the entire use of said land to me and my wife during our natural lives, and also the entire use of the same after our deaths to John T. Grady and his wife during their natural lives." His Honor gave judgment for the plaintiff, and the defendant appealed.

Badger, for defendant.
Gaston, contra.

HALL, J., after stating the material parts of the deed, as above set forth, proceeded: It is true, there is no consideration expressed as between the grantor and John, yet there was one before that time expressed between the grantor and Alexander; and a consideration of natural affection, expressed to one child, will by construction of law be extended to others. (7 Gwil. Bac. Abr., 97.) Therefore, in this case it must be taken that John T. Grady has a life estate in the premises in question.

PER CURIAM. Affirmed.

(397)

JOHN BELL v. RICHARD DAVIDSON AND GORDON CAWTHORN, Administrators of Robert R. Johnson.

FROM WARREN.

1. If an administrator pleads fully administered, except a certain sum, and as to that sum sets forth judgments confessed by him, giving the particulars of each, the plaintiff cannot impeach any of those judgments for fraud, unless upon a special replication.

2. But if, according to the loose practice adopted in the Courts of this State, the defendant pleads that he has confessed sundry judgments at a certain term of the Court, without giving any particulars of them, the plaintiff may, under general replication impeach any judgment offered by the defendant in support of his plea.
3. Where, upon the plea of *plene administravit praeter*, the administration account was referred to the clerk, and he was directed to ascertain how the assets were disbursed or confessed, with liberty to each party to except, and the report to be evidence on the trial, and the clerk excluded one judgment confessed by the defendant, because it was on a note not due at the time of confession, and part of another because it was for more than the debt, and stated the reasons why he had excluded them on the face of his report—held, the defendant having filed no exceptions, that he was concluded by the report.
4. If several judgments are pleaded by an administrator and the plaintiff falsifies any of them, he is entitled to recover the amount thus falsified, notwithstanding the defendant, in fact, has fully administered.
5. Whether an administrator can protect himself by pleading judgments since the last continuance. Qu.?

ASSUMPSIT, upon a promissory note of the intestate, payable to the plaintiff, originally commenced in the County Court.

At the return term the defendants, among other pleas, pleaded "retainer, judgments outstanding against them, and also against their intestate; and as to the assets which have come to their hands which are unprotected by their former pleas, they plead fully administered, except as to the sum of $18,785, and with respect to that sum they have confessed assets to that amount to other actions on claims of equal dignity with the plaintiff's, returnable to the present term of (398) this Court and now depending."

No special replication was filed by the plaintiff. After the cause was in the Superior Court, the following rule was made by consent:

"Ordered, That the clerk state an account of the administration of the defendants, showing the amount of assets and how the same have been disbursed, confessed, or otherwise disposed of, specifying the time when such payment or other dispositions were made, to whom and on what account, and that he state any question that may be desired by either of the parties, or on which he may doubt, for the opinion of the Court. It is further ordered that either party be at liberty to except to the report of the said clerk; and it is agreed that the account so taken shall be received as evidence in the trial of the cause, on the plea of fully administered."

The clerk, in taking the account, rejected a judgment for $409 and $100 part of another, both of which were upon promissory notes of the intestate, and stated as his reasons that the first was confessed upon a note which was not due at the time the writ was sued out; and that the second was confessed for $100 more than was due upon the note on which the action was brought. No exception had been taken to the report in either of these respects.

On the trial of the cause before his Honor, Judge MARTIN, the defendants claimed the benefit of both the judgments which the clerk had rejected. For the plaintiff it was insisted that as no exception had been taken to these particulars of the report, it was too late for the defendants now to object. The counsel for the defendants stated that they did not wish to offer evidence to vary the state of facts reported by the clerk, but only desired that the Court would re-examine the reasons of the clerk as stated by him, and insisted upon the face (399) of the report that both judgments should be allowed them in full. But his Honor was of opinion that upon a proper construction of the rule of reference an exception was necessary, not only to let in proof in opposition to the facts reported, but also to enable the Court to re-examine any decision of the clerk upon the facts reported.

The defendants then offered to show debts of higher dignity than the plaintiff's claim, which, with the judgments confessed as stated in the plea and allowed by the clerk, would amount to the whole sum of $18,785 of the assets mentioned in the plea. But the judge was of opinion that the defendants by their plea had admitted $18,785 of assets, besides the judgments and debts of higher dignity, and had relied upon the confessions of judgments at that term for their protection as to that sum, and consequently that the plaintiff by falsifying any of those judgments thus confessed had shown assets to the amount of the judgments thus falsified, which were liable to his demand, and thereupon the jury, under the directions of his Honor, found for the plaintiff.

Another point was made in the Court below. After the cause was in the Superior Court the defendants pleaded that J. W. Hawkins had sued out a writ against them, returnable at the same term with that of the plaintiff's, and since the last continuance had obtained judgment, etc." To this the plaintiff replied, *nul tiel record.* On this issue his Honor *pro forma* gave judgment for the plaintiff, and judgment being also rendered upon the verdict, the defendants appealed.

(400) *Seawell & Devereux,* for the defendants.
Badger & W. H. Haywood, for the plaintiff.

HENDERSON, C. J. We are glad that we have it in our power to decide this case on its merits, without determining the much contested point, whether Hawkins' judgment could be pleaded since the last continuance, in protection of the assets. The case stands upon the plea that the defendants had fully administered, except as to $18,785, which they had confessed to suits brought to and then pending in that court, to which there was a general replication. It was then, by mutual consent, re-

ferred to the clerk to take an account of the administration and report, and that such report should be evidence in the cause. The clerk reports, among other things, that one of the judgments was on a note not then due; and that in another case judgment had been confessed for $100 more than was due on the note. The first question is, are these facts under the pleadings admissible to be shown; and secondly, if so, is the report evidence of those facts? If the debts had been pleaded, and the judgments set forth *nominatim* in the plea, I think the evidence would have been inadmissible. For if the plaintiff intended to impeach the judgment, he should have specially replied the cause of the impeachment. But the plea, although more special than common, is not so precise in pointing to the judgments, as to require a special replication. The defendant must himself ask indulgence to make his plea good, for want of certainty, and thereby the plaintiff is excused from making the special replication, that one judgment was fraudulent, being for too much, and another was so because on a bond not due. For, although the defendant pointed to the judgments as in that Court and at that term, the plaintiff was not obliged to wade through the whole of the records of the term to ascertain them. According to our loose practice, the defendant is at liberty to produce his judgments, and the plaintiff to impugn them by any means in his power. The defendant cannot complain, for he requires a relaxation of the rules of (401) pleading to make his plea good, and must consent to a like relaxation in behalf of the plaintiff.

The next question is whether the clerk's report is evidence to impeach the judgments. I think that it is. It will be recollected that the plea is that there are suits pending to the amount of $18,785 on evidences of debt equal in dignity to that of the plaintiff's. The reference to the clerk is not whether the suits are pending on evidences of debt equal in dignity to the plaintiff's, for that question the parties did not submit to him; but they did submit to him an investigation of the facts, on which that question depended as well as others—to wit, the amount of all the assets, the prior judgments, or debts due by the defendants; whether there were debts to that amount in suit, and the nature of the evidences of the debts. Those particulars, I think, were fully within the scope of his authority. This is fortified by the consent of the parties. Otherwise the defendants must be subjected to the charge of being guilty of a foul fraud. Either party was at liberty to except. The clerk made a report, in which the facts were stated. No exception is taken, and when the report is offered in evidence for the first time it is objected that the defendant did not intend to refer particular facts to him. Fair dealing required, if he did not design to submit those facts to the clerk, he at once ought to have excepted to it, that his

opponent might be put on his guard. This conduct of the defendant, although it cannot change the law in matters of fact, concludes him in this point of his case whether or not it was within the submission. But I think, taking these as suits pending, it was clearly within the submission.

There are, therefore, assets in defendant's hands over and above those attached to the suits pending and which could be recovered of them sufficient to satisfy the plaintiff's demand. If they are permitted (402) to remain there against this plaintiff, who can call them out? None others have suits pending.

PER CURIAM. No Error.

ISAAC PIPKIN et ux. v. JAMES D. WYNNS AND WILLIAM B. WYNNS.

FROM HERTFORD.

1. The exclusive right of keeping a ferry and taking tolls belongs to the sovereign; but he can grant the franchise to none but the owner of the adjacent lands. If the owner refuses to exercise the franchise, the grant may issue to another. But in such case compensation must be made to the owner of the fee for the use of the soil for that express purpose, although there is a public highway leading to the river on both sides.
2. An order of the County Court granting to one tenant in common the exclusive right of keeping a ferry and receiving tolls, without default in the others, and without notice to them, is void.
3. The case of Rayner v. Dowdy, 5 N. C., 279, overruled.
4. Twenty years enjoyment of a franchise raises a presumption of a grant.

ASSUMPSIT for money had and received by the defendants to the use of the plaintiffs, commenced in obedience to an order of the Court of Equity for the county of Hertford for the purpose of trying the title of the plaintiffs as tenants in common with the defendants to a ferry upon Chowan river. By the order of the Court of Equity, the defendants were to admit the receipt of money for use of the plaintiffs to enable them to sustain the action, and were to take no formal objection to their recovery.

Upon the trial before DANIEL, J., the jury returned a special verdict as follows: "That Thomas Wynns was seized in fee of a tract of land situate in Hertford county, on the south side of Chowan river; that he was also seized in fee of another tract in Gates county, (403) directly opposite the former, on the north side of the river; that the river Chowan is a public river, navigated by sea vessels; that from the year 1790 until the year 1825, when the said Thomas Wynns died, he had kept up a ferry across the river, landing on each side upon his own premises; that during all this time he had taken tolls

for transporting persons across the said ferry; that it did not appear that the said Thomas Wynns had ever obtained an order of the County Court establishing the said ferry; that the road to it from the south had ever been a public highway; that on the north side the way to the ferry from the nearest public road was made through the swamp by the father of the said Thomas Wynns, and had ever been used by the public, and had, together with the landing places on each side of the river, been kept in repair at the expense of said Thomas and his father; that the said Thomas died intestate in the year 1825, seized in fee of the lands before described, and leaving Margaret Pipkin, one of the plaintiffs, one of his heirs; that the defendants are also heirs of the said Thomas; that soon after the death of the said Thomas the defendants applied by petition to the County Courts of Hertford and Gates for an order to keep the said ferry, and were by the said courts appointed ferry-keepers; that no notice of this application was given to the plaintiffs, and that the defendants ever since the said order was obtained have kept and used the said ferry.

The presiding judge, upon the authority of *Rayner v. Dowdy,* 5 N. C., 279, held that the plaintiffs had no interest in the ferry, and gave judgment for the defendants upon the verdict, from which the plaintiffs appealed.

Hogg & Badger, for the plaintiffs. (404)
Gaston, contra.

HENDERSON, C. J. *Rayner v. Dowdy,* 5 N. C., 279, or the reasoning upon which it is founded, stands directly in the way of a correct decision in this case. That case was argued on one side only, and was not well considered.

The sole and exclusive right of transporting persons over water courses for tolls (by which is meant price independent of contract) resides in no individual; it belongs to the sovereign. But the right of transporting persons on water courses may belong to an individual, and he may by contract, express or implied, receive hire for so doing. It is the exclusive right which makes the franchise. Where the sovereign, as owner of the land, possesses the power of transporting persons, his grant in such cases will communicate the whole franchise. Where the sovereign is not the owner of the land, his grant communicates only the exclusive right; for a sovereign cannot grant that which he has not more than any individual. If I am owner of the land at the place of landing on both sides of a river, and the sovereign grants this right to another, it is granting (405) that which is in me, and the grant is void. If a ferry be

necessary at that place for the public good, the land may be taken by the sovereign for that purpose; but it must be taken in the manner prescribed by law, by which I am compensated for my loss. What interest in the land passes to the sovereign by establishing over it a public highway? The right of passing only and of taking the necessary materials (adjoining or convenient) for repair. The residue of the dominion or property remains in the former proprietor. It remains his freehold still. For the uses and purposes of the highway, it is the sovereign's; for all other purposes it is the former proprietor's. The right of using it as a landing place for a ferry has never been taken from him; and although there is scarcely a perceptible difference between stepping from a boat on the land laid out as a public road, and stepping from land to land, yet that has never been taken from the former proprietor for such purposes, as he has never been compensated for the right of transporting persons across the water course, as that was not considered when the price of taking the land for a highway was fixed; and although it is of but little value without the franchise, yet his ownership of the land gives him the preferable right to call for the franchise when a ferry becomes necessary. This right is valuable, for unless there are good reasons to the contrary, the sovereign must grant it to the owner; as sovereigns are bound to be just. A grant to another without good reasons is void, as an act of injustice. It cannot, therefore, be arbitrarily and capriciously granted to another. And when it is so done without hearing the owner, by which is meant without giving him an opportunity of being heard, it is *prima facie* an act of injustice, and the grant is void. If it is asked what is to be done if the owner of land where a ferry is necessary refuses to receive the
(406) franchise, it is answered, pay him for his land and grant it to another. The law has prescribed a method whereby land wanted for public purposes may be taken from an individual. But, then, the owner is always compensated for what is taken from him. Let it not be taken, as it were, surreptitiously; taken for one purpose and used for another; taken for a road and used for a ferry. The owner is to be considered as refusing to call for the franchise when he omits to perform what is required by law of those appointed (in the language of our law) ferry-keepers. If, when appointed, he does not perform the duties of a ferry-keeper, he is liable to all the penalties of those who abuse a franchise to be inflicted by indictment *quo warranto,* or other means prescribed by law. But it is not to be expected that the owner of the land will not call for the franchise. Men generally pursue their own interest, and if the owner cannot by reason of poverty or other cause use it himself, he can hire it to others. But we are not to act upon such suppositions. When they occur the law has provided a remedy for them.

I have considered this case as if the landing on the northern side of the river was a public road. But it is the property of the heirs of Thomas Wynns, of which the plaintiff is one. We are satisfied, notwithstanding the decision in *Rayner v. Dowdy,* that the Court cannot grant the franchise to any but the owners of the land, at least until the owners shall be in default. Nor had the defendants, as a part of the heirs of Thomas Wynns, a right to call for the franchise to themselves in exclusion of the others, as the lands descended to all the heirs.

We are of opinion, also, that in this case the long use is sufficient to raise the presumption of a grant; but this it is unnecessary to consider.

The Judge below felt bound by the decision of *Rayner v. Dowdy.* I think from his bottoming his judgment entirely on that case, he would have decided differently, if he conceived himself free to (407) act.

PER CURIAM. Judgment reversed, and judgment entered for the plaintiff.

Cited: Rogers v. Mabe, 15 N. C., 190; *Barringer v. Ferry,* 69 N. C., 170, 173; *Broadnax v. Baker,* 94 N. C., 677; *Bridge Co. v. Flowers,* 110 N. C., 385; *Comrs. v. Bonner,* 153 N. C., 68.

JOHN DEN, ex dem. of George Blair, v. ELISHA P. MILLER.

FROM BERTIE.

1. In ejectment a continued possession of seven full years, with color of title, is absolutely necessary to bar the right of entry. The possession need not be continued from day to day without interruption; but it must be a continued possession consistent with the usages of agriculture.
2. Therefore, when a crop was planted at the beginning of the seventh year, and at midsummer possession was abandoned and never resumed—held that the right of entry was not barred.
3. A lease thirty years old is prima facie evidence of the time the lessee took possession and is admissible, although produced by the lessor in support of his title—especially where it is admitted that the lessee took possession about the time of its date.

EJECTMENT, trial on the fall circuit of 1828 before his Honor, Judge DANIEL. The only question in the Court below was whether one Greenlee, under whom the defendant claimed, had seven years' possession so as to perfect a defective paper title.

The witnesses for the defendant deposed that Greenlee's possession commenced in 1797; that one Elrod was a tenant of his, and occupied

the land from January, 1800, to August, 1806, when he left the premises in dispute, but left a small crop of cotton growing on the land. The lessor of the plaintiff then introduced witnesses to prove that the land was unoccupied during 1800, and that Elrod's possession did not commence until December, in that year. It was admitted by the lessor of the plaintiff that Elrod was a tenant of Greenlee's. In this stage of
(408) the case the counsel for the defendant produced a lease from Greenlee to Elrod for 1800, and offered to introduce it as evidence that Elrod's possession was taken in December, 1799. The counsel for the plaintiff objected to this testimony, because the fact of Elrod's tenancy was not disputed, and insisted that the offer to introduce the lease was nothing but an attempt to prove by Greenlee's written declaration the time when Elrod took possession under him. For these reasons his Honor rejected the testimony.

The counsel for the defendants moved the judge to charge the jury that if they should find against the plaintiff upon the evidence as to the continuance of Greenlee's possession for the space of seven years from 1797; yet if they believed that Elrod entered into possession in December, 1800, and continued that possession for six years and four months, and then kept up his crop until August, and afterwards gathered his cotton in the seventh year, that in law this was a possession during the whole of the seventh year, and the act of limitations perfected the defendant's title. But his Honor refused so to charge the jury, and instructed them that if Elrod took possession in December, 1800, his possession, in order to protect the defendant, must have continued until December, 1807. A verdict was returned for the plaintiff, and the defendant appealed.

Seawell, for the plaintiff.
Gaston & Badger, contra.

RUFFIN, J. We all agree with the judge below in his opinion respecting the statute of limitations. Nothing short of seven full years will satisfy the act of Assembly. We do not mean to say that the occupation must be daily or weekly shown. For, if a man has his field in crop, or under fence, as a part of his plantation, according to
(409) the usages of agriculture, it will do. And so, if a landlord has a tenant on his land to make a crop every year, though it be not proved that one came in the day the other went out. But we mean that it will not be sufficient to plant a crop and abandon the farm in the middle of the year, and not have an occupation afterwards. If, for instance, Greenlee had put another tenant on the land in 1807, that would have constituted a continued possession by connecting him with

Elrod. It would have proved the *animus revertendi*, and evinced that Greenlee never abandoned the possession. But when he leaves the land in August of the sixth year and never afterwards enters, no such inference of occupation can be drawn.

We, however, think the Court erred in rejecting the lease as evidence. It must be admitted that the defendant did not treat the case quite fairly in waiting for its introduction to the critical moment, when it would be most powerful in supporting the credit of his witnesses, as to the time of Elrod's entry. It would have been most proper to have offereded it in the first instance as a part of his title; for such is possession under the statute. But it was evidence *per se* to the point to which it was offered under the circumstances. That was to show the time when Elrod took possession. We must take it for granted that its execution was, or could have been, duly proved, and that it was actually delivered to Elrod, and that he entered under it, because the defendant's counsel said he would prove that possession was taken in the pursuance thereto, and the Court rejected it because it was not evidence of the fact for which it was tendered, and not because it was not proved. Certainly, if it is found in Greenlee's pocket and depends upon his acknowledgment or handwriting, it is nothing. It must be traced to Elrod at the period of his tenancy. Taking that for granted, how does the case stand?

It is admitted on all hands that Elrod was Greenlee's tenant. Witnesses come in and say that he entered in 1799; others in December, 1800. Between this conflict of testimony, this document is (410) most material to show that one or the other set of witnesses is mistaken. Where a person is proved to have entered about a particular period, and that a remote one, the very time is not conclusively shown by the date of his deed, it is true; but there is a strong probability raised by it, because owners of land are not presumed to let it lie idle; and we will not suppose that one entered before he had title. If the conveyance be in fee, the presumption of an immediate entry is not so strong as if it be for a less estate. But if it be for years, and especially for one year, the presumption is violent that the tenant entered forthwith. It is in the nature of man that he should endeavor to make the most of his property, and it cannot be supposed that he who is paying rent and has but one year's estate should not enoy it. In such a case the probability of occupation is as great as that the date of a deed corresponds with the true time of its execution. The contrary may be shown, but by itself it imports the truth, because men usually put the real date. So a lease for a single year made thirty years ago creates a probability that the lessee entered that year; for we cannot suppose that he would forego the present enjoyment of property thus fleeting, especially when the actual occupation is proved *aliunde* to have been about that time.

It may be proper to add that this presumption might certainly be weakened by evidence that he paid a rent in part of the crop, instead of money, or other circumstances open to the other side. But of itself it is evidence as a circumstance, from which the time of possession may be collected.

PER CURIAM. New Trial.

Cited: Holdfast v. Shepard, 28 N. C., 366; *Moblay v. Griffin,* 104 N. C., 115.

(411)

PETERS CLARK v. HENRY DUPREE.

FROM NORTHAMPTON.

1. Assumpsit cannot be maintained before a single magistrate upon an implied promise, where the plaintiff has an election to sue either in tort or in contract; the action must be brought in a Court which has jurisdiction of the tort.
2. One who sues in forma pauperis neither recovers nor pays costs.
3. An order that a plaintiff may sue in forma pauperis extends only to the Court in which it is made. Therefore, if such an order be made in the County Court, and the cause is afterwards brought to the Superior Court, and the order is not renewed there the defendant, if he succeeds, will recover the costs of that Court.

This was an action commenced by a warrant, which was sued out 5 June, 1826. By a rule of the County Court the plaintiff had been permitted to sue *in forma pauperis.*

On the trial before his Honor, Judge STRANGE, the proof was that the defendant had admitted that he had received three bales of cotton from the plaintiff to sell on his account in Petersburg; that he had not sold it, or received anything for it; but had stored it in Petersburg in his, the defendant's own name, and that the plaintiff owed him an account; the account was produced and identified, and amounted to $45.32, and was receipted by the defendant on 17 May, 1826.

The defendant then offered the following receipt in evidence, which was signed by the plaintiff: "Received 17 May, 1826, of Henry Dupree, forty-five dollars, thirty-two cents, in part pay for three bales of cotton, which said Dupree has to sell for me."

The plaintiff contended that he had a right to recover:

1. Because there was evidence to be left to the jury of an actual sale by the plaintiff to the defendant.

2. Because the receipt offered in evidence by the defendant was proof of the defendant's liability to the plaintiff for the value of the cotton.

3. Because the defendant having stored the cotton in Petersburg

in his own name, the plaintiff had a right to treat it as a sale to him, and recover the amount. (412)

But his Honor being of opinion that the subject matter of the action was not within the jurisdiction of a justice of the peace without proof of a sale by the plaintiff to the defendant, or of sale by the defendant and a receipt of the price; and that no view of the case which involved an inquiry into the manner in which the defendant had performed his agency, could be taken in this form of action, nonsuited the plaintiff, who appealed to this Court.

Gaston, for the plaintiff.
No counsel for defendant.

RUFFIN, J. There was no evidence of a sale of the cotton to the defendant, nor of a sale by him and receipt of the price. The declarations of the defendant which the plaintiff gave in evidence prove the contrary. His receipt given 17 May shows that it was not then sold. The warrant was sued out on 5 June. The intervening time was of itself too short to be left to the jury as evidence of a sale. It is unnecessary to consider the effect of storing the goods in the defendant's name. If it could amount under the circumstances to a conversion, no Court can entertain jurisdiction of the *assumpsit* to be implied therefrom, but one which could give a remedy directly on the *tort* itself; for the same questions of law arise in each case. This the justice of the peace could not do. *S. v. Alexander,* 11 N. C., 182; *Fentress v. Worth, ante,* 229. The nonsuit was therefore right.

Another objection is taken here that there ought not to have been judgment against the plaintiff for costs, as he had been allowed to sue *in forma pauperis.* A pauper neither recovers nor pays costs (413) in general. He may, in the discretion of the Court, be dispaupered when he has received an accession of property, or has misbehaved himself, and the effect of this may be retrospective, as well as prospective. This Court would not revise the exercise of such discretionary power; but we think that by an oversight the judgment for costs has been given against the plaintiff without his having been dispaupered. The order was made in the County Court, and we cannot consider that as relates to the costs in that Court the Superior Court intended to dispauper, unless it had been done by a distinct order to that effect. That is the regular method, and makes it appear to have been deliberately done. We cannot infer such an order from the mere fact of a judgment being given for costs. The judgment, however, was properly rendered for the costs of the Superior Court, because the plaintiff had never been a pauper in that Court. The order of the County Court can only extend

to its own officers. They can have no control over the counsel and officers of another Court superior to themselves, so as to make an order that they shall work for nothing; nor over a suitor after he ceases to be a suitor before them. *Gibson v. McCarty,* Cas. temp. Hardw., 311. Suppose the plaintiff had been unable to give security for his appeal to this Court, his only remedy would have been by *certiorari,* granted by this Court upon our own terms. The Superior Court could not have sent him here as a pauper appellant; nor, as I think, as a pauper appellee. This view is supported by the statute of Henry VIII itself, which commands the chancellor to provide counsel to advise writ, and the clerk to write it for the seal without charge; and also commands the justices of the bench to which it is returnable in like manner to provide the party with an attorney and counsel in that Court. Thus each tribunal is left to act upon its own officers and suitors. The reason why the
(414) Superior Court could modify and discharge the order of the County Court is that by our appeal a trial *de novo* is to be had, which brings every previous order made in the cause which has not completely spent its force on the parties under revision. But until it be reversed directly we must consider it as remaining in force. There ought not, therefore, to have been judgment for the costs in the County Court. The judgment of the Superior Court must, consequently, be reversed; and this Court, proceeding to give such judgment as the Superior Court ought to have given, doth consider that the defendant recover from the plaintiff his costs in the Superior Court expended, to be taxed by the clerk of that Court, and that the plaintiff recover his costs in this Court. This leaves the defendant to pay his own costs in the County Court, and the plaintiff, being a pauper in that Court, was not liable for his own costs, and could not recover them from the defendant.

PER CURIAM. Judgment reversed, and judgment for the costs of this Court entered up for the plaintiff, and of the Superior Court for the defendant.

Cited: Carter v. Woods, 33 N. C., 23; *Revel v. Pearson,* 34 N. C., 245; *Mann v. Kendall,* 47 N. C., 193; *Collett v. Frazer,* 56 N. C., 399.

See S. v. Alexander, 11 N. C., 187; *Fentress v. Worth,* 13 N. C., 229.

(415)

JOHN DEN, ex dem. of Sarah Reed et al., v. MICHAEL SHENCK.

FROM LINCOLN.

1. Parol evidence to control the description of land contained in a deed is in no case admissible, unless where monuments of boundary were erected at the execution of the deed. If the description in the deed varies from these monuments, the former may be controlled by the latter.
2. The course and distance in a deed cannot be altered by parol evidence of ex post facto transactions, unless those transactions tend to prove the erection of some monument of boundary contemporaneously with the execution of the deed.
3. The case of Person v. Roundtree, 2 N. C., 378, commented upon and approved by HENDERSON, Chief Justice.
4. Where the boundaries of land never were marked, nothing can alter the course and distance of the deed. Therefore, where a deed called for a front of six poles, and parol evidence was received to prove that six poles and six feet were intended, in the absence of proof that the line was run and marked—held, that the parol evidence was improperly received.
5. A judge has no right to inform the jury how much weight is to be given to testimony; but it is his duty to inform them when it weighs nothing.

EJECTMENT for a lot of ground in the town of Lincolnton, tried on the fall circuit of 1829 before MARTIN, J.

The only question between the parties was whether seventeen feet front was a part of lot No. 3 in the plan of the town, to which the lessors of the plaintiff had title, or of lot No. 2, of which the defendant was owner.

The lessors of the plaintiff proved that lots Nos. 1, 2, and 3 were coterminous; that the beginning of lot No. 1 was well ascertained; that the lots were described in the deeds, and also in the plan of the town, as being six poles in front; and by measuring from the beginning of lot No. 1 and allowing six poles only to each lot, the land in dispute clearly formed a part of their lot.

The defendant contended that the lots were in reality laid out six poles and six feet wide, and if this was the fact, the land in dispute as clearly belonged to him. (416)

The lessors of the plaintiff objected to parol proof of the lots being wider than they were described to be in the deeds and in the plan. But the presiding judge, holding that such evidence was sanctioned by a series of decisions in the Courts of this State too well established to overrule, admitted the testimony.

The defendant then proved that twenty years before the commencement of this action the lessors of the plaintiff and himself had dug a well and erected a wash-house, so as to stand equally upon their respective lots, as they then thought the dividing line between them to run, allowing six poles and six feet to each lot; that this well and house had

been used by them in common; that Mr. Alexander, under whom the lessors of the plaintiff claimed, more than forty years ago had erected an office on what was supposed to be the corner of lot No. 3, estimating the lots to have six poles and six feet front, but by confining the lots to six poles, this office stood seventeen feet in the street next below lot No. 3. Evidence of a general reputation that the lots were six poles and six feet wide was also introduced, and it was proved that in other squares of the town they were laid off of that width.

It was like wise proved that under a private act passed in the year 1816, commissioners were appointed who surveyed the town anew; that upon that survey the plaintiff's lot was found to have seventeen feet front more than it was entitled to; that in submission to an award of these commissioners he paid $50 for the surplus; that after this survey the defendant claimed six feet of land before that time admitted by him to belong to the lot No. 1, and received possession of it, and agreed to pay the lessors of the plaintiff $100 for the land now in dispute.

His Honor instructed the jury that if the boundaries of the lots Nos. 1, 2, and 3 had been run and marked at the time the town was (417) laid out, then they should be governed by the lines actually run.

That if they were not satisfied by the evidence that the boundaries had been thus run and marked, then that they ought to be governed by the description of the boundaries contained in the deed.

A verdict was returned for the defendant, and the plaintiff appealed.

Gaston, for the plaintiff.
Devereux, for the defendant.

HENDERSON, C. J. After stating the case as above, proceeded: We are not aware of any such series of decisions as that mentioned by the judge below. It is true, that during the time of Judge HAYWOOD there were many decisions on the subject of boundary which placed the question so much at large that the description contained in the deed was almost totally disregarded. But many of them never met the approbation of the profession, and for many years we have in all cases, I believe, except one, adhered to the description contained in the deed, and it is much to be lamented that we do not altogether. The case to which I allude is where the deed describes the land by course and distance only, and old marks are found corresponding in age as well as can be ascertained with the date of the deed, and so nearly corresponding with the courses and distances that they may well be supposed to have been made for its boundaries, the marks shall be taken as the *termini* of the land. This is going as far as prudence permits; for what passes the land not included by the description in the deed, but included by the

marked *termini?* Not the deed; for the description contained in the deed does not comprehend it. It passes, therefore, either by parol, or by a mere presumption. As far as we know, there has been no series of decisions by which the description in the deed is varied (418) by marks, unless they were made for the *termini* of the land described in the deed, or supposed to be so made, and to which it was intended the deed should refer, or to which it was supposed the deed did refer; or, rather, supposed that the courses and distances corresponded with the marks, and that the same land was described, whether by course and distance in the deed, or by the marked *termini.* Not recollecting that all admeasurement was uncertain, it was settled that in such cases the marked *termini* should control the course and distance mentioned in the deed. But even this does not admit of parol evidence to show that lines were run six poles and six feet, instead of six poles only, as in this case. Neither does this rule authorize proof that the parties afterwards made or marked a line between them; that they dug a well, or erected a house where they thought the boundary was, for such acts or marks were not done or made to describe the calls of the deed. For the deed had been made already, and these were not contemporaneous transactions. They were not intended to be, and to remain as monuments of description, erected when the tract was separated from other lands, or was passing from one hand to another, and required a name, a description, an identification, by which it should be known from other lands. They were not intended as monuments to point out the boundaries. Suppose the well was not on the line, would the party saying that the line was there change its location? It is true, such acknowledgments are evidence of the place where the marks or *termini* once were, but it is only evidence when it has been shown or appears there were some marks to which such acknowledgments pointed. Here there is no evidence that any such ever existed.

Even in cases of any other description than that by course and distance, as where marks, as trees, rocks, water courses, or other things, are called for in the deed as *termini,* the rules of law and the rules of construction make them the *termini* of the land, and although they may vary from and even be in direct opposition to, the courses (419) and distances set out in the deed, when established, they control the weaker description of course and distance. Their variance from the course and distance only increases the difficulty of proving that they are in fact the *termini* named. But when proven (by which I mean satisfactorily established), they are the *termini* adhered to; as in the case of *Person v. Roundtree,* 1 N. C., 69; S. c., 2 N. C., 378, or which is consistent with the most rigid construction of deeds. I therefore think that the parol evidence should have been rejected.

No one can find fault with the law as laid down by the judge in his charge as a mere abstract proposition. But there was no such case made by the evidence. There was no proof that the boundaries had been marked. The judge should have told the jury that there was no evidence to control the courses and distances, and that the lots were described and bounded only by the course and distance. For, although it is not proper for the judge to say how much the evidence weighs, yet if it weighs nothing, it is his peculiar province to declare it. With that question the jury have nothing to do.

PER CURIAM. New Trial.

Cited: S. v. Cardwell, 44 N. C., 249; *Gause v. Perkins,* 47 N. C., 226; *Davidson v. Arledge,* 88 N. C., 332; *Baxter v. Wilson,* 95 N. C., 144; *Higdon v. Rice,* 119 N. C., 626, 627; *Batts v. Staton,* 123 N. C., 48; *Elliott v. Jefferson,* 133 N. C. 212; *Boddie v. Bond,* 154 N. C., 367; *Clarke v. Aldridge,* 162 N. C., 330; *Allison v. Kenion,* 163 N. C., 585.

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(420)

THE STATE v. JAMES MILLS.

FROM DUPLIN.

1. Co-defendants in an indictment cannot be witnesses for each other, unless they have been first acquitted or convicted, and this although their trials are to be had in different counties.
2. An indictment for a forcible trespass upon personal property, greater force must be averred than is expressed by the words *vi et armis.* The trespass must involve a breach of the peace, or directly tend to it, as being done in the presence of the prosecutor, to his terror or against his will.
3. Actual possession by the prosecutor must be averred; but an indictment which averred the legal possession of the prosecutor, and that the defendants with strong hand, unlawfully, violently and forcibly did seize, arrest and take from the prosecutor, was held sufficient.

The defendant was indicted for a forcible trespass. The indictment was as follows: "The jurors, etc., present that one Rhoda Waller of, etc. was on, etc., then and there lawfully possessed of certain negro slaves, named, etc., and the said R. W., being so possessed, Daniel Bradham, late of, etc., James Mills, late of, etc., and Jesse Ballard, late of, etc., afterwards—to wit, on, etc., at, etc., with force and arms, and with a strong hand, at, etc., unlawfully, violently, forcibly, and injuriously, did seize, arrest, and take from the said R. W. the aforesaid negro slaves, and did then and there unlawfully, forcibly, and violently keep, hold, and maintain the possession of the said slaves to the great damage of, etc."

After not guilty pleaded by the defendants' Mills and Bradham (Bal-

lard not having been arrested), the cause as to Bradham was removed to an adjoining county. At the same term of the Court, Mills, being upon his trial, offered Bradham as a witness; but his Honor, Judge STRANGE, rejected him as incompetent. A verdict was returned for the State, when the counsel for Mills moved in arrest of judgment, because the indictment did not charge that the defendants had taken the slaves from the actual possession of the prosecutrix. The motion (421) was overruled by his Honor, and judgment entered up for the State, and the defendant appealed.

Gaston, for the defendant.
The Attorney-General, contra.

RUFFIN, J. There can be no doubt that an accomplice, merely as such, is a competent witness on either side. Hawkins, P. C., Book 2, ch. 46, sec. 18, states that it is no exception to a witness that he confesses himself guilty of the same crime, if he be not indicted for it. When indicted, however, he adds, accomplices are good witnesses for the King until they be convicted. I take it, the rule is perfectly established as thus laid down. It is found in all the text writers, and many adjudged cases. The very manner in which Hawkins states it would exclude the accomplice, jointly indicted, from testifying on behalf of his codefendant. He first says that an accomplice not indicted may be a witness for or against a prisoner, and then further remarks that accomplices, jointly indicted, may be witnesses against the prisoner. This excludes the idea that he can testify for him. It must be obvious that an accomplice indicted can only be called for the State by his own consent. For he never can be forced to give evidence upon an indictment in which he stands accused. If he cannot be compelled to testify against the prisoner because he himself is implicated, neither do I think, for the same reason, ought he to be permitted to give evidence for him. I do not know that his exclusion depends so much upon his direct and particular interest in the verdict touching his codefendant as upon a principle of public policy arising out of the presumption that it is dangerous to suffer one, apparently upon the record guilty of the same offense, to exculpate his associate in crime. For, after bill found, a defendant is presumed to be guilty to most, if not to all, purposes, except that of a fair and impartial trial before a *petit* jury. This presumption is so (422) strong that in the case of a capital felony the party cannot be let to bail. It seems likewise to have been the ground upon which the Courts have refused to hear them in exoneration of their companions more than of themselves. The force of the principle of association to elude, as well as to disregard and resist the law, is so powerful that an

honest and impartial relation cannot be hoped for. But whatever may have caused the rule, it is found by us as an ancient one, thoroughly incorporated with the law of public trials; and can only be annulled by the law-making power. It is so laid down by Mr. Justice Buller (Law of *Nisi Prius,* 285), and in Mr. McNally's Treatise, 214. And Lord Ellenborough says (in *Rex v. Laforce,* 5 Esp., 155), that "he had never known joint defendants to give evidence for each other," and he rejected the witness, although he was not on trial, having suffered judgment by default. He said when a defendant has been fined then he is a witness. And with this accord other books. (*Rex v. Fletcher,* 1 Str., 633.) They state the uniform method to be for one defendant to plead guilty and be fined, or if no evidence be produced against him on the joint trial, for the jury to pass on his case. He may then give evidence for the others. (1 Gilb. Ev., 117.) To the same effect have been the practice and decisions in this State. So far as my observation has gone, I can speak to the unvarying usage. The question was made in the late Supreme Court in 1814, in the case of Rebecca Carter,* who was indicted with Fannie Snow for murder. The indictment was found in Caswell and removed, as to the former, to Guilford. Upon her trial the other was offered as a witness, and rejected by Judge HALL, who brought the question up. There was a difference of opinion, but a majority of the Court thought the witness was incompetent. The dissenting (423) judges, I learn, considered the rule as applying only to cases of joint trial, as well as a joint indictment. But in this, I think, they were mistaken, as is shown by the case of *Rex v. Laforce,* just quoted and a case in New York. *People v. Bill,* 10 Johns., 95. Carter's case has been held the law of all cases on the circuits for the last fifteen years. It is further contended that here is not only a separate trial, but that by the change of the *venue* as to the witness it became a separate indictment; in which case each defendant is certainly competent to speak for the other. I do not perceive how the consequence demanded follows the removal. The parties are indeed to be tried separately, but each is to be tried on an indictment against both, as much as if several trials took place in the same Court. But the objection is removed by the authority of Carter's case, in which precisely the same state of facts existed.

The objection to the indictment is founded on the position that at common law no trespass either on lands or chattels was indictable without a breach of the peace; and that as to chattels, so the law now remains. I do not suppose that an actual breach of the peace is necessary to make a trespass a crime. But certainly it must be something more than a mere civil injury, or that degree of force which is expressed by the terms *vi et armis.* The act must involve a breach of the peace, or mani-

*Not reported.

festly and directly tend to it as being done in the presence of the party to his terror, or against his will. The force or the numbers can make no difference (except under the statutes of forcible entry), where they neither put the owner in fear, nor provoke him to an immediate redress of his wrong by force, nor excite him to protect the possession of his chattel by personal prowess; and none of these can happen in the absence of the owner and his family. Hence, "strong hand" and "numbers" in this indictment do not of themselves import more than the requisite force. The presence of the owner cannot be implied (424) from them. They are found first in the statute of 5 Richard II, and relate to a forcible entry, which may be under the statute, if done violently, as well in the owner's absence as presence. Nor would the lawful possession of the prosecutrix stated in the indictment suffice. For that would be true of a mere constructive possession. But the indictment goes on to charge, after the lawful possession of Rhoda Waller, that "the defendants, with strong hand, unlawfully, violently, and forcibly did seize, arrest, and take from the said R. W. the said slaves." "Taking from her," in ordinary parlance, is certainly to be understood as taking from the person, and the force shows the want of consent, or, at all events, of a free consent. The words to any common understanding carry the idea of personal presence. The facts are not, indeed, charged with the utmost precision. But a charge of taking from another with force and violence does seem plain, intelligible, and explicit enough in the case of a misdemeanor.

PER CURIAM. Affirmed.

Cited: *S. v. Tuttle,* 145 N. C., 488, 490.

(425)

THE STATE v. NEIL CRAWFORD.

FROM ROBESON.

1. In a prosecution under the act of 1791 (Rev., ch. 339) for preventing malicious maiming the intent to disfigure is presumed from the act of maiming, unless the contrary appear.
2. Under that act the *corpus delicti* is complete, if the maim be committed on purpose, and with intent to disfigure, although without malice prepense.
3. Per RUFFIN, Judge.—The words "malice aforethought," in the act of 1791, do not mean an actual, express, or preconceived disposition; but import an intent, at the moment, to do, without lawful authority, and without the pressure of necessity, that which the law forbids.

The defendant was indicted upon the act of 1791 (Rev., ch. 339), for biting off on purpose the ear of one Duncan Munroe. On the trial

it appeared that upon a quarrel between the defendant and Munroe the latter gave the former a blow, upon which the defendant immediately threw him down and bit off his ear.

DANIEL, J., charged the jury that they ought to ascertain whether the defendant bit off the ear on purpose; and if on purpose, whether it was with the intent of disfiguring Munroe; and in ascertaining that intent, the fact that he had actually bitten off the ear was a circumstance from which the intention to disfigure might be inferred, unless that inference was rebutted by other evidence. That if the defendant did the act to save his own life, or to prevent great bodily harm to himself, they ought to acquit him. A verdict was returned for the State, and the defendant appealed.

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

RUFFIN, J. The act of 1791, upon which this indictment is framed, received a contemporaneous exposition by very able judges, which
(426) I conceive is authoritative, even if there be doubts on the act itself. *S. v. Evans,* 2 N. C., 281, was decided in 1796 by Judges HAYWOOD and STONE, and has been supposed heretofore to have settled this question. I see no reason now to disturb it, but entirely yield my assent to that case. They held that the first blow, or a sudden affray, did not palliate the offense under the act; for if it did, the statute would be of little avail. Almost all such maimings take place, not after lying in wait, and with deliberate intent, but in sudden encounters. The very object of the Legislature was to suppress this barbarous mode of fighting. If, therefore, a maim is perpetrated, the enormity of the act itself and the impossibility almost that it should not be done with the intent to perpetrate it creates the presumption that the offender did the act on purpose and with intent to maim. This presumption arises out of the fact, and needs no further proof to create it. But it may be rebutted by the defendant. This can be done by showing that he did it *in extremis,* in the exercise of the natural right, and in the instinctive effort to defend himself, and as the only means of doing so; or that it was accidental, or not within the probable consequences of what he did; as if the ear were severed by falling against a sharp instrument, or the like. But certainly the burthen of removing the inferences thus morally probable is thrown on the accused. For everything is to be taken against a man who voluntarily maims another.

It is insisted, however, that although the act uses the words "on purpose," something more is meant than merely a voluntary act; and that it requires "malice aforethought," because subsequently, in the same

section, it says, "with intent to murder or maim." An argument is likewise drawn from the first section, which is against cutting out the tongue, or putting out an eye with malice aforethought, and (427) makes it felony for the second offense. It is said that as the second section relates to other members—namely, the nose, lip, ear, etc., (not including the tongue or eye), a maiming of these last with malice aforethought is not punishable at all under the statute, or not more grievously than if not done with malice aforethought, but only on purpose; and that this is unreasonable. I answer as to the difference between the two sections that the Legislature intended it.. If they had not, they would have used the same words, denoting the disposition in both. But in the first they make maiming of particular members with malice a felony, and in the next maiming other members "on purpose" an aggravated misdemeanor. The difference of phraseology in the same statute in reference to different acts evinces a corresponding difference in the sense. If the second section meant malice aforethought, why does it not say "malice aforethought?" This observation satisfies me of the intention of the Legislature. I have no right to enquire further why they did not also make a malicious maiming of the nose a felony, or punish it more severely than a maiming of the nose on purpose. I must take the act as it is. But I suppose the Legislature did not intend to affix to the maiming of any of the members mentioned in the second section, with whatever disposition effected, a greater punishment than there specified. That was thought a sufficient protection of them; or, as the offense was almost always committed in affrays on the sudden, some regard might have been had to the excitement of passion, under which the perpetrator labored.

The other objection, grounded on the words, " with intent to murder," has embarrassed me more. But, I think, they also are susceptible of an explanation which will make them harmonize with the rest of the clause. These words were probably introduced for the purpose of obviating the doubts raised in Coke & Woodburne's case (4 Bl. Com., (428) 207) upon the Coventry Act. I do not think they ought to have any other effect than to prevent a party from saying he did not maim with intent to maim, but with intent to commit the higher offense of murder; and if the maiming take place without the design of committing that higher offense, then the disposition essential to the crime of murder, is not to be required to enter into the inferior offense. The maiming forbidden by this section is that done "on purpose," with intent to murder or maim. The intent to murder can only exist where the party is actuated with malice *prepense*. But if that exist, it includes "on purpose"; if the defendant maimed with intent to murder, he maimed on purpose. So far, therefore, the act is consistent, and certainly, when the

intent laid in the indictment is to murder, the act must be proved to have been done with malice *prepense.* But I perceive no reason, when the intent to do another act—namely, to maim, in which malice *prepense* in a legal sense is not a constituent principle is charged, to say that it also must be done with malice, when the statute comes short of it and declares the act a crime, if done on purpose. To maim with intent to murder is to be actuated by malice; to maim with intent to maim, is to do it on purpose—voluntarily. This last species of crime is complete, if perpetrated wittingly and willingly without accident, or without pressing necessity. But even if the argument for the defendant be allowed so far as to make malice a necessary ingredient of each criminal act forbidden in either section, it may well be asked what is malice in reference to this subject? Does it mean an actual, express, or preconceived disposition to do his adversary the particular injury inflicted? I suppose not. But it is used in that enlarged and legal sense, which imports the intent or disposition at the moment to do without lawful authority and without necessity that which the law forbids. And how
(429) does an act done on purpose and without the pressure of necessity differ from that? To me it seems that if it be done on purpose, it is done with malice, so far as relates to this matter, although it might not be under such circumstances as would constitute murder; and that malice *prepense,* technically speaking, need not be shown, except when the maim is laid to be with intent to murder. An act of such cruel vengeance, by the selecting, as it were, a particular member for mutilation, imports a bad heart, and some degree of deliberation, though the incitement arise in actual combat. Such was Lord Coke's opinion upon the maiming statute of 5 Henry IV, ch. 5. That statute declares that "offenders who cut out the tongue, or put out the eye of any, and it be duly proved and found that such deed was done of malice *prepense,* shall incur the pain of felony." In commenting on it, Lord Coke says if the act be done voluntarily and of set purpose, however sudden the occasion, it is within the statute. 3 Inst., 62. The correctness of this exposition is strongly to be inferred from the provision of statute 37, Henry VIII, ch. 6, which are that if any person maliciously, wilfully, and unlawfully, cut off the ear of another otherwise than by sudden affray, etc. This clearly shows that the "sudden affray" would have been within the previous words, descriptive of the intent; and hence it became necessary expressly to except it.

I therefore think the judgment below right.

HALL, J. The offenses of wounding and maiming, enumerated in the act of 1754 (Rev., ch. 56), were, "unlawful cutting out the tongue, putting out an eye, slitting the nose, biting or cutting off a nose or lip,

or disabling any limb or member; to maim and disfigure," and any person who committed on purpose either of those offenses was declared to be a felon.

By the act of 1791 (Rev., ch. 339), under which the defendant is indicted, it is declared that "if any person shall of malice aforethought unlawfully cut out or disable the tongue, or put out an (430) eye, with intent to murder, maim or disfigure, the person so offending shall for the first offense stand in the pillory, and for the second offense be declared guilty of a felony without benefit of clergy." The second section of the same act declares that "if any person shall on purpose unlawfully cut or slit the nose, bite or cut off a nose or lip, or cut off an ear, or disable any limb or member with intent to murder, maim, or disfigure, shall be imprisoned six months and fined at the discretion of the Court."

If I might be permitted to risk a conjecture as to the reason that induced the Legislature to repeal the Act of 1754, it would be this: That that act placed all the offenses therein enumerated on the same footing. It punished the perpetrators of any of them, provided they committed the act on purpose; that is, as I understand the import of the term, wittingly, knowingly, intentionally, designedly at the moment of doing it, but not with malice aforethought. And I think this conjecture will appear to be the better founded when the enactments of 1791 are examined. That act declares that some of the offenses must be committed with malice aforethought, such as cutting out or disabling the tongue. That others enumerated in the second clause may be committed, if done on purpose, but without malice aforethought, such as biting off an ear, as is charged upon the defendant in the present indictment. I am consequently of opinion that judgment should be rendered for the State.

PER CURIAM. No Error.

Cited: *S. v. Girkin,* 23 N. C., 122.

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(431)

THE STATE v. ELIJAH W. KIMBROUGH.

FROM WAKE.

1. Secondary evidence of papers in the possession of a party to a cause is admitted, after notice to produce the originals, not because the originals are not produced, but because it is the best evidence in the power of the adverse party.
2. This principle extends to criminal as well as civil cases; and the rule that no man is bound to criminate himself only protects the accused in the possession of the originals, and prevents him from being compelled to produce them. If, after notice, he objects to their production, the State has a right to prove their contents.

3. A notice to produce on a trial to be had "this day" is not confined to a trial on that day, but extends to a trial at any subsequent term.
4. Whether persons who have an interest in property expectant upon the life-estate of another are competent witnesses for the prosecution in a capital charge against the tenant for life. Qu.?
5. But if their interest does not exclude them, it may, however remote and contingent, whether legal or equitable, be assigned or released, so as to render them competent.
6. A judge may, in his discretion, adjourn a capital trial over until the next day without the consent and against the will of the prisoner.
7. In the record of an indictment it is proper to state it as taken "at a Superior Court of law," and not "at a Superior Court of Law and Equity."
8. In a record which states that "at a Superior Court begun, etc., present the Hon. A. B., Judge," it will be intended that the judge was present in his official character.
9. The manner in which inferior Courts exercise their powers must appear upon the record of their proceedings—no intendment is made to support their acts—but Superior Courts are supposed to do everything in the prescribed manner and form. Therefore, where it appeared on this record of the Superior Court, that a grand jury was empaneled, but it was not stated that they were sworn, upon a motion in arrest of judgment made in this Court, it was held sufficient.

The record certified in this Court was as follows:

"Be it remembered that heretofore—to wit, at a Superior Court of Law, begun and held for the county of Wake, at, etc., on the first Monday after the fourth Monday of September, 1829; present, the (432) Honorable WILLIE P. MANGUM, Judge; W. R. H., sheriff, and returns the *venire facias* to him directed, endorsed, etc. Upon balloting, the following persons were drawn to serve as jurors—to wit: William Peace, foreman, etc.

"A bill of indictment was preferred before our said grand jury against Elijah W. Kimbrough, which is in the following words and figures—to wit:

"The jurors for the State, upon their oath, present that Elijah W. Kimbrough, late, etc., not having the fear, etc., but being moved, etc., on, etc., in and upon one John Davis, in the peace, etc., felonously, wilfully, and of his malice aforethought, did make an assault, and that the said E. W. K., a certain rope about the neck of the said J. D., then and there felonously and wilfully and with malice aforethought, did fix, tie and fasten, and that the said E. W. K., with the rope aforesaid the said J. D. then and there felonously and wilfully and of his malice aforethought, did drag, pull, choke strangle, and dislocate the neck; of which said dragging, pulling, choking, strangling and dislocation of the neck, he, the said J. D., then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said E. W. K., in, etc., the said J. D. in manner and form aforesaid, felonously and wilfully, and of his malice aforethought, did kill and murder, against the peace etc.

"And the jurors aforesaid, upon their oath aforesaid, do further present that the said E. W. K., with divers other persons, etc., afterwards, to wit, etc., not having the fear, etc., in and upon the said J. D. in the peace, etc., felon-

ously, wilfully, and of their malice aforethought, did make an assault, and that the said E. W. K., a certain rope about the neck of the said J. D. then and there felonously, wilfully, and of his malice aforethought, did fix, tie and fasten; and that the said E. W. K., by means of the said rope, the said J. D. then and there felonously, wilfully, and of his malice aforethought, did drag, pull, choke and strangle; and that the said E. W. K., with a certain drawn dagger, being part of a walking cane, etc., which he, the said E. W. K., in his right hand then and there had and held, the said J. D. in and upon the forepart of the belly and divers other parts of the body of the said J. D. then and there felonously, wilfully, and of his malice aforethought, did strike, thrust and penetrate, giving to the said J. D. then and there, with the dagger aforesaid, in and upon the aforesaid forepart of the belly and divers other parts of the body of the said J. D. several mortal wounds of the breadth of one inch, and of the depth of six inches, as well of which pulling, dragging, choking and strangling, as also of the striking, thrusting and penetrating, etc., he, the said J. D., from, etc., until, etc., did lan- (433) guish, etc., on which, etc., the said J. D., in, etc., of the pulling, dragging, choking and strangling, as well as of the mortal wounds, inflicted as aforesaid, died; and that divers other persons, etc. And so the jurors, etc., do further say that the said E. W. K., and divers other persons the said J. D. then and there in manner and form last aforesaid, felonously, wilfully, and of their malice aforethought, did kill and murder, against the peace, etc."

"At the autumn term aforesaid of our said Court the foregoing bill of indictment was returned into open Court, endorsed, 'A true bill, Wm. Peace, foreman.'"

The record then set forth the arraignment of the prisoner and his plea of not guilty; the continuance of the cause, the opening of the ensuing term; "present, the Honorable JAMES MARTIN, J.," and the impaneling of a jury; that at a quarter past 8, p. m., his Honor suggested, as the examination of the testimony could not be closed that night, the propriety of an adjournment; that the Attorney-General and the counsel for the prisoner not being able to agree upon the time of an adjournment, the latter objected and insisted that the trial should then proceed, but that his Honor, notwithstanding the objection of the prisoner, adjourned the trial until the next day.

From the case attached to the record it appeared that two witnesses, Adolphus Davis and Ezra Gill, were offered by the Attorney-General and objected to by the counsel for the prisoner, who, to sustain their objection, proved that Davis was a son of the deceased, and that Gill had married one of his daughters; that by a decree of the Supreme Court made in a cause wherein the prisoner was plaintiff and the deceased and his wife defendants, *Kimbrough v. Davis*, 16 N. C., 71, certain slaves were settled upon the prisoner for life, with a remainder, in case the prisoner should die without issue, to the children of the deceased; and further, that the prisoner was an unmarried man. To obviate this objection, the witnesses executed and delivered to the Clerk of the court, for the benefit of the other children of the deceased, a deed, whereby "in consideration of the love and affection which we have (434)

and bear unto the said, etc. (naming the other children), and for the further consideration of the sum of ten dollars, to us in hand paid, we have released, conveyed, assigned, and quit claimed all our interest which we now have, or may upon the happening of the contingency set forth in the said decree hereafter have, in and to" the negroes to the said children.

The counsel for the prisoner still objected that the witnesses were incompetent by reason of their interest, but his Honor, holding that the witnesses had either divested themselves of all interest in the event, or that they had done all in their power to divest themselves, overruled the objection, and the witnesses were examined. One of the witnesses for the prosecution, in the course of his examination, stated that he met a negro after night and about the time the homicide was supposed to be committed. The counsel for the prisoner proposed to examine him as to the declarations of the negro made at that time. The Attorney-General objected to the question, and his Honor sustained the objection, because the declarations were apparently no part of the *res gestae.*

The Attorney-General then proved that the prisoner was in possession of sundry papers, and had been served with the following notice:

Wednesday Morning, 7 Oct., 1829.

You are notified to produce on your trial this day the following papers (describing them) or I shall give parol evidence of their contents.

R. M. S., *Attorney General.*

Secondary evidence of the contents of the papers mentioned in the notice was offered by the Attorney-General. The counsel for the prisoner objected to the sufficiency of the notice, because the notice was to produce the papers on 7 October, 1829, and not generally at the trial; and contended that it was good only for the trial which was contemplated at the preceding term. But his Honor held the notice suffi-
(435) cient to authorize the introduction of secondary evidence, if the prisoner declined producing the originals. The counsel for the prisoner then objected to the secondary evidence, contending that as the prisoner was not obliged to furnish evidence against himself, he was not bound to produce the papers, and as the evidence offered was not the best, while the originals were in existence, it was not admissible. But his Honor overruled the objection, and admitted the evidence.

The prisoner was convicted, and judgment of death being pronounced and execution awarded, the prisoner appealed.

Seawell & Badger, with whom was *Devereux,* for prisoner.

The Attorney-General argued in support of the judgment of the Superior Court.

HENDERSON, C. J. It is contended in the very able argument for the defendant that secondary evidence such as was received in this case, although admissible in civil, is inadmissible in criminal cases, because its admission impugns the principle of the common law, sanctioned by our bill of rights, that no man shall be compelled to give evidence against himself.

We believe that the whole of the argument is built upon mistaken grounds. Secondary evidence, such as was received in this case, is admitted, not because the adverse party, who is shown to be in the possession of the primary evidence, refuses to produce it, but because it is the best evidence in the possession of the prosecutor. It is the same thing to him as if the primary evidence was actually destroyed. It is placed beyond his control, and it seems to be admitted that if it was actually destroyed, such evidence is admissible. We cannot perceive a difference between the two cases; they are both equally (436) correct; both founded on the same principle—that is, that the law requires not impossibilities, and deems that which cannot rightfully be done and which it would punish if done, the same as if it could not be done. The principle of the common law sanctioned by the bill of rights, so far, therefore, from operating against the admission of the evidence, operates in its favor. It protects the defendant in the possession of the primary evidence, and thereby places it in the same situation as to the power which the State has of compelling its production, as if it were actually destroyed. The object of the notice is not to compel the party to produce the paper; for no such power is assumed, either directly or indirectly, by placing him under a disadvantage if he does not produce it. Its object is to enable the prisoner to protect himself against the falsity of the secondary evidence, which the law presumes may be false, as its very name imports. The copyist may make a mistake in transcribing; he may be corrupt; so may the witnesses who give evidence of the contents. It is but reasonable, therefore, that the accused should have an opportunity of correcting a falsity in the evidence, if one should exist. Notice is given for that purpose, and that alone; and whatever may be its form in common practice, it is in substance a notification that the secondary evidence will be offered. Neither can we perceive a difference where the primary evidence is the *corpus delicti,* to use the counsel's own phrase, and where it is only evidence. Thus we think the point stands upon principle.

Upon authority it seems to be well settled that there is no difference in civil and criminal cases. 1 Stark Ev., 358. In Rex v. Watson (2 T. R., 199), Buller's opinion is very clear and explicit. (McNally, 236, 239; People v. Holbrook, 13 Johns., 90; United States v. Britton, 2 Mason, 464, 468.) Nor does the clause in the bill of rights

detract from the weight of those authorities; for that is but in
(437) affirmance of the common law. The *dictum* of Lord Eldon, in the case of Parkhurst v. Lowten (2 Swanston, 213),* is supposed to be in conflict with these authorities, if they should establish the admissibility of the evidence in this case. Everything which Lord Eldon says deserves consideration, even the droppings of his mind as he holds communion with himself in arriving at his conclusions; for what then falls from him seems to be of that character, rather than arguments addressed to the understandings of others. If his Lordship means that it yet remains to be decided in a Court of Law that such evidence is admissible in a criminal case where the defendant has possession of the deed, or, rather, that it does not subject him to have the contents proven, as if it were lost, I think very clearly his Lordship is mistaken; and I refer to the authorities before cited, and many others to be found in the books. But as Lord Eldon must have known of these decisions, I think that he was speaking of a Court of Equity, in which he was then sitting. How he would decide such a case there, he very plainly tells us in the next paragraph. This is not very doubtful, if the
(438) passage is read affirmatively, as it is printed. But if read interrogatively, as I think it should be, there cannot be a doubt. The latter reading may be effected by transposing two words—it and is. It will then read, "is it a question," and in confirmation of this reading, the sentence is closed with the mark of interrogation. But be it as it may, his opinion cannot overrule so many, and so great authorities supported, too, by reason and good sense.

The next objection is to the notice to produce the papers, as it is called. We think that in substance it is sufficient. No form is required. Anything will do coming from a proper source which apprizes the prisoner that secondary evidence will be offered on the trial. Here the prisoner could not be misled by the notice pointing to the trial to be had in the then current term. He was fully apprized thereby that when-

*The following is an exact copy of the *dictum* referred to, as it is printed in the American edition of Swanston, published in 1826:

"Though in ordinary cases, to know what has passed, the deeds must be produced, yet if a man declines to produce the deeds as convicting him of simony, I should be glad to know whether this Court would not receive secondary evidence? If the deed is in the hands of a person who objects to the production, as convicting him of a crime, whether against a party so objecting, secondary evidence of the contents may not be produced, as in the case of a lost deed, is a question, so far as I know, yet undecided. It is clear that, in a case in which the defendant says that he will not disclose the contents of a deed in his possession, because, if he does, he shall prove himself guilty of an offence, the contents of that deed may not be proved by information? If a man chooses to place a deed in his possession in the same condition as if it were lost, it is a question whether the contents of that deed may not be proved in the usual mode by which proof is given of the contents of a lost deed?"

ever the trial should take place, either then or at the next, or any ensuing term, the evidence would be offered.

The next objection is that the witnesses, Davis and Gill, were interested, and should have been rejected.

It is admitted that where property only is at stake, where that only is the subject of controversy, it is the presumption of law that interest in the event will with most men overcome the love of truth. The law, therefore, acting upon that presumption, excludes all who are so interested from being witnesses, as general rules are formed for majorities. But we are unwilling to acknowledge that where life is at stake, where the injury inflicted by the perjury is a murder, the most cold-blooded and deliberate which can be imagined, that the law makes any such presumption. Although there are beings on whom interest (I mean pecuniary interest) would thus operate, they are rare exceptions to the nature of man, and general rules are not predicated on exceptions. They are rather monsters than men. But we are glad that we are not left to the necessity of deciding this point, for we are all clearly of opinion that the witnesses were competent when sworn, the (439) release or assignment having destroyed or transferred their interest, if they had any. For the argument is entirely incomprehensible to us, how an interest so remote and contingent, so much of a bare possibility, so much of a nothing, if I may so express it, that it cannot, by reason thereof, be released or assigned, should disqualify a witness. It is either an interest in property recognized by law, or it is not. If it is of the former kind, it may be assigned; if of the latter, it does not disqualify. As to the objection that Gill's assignment being voluntary—that is, without consideration—does not bind or pass the property; it binds him, and what effect it may have as to his wife, if she survives him, is immaterial, for it is his interest, and not her's, that we are enquiring into. Whether the interest was legal or equitable, is unimportant, for in either case the Court which could declare that the interest disqualified, whether it was legal or equitable, was competent to declare that it was annulled or transferred. The case supposed by the counsel does not arise of a mere equity being transferred, leaving the legal estate in the witness, as whatever interest the witness had, whether equitable or legal, passed; as the instrument professed to pass the whole of it, and its form is sufficient for that purpose.

As to the declarations of the negro, I can only repeat what I said in *S. v. Scott,* 5 N. C., 24.

The next objection is that the Court adjourned in the evening over to the next morning (keeping the jury together) without the prisoner's consent, and contrary to the declared wishes of his counsel. This is a mere matter of discretion in the Court, convenient and necessary for

the exercise of its proper functions, in which the prisoner's counsel has nothing to do. It deprives him of no right, as in the case of the Kinlocks (Foster, 16); if it did, his consent would be necessary.

The motion, therefore, for a new trial must be overruled.

(440) Various objections are made upon the record in arrest of judgment. It is objected, first, that the Court before which the indictment is taken is stated in the record to be a Superior Court of Law, and not a Superior Court of Law and Equity, as directed by the act of 1782. (Rev., ch. 177.) The counsel himself has obviated the objection by pointing to the act of 1718 (Rev., ch. 278, sec. 4), which declares that such Courts shall in all law proceedings be styled the Superior Court of Law, and in all equity proceedings, the Superior Court of Equity. And this is a law proceeding.

It is next objected that, although it appears in the record of the opening of the Court that the Honorable WILLIE P. MANGUM, Judge, was present, thus: "Present the Hon. WILLIE P. MANGUM," yet it does not appear that the Court was held by him; that he might be present as a mere spectator. It requires no intendment to understand that he was present in his official character. The record is made by the direction and under the superintendence of the judge, and it is impossible to conceive why he should direct that entry to be made, unless it was to record his official presence. It does not appear that any other judge was present, and we officially know who are the judges of the Superior Courts, and we know him to be one of them. This objection was taken and overruled in *S. v. Lewis,* 10 N. C., 410.

The next objection is that it nowhere appears upon the record that the grand jurors were sworn, although it is stated that the grand jurors upon their oath present. This is the most serious objection taken to the record. If it were the record of the proceedings of an inferior Court, from authority it seems that it would be fatal. For no presumption is made in favor of the manner and form in which such Courts do their business, or

(441) exercise their jurisdiction. It must appear upon the record how and in what way they exercised their powers. But it is said that this rule is confined to the proceedings in inferior Courts, and that the rule as to Superior Courts is that unless the contrary expressly appear, it shall be intended that they do everything in the manner and form prescribed by law. When it appears, therefore that they have taken an indictment, it shall be intended that it was duly taken; that it was taken by the requisite number of good and lawful men, duly drawn, sworn, and charged; in other words, that everything was done correctly as far as concerns form and manner. This objection was taken and seriously urged at the bar in *S. v. Lewis, supra.* It was considered by the Court and overruled, although not noticed in the opinion. In this

case, therefore, it must be taken that the grand jury were duly sworn; also, that William Peace, who is marked as foreman of the grand jury, was duly appointed, and that "Wm. Peace," who signed the bill as foreman, is the same William Peace who is so appointed. For the Court receives the indictment with that endorsement as an indictment, and files it with its records. What is said upon the subject of superior and inferior Courts and the distinctions taken are fully supported by the cases cited by the Attorney-General. But the most prominent, and that referred to by most authors who speak on the subject, is Keeble, 639, and certainly the rule, so far as regards superior Courts, is warranted by good sense, for it is but a rational presumption that Courts of superior jurisdiction conform to the manner of doing business prescribed by law, until the contrary appears.

As to the objection that in the record it is called autumn term, it is true there is none such known in the law. But where "autumn term" occurs there was no necessity of naming any term, for the style and caption of the proceedings, the record of the opening of the Court show, when, where, and before whom the Court was held, and (442) the taking of the indictment is a proceeding of that term.

It is lastly urged that upon a critical construction of the indictment, it does not appear that Kimbrough dragged, pulled and choked Davis, than that Davis dragged, pulled and choked Kimbrough. However this may be upon the first count, I think no such objection as this appears on the second. In that count it is charged that Kimbrough made an assault upon Davis, and that Kimbrough placed a rope around Davis' neck, and that the said Kimbrough, by means of the said rope the said John Davis did choke and strangle; and that the said Kimbrough, with a dagger, which he then in his hand held, the said John Davis, in and upon the belly of the said John Davis did thrust and penetrate, giving to him, the said John Davis, with the said dagger in and upon the belly of him, the said John Davis, a mortal wound, of which the said John Davis died on the next day; with a conclusion that he, the said Kimbrough, the said John Davis did kill and murder. Human ingenuity cannot make out from this that it stands indifferent whether Kimbrough or Davis was the actor in all and every act necessary to constitute murder; or which was the agent and which the sufferer, not only in the close of the drama, but in each and every act which led to the catastrophe.

PER CURIAM. No Error.

Cited: *S. v. Seaborn,* 15 N. C., 308; *S. v. Calhoon,* 18 N. C., 376; *S. v. Miller, Ib.,* 510; *S. v. Christmas,* 20 N. C., 548; *S. v. Lytle,* 27 N. C., 62; *S. v. King, Ib.,* 205; *S. v. Ledford,* 28 N. C., 9; *S. v. Noblett,* 47 N. C., 430; *S. v. Jim,* 48 N. C., 352; *Howell v. Ray,* 83 N. C. 560; *Ivey v. Cotton Mills,* 143 N. C., 198.

(443)

THE STATE v. JOHN DOURDEN.

FROM JOHNSTON.

1. An indictment for forgery must contain an exact copy of the forged instrument. And when a bank-note had been forged by raising its amount, and the sum mentioned in its body had been erased, and never filled up again—held, that it was proper to set it out with a blank.
2. As such an instrument, from its tenor, purports to be of value, it is unnecessary to aver in the indictment that it was for a specific sum.
3. An averment of the legal validity of an instrument is never necessary in indictments for forgery, unless the instrument may, or may not, from its tenor, be of any validity—as where the forgery is by signing a name in blank, it is necessary to aver the effect of such signature.
4. The doctrine of indictments for forgery, and of the difference between the purport and the tenor of an instrument, discussed by RUFFIN, Judge.

The defendant was indicted for passing a forged bill of the State Bank of North Carolina.

The indictment contained four counts. The first and third charged the defendant with passing the bill; the second and fourth with attempting to pass it. The second count was as follows:

"And the jurors for the State, upon their oath aforesaid, do further present, that the said J. D., on, etc., with force and arms in, etc., did knowingly and felonously attempt to pass as true to, etc., a certain false, forged and counterfeited note, commonly called a bank-note, purporting to be issued by order of the President and directors, etc., which said, etc., is and was at the time of attempting to pass the said last-mentioned note of a bank within the State of, etc., the tenor of which last-mentioned note is as follows, that is to say:

* * *
* 20 *
* * *

"'The President and Directors of the State Bank of North Carolina promise to pay on demand at the Branch Bank at Salisb dollars, to J. Sneed, or bearer leigh, 2 day of May, 1823.'

"With intent to defraud the said, etc., he, the said J. D., at the time of attempting to pass the said last-mentioned note, then and there, that is to say, on, etc., in, etc., well knowing the last-mentioned note to be false, forged and counterfeited, against, etc.

The fourth count was exactly like the second, except that in the tenor of the note the words Salisbury and Raleigh were written at
(444) full length, instead of the abbreviations above set forth—viz., "Salisb." and "leigh."

On the trial upon an inspection of the note, it turned out that the forgery consisted in altering a genuine one-dollar bill, which was effected by erasing the figure 1 at the top of the bill near the left corner, and placing in its stead the figures 20. The corresponding figures on the right side of the note were entirely torn off. The word one in its body was erased, and the erasure had taken off parts of the words Salisbury

and Raleigh, so as to make them Salisb. and leigh, and the word dollar was altered by having the letter s added to it, so as to make it read dollars.

The counsel of the defendant objected to the bill's being read to the jury, because in setting out the tenor the indictment contained a verbatim copy of the note, without inserting before the word "dollars" the word "twenty," so as to designate the number of dollars for which the note purported to be. MARTIN, J., overruled the objection, and the defendant was acquitted upon the first and third counts, and convicted upon the second and fourth.

Afterwards his Honor arrested the judgment, because the indictment did not contain an averment that the bank note purported to be of any value; from which judgment Mr. Attorney-General, on behalf of the State, appealed.

The Attorney-General, for the State.
Seawell, for the defendant.

RUFFIN, J. Had the objection been taken to the evidence that the note produced varied from that set out in the fourth count, there must have been a new trial. For, in forgery, the tenor of the instrument must be given in the indictment, and if that produced do not correspond with it, the prosecution must fail. Here the fourth count states the words "Salisbury" and "Raleigh" in full. Whereas, on the note itself they appear as "Salisb." and "leigh," which are different (445) words. No objection, however, of variance was taken to either count. Indeed, none such could be made to the second count, for an exact transcript of the note is set out in that.

The objection actually taken is that in setting out the tenor, the indictment contains a *verbatim* copy of the note, without having inserted before "dollars" the word "twenty," so as to designate the number of dollars for which the note imports to be; and that the note when produced is in law for twenty dollars, and therefore varies from the count. I think this objection untenable. Tenor does not mean that in effect or in law it is a note for twenty dollars, but that the note is in those very words and figures. It imports a copy, and when the indictment charges the passing a forged note of a certain tenor, the note set out in the indictment must be a copy of the instrument, such as it was when the prisoner passed it, with all its defects, omissions and additions, as then existing. For that was the instrument he passed, and the Court is to judge whether in that state it be one of the instruments embraced by the statute. I think, therefore, the method adopted here was the only proper one, and that if "twenty," or any other word, had been in-

serted in the tenor, it would have been fatal, though the sense and legal meaning of the note, without the word, should be the same with that set out with the word, as the tenor in the indictment. On this point I concur with the judge below.

The Court below, however, arrested the judgment after conviction on the second and fourth counts for want of a specific averment in those counts, that the notes set forth in them were bank notes for a certain sum, or purported to be for a certain number of dollars. This position is different from the former in this: The first assumes that a note for ————dollars must set forth in its tenor as being for a certain number of dollars; the latter that the tenor of such a note must
(446) be truly given, so as to make it on the record read———— dollars. Yet the indictment must, by a distinct averment, allege that the note thus spread on the record is a note or purports to be a note for a specific sum of money.

Very clearly, the indictment must charge the forgery of such an instrument as is included in the statute. In this case it must appear to be a bank note; which *ex vi termini* means a note for a certain sum. This is the reason why the tenor must be stated. For the construction of the statute and of the forged instrument, its obligation and value, or, rather, the sum that may be recovered on it, are all matters of law to be decided by the Court. If the instrument be perfect in its structure, it can never be deemed necessary by anybody to do more in the indictment than give the tenor. From that, everything material, the nature of the instrument, and the sum which it obliged one to pay, or discharged another from paying, fully appears. But it seems to be thought that if the instrument be not complete in all its parts, according to the usual form of such instruments, further averments are necessary to show its meaning, and the extent of its obligation as being its purport. This is true to a certain extent. It is true of such instruments as may or may not be of legal validity or meaning, according to the intent of the party, that they should or should not be so understood; but it is no further true. An averment cannot supply a defect in the instrument, which no intent of the party could make to mean a different thing from what it imports in itself to be; nor, where the instrument thus in itself imports to be one thing, can the intent of the party make it purport to be another. The purport of a writing is that which it appears on its face to be. The use of the term becomes proper in an indictment, because a forgery cannot be said to be in fact the thing it purports to be. We cannot with propriety say one forged a bond or a bank note. If it be a forgery,
(447) it is not a bank note or a bond. It only professes to be so. Therefore, it is most correct to say that the accused forged a certain paper writing, "purporting to be a bank note or a bill." Either way

has been held sufficient in England, because in their statutes, the offense is often described by the words "forge a bank note, or bill," or the like. *Rex v. Birch,* 1 Leach, 79; 2 Bl., 790. It may be doubted whether it would be safe to lay it here otherwise than as "purporting to be," since the act of 1819 says, "forge a bill or note in imitation of, or purporting to be a bill or note." It is never, therefore, necessary to set out the meaning of an instrument having a meaning in itself, under the term purport. It is only necessary, if at all, to bring the instrument within the general description of the statute, as "purporting to be a bank note, deed, receipt for money," and the like. All beyond that, which must appear to the Court, does appear from the tenor. If the purport means, as Mr. Justice Buller says it does, "the substance of an instrument, as it appears on the face of it," it can be gathered from the contents alone. What more, then, can the purport inform the Court of than the tenor does? From the tenor, the purport is seen as perfectly as if the indictment were encumbered and complicated by a formal statement that the purport is one thing or another. The general doctrine on this point is fully stated in the opinion of the twelve judges, delivered by Judge Buller, in Gilchrist's case. 2 Leach, 657. That case fully shows the danger of setting out anything else under this word than the general description of the instrument. For there a variance between the purport as expressed at large in the indictment and the purport as collected by the Court from the tenor, was fatal. The indictment charged the forgery of a bill of exchange purporting to be directed to G. K., W. M. & T. H., by the name and description of Messrs. R. M. & H., and the tenor showed a bill directed to Messrs. R. M. & H. The judgment was arrested, for G. K.'s name did not appear on the bill, (448) and therefore it did not purport to be directed to him, though he was in fact one of the firm of R. M. & H., to which the bill was directed. And the judges go so far as to say that there had been no determination, that the purport and tenor should both be set out, and intimate that they need not. If here there had been an averment that the forgery "purported to be a bank note for twenty dollars," what consequence would follow? If it do not appear upon its face, in other words, from the tenor set out in the indictment, to be for that sum, the indictment is repugnant and bad. If it doth so appear from the tenor, then it is already sufficiently stated in the indictment.

It is true, if the instrument be not apparently within the act, or, rather, if it be not apparently any legal instrument whatever, there must be such averments as will make it one and bring it within the statute. Hunter's case, Leach, 624, is an instance of this. The indictment charged that the prisoner "forged a certain receipt for money—viz., twenty-five pounds, mentioned and contained in a certain paper

writing, called a navy bill, which said false and forged receipt for money is as follows: That is to say, William Thornton," "William Hunter." It was held that the indictment must aver such other facts as would enable the Court to see that the instrument was in law a receipt for money; as that "those words were intended to signify that those persons had received the money."

The ground of that decision obviously is that the mere names of the persons do not *per se* constitute a receipt, according to the intent with which, if genuine, they had been placed there; or, in case of a forgery, as they will purport to be a receipt, according to the intent with which the prisoner meant others to understand, they had been placed there, by the persons whose names they are, that intent must be averred.
(449) Such an averment is necessary that the signification of words, unmeaning in themselves, may be ascertained to the Court. If it were not so, the matter of law, whether it was a receipt, would be tried exclusively by the jury; whereas, that is the province of the Court, after the intent is found.

But that can have no application to the case before us. Here the note is apparently a bank note, and therefore within the letter of the act. There is nothing equivocal on its face, which makes it one thing or another, according to the intent with which it was fabricated or passed. It would not purport the less to be a bank note, issued by the State Bank of North Carolina, because the prisoner said it was issued by the Bank of New Bern; nor the less purport to be for twenty dollars, because he passed it for five. If there had been an averment that it purported to be, or was intended to be, a bank note for "twenty" dollars, the case would have been the same as it now is, unless to the Court it appeared by the tenor, not to be a note for that sum, and if the jury had so found it, still the objection of repugnancy would have existed, unless the finding accorded with the inference of law from the face of the note itself, as may be fully seen from Elliott's case, hereafter cited.

The enquiry, then, comes down at last to this. In this a bank note, as stated in either count, for any what sum? If the note, considering it as an original forgery out and out, contain no obligation to pay money; or, considering it as a forgery committed by altering a genuine note, if it be so modified or cancelled as to leave nothing whereby, if genuine, the bank could be compelled to pay any sum; in either case, it would not be a bank note, and it would be mere folly to receive it, since it does not purport to oblige the bank to redeem it. Such a case would not be within the statute; but I should be sorry to be compelled by the rules of law, so to consider this instrument. It would be opening the door to great and dangerous frauds and forgeries.

This instrument is, in all respects, in the usual form of a bank note,

except that in its body it has not in letters the certain sum for which it was given. It purports to be a promise by the presi- (450) dent and directors of the State Bank of North Carolina to pay on demand to J. Sneed, or bearer, ——— dollars. In this shape, without more, I should say it was not a bank note, for the want of a sum expressed. But it is not necessary that the instrument forged should be an exact resemblance of one that is genuine. It is sufficient, if it be fit, *prima facie,* to pass for true. Now, although it is usual and proper, to insert the sum in the body of the note, in Roman capitals, yet the amount of the note does not appear in that way alone, nor does its obligation depend solely on the word designating its amount, having been there inserted, or being there remaining. It is likewise proper and usual to place the denomination in one or more other places on the bill. This is done merely for ornament, or to render counterfeiting more difficult, as if they were vignettes in the margin; but it is done with figures in the body of the bill, and usually at one or each corner, for the purpose of designating the value of the bill. As long as the denomination appears in either of those places, it is a note of the bank, and for the sum specified by the words or figures, they not disagreeing.

We are obliged judicially to take notice of the common form of bank notes; for the Court is to determine whether the instrument is a bank note. And the whole circulating medium of the country would be discredited and become worthless, if this Court were to say that a bank was discharged from payment of its notes, if a figure or word be obliterated in use, when enough still remains to show its true amount. In a suit against the bank, the Court would tell the jury that it was a note for the sum thus appearing on its face by letters, though the figures were worn off, or by the figures, though the word was illegible. It need not be declared on as a lost note; for it remains a note for the money mentioned in any way upon its face. We know (451) that, in fact, the banks pay such notes. They do not pay them from courtesy. I should regret to leave them on that footing. They pay because they are lawfully their notes, and they are obliged to pay them. Here, as I have said, the note promises to pay ——— dollars. The kind of coin thus appears. The quantity alone remains to be ascertained. On the face of the note, and according to the usual form, the number of pieces is designated by the figures "20." From this, I think, as against the bank, and to all the world, this paper purports to be and is, if genuine, a bank note for "twenty dollars." Elliott's case (1 Leach, 175), is a direct authority upon this point. There it was held that although in a body of the note it was for fifty ——, without saying "pounds" or "shillings," yet the fifty pounds in the margin

removed every doubt, and showed the note to be for fifty pounds. And this was on a motion in arrest of udgment, upon the objection that the indictment was repugnant, as the tenor was of a ncte for fifty ——— and the averment alleged a note which purported to be for fifty pounds. This shows that it is not only the province of the Court to judge of the nature of the instrument therein set forth, but also that the instrument was, in law, a note for fifty pounds. So I think here the note is for twenty dollars.

If it were not so held, most serious would be the impositions in paper appearing to be bank notes, and without the possibility of punishment; for we know that the banks always pay genuine notes, however much they be mutilated. And we likewise know that in order to make forgeries more deceptive, and especially to common persons, it is a common device of counterfeiters to chafe, rumple, and wear away the notes. An apparent long circulation furnishes an evidence of genuineness, particularly calculated to delude the ignorant, whose protection is chiefly designed by the legislature.

I am, therefore, of opinion that the indictment is good and sufficient, and that there must be judgment for the State on the con-
(452) viction.

PER CURIAM. Reversed, and judgment entered for the State.

Cited: *S. v. Fulford,* 61 N. C., 563.

THE STATE v. MOSES, a Slave.

FROM CRAVEN.

1. Under the act of 1796 (Rev., ch. 452), directing the conduct of judges in charges to the petit jury, it is the duty of the judge to recapitulate the testimony in such a manner as will divest it of immaterial circumstances, and so to present all the facts, on each side, that they may have their fullest legitimate operation. An unfair and partial exhibition of the testimony only can be complained of.
2. The weight of testimony is exclusively the province of the jury; but its nature, relevancy and tendency it is the duty of the judge to explain.
3. The duty imposed by the act upon the judge "to state, in a full and correct manner, the facts given in evidence," does not confine him to the words spoken by the witnesses, but authorizes him to state all the circumstances attendant upon the examination, to show how they are contradictory and how reconcilable, and thence to submit a reasonable inference which may be drawn.
4. Thus, where a witness testified that at the distance of ten paces, in a dark night, he saw the prisoner pull the trigger of a gun, and the judge informed the jury that if they believed the witness meant, that by the flash of the gun he saw the prisoner's hand upon the trigger, that

would explain the apparent contradiction—held, that the judge, by such instruction, did not trangress the limits of his duty.

5. Per RUFFIN, Judge.—If a judge, in his charge to the jury, presents only the inferences that can be drawn on one side, arrayed in solido, so as to constitute an imposing argument to the jury, without summing up on the other side, it is an evasion of the statute.

6. By the act of 1811 (Rev., ch. 809), to regulate proceedings on indictments in the Superior Courts, all defects in indictments are cured, except the omission of an averment of facts and circumstances which constitute the crime charged. Nothing need be stated of which proof is not required on the trial. Therefore, in an indictment for murder it is necessary to aver that a mortal wound was given, but the size and nature of the wound being in an indictment for murder it is necessary to aver that a mortal wound was given, but the size and nature of the wound being matters not material to the descrip- (453) tion of the offense, nor a necessary part of the evidence, its dimensions need not be stated.

7. An indictment concluding "and the jurors," omitting the word so is sufficient.

8. Where a cause is removed for trial it is the exclusive duty of the judge of the Superior Court to determine the fact whether the transcript of the record was certified under the seal of the Court, and this Court will not revise his decision.

The prisoner was indicted in the Superior Court of Jones, as follows:

"The jurors for the State upon their oath present, that Moses, a slave, etc., not having the fear, etc., but being moved and seduced, etc., on, etc., at, etc., with force and arms, at, etc., in and upon one Gabriel, a slave, etc., in the peace, etc., feloniously, wilfully, and of his malice aforethought, did make an assault, and that he, the said Moses, with a certain gun, of the value, etc., then and there charged and loaded with, etc., which gun the said Moses in both his hands, etc., to, against and upon the said Gabriel, then and there feloniously, wilfully, and of his malice aforethought, did shoot and discharge, and the said Moses, with the leaden shot aforesaid, out of the gun aforesaid, then and there, by force of the gunpowder, shot and sent forth as aforesaid, the said Gabriel, in and upon, etc., then and there, feloniously, wilfully, and of his malice aforethought, did strike, penetrate and wound, giving to the said Gabriel, then and there, with, etc., so as aforesaid shot, etc., in and upon, etc., one mortal wound of the breadth of two inches, and of the length of six inches of which said mortal wound the said Gabriel then and there instantly died. And the jurors aforesaid, upon their oath aforesaid, do say that the said Moses, the said Gabriel, in manner and form aforesaid, feloniously, wilfuly, and of his malice aforethought, did kill and murder, against, etc."

After the arraignment and plea, upon the affidavit of the prisoner, the trial was removed to CRAVEN. The following is a copy of the certificate of the clerk of JONES, upon sending a copy of the record to CRAVEN, as certified by the clerk of Craven; the seal of county of Jones being represented in the transcript from Craven by (454) a scrawl.

[L. S.]

"State of North Carolina, Jones County:

"I, R. B., clerk of the Superior Court of Jones county, hereby certify that the foregoing transcript contains true copies of the original bill of in-

dictment, capias, plea, and all other proceedings lately had in the suit in which the State is plaintiff and negro Moses defendant, as full and entire as they remain of record in said Court at Trenton. 22d October, 1829.

"R. B., Clerk."

On the trial before his Honor, Judge STRANGE, the principal witness for the prosecution deposed that on a dark night he was standing within ten steps of the prisoner, when he saw him pull the trigger and fire the gun which killed the deceased. The cross-examination of the witness was not very particular, and he did not in any way explain how he was enabled to see in the night. The witness stated that after the deceased was shot, the prisoner and himself, both being fugitive slaves, went into the woods, where the prisoner left him, the witness, and went towards the house of Juba, a slave of Mr. Stanly's, and after being absent some time, returned and said that Juba had charged him with being the murderer of the deceased. Juba was called for the prisoner, and positively denied having ever seen the prisoner during the whole time he was a fugitive, either at his own house or elsewhere. Witnesses were also called for the prisoner, who gave Juba a good character, and proved especially that he stood high in the confidence of his master. A witness from Robeson county was examined, in support of the principal witness for the prosecutor. He was impeached by another witness from the same county, who swore that before he, the last-mentioned witness, was summoned he heard the first say that he had a grudge against the prisoner, and would hang him if he could, and afterwards, as they were travelling together to Court, the

(455) conversation was repeated.

The counsel for the prisoner placed his defence upon the total want of credibility in the witnesses for the prosecution. It was argued —first, that the testimony of the principal witness was not credible from its absurdity, for how could a man in a dark night, at a distance of ten steps, see another pull the trigger of a gun. Secondly. It was urged that he was directly contradicted by Juba; and thirdly, that such feelings were proved to exist in the breast of the witness from Robeson that no confidence whatever could be placed in his testimony.

His Honor, in his charge to the jury, informed them that the credit they would give to the testimony was a matter exclusively with them, and proceeded to suggest such circumstances as, in his opinion, might be considered by them as tending to shake or support the credit of the witness for the State, and leaving it also to them to give such weight to any other circumstances which they might remember and the Judge should omit, as they thought proper.

In speaking of the first objection, the Judge said that a man might see by the flash of a gun, even in the night, and probably the darker the night the more distinctly; and if they believed from the testimony

that was the case in the present instance, and that seeing a man in the attitude of shooting, with his hand upon the trigger, and even by the flash of the gun, was substantially seeing him pull the trigger; and that if this was the fact in the particular case, then the contradiction relied upon in the testimony of the witness did not exist.

Upon the second objection, his Honor instructed the jury that in weighing the credit of the witnesses for the State and for the prisoner, the motives in each to speak truth or falsehood might and ought to be considered; and it was for them to say whether any and what influence the witness Juba's having a good character, and standing high in the estimation of his master, might have in making him (456) desirous to conceal any intercourse he might have had with a runaway slave.

Upon the third objection, the jury were instructed that one of the conversations in which the witness from Robeson was said to have acknowledged to the witness for the prisoner that he was influenced by malice against him, was after it was known to that witness that the other had been summoned for the express purpose of discrediting him, and while he was going to Court to accomplish that purpose, and the probability of such an acknowledgment under such circumstances should be considered by them in weighing the credit of the discrediting witness.

The jury returned a verdict of guilty, upon which the counsel for the prisoner obtained a rule for a new trial for misdirection, which was discharged. A motion in arrest of judgment was then made, because the word so, in the conclusion of the indictment, was improperly omitted, but the motion was overruled, and judgment of death entered up, from which the prisoner appealed.

Gaston, for the prisoner.
The Attorney-General, for the State.

RUFFIN, J.—The act of 1796 (Rev., ch. 452), "to direct the conduct of judges in charges to the *petit* jury," restrains the judge from giving an opinion, whether a fact is fully or sufficiently proved. At the same time, it imposes another duty, which is to state in a full and explicit manner, the facts given in evidence, and declare and explain the law arising thereon.

Perhaps the judge presiding at the trial will find no part of his task more difficult than that of determining how he may fulfill that part of his duty which is active, without violating that in- (457) junction of the statute which is restrictive.

The act must be so construed as to leave the two duties compatible

with each other; for neither clause must overrule the other. The full and explicit statement of the facts required from the judge cannot mean a mere repetition from his notes of the testimony, in the order in which it was delivered; that would be a vain and empty ceremony, consuming time without conveying instruction. If the judge is to say anything, and not be a mere automaton, his statement must be such as to exhibit to the jury the nature of the plaintiff's cause of action, and of the defence in point of law, the matters of fact in issue on the record, and also those in dispute between the parties upon the testimony actually given, tending to maintain on either side the main fact contained in the issue. To do this with the least prospect of affording aid to the jury, the judge is obliged to present the evidence in such a light as will divest it of all those immaterial parts, that necessarily more or less incumber every trial, and to collate the residue so as to bring it to bear with the strength of combination on the points in controversy. He is so to present each fact, that it may have its fullest legitimate operation on the conclusion sought for. And if on each side the evidence is thus exhibited it cannot but ease the labors of the jury, lead them through the convictions of their understandings to a just determination, and give certainty and dignity to the course of justice. An unfair and partial exhibition of the testimony can alone be complained of; and the apprehension of that seems to have induced the passage of the law under consideration. It is not for us to say whether that apprehension was well or ill founded; or whether the administration of the law would not be more certain, its tribunals (458) more revered, and the suitors better satisfied, if the judge were required to submit his view upon the whole case, and after the able and ingenious, but interested and partial arguments of counsel, to follow with his own calm, discreet, sensible and impartial summary of the case, including both law and fact. Such elucidations from an upright, learned, and discreet magistrate, habituated to the investigation of complicated masses of testimony, often contradictory, and often apparently so, but really reconcilable, would be of infinite utility to a conscientious jury in arriving at just conclusions—not by force of the judge's opinion, but of the reasons on which it was founded, and on which the jury would still have to pass. If this duty were imposed on the judge, it is not to be questioned, that success would oftener than it does depend on the justice of the case, rather than the ability or adroitness of the advocate. But such is certainly neither the duty, nor within the competency of our judges. I have already mentioned that it would be difficult for a judge, surrounded by all the circumstances, to determine exactly what is his duty in this respect, in law, and his own conscience. With still less certainty can a revising

Court lay down any rules *a priori*, or even apply them, after they are prescribed to cases as they arise. So much of the meaning of words depends upon their context, and of words spoken, upon the tone, emphasis, temper, and manner of the speaker, that it is utterly impossible that the whole can be transferred to paper, so as to enable an appellate tribunal to pass in general upon cases, without imminent hazard of doing injustice to the parties, and casting unmerited reproach upon the intentions of the judge and the understanding of the jury. If I were to lay down a rule as growing out of this act of Assembly, I would say that it was in general this: that the weight of the evidence is for the jury; they hold the scales for that. But the nature, relevancy, and tendency of the evidence, it is competent for the judge and his duty to explain. He is not only to recapitulate the testimony, but to show what it tends to prove, and he may recapitulate it in such order and (459) connection as to give it the effect of proving the fact sought for, if in itself it be sufficient for that purpose. Whether it be sufficient, it is the province of the jury to determine, and by this statute it is their exclusive province; and the judge cannot give his opinion in aid of theirs that it is or is not sufficient. But if he is to speak at all (and this act makes it his duty to speak), it is not to be supposed that his interposition is for the sake of increasing the doubts of the jury, or leaving them as they were; but that his discussion of the case, fair, grave, sensible, and impartial, may enable the jury better to decide upon the sufficiency of the proof, though deprived of the advantage of his opinion on that point. For a plain departure from that fairness and impartiality, it would be the duty of this Court to set aside the verdict, as much as if the judge were explicitly to declare his opinion upon the weight of the evidence. But short of a clear case, this Court cannot interpose, but must necessarily leave it to the conscience of the judge himself, upon the responsibility of his professional reputation, and official oath and character, to determine.

To apply these observations to the case before us: It is objected here that the Court below assumed the power of expressing an opinion upon the facts, or expressed such forced inferences from the testimony, as might bias the minds of the jury. The facts to which those parts of the charge apply were the credit due to several witnesses. The main fact in dispute, on which the issue was joined, was the guilt or innocence of the prisoner. This depended upon the subordinate facts of the veracity or falsehood of the tales of the witnesses. Now this last fact —of credibility, or the want of it—rested again upon other facts which tended to sap or sustain it. It is to be remarked here that the judge is to give a full and explicit statement of all the facts given in evidence. What is meant by "a fact given in evidence?" Is it (460)

confined to the very words spoken by the witnesses, or does it extend to all attendant circumstances? For instance, it is a rule that the jury may judge of the credit of a witness, not only upon testimony of his general character, but upon his own testimony; upon the probability of his story, its consistency, or self-contradiction, the witness' willingness to depose to the whole case, or his hesitation and reluctance to testify against the party calling him, his manner, and even the expression of his countenance. Indeed, these principles constitute the chief excellence of the trial by jury; because the *viva voce* examination represses at once the committing of perjuries, and facilitates their detection. Are not all these circumstances, when they happen (and happen some of them must in every case), "facts in evidence?" If they be not, the jury is to discredit a witness without any fact being in evidence upon which they can do it. If they be such facts, then the judge is to comment upon each fact, as he would on any other. For instance, if a witness, after deposing to the case of the plaintiff, positively refuse to submit to a cross-examination, the Court may not only commit him for a contempt, but may commit him before the face of the jury, and pending the trial, though the act of the Court may affect his credit in the estimation of the jury. And in charging the jury, the judge is not obliged to confine himself to delivering the abstract rule that a witness does impair his credit by refusing to give full evidence; but may, and ought also to call the attention of the jury to the specific misbehavior before their own eyes, a fact in evidence to him and them. Again, if the credit of one witness is assailed upon the ground that he is contradicted by two others, is the Court barely to inform the jury that if such contradiction exist, it may impair the credit of the first witness, but that they have the right in law to reconcile the testimony, and then act on it? Or may he not mention to them the cir-

(461) cumstances, and show how they are contradictory, or how reconcilable, leaving it to the jury to say whether in truth, the two tales do or do not stand together, according to the parts of the transaction to which they relate, or to the meaning of the witnesses? Such a course as this last seems to me to be right, useful, and lawful.

In the case before us it was argued for the prisoner that the witness' credit was destroyed, not by the contradiction of others, but by absurdity and contradiction of himself, in deposing that he saw the prisoner in the night pull the trigger of the gun. This argument was well or ill founded, as the night might be more or less dark, or the meaning of the witness was to be taken as literally or substantially expressed by his words. How dark the night was, was a fact the Court could not say was proved, but only that it was sworn to; and what was the meaning of the witness, the Court could not determine, but only that it might

have a meaning not absurd and contradictory, and leave it to the jury to say whether in truth it was light enough for the witness to see the prisoner pull the trigger; or if not, whether he meant, by "seeing him pull the trigger," that he saw his finger on the trigger at or immediately after the gun fired. If this last was his meaning, there was plainly no contradiction, and the argument fell. This is a deduction of right reason, which the Court could express. The Court did not express an opnion on the question what in fact was the meaning, but leaving that to the jury, said that as it should be found, the other consequence would follow on the one side or the other. So with respect to the other points; the Court uttered nothing but suggestions of certain views which might be taken of the testimony, without saying whether they were or were not the correct views. As an example, the judge charged the jury that they might consider the probability of the tale of the witness from Robeson, in passing on the credit of a witness for the State, whom the former was brought to discredit by prov- (462) ing his declarations of enmity to the prisoner. Now certainly when one witness on his oath deposes to a fact, and another is called to discredit him by proving declarations of ill-will, the time of making those declarations, and the person to whom they are said to have been made, are circumstances, with others, tending to show the probability or improbability that they were in fact made, and thence to impeach the credibility of the witness who affirms that they were uttered or of him who denies them. The judge has a right as against the witness who proves them, to assume the time deposed to by himself as the true time, and thence submit a reasonable inference, which may be drawn. But he cannot say it must be drawn. That is the province of the jury. In like manner, the other exceptions are readily disposed of, without my going through them in detail. The whole are regarded as mere suggestions by the judge to the jury of the construction of which the words of the witnesses are susceptible, or the inferences which could be deduced from admitted or hypothetical facts, in each case, leaving it to the jury to say what was the true construction, or the true inference. I think this is the legitimate province of a judge within the statute under consideration. If I err, the charge of the judge is an empty pageant and ceremonial mockery, which may serve for the amusement of the crowd. But instead of aiding the jury by rescuing the case from the false glosses of powerful advocates, and the misconception of the evidence as applicable to the legal controversy, will but confound the jury, and still further obscure the truth.

It is to recollected that the objection here is not that the charge of the judge as a whole was partial or unfair, and therefore that he did not give "a full and explicit statement of the facts in evidence." The

whole charge is not given to us; but detached sentences are picked out as being *per se* violations of the act of Assembly. They are
(463) not so in themselves; but they would be so, if they formed the whole charge, and so appeared to us; I mean, if the Court presented to the jury only the inferences that could be drawn on one side, arrayed *in solido,* so as to constitute an imposing argument to the jury without also summing up on the other side. For that would be a palpable evasion of the statute, if not a corrupt violation of the great duty of impartiality, incumbent upon every judge and juror. There is no such complaint here; the objection, on the contrary, is that any suggestion, however reasonable, and though (without relating to the sufficiency of proof), it form a part of the most explicit charge, going fully and impartially into the case on both sides, is forbidden to the judge. That, I think, for the reason I have given, is not so. Consequently, the motion for a new trial was, in my opinion, properly overruled.

There are also several reasons offered in arrest of judgment. The most important is one taken in this Court for the first time, which is that the depth of the wound is not laid in the indictment. This is a fatal defect at common law. *S. v. Owen,* 5 N. C., 452, would save us the necessity of investigation into authorities of a remoter period, as that is precisely in point, were it not that in our opinion the law is since altered, and the alteration can only be properly understood by a recurrence to the ancient law, the better to ascertain the nature of the defect. The act of 1811, Rev., ch. 809, passed the year after Owen's case was decided and we have reason to believe was caused by it. It enacted that in all criminal prosecutions in the Superior Courts, it shall be sufficient that the indictment contain the charge in a plain, intelligible, and explicit manner; and no judgment shall be arrested for or by reason of any informality or refinement, when there appears to be sufficient in the face of the indictment to induce the Court to proceed to judgment.

This law was certainly designed to uphold the execution of public justice, by freeing the Courts from those fetters of form, techni-
(464) cality, and refinement, which do not concern the substance of the charge, and the proof to support it. Many of the sages of the law had before called nice objections of this sort a disease of the law, and a reproach to the bench, and lamented that they were bound down to strict and precise precedents, neither more brief, plain, nor perspicuous than that which they were constrained to reject. In all indictments, as especially those for felonies, exceptions extremely refined, and often going to form only, have been, though reluctantly, entertained. We think the legislature meant to disallow the whole of them, and only require the substance, that is a direct averment of those facts and circumstances which constitute the crime, to be set forth. It is to be remarked

that the act directs the Court to proceed to judgment, without regard to two things—the one form, the other refinement. The first can embrace, perhaps, only the mode of stating the fact. If the fact be one essentially entered into a crime, it must be set forth; but it need not be set forth in any particular words, if other words can be found which will convey the whole requisite legal idea. Pleaders are much to be commended for pursuing the ancient, settled, and approved precedents. They are the best evidence of the law itself; and it is a becoming modesty in us, the emblem of merit, to evince a marked veneration for the sages who have preceded us. But it has pleased the legislature not to require, as a matter of duty, in all cases, what is certainly a matter of prudence and propriety. Allowing it to be necessary that a certain fact shall be stated, they have dispensed with the necessity for stating it in a certain manner. *S. v. Dickens,* 2 N. C., 406, is the first instance in our books, and it is a strong one, illustrative of the construction of this branch of our statute. The objections were that the time was stated in figures, and that "extorsively" was omitted. They were both overruled; the first because the figures were as well understood (465) by the Court as letters would have been; the second, because the extortion, which was the substance, did as well, and by as strict legal intendment, appear to the Court, as if it had been described by that name, since the indictment charged that the defendant did, by color of his office, and for wicked gain's sake, receive a larger fee than by law was due to him. These facts constitute extortion; and, therefore, the extortion appeared to the Court, without the jury calling it so. It is to be observed that the indictment was found in the County Court, and was governed by the act of 1784; though Judge HAYWOOD admitted that it would not do in the Superior Court. I will not say that the last point ruled would hold in a case of felony, because, perhaps, there is no *periphrasis* expressive of the technical sense of *felonice, burglariter, rapuit, murdravit,* and the like; or that it was even proper, in the particular case of misdemeanor then before the Court, for the like reason. But although the propriety of the application of the rule may be doubted, the rule itself is there clearly established. The act of 1811 is a literal copy of that of 1784, except that it relates to the Superior Courts. *S. v. Cherry,* 7 N. C., 7, is another case on these statutes. The Court did not intend to dispense with time and place, as material facts in the indictment; but considered that although the common law required them to be annexed expressly to each act, and would allow of no implication, yet under the statute time and place were sufficiently annexed to the giving the mortal blow, without saying "then and there giving," because, to any common mind, the whole matter was stated as one transaction and the mortal blow was to be referred, as to time and place, to the previous assault.

I do not know that the present objection concerns so much matter of form as of refinement. It demands, rather, that a particular im-
(466) material fact should be stated than that the statement should be in a prescribed form. The complaint is that the depth of the wound is not stated at all, and not that it is not properly stated. Though it may be examined a little deeper, and turn out to be a mere objection of form, if we consider that the length and depth of the wound are not independent facts of themselves, but only circumstances and incidents of the wound, showing it to be mortal, over and above the direct allegation of its mortality. Thus it may concern the mere form of setting out the wound. It becomes us now to inquire whether this be one of those matters of form or refinement contemplated by the legislature.

No doubt that originally the dimensions of the wound were set out that the Court might see whether it was of a nature to cause death. The particularity of the description can be attributed to no other motive. The Court meant to supervise the jury as to the correctness of their conclusion. If this be so, it must have been necessary to allege these matters according to the truth, else the fact found by the jury would give no information to the Court. And at the early day at which indictments for murder were first settled, I have no doubt it was required that the proof should support the description. It is impossible to suppose that a merely false averment was indispensable upon a trial for life. This particularity so often defeated prosecutions as to place the judges under the necessity of relaxing, so far as to allow indictments to be sustained by evidence of the substance. The substance is that the prisoner gave the deceased a mortal blow of which he died. A stroke, a mortal wound inflicted thereby, and the averment of death by that wound are essential. To those points proof has been at all times required. But beyond them no proof has been demanded for centuries past. True, a strict conformity to early usage in framing the accusation has been exacted. But in support of it, much latitude of proof was permitted. Upon this relaxation, it is to be wondered that it did
(467) not extend to the indictment also. It did not, however, and the judges who found the rule of evidence as well established as the method of accusing, often expressed their sense of the incongruity. Yet finding it so, they properly stood by it, until a change should be wrought by the legislature. In England that has not been effected to this day. Here, we think, that it was by the act of 1811. That the wound, its mortality, and its actually causing the death, are the substantial parts, and the rest refined formalities, may be gathered not only from the nature of the proof required, but also from the manner in which the most approved writers speak on the subject. Thus Lord Hale (2 Pl. C., 186) says, that, regularly, the length and depth of the wound are to be shown; "but," he

adds, "though the manner and place of the hurt and its nature be requisite, as to the formality of the indictment, and it is fit to be done as near the truth as may be; yet if, upon evidence, it appears to be another kind of wound, in another place, if the party died of it, it is sufficient." There are cases in which the length of the wound need not be given, as where a limb is cut off, or where *mortale vulnus penetrans in et per corpus* is alleged. Again, *plaga* means both a wound and a bruise, and no dimensions are required of a bruise. Now is it not strange that where a mortal wound is charged its dimensions must be given, yet, where the wound is stated to be in and through the body, or by cutting off the right arm, this latter indictment may be supported by proof of a wound in the side or the head, not going through nor dismembering the body; that is, by proof of a fact, which, if stated in the indictment, would not of itself suffice to sustain it. So, if the word *plaga* be used without adding dimensions, it shall be taken to be a bruise, though, by itself, it means wound as well as bruise, and thus life is taken upon an equivocal word. Indeed, where it means bruise, you may prove a wound. To all these purposes we find cases fully supporting Lord Hale's ob- (468) servation, that if one kind of wound in one place be alleged, it sufficeth to prove another kind of wound in another place, provided the party died of that proved. So that the general rule is that lay the wound as you will—namely, of a certain length and depth, or as going through the body, or by cutting off a limb, or as a bruise—proof that the party died of an injury of the like kind is sufficient. So, that, in truth, it has now resulted that the finding of the jury, in fact, gives no information to the Court of the place or dimensions of the wound, or whether it be a wound or a bruise. Is not this conclusive that in substance they are all the same, and are comprehended in the "mortal wound" alleged, whereby the party died? The only restriction upon the proof is that it shall not be of a species of death entirely different; for example, by poisoning or strangling, when alleged to be by striking, or *vice versa.*

After this, I think, we must conclude with Sergeant Hawkins, when speaking of the necessity of setting forth a particular weapon (Pl. C., book 2, ch. 46, sec. 37), that the substance of the matter is whether the accused gave the party a wound of which he died, and its length and depth are not material, "though for former form's sake, it be necessary to set forth a particular length and depth." This former form we are released from by the act of Assembly; and since none of the averments need be supported by other proof than of a killing by a wound, it seems now to be superfluous to charge more than a mortal wound or bruise, without a further formal description of it. Such a description seems now as superfluous as *vi et armis et baculis* are since the statute 37,

Henry VIII. We are as much bound to dispense with unnecessary and immaterial averments when permitted by the statute, as if commanded by it; and if the one in question be not of that character, it is difficult to say, to what "unseemly nicity" as Lord Hale calls it, formality (469) or refinement the act can extend.

It appears by a second transcript that the objection that the indictment is ungrammatical and senseless, because it has "him the said Moses," instead of he, grows out of a slip of the clerk in copying.

Another objection is that the indictment does not conclude with "so." A proper conclusion is necessary; for otherwise it will not appear that the jurors have drawn their conclusion from the preceding facts. The precedents within our reach here all use the word "so." But Mr. Starkie, in his treatise, p. 82, gives a conclusion without it; and it would seem that the words in the conclusion, "that the said Moses, him the said Gabriel in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder," must refer as certainly to the whole matter foregoing as if "so" was also used.

The last objection urged is that the transcript of the record from Jones Court does not purport to have been given under the seal of that Court. The answer is that this Court is incapable of deciding that fact. The certificate of the clerk of Jones does not say that he gives it under the seal of that Court. But the clerk of Craven, in setting forth in the transcript from his Court that from Jones, endeavors to represent the seal *ad ejus locum.* I suppose this to have been unnecessary, for the judge below can alone determine the fact, whether the seal of Jones Court was affixd to the transcript, and as he has acted on it, it is conclusive. It is the seal of the Court, and not the certificate of the clerk that it is the seal, which verifies the record.

Wherefore, I think, the reasons in arrest must be overruled, and judgment of death be pronounced on the prisoner.

PER CURIAM. Affirmed.

Cited: *S. v. Davis,* 15 N. C., 614; *S. v. Jesse,* 19 N. C., 301; *S. v. Gallimore,* 24 N. C., 377; *S. v. Duncan,* 28 N. C., 240; *S. v. Green,* 29 N. C., 41; *S. v. Shepherd,* 30 N. C., 199; *S. v. Latham,* 35 N. C., 35; *Bailey v. Poole, Ib.,* 408; *S. v. Cardwell,* 44 N. C., 249; *S. v. Noblett,* 47 N. C., 431, 434; *S. v. Smith,* 63 N. C., 236; *S. v. Caveness,* 78 N. C., 487; *S. v. Parker,* 81 N. C., 533; *S. v. Hardee,* 83 N. C., 621; *S. v. Morgan,* 85 N. C., 584; *S. v. Lambert,* 93 N. C., 622; *S. v. Jones,* 97 N. C., 474; *S. v. Boyle,* 104 N. C., 820; *S. v. Kirkman, Ib.,* 913; *S. v.* Harris, 106 N. C., 687; *S. v. Barnes,* 122 N. C., 1035; *S. v. Hester, Ib.,* 1050; *S. v. McBroom,* 127 N. C., 534; *S. v. Leeper,* 146 N. C., 659, 660; *S. v. Whedbee,* 152 N. C., 781.

(470)

STATE v. WILLIS ALEXANDER.

FROM WILKES.

An indictment for perjury, which sets forth that a warrant was tried in which A demanded of B twenty dollars for corn, etc., is sufficiently proved by producing a warrant between the same parties "for debt due by account," without specifying the particulars of the account.

The defendant was indicted for perjury. The suit in which the perjury was assigned was set forth in the indictment, as follows: That "there was a suit come on to be tried before E. V., an acting justice of the peace for the county of Wilkes, by a warrant, wherein Willis Alexander was plaintiff, and Adam Crause, defendant, by which said warrant the said W. A. claimed of the said A. C., among other things, the sum of twenty dollars for the sale and delivery of eleven barrels and three bushels of corn to the said A. C., and twelve dollars for the wintering and feeding four steers by him, the said W. A."

On the trial it appeared that the warrant was, "to answer Willis Alexander of a plea of debt due by account."

The counsel for the defendant objected to the evidence, because of a supposed variance between it and the description of the suit in the indictment. But his Honor, Judge MARTIN, thinking that the charge in the indictment was not intended as a description of the form of the warrant, but was only intended to describe the object of the plaintiff therein in suing it out, or was intended as a parol declaration, which might be made on the trial, overruled the objection, and the defendant was convicted, and appealed to this Court.

No counsel appeared for the defendant.
The Attorney-General, for the State.

HENDERSON, C. J. Although it is not required to describe in the indictment the cause of action—*i. e.,* the declaration in the suit, (471)
in which it is alleged the perjury was committed, yet if it be set forth, the record produced must correspond with the one set forth.
The question, therefore, in this case are the words in the indictment—viz., "twenty-nine dollars for the sale and delivery of eleven barrels and three bushels of corn, and twelve dollars for the wintering and feeding of four steers," descriptive of the cause of action for which the warrant was brought, or the warrant itself upon its face. I think that they are. The warrant, as the suit in which it was alleged that the perjury was committed, is sufficiently described in the foregoing part of the indictment, by the words "a warrant, wherein Willis Alexander was plaintiff, and Adam Crause was defendant." (Laws of 1791, Rev.,

ch. 338.) The words eleven barrels of corn, etc., are a mere parol declaration, to use the words of the presiding judge, of the cause of action preparatory to a more proper understanding of that part of the indictment which states the materiality of the oats. This opinion is much strengthened by the uniform exposition given to the act of 1794. (Rev., ch. 414.) For, although that act requires that it should be stated in the warrant, how the sum demanded is due, it has never been required, nor has the practice been to insert the items of an account. It has always been sufficient to say due by account by *assumpist,* or other general description. We are of opinion that there was no variance between the warrant described and the one given in evidence.

PER CURIAM. No Error.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1830

(473)

PETER P. LAWRENCE v. WILKINSON MABRY.

FROM EDGECOMBE.

A bona fide holder of a bill or a promissory note in which the name of the payee has not been inserted has a right to fill up the blank left for the payee's name with that of an endorser; or he may subject the endorser, in a count upon his endorsement; or as the drawer of a bill of exchange upon the maker.

ASSUMPSIT, in which the plaintiff declared—first, on the endorsement by the defendant of a note made payable to him by one David Barnes; second, on the endorsement by the defendant of a note payable to bearer; third, on a special guaranty of the defendant, in consideration of money advanced by the plaintiff to David Barnes, on the credit of the defendant; fourth, on a promissory note of the defendant payable to the plaintiff; fifth, on a bill of exchange drawn by the defendant in favor of the plaintiff upon David Barnes; and also for money had and received by the defendant to the use of the plaintiff, and for money lent by the plaintiff to the defendant.

Upon *non-assumpsit* pleaded, the cause was tried before MARTIN, J., when a verdict was returned for the plaintiff, subject to the opinion of the presiding judge, on the following facts: (474)

David Barnes offered a note for discount at the Tarborough branch of the State Bank, made by himself as principal, and one Carney as surety, for $1,300. A blank had been left in the body of the note for the purpose of inserting therein the name of the payee. This blank had never been filled up, but the defendant had endorsed the note. The note was discounted at the bank, and the proceeds paid to Barnes, and was regularly protested for nonpayment, of which the defendant had

notice. The plaintiff is the cashier of the State Bank at Tarborough, and the blank endorsement of the defendant had, according to the usage of the bank, been filled up to him.

Upon these facts, his Honor set aside the verdict, and entered a nonsuit. Whereupon the plaintiff appealed.

Badger and *Mordecai,* for the plaintiff.
The Attorney-General, contra.

HALL, J. It appears from modern decisions that liberal constructions have prevailed in relation to negotiable securities, in order to obtain the ends of justice. It has been long since held that the (475) payee of a negotiable paper, by endorsing his name on it and delivering it to a third person, authorizes that person to make an assignment of it to himself. In the present case, the name of the payee of the note was not inserted. But when the note was in the hands of the endorser, Mabry, the defendant, where it was placed by the makers, he was authorized to insert his own name in it.

In *Cruchly v. Clarence,* 2 Maul. & Sel., 90, it was decided that a bill of exchange drawn and issued in blank for the name of the payee, may be filled up by a *bona fide* holder with his own name, and will bind the drawer. So an endorsement on a blank note will bind the endorser for any sum which the person with whom it is entrusted thinks proper to insert in it. *Russell v. Langstaffe,* 2 Doug., 514.

So, I think, when the bill came into the hands of the plaintiff as a *bona fide* holder of it, he might have inserted the defendant's name. By leaving it blank, the makers of the note authorized any *bona fide* holder of it to fill it up. I think the defendant is liable upon his endorsement as such, or is liable as the drawer of a new bill. *Clark v. Pigot,* 1 Salk, 125; *Nicholson v. Sedgwick,* 1 Ld. Ray, 180; *Slacum v. Pomery,* 6 Cranch., 221. A bill payable to a fictitious payee may be declared on as a bill payable to bearer, against all persons knowing the name of the payee to be fictitious. *Gibson v. Minet,* 1 H. Bl., 569; *Collis v. Emett, Ib.,* 313; *Gibson v. Hunter,* 2 *Ib.,* 187; S. C., *Ib.,* 288; *Ballingalls v. Gloster,* 3 Term, 481. I mention this case to show that the more ancient and rigid rules are wearing away, and giving place to more liberal ones, for the sake of attaining the ends of justice. Nothing can be more true (provided I am correct in the law of this case), than that the justice of it is with the plaintiff. Believing the law to be so, too, I think that the nonsuit should be set aside, and judgment entered for the plaintiff.

PER CURIAM. Reversed.

(476)

The PRESIDENT and DIRECTORS of The BANK OF NEW BERN v. JAMES G. STANLEY and HENRY A. JONES.

FROM CRAVEN.

1. The proviso in the last section of the act of 1789 (Rev., ch. 311) does not prevent an execution from issuing under that act and the act of 1784 (Rev., ch. 226), where one of several heirs is a minor, but only directs that it shall not be levied upon the property of the infant defendant. Therefore, where judgment was obtained against several co-heirs, one of whom was an infant, it was held that the creditor might sue out his execution and obtain satisfaction from the assets in the hands of the adults.
2. Per HENDERSON, Chief Justice, arguendo. The proviso was probably intended only to apply to cases where the guardian had sold property of the infants to satisfy the debt, and this construction is justified by the fact that execution cannot issue, except upon motion, because circumstances may require some further extension of time to enable the guardian to realize the proceeds of the sale.
3. A superior court cannot supersede the process of an inferior court, unless the writ of supersedeas be auxiliary to the appellate jurisdiction of the former. An execution against the land of an infant, under the acts of 1784 and 1789, ought to appear upon its face to have issued after a stay of twelve months, and upon motion; otherwise the sheriff is not bound to levy it.

The plaintiffs, together with other persons, and particularly one Henry A. Jones, had obtained judgments at the same term of Craven County Court, establishing the amount of their debts against the administratrix of John Harvey, and writs of *scire facias* were issued to the heirs of Harvey, one of whom was a minor, to show cause why executions should no tissue against the lands of their ancestor. Upon all these writs judgments were regularly entered at August Term, 1829, and upon all, except that in favor of Jones, there was an entry as follows: "Execution stayed according to law." Upon that in favor of Jones there was the following entry: "Stay of execution waived by the defendants."

Motions had not been made in open Court for executions, but the plaintiffs applied to the defendant, Stanley, the clerk of Craven County Court, for executions upon their judgment, which he de- (477) clined issuing, but had issued an execution upon the judgment in favor of Jones.

Upon the above facts, the plaintiffs at the October Term, 1829, of Craven Superior Court, obtained a rule upon the defendant to show cause why a *mandamus* should not issue, commanding him to issue execution on their judgments; and also, if the rule should not be refused, for a rule upon Jones to show cause why a *supersedeas* of the execution on the judgment in his favor should not issue. Upon the return of this rule, all the above facts being admitted and the parties consenting

to waive all error of form, his Honor, Judge DONNELL, being interested in the suit, *pro forma* discharged the rule for a *mandamus,* and made absolute that for a *supersedeas.* Whereupon, the plaintiffs and the defendant Jones both appealed.

These questions were argued at June Term, last, by *Gaston,* for the plaintiffs, and *Badger,* for the defendants. *Cur. vult. adv.*

HENDERSON, C. J. No argument can be drawn in favor of the defendant, from the fact that all the heirs or all the devisees must be brought in and made parties in a suit, if in truth that be necessary. For such is the rule in all joint assumptions and obligations, as the law formerly stood, and is now in England; yet the plaintiff may levy the whole debt of any one. They are required only to aid in the defense, and the question of contribution is left to be settled between themselves. There is no mode here, particularly between devisees, to ascertain how the sheriff or creditor shall apportion the debt. For the sheriff has no inquest on a *fieri facias,* as he has on an *elegit,* by which he equalizes the burden according to the respective rights of the heirs or *terre-tenants.*

(478) And the statute itself seems to yield this right to the creditor, for the second section of the act of 1784 (Rev., ch. 226), which gives the *scire facias* enacts that if judgment shall pass against the heirs, or devisees, or any of them. And the second section of the act of 1789 (Rev., ch. 311), gives an action against the heirs or devisees jointly or severally. Why, then, it may be asked, shall the infancy of one heir delay the creditor from collecting the debt from the hands of an adult heir, when if all were adults, the creditor might collect from whom he pleased, and leave it to themselves to settle the question of contribution? The last section of the act of 1784 (Rev., ch. 226), provides for contribution, and gives a rule of settling it among devisees. Whatever, therefore, may have been the rules at the common law with regard to equalizing the burdens upon co-heirs and upon *terre-tenants,* these acts of our Assembly have abolished it, so far as relates to proceedings under them.

We will next enquire if there is anything which, by words, or even by implication, suspends the right of the creditor as to adults during the twelve months' stay given to the minor? Here it must be admitted that if the stay was of the execution, as the execution must follow the judgment, that is, must issue against the lands of the ancestor in the hands of all the heirs, it would necessarily operate as a suspension of the right for that period. But the execution is not suspended at all, not for a day; but its levy upon the estate of the minor is forbidden, from which a very strong inference is to be drawn that it may issue as to the

others, and if issued, and restrained in its operation as to the infant defendant only, it is left to its operation as to the others. This is language which cannot well be misunderstood. It furnishes of itself conclusive evidence of the right of the creditor to satisfaction to some extent out of the others, and as it does not restrain him to a *pro rata* satisfaction, he is left to that right which creditors ordinarily possess of satisfying their debts out of any part of the fund which is acces- (479) sible to them, and to leave to its different owners an adjustment of their contributions.

I do not pretend to expound the whole of the act of 1789, for I confess there are parts of it which I do not understand. Perhaps the proper exposition of the proviso in the last section may be to confine it to cases where the guardian has sold the property of his ward under that act. But I believe it has been expounded in every part of the State to be general, and applies to all cases where there is an infant heir. Much stress was laid on that part of the act of 1789 which forbids such execution to issue, but on motion to the Court. I take both parts together to mean this: That no execution shall be levied on a minor's estate, but after a delay of twelve months; nor then, but an execution issued on motion to the Court; which strongly fortifies the idea that it relates to cases where the guardian has made sales, and may have some excuse farther to obtain indulgence from some circumstances beyond his control, which require a farther suspension of the execution. It is very clear that the order to sell extends to every part of the property of the ward, real or personal, regardless of the fact, whether it descended from the ancestor from whom the debt devolved, or not, or even for the infant's own debts, as for necessary support, or otherwise.

The *supersedeas* should be dismissed, because one Court cannot supersede the process of another, however superior the one may be to the other; but in the exercise of, and as ancillary to its revising power. There was no error or mistake in the clerk in issuing Jones' execution; not because the guardian waived the benefit of the stay, but because he was entitled to it *instanter* upon final judgment. But the clerk mistook the law in refusing executions to the plaintiff for the same reasons.

The Superior Court of Craven will, therefore, direct the County Court to grant to the applicants their executions; and the sheriff will take care to obey the law in not levying the execution (by (480) which I understand raising the money), upon the estate of the minor until twelve months shall have elapsed from the time of rendering the judgment; and not then, but on an execution issued on motion to the Court. These facts should also appear on the execution, I presume. If they do not, the sheriff will not be responsible for not levying. For he who demands of a mere ministerial officer the execution of a

precept should furnish him with the necessary powers apparent upon the precept itself. If such authority does not appear on the precept, the sheriff may act if he will, and he will or will not be justified by the fact; that is, that the judgment had been obtained twelve months or more, and that the execution issued on motion; that is, to justify a levy on the minor's property. But he may levy *instanter* upon the property of the adults.

PER CURIAM. Certificate to be issued accordingly.

Cited: Ricks v. Blount, 15 N. C., 136; *Jackson v. Hampton,* 32 N. C., 603.

JACOB JONES v. SALLY LANIER et al.

FROM FRANKLIN.

A witness not interested in the event of the suit may be compelled to answer all questions on which the rights in litigation depend, except when his answer would subject himself to a criminal prosecution or make him liable to a penalty or forfeiture, or render him infamous. Therefore, where a witness declined answering because his answer would subject him to a civil action—held, that this was not a ground of protection.

TROVER, for slaves, tried before MARTIN, J. On the trial the plaintiff introduced as a witness one Hawkins, who stated that he (481) could not answer the question proposed without subjecting himself to an action at the suit of the plaintiffs for the conversion of the same slaves, and on that ground claimed the privilege of declining to answer the question. His Honor being of opinion that a liability to a civil action was a sufficient ground of protection to the witness, decided that he was not bound to answer. The plaintiff being unable to proceed in the cause without the testimony of the witness, in submission to the opinion of the judge, offered a nonsuit, and appealed.

Badger, for the plaintiff.
Seawell & W. H. Haywood, contra.

RUFFIN, J. The decision in Lord Melville's impeachment, settled that the law of England on this point was that a witness might be compelled to give evidence which subjected him to a debt or civil action. Four of the judges thought differently; but eight of them gave clear and confident opinions in the affirmative, on which the Court acted, and the witness was examined. The act 46, Geo. 3, does not profess to

create the rule it lays down. It is declaratory, and was passed merely to remove the doubts arising from the dissenting opinions. As I just remarked, the witness had been compelled to answer without the act.

I know not whether the privilege of the witness did at any time extend thus far. But if it ever did, the principle on which it was founded is gone, and the protection must go with it.

It was and is an undoubted rule of the common law, that a party cannot be examined for or against himself. Yet since the jurisdiction of equity hath arisen to enforce discovery, the privilege not to testify against one's self is nominal so far as respects mere liabilities for debts. Discoveries thus obtained by compulsion and on oath, are constantly used in trials at law, as other admissions of the party; and the only limitation on discovery in equity is that it shall not extend to (482) crimes, nor to charge one with a penalty, nor incur a forfeiture. If, then, a person may be compelled to testify indirectly against himself in a suit at law then actually pending, would it not be strange that he should be protected from doing so against another, because he might thereby expose himself to a future civil action? That would make the protection operate quite differently from the original purpose of it. It was designed to operate solely for the benefit of the witness. Yet we see that when he is a party, the Chancellor strips him of it. Shall it cover him, when he is not a party? The effect would be that when the protection can be of immediate and direct service to him for whom it was created, it shall be unavailing; but when it operates chiefly to the advantage of a third person, it shall be in full force. This is a complete perversion of the principle, and shows that the rule of exclusion ought not to exist.

I think a witness not interested in the event of the suit may be compelled to answer to all questions on which the rights in litigation depend, except where his answer would subject himself to a criminal prosecution, or make him incur a penalty or a forfeiture. To these may be added one other exception, that where the question affects the witness' own credit, he is not bound to discredit himself by declaring his own infamy. Farther than this, the privilege of the witness cannot be allowed to impede the course of justice, or obstruct the ascertainment of the actual rights of the litigants.

PER CURIAM. New Trial.

Cited: *Harper v. Burrow,* 28 N. C., 33; *Hice v. Cox,* 34 N. C., 323; *Wilder v. Mann,* 58 N. C., 67.

(483)

WILLIAM WILLIAMS v. NOAH BEEMAN et al., Administrators of Noah Beeman.

FROM PITT.

1. In an action by the vendee against the vendor for a breach of the covenant of quiet enjoyment the rule of damages, when there is an eviction from the whole estate, is the purchase-money paid by the vendee.
2. But when the eviction is only of a part of the estate, as of an estate for life, there is as yet no rule of damages established.
3. Whether interest upon the purchase-money can be recovered depends upon the circumstances of each case. Ordinarily it is given where the vendee is liable to the rightful owner for the profits.
4. A vendee who has been evicted by a paramount title can, from his privity of estate, recover on a covenant made to his vendor by the person from whom the latter purchasd.
5. But in such a case, where the intermediate vendee sold at a less price than he gave—held, RUFFIN, Judge, dissentiente—that his vendee could recover of the original vendor only the purchase-money paid by him.

This was an action for the breach of a covenant of quiet enjoyment, contained in a deed from the intestate of the defendants to James G. Sheppard, dated 4 December, 1817, whereby, in consideration of $4,125, he had conveyed to the vendee the land from which the plaintiff was afterwards evicted. The plaintiff offered in evidence a deed from Sheppard to John Glasgow for the same land, and upon an equal consideration, dated 20 December, 1817, and a deed from Glasgow to himself, in consideration of $3,500, dated 15 February, 1825.

Robert White and wife having a title to the land had, on 6 January, 1816, conveyed it to one W. J. Stanton, who immediately reconveyed it to White, in mortgage, for the purpose of securing the purchase money, and afterwards sold to Beeman; on 4 April, 1826, a declaration in ejectment, at the instance of White was served on the plaintiff, and
(484) on 4 August, following, he was evicted under final process in that suit.

Upon the trial, the jury found specially that if the measure of damages was the original purchase money paid the defendant's intestate by Sheppard, with interest thereon from the date of the deed, they assessed the plaintiff's damages to $6,383.79. If the same sum with interest from the service of the declaration, then they assessed the damages to $4,447.55. If the purchase money paid by the plaintiff to Glasgow, with interest from the date of the deed, was the measure of damages, then they assessed them at $4,302. If interest was to be taken only from the service of the declaration in ejectment, they assessed the damages to $4,050. The jury also, upon both views of the case—viz., the plaintiff's right to recover the whole purchase money paid by Sheppard, and that paid by himself, assessed damages contingently from the time of the

eviction, and also they found the actual value of the land and the improvements at the time of serving the declaration and at the eviction.

NORWOOD, J., upon the verdict, rendered judgment for the plaintiff for $4,475.55, being the purchase money paid by Sheppard to the defendant's intestate, with interest thereon from the service of White's declaration; from which judgment the defendant appealed.

Hogg, for the appellant.
Gaston, for the plaintiff. *Cur. vult. adv.*

HENDERSON, C. J. In actions between the vendee and his immediate vendor upon the covenant for quiet enjoyment, it is the settled law of this State that the value of the lands at the time of the sale shall be the measure of the damages; and in cases of actual sales, the purchase money is conclusive evidence of that value. This is the (485) case where a covenant or warranty is annexed to an estate in fee, and the eviction is from the whole estate. What may be the rule where there is a partial eviction of the estate, as the recovery of a life estate, or other interest less than a fee, or where the covenant is annexed to an estate less than a fee, is, as far as I know, not determined by our Courts. The interest upon the purchase money is merely incidental, and depends upon the circumstances of each case. It ordinarily runs during the time that the tenant is liable for the profits to the rightful owner. When he is not so liable, the profits are set off against it. Had this action, therefore, been brought against Glasgow, Williams' immediate vendor, it would have presented no difficulties, governing ourselves by former decisions. Is the case varied by its being brought against Beeman, a remote vendor, and whose estate, with his covenants annexed thereto, have come to Williams? I think that it is not; for Beeman cannot be bound to pay to Williams more than Williams ought to receive. If he has money in his hands belonging to some other person, there is no reason why it should be paid to Williams. Now it is settled that the purchase money paid by Williams to Glasgow is the measure of Williams' damages, and the fact that he is substituted to the estate of Sheppard, and to the covenants entered into with Sheppard for its enjoyment and protection, does not thereby substitute him to Sheppard's claim to damages in case the latter had been evicted. He is only substituted to Sheppard's covenants to redress his own, not Sheppard's, injuries, in regard to the estate. But as there is no privity of contract between Williams and Beeman, the injury of the former cannot exceed the liability of the latter upon his covenant. But it may fall short of it. Neither would the case be varied, if the action in this case had been brought by Sheppard, as it is said it might be. For Sheppard

(486) having sold to Glasgow, and Glasgow to Williams, he, Sheppard, could only claim an indemnity, which is the amount of the consideration money paid by him who is evicted. And on this ground alone, or that he is trustee for the person evicted, can the action be sustained in his name. In either case Williams' injury is the one to be compensated. Should it be asked what is to become of the excess left in the hands of Beeman, for it is certain that he has given nothing for it? It is answered who can claim it? Not Williams, for under the rule established by our decisions, he has no pretence to receive it. Not Sheppard, for he sustains no damage by the bad title, further than he may be compelled to comply with the covenants in his deed. And it would be strange that he should be placed in a better situation by selling a bad title than a good one. For had the title been good, he must have been content with his loss upon his resale. Should it turn out to be bad, could he then regain his whole purchase money? In fact, the difference between what he gave and what he got for the land is sunk, is extinguished, and there is no person who can receive it by making a resale at a reduction in the price. The first sendee submits to the loss, and it can, therefore, form no part of a claim to an indemnity.

As to the interest in this case, it should commence from time the declaration in ejectment was served. From that time and not before the tenant is liable for *mesne* profits, as the eviction was by White under a mortgage from a former proprietor of the estate, under whom both plaintiff and defendant's intestate claimed. And in mortgages, where the mortgagor is in possession by the consent of the mortgagee, he cannot be made liable to the mortgagee for *mesne* profits, as he is not a trespasser, a wrong-doer, but a *quasi* tenant to the mortgagee. Williams, therefore, received the profits to his own use up to the time when White's declaration in ejectment was served.

I am of opinion, therefore, that the Judge erred in making the consideration money paid by Sheppard to Beeman the measure of (487) the damages. He should have taken the consideration money paid by Williams to Glasgow—to wit: $3,500, with interest from 5 April, 1826, the time when the declaration in ejectment was served.

HALL, J., concurred.

RUFFIN, J., *dissentiente.* I do not propose to discuss at large the intricate question involved in this case; but content myself with barely saying that I cannot concur in the opinion of the Court. It is known that the decision in *Phillips v. Smith,* 4 N. C., 87, was made with much hesitation, and by a bare majority. Both of the judges with whom I now sit were of a different opinion. I admit that I should then have

coincided with them. On covenants relating to personal things, the actual damages sustained by a breach are recovered. Thus the value of a specific article at the time it ought to be delivered, or the value of slaves at the time of eviction, are the uniform measures of damages. I conceive that when we give the personal remedy by action of covenant on a warranty of land, we adopt all its consequences; and among them that the party evicted shall be indemnified for his loss. The covenant for quiet enjoyment is peculiarly applicable to terms for years; and when the term is half gone, it is plainly unjust that the covenantee should recover the price he paid for the whole term. It seems to be a principle of natural justice that he who has contracted for an indemnity in the most extended terms should not be restricted to a partial one by mere construction. But in relation to warranties in deeds for the fee simple, a rule was adopted in the case alluded to which has been considered a settled one. It professes to be drawn from the principles of the common law, applicable to pure warranties, and the action of *warrantiae charta.* To its authority I yield; and upon its authority I found myself in the present case. I think the opinion of my brethren a depart- (488) ure from it. The value at the time of the sale is the measure there prescribed. It ought to operate both ways. If the vendor be not liable for more, he ought not to be for less. I understand it to be admitted that if his immediate vendee be the person evicted, he is still liable for that. I do not see why he should not be equally so to the assignee of his vendee. Does the assignment change his covenant? It runs with the land, and he who buys the covenant. He gets the whole of it. But it is said that the assignor in such case cannot recover from the first vendor more than the evicted vendee gave for the land; because this is all the assignor would be obliged to pay the assignee, and therefore he has a complete indemnity. This is changing the rule essentially. It puts it upon the amount of the loss, not the price paid. It would seem to me that whoever buys land with a covenant adhering to it, takes with it all the advantages which it conferred on his assignor. It is so in personal contracts; for we do not inquire what the assignee of a bond gave for it; the obligor must pay him the whole. If we are not to follow *Phillips v. Smith, supra,* out to all its consequences, then we ought to recur to the true principle of giving the real value at the time of eviction; and if that were the opinion of the Court now, I should give my assent. That rule is too just to all parties to be wrong. We ought to recur to it, or adhere to the other, which has superseded it. Put a case upon the new one. Suppose Sheppard had sold to Williams without warranty. In that case, Sheppard is not bound to pay anything to Williams upon eviction. Is Beeman releasted, too? He must be, if he be liable to pay to Sheppard only what the latter is bound to pay to

Williams. Then all warranties of land sold under execution are gone. I cannot think so.

PER CURIAM. Error.

Cited: Markland v. Crump, 18 N. C., 102; *Nichols v. Freeman,* 33 N. C., 105; *Gant v. Hunsucker,* 34 N. C., 257; *Ward v. Smith,* 58 N. C., 207; *Southerland v. Stout,* 68 N. C., 449; *West v. West,* 76 N. C., 48; *Price v. Deal,* 90 N. C., 294; *Wyche v. Ross,* 119 N. C., 178; *Smith v. Ingram,* 130 N. C., 103; *Eames v. Armstrong,* 142 N. C., 516.

Dist.: Smith v. Britton, 38 N. C., 354.

(489)

THE GOVERNOR, upon the relation of David Keck, v. DANIEL COBLE and WILLIAM SMITH.

FROM ORANGE.

The sureties of a constable are liable only for his official misconduct during one year; and where a note was put into the hands of a constable in the year 1823, but he recovered the money due on it in the year 1825—held, that his sureties for the past year were not liable for the breach of his duty in not paying it to the owner.

DEBT upon the official bond given by the defendant, Coble, with the defendant, Smith, as his surety, with a condition for the performance of his duty as constable for the year commencing May, 1823.

After oyer the defendants pleaded performance, and on the trial before STRANGE, J., it turned out that the relator had, in July, 1823, placed a note in the hands of Coble for collection, but Coble did not actually receive the money until 1825.

The jury, under the instructions of his Honor, found a verdict for the plaintiff, and the defendant appealed.

Nash, for the defendant.
Winston, for the plaintiff.

HALL, J. The act of 1818 (Rev., ch. 980), limited the time for which constables should be appointed to one year, and subjected them to an indictment if they presumed to act afterwards without being reappointed and giving bond and security, as when first appointed.

This act also enlarged the sphere of their official duties. It authorized them to collect claims placed in their hands for collection without a suit or warrant; but it made it their official duty faithfully to pay over the moneys so collected to the persons entitled to receive them. But at the expiration of one year after their appointment their official bond

ceased to be obligatory as to breaches of official duties committed after that time; but it was a security for such breaches committed the year preceding, whilst it was in force. (490)

In the present case the claim of the person for whose benefit this suit has been brought, was placed with the constable for collection in 1823. During that year or the year commencing at the date of the bond on which this suit is brought, no official breach of duty is charged in 1825. Now, if the defendant, Coble, acted as a constable during that year, he had given a bond with securities for the faithful discharge of his official duties for that year, and the party injured would have his remedy on that bond, and not on the bond given in 1823. If the constable continued to act after 1823, without having given bond, he was, as before stated, liable to an indictment. But the person for whom this suit is brought can only be considered as having employed the defendant in his business as a private individual, and he can only look for redress to his individual responsibility. Hardship and injury there may be in the case, but the law cannot be blamed, because the records of the Court are open to public inspection, and any person may see upon examination who are regularly appointed constables, and have given security for the faithful discharge of their official duties. If they take it upon trust that a man is constable who pleases to act as such, they must blame their own credulity, rather than subject sureties to losses against which they never undertook, either in law or in fact, to indemnify them. I therefore am of opinion that the rule for a new trial should be made absolute.

PER CURIAM. New Trial.

Cited: S. v. Hankins, 28 N. C., 429; *Miller v. Davis,* 29 N. C., 200; *S. v. McGowan,* 34 N. C., 45; *Graham v. Buchanan,* 60 N. C., 95.

Dist.: Governor v. Davidson, 14 N. C., 362.

(491)

ELIJAH WILSON v. DUNCAN MURCHISON.

FROM MOORE.

The bond required by the act of 1777 (Rev., ch. 115, sec. 75) upon appeals from the County to the Superior Court is intended as a security for the appellee, and if the appellant fails, the sureties are not liable for his costs.

SCIRE FACIAS to obtain judgment against the defendant, who was surety of one Brooks, upon an appeal from the County to the Superior Court of Moore, from a judgment recovered against him by the plaintiff.

The appeal bond was in the usual form. Brooks had been cast in the Superior Court, and the recovery, as well as the plaintiff's costs, having been paid, the only question was whether the defendant was liable for the costs of Brooks in the Superior Court. MARTIN, J., held the defendant to be liable for those costs, and judgment was entered up accordingly; from which he appealed.

Seawell, for the defendants.
No counsel for the plaintiff.

HALL, J. In *Dolby v. Jones, ante,* 109, one question was whether the surety for an appeal from a judgment of a justice of the peace to the County Court was liable for the judgment of the Superior Court, pronounced against his principal, after an appeal to the Superior Court. A second question was whether upon such judgment the surety was liable for the costs of his principal. The first question was decided in the affirmative. The other was not decided at that time, but was examined and decided at the succeeding term, in the negative. It appeared to the Court then that the question never had been settled, and that the practice in the State had not been uniform. In some instances all the costs had been inserted in the bill of costs, and execution issued for them
(492) under the act of 1783. (Rev., ch. 189.) In other instances two executions had issued, the one against the plaintiff, and the other against the defendant for the costs due by each. The question was then taken up upon the construction proper to be given to the act of 1777 (Rev., ch. 115), which gives an appeal from the County to the Superior Court. The seventy-fifth section of that act grants an appeal from every judgment, sentence, or decree pronounced by the County Court; but directs that the appellant shall previously thereto enter into bond with two sufficient sureties for prosecuting the same with effect, and for performing the judgment, sentence, or decree, which the Superior Court shall pass or make thereon, in case the appellant shall have the cause decided against him. The appeal bond is given for the security of the appellee, and when he succeeds in the Superior Court, judgment is given for him. And part of that judgment is that he shall recover his costs from the appellant. But there is no judgment given that the appellant shall pay his own costs. The sureties for the appeal are only liable for the judgment pronounced against the appellant, and are no further bound. Of course, they are not bound in the present case for the appellant's costs, no judgment of the Superior Court having been given for them. The appellant is liable for his own costs. He is made liable by the same act of Assembly. But he is not liable by virtue of the appeal bond, which he has given.

PER CURIAM. Reversed, and judgment entered for the defendant.

(493)

RICHARD YARBOROUGH v. STEPHEN MONDAY.

FROM PERSON.

Where an instrument is signed by two persons, and but one seal is affixed, ordinarily it is to be taken as the deed of that party only whose name is written nearest to it. But it may be shown by proof, either on the face of, or dehors the instrument, that the other party adopted the seal.

ASSUMPSIT upon a written instrument in form of an indenture of apprenticeship. It was signed by the plaintiff and defendant. There was but one seal to the instrument, which was placed over the name of the plaintiff, his signature being the first. Upon the opening of the case, STRANGE, J., thinking that an action of *assumpsit* could not be sustained on the instrument, nonsuited the plaintiff, who appealed to this Court.

Winston, for plaintiff.
No counsel for defendant.

RUFFIN, J. The nonsuit, I think, was premature. I understand it to have been ordered upon the production of the instrument, and before proof by the plaintiff that the defendant had not sealed it. I do not doubt that more than one person may adopt the same seal. But that is to be shown by evidence. Upon the face of the paper the seal is to be taken as that of a person whose name is next to, or written to it. Such is the course of business. But yet the defendant might show that it was his, and the plaintiff might rebut that by other evidence. In which event, it would be a case for the jury. But I understand the record to state in effect that the Court ruled upon the face of the paper in exclusion of all evidence. I do not concur in that, because I con- (494) ceive it was a simple contract or a deed, as the defendant did or did not adopt the seal at the time of executing. Unless he acknowledge it as his seal, it was not his seal. It may be that it was executed by the parties at different times. The seal may have been affixed after the first signature, when clearly it would be that of the party making it. Or one may have affixed it and the other afterwards signed. It seems to to me that in such case a mere signature is not to be taken as a sealing, unless the party declare the seal already made to be his own.

HALL, J., concurred.

HENDERSON, C. J., *dissentiente.* Seals were properly emblems impressed on wax, or some material susceptible of receiving and retaining an impression. In this State, from necessity or from some accidental cause, our forefathers early adopted as a seal, or in lieu of one, a scrawl; and our Courts have for a long period given to it all the efficacy of a seal—in fact, have considered it as a seal. In Virginia it is considered

a seal, if in the writing it appears that the parties so called or so understood it; as "witness my hand and seal." In our State no such rule has been established. It is sufficient if a scrawl appears where, if there had been a seal, it would have been affixed. It is also true that many parties may adopt the same seal. *Ball v. Dunsterville,* 4 Term, 313. But as each ordinarily seals with his own or proper seal, and *prima facie,* when there is but one it is the seal of him only who made it, such adoption is matter of proof, and may be inferred from some expressions in the writing, or proved by something *dehors* the instrument; in other words, as the question of sealing is a matter of fact, it must be proven. If there is a seal, and but one obligor or grantor or person bound, if it is the seal of any one, it is the seal of him who appears to be the obligor, grantor, or person bound. But if there are more parties bound or to be
(495) bound than one, and there is but one seal, without farther proof it is not the seal of both, but of him only whose it is proven to be, either by its location or other proofs. For one party may be bound by writing under seal, and the other by parol—that is, by writing not under seal. In the present case there is but one seal. It may be the seal of either, or of both. Its locality would make it the seal of the plaintiff alone, as there is no other seal, for his name is written nearest to it, and immediately under it. In the absence of all proof, either upon the writing or by parol, I think it must be taken to be the seal of him alone. But I am inclined to think that the paper itself affords such proof. It begins "this indenture." Now it is true that it is not calling a paper an indenture which makes it one, but its actual indentation. Yet the appellation given to it by the parties must certainly have an operation so far as to show, not what the parties actually did, but what they intended to do. But I do not mean that this would be conclusive, for there may be other marks to control the operation of the name even as to the intent. Now, an indenture is a deed of two or more parties. Each must seal to make it the deed of each party; nor will the mistake of the parties in calling it an indenture, without indentation, induce a conclusion that they were also ignorant that it required the sealing of each to make it an indenture. For it would be going too far to conclude that if they were ignorant of any one thing which constituted an indenture, they were ignorant of everything relating thereto. But their ignorance should be confined to such things as it is apparent they were ignorant of, and to give to other words their ordinary signification. I therefore think that in this case there was sufficient in the writing to induce the Court to say that both parties adopted one and the same seal,
(496) and that it is the deed of both.

PER CURIAM. Reversed.

Cited: Devereux v. McMahon, 108 N. C., 141.

JOHN DEN, ex dem. of John Smith and Peter W. Gautier v. JEREMIAH NORMAN.

FROM BLADEN.

When no evidence is offered on one or two counts in the declaration and the verdict, by mistake, is entered generally upon both of them, it may be corrected from the notes of the judge.

EJECTMENT, tried before his Honor, Judge MARTIN, on the last circuit. On the trial no evidence was offered tending to prove title in the lessor, Smith, the enquiry being solely directed to the title of Gautier. After the case was committed to the jury, and they had retired, his Honor left the bench, upon an agreement of the counsel that the verdict might be taken by the clerk. During this recess the jury returned and the clerk, by their directions, entered a general verdict for the plaintiff, and was discharged.

The defendant moved for a new trial, because the verdict was general, when no evidence of title in the lessor, Smith, was offered. The plaintiff moved to correct the entry of the verdict, so as to render it responsive to each demise according to the evidence.

His Honor, the presiding Judge, being satisfied that the verdict was according to the justice of the case, and that the cause had been tried wholly upon the title of Gautier, directed the entry of the verdict to be altered, so as to read not guilty, as to the count setting forth a demise from Smith, but guilty as to the other; which being done, and judgment rendered accordingly, the defendant appealed.

Gaston, for defendant. (497)

No counsel for plaintiff.

RUFFIN, J. The agreement of counsel, stated in the record, ought surely to bind both parties to submit to any order of the Court for putting the verdict on the record, not only in legal form, but in the proper form, according to the case proved on the trial. It must mean that any inadvertance of the jury in returning, or slip of the clerk in entering a defective verdict, should be obviated by such a correction, by the parties themselves, or by the Court.

But it is not necessary to resort to that agreement in justification of the course pursued by the Court below. It is the constant practice to set verdicts right from the notes of the judge, as was done in this case. (*Petrie v. Hannay,* 3 T. R., 659.) No inconvenience can arise, and justice is often answered and costs saved by it. If a plaintiff offer no evidence, the Court ought to nonsuit him. If he declare in several counts, and offer no evidence upon some of them, but prove others, and

the jury find for him, unless the jury expressly specify the counts on which the verdict is founded, the Court may, and does direct it to be entered up, on the count to which the evidence was applicable. If the evidence be not sufficient in law to sustain the verdict as entered, the defendant can spread the whole case on the record by an exception and obtain the revision of this Court, as in other cases. He is deprived of no right or proper privilege whatever.

PER CURIAM. Affirmed.

(498)

JOHN N. PFIFER v. WILLIAM M. GILES.

FROM MECKLENBURG.

The clause of limitation in the act of 1786 (Rev., ch. 248), respecting endorsed bonds, goes only to the action on the case given to the endorsee. But when a bond, after being endorsed, becomes again the property of the obligee, there is no statute of limitations to bar his action of debt.

DEBT upon the single bond of the defendant, executed to the plaintiff, dated 17 December, 1819.

The only question was whether the statute of limitations, which was pleaded, was a bar. On this issue it was proved that on 6 March, 1812, the plaintiff had, by endorsement, assigned the bond to one Douglas, who, on 20 July, 1826, commenced suit against the defendant. To this suit the statute of limitations being pleaded, a nonsuit was entered, the endorsement stricken out, and the present suit commenced.

MANGUM, J., instructed the jury that the statute of limitations did not bar the action, and a verdict being returned for the plaintiff, the defendant appealed.

Devereux, for the defendant.
Hutchison, for the plaintiff.

RUFFIN, J. The argument for the plaintiff is entirely satisfactory. The act of 1786 (Rev., ch. 248), gave an action on the case to the indorsee of a bond. The utmost latitude which can be allowed to the clause, of limitation in that act, is that it goes to the action therein specified. If it be construed literally, it is incongruous, because the act of limitation did not before operate upon notes, but only on actions brought on notes; and therefore it would not operate on actions brought on assigned bonds. But we should endeavor to execute the statute in its spirit, and hold that the action of *assumpsit* on an endorsed bond must be brought within three years.

But when the act of 1789 (Rev., ch. 314) gave the indorsee the action of debt, it gave him a remedy to which there was no period of limitation. And, at all events, when the obligee again becomes owner of the bond, there is nothing in any of the statutes to obstruct his recovery. The act of 1786 itself only operates on actions on the bond in the hands of the assignee, and cannot be extended by construction, to bar the original rights of the obligee.

PER CURIAM. No error.

Cited: Howell v. McCracken, 87 N. C., 402.

(502)

FRANCIS S. COXE v. AARON CAMP.

FROM RUTHERFORD.

1. If the mortgagee obtains judgment and execution for the mortgage debt, and under the act of 1812 (Rev., ch. 830), sells the equity of redemption and becomes the purchaser, how is the relation between him and the mortgagor affected thereby? Quære?
2. Does he abandon his mortgage and become the owner of the land to all purposes, and liable to pay the mortgagor the amount he bid at the sale, or is he still liable to an amount and redemption? Quære?
3. If a third person buys at such sale does he hold the whole equitable estate in the land, and is he entitled to call for the legal title without payment of anything beyond his bid? Quære?
4. But in such a case, the contract of sale being made with the sheriff, whatever may be right of the mortgagor in equity he cannot, at law, recover the sum bid by the mortgagee.
5. Per HENDERSON, Chief Justice.—No analogy exists between the sheriff and an original agent, so as to enable the person whose goods are sold by the former to recover the price in his own name, as the principal can, in a sale by the latter, because the power to the sheriff is irrevocable.

ASSUMPSIT upon a special count, and for money had and received by the defendant to the use of the plaintiff. Plea *Non-assumpsit.* On the trial MANGUM, J., directed a nonsuit to be entered, with liberty to the plaintiff to have it set aside, and a verdict entered for $298, if, upon the following facts, the Court should be of opinion he was entitled to it:

The plaintiff had purchased a tract of land of the defendant at the price of $800, half of which was paid down, and to secure the balance a bond and mortgage of the same land was executed to the defendant. When the money thus secured became due, the defendant commenced an action on the bond, obtained a judgment, issued an execution, and had it levied upon the plaintiff's equity of redemption in the mortgaged premises. At the sale under this execution the sheriff gave notice that he offered the land for sale, subject to the defendant's mortgage.

(503) The defendant became the purchaser for the sum of $298, which the sheriff credited on the execution. The defendant afterwards took measures to enforce the collection of the residue of his judgment from the plaintiff. The mortgaged premises had been sold as the property of the defendant. Upon these facts his Honor, retaining his original opinion, refused to set the nonsuit aside, and the plaintiff appealed.

J. M. Carson, for the plaintiff.
No counsel for defendant.

RUFFIN, J. I regret that there is no contract between the plaintiff and defendant, and therefore that this action cannot be sustained. The sheriff is between the parties and keeps them asunder.

But on the other question, I am not prepared to give an opinion. It is plain enough, when another creditor of the mortgagor sells the equity of redemption, what the rights of the mortgagor, mortgagee, and purchaser are. But when the mortgagee himself sells the mortgaged premises, not under his mortgage, but under an execution at law for the mortgage debt, a case is presented requiring much consideration before pronouncing judgment. On the one hand it seems contradictory in terms, that a sale should be made under execution, and yet the thing disposed of be sold subject to the very debt mentioned in the execution. It would amount to this: that equities of redemption may be sold at law by all creditors except the mortgagee for the mortgage debt. For if the mortgagor be entitled after the sale to an account, his equity is not in fact extinguished by the sale. Perhaps this would be the safest construction, that the mortgagee must proceed on his contract to foreclose, though the act seems as one of its objects to give him in this way a kind of legal foreclosure, instead of the more dilatory one in equity. Yet, on the other hand, that may produce the greatest hardship and appalling injustice to the debtor. If a sale at law between these parties be allowed at all, and a third person purchase, I do not know that it ought to be regarded as the sale of the equity of redemption merely; but as those having the whole legal and equitable interest are parties to the proceeding, the one as plaintiff (506) and the other as defendant in the execution, it may be taken as a sale of the estate out and out. It is true the mortgagee's legal title does not pass by the sheriff's deed, but the purchaser might call for it in equity, without paying any more than is his bid, since the mortgagee has had the full benefit of it. This, I suppose, is clear enough when the bid exceeds the mortgage debt. When it falls short of it, a difficulty arises. Upon the whole it seems to me to be a very nice

point, and not fit to be settled but in a case which will make it absoluetly necessary. Whatever may be the rights of the parties, they depend upon complicated equities, which can never be adjusted in a Court of Law; which is another reason why the plaintiffs here cannot recover. I concur fully in that; but as to the equitable demands of either party, I reserve myself altogether, until the question shall be directly made in a proper case, and then I will bestow on it my best reflection.

HENDERSON, C. J. The plaintiff's equity of redemption in the land, mortgaged by him to the defendant to secure the sum of $400, had been sold under an execution issued on a judgment obtained by the defendant against him for the mortgage debt, and bid off by the defendant for the sum of $298, which sum the sheriff credited on the execution. The land has since been sold as defendant's property to satisfy his creditors, and the defendant is now pursuing the plaintiff for what he calls the balance of the mortgage debt. This action is brought by the defendant in the execution against the plaintiff therein to recover the amount of his bid, upon the ground that it was so much bid over and above the mortgage debt, and therefore belongs to him. Or, to speak more intelligently, the biddings at such sales are the sums named or offered, added to the mortgage debt. And if the construction of the act of 1812 (Rev., ch. 830), contended for is correct, the money thus bid belongs to the defendant in the execution. But even (507) if it does, can the action be sustained? Is there any contract or privity between the defendant in the execution and the bidder? Is not the contract made with the sheriff? Is he not the person to enforce it? And if he omits or refuses to perform his duty, is he not the person responsible to the defendant? Certainly, no action can lie for this plaintiff against the bidder, unless in analogy to those cases where a contract is made by a mere agent, and the principal assumes the right to himself, and brings an action to enforce it. But these are cases of mere agents to sell, and to collect if the principal pleases. The principal may put an end to the agency at his pleasure, and assume his rights to himself. When he does this he affirms the sale as his act, and can enforce performance. But is the sheriff a mere agent to sell? Is not his authority entire and irrevocable? Do not his duties require that his agency, if it be one, should continue until the transaction is finished? We think it does, and that he is the proper person to enforce the performance of the contract. The same principle would sustain an action against any purchaser at a sheriff's sale, where more is bid than will satisfy the execution. If this action will lie, an action will lie against such bidder at the instance of the defendant in the execution to recover the surplus. If it be said this is arguing in a circle, and

that such an action will lie, it is answered that cases of that kind are of daily occurrence, and yet we never have known such an action brought, which is strong evidence that it could not be supported. Whatever, therefore, may be the just construction of the act of 1812, we think this action cannot be sustained.

PER CURIAM. Affirmed.

Cited: *Bissell v. Bozman,* 17 N. C., 165; *Camp v. Coxe,* 18 N. C., 52.

(508)

ISAAC COLEMAN v. JOHN CRUMPLER et al.

FROM LENOIR.

1. In an action on a bond conditioned to perform the decree in a suit in which A and B were defendants—held, that the record of a suit in which B and C were defendants did not support the breach assigned.
2. Held, also, that parol evidence to prove that the name of C was inserted in the bond by mistake, instead of the name of A, was inadmissible.
3. Whether the breach of a bond, conditioned to perform the final decree of the Supreme Court, is supported by evidence of a failure to perform the decree of a Superior Court, to which the cause was afterwards remanded by the Supreme Court? Quære?

DEBT upon a bond executed by the defendants to the plaintiff, for the sum of $2,500. Upon oyer, the condition was, "that if the said John Crumpler shall and will perform and abide by such final decree as may be made against him by the honorable judges of the Supreme Court of North Carolina, in the suit now pending in said Court, wherein the aforesaid Isaac Coleman is complainant, and the said John Crumpler and Mary Crumpler are defendants in equity," then, &c.

The defendants pleaded—first, *non est factum;* second, *non infregerunt conventionem;* third, performance.

In his replication the plaintiff assigned as a breach the following facts: That a suit was pending in the Supreme Court, in which Isaac Coleman was plaintiff and John Crumpler and Mary Coleman, defendants, in which suit the said bond was taken, and which was, by the order of the Supreme Court, tried in the Court of Equity in the county of Lenoir, where a final decree for the sum of $1,150, with interest, etc., was entered for the plaintiff, which John Crumpler had failed to perform and abide by. Issue was taken upon this, and the cause was tried before his Honor, Judge DONNELL, on the last circuit.

The plaintiff produced a record of a cause pending in the Supreme Court between Isaac Coleman, plaintiff, and John Crumpler (509) and Mary Coleman, defendants, in which the defendant, Crump-

ler, was directed to give a bond, similar to the one declared on in this action, and which was by a subsequent order of the Court remanded for hearing to the Court of Equity for the county of Lenoir; and also the record of a final decree in that cause made by the Court of Equity for Lenoir county, whereby the defendant, Crumpler, was directed to pay the plaintiff $1,150, with interest. He then offered to prove by the clerk of the Supreme Court that the cause which pended in the Supreme Court, and in which there was an order for the defendant's giving a bond, was the same cause which was finally decided in Lenoir, and that the bond now sued on was taken in pursuance of the order of the Supreme Court; but by mistake the name of Mary Crumpler, instead of Mary Coleman, was inserted in the condition. This was objected to by the counsel for the defendants as tending to control by parol testimony either the record or the bond, and was rejected by his Honor. It was also objected by the counsel for the defendants that the record of a decree of Lenoir Court of Equity did not support the breach assigned by the plaintiff, and his Honor, being of this opinion, the plaintiff, in submission to it, suffered a nonsuit, and appealed.

Gaston, for the plaintiff.
Seawell, for the defendants.

HENDERSON, C. J. (after stating the case as above): This action cannot be sustained. It is too well settled to require either argument or authority to show that a written document cannot by parol be made to mean anything but what its words, that is, itself imports. It certainly cannot be contradicted. I enter not into the doctrine of ambiguities, either latent or patent. The case does not require it.
Parol evidence can neither bend the bond to the record, nor the (510) record to the bond. It was, therefore, properly rejected.

Then, as to the breach proven by the record. The breach alleged is, as it should be, according to the meaning of the words of the condition; that is, according of their legal import—to wit, that the Court, either the Supreme Court or that of Lenoir (for I give no opinion whether the decree of that Court, or any Court having jurisdiction of the cause, is not within the legal import of the words, "the final decree of the Supreme Court"), rendered a judgment in the suit mentioned in the condition of the bond aforesaid, wherein Isaac Coleman is plaintiff and John Crumpler and Mary Crumpler are defendants. The record offered to support that breach proved that there was a decree in a suit wherein Isaac Coleman was plaintiff and John Crumpler and Mary Coleman were defendants, which Crumpler had failed to perform. Certainly, such evidence cannot, by the most strained construction,

support the allegation made in the replication. The Judge was, therefore, right in instructing the jury that there was no evidence. This mistake, for it evidently is one, is much to be lamented; but the Court cannot correct it, or bind these defendants further than they have bound themselves.

PER CURIAM. Affirmed.

(511)

OWEN WILLIAMS et al., Justices of Pasquotank, v. JOHN C. EHRINGHAUS et al.

FROM PASQUOTANK.

1. In an action upon a bond made to a number of persons as a class, by the name of their class, as with the justices of a county, all who belong to the class must join, and upon *non est factum* pleaded, it must be averred and proved that the plaintiffs do belong to that class.
2. Where a bond was given to "the justices of the Court of Pleas and Quarter Sessions," and sundry persons joined as plaintiffs, averring themselves to be justices, but offered no evidence of their character, it was held—HENDERSON, Chief Justice dissentiente—that they could not recover, although the defendant had not, by any special plea, denied that they were justices.
3. Per RUFFIN, Judge, arguendo.—In actions of debt upon endorsed bonds the general issue does not put the endorsement in issue; but it is different in assumpsit upon endorsed promissory notes, because in the first case, the debt is created by the execution, and is not affected by the subsequent endorsement; but in the last, the making of the note and the endorsement does not constitute the promise, being only a circumstance proving the existence of a debt, from which a promise is inferred.
4. HENDERSON, Chief Justice, arguendo.—The delivery of the bond and the character of the plaintiffs are distinct averments; and the latter not being denied by the plea of *non est factum*, need not be proved.

DEBT upon the following bond: "Whenever the Court of Pleas and Quarter Sessions for the county of Pasquotank shall require, we, the undersigned, jointly and severally promise to pay to the justices of said Court, or their order, the sum of, etc. In witness whereof, we have," etc.

The writ and declaration set forth the names of the plaintiffs, twenty-one in number, and averred them to be the survivors of the justices who were in office at the execution of the bond.

After oyer, the defendants pleaded *non est factum*, on which the cause was tried before his Honor, Judge NORWOOD. After proof of the execution of the bond by the defendants, it was obected that the plain-
(512) tiffs had not proved that they were justices of the Court of Pleas and Quarter Sessions, at the time the bond was executed. But

his Honor held this to be unnecessary, and under his direction a verdict was returned for the plaintiffs, and the defendants appealed.

Kinney, for the defendants.
Gaston, contra.

RUFFIN, J. In actions on contract, if it appear on the pleadings that too many or too few persons are plaintiffs, advantage may be taken of it on demurrer, or in arrest of judgment. If it do not so appear, but a variance appear at the trial, the plaintiff may be nonsuited, or a verdict taken for the defendant on the general issue. No advantage can be taken of a variance, unless the general issue be pleaded; because the contract is admitted as stated in the declaration. I mention this, because it shows that the general issue denies the plaintiff's whole case, so far as it rests upon the existence, terms, and effect of the contract. There are cases, however, in which the variance may not appear upon the pleadings, nor upon the face of the contract itself, when produced. This is one of them, and a contract with partners, under the name of their firm, is another. When a contract is thus made with a class of persons by their description as a class, or by the name of office, it is to be sued on by them in their natural capacities, and each (513) person composing the class must be a plaintiff in the same manner as if each was mentioned *nominatum* in the contract. Yet it cannot be declared on, as thus mentioning them, because when given in evidence it would not appear to be the instrument declared on. It must be stated truly, as it reads, and the declaration must then aver, that the plaintiffs are the persons thus described. The effect is that it shows them to be the persons to whom by the contract the defendant has come under an obligation to pay money, or to do any other act. Surely, a most material part of the contract and of the description of a contract, is the designation of the person or persons between whom it is made, and on whom it confers an advantage. To identify it as thus described, it would seem that the plaintiffs must show themselves to be, in fact, the persons meant by the terms of general description. It is admitted by the counsel for the plaintiffs that such is the rule in actions of *assumpsit,* or debt on simple contract. But it is contended that this is because *non assumpsit,* or *nil debet,* go to the whole case in the declaration; and, therefore, not only denies any promise, but also the promise to these plaintiffs. I agree to that, and the rule seems to me to be the same upon *non est factum* to debt on specialties. This is denied upon the suppositions that this plea only denies the execution of the deed, and its continuing validity. I think it also extends to the legal effect and substance of the deed, as stated in the declaration. The rule is thus

expressed in respectable text writers. (2 Phil. Ev., 88.) As an instance, however, of the distinction contended for between *non est factum* and *non assumpsit,* the case of debt by the assignee of a bond is put, in which *non est factum* would not go to the assignment, though in *assumpsit* the general issue would. It is said, this is because in debt the general issue extends only to the execution and validity of
(514) the deed. I admit the difference, but not the reason assigned.

It is owing to the different mode of declaring the case, the note and assignment are not stated as containing the promise of the plaintiff, but as creating a debt which formed a consideration, upon which an express promise was made, or is supposed to have been made to the plaintiff. In debt, no contract between the plaintiff and defendant is alleged. The debt to the obligee is shown to be created by the bond; that debt is transferred to the plaintiff by virtue of the assignment, and by force of the statute; and upon this right alone he founds his action. In *assumpsit,* the general issue goes to the assignment, because it denies the promise; and that can only be commensurate with the consideration from which it is implied; in debt, it does not, because neither the execution nor continuance, nor effect of the deed depends upon the assignment, which is a subsequent and independent thing. In debt, therefore, the assignment must be denied by a special plea. But this is not like the present question, which turns on the meaning of the deed originally. Why in *assumpsit* must the plaintiffs prove themselves as stated in the declaration? Because it is of the substance of the contract alleged. *Non assumpsit* denies a promise to these plaintiffs. So *non est factum* denies the sealing and delivery of the deed to these plaintiffs, and to them alone. It puts in issue whether the defendant entered into a contract, whereby he became obliged to pay a sum of money to the particular persons who sue him. They say he did; if they say so, they must prove it so. In what other mode can the defendants protect themselves against a suit brought by too many plaintiffs? They cannot plead in abatement, because they could not give the intruding plaintiffs a better writ. The defense, if true, bars them altogether. Besides, how can he know them? If it be specially pleaded, it will amount to *non est factum,* and be bad, for it puts in issue whether the deed
(515) be such in effect as described. There is no precedent of such a plea. If, indeed, the bond be payable to certain persons by name, and others sue on it, and it be spread on the record upon the oyer, the defendant may demur or plead in abatement the apparent variance. But if the variance be not apparent, I know not of any method of taking advantage of it, but by the general issue. The execution of the deed must be proved to be by the defendant to the plaintiffs. The identity of the parties is of the essence of the issue. It will not do, says Mr.

Justice Buller, that one who called himself B executed the deed, the witness must know him to be the defendant. Buller's Nisi Prius, 171. And so I think it is of the plaintiffs, also. The defendant cannot plead that another person in his name executed the deed, and so it is not his; nor can he plead that he executed it to other persons, and so not to these plaintiffs. Both would amount to the general issue, and such pleading is not allowed. I think, therefore, that there must be a new trial.

HALL, J., concurred.

HENDERSON, C. J., *dissentiente.* The plea of *non est factum* does not necessarily deny and put in issue all the allegations in the declaration. As where an assignee of a reversion brings an action on a covenant contained in the lease, and which runs with the land as annexed to the estate in the land. Or an action is brought by an assignee of a reversion upon some covenant made assignable by the Stat. of Hen., VIII., as passing with the estate. In these cases *non est factum* only denies the execution of the lease or deed, on which the action is brought, as containing the covenant sued on. The assignment is not thereby put in issue, and, of course, need not be proven on the trial. It is a separate and distinct averment from the making of the deed. So here, this bond is given to the justices of Pasquotank county. The action is brought by A., B., etc., with an averment that they are or were (516) justices of Pasquotank. This is a distinct and separate averment from the one that the defendant made the bond to the justices of Pasquotank, and not being denied, as said above, need not be proven. The plea of *non est factum* here goes to the making of the bond to the justices of Pasquotank, not to the averment that A., B., etc., are justices. It is unlike the case to which it was compared in the argument—that is, where a bond is made to J. S., and another, J. S. gets possession of and sues on it. Here J. S., who sues, must show on the plea of *non est factum* that he is the J. S. named in the bond. For in such case there is but one averment—to wit, that the defendant made the bond to him, J. S., which the plea of *non est factum* denies. On the trial the plaintiff must prove that he is the J. S. named in the bond. And so of all other obligees. But this passes unnoticed most commonly, because possession of the bond is at least *prima facie* evidence that the plaintiff is the J. S. meant. It is, therefore, *non est factum* to you. But, as was said before, this arises from its being all one allegation. But the case now under consideration contains two distinct allegations—first, that the defendant made the bond to the justices of Pasquotank, and secondly, that A., B., etc., the plaintiffs, are the justices. *Non est factum* is, therefore, confined to its appropriate denial—that is, that of making

the bond to the justices, and not to the allegation that A., B., etc., are the justices. Being a distinct fact, and not denied, I think it need not have been proven on the trial, and that the judgment ought to be affirmed; but as my brethren think differently, the judgment must be reversed.

PER CURIAM. New trial.

(517)

JOHN NOBLET v. WILLIAM GREEN, administrator of Thomas Potter.

FROM BURKE.

Although courts of law take no notice of bare equities, yet the forbearance to enforce one is a sufficient consideration to support an action of assumpsit.

ASSUMPSIT, tried before MANGUM, J., on the last circuit. The pleas were—first, general issue; second, statute of limitations, and third, set-off. A verdict was taken for the plaintiff, subject to the opinion of the Court upon the following facts: One Alexander Potter had obtained a judgment against the defendants before a single magistrate upon an account due him by the intestate. Being in great want of money, Potter applied to the defendant for payment, but was told by him that payment could not then be made, and advised him to sell the judgment for cash. Upon this, Potter sold the judgment to the plaintiff, who applied to the defendant for payment, and received a small part of the amount due, and was informed by the defendant that he, the defendant, was about going to the South for a few weeks, and if the plaintiff would wait until his return, the balance should be paid. The plaintiff, relying upon this promise, waited until the defendant's return, who then refused to pay him, admitting that he had assets sufficient. His Honor, upon these facts, set the judgment aside, and entered a nonsuit, and the plaintiff appealed.

No counsel for either party.

RUFFIN, J. Forbearance by a creditor is a good consideration for the promise of an executor, having assets, to pay the debt of his testator; and such promise will bind him personally. It is unnecessary to consider whether such a promise imports assets; since they are expressly found here. I should, indeed, think, notwithstanding some
(518) contradictory *dicta*, that it did not. The promise is one thing, and the consideration another. And I see no more reason for saying that the consideration is in this case to be inferred from the fact that the promise was made, than that sufficient consideration

should be implied from the mere promise in all other cases. But here, both the assets and forbearance are expressly alleged by the plaintiff, and stated in the case.

The ground of decision in the Court below does not appear on the record. But we collect that it went on the gorund that the plaintiff was not the legal owner of the justice's judgment, and therefore that there was no debt to forbear; and so, that the forbearance was not a good consideration.

It is very true that where there is no original cause of action, an agreement for forbearance will not support a promise to pay; for there is nothing to be paid. And it is equally true that to a certain extent, and indeed generally, Courts of law only take notice of legal rights. In actions on bare equities, when they come directly into judgment, we cannot recognize them. And in suits in the name of the person having the legal right, we cannot know anybody but the plaintiff of record. But there are yet many instances in which mere equities are held by Courts of law to be of value. The sale of an equity of redemption will support a promise to pay the price. And a promise not to sue for a certain time in the Court of Chancery for an equitable demand is the same as constituting a consideration for the promise to pay it, as a like forbearance not to sue at law for a legal demand. All we say in this Court is that we cannot enforce or protect an equitable right, independent of the parties' contracts. But if they deal together upon those rights, and ascertain their value, and in consideration of the possessor of them yielding them up entirely, or refraining to enforce them, another promise to pay that value, or do some other act, it is a good promise. Courts of law are obliged to know that there is a (519) Court of Equity, as a part of the general public judiciary; and that it is as much to the advantage of a person to avoid a suit in that Court as in a Court of law. These positions are fully sustained by *Thorpe v. Thorpe* (Ld. Ray., 663), and *Dowdenay v. Oland* (Cro. Eliz., 768). The plaintiff here had a clear remedy in equity to collect the debt against the wishes and resistance of both the defendant and the plaintiff's assignor. To forbear to use it was both a loss to him and an advantage to the defendant.

Besides, the express promise of the defendant recognizes the plaintiff as the owner of the judgment, and the real creditor. It is like the common case of the holder of an instrument not negotiable, placing it in the hands of another to collect. When the money is collected, it is no answer to the holder that he is not the owner. The receiver took it as his, and to his use collected the money, and to him he must pay it. I do not say that this defendant might not show that Alexander Potter was still the true owner, and that the plaintiff came dishonestly by the

judgment. Upon that I give no opinion. But in the present state of the case, the express agreement of the defendant is a sufficient acknowledgement that the plaintiff is the real creditor.

PER CURIAM. Judgment set aside, and judgment entered for the plaintiff.

Cited: Hudson v. Critcher, 53 N. C., 486.

(520)

JOHN BARTON v. ALEXANDER MORPHES.

FROM PERSON.

1. Proof of particular facts is inadmissible in impeaching a witness, because such proof tends to a number of collateral issues, and because neither the witness nor the party offering him can be prepared to meet them.
2. Where a witness who supported another was asked if he had not heard the first accused of a particular larceny, it was held to be improper.

TROVER for a slave, tried before STRANGE, J. On the trial the only question was whether on Turner, a witness for the plaintiff, was worthy of credit. Many witnesses were examined to impeach him, and particularly one Morton. The plaintiff examined testimony to support Turner and impeach Morton, who was in turn supported by the defendant, one of whose witnesses swore that he, Morton, was a man of good reputation. The witness, on his cross-examination, was asked by the plaintiff's counsel if he had not heard Morton charged with stealing a penknife. The question was objected to by the defendant's counsel, but admitted by his Honor. After a verdict for the plaintiff, the defendant appealed.

Gaston & Winston, for the defendant.
Nash, contra.

HENDERSON, C. J. Where character is not in issue, but comes in question incidentally and collaterally, as that of a witness does, the rule is that specific charge of criminal or corrupt acts are not to be heard to impeach it. Two reasons are given for the rule, either of which, I think, is sufficient to sustain it. The first is the number of issues such evidence is calculated to create, thereby consuming
(521) the time of the Court, and abstracting the mind from the main issue. The other is that both the party and the witness would always be wholly unprepared to meet and repel the charges. But these reasons do not go to exclude proof of bad character by common report or reputation; for that is single in its nature, and but one issue can arise upon it. Nor can the party or the witness be taken by surprise by such evidence, for it must be known to many, otherwise it is not

common reputation. If a bad character, therefore, be falsely by this evidence attributed to a witness, it is easily repelled by evidence of the same kind. The ground on which the counsel for the defendant placed the question cannot render the evidence admissible—namely, that although not evidence in chief, it is admissible to impeach the character of the supporting witness; that witness having given the first a good character, when he knew such reports had been circulated. This would be doing that indirectly which the law forbids to be done directly—viz., impeaching the character of the witness in chief by specific charges, and that, too, not by common reputation, but by a mere report, which is very different. For the law supposes the latter to be true, and therefore admits it as evidence. But it makes no such supposition in favor of a mere report, which we know to be most commonly false. Reports may ripen into common reputation and common belief. When they arrive at that stage, it is supposed that they are true. They have then the best test of their truth, common opinion and belief, and cease to be mere reports.

Independently of the injury which evidence of the kind objected to inflicts on the witness in chief, and the party offering him, it ought not to discredit the supporting witness. For if the witness in chief sustains a good general character from common reputation, the supporting witness said nothing untrue, in attributing it to him. Nor do I think that such specific charges could be proven by common reputation, which is nothing more than heresay; which, for every obvious (522) reason, is confined to character, pedigree, and boundary; for very often they are incapable of other proof.

PER CURIAM. New trial.

Cited: Downer v. Murphey, 18 N. C., 85; *S. v. Johnston,* 82 N. C., 591; *S. v. Garland,* 95 N. C., 672; *S. v. Bullard,* 100 N. C., 488; *Nixon v. McKinney,* 105 N. C., 29; *Cora v. Singleton,* 139 N. C., 362; *S. v. Arnold,* 146 N. C., 603; *S. v. Haley,* 155 N. C., 492, 493.

THOMAS COX v. JAMES GORDON.

FROM WASHINGTON.

Where there is no allegation of fraud the transfer of property in the hands of a consignee may be presumed from letters of the owner and vendee to the consignee, directing him how to hold the property, without an actual delivery, and without proof of a consideration.

The plaintiff had sued out an attachment against the effects of one J. E. Burrell, a resident of New York, and summoned the defendant, a

resident of Washington county, as a garnishee. The summons was executed 12 November, 1828. Upon his garnishment the defendant stated that he had no money or effects of J. E. Burrell in his possession at the time of his being summoned as a garnishee; that prior to the 26th of July he had thirty barrels of gin in his hands, the property of J. E. Burrell; but that by a letter of that date he, the garnishee, was directed by J. E. Burrell to hold the gin unsold, and the proceeds of that which had been sold, subject to the order of George T. Burrell, and that by letter of the 5th of August following he, the garnishee, had acknowledged that he held the gin and proceeds on account of George T. Burrell; that the same was all sold, and a sum equal to the demand of the plaintiff was in his hands.

The plaintiff having recovered final judgment against J. E. Burrell, took issue upon this garnishment, which was tried before his (523) Honor, Judge NORWOOD.

On the trial of this issue the evidence consisted of the following letter from J. E. Burrell to the garnishee, dated 26 July, 1828: "Having declined business in favor of my brother, Mr. G. T. Burrell, I wish you to hold the property shipped by me and now in your hands subject to his order." And on the same paper, and of the same date, G. T. Burrell also wrote to the garnishee as follows: "On the other side, you have a letter from Mr. J. E. Burrell, to which please refer. Do me the favor, on receipt of this, to state what remains unsold, and what balance will probably be due on the shipment. It is desirable to close the sales as soon as practicable. For the present, please direct to the care of Mr. J. E. Burrell."

His Honor instructed the jury that these letters did not prove a sale, or legal transfer by J. E. Burrell of his property in the gin to George T. Burrell. A verdict was returned for the plaintiff, and the defendant in the issue appealed.

The Attorney-General, for the plaintiff.
No counsel for the other side.

HALL, J. (after stating the case as above): It is to be observed in this case that there is no allegation of fraud in the transaction. It must, therefore, be taken as honestly conducted. It is true, there was no actual delivery of the gin, nor has it been proved what was the consideration upon which the transfer was made. But the letters are evidence of an agreement between the Burrells that the right to the gin should be transferred from the one to the other; and title to it should be passed by contract, although no delivery was made of it. Nor (524) was it necessary that a consideration should be proved. It is

sufficient that the garnishee should be directed to transfer it to the credit of G. T. Burrell.

What would it be natural for an agent to do in such a case? Surely, I think, he would consider himself as acting under the direction of G. T. Burrell, and the proceeds of the sale he would consider himself authorized and bound to pay over to him, as he did in the present case, as appears from his garnishment. J. E. Burrell could have no claim upon him; he would be repelled by his letter. His accountability was with G. T. Burrell, to whose credit it appears he transferred the right to the gin. I think, therefore, in the absence of fraud in the transaction, the letters of the garnishee were evidence of the transfer of the gin from J. E. Burrell to G. T. Burrell, and that a new trial should be granted.

PER CURIAM. New trial.

THOMAS RHODES v. NEILL BLUIE.

FROM ROBESON.

1. It is the duty of the Clerk of the County Court to publish the lists of taxables and insolvents, in the mode prescribed by the act of 1786 (Rev., ch. 255), in the state in which they are returned to him, notwithstanding they may be incomplete.
2. The act of 1786 is not repealed by the acts of 1814 and 1817 (Rev., ch. 872 and 945), authorizing the County Courts to assess county and poor taxes.

DEBT brought against the defendant, who is the clerk of the County Court of Robeson, for the penalty imposed by the act of 1786 (Rev., ch. 255), for not setting up in some conspicuous part of the courthouse an alphabetical list of the taxables, and for not advertising the list of insolvents returned to August term, 1826, of the County (525) Court.

The plaintiff having made out a *prima facie* case, the defendant proved that one of the justices, who had been appointed at May term, 1826, to take the lists of taxables, had made no return, and that the sheriff had also omitted to make out his list of insolvents; it was insisted for him that as the returns were not complete, it was not his duty to put up the defective lists which were returned. It was also contended in his defense that the acts of 1814 and 1817 (Rev., ch. 872 and 945), had rendered it impossible for the clerk to perform the duties required by the act of 1786, and were a repeal of it. His Honor, Judge

NORWOOD, being of this opinion, the jury, under his instructions, returned a verdict for the defendant, and the plaintiff appealed.

No counsel for either party.

HALL, J. By the act of 1786 (Rev., ch. 255), it is made the duty of the clerk of the County Court at the next Court after the lists of taxable property shall be returned by the judges appointed to take them, to set up in the court house an alphabetical list of the taxables and taxable property, and for not performing the duties required by this act a penalty of fifty pounds is imposed, to be recovered by any person who will sue for it. Before this duty can be performed by the clerk, it is necessary that lists of taxation should be returned in due time by the justices. It is also necessary that the sheriff should make a return of insolvents. But if the sheriffs fail to make such returns, or if the justices omit making due return of the lists of taxables and taxable property which they were authorized and required to take, it would be impossible for the clerk to perform the duty required of him. But if one of the justices, as in the present case,
(526) omits making due return of the lists which had been assigned to him to take, to be sure the clerk cannot supply such omission; but that is no reason why he should not perform his duty in setting up for public inspection such lists as have been returned by other justices.

By the act of 1798 (Rev., ch. 506), it is made the duty of the clerk to add to each person's taxable property the amount of tax for which he is liable; but for the non-performance of this duty, the act imposes no penalty. The penalty is confined to the duties imposed by the act of 1786. By the act of 1814 (Rev., ch. 872, sec. 18), the County Courts are directed at the first Court which shall happen after the first day of January in every year, to lay a tax for defraying the county charges. It would be impossible that this tax should be inserted in the lists of taxation, which, by the act of 1786, were directed to be set up. Of course there can be no penalty incurred on that account. The same remark may be made as to the act of 1817. (Rev., ch. 945.) I cannot bring my mind to believe that these acts, or any one of them, is a repeal of the act of 1786.

In fact, this suit is brought for the non-performance of the clerk's duties, as imposed by the act of 1786, but not for the non-performance of the duties imposed by any of the subsequent acts brought in to view in this case. I think the penalty was incurred by not putting up such lists as were returned under the act of 1786. But it could not be incurred by not putting up such list as was not returned. For this he was in no fault.

PER CURIAM. New trial.

(527)

JOHN DEN, ex dem. of Bathsheba Sumner et al., v. ASA ROBERTS.

FROM PERQUIMANS.

1. The probate of a will ought regularly to appear upon the minutes of the County Court, and the will itself ought to be recorded.
2. Although the certificate of the clerk on the will itself has been commonly received as sufficient, yet if this certificate be made and signed by the deputy it is not a legal probate, and the fact that the original is on the files of the Court will not aid it.
3. In this State does any length of time dispense with the necessity of a probate? Quære?

EJECTMENT tried before his Honor, Judge NORWOOD. The lessors of the plaintiff claimed titles as heirs at law of Josiah Sumner. The defendant claimed under James Sumner, who was the heir at law and devisee of Seth Sumner. Seth Sumner had devised the premises in dispute to his son, James, but in case he should die without issue, to Josiah Sumner, the ancestor of the lessors of the plaintiff; and the contingency having happened in the year 1824, the only question was whether the will of Seth Sumner had been properly approved. Upon this point the plaintiff offered in evidence a copy of it upon which was endorsed the following certificate:

"Perquimans County Court, April Term, 1787:

"The last will and testament of Seth Sumner, late of said county, deceased, was exhibited and duly proved in open Court by the affirmation of Abner Pierce, one of the subscribing witnesses thereto; and at the same time appeared James Sumner, one of the executors therein named, and qualified according to law.

"J. HARVEY, Deputy Clerk."

The clerk of the County Court produced the original, and proved that he found it in the files of his office. Upon the original was a certificate, in all respects similar to that upon the copy offered by the plaintiff. His Honor, thinking that the above-mentioned facts (528) did not in law amount to a probate of the will, nonsuited the plaintiff, who appealed.

Gaston, for the plaintiff.
Hogg, for the defendant.

RUFFAN, J. If in any case in this State the age of a will dispenses with the necessity of proving it, that rule cannot apply here, because the devisee was heir at law of the testator, and his possession is consequently consistent with either title.

The question, then, turns entirely on the sufficiency of the evidence of probate. The act of 1777 (Rev., ch. 115, sec. 57), enacts that the

County Courts may take probate of wills, and order them to be recorded in proper books to be kept for that purpose. The act of 1784 (Rev., ch. 225, sec. 6), enacts that the probate of a will shall be sufficient evidence of a devisee, and that attested copies of such wills, or the records thereof, by the proper officer, may be given in evidence, as the original might. It must, therefore, appear that the will has been proved. This can only be done by the records of the Court. The original being on file is no evidence that it was proved. It might have been barely deposited by the executor, or caveated and adjudged to be no will. The certificate of the clerk on the will itself has commonly been received as evidence of the probate, because he is the "proper officer" to attest the acts of the Court. But regularly, it ought to appear by the minutes of the Court how it was proved, and the order for recording; and it ought to be recorded. If it did so appear on the minutes, or if it were recorded in the book of wills, those records would make the proper evidence, because these records are the acts of the Court, by whose hand soever the Court may have caused the facts to be set down. But, in the present case, it doth not appear that any order whatever was made on the record or minutes of orders of the Court, nor that the paper (529) itself has been recorded. It must be presumed that the party did not offer such evidence, because it does not exist; and the inference therefrom is very strong that no probate was, in fact, adjudged by the Court. The certificate alone of a deputy clerk in his own name is altogether insufficient evidence. He cannot attest the records of the Court, nor certify its acts. The original paper being among the archives of the clerk's office does not establish its probate. Its identity, perhaps, may be inferred from the certificate of the clerk, but much more certainly, and also the probate of it from the record of it. In the absence of such record, and any minutes of the probate, it cannot be received in evidence. The certificate on it is a nullity, unless it appear that the principal had died; in which case, by the act of 1777 (Rev., ch. 115, sec. 86), the deputy becomes clerk. The judgment is, therefore,

PER CURIAM. Affirmed.

JOHN DEN, ex dem. of Caroline Anders et al., v. TIMOTHY ANDERS.

FROM BLADEN.

1. To render a partition between co-heirs under an order of the County Court valid it must appear that a petition was filed, that all the heirs were represented, that the commissioners were sworn, and that they returned their proceedings under their hands and seals. A partition made without these requisites is not validated by the assent of the heirs at the time, nor by their subsequent acquiescence.
2. Whether a partition made by parol, with livery of seizin, is valid in this State? *Quaere?*

ANDERS *v.* ANDERS.

EJECTMENT tried on the last spring circuit before NORWOOD, J. The lessors of the plaintiff and the defendant both claimed title under one John Anders, who died in the year 1814, seized of the premises in dispute, leaving the father of the lessors of the plaintiff, the (530) defendant and five other children, his heirs at law. Soon after the death of the ancestor, upon the motion of some of his children, the County Court appointed commissioners to make partition of the land, of which he died seized. A report was returned, but no petition was produced. No process appeared to have issued, nor was any notice given to the other heirs, although one of them was an infant. The report was not under seal, there was no judgment or confirmation, no order that the report should be enrolled or registered; neither had any enrolment been made; all that appeared was an entry upon the minutes that the report had been returned. For these reasons, the counsel for the defendant objected to its being read to the jury; but the objection was overruled by his Honor, who permitted it to be read, not as a record, but as a division which might have been made between the heirs by consent, or with their approbation.

The plaintiff then proved by one of the commissioners that the division was made as stated in the report; that the several dividing lines had not been run and marked; that after running as many lines as they thought necessary to enable them to make an accurate division, the commissioners went to the house of the mother of the tenants in common, where they found all of them together, one being an infant of eighteen years of age, and there the partition was made, all of the tenants acquiescing in it; and that immediately all of them took possession of the portions allotted to them, and had never questioned the validity of the partition until the trial of the present suit, which had originated solely upon a question as to the boundary of two of the parts in which the land, descended from their common ancestor, had been divided.

His Honor instructed the jury that the order of the County Court, and the report of the commissioners were not submitted to them, as a record concluding the parties, but as proof of a transaction which might become conclusive, according to the circumstances connected with it at the time, and the subsequent conduct of the (531) parties; that if this partition had been assented to by the tenants in common at the time it was made, and was afterwards acquiesced in, they were concluded by it; but without such assent and acquiescence, the partition was of no effect whatever.

A verdict was returned for the plaintiff, and the defendant appealed.

No counsel for either party.

HALL, J. This is not a petition under the act of 1787 (Rev., ch. 274), and so the judge instructed the jury. Independently of the other objections to it, it does not appear that the commissioners were sworn, nor did they make a return of their proceedings and appropriations under their hands and seals. Regularly a petition ought to have been filed, and those of the representatives who were not petitioners ought to have had notice of the petition. This is required by the act of 1803 (Rev., ch. 636). Besides, one of the heirs at law was an infant, and was not represented.

The judge further instructed the jury, that although it was not a partition concluding the parties, yet it might become conclusive if the parties assented to it, and acquisced under it until the bringing of the present suit.

This is not a suit brought in equity to complete a partition which the parties had agreed to and acquiesced under for a length of time, and to give to each party a title in severalty to the portion of land, by that agreement allotted to him; but it is an action at law brought to recover that part of the land which the plaintiffs say was allotted to them by the partition set forth in the case. If the partition is not valid under the act of Assembly, is it valid as a partition made by consent of the tenants in common?

It is said that partition at common law might be made by tenants in common parol, with a feoffment, or any written instrument (532) evidencing the partition. That may be admitted, but it cannot be admitted that it could not be done by parol without livery of *seisin,* because tenants in common have several freeholds, and when one conveys to the other without deed at common law, it was necessary that livery of *seisin* should be made. In the present case that is not pretended to have been done. And, indeed, it is questionable whether it would be valid if admitted to have been done, because the act of 1715 (Rev., ch. 7) seems to have pointed out the mode to observed in conveying lands, and the act of 1778 (Rev., ch. 133) adopts so much of the common law as was in use before that time. But on this part of the case I give no opinion.

But it is said that each tenant in common in this case has been long possessed of the part allotted to him under the partition, and has so long acquiesced in the possession of each of the other tenants in common. Admitting that to be the case, it is to be observed that they are all heirs of the same ancestor, and each has a right to the possession of the whole, and the possession of one cannot be considered as adverse to the possession of the others. (Co. Litt., 242; Lit., secs. 396, 397; 1 Salk., 142, 423.) Their title is the same, and their possession is the same under that title.

The case states that the commissioners (not sworn, and unauthorized to act on that account) calculated and made the plot, as laid down in their report and in their survey, sent as part of the case in the black lines, but did not run or mark the dividing lines, or either of them. Laying their common title derived from their common ancestor out of the case, this partition on paper, made by strangers unauthorized to make it, would not be a color of title to any possession, however adverse.

PER CURIAM. No error.

Cited: *McPherson v. Seguine,* 14 N. C., 155; *Medlin v. Steele,* 75 N. C., 156; *Rhea v. Craig,* 141 N. C., 609.

(533)

THOMAS L. COWAN v. WILLIAM DAVIDSON.

FROM ROWAN.

1. Where it was agreed to abide by the decision of the Supreme Court, upon a case stated, an averment of a breach of that agreement was supported by proof of the decision of the Supreme Court, upon a consideration of the whole case, although the judgment of that Court was not final, but a new trial was granted.

ASSUMPSIT upon the following written agreement:

"The understanding between Messrs. Thomas L. Cowan and William Davidson, relative to certain executions of Mr. Cowan's levied on certain negroes, upon which Mr. Davidson has a mortgage: It is agreed that if the lien of Cowan's executions binds the property, notwithstanding the mortgage, then Mr. Davidson is to pay off and discharge the executions creating such lien; if the mortgage be invalid then Mr. Davidson is to surrender the negroes to the sheriff of Rowan to be sold under the executions. If Messrs. A. Henderson and J. Martin disagree in their opinion, then a case agreed is to be submitted to a judge, with liberty for either party to appeal to the Supreme Court.—26 April, 1821.

"P. S.—The above stipulations, it is agreed, shall extend and enure to all executions now out and unsatisfied."

The plaintiff averred that Messrs. MARTIN and HENDERSON had disagreed that a case had been stated for the opinion of the Supreme Court, that the decision of the Superior Court was in his favor, and that the defendant had refused to abide by the decision, either by paying the plaintiff the amounts of his executions, or by surrendering the negroes to be sold.

Plea—general issue.

On the trial the plaintiff proved that Messrs. HENDERSON and MARTIN, having disagreed in opinion, the case of *Davidson v.*

*This case was decided at the last term of this Court, but was omitted in its proper place. The reporter was reminded of it by the case of Hargrave v. Davidson, post. 535.

(534) *Beard,* 9 N. C., 520, was prepared to obtain that of the Supreme Court. He then produced a certified copy of the record of that cause in the Supreme Court, and proved the amount of his judgments against McCulloch. The defendant proved that after the new trial which was granted in the Supreme Court in the case of *Davidson v. Beard,* that case was remanded to the Superior Court of Mecklenburg, and was still on the docket of that Court. For him it was contended that the case of *Davidson v. Beard,* being decided on a motion for a new trial, was not a final decision of the main question between him and the plaintiff.

His Honor, Judge DONNELL, instructed the jury that if the case of *Davidson v. Beard* was intended by the parties to be the case prepared for the Supreme Court under the contract, and if it contained the points in controversy between them, it was not material that in form the judgment of that Court should be final in that suit.

A verdict was returned for the plaintiff, and the defendant appealed.

HALL, J. As far as I am capable of understanding the question litigated between the parties, it is this: Whether the mortgage under which the defendant claimed, or the executions, under which the plaintiff claimed the negroes levied upon, gave the preferable title. It has been decided in *Davidson v. Beard,* 9 N. C., 520, the decision in which suit it appears, was to decide the controversy between the parties, that the execution levied on the slaves gave a preferable right to any claimed by the defendant under the unregistered mortgage. It is true, that a new trial was granted in that case, as the consequence of that opinion; but the question of law was completely settled, as it was decided upon a case agreed. Of this opinion was the judge below, and I think the rule for a new trial against that opinion ought to be dis-
(535) charged.

It may have been the case, or it may be the case, if the former suit has not been decided, that the judge on the second trial may give an opinion in favor of the rights claimed under the mortgage; but such opinion is subject to the opposite party's right of appeal to this Court, where the law of the case has been otherwise held, as before stated.

PER CURIAM. Affirmed.

Cited: S. c., 16 N. C., 470.

WILLIAM HARGRAVE v. WILLIAM DAVIDSON.

FROM IREDELL.

Where an agreement in writing is made, and one of the contracting parties and a third person agree by parol that its stipulations shall extend to them, in an action between the two last, the written agreement is competent evidence, and may be connected with that on which the action is brought by parol testimony.

ASSUMPSIT, in many respects similar to that of *Cowan v. Davidson, ante,* 533. The plaintiff declared for the breach of an express agreement by the defendant either to pay the amount of a judgment obtained by the plaintiff against one McCulloch, or to surrender certain negroes of McCulloch, on which he, the defendant, had a mortgage, and permit the sheriff to sell them, in satisfaction of an execution on that judgment. The defendant pleaded the general issue, and the statute of limitations. To the latter plea the plaintiff replied a former suit for the same breach, a nonsuit therein, and that the present action was commenced within a year and a day after the judgment of nonsuit in the first.

Upon the issue on the first plea, the plaintiff produced the written agreement, a copy of which has been given in *Cowan v. Davidson,* and offered to prove that when that agreement was signed (536) he was present and consented thereto, and that an execution on his judgment against McCulloch was then in the hands of the sheriff, and was in all respects equally binding upon the property mortgaged to the defendant, as those in favor of Cowan. The counsel for the defendant objected to this testimony, insisting that as the plaintiff's name was not inserted in the body of the agreement, he was no party thereto, and that the testimony, if received, would vary or explain the written contract. The objection was overruled by his Honor, Judge MANGUM, and the agreement was read to the jury.

The plaintiff then proved a disagreement in opinion between Messrs. HENDERSON and MARTIN, and the making up of the case of *Davidson v. Beard,* 9 N. C., 520, and further, that after the decision of the Supreme Court in that case, but before the commencement of the present action, that final judgment in that suit had been rendered against the plaintiff in the Superior Court of Mecklenburg. The plaintiff also fully supported his replication to the plea of the statute of limitations.

Under the directions of his Honor, the jury returned a verdict for the plaintiff, and the defendant appealed.

Gaston, for the defendant.
Devereux, for the plaintiff.

RUFFIN, J. The written agreement between Cowan and Davidson is not the agreement declared on by the plaintiff; nor was it given in evidence, as the one entered into between the parties to the present suit. We understand the case, that the plaintiff alleged that he and the defendant made a like agreement, not in writing, referring expressly to the written one. The sole purpose, then, of offering the letter in evi-
dence was to show precisely the terms of the contract between
(537) these parties. It was necessary evidence, as their parol agree-
ment referred to the written one, and the latter was, therefore, the highest proof of the terms of the former. To connect them in this manner by parol testimony, there can be no objection. It is not varying, nor even explaining the writing. It is simply proving that the plaintiff and defendant said: "We agree by word of mouth exactly as Mr. Cowan and Mr. Davidson have agreed on paper."

Upon the contract thus ascertained, the Court put a construction at the last term in the suit brought on it by Cowan, which fully determined this.

No objection is taken in this Court to the replication to the plea of the statute of limitations. Indeed, the Court could not hear an argument on it. The judgment must be affirmed.

PER CURIAM. Affirmed.

SAMUEL VINES v. OBEDIENCE BROWNRIGG.

FROM GREENE.

Where the jury do not respond to all the issues on the record their verdict is defective and no judgment can be rendered on it.

Detinue for sundry slaves, to which the defendant pleaded—first, *non detinet;* second, a release; third, the statute of limitations. Issue was taken on the two first pleas, and to that of the statute of limitations the plaintiff replied a former suit and a nonsuit herein, and that the present action was commenced within a year and a day. On this replication issue was taken by the defendant. The cause was tried before
DONNELL, J., when the jury found "that the defendant does de-
(538) tain negroes, etc. (identifying them and fixing their value); and
they further find, that the statute of limitations is no bar, and they assess," etc. Judgment was rendered according to the verdict, and the defendant appealed.

Gaston, for the defendant.
Mordecai, for the plaintiff.

RUFFIN, J. The decision at the bar turned altogether upon the effect of the verdict as entered on the issue joined on the plaintiff's replication to the plea of the statute of limitations. It certainly is very badly expressed, and much as we are disposed to make every inference to support verdicts, we might have found much difficulty in doing so here, were the case depending on that point only. But there is another objection apparent on the record, which was overlooked by the counsel, and which is decisive, without expressing any opinion on the former. One of the defendant's pleas is a release, on which an issue was joined. To that the jury has not made, nor attempted to make, any response. The verdict is, therefore, so defective, that no judgment can be given, and there must be a *venire de novo*.

PER CURIAM. *Venire de novo.*

Cited: Rogers v. Ratcliff, 48 N. C., 236.

RICHARD MITCHELL v. JAMES DURHAM.

FROM PERSON.

For a mere non-feasance by a deputy, without any wrongful act, an action must be brought against the principal.

CASE, in which the plaintiff declared—first, for a breach of duty by the defendant, as the agent of the plaintiff; second, for a neglect of the defendant in the discharge of his duty as a constable; (539) third, for a similar neglect in the discharge of his duty as a deputy sheriff. The pleas were not guilty, and accord and satisfaction. The jury found "all the issues in favor of the plaintiff." And the defendant appealed.

A case was made up in the Court below by STRANGE, J., upon a motion for a new trial, which it is unnecessary to state, as Winston, for the defendant, in this Court, moved in arrest of judgment, because the verdict was general, and the third count in the declaration was defective, inasmuch as a deputy is not liable for a non-feasance, the rule being *respondent superior*. For this, he cited *Cameron v. Reynolds,* Cowp., 403.

No counsel for the plaintiff.

RUFFIN, J. The instructions to the jury are now out of the case, by the counsel for the defendant moving in arrest of judgment, and thereby abandoning the rule for a new trial.

The ground of the motion in this Court is that the count charging the defendant as deputy sheriff is bad. The case cited in argument, *Cameron v. Reynolds,* Cowp., 403, besides many others, does undoubtedly show that for a mere non-feasance, without any wrongful act done by the deputy, the action must be against the principal, and not the deputy.

The rule, too, is so perfectly established as not to require an authority that in civil cases (though it is otherwise in criminal), if a general verdict is given on several counts, of which one is bad, there cannot be judgment; because the Court cannot say to which the evidence referred. The plaintiff ought to have withdrawn his evidence on the defective count, or moved the Court to enter the verdict, or to amend it, so as to make it refer to the good parts of the declaration, if the evidence (540) would have justified the Court.

PER CURIAM. Judgment reversed and judgment arrested.

Cited: Jones v. Palmer, 83 N. C., 305.

JOHN JONES v. JAMES MILLS.

FROM JONES.

In an action for seducing a colored apprentice, bound by the County Court, the defendant cannot avail himself of any defect in the bond required by the act of 1801 (Rev., ch. 583), not to remove the apprentice out of the county, nor of the fact that no such bond has been executed.

CASE, for seducing from the service of the plaintiff two colored boys, who were bound to him by the County Court of JONES. The plaintiff having made out his case by proof of the indentures and of the actual service of the apprentices, the defendant produced a blank paper, signed by the plaintiff and two sureties, intended for the bond required by the act of 1801, which requires persons to whom children of color are bound not to remove such apprentices from the county where they are bound and proved that this was the only compliance by the plaintiff with the requisitions of that act.

His Honor, Judge DONNELL, charged the jury that as the plaintiff had executed the indentures of apprenticeship and taken the boys under his care, the indentures were obligatory upon him, although he had not given bond, as required by the act of 1801, and that the defendant, who was a stranger, could not avail himself of any irregularity or defect in the bond, as a defence to this action.

A verdict was returned for the plaintiff, and the defendant appealed.

No counsel for either party.

HALL, J. The judge was certainly correct in stating to the jury that as the apprentices were regularly bound out to the plaintiff by indentures regularly executed by the plaintiff and the presid- (541) ing magistrate, according to the act of 1762 (Rev., ch. 69), the defendant was not at liberty in his defense to avail himself of any defect in the bond required by the act of 1801. (Rev., ch. 583.) Taking it for granted that the bond under the latter act is so defective that it is not obligatory upon the obligors, the case then stands as if no such bond was given. It is, then, the duty of the Court to notify the master of the apprentices to appear and give bond and security in the sum of 250 pounds not to remove such apprentices out of said county. In case default is made by not giving such bond, it then becomes the duty of the Court to bind such apprentices to some other person. But whilst the original indentures are in force, and before such bond is given, the apprentices are not to be considered as turned loose, and fit subjects to be seduced and employed by any stranger that thinks proper to interfere. On him there is not obligation to do them justice.

PER CURIAM. Affirmed.

THOMAS H. SMITH et al. v. ROBERT TUCKER.

FROM STOKES.

1. Slaves were, before the act of 1823 (Rev., ch. 1211), by deed limited to a woman "and her children at present living and those she may hereafter have, to have, etc., to her in manner aforesaid, for life, and afterwards to her present children, and any which may hereafter be born." Held that the limitations being in succession, the mother took the whole interest.
2. Held, also, that if the deed had been executed in a State where such limitations of slaves were valid, they would have been supported here.

DETINUE for several slaves. The defendant pleaded the general issue, and the cause was tried before his Honor, Judge STRANGE. The plaintiffs were the children of Eleanor Smith, mentioned (542) in the following deed:

"State of Virginia, Mecklenburg County:

"Know all men by these presents, that I, Robert Hyde, of the county, etc., for, and in consideration of the natural love and affection I bear to Eleanor Smith, my sister and her children by her present husband, James Smith, and which she may hereafter have, have this day granted, given and transferred to my said sister and her children, at present living, and those she may hereafter have, the following property (setting forth the negroes claimed in this action) to have and to hold the before-mentioned property, to her, the said Eleanor, in manner and form aforesaid, for and during her life, and afterwards to her present children and any which may hereafter be born of the said marriage, and which may be living at the time of her death, to be divided among them in equal portions, to them and their heirs forever. In witness whereof," etc.

No evidence of title, except this deed, was offered by the plaintiff, and his Honor, being of opinion that the mother, Eleanor Smith, took the whole interest in the slaves, and that the plaintiffs had no title as tenants in common with their mother, a nonsuit was entered, and the plaintiffs appealed.

Nash, for plaintiffs.
No counsel for defendant.

RUFFIN, J. The construction of the deed under which the plaintiffs claim is settled in our law. Upon the whole deed, the donees take in succession. The limitations over are unquestionably void. The construction may be varied by the law of another State in which it was executed. If it was executed in Virginia, the plaintiff should have proved the fact and the law of Virginia. It may be and probably is the law in that State that remainders in slaves after a life estate are valid, as they are known to certain purposes to have been part of the realty.

But, if it be so, the burden of making it appear rested on the (543) plaintiffs, and in the absence of such evidence, the opinion of the Court below is correct.

PER CURIAM. Affirmed.

THE STATE v. CHARITY, a Slave.

FROM ORANGE.

1. On an indictment against a slave for a capital offence the master cannot be compelled to testify.
2. If the master waives his privilege, has not the slave a right to object to evidence of confessions made to the master? *Quaere?*

The prisoner was indicted for the murder of her own child, and was tried before STRANGE, J.

On the trial, the master was offered by the prosecution to prove the confession of the prisoner. This was objected to by the master and by the prisoner; but the objection was overruled, and the witness examined.

The prisoner was convicted and appealed to this Court.

Nash, for the prisoner.
Attorney-General, for the State.

RUFFIN, J. I do not know that the question made in this case has ever arisen before in this State. Nor have I been able to find a decision of it in any of our sister States. It must be decided, therefore, on general principles.

It is a fundamental rule of evidence at common law that a party to a suit, or one directly interested in the result, is not competent to testify on the side of his interest, nor can he be compelled to testify against it. This rule less frequently applies to public prosecutions than to civil actions, because it cannot often happen that private rights are directly involved, or can be consequently affected by verdicts or indictments. But when they are, the rule prevails in one case as (544) well as the other, subject to a few certain exceptions of necessity or statute provision; as in the cases of violence on the wife, or of a witness who is entitled to a reward, on a conviction of the offender upon his testimony. But in other instances, there is no distinction between the effect of a direct interest in criminal or civil cases. A wife cannot testify for one who is co-defendant with her husband upon an indictment for a riot or conspiracy. A prosecutor, or his wife, cannot give evidence in an indictment for forcible entry, under the statutes of Henry and James. One charged as accessory, cannot be a witness for the principal; and other like cases. This has never been carried so far as to embrace heirs apparent, or in tail, or remainder-men, or masters of apprentices. In the former cases, the interest is too uncertain and remote; in the latter, there is no legal interest, because there is no property. But in the case of master and slave, the interest is direct and immediate. The whole property in the slave is in jeopardy, and the master is liable for the costs in case of a conviction. He is not, it is true, party to the record in the sense of reversing the judgment for any irregularity in giving him notice, which is a collateral matter within the discretion of the Court, as to the time and mode of proceeding. But his interests are essentially at stake, as much as the life of the slave is. The rule of exclusion or protection, on the score of interest, must apply in all cases alike, because it is drawn from the known general frailty of our species. The evidence of an interested witness is rejected, because we cannot have confidence that men in general in that state will tell the truth and the whole truth. The temptation is too strong for men to be exposed to it, and the danger of a jury being misled is too great. This applies equally to all cases. I think therefore, that a master cannot be a witness for his slave. It follows that he ought not to be forced on the other side. (545)

But this suggests another difficulty. The privilege not to testify, upon the ground of interest, is that of the master, and not of the slave. It may be consequently waived by the former. He may himself prosecute and give evidence against his slave. And since that is certain, I have entertained the most serious scruples against interfering with this conviction. It cannot be presumed that the master would falsely and corruptly destroy his own property. His evidence on the side of his interest may be suspected; but that against it cannot be supposed

to be the stronger than the truth would justify. If so, the prisoner can have no cause to complain. And could I separate her rights from those of the witness, I would do so, and let the verdict stand. But they are so connected that justice cannot be done to the master without giving the slave the benefit of it. We cannot restore him his property, without yielding her another trial for her life; nor reverse the judgment for the costs, without reversing it altogether. I therefore conclude, with much hesitation, that as the master did object to be sworn, there must be a new trial.

When I speak of the power of the master to waive his privilege and give testimony, I would not be understood as putting the slave's life in the master's hands and resting it on his mercy. I allude to testimony, to facts within his knowledge. When he is called to confessions, a different state of the case may arise, in which the privilege will be that of the prisoner. The confessions may have been made in reference to defense, and as instructions for conducting it; or being to the master, may or may not be of that voluntary character which the law, not less in wisdom than humanity, requires. Upon those points not the slightest intimation of opinion is now intended; for there is not a little difficulty in them, and this case does not require a decision upon them. The (546) exception of the prisoner does not present an objection to the evidence upon either of these grounds; and therefore this Court must take it that none existed in point of fact; that the confessions were made freely, and not with a view to defense.

HALL, J. The question submitted to the Court is one of a complex nature. The rights of the State, of the master, and of the slave, are involved in it. If the offense charged in the indictment has been committed, the State is entitled to redress by the legal conviction and punishment of the slave. In such case, the master must submit to the loss of the slave, and the slave must submit to her fate. But it is necessary to enquire whether the rights of either have been violated.

First, with respect to the rights of the master. It is a rule of evidence that a party to a suit canno be admitted or compelled to give evidence in it, because he is directly interested in the issue of it. The trial throws directly upon him a loss or a benefit. He is therefore, on the score of interest, altogether excluded from giving evidence. It may be taken in the present case that the master is not a party in form to the proceeding. But he is substantially so. He has as great an interest in the issue as if it was made up in an action of *detinue* to which he was a party. The conviction of the slave is a judgment against him to the amount of her value. In addition to this, he is made liable by the act of 1793 (Rev., ch. 381), for the costs of the prosecution; pro-

vided the slave, if a free person, would be liable for them. And there is no doubt that she would be liable upon conviction. I therefore think that the master was so much interested in the case that he ought not to have been examined as a witness when objected to by himself. The objection, however, is personal to the master. It cannot be taken by the slave. As to her, the evidence was legal. But to rectify the error as to the master, a new trial must be awarded. As to the rights of the slave, were the master to forego his interest and voluntarily (547) give evidence against her, I am inclined to think that she might legally object to his giving in evidence any of her confessions made to him, because by the act of 1793 (Rev., ch. 381), he is authorized to defend her; and because she is his slave, and by various means, against which slavery could make but little resistance, he might exact from her any confessions he pleased. But upon this part of the case I give no opinion.

HENDERSON, C. J. My concurrence in the opinion of the Court in excluding the master on the ground of interest, is so feeble that it almost amounts to a dissent. Where pecuniary interest only is at stake, to exclude a witness on the score of interest, however small, is applying a scale of morality to our nature sufficiently humiliating. But, where the life or death of a fellow-being is to be the result of the trial, to exclude a witness because he may have a pecuniary interest, either in preserving or in taking the life of the accused, is attributing to us, frail as we know ourselves to be, more depravity than we are willing, I think, to admit. And the rule, as laid down by the Court, as I understand it, excludes the master on the same ground—that of interest—from becoming a witness for his slave; for the rule must be mutual. If he cannot be compelled to give evidence against his slave, because he has an interest in his acquittal, he cannot, if he wishes, or, rather, is willing, give evidence for the slave on the same ground. I shall rather suppose that the interest at stake, being so entirely different from that which is brought forward to protect the witness from giving evidence, or to exclude him, if willing, is not to be weighed in the same balances with mere pecuniary interest. It is so transcendent in its nature that its weight is not to be ascertained by mere money balances. Cases are to be found in which witnesses were objected to on the score of interest in pro- (548) curing convictions for the sake of reward. They were admitted, because it was said that the statute giving the reward contemplated them as good witnesses, for the reward is given on condition that they give, or procured to be given, material evidence on the trial. There are other cases of interest arising under a statute giving them advantages in which the statute renders them competent. But I know of no case of

life and death where the interest excluded a witness. These statute cases did not require a further investigation of the principle of the rule of exclusion. They were admitted, not excluded. These different kinds of interest were not thrown into the opposite scales of the same balance. I consider indictments under the statutes of forcible entries and detainers as mere civil suits, and the decisions under them as made in civil causes. For the prosecutor, if successful, obtains a writ of restitution. I am inclined to think, but I am by no means satisfied, that the master is a good witness for his slave, and if so, may be compelled to give evidence against him; that is, as to acts, but not as to confessions; and more particularly, as to those made in reference to defense. But I think that they ought to be excluded in all case of confessions. The master has an almost absolute control over both the body and mind of his slave. The master's will is the slave's will. All his acts, all his sayings, are made with a view to propitiate his master. His confessions are made, not from a love of truth, not from a sense of duty, not to speak a falsehood, but to please his master; and it is in vain that his master tells him to speak the truth, and conceals from him how he wishes the question answered. The slave will ascertain, or which is the same thing, think that he has ascertained, the wishes of his master, and mould his answer accordingly. We, therefore, more often get the wishes of the master, or the slave's belief of his wishes, than the truth.

(549) And this is so often the case that the public justice of the country requires that they should be altogether excluded. Confessions made to propitiate the good opinion of the gaoler, or to avert harsh treatment, are excluded upon the same principle. I think the case of the master and slave much stronger. The power of the gaoler is temporary and limited; that of the master permanent and almost unlimited. The public justice of the country loses but little by excluding these confessions; for confessions of all kinds are very questionable guides to truth. In crimes of any magnitude they seldom speak the truth. But, if I should be entirely mistaken as regards the slaves' confessions in general, I think that confessions made in reference to defense certainly cannot be received, for the master from his situation, from the duties which the legislature have imposed on him, is the guardian and defender of his slave. It is a moral duty of the highest grade to see that no injustice is done him. The relation subsisting between them imposes upon him a load of obligations, and he should not be permitted, even if willing, to disregard them. He is the medium of communication with the counsel in Court; and a fair and free defense cannot be made if this confidence is permitted to be violated. In the present case, it does not appear what was the object in making the confession. In common cases, the party must bring his case within the law, as if this

question regarded the evidence of one who was an attorney, it must be stated that the disclosure related to a case in which he acted as the counsel of him who made the confession, and that it related to the cause. In this case I think it is different. *Prima facie* the confession was made in reference to defense or protection, for the master is the perpetual defender and protector of his slave. And if it did not relate to defense or protection, it should be shown on the other side; at least, in a case of such magnitude to the prisoner, I should be unwilling to consider it as made with a different intent, unless proved to be so. (550)

PER CURIAM. New Trial.

Cited: *S. v. Jim,* 48 N. C., 353.

THE STATE v. JOB S. CHERRY et al.

FROM MARTIN.

1. In appeals from the County to the Superior Court the latter does not inquire whether the former had sufficient evidence to justify the judgment, but is confined to evidence produced before itself.
2. So, likewise, in a proceeding upon a record of the County Court, the Superior Court cannot inquire whether the record ought to have been made up, but simply whether it was made up.
3. Where the record of a scire facias on a recognizance taken in the County Court, and the record of the recognizance itself differed, and after an appeal to the Superior Court, the County Court amended the entry of the recognizance, it was held to be proper.

SCIRE FACIAS, originally brought in the County Court, upon a recognizance entered into in that Court. The *scire facias* set forth a recognizance entered into at December Term, 1828, for the appearance of the defendant, Cherry, at the ensuing March Term. Plea—*nul tiel record* and issue. After a judgment in the County Court for the State, the case was transferred to the Superior Court by the appeal of the defendants.

The copy of the record transmitted to the Supreme Court contained a copy of a recognizance for $200, entitled, "In the County Court of Law,———, 1828," for the appearance of Cherry, "at March Term," and stated to be "entered into and taken in open Court, ———, 1828," and also an entry made at December Term, 1828, as follows: "Job S. Cherry, etc., recognized in the sum of $200, for the appearance of Job S. Cherry at the next term of this Court, on the second Monday of March, then and there," etc. (551)

In the Superior Court, upon the motion of the Attorney-General and a suggestion of diminution, a *certiorari* issued to the County

Court, to which a return was made, That at April Term, 1830, of the County Court, the following order was made: "Ordered by the Court, that a paper writing, purporting to be a recognizance between the State of North Carolina and Job S. Cherry, be amended, by adding thereto the words, 'December Term, Court of Pleas and Quarter Sessions,' in the caption thereof, and the figures '1829,' in the body thereof, and also, 'December Term, 1828,' above the teste."

His Honor, Judge DANIEL, upon an inspection of the record, and the return of the *certiorari,* affirmed the judgment of the County Court, and the defendants appealed.

Gaston, for the defendants.
The Attorney-General, contra.

RUFFIN, J. There is no ground for the objection that the Superior Court proceeded to the trial before any sufficient return to the *certiorari.* That writ was improperly issued, as there was no defect in the transcript of the appeal, but only in that of the recognizance. The latter is no part of the record of the appeal, but is a distinct record, to be used as evidence on the trial of the appeal. The copy of that was not needed to bring the cause into the Superior Court. When the cause got there, it was necessary proof. If the Attorney-General had received a defective copy, or a defectively certified copy, he was at full liberty to supply it by a new one without a *certiorari.* For aught we know, he did. The evidence on which the Court below acted is not stated in the case; and perhaps this Court ought, in strictness, to affirm the judgment,
(552) without saying more, since we do not see the error.

But if we are to take the recognizance, as stated in the transcript from the County Court, to be that used as evidence in the Superior Court, it will remain to be considered whether it sustains the judgment.

The *scire facias* alleges a recognizance entered into in Martin County Court, at December Term, 1828, for the appearance of Cherry at March Term, 1829, of the same Court. The cause now stands on the single issue of *nul tiel record.* In the transcript two entries appear at December Term, 1828. One of them made shortly on the docket of recognizances, thus: "Job S. Cherry, etc., recognized in the sum of two hundred dollars each, for the appearance of Job S. Cherry at the next term of this Court, on the second Monday of March next, etc. See recognizance." The other inserted either on the general minutes of the Court, or drawn up separately, purporting to be a formal recognizance, entered into in Martin "County Court of Law, 1828," without saying at what

term, and to be conditioned for Cherry's appearance "at March Term," without saying of what year. At the foot it is certified by the clerk to have been entered in open Court. After the appeal from the County Court, that Court ordered this latter paper to be amended by inserting, "December Term, 1828," both in the caption and at the foot, as the time of acknowledgment, and "1829" in the body of it as the year, in the March Term of which Cherry was to appear.

It is objected, that without the amendments, the recognizance would not conform to the *scire facias;* that they could not be made; or if they could, not after appeal. In England, all recognizances to the King are sued in the same Court. When forfeited, they are estreated and sent to the Exchequer. The original goes, and it must then be perfect, because there is nothing in that Court by which it can be amended; nor has the Court or magistrate who took it the power to amend, since the record is beyond their control. But, when entered into (553) before a magistrate in the county, he need not make up the record, technically speaking, at the time. He enters it in his book, and afterwards draws it out on parchment and files it in the proper Court. Yet it is a matter of record, by relation, from the time it was acknowledged. (1 Chitty, C. L., 72.) Some person must be entrusted with such duties; and the law supposes the integrity and responsibility of its judicial magistrates a sufficient warrant that the record, as made up, will speak the truth. It cannot be supposed that the note of it "in the book" of the magistrate contains a full copy of the recognizance, as afterwards engrossed on parchment. Yet, being made up, it is a record, and no averment can be made against it. It cannot be alleged that the party never entered into a recognizance, nor that, as made up, it varies from the original note of it. Until the magistrate parts finally from it, he may give it what form he likes, and he may rightfully give it any form consistent with the truth. After the filing of it, he cannot, either in England, or this State, alter it, for it has gone from him.

But this is not the case with recognizances acknowledged in our Courts. They are not commonly to be originally proceeded on in another Court, but only in that which takes them. They are not made up in separate parchments, but notes of them are made on the minutes. As they are not contracts executed by the parties, such notes are sufficient, and from them formal recognizances may be drawn out at any time. If suits on them be removed to another Court by appeal, the original recognizance, as a distinct record enrolled by itself, is not sent up. Our law knows no method of removing the original record from one Court to another. Copies are used. If a defective transcript has been made, or the recognizance itself defectively drawn up from the note, there is no reason why the Court should not supply the latter defect by

(554) having it truly and in legal form engrossed, and the clerk the former by giving a new copy. Neither is an original, but both purport to be copies. Another Court cannot know that a copy sent to them is not a true copy. The transcript is to them the record, and is conclusive evidence. If at first it was defective, it makes no difference; for the appellate Court does not enquire what reason the first Court acted on; but whether sufficient evidence is before itself upon a trial *de novo*. One Court cannot falsify the record of another Court, and for that purpose look at a variance between the recognizance as made up and certified, and the original note of it. The Superior Court cannot enquire whether the County Court ought to have made up such a record, but whether it did make it up. A record states the matters of fact which occur in Court. Only that Court in which they occur can know what they are. If the clerk makes a slip in drawing it up defectively, or does it falsely, as by inserting a different sum that the Court, the whole record being still with them, may have it properly enrolled, by reference to the first note of it, is a position which is proved by the stating of it. Justice to all persons requires such a power, and the exercise of it. The probity of the judge is our assurance in this, as in other cases, of the verity of our judicial proceedings. If it can be done before an appeal, it may be afterwards. Amendments are constantly allowed after error, to which effect numerous cases are collected in a late edition of Tidd's Practice, p. 770, and the Court of error often waits, even for the amendment to be made in the Court below. I conclude that there was nothing improper either in the amendments, or the time of making them.

But if there were, their propriety could not be questioned in a collateral proceeding. This is not an appeal from the order of
(555) amendment, but from a judgment in a suit on the recognizance. Though had it been the former, this Court could not help the defendants; for, as I have before said, one Court cannot alter or question the record of another as to matter of fact.

Yet, if the amendment had not been made, the Court is of opinion that enough appeared. The time when a recognizance is entered into sufficiently appears by its being entered as of a particular term. The entry itself is evidence of that to the Court taking it, and to another Court it appears, as many other matters do, by a separate caption. The time of appearance is expressly mentioned in the first note, set out in the transcript. Upon every point, therefore, the judgment below must be affirmed.

PER CURIAM. Affirmed.

Cited: *S. v. Reid,* 18 N. C., 381.

THE STATE v. MATTHEW MILLS and JOHN KEESE.

FROM CASWELL.

Where a prisoner was committed to the custody of the sheriff until he entered into a recognizance to keep the peace, and for his appearance, it was held—HALL, Judge, dissentiente, and RUFFIN, Judge, dubitante—that the sheriff was not a judicial officer authorized to take a recognizance. But the recognizance not being taken by the sheriff as a judicial officer, but simply signed by the parties, and attested by him, without the addition of his office, it was held—HALL, Judge, dissentiente—not to be a recognizance, but a simple obligation.

At the spring term, 1827, of CASWELL, upon the usual affidavit, it was "ordered by the Court that the said John W. Grant be committed to the custody of the sheriff of this county, until he enters into recognizance in the sum of $2,000, and two sureties, each in the sum of $1,000 for his appearance at the next term of this Court, then (556) and there to answer, etc., and also to keep the peace towards," etc.

At the ensuing term of the Court the sheriff returned into Court the following instrument:

"John W. Grant acknowledges himself justly indebted to the State of North Carolina in the sum of two thousand dollars, and Matthew Mills and John Keese, his sureties, in the sum of two thousand dollars, to be levied of their goods and chattels, lands and tenements. Nevertheless to be void, on condition that John W. Grant shall make his personal appearance, etc., shall also keep the peace, etc. Given under our hands and seals.

"JOHN W. GRANT, L. S.
"JOHN KEESE, L. S.
"MATTHEW MILLS. L. S.

"Teste—GEORGE WILLIAMSON,
"THOMAS L. LEA."

A *scire facias* issued on this recognizance against Mills and Keese, it having been suggested on the records of the Court that George Williamson was sheriff of Caswell County. The defendants pleaded *nul tiel record,* on which issue was taken by the State.

NORWOOD, J., rendered judgment for the defendants, and Mr. Solicitor-General Scott, in behalf of the State, appealed to this Court.

Attorney-General, for the State.
Winston, for the defendants.

RUFFIN, J. Upon the principal question in this case, whether a sheriff can award process of the peace and take security for it by way of recognizance, there seems to be great doubt. Most respectable writers, Sergeant Hawkins and Sir William Blackstone, express themselves in the affirmative; and yet, in other parts of their works, they lay down positions from which the contrary is to be inferred. It seems certain

that the sheriff once possessed that authority, for his *torn* was a Court of record of extensive criminal jurisdiction, and it is incident to every judicial officer to take obligations of record. The power may also be imparted by statute to other magistrates, who are not judges. It (557) is in its nature, however, judicial, since its execution consists in making a record. This observation leads me now to remark that the obligation in this case cannot be valid, unless the sheriff, *virtute officii,* possesses the power. It cannot derive validity from any supposed authority conferred by the Court, which committed Grant to the sheriff's custody; for judicial powers cannot be delegated.

The authority to bail in England on indictments was taken from the sheriff by the statute of 1 Edw. IV, ch. 2, which, with several others, speaks of the extortions and oppressions practiced by them, and transferred the jurisdiction of the offenses, and by construction that of bailing, to the justices. From that time taking recognizances by sheriffs seems to have fallen into disuse, at least; whence a strong argument is drawn that the authority was annulled. In this State I never knew an instance before the present, nor, upon enquiry, have I been able to hear of one among the oldest of the profession. Our act of 1797 (Rev., ch. 474, sec. 4) gives authority to the sheriff and his deputy to "take bail in the nature of a recognizance," upon a *capias* issued on indictment found. Before that time, all persons arrested were carried before justices of the peace to be bailed. The statute is a strong legislative declaration that such power was not possessed before, and in its terms is confined to indictments found. Indeed, I am not aware that sheriffs in this State have any original judicial powers. Nor can they exercise any but upon writs, under which they preside at inquests, as in dower, *ad quod damnum,* and the like. Hawkins, 2 P. C., says that this power exists still, book 2, ch. 8, sec. 4. In *Burghough v. Rosseter,* 2 H. Bl., 418, it was held that he could not bail by obligation upon an indictment. Eyre, C. J., who thought he could, admits that he cannot take a recognizance. (Ib., 434.) Yet, Sergeant Williams thinks he can bail in this (558) last way (*Posterne v. Hanson,* 2 Saund., 59); while Mr. Chitty, after remarking that it has been supposed he may take a recognizance, but not a bond, says that he cannot, in any way, take on himself to let a prisoner at liberty on bail. (1 Crim. Law, 98.) Between authorities at once so respectable and conflicting, the Court will not assume to determine, unless it become absolutely necessary in the cause; and then, not without farther investigation. I confess, for myself, that I am not satisfied either way, but I incline against the authority. My impression is founded on the *non user* in England for several centuries, and its total *non user* here; the act of 1797; the great danger of allowing the person having the custody of prisoners to judge of their

offenses, and determine the propriety of imprisoning them, and the sum in which they shall give bail; a power of the abuse of which *magna charta,* and sundry other English statutes, afford abundant evidence; and not the least, on the provisions of the *habeas corpus* act, which plainly supposes the cause of commitment to be set down in a warrant in writing, to be returned with the prisoner; and on our act of 1715 (Rev., ch. 1), which enacts that no person shall be committed to prison for any criminal matter until examination had before some magistrate, who shall admit the party to bail, if bailable, and shall record the examination—a function to which the sheriff is altogether incompetent. Still, I will not say that the sheriff cannot take security of the peace by recognizance, for this case may be decided without. It is, however, at least, so doubtful as to render it safest that he should not exercise the power.

It is the opinion of the Court that this instrument is not a recognizance, but only an obligation *in pais,* because it only purports to be such. A recognizance is an obligation acknowledged of record before a Court, or some judicial officer, by whom it is drawn out and certified. It is not executed by parties, but acknowledged by (559) them. (1 Ch. Cr. Law, 72). The official character of the person before whom it is acknowledged must appear, as that it was done in Court, or before A. B., a justice of the peace, or sheriff. (3 Burns, Jus., 188.) The reason is that it may appear to be a record. It is not sufficient, therefore, that the person is an officer competent to act, but he must state himself to be acting officially. Here, although the instrument begins with an acknowledgment of a debt by the parties in the third person, in the usual form of a recognizance it does not say before whom it is acknowledged, and it concludes in the common form of bonds, "given under our hands and seals," and it is signed and sealed as a deed. It is then attested by George Williamson and Thomas L. Lea, as individuals, the former being, as stated in the case, the sheriff. What is to distinguish this instrument from other acts *in pais?* If this be a recognizance, then every obligation attested by a sheriff may be equally a record. His official character must be expressed in the act itself. The present bears every mark of not being one. This is not like *Siler v. Ward,* 4 N. C., 161, where the act in itself purported to be one, which, in a private capacity, the person could not do, and could do in his judicial character. It was referred to the capacity, in which alone it could be done. Precisely the reverse is the case here; and consequently, the contrary inference is to be drawn.

HENDERSON, C. J., concurred.

HALL, J., *dissentiente.* It is stated in Fitzherbert's Natura Brevium, 79, that a sheriff is by the common law a conservator of the peace, and hath the keeping and custody of the county for the time he is sheriff; that he hath power by recognizance to bind men to keep the peace, and that everything which they do by virtue of their commission ought to be taken as matter of record. (Hawk., ch. 8, sec. 4; Bac. Ab. Justices of the Peace A, Sheriff L. Th. Co. Litt., 82, note B; 1 (560) Bl. Com., 343.) To these authorities that of Sir Edward Coke may be added in Cro. Ca., 26. When he was made sheriff, he took exception to the oath proposed to be administered to him, because part of the oath was that he should cause the statute of Winton and the statutes against rogues and vagabonds to be put in execution; when, in fact, the statute of Winton was altered, and the statutes against rogues and vagabonds were appointed to be executed by justices of the peace, not by the sheriff. It was answered by the Lord Keeper and judges that, although authority had been given to justices of the peace to put those statutes in execution, yet it doth not take away the sheriff's rights, who is the public conservator of the peace.

Notwithstanding, by the statutes of 4 Ed. III, ch. 2 and 1 Ed. IV, ch. 2, and other statutes, the sheriff's jurisdiction in criminal cases is in a great measure taken away from him, and transferred to justices of the peace, yet he is still a sworn peace officer and conservator of the peace, the proper officer to serve process, and may take security of persons whom he is ordered to bail.

It is stated in Natura Brevum (*ubi supra*), that the writ *de securitate pacis* originally issued from chancery, and was directed to the justices or the sheriff, commanding him to take security of the offender to keep the peace towards him, at whose instance it was issued. It is also laid down in the same book that if a man be condemned in trespass before justices of the peace, and be arrested and put into prison in the custody of the sheriff, he may sue a writ out of chancery to the sheriff that he take bail of him and set him at liberty. (Ibid., 250.) So the writ of mainprize was a writ directed to the sheriff, commanding him to take security for a person's appearance, if bailable, although such a person might have been committed by justices of the peace. (2 Hale, 142; 2 Hawk., ch. 15, secs. 29, 30; Bac. Ab. Bail in crim. cases, A.) Where is the difference in taking bail in those cases, and the present case (561) under an order of the Superior Court, made for that purpose; a Court of the highest criminal jurisdiction known to the laws of the State?

It has been frequently ordered by the Superior Courts, when persons could not give bail in a bailable case, during the sitting of the Court, that a recognizance should be entered into in a certain sum before a

justice or justices of the county, and that the sufficiency of the bail should be judged of by them. And in such case, the justices of the County Court might not have jurisdiction of the offense. In such case the recognizance is taken altogether by virtue of the order of the Superior Court. The justices do not act in such cases *ex officio,* but they are conservators of the peace. They hold an office, which qualifies them to comply with the mandate. If it shall be said that the Attorney-General commonly gives his assent to such orders, my answer is that if the justices have not the power in law to comply with such order, his assent would not give it. *Potestas delegata non delegari potest.* (1 Bac. Ab., bail in crim. cases, B.) Chitty (1 Crim. Law, 97, 8), says that since the sheriff's jurisdiction in criminal cases has been transferred to the justices of the peace, he has not in modern times exercised the power of bailing; that it is supposed he may take a recognizance. But he adds that it appears from authorities that he cannot in any way take on himself to set a prisoner at liberty on bail whom he once obtains in his custody. It is not necessary to examine that question here, because the sheriff has not taken upon himself to set the prisoner at large. He took the recognizance in consequence of the order of the Superior Court. In addition, it appears from the following authorities that the sheriff may take a recognizance: *Posterne v. Hanson,* 2 Saund., 59, b; *Bengough v. Rossiter;* 4 Term, 505; *S. c.,* 2 H. Bl., 418. The case there was that a *capias* issued upon an indictment for a misdemeanor from the quarter sessions, and the sheriff took a bond for the defendant's appearance. It was held that he had no power to (562) take a bond, but it was admitted in the case, as reported in Term Reports, that he might take a recognizance.

Judge Haywood also says in his Justice (p. 244), that sheriffs are vested with such power, but advises that the exercise of it should be left to the justices of the peace.

By an act passed in 1797 (Rev., ch. 474), when a *capias* issues upon an indictment (if the offense is bailable), the sheriff is directed to take recognizance for the defendant's appearance. Can it be doubted that a Court could issue a *capias* against a person to appear at the next Court to give security to keep the peace in case of a complaint made and properly supported by the oath of the party? If so, would not the sheriff, particularly if so directed by the Court, be at liberty to take a recognizance for the person's appearance? If this would be right, it is the present case. The party was in the sheriff's custody. He held him for his appearance at the next Court to give security to keep the peace. The only difference is that the Court fixed the sum in which he should be bound, and did not leave it to the discretion of the sheriff. I cannot

but think that this case, although there was no indictment against the defendant, comes within the equity of the act.

But it is said that the recognizance in this case is not in form such a recognizance as the sheriff should take, provided he had the power to take it. The recognizance, as far as it relates to the defendants, appears to be good. It is true, the sheriff does not state that it was attested by him as sheriff. He merely signs his name to it; but it was known to the Court that he was sheriff, and it must be taken that he returned it to Court in that character. He had no authority to take it and return it in his private character; and it must be taken that he returned (563) it in that character in which the law required him to act.

With respect to the circumstance that the recognizance was also attested by Thomas L. Lea, I can only remark that if it would be good without his attestation, it is not bad on that account. *Utile per inutilia non vitiatur.*

Upon the two questions raised in this case—first, whether the sheriff had the power to take a recognizance, and second, whether it has been taken in due form—I am free to confess that I do not feel a perfect conviction that my opinion is correct, and the less so as my brethren differ in opinion from me. But the inclination of my mind is that the State is entitled to judgment.

PER CURIAM. Affirmed.

Cited: S. v. Hill, 25 N. C., 400; *S. v. Davis,* 109 N. C., 811; *S. v. Lawson,* 123 N. C., 743.

THE STATE v. NEWELL JACKSON.

FROM SURRY.

1. The act of 1823 (Rev., ch. 1193) directing the mode in which laws of ther States shall be proved, is substantially complied with by a certificate under the hand and private seal of the Secretary of State, accompanied by a certificate of the Governor, under the seal of the State, as to the official character of the Secretary.
2. The existence of a foreign law is an inquiry for the jury; but that fact being ascertained, its construction and effect are questions to the Court.
3. Where a question of law has been improperly left to the jury a new trial will not be awarded if the jury decided it correctly.

The defendant was indicted for passing on 26 November, 1826, as genuine, with an intent to defraud one J. C., a counterfeit note, purporting to have been issued by the president and directors of the Bank of the State of South Carolina, knowing the same to be forged. The note was for one hundred dollars, and was dated 15 December, 1824.

Upon the trial, the Solicitor offered in evidence a copy of the act incorporating the Bank of the State of South Carolina, certified by the Secretary of this State, under his hand and private seal, (564) together with a certificate of the Governor of this State, under the great seal of the official character of the Secretary. This testimony was objected to by the defendant, but was admitted by the Court.

The copy thus certified did not contain the date of the passage of the act, nor any caption of the day when, and place where it was passed. Upon which it was objected for the defendant that it did not appear that the Bank of the State of South Carolina was in existence, either at the time the bill purported to be dated, or at the time when it was alleged to have been passed by the defendant. But his Honor, Judge MANGUM, informed the jury that if, upon an examination of the act of incorporation, they were satisfied that such a corporation as the Bank of the State of South Carolina existed, and that its existence commenced before the bill upon its face purported to have been issued, and continued till it was passed by the defendant, they ought to find a verdict for the State.

Under this charge the defendant was convicted and appealed.

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

RUFFIN, J. Upon looking into the certificates of the Governor and Secretary of State to the copy of the statute of South Carolina, they seem to conform substantially to the provisions of the act of 1823. (Rev., 1193.) That of the latter is under his private seal, and the act so requires it. It adds further, that "the seal of the State shall be attached." This cannot mean to the certificate of the Secretary, because it is before said that it shall be under his own seal, and because that officer has not the custody of the great seal. We cannot attribute any other meaning to it, than that the Governor shall annex it (565) to the usual testimonial by himself of the official character of the Secretary of State.

In copying the law of South Carolina, the Secretary has omitted the date of it, as appearing in the statute book. He does not seem to have been aware that all the acts of one session of the Legislature make but one statute, and that each particular law, as we now call them, is but a chapter of one statute, composed of the whole. The Secretary certainly need not copy all the acts of the session for the sake of one, within the meaning of the act of 1823. It is sufficient if he gives the particular chapter. But he may, and it is proper that he should prefix to each chapter, when needed, the general caption of the whole, in which the

day and place of passing it appear. That is a part of each chapter in this sense; for it extends to the whole.

The substance of the objection is that for want of such caption, or other direct evidence, there was no proof that the statute had been passed, when the note purports to have been made—viz., the 15th of December, 1824, or when it was passed by the prisoner. Certainly, the date of a statute, or its duration, cannot be shown by parol. The former is a part of the law itself, and must appear from it; the latter can be established only by that statute itself, if it contain an express limitation, or by a repealing statute. But it is not necessary that the time of its passage should be made to appear by the caption of the statute. It is sufficient if it appear in any part of it. It must be proved by the statute; but it may be expressed either in the beginning or elsewhere; or may be collected by inference from express provisions. When passed, it remains in force until repealed, or the expiration of the time limited in the act.

In the present case, there is an express limitation of the time to 1835; so that it was in force in 1824, if, in fact, it was passed before that time. That it was passed before, is a necessary inference from (566) another provision in it, that certain officers should perform certain duties annually, until 1824. So that both the period at which the statute passed, and for which it continued in force do sufficiently appear in the present case.

A doubt has suggested itself to the Court upon the effect of its being left by the judge below to the jury to draw these inferences. We suppose that it was on the idea that foreign laws are facts, and that the jury alone could deal with them. The existence of a foreign law is a fact. The Court cannot judicially know it, and therefore it must be proved; and the proof, like all other, necessarily goes to the jury. But when established, the meaning of the law, its construction and effect, is the province of the Court. It is a matter of professional science, and as the terms of the law are taken to be ascertained by the jury, there is no necessity for imposing on them the burden of affixing a meaning to them, more than on our own statutes. It is the office of reason to put a construction on any given document, and therefore it naturally arranges itself among the duties of the judge. It is the opinion of this Court that the Court below erred in not deciding the question. In ordinary cases, the consequence would be a new trial. But in the present, the statute is spread out in the case, and it is thus made to appear to us that the jury have precisely adopted that interpretation which the Court ought to have given by way of instruction. The course of the judge gave the prisoner the benefit of the chance of a mistake of the jury. He cannot complain that they made no mistake. As, therefore,

it is manifest that the jury have administered the law correctly, there is no ground for a new trial.

PER CURIAM. No Error.

Cited: Knight v. Wall, 19 N. C., 129; *Moore v. Gwynn,* 27 N. C., 190; *S. v. Cheek,* 35 N. C., 120; *Hooper v. Moore,* 50 N. C., 136; *Hilliard v. Outlaw,* 92 N. C., 269; *Lassiter v. R. R.,* 136 N. C., 98; *Baker v. Railroad,* 144 N. C., 41; *Hall v. Railroad,* 146 N. C., 351; *Carriage Co. v. Dowd,* 155 N. C., 317.

(567)

THE STATE v. SAM, a Slave.

FROM ROWAN.

1. An averment of the time when an offense was committed is unnecessary, unless the time is a constituent part of the offense.
2. Such an averment is frequently made, where offenses committed after a certain specified day are made criminal; or where the statute increases the punishment. But it seems that it is now in no case necessary.

The prisoner was indicted under the act of 1823 (Rev., ch. 1229), as follows:

"The jurors, etc., present, that Sam, a person of color, etc., on, etc., with force and arms in, etc., in and upon the body of one L. S., a white female, in the peace, etc., violently and feloniously did make an assault, with intent to commit a rape upon the body of the said L. S., then and there did beat, etc., against the form of the statute.

After a conviction, the counsel for the prisoner filed an affidavit, and upon the facts disclosed therein moved for a new trial, upon the ground of surprise, which was refused by STRANGE, J.

A motion in arrest of judgment was then made, because the indictment did not charge the offense to have been committed since the passage of the act of 1823. This motion was overruled, and, judgment of death being pronounced, the prisoner appealed.

Nash, for the prisoner.
The Attorney-General, contra.

RUFFIN, J. When the time of doing an act constitutes its guilt, the indictment must expressly aver it, and so describe the time as to bring the case within the words of the statute, if the offense be one created by statute. As where it is made unlawful to do certain things between such a day and such another day of the year. The time not only enters into the offense, but also into the description of it in the (568)

act; and therefore ought also to enter into the description of the indictment.

Going on that reason, there are cases which require the same particularity in indictments framed on statutes, which make acts done after a specified day criminal, or increase the punishment. But this was always confined to recent statutes. And a respectable writer, Mr. Chitty (Cr. Law, 234), supposes that, though usual, it is now in no case necessary. I should, indeed, think that in such a case the conclusion, *contra forman statuti,* did sufficiently aver that the fact was done after the day specified in the act itself, and that the verdict so affirmed: For, except in cases of description, the time stated need not be proved; and unless the evidence showed the commission of the offense was subsequent to the day limited, the party would be entitled to an acquittal. The verdict of guilty, therefore, affirms not only that the fact has been done, but also that it was done, so as to be criminal within the statute; that is to say, after its passage, or the day specified in it. And that such an averment does not enter into the description of the offense is clear from this: If it did, it must appear alike in all indictments drawn on any statute, ancient or modern thus specifying a day. But all the books state that it need not in the case of an ancient one.

But clearly, the rule, never went farther than to embrace cases arising on statutes which do in themselves designate a particular day after their passage, after which the act prohibited shall be an offense. It never did extend to statutes making the act criminal immediately after the passage of the statute, or the general period at which all statutes go into operation. The time does not make a part of the offense, as described in the statute, and is material only so far as it shows the fact was perpetrated after the statute was in force, which is necessarily
(569) inferred from the verdict, and the averment that it was against the statute. Of this last kind, is the act of Assembly on which this indictment is drawn.

We do not give any opinion upon the motion for a new trial, because it is founded altogether upon surmise, and of that the Court below is exclusively the judge. It is a matter of discretion, with which this Court cannot interfere.

PER CURIAM. No Error.

Cited: *S. v. Wise,* 66 N. C., 121.

THE STATE v. TOM, a Slave.

FROM CRAVEN.

1. A conspiracy to murder, unaccompanied by an intent to rebel or make insurrection, is within the meaning as well as the words of the act of 1802 (Rev., ch. 618) to prevent conspiracies and insurrections among slaves.
2. On an indictment for conspiracy against two the acquittal of one is the acquittal of the other.

The prisoner was indicted under the act of 1802 (Rev., ch. 618), as follows:

"The jurors, etc., that Donum, a slave, the property of E. S. I., Tom, a slave, the property of S. F. (and six others) on, etc., at, etc., unlawfully did arm themselves with guns and fire-arms, and being so armed with guns and fire-arms as aforesaid, unlawfully did assemble and meet together, and being so unlawfully assembled, etc., did then and there feloniously and wickedly consult, advise, and conspire, to rebel and make insurrection, contrary to the form of the statute, etc.

"And the jurors, etc., do further present, that the said Tom, etc., the said Donum, etc. (and six others), afterwards, etc., did unlawfully arm themselves with guns and fire-arms, and being so armed, etc., did meet and assemble, etc., then and there feloniously and wickedly did plot and conspire the murder of one William Duncan, contrary to the form of the statute, etc."

Upon this indictment, Donum was first tried and acquitted.

On the trial of the prisoner no evidence was offered on the (570) first count. The enquiry was confined solely to a plot, alleged to have been made between the prisoner and Donum to murder Duncan, without any ulterior views to an insurrection. For the prisoner, the record of Donum's acquittal was given in evidence, and his counsel contended that it required two persons to commit the crime charged, if the jury should think that the evidence inculpating the prisoner related only to a conspiracy with Donum, and with no other, then the record of his acquittal was conclusive evidence that he was innocent, and they could not find the prisoner guilty.

His Honor, Judge DONNELL, instructed the jury that the record of Donum's acquittal was not, upon this trial, conclusive, but was strong *prima facie* evidence that Donum was not guilty, so far as his guilt was a necessary fact in establishing that of the prisoner's. That the prisoner could not be found guilty from the very nature of the charge, unless the jury were satisfied of the guilt of another of the persons charged in the indictment, as it required the concurrent guilt of two to commit the offense; and that, in giving to the record of Donum's acquittal the full weight to which it was entitled, as the finding of another jury on the very point in issue, they should still be fully satisfied, from the whole

evidence before them, of the guilt of the prisoner in plotting and conspiring with Donum the murder of Duncan, then they might find him guilty.

The prisoner was convicted, and judgment of death was pronounced, from which he appealed.

Gaston, for the prisoner.
(571) *Attorney-General,* for the State.

RUFFIN, J. The words of the act of 1802 (Rev., ch. 618), "If any number of slaves shall plot or conspire the murder of any person whatsoever, they shall suffer death," upon which the second count of the indictment is drawn, do by themselves create a substantive offense. Arguments from the context have been urged to show that they are connected with the preceding words: "Shall conspire to rebel, or make insurrection," and that no conspiracy to murder is within the act, unless it have also for its object a change of the conspirator's state of servitude.

The Court certainly is not inclined to tear any part of a penal law from its context to make it more severe. If the obvious sense of particular words could be restrained by the general purview of the act, the Court would not feel at liberty, but bound to put the mildest interpretation on them. That would be to obey the words of the Legislature in their true meaning; that is, as collected from all the words used.

But we cannot disobey the plain mandate of a statute, expressed in a distinct and substantive manner; unless, indeed, the context does show that the obvious sense is not the true sense. Here two different kinds of conspiracy are expressly and severally mentioned in the first section: "If any number of slaves shall conspire to rebel or make insurrection, or shall conspire or plot the murder of any person whatsoever." The structure of the sentence makes the offences several.

It has been said that as the act relates to offences committed by slaves, it embraces only such as are connected with their condition as such. That inference by no means follows. It would be to suppose that the legislature would make no act criminal in a slave, which is not also criminal if done by a free person, unless it had a view to his
(572) enfranchisement, and is contradicted by the acts regulating the trading of slaves, besides many others of police.

Nor can the Court yield to the argument that the legislature did not intend to apply a higher scale of morality to slaves than to free persons by making a bare conspiracy to murder, without a rebellious intent, a capital felony. That is a consideration not to be addressed to a Court, because it does not aid in discovering the meaning of a law; but rather to the law-maker, in settling the policy of it. Yet it would seem obvious

to either tribunal, that the most debased or licentious a class of society is, the more rigorous must be the penal rules of restraint.

The second and third sections relate to accessories to a conspiracy to rebel or make insurrection. It is thence inferred at the bar that the principal offence created in the first section must be correlative, and likewise confined to a conspiracy to rebel or make insurrection. The argument, I think, is the other way. It would, indeed, be absurd to create the offence of the accessory, where there is no principal offender. But that is not the case here. The first section does create the specific crime of conspiring to rebel, to which the two following refer. It is remarkable, however, that the two last sections drop the words "plot or conspire to murder"? What is the inference from that? Certainly, that being accessory to that species of conspiracy shall not be a felony, but left at common law; but not that those words, omitted in the second and third section, should not, when used in the first section, create in that section the principal felony of conspiring to murder.

Another consideration presses itself on our notice. The crime of conspiring among slaves against the lives of those to whom they owe immediate domestic allegiance is, though not of so extensive consequence, more to be apprehended than that of general insurrection. It is more likely to be of frequent occurrence, and is more dangerous than the other, because it is not so easy of resistance. It cannot be (573) doubted that the Legislature had in the passage of this act a care of the lives of those exercising dominion over slaves. Yet, how could a Court put such a meaning upon the terms employed, if their general and more extended signification is imported by them, *per se*, be once limited as contended for? If the murder meant a murder growing out of a conspiracy to rebel, then a conspiracy to murder the master, much less any other member of his family, would be out of the act. For the conspiracy to rebel surely means an attempt to throw off, not the particular allegiance of the master or mistress, but the general allegiance to the country, by subverting the government, or that principle of it which fixes their servile condition.

I therefore think the opinion of the Superior Court right on this point.

The other question is, whether the acquittal of one of two persons charged *nominatim* in the same indictment with a conspiracy, is an acquittal of the other. In this indictment six are charged. The case states that the evidence went only to a conspiracy between Tom and Donum, yet the jury found Tom guilty generally. That might well be done, though Donum were not guilty; because it is sufficient to show a conspiracy between Tom and any one of the others. If the case rested there, the judgment would be without difficulty affirmed; for this Court

cannot grant a new trial, for the reason that the verdict is against evidence. But the Court below instructed the jury that they might convict the prisoner, although they believed all the other persons, except Donum, to be not guilty, notwithstanding the previous acquittal of Donum upon the same indictment. The case is, therefore, upon the instructions given, the same as if Donum and the prisoner were the only defendants.

Conspiracy being a crime, requiring the guilty coöperation of two, at least, to constitute it, in which there is a mutual dependence (574) of the guilt of each person upon that of the other, principle would seem to demand that all the accused should be jointly tried and convicted, or acquitted. In other cases of dependent crimes, that upon which the rest depends must be first established. Such is the law between principal and accessory. The reason is that there may be as full defense as possible upon the very point of the principal's guilt, by that principal himself, who is best able to make it. To make that rule effectual, it became necessary to establish another that, but by the accessory's own consent, no proof of the principal's guilt should be heard against him until it was first established against the principal himself. The rule arises out of the nature of dependent criminality. Now conspirators may be said to be co-principals. The guilt of both must concur to constitute that of either; and it must consist of a joint act, and it makes one crime in both. As the trial of one need not precede that of the other, the trial of both ought to be concurrent. I think it more than probable that anciently such was the course. But, clearly, now it is otherwise. There are many precedents of the separate trial of persons indicted for offenses that could not be committed by less than two. *Rex v. Sudbury,* 1 Lord Raymond, 484; *S. c.,* 12 Mod., 262; *Rex v. Kinnersly,* 1 Str., 193; *Rex v. Niccolls,* 2 Str., 1227. It is too late now to question it.

But it can never follow from those cases that where one of the persons, the establishment of whose guilt is essential to the conviction of the other, has been legally acquitted, the other does not thereby become discharged. It cannot be that a man can be held guilty to any purpose who has, in due course of law, been found not guilty. The analogy between this case and that of the accessory is strict. The acquittal of the principal is an immediate and absolute discharge of the accessory.

For there can be no aid given to a deed when the deed itself was (575) never perpetrated. So, where guilt consists in the joint act or intent of two, and it is found that one of them did not join in the act or intent, it is conclusive as to both. For A could not conspire with B if the latter did not conspire at all. In all the cases, therefore, a verdict affirming the guilt of fewer persons than could commit the crime,

and affirming the innocence of all others charged, has been held to be an acquittal of all. That of *Rex v. Sudbury,* before cited, was for a riot. Two of the defendants were found guilty, and the others acquitted; upon which all were discharged. This case is fully recognized in *Rex v. Scott,* 3 Bur., 1262, where six were indicted for a riot; two were not tried, two acquitted, and two convicted. There was judgment against the convicts, because the verdict must be held to find them guilty with the two not tried. If all had been acquitted but the two, Lord Mansfield's opinion would have agreed with Lord Holt's. The doctrine of this last case, it will be seen, is that some of the offenders may be punished before the guilt of all is established against all, and in that respect agrees with the previous cases of Kinnersly and Niccolls. These were indictments for conspiracy. In each of them one defendant was found guilty, but in one of them the other was dead, and in the other, not in Court. There were motions in arrest of judgment on the ground that both should be convicted, and that the dead man never could be, and the other never might be tried, or might be acquitted, which would make a contradiction in the record. The motions were overruled, because the guilt of the co-defendant was found, as against the convicted defendant, and there was then no repugnancy; and where the one was dead, there could not be another trial, and therefore no contradiction; and where one had not pleaded, though he was not concluded by the first verdict, and might traverse his own guilt and be subsequently acquitted, yet the possibility of it should not intercept the stroke of justice (576) on him already found guilty. This is the whole extent of those cases: That where one party has not been tried, and can or may never be tried, the other, being convicted, shall immediately suffer. But they neither touch the question what shall be the effect upon him who is attaint, of the subsequent trial and acquittal of the other defendant, nor the other question now before us, what shall be the effect of the previous acquittal of the other defendant. Upon those points, I have been able to find no adjudged case. But we are not left without analogies, equally instructive. An accessory may, at his own desire, be tried before the principal, and by consequence may be convicted and punished. Yet, where both have been attainted, the reversal of the attainder of the principal *ipso facto* reverses that of the accessory, and his heir may enter. (Lord Sanchar's case, 9 Rep., 117.) This follows from the dependent nature of the charge against the accessory. If a reversal, for mere error in law, of the principal's attainder thus operates in favor of the accessory, the conclusion seems to be a necessary one, that the subsequent acquittal of the principal by a jury shall have an equal effect. And as the accessory could not again be put upon trial, or, rather, convicted, for want of a conviction of the principal, the inference

cannot be avoided, that by such subsequent acquittal of the principal, the accessory is also acquitted. The corporal suffering cannot indeed be cancelled. But all the continuing consequences—corruption of blood, escheat, and the like—immediately cease. If the accessory may thus avail himself of the subsequently established innocence of the principal, much more would we expect the previous acquittal of the latter, to be the acquittal of the former. And so we find it immemorially held. And so, I think, it is in conspiracy and other like cases. A conviction and sentence of one only, are abrogated by the consequent acquittal of all others named, the indictment not being *cum multis aliis*. All the (577) remaining effects of the judgment cease; the character becomes purged, and the party's free law and competency *ut vir bonus et legalis,* restored. And a previous acquittal of all the persons but one, between whom the conspiracy is laid, absolutely negatives the guilt of that one, and he stands thereby acquitted.

I have said that I find no case adjudged directly in point. But *Rex v. Niccolls* is much more fully reported than in Strange, in a note to *Rex v. Oxford,* 13 East, 412. And the reasoning of Chief-Justice Lee, as there given, is strong to support the positions here taken. To illustrate his argument against the motion in arrest, the Chief Justice puts the case of an action of conspiracy, where one is found guilty upon issue joined, and the other demurs, and has judgment for him. "That shall not," he says, "discharge him who is attaint, if the cause of the demurrer do not go to the gist of the conspiracy." This certainly yields to the other side their postulate, and if one be acquitted, though not by the same inquest, the others shall be too. For the way in which he puts it is stronger than a direct assertion that if the demurrer went to the gist of the action, a judgment on it for the defendant, who put it in, would discharge him who was attaint. He takes it for granted, as a thing not to be disputed. If this be the case on demurrer, it must be also on a verdict. It is true, he is speaking of a civil action, in which judgment cannot be rendered against one defendant alone, as it may upon indictment. But I do not perceive any distinction growing out of that circumstance. The guilt of one defendant is, in both instances, established by a method, and at a time distinct from those by which the innocence of the other appears. The true principle is that both the guilt and innocence of the party attainted are affirmed in different parts of the proceedings, and so the record is nugatory; and on (578) the side of humanity, innocence is presumed. It then amounts to the acquittal of him who was convicted, because the acquittal of the other is a bar to a second trial of either for that offense.

There are other instances, presenting a strong analogy. I allude to actions against several, in which one suffers judgment by default, and

the other pleads to issue, which is found for him. In cases of contract, a verdict for one enures to the benefit of both, because the contract alleged being joint, the verdict is a demonstration of record that it did not exist, and the final judgment is arrested. *Porter v. Harris,* 1 Lev., 63; *Shrubb v. Barrett,* 2 H. Bl., 28. It is otherwise generally, in torts and crimes, because they are joint and several. But even in torts, if the plea of one defendant be not personal to himself and several in its nature, but go to the whole action, the rule is the same as that in contracts. *Brigs v. Greinfield,* 1 Str., 610; *S. c.,* 2 Ld. Ray., 1372. There two were sued in trespass for seizing and selling plaintiff's goods. One let judgment by default pass; the other pleaded a distress for rent, and the license and request of the plaintiff to sell the goods, and it was found for him. The judgment against the first was arrested, because it appeared upon the whole record that the plaintiff had no cause of action. Thus, the finding for one overrules the confession of the other in the same suit. These cases are exactly applicable. It is true that indictments for conspiracy are not to all intents joint; for, where more than two are charged, some may be acquitted, and the conviction of the rest, if two, will be good. But it is strictly joint, so far as respects the constitution of the offence by two. And if it appear in the record, in any manner, that two did not participate in the unlawful intent, all are discharged, because neither is guilty of that offence. The only departure from this has been, in passing sentence on one before another was convicted. But one has never been convicted after all (579) the others charged were acquitted, and we think cannot be.

If the acquittal of part and the conviction of part be by the same inquest, it is plain from the cases that all are acquitted, unless the number of convicts be sufficient to constitute the crime. The principal to be elicited from the cases, and the preceding course of reasoning satisfy my mind that with the exception of the intermediate infliction of punishment, between the conviction of one and the subsequent acquittal of another, there is no difference between the case of a trial of all by one jury, and the separate trial of each by different juries. The operation on one of the acquittal of the other does not arise from the mode of pronouncing it, but from the fact of the acquittal itself being in due course of law, the guilt of one being dependent upon that of the other.

For this reason the judgment of the Superior Court must be reversed. The judgment of this Court would be that the prisoner go without day, if only he and Donum were charged, because the acquittal of Donum would be his acquittal. But as others, not yet tried, are included in the indictment, we can only set aside the verdict for the erroneous instruction to the jury, and submit the case to a second jury to consider the

prisoner's guilt, as connected with that of the other defendants, exclusive of Donum.

HENDERSON, C. J. I concur in the opinion delivered by Judge RUFFIN, that the acquittal of all the conspirators but one necessarily amounts to the acquittal of that one also. For, although in the abstract, his guilt depends not upon the conviction of his co-conspirators, but in their participation in the criminal design, yet in law their acquittal shall be taken as conclusive evidence of the want of that participation, as the acquittal of the principal offender necessarily acquits the accessory. The authorities are numerous on the latter proposition, and, indeed, so far do they go, that if the attainder of the accessory,
(580) who had consented to be tried before his principal (and without such consent could not have been tried), the principal had afterwards been tried and acquitted, that acquittal *ipso facto* reverses the attainder of the accessory, and all its continuing consequences are wiped away, as corruption of blood, all civil disabilities, and the like; and consequently the lord's title by escheat is so effectually gone that the heir of the attainted may enter upon him, and is not put to the action. If the sentence of the law has not been executed upon him, the judgment is reversed, and the sentence of death or other punishment falls to the ground with the attainder; and this as well in cases where they are charged in separate indictments, and of course tried at several times and by different inquests, as where they are jointly indicted, and put on their trials together, and consequently tried by the same inquest. Cases are not wanting to show that upon trials for conspiracy the verdict cannot rightfully affirm the guilt of one and the innocence of all the others. The furthest they go that way is to sustain the conviction of one conspirator where the other is dead or not taken. But this is done expressly on the ground that the verdict affirms the guilt of both.

I have seen no case where, after the trial and conviction of one conspirator the other (not then being taken) is afterwards brought in, tried, and acquitted. But if the ground taken to support the verdict before he is brought in—to wit, that the verdict affirms his guilt, is the one on which it rests (of which there can be no doubt), it is, in such cases, taken away, for the latter verdict affirms his innocence. And if the reason of the rule be anything, and the analogies worth preserving, it must, as in cases of principal and accessory, *ipso facto,* reverse the first judgment.

It will be perceived that a strict analogy has not been kept up between cases of this kind and those of principal and accessory; for the accessory cannot be compelled to try before the principal has been con-
(581) victed, or at the same time with him. In that case, the trial of

the principal, in point of fact, precedes the trial of the accessory, and in all cases the death of the principal before conviction amounts to an acquittal of the accessory. But, as stated before, the cases have preserved the principle. They expressly negative all idea of affirming the guilt of one conspirator and the innocence of all his co-conspirators. For the conviction of one is sustained on the sole ground that it affirms the guilt of the other, or others.

The record, taken altogether (for I put the judge's instructions into the record), affirms that Tom and Donum did conspire to murder Duncan, and that Donum and Tom did not conspire to commit the same murder. Which shall we take? We are asked to take that affirmation which fixes upon Tom the fact of conspiring, because he was then on trial; and to disregard the affirmation, which acquits him of it, because he was not then on trial. But the same principle of humanity which imparts to the accessory the benefit of the acquittal of his principal demands that we should accord to Tom the benefit of Donum's acquittal, without whose participation he, Tom, could not be guilty. For it hangs in equal balance, which affirmation is true. Can we, then, doubt which should be taken as a ground of action? Give the record what it really amounts to, and it is this: That Tom proposed to Donum to murder Duncan, and that Donum declined to accede to the proposition. This is the extent of Tom's guilt, giving to every part of the record its due weight; and this is not the offence for which Tom stands indicted. For there cannot be a conspiracy, unless at least two unite in an agreement to commit the criminal or prohibited act. I can very readily imagine cases where there may be sufficient evidence to convict one without its being sufficient to convict the other, as the confessions of the party which affect him, and not the companion, as probably was the case here. The same thing might as well happen in accessorial (582) offences, and it is conceded that in those cases the legal guilt of the accessory is dependent on the conviction of his principal.

A few words only, in addition to what was said by Judge RUFFIN, as to the nature of the conspiracy, and upon the question whether it is within the act of 1802 (Rev., ch. 618). The words of that act are: "If any number of negroes or other slaves shall, at any time hereafter, consult, advise, or conspire to rebel or make insurrection, or shall plot or conspire the murder of any person or persons whatsoever, every such consulting," etc. I would here remark, in passing, that by the very words of the act one person only cannot be guilty of the crime created by it. It is contended, that no murder comes within the act, but one connected with, or in furtherance of the rebellious intent spoken of in the act. I think that this construction can be supported, neither by the words of the clause, nor the context of the act. The crime of murder

is a well-known and well-defined offence. It may be committed in connection with, or in furtherance of the rebellious intent spoken of in the act, or in execution of various other designs; or its commission may be the ultimate intent. To ascertain the crime, as defined by the words, we need not look into other parts of the act. It is sufficiently marked by the words plot or conspire the murder of any one. Nor do the words of the preceding clause look to the murder, as consummating the conspiracy, or as the means of effecting the object. The conspiracy may be complete without contemplating a murder. It contemplates throwing off their servile state. It is true, murder may, and almost certainly would, attend its completion. But it does not follow that by conspiring to rebel they thereby conspire directly to commit murder; at least, not the murder of a particular individual, which is the murder provided for in the act. But, to my mind, there is an insurmountable objec-
(583) tion to confining it to such murders. It would make the clause in regard to murders entirely useless. For if such murders only were intended to be embraced, they are sufficiently provided for by the clause relating to rebellion, or making insurrection. For the conspiring to commit murder, in furtherance of such a rebellious design, would certainly fall within the prohibition against conspiring to rebel. The offence would be complete by the conspiracy to rebel. The contemplated murder would be but a means to that end. For the construction asked for—to wit, that it should be in furtherance of, or in connection with, such design, presupposes such design to be formed. To confine it to such cases, therefore, would be to render the clause entirely useless.

PER CURIAM. New trial.

Cited: *S. v. Mainor,* 28 N. C., 340; *S. v. Lyerly,* 52 N. C., 161; *S. v. Ludwick,* 61 N. C., 405; *S. v. Gardner,* 84 N. C., 734; *S. v. Van Pelt,* 136 N. C., 645.

MEMORANDUM.

At the recent session of the Legislature, DAVID L. SWAIN, Esq., of Buncombe, was elected a judge of the Superior Court, *vice* WILLIE P. MANGUM, Esq., of Orange, who resigned.

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STATUTES CONSTRUED OR COMMENTED UPON: